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TABLE OF TITLES.

FRAUD.

By A. I. McCormick.

CROSS-REFERENCES:

Assignment for Benefit of Creditors;

Cross-Examination;

Duress;

Elections;

Fraudulent Conveyances;

Guardian and Ward;

Handwriting; Husband and Wife;

Insolvency; Intent;

Parol Evidence; Principal and Agent;

Specific Performance; Spoliation;

Undue Influence;

Vendor and Purchasor.

I. IN GENERAL.

1. Presumptions and Burden of Proof. — A. In General. — In all cases, except those involving transactions between persons occupying fiduciary or confidential relations with each other,[1] where the right to relief is based upon the alleged commission of a fraud, the presumption is in favor of the fairness of the transaction and the innocence of the person accused, and the burden of proof is upon the party asserting the fraud to establish the same.[2]

1. Mathews *v.* Reinhardt, 149 Ill. 635, 37 N. E. 85.

2. *United States.* — United States *v.* Iron Silver Min. Co., 128 U. S. 673; Evans *v.* Mansur, 87 Fed. 275; United States *v.* King, 83 Fed. 188; Michel *v.* Olmstead, 14 Fed. 219; Walker *v.* Collins, 59 Fed. 70.

Alabama. — Wilk *v.* Key, 117 Ala. 285, 23 So. 6; Moses *v.* Katzenberger, 84 Ala. 95, 4 So. 237.

Arkansas. — Bank of Little Rock *v.* Frank, 63 Ark. 16, 37 S. W. 400, 58 Am. St. Rep. 65; Stephens *v.* Oppenheimer, 45 Ark. 492; Holt *v.* Moore, 37 Ark. 145.

California. — Truett *v.* Onderdonk, 120 Cal. 581, 53 Pac. 26; McCarthy *v.* White, 21 Cal. 495; Levy *v.* Scott, 115 Cal. 39, 46 Pac. 892.

Colorado. — Marsh *v.* Cramer, 16 Colo. 331, 27 Pac. 169; Allen *v.* Elerick, 29 Colo. 118, 66 Pac. 891.

Connecticut. — Dwight *v.* Brown, 9 Conn. 91.

Delaware. — Clayton *v.* Cavender, 1 Marv. 191, 40 Atl. 956; Freemar *v.* Topkis, 1 Marv. 174, 40 Atl. 948; Terry *v.* Platt, 1 Penn. 185, 40 Atl. 243.

Florida. — White *v.* Walker, 5 Fla. 478.

Georgia. — Robinson *v.* Donehoo, 97 Ga. 702, 25 S. E. 491; Lewin *v.* Thurber, 62 Ga. 25.

Illinois. — Union Nat. Bank *v.*

State Nat. Bank, 168 Ill. 256, 48 N. E. 169; Dexter *v.* McAfee, 163 Ill. 508, 45 N. E. 115; *compare* Mathews *v.* Reinhardt, 149 Ill. 635, 37 N. E. 85; Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70; Mey *v.* Gulliman, 105 Ill. 277; Walker *v.* Hough, 59 Ill. 375; Strauss *v.* Kranert, 56 Ill. 254; Mitchell *v.* Deeds, 49 Ill. 476; Wright *v.* Grover, 27 Ill. 426; Barrie *v.* Frost, 105 Ill. App. 187; State Bank of Freeport *v.* Blake, 78 Ill. App. 166; Faulkner *v.* Elwood Mfg. Co., 79 Ill. App. 544.

Indiana. — McCoy *v.* Able, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; Adams *v.* Laugel, 144 Ind. 608, 42 N. E. 1017; McLaughlin *v.* Ward, 77 Ind. 383; Tenbrook *v.* Brown, 17 Ind. 410; Baltimore & O. C. R. Co. *v.* Scholes, 14 Ind. App. 524, 43 N. E. 156.

Iowa. — Daugherty *v.* Hockman, 74 N. W. 6; Lillie *v.* McMillan, 52 Iowa 463, 3 N. W. 601; Drummond *v.* Couse, 39 Iowa 442; Schofield *v.* Blind, 33 Iowa 175.

Kansas. — Railway Co. *v.* Goodholm, 61 Kan. 758, 60 Pac. 1066; Ferguson *v.* Willig, 57 Kan. 453, 46 Pac. 936.

Kentucky. — American Harrow Co. *v.* Tweddle, 19 Ky. L. Rep. 1356, 43 S. W. 109; Kentucky Life & Acc. Ins. Co. *v.* Thompson, 18 Ky. L. Rep. 79, 35 S. W. 550.

Louisiana. — American Furn. Co. *v.* Grant-Jung Furn. Co., 50 La. Ann. 931, 24 So. 182; Barlaw *v.* Harrison, 51 La. Ann. 875, 25 So. 378; Lewis *v.* Western Assur. Co. of Toronto, 49 La. Ann. 658, 21 So. 736.

Maine. — Burleigh *v.* White, 64 Me. 23; Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713; Bartlett *v.* Blake, 37 Me. 124, 58 Am. Dec. 775.

Maryland. — Shaffer *v.* Cowden, 88 Md. 394, 49 Atl. 786; Brewer *v.* Bowersox, 92 Md. 567, 48 Atl. 1060; Phelps *v.* George's Creek & C. R. R. Co., 60 Md. 536; Hill *v.* Reifsneider, 46 Md. 555.

Massachusetts. — Wood *v.* Massachusetts Mut. Acc. Ass'n, 174 Mass. 217, 54 N. E. 541; Beatty *v.* Fishel, 100 Mass. 448; Page *v.* Bent, 2 Metc. 371.

Michigan. — Bly *v.* Brady, 113 Mich. 176, 71 N. W. 521; Gumberg *v.* Treusch, 103 Mich. 543, 61 N. W. 872; Peaselee *v.* Collier, 83 Mich. 549, 47 N. W. 353; Bostwick *v.* Benjamin, 63 Mich. 289, 29 N. W. 714; Michels *v.* Stork, 52 Mich. 260, 17 N. W. 833; Darling *v.* Hurst, 39 Mich. 765.

Mississippi. — Parkhurst *v.* McGraw, 24 Miss. 134.

Missouri. — Nauman *v.* Oberle, 90 Mo. 666, 3 S. W. 380; Muenks *v.* Bunch, 90 Mo. 500, 3 S. W. 63; Priest *v.* Way, 87 Mo. 16; Henry *v.* Buddicke, 81 Mo. App. 360; Mapes *v.* Burns, 72 Mo. App. 411; Redpath *v.* Lawrence, 48 Mo. App. 427.

Nebraska. — Knapp *v.* Fisher, 58 Neb. 651, 79 N. W. 553; Hampton *v.* Webster, 56 Neb. 628, 77 N. W. 50; Home Fire Ins. Co. *v.* Bredehoft, 49 Neb. 152, 68 N. W. 400; Western Horse & Cattle Ins. Co. *v.* Putnam, 20 Neb. 331, 30 N. W. 246; Ahlman *v.* Meyer, 19 Neb. 63, 26 N. W. 584.

New Hampshire. — Griswold *v.* Sabin, 51 N. H. 167, 12 Am. Rep. 76.

New York. — Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123; Morris *v.* Talcott, 96 N. Y. 100; Cowee *v.* Cornell, 75 N. Y. 91; Marsh *v.* Falker, 40 N. Y. 562; Ward *v.* Center, 3 Johns. 271.

North Carolina. — Atkins *v.* Withers, 94 N. C. 581; Tomlinson *v.* Payne, 53 N. C. 108.

North Dakota. — Montgomery *v.* Fritz, 7 N. D. 348, 75 N. W. 266.

Oregon. — Fisk *v.* Basche, 31 Or. 178, 49 Pac. 981.

Pennsylvania. — Miller *v.* McAlister, 178 Pa. St. 140, 35 Atl. 594.

Rhode Island. — White *v.* Fitch, 19 R. I. 687, 36 Atl. 425.

South Carolina. — Habersham *v.* Hopkins, 4 Strob. L. 238.

Tennessee. — Old Folks Society *v.* Millard, 86 Tenn. 657, 8 S. W. 851.

Texas. — Carson *v.* Houssels (Tex. Civ. App.), 51 S. W. 290; Turner *v.* Lambeth, 2 Tex. 365.

Utah. — Deseret Nat. Bank *v.* Little R. & Co., 13 Utah 265, 44 Pac. 930.

Vermont. — Sawyer *v.* Childs, 68 Vt. 360, 35 Atl. 84.

Virginia. — Todd *v.* Sykes, 97 Va. 143, 33 S. E. 517; New York Life Ins. Co. *v.* Davis, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 345; Gregory *v.* Peoples, 80 Va. 355; Crebs *v.* Jones, 79 Va. 381; Engleby *v.* Harvey, 93 Va. 440, 25 S. E. 225.

Washington. — Manhattan Trust Co. *v.* Seattle Coal & Iron Co., 19 Wash. 493, 53 Pac. 951.

B. Strength of Presumption. — It has been held that the presumption against fraud is "a presumption approximate in strength to that of innocence in crime,"[3] but the overwhelming weight of authority does not so hold it.[4]

C. Extent of Burden. — The party alleging fraud takes upon himself the burden of proving every necessary element of the fraud.[5]

D. No Presumption from Intent or Motive Alone. — Fraud will not be presumed from a showing merely that a motive[6] or intent[7] to perpetrate the same existed.

E. Validity of Contract or Transaction. — This rule is not varied or affected by the equally strong principle that a contract or transaction, in order to be enforced or to be made the foundation for relief, must be free from fraud. Thus, in an action on a contract, while it is incumbent on the plaintiff to show that the contract is a valid and binding obligation between the parties, this does not throw upon him the burden of showing an absence of fraud therein, but in such case it is incumbent on the defendant in the first instance to show the fraud affirmatively.[8]

West Virginia. — Board of Trustees *v.* Blair, 45 W. Va. 812, 32 S. E. 203; Wood *v.* Harrison, 41 W. Va. 376, 23 S. E. 560; Armstrong *v.* Bailey, 43 W. Va. 778, 28 S. E. 766; Harden *v.* Wagner, 22 W. Va. 356.

Wisconsin. — The Plano Mfg. Co. *v.* Bergmann, 102 Wis. 21, 78 N. W. 157; Small *v.* Champeny, 102 Wis. 61, 78 N. W. 407; Curtis *v.* Hoxie, 88 Wis. 41, 59 N. W. 581.

3. Truett *v.* Onderdonk, 120 Cal. 581, 53 Pac. 26, and see Willoughby *v.* Fredonia Nat. Bank, 52 N. Y. St. 387, 23 N. Y. Supp. 46.

4. See *post*, "Weight and Sufficiency of the Evidence," and especially cases cited in notes 2 and 11 thereunder.

5. *Illinois.* — Dickinson *v.* Atkins, 100 Ill. App. 401.

Kansas. — Ferguson *v.* Willig, 57 Kan. 453, 46 Pac. 936.

Massachusetts. — Horton *v.* Weiner, 124 Mass. 92; Springer *v.* Crowell, 103 Mass. 65.

New York. — Wakeman *v.* Dalley, 51 N. Y. 27; Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376.

6. Moore *v.* Parker, 25 Iowa 355.

7. Seward *v.* Seward, 59 Kan. 387, 53 Pac. 63, in which it was said: "It is not the law that proof of an intent to perpetrate a fraud will justify a finding that fraud was committed."

8. Stephens *v.* Oppenheimer, 45 Ark. 492; Murray *v.* Supreme Lodge M. E. O. P., 74 Conn. 715, 52 Atl. 722; Bly *v.* Brady, 113 Mich. 176, 71 N. W. 521; Sloan *v.* Holcomb, 29 Mich. 153; Briggs *v.* Humphrey, 5 Allen (Mass.) 314; Sperling *v.* Boll, 75 N. Y. St. 1256, 41 N. Y. Supp. 889. And see Carson *v.* Houssels (Tex. Civ. App.), 51 S. W. 290.

Wrong Instruction. — In an action upon a written lease, to which defendant pleaded fraud by plaintiff in its procurement, an instruction that the burden was upon plaintiff to prove that the lease was executed and delivered by defendant under such circumstances as to make it a valid contract, was held correct. But the further instruction (viz., that if the jury believed that the alleged fraudulent representations were made, or if they, on the whole testimony, could not say whether the lease had been executed and delivered under such circumstances as to make it a valid contract, as had been explained to them, the verdict should be for defendant) was held erroneous because the instruction implied that the burden was on plaintiff to prove the absence of fraud in the transaction instead of upon the defendant to prove the contrary, and that the doubt of the jury should be resolved in favor of the defendant instead of the plaintiff. Beatty *v.* Fishel, 100 Mass. 448.

Insurance Cases. — This rule is

Adverse Possession. — Likewise, under a statute requiring good faith as an essential element in order to constitute valid adverse possession, the color of title under which such adverse possession was initiated is presumed to have been acquired in good faith.[9]

F. When Party Charged Has Burden. — a. *Generally.* — The circumstances may so shape themselves as to throw upon the party charged with the fraud the burden of proof in the first instance. Thus, where such party claims and is allowed the privilege of opening and closing the case, he thereby assumes the burden of proof.[10] Likewise, where the misrepresentation charged as the basis of the fraud is admitted to have been made and to have been untrue, but facts are alleged as a justification, the burden of proof is upon the

often invoked in actions upon insurance policies where the insurer defends on the ground of fraudulent representations on the part of the insured, either in connection with the statements required in his application or in the policy. The rule is general in such cases that the burden is upon the insurer to show such fraud in the first instance.

Piedmont Ins. Co. *v.* Ewing, 92 U. S. 377; Lampkin *v.* Travelers Ins. Co., 11 Colo. App. 249, 52 Pac. 1040; State Ins. Co. *v.* DuBois, 7 Colo. App. 214, 44 Pac. 756; Penn Mut. Life Ins. Co. *v.* Mechanics Sav. Bank & T. Co., 72 Fed. 413; Sullivan *v.* Hartford Fire Ins. Co. (Tex. Civ. App.), 34 S. W. 999; Mutual Benefit Ins. Co. *v.* Robertson, 59 Ill. 123, 14 Am. Rep. 8; Fiske *v.* New England M. Ins. Co., 15 Pick. (Mass.) 310; Jones *v.* Brooklyn Life Ins. Co., 61 N. Y. 79; and this is the rule, although the application in which the alleged false statements are contained is, by the very terms of the policy, made a part of the contract and the faith of such statements warranted. Supreme Lodge of Knights of Honor *v.* Wollschlager, 22 Colo. 213, 44 Pac. 598; Grangers Life Ins. Co. *v.* Brown, 57 Miss. 308.

Contract of Blind or Illiterate Person. — In Robinson *v.* Donehoo, 97 Ga. 702, 25 S. E. 491, which was an action involving a written instrument, the party contending that when he signed the paper he was not fully acquainted with its contents, that he thought he was signing a paper of a different import, and it appeared that he was not an illiterate man, but that at the time when he signed the paper his face was swollen, and, according to his own testimony, he could not clearly make out the writing, the trial judge charged the jury that one who attacks an instrument signed by himself, on such grounds, and that his signature was obtained by fraud, carries the burden of proving the truth of his allegations. The court held that this charge was proper, and distinguished the authorities holding that where the maker of an instrument is illiterate or blind the burden of showing that it was read over to him, and that he understood it, is on the person claiming rights therein. "Here the evidence is conflicting as to whether the defendant was able to read the instrument or not on the occasion in question; there is evidence strongly tending to show that he was able to do so, and a significant fact is that he made an addition to it in his own handwriting. In view of this evidence it is certainly no cause for a new trial that the court failed to give in charge a rule of law applicable to persons confessedly blind or illiterate."

9. Stumpf *v.* Osterhage, 111 Ill. 82; Sexson *v.* Barker, 172 Ill. 361, 50 N. E. 109; Davis *v.* Hall, 92 Ill. 85; *criticising* Bowman *v.* Wettig, 30 Ill. 416; Hardin *v.* Gouveneur, 69 Ill. 140; Morrison *v.* Norman, 47 Ill. 477; Fagan *v.* Rosier, 68 Ill. 84.

"When a party claims adversely, it is not necessary for him to show that he went into possession *bona fide*." Hall *v.* Gay, 68 Ga. 442; Evans *v.* Baird, 44 Ga. 645.

10. Armstrong *v.* Penn, 105 Ga. 229, 31 S. E. 158.

party alleging such justification in the first instance.[11] Proof of slight circumstances may also be sufficient to shift the burden to the party charged with the fraud.[12]

b. *Fiduciary and Confidential Relations.* — **(1.) In General.** Transactions between persons occupying confidential or fiduciary relations with each other constitute exceptions to the general rule.[13] Thus, in transactions between persons occupying such relations, in which the stronger or superior party obtains a benefit or advantage, fraud is presumed, and the burden is cast upon the superior party to show fairness, adequacy and equity in the transaction.[14] This rule has been held applicable to transactions between attorney and client,[15] guardian and ward,[16] trustee and *cestui que trust*,[17] principal and agent,[18] executor or administrator and heirs,[19] spiritual adviser and dying person,[20] physician and patient,[21] husband and wife,[22] parent and child,[23] a young, inexperienced child and his grand-

11. Winans *v.* Winans, 19 N. J. Eq. 220.

12. See Kelley *v.* Owens (Cal.), 30 Pac. 596, *affirming* on rehearing, 31 Pac. 14; Gill *v.* Crosby, 63 Ill. 190.

13. See article "UNDUE INFLUENCE." As to the application of the rule to particular relations, see the particular title.

14. Thompson *v.* Lee, 31 Ala. 292; Lee *v.* Pearce, 68 N. C. 76; Atkins *v.* Withers, 94 N. C. 581.

Overcomes Other Presumptions. The ordinary presumption (in Illinois) that the color of title, which is relied upon in adverse possession, was obtained in good faith, does not apply where such color of title consists of a deed obtained by an attorney from his client during the relationship. The presumption of fraud in transactions between persons occupying confidential relations overcomes the presumption of good faith in the acquisition of color of title. Ross *v.* Payson, 160 Ill. 349, 43 N. E. 399.

15. Attorney and Client. — Ross *v.* Payson, 160 Ill. 349, 43 N. E. 399; Elmore *v.* Johnson, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L. R. A. 366; Ziegler *v.* Hughes, 55 Ill. 288; Faris *v.* Briscoe, 78 Ill. App. 242.

16. Guardian and Ward. — Wickiser *v.* Cook, 85 Ill. 68; Goodrick *v.* Harrison, 130 Mo. 263, 32 S. W. 661.

17. Trust and Cestui Que Trust. Ward *v.* Armstrong, 84 Ill. 151; Jones *v.* Lloyd, 117 Ill. 597, 7 N. E. 110; Smith *v.* Howlett, 47 N. Y. Supp. 1002, 51 N. Y. Supp. 910.

Sale by Trustee to Third Person with Reconveyance. — Webb *v.* Branner, 59 Kan. 190, 52 Pac. 429.

18. Principal and Agent. — Webb *v.* Marks, 10 Colo. App. 429, 51 Pac. 518; Alwood *v.* Mansfield, 59 Ill. 496; Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58; Brook *v.* Berry, 2 Gill (Md.) 83.

Principal and Attorney in Fact. Rubidoex *v.* Parks, 48 Cal. 215.

19. Executor or Administrator and Heirs. — Branner *v.* Nichols, 61 Kan. 356, 59 Pac. 633, 44 L. R. A. 464; Humphreys *v.* Burleson, 72 Ala. 1.

20. Spiritual Adviser and Dying Person. — Ross *v.* Conway, 92 Cal. 632, 28 Pac. 785.

21. Cadwallader *v.* West, 48 Mo. 483; Woodbury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479.

22. Brison *v.* Brison, 75 Cal. 525, 17 Pac. 689; 90 Cal. 323, 27 Pac. 186, 7 Am. St. Rep. 189.

Burden on Wife. — The burden may be upon the wife to disprove the fraud. See Disch *v.* Timm, 101 Wis. 179, 77 N. W. 196; Horton *v.* Dewey, 53 Wis. 410, 10 N. W. 599.

23. Davis *v.* Strange, 86 Va. 793, 11 S. E. 406; Todd *v.* Sykes, 97 Va. 143, 33 S. E. 517; Hickman *v.* Trout, 83 Va. 478, 3 S. E. 131; Sands *v.* Sands, 112 Ill. 225; Doyle *v.* Welch, 100 Wis. 24, 75 N. W. 400; Davis *v.* Dean, 66 Wis. 100, 26 N. W. 737.

Aged Father to Son. — Oard *v.* Oard, 59 Ill. 46.

parents,[24] aged relative and heir,[25] mortgagor and mortgagee,[26] partners,[27] creditor and surety of debtor,[28] stockholder and officer of corporation concerning corporate affairs,[29] joint purchasers of property,[30] and to a party dealing with an expectant heir as to the expectant estate.[31]

(2.) After Relation Dissolved. — This rule has been held applicable to transactions occurring within a short time after the relation has been dissolved.[32]

(3.) Extent of Rule. — The application of this principle is not confined to the known and definite fiduciary relations, such as attorney and client, guardian and ward, etc., but it extends to any and all cases in which it is manifest from the facts and circumstances that confidence is reposed by one person in another who possesses con-

24. Brown *v.* Burbank, 64 Cal. 99, 27 Pac. 940.

25. Zimmerman *v.* Bitner, 79 Md. 115, 28 Atl. 820; Duncombe *v.* Richards, 46 Mich. 166, 9 N. W. 149; Lansing *v.* Russell, 13 Barb. (N. Y.) 510.

26. Wygal *v.* Bigelow, 42 Kan. 477, 22 Pac. 612, 16 Am. St. Rep. 495; Jones *v.* Franks, 33 Kan. 497, 6 Pac. 789; Hall *v.* Lewis, 118 N. C. 509, 24 S. E. 209; Whitehead *v.* Hellen, 76 N. C. 99; McLeod *v.* Bullard, 84 N. C. 515, *overruling* Chapman *v.* Mull, 42 N. C. 292; Villa *v.* Rodriguez, 79 U. S. 323; Perkins *v.* Drye, 3 Dana (Ky.) 170.

27. Pomeroy *v.* Benton, 57 Mo. 531; Caldwell *v.* Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. Rep. 599; Coggswell-Boulter & Co. *v.* Coggswell (N. J. Eq.), 40 Atl. 213. *Compare* Stephens *v.* Orman, 10 Fla. 9.

28. First Nat. Bank *v.* Mattingly, 92 Ky. 650, 18 S. W. 940; Burks *v.* Wanterline, 6 Bush (Ky.) 20; Benton Co. Sav. Bank *v.* Boddicker, 105 Iowa 548, 75 N. W. 632, 79 Am. St. Rep. 310, 45 L. R. A. 321.

29. Barbar *v.* Martin (Neb.), 93 N. W. 722; Bristol *v.* Scranton, 63 Fed. 218; Cumberland Iron Co. *v.* Parish, 42 Md. 598; Bent *v.* Priest, 86 Mo. 475; Gorder *v.* Plattsmouth Canning Co., 36 Neb. 548, 54 N. W. 830. *Compare* Horbach *v.* Marsh, 37 Neb. 22, 55 N. W. 286.

Contra. — Rule Not Applicable in Private Transaction. — It was held in Krumbhaar *v.* Griffith, 151 Pa. St. 223, 25 Atl. 64, that no confidential relation existed between the secretary of a corporation and a stockholder from whom he purchased stock in a private transaction which such stockholder claimed to have been induced by the secretary's fraud.

30. Joint Purchasers. — Bergeron *v.* Miles, 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911; and see Constant *v.* Lehman, 52 Kan. 227, 34 Pac. 745.

31. "The rule is well settled that a party dealing with an expectancy must prove that the bargain was upon an adequate consideration, was entered into carefully, deliberately and with a knowledge of all the circumstances connected with it." Wells *v.* Houston, 29 Tex. Civ. App. 619, 69 S. W. 183; Hale *v.* Hollon, 90 Tex. 427, 39 S. W. 287, 59 Am. St. Rep. 819, 36 L. R. A. 75, in which latter case, in speaking of this doctrine as being of ancient common law origin, the court say: "We find the doctrine firmly established in said courts that, whether the suit be by the holder of the contract to enforce specific performance, or by the expectant to be relieved from the terms thereof, the *prima facie* presumption was that the same was a fraud both upon the expectant and the ancestor or party from whom the expectancy was to be derived, and therefore the burden was imposed upon the holder to rebut such presumption." *Citing* Earl Chesterfield *v.* Janssen, 2 Ves. Sr. 158, and see also Clark *v.* Malpas, 31 Beav. 87; Golland *v.* De Faria, 17 Ves. 20.

32. Goodrick *v.* Harrison, 130 Mo. 263, 32 S. W. 661.

Guardian and Ward. — A transac-

trolling influence over the former.[33] Thus, a person who occupies no definite confidential relation with another, if he clothe himself with a character which brings him within the range of the principle, *e. g.*, an attorney acting for the executor in a transaction with a legatee,[34] or a self-constituted agent,[35] or confidential adviser,[36] has the burden of proving a want of fraud in the transaction.

(4.) Limitations of Rule. — But the mere fact that the persons between whom the transaction takes place stand in a relation that is generally one of confidence is not of itself, in all cases, sufficient to raise the presumption of fraud. Thus, in all cases other than those of guardian and ward, attorney and client, trustee and *cestui que trust*, and the other known and definite fiduciary relations,[37] in which the superiority on the one side and the weakness on the other are

tion occurring shortly after the ward attained his majority. Wright *v.* Arnold, 14 B. Mon. (Ky.) 638.

33. *England.* — Dent *v.* Bennett, 4 Myl. & C. 269.

United States. — Taylor *v.* Taylor, 8 How. 183.

Alabama. — Thompson *v.* Lee, 31 Ala. 292.

Connecticut. — Nichols *v.* McCarthy, 53 Conn. 299, 55 Am. Rep. 105.

Illinois. — Ward *v.* Armstrong, 84 Ill. 151.

Maryland. — Zimmerman *v.* Bitner, 79 Md. 115, 28 Atl. 820.

Michigan. — Wartemberg *v.* Spiegel, 31 Mich. 400.

New York. — Whelan *v.* Whelan, 3 Cow. 576; Green *v.* Roworth, 113 N. Y. 462, 21 N. E. 165.

Pennsylvania. — Stepp *v.* Frampton, 179 Pa. St. 284, 36 Atl. 177; Hetrick's Appeal, 58 Pa. St. 477.

Texas. — Goar *v.* Thompson, 19 Tex. Civ. App. 330, 47 S. W. 61.

Virginia. — Francis *v.* Cline, 96 Va. 201, 31 S. E. 10.

Wisconsin. — Watkins *v.* Brant, 46 Wis. 410, 1 N. W. 82.

Rule Applies to "Trustees, Attorneys, or Anyone Else." — Lord Eldon, in Gibson *v.* Jeyes, 6 Ves. (Eng.) 266, *cited* and *quoted* in Fishburne *v.* Furguson's Heirs, 84 Va. 87, 4 S. E. 575.

Rule Stated. — "And if the circumstances disclose that the person under the infirmity, whether through choice, accident or otherwise, was as matter of fact for the time being in the place of ward of the other party, or was by his own consent, however brought about, in a state of submission to the judgment or opinion of the other, a presumption will arise adverse to the justice and equity of the bargain, and the bargainee will be required to show that no advantage was taken, and that in itself the arrangement was not only suitable, fair and conscientious, but one expedient under the circumstances and conducive to the interests of the other." Jacox *v.* Jacox, 40 Mich. 473.

34. Reed *v.* Peterson, 91 Ill. 288; and see Hixon *v.* Bryan Adm'r, 75 Ga. 392.

35. Casey *v.* Casey, 14 Ill. 112.

36. See Mallory *v.* Leach, 35 Vt. 156.

Friend Acting as Attorney. — This rule applies to a friend and confidential adviser, who acts the part of an attorney in a proceeding before a court where attorneys do not appear. Buffalow *v.* Buffalow, 22 N. C. 241.

37. Fraud Presumed From Relationship Alone. — In Atkins *v.* Withers, 94 N. C. 581, the court held that the relations of guardian and ward, trustee and beneficiary, principal and agent, mortgagor and mortgagee, attorney and client, husband and wife, are the only ones in which fraud is presumed from the relation of the parties; and in McLeod *v.* Bullard, 84 N. C. 515, the following are added as coming within the rule, to wit: partners, executors and administrators, and parent and child. And see Cowee *v.* Cornell, 75 N. Y. 91.

In Lee *v.* Pearce, 68 N. C. 76, this question is thoroughly discussed, the court among other things saying: "After a full consideration of the authorities and 'the reason of the

apparent, the trust and confidence, the superiority and weakness, must be clearly made out before the presumption of fraud is raised and the burden shifted.[38]

thing,' we are of opinion that only 'the known and definite fiduciary relations,' by which one person is put in the power of another, are sufficient under our present judiciary system to raise a presumption of fraud, as a matter of law to be laid down by the judge, as decisive of the issue unless rebutted. For instances, and by way of illustration: (1.) Trustee and *cestui que trust* dealing in reference to the trust fund; (2) attorney and client, in respect to the matter wherein the relationship exists; (3) guardian and ward, just after the ward arrives at age; (4) when one is the general agent of another and has entire management so as to be, in effect, as much his guardian as the regularly appointed guardian of an infant. There may be other instances. Fiduciary relations that do not fall under the first class raise a presumption of fraud as a matter of fact, to pass before the jury for what it may be worth. For instance: (1) Family physicians; (2) a minister of religion; (3) parent and child; (4) when the only relation is that of friendly intercourse and habitual reliance for advice and assistance, and occasional employment in matters of business as agent."

38. *Alabama.* — Thompson *v.* Lee, 31 Ala. 292.

California. — McCarthy *v.* White, 21 Cal. 495, 82 Am. Dec. 754.

Connecticut. — Looby *v.* Redmond, 66 Conn. 444, 34 Atl. 102; Hemingway *v.* Coleman, 49 Conn. 390, 44 Am. Rep. 243.

Iowa. — Wheatley *v.* Wheatley, 102 Iowa 737, 70 N. W. 689.

Kansas. — Seward *v.* Seward, 59 Kan. 387, 53 Pac. 63.

Kentucky. — Waters *v.* Barral, 2 Bush 598.

Maryland. — Brown *v.* Mercantile T. & D. Co., 87 Md. 377, 40 Atl. 256, *distinguishing* Brooke *v.* Berry, 2 Gill 85, and Todd *v.* Grove, 33 Md. 188.

New York. — Cowee *v.* Cornell, 75 N. Y. 91.

North Carolina. — Mauney *v.* Redwine, 119 N. C. 534, 26 S. E. 52.

Wisconsin. — The Plano Mfg. Co. *v.* Bergmann, 102 Wis. 21, 78 N. W. 157; Small *v.* Champeny, 102 Wis. 61, 78 N. W. 407.

Defendant a Partner of Plaintiff's Husband. — The fact that the person charged with the fraud was the partner and banker of the plaintiff's husband, and that their relations had been satisfactory, does not show such relation of confidence between the wife and such party as to throw upon him the burden of proof. Warden *v.* Reser, 38 Kan. 86, 16 Pac. 60, *citing* Roach *v.* Kerr, 18 Kan. 529, 26 Am. Rep. 788.

Husband and Wife. — In Kentucky it is held that the wife, her husband joining her, can convey her property to a third person with the understanding that such person will reconvey it to the husband. A conveyance thus made is valid, and if attacked for fraud or undue influence, the burden is upon the party attacking the deed to establish the facts justifying its rescission. Wicks *v.* Dean, 19 Ky. L. Rep. 1708, 44 S. W. 397, *citing* Scarborough *v.* Watkins, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528; Todd's Heirs *v.* Wickliffe, 18 B. Mon. (Ky.) 908.

Parent and Child. — No presumption of unfair dealing between parent and child is to be drawn solely from the fact of relationship. Tenbrook *v.* Brown, 17 Ind. 410; Jenkins *v.* Pye, 12 Pet. (U. S.) 241; Baxter *v.* Bailey, 8 B. Mon. (Ky.) 336; *In re* Flagg's Estate, 27 Misc. 401, 59 N. Y. Supp. 167; Reehling *v.* Byers, 94 Pa. St. 316.

Brother and Sister. — A deed from the married sisters of a decedent conveying their interest in the estate to their brothers is not presumed to have been obtained by fraud from the fact that the parties are such near relatives. Goar *v.* Thompson, 19 Tex. Civ. App. 330, 47 S. W. 61. But see Million *v.* Taylor, 38 Ark. 428, and Boney *v.* Hollingsworth, 23 Ala. 690, in which it is said that while it is generally true that the mere relation of brother and sister

G. Successor in Interest of Wrongdoer. — It is not always essential that the party alleging fraud trace it to the person against whom it is urged. When fraud is once shown it affects all persons whose rights are dependent upon the transaction polluted by it, and the transaction itself, and all subsequent transactions growing out of it or dependent upon it, are *prima facie* fraudulent. Thus where it is shown by the original vendor that the purchase by his vendee was fraudulent and void, or where the execution of a promissory note is shown to have been originally obtained by fraud or deceit, the burden of proof in the former instance is upon the assignee of the fraudulent vendee,[39] and in the latter instance upon the assignee

does not impose a relation of confidence of itself, if there be nothing in the circumstances showing dependency and trust on the one hand, and a superiority or influence on the other, yet a transaction by which a sister divests herself of a valuable interest in favor of a brother is regarded with suspicion, and until the act is satisfactorily accounted for the inference of fraud or abuse of confidence is so strong that equity should relieve against it.

Conveyance Between Other Close Relatives. — Ditmas *v.* Ditmas, 11 App. Div. 628, 41 N. Y. Supp. 108; Shaffer *v.* Cowden, 88 Md. 394, 49 Atl. 786.

Intimate Relations of Friendship. Intimate relations of friendship do not raise the presumption of fraud. Wells *v.* Houston, 29 Tex. Civ. App. 619, 69 S. W. 183; *s. c.* on former appeal, 23 Tex. Civ. App. 629, 57 S. W. 584; Miller *v.* Welles, 23 Conn. 21.

Persons Who Have Agreed to Marry. — The relations subsisting between a man and woman who have agreed to marry are not such as to raise a presumption of fraud in dealings between them, or to throw upon the man the burden of proof. Atkins *v.* Withers, 94 N. C. 581.

39. *Connecticut.* — Lynch *v.* Beecher, 38 Conn. 490.

Iowa. — Gardner *v.* Early, 72 Iowa 518, 34 N. W. 311; Sillyman *v.* King, 36 Iowa 207; Falconbury *v.* McIlravy, 36 Iowa 488; Rush *v.* Mitchell, 71 Iowa 333, 32 N. W. 367; Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217.

Kansas. — Wafer *v.* Harvey Co. Bank, 46 Kan. 597, 26 Pac. 1032; Kilpatrick-Koch Dry Goods Co. *v.* Kahn, 53 Kan. 274, 36 Pac. 327.

Massachusetts. — Easter *v.* Allen, 8 Allen 7; Haskins *v.* Warren, 115 Mass. 514.

Michigan. — Durrell *v.* Richardson, 119 Mich. 592, 78 N. W. 650; Whitaker Iron Co. *v.* Preston Nat. Bank of Detroit, 101 Mich. 146, 59 N. W. 395.

Mississippi. — McLeod *v.* Nat. Bank, 42 Miss. 99.

Missouri. — Strauss *v.* Hirsch, 63 Mo. App. 95; Reid *v.* Lloyd, 52 Mo. App. 278.

New York. — Devoe *v.* Brant, 53 N. Y. 462.

Mortgage by Fraudulent Vendee. The subsequent mortgagee of a fraudulent vendee must show mortgage in good faith, without notice and for value. Cappon & B. Leather Co. *v.* Preston Nat. Bank, 114 Mich. 263, 72 N. W. 180.

Assignee's Participation or Intent is Immaterial. — Traywick *v.* Keeble, 93 Ala. 498, 8 So. 573; Cohn Bros. *v.* Stringfellow, 100 Ala. 242, 14 So. 286.

Rule in Alabama. — The plaintiff in the first instance must prove fraud in the original purchase. When this proof is made, the burden is then on the defendant, as sub-purchaser, to show that he paid value for the goods. The *onus* is then again shifted to the plaintiff, the original vendor, to prove that the defendant had notice of the fraud when he made the purchase. Wilk *v.* Key, 117 Ala. 285, 23 So. 6; Kyle *v.* Ward, 81 Ala. 120, 1 So. 468; McCormick *v.* Joseph, 77 Ala. 236; Loeb *v.* Flash, 65 Ala. 526; Spira *v.* Hornthall, 77 Ala. 137; Roswald *v.* Imbs, 78 Ala. 315; Robinson *v.* Levi, 81 Ala. 134, 1 So. 554. This doctrine has also been applied in other courts. See Atlas Nat. Bank

or indorsee of the original payee,[40] to prove that his rights were initiated in good faith and for value, and not upon the party relying upon the fraud to prove the contrary in the first instance. And the fact that the complainant alleges in his pleading that such sub-

v. Holm, 71 Fed. 489, and cases cited.

40. *England.* — Bailey *v.* Bidwell, 13 M. & W. 73.

United States. — Pana *v.* Bowler, 107 U. S. 542; Stewart *v.* Lansing, 104 U. S. 505; Atlas Nat. Bank *v.* Holm, 71 Fed. 489.

California. — Jordan *v.* Grover, 99 Cal. 194, 33 Pac. 889.

Indiana. — Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Giberson *v.* Jolley, 120 Ind. 301, 22 N. E. 306; Zook *v.* Simonson, 72 Ind. 83; Pope *v.* Branch Co. Sav. Bank, 23 Ind. App. 210, 54 N. E. 835.

Iowa. — Union Nat. Bank *v.* Barber, 56 Iowa 559, 8 N. W. 890; Bank of Monroe *v.* Anderson Bros. M. & R. Co., 65 Iowa 692, 22 N. W. 929. *Compare* Swan *v.* Mathre, 103 Iowa 261, 72 N. W. 522.

Kansas. — Brook *v.* Teague, 52 Kan. 119, 34 Pac. 347.

Kentucky. — David *v.* Merchants Nat. Bank of C., 20 Ky. L. Rep. 263, 45 S. W. 878.

Maine. — Perrin *v.* Noyes, 39 Me. 384, 63 Am. Dec. 633; Aldrich *v.* Warren, 16 Me. 465.

Maryland. — Totten *v.* Bucy, 57 Md. 46.

Massachusetts. — Smith *v.* Livingston, 111 Mass. 342; Smith *v.* Edgeworth, 3 Allen 233; Sistermans *v.* Field, 9 Gray 331; Tucker *v.* Morrill, 1 Allen 528. *Compare* Worcester Co. Bank *v.* Dorchester & M. Bank, 10 Cush. 488, 57 Am. Dec. 120.

Michigan. — Mace *v.* Kennedy, 68 Mich. 389, 36 N. W. 187; Stevens *v.* McLachlan, 120 Mich. 285, 79 N. W. 627.

Minnesota. — Bank of Montreal *v.* Richter, 55 Minn. 632, 57 N. W. 61; First Nat. Bank *v.* Holan, 63 Minn. 525, 65 N. W. 952.

Missouri. — Brown *v.* Hofflemeyer, 74 Mo. App. 385. *Compare* Terry *v.* Hickman, 1 Mo. App. 119.

Nebraska. — National Bank of Battle Creek *v.* Miller, 51 Neb. 156, 70 N. W. 933; Violet *v.* Rose, 39 Neb. 660, 58 N. W. 216.

New York. — Vosburg *v.* Diefendorf, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836; Seymour *v.* McKinstry, 106 N. Y. 230, 12 N. E. 348, 14 N. E. 94; First Nat. Bank *v.* Green, 43 N. Y. 298; Rogers *v.* Morton, 12 Wend. 484.

Oregon. — Owens *v.* Snell, 29 Or. 483, 44 Pac. 827.

Vermont. — McCasker *v.* Enright, 64 Vt. 488, 24 Atl. 249, 33 Am. St. Rep. 938.

Virginia. — Vathir *v.* Zane, 6 Gratt. 246.

See article "Bills and Notes."

Reason for Rule. — One of the reasons for this rule is that the fact that it was obtained by fraud affords a presumption that the guilty person would place the instrument in the hands of another person to sue upon it. Smith *v.* Livingston, 111 Mass. 342; Bailey *v.* Bidwell, 13 M. & W. (Eng.) 73.

Insufficient Proof to Shift Burden. The burden does not shift upon mere proof of the note and its execution and assignment, although this may constitute *prima facie* evidence that it was acquired in good faith and for value. Estabrook *v.* Boyle, 1 Allen (Mass.) 412; Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Harbison *v.* Bank of State of Indiana, 28 Ind. 133, 92 Am. Dec. 308.

Surety of Fraudulent Maker. This rule applies where the indorsee or holder attempts to recover from the surety whose signature was obtained by the fraud of the maker. The Bank of Monroe *v.* The Anderson Bros. M. & R. Co., 65 Iowa 692, 22 N. W. 929.

Proof Required to Overcome Presumption. — The decisions are not entirely harmonious as to the extent of proof required on the part of the holder in order to overcome the presumption. The general rule seems to be that the holder must show not only that he paid value for the instrument, but also that he took it in good faith and without notice. Bunting *v.* Mick, 5 Ind. App. 289, 31 N. E. 1055, 31 N. E. 378; Giberson *v.* Jolley, 120

purchaser or assignee had notice of the fraud and participated therein, which allegation is denied, does not affect the rule.[41]

2. Substance and Mode of Proof. — A. PAROL EVIDENCE. — a. *To Prove Fraud.* — It is always competent to prove fraud by parol evidence,[42] notwithstanding the fact that the contract or transaction assailed may have been reduced to writing.[43] This principle does not conflict with the rule excluding parol evidence to vary the terms of a written contract,[44] nor is it at all affected by the rule which

Ind. 301, 22 N. E. 306; Hunter *v.* Batterson, 28 Misc. 479, 59 N. Y. Supp. 501; Stifter *v.* Boggs, 15 Misc. 623, 37 N. Y. Supp. 219, while, on the other hand, a number of the decisions hold that he is only required to show that he paid value for the instrument, but not to go further and show affirmatively his want of notice or knowledge of the fraud, the *onus* of proving this latter fact being upon the party charging the fraud. Mears *v.* Waples, 4 Houst. (Del.) 62, *affirming* 3 Houst. 581. See also Arnold *v.* Lane, 71 Conn. 61, 40 Atl. 921, and Atlas Nat. Bank *v.* Holm, 71 Fed. 489, and cases cited.

This Rule Does Not Apply to Bank Bills, because they pass as money, and in most cases cannot be identified. Wyer *v.* Dorchester & M. Bank, 11 Cush. (Mass.) 51, 59 Am. Dec. 137, and cases cited.

Not Applicable Where Holder Is Party to Original Fraud. — In Potter *v.* Young, 90 Iowa 138, 57 N. W. 699, it is held that this rule does not apply to an action where the holder of the note is not charged with being a sub-purchaser thereof, with notice of the original fraud of the payee, but as being one of the parties to the original fraud. And see also First Nat. Bank *v.* Getz, 96 Iowa 139, 64 N. W. 799.

41. Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217.

42. The fraudulent representations need not be in writing in order to be admissible. Sibley *v.* Hulbert, 15 Gray (Mass.) 509.

43. Nelson *v.* Wood, 62 Ala. 175; Hanger *v.* Evins, 38 Ark. 334; Newman *v.* Smith, 77 Cal. 22, 18 Pac. 791; Kerrick *v.* Van Dusen, 32 Minn. 317, 20 N. W. 228.

Rule Universally Recognized. "The right to prove fraud, in whatever shape it may exist, to avoid written contracts, has been so uniformly recognized that it can hardly be said to have been the subject of serious judicial discussion." Cummings *v.* Case, 52 N. J. L. 77, 18 Atl. 972.

"There is no contract, sealed or unsealed, that is sufficient of itself, unaided by other circumstances, to cover and protect fraud. And rules of evidence which exclude parol proof, when offered to affect written instruments, will generally give way and allow the fraud to be proved." Feltz *v.* Walker, 49 Conn. 93; Indianapolis, P. & C. R. Co. *v.* Tyng, 2 Hun (N. Y.) 311.

Fraud in Acknowledgment. Parol evidence is admissible to show that a fraud was practiced not only in procuring execution of the deed, but also in the obtaining of the acknowledgment. Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552.

44. *Alabama.* — Dickson *v.* Barclay, 22 Ala. 370; Thompson *v.* Bell, 37 Ala. 438; Pierce *v.* Wilson, 24 Ala. 596; Tabor *v.* Peters, 74 Ala. 90.

California. — Brison *v.* Brison, 75 Cal. 525, 17 Pac. 689.

Connecticut. — Fox *v.* Tabel, 66 Conn. 397, 34 Atl. 101; Feltz *v.* Walker, 49 Conn. 93.

Illinois. — Antle *v.* Sexton, 137 Ill. 410, 27 N. E. 691.

Indiana. — Burns *v.* Thompson, 91 Ind. 146; Hines *v.* Driver, 72 Ind. 125.

Iowa. — Humbert *v.* Larson, 99 Iowa 275, 68 N. W. 703; Sisson *v.* Kaper, 105 Iowa 599, 75 N. W. 490; Porter *v.* Stone, 62 Iowa 442, 17 N. W. 654.

Kansas. — Brook *v.* Teague, 52 Kan. 119, 34 Pac. 347.

Massachusetts. — Burns *v.* Dockray, 156 Mass. 135, 30 N. E. 551.

declares that all prior negotiations and transactions are deemed to have been merged in the written contract thereafter executed,[45] because the action in which the fraud is in issue is based on the deceit and not on the contract;[46] nor is the rule varied by the fact that the fraudulent representations which are sought to be proved relate to the title to real property;[47] nor by the fact that the parties have, by a written contract, agreed that their rights and liabilities thereunder shall be finally and conclusively settled by the decision of some third person.[48] The fact that the parties have, in such contract, stipulated certain facts as true does not render parol evidence incompetent to prove the contrary for the purpose of showing fraud.[49]

b. *In Disproof of Fraud.* — Parol evidence is likewise admissible to disprove fraud in the transaction, although it may be evidenced by a written instrument.[50]

New York. — Sandford *v.* Handy, 23 Wend. 259.

North Carolina. — McLeod *v.* Bullard, 84 N. C. 515; Powell *v.* Heptinstall, 79 N. C. 206.

Vermont. — Mallory *v.* Leach, 35 Vt. 156; Dano *v.* Sessions, 65 Vt. 79.

45. Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376; Tyler *v.* Anderson, 106 Ind. 185, 6 N. E. 600; The Dowagiac Mfg. Co. *v.* Gibson, 73 Iowa 525, 35 N. W. 603, 5 Am. St. Rep. 697; Leicher *v.* Keeney, 98 Mo. App. 394, 72 S. W. 145; Burns *v.* Dockray, 156 Mass. 135, 30 N. E. 551; Gustafson *v.* Rustemeyer, 70 Conn. 125, 39 Atl. 104, 66 Am. St. Rep. 92, 39 L. R. A. 644. And see Lovejoy *v.* Isbell, 73 Conn. 368, 47 Atl. 682.

In Weeks *v.* Currier, 172 Mass. 53, 51 N. E. 416, the court said: "Fraudulent representations and oral misstatements made with intent to deceive are not so merged in the written instrument procured by means of them that they may not be made the basis of a decree to set it aside."

Immaterial Effect of Express Warranty. — Parol evidence is admissible to show other fraudulent representations inducing the contract, although there was a written warranty in respect to certain representations other than those sought to be shown. Cummings *v.* Cass, 52 N. J. L. 77, 18 Atl. 972.

Contract Silent As to Representations. — Parol evidence is competent to establish fraudulent representations as an inducement to the contract, although the written contract itself is silent on the subject to which the representations refer. Carvill Adm'r *v.* Jacks Adm'r, 43 Ark. 439; Antle *v.* Sexton, 137 Ill. 410, 27 N. E. 691; Davis *v.* Driscoll, 22 Tex. Civ. App. 14, 54 S. W. 43; Mitchell *v.* Zimmerman, 4 Tex. 75.

46. Such Evidence Does Not Vary the Writing or add to it, but proves that it was void in its inception. O'Donnell *v.* Clinton, 145 Mass. 461, 14 N. E. 747; McLeod *v.* Bullard, 84 N. C. 515.

47. Whitney *v.* Allaire, 1 N. Y. 305.

48. Baltimore & O. C. R. Co. *v.* Scholes, 14 Ind. App. 524, 43 N. E. 156, 56 Am. St. Rep. 307; McCoy *v.* Able, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453.

49. The Fact That the Insurance Policy is a "Valued" Policy and the demand therein liquidated does not render incompetent parol proof of the real value of the property insured for the purpose of proving a fraudulent overvaluation of the property in procuring the insurance. Sullivan *v.* Hartford Fire Ins. Co. (Tex. Civ. App.), 34 S. W. 999.

50. Cameron *v.* Paul, 11 Pa. St. 277.

In defense to a charge that the defendant (grantor) fraudulently asserted title to a piece of land conveyed to plaintiff, parol evidence on the part of such defendant to show that the real transaction between the parties covered a different piece of land and that an erroneous description thereof was placed in the deed

c. *Must Tend to Show Fraud.* — But where the tendency of the parol testimony is simply to control or modify the effect of a written agreement, it is incompetent, although the object in offering it may have been to establish an alleged fraud.[51]

B. Direct Evidence. — Testimony of Party. — The intent or motive[52] of a party in a transaction, whether he knew of the falsity of the representation,[53] and whether he relied upon the fraud charged,[54] may be shown by the direct testimony of the party whose motive, belief or intent is in issue.

C. Circumstantial Proof. — While a vast number of the decisions have adopted and used the expression that the law will never presume fraud, and that it must be proved,[55] this is but the mere

by mistake, is competent. Taylor *v.* Leith, 26 Ohio St. 428.

Where the grantor in a quitclaim deed is charged with deceit in that he had no title to convey, he may testify that no representation was made by him as to the nature of the title at the time the deed was given, as this tends to show that no deceit was practiced. Walton *v.* Mason, 109 Mich. 486, 67 N. W. 692.

51. Faucett *v.* Currier, 109 Mass. 79; Cowles *v.* Townsend, 31 Ala. 133.

See McLeod *v.* Johnson, 96 Me. 271, 52 Atl. 760, in which it was held that evidence of the language used by the parties during the conversation at the time and place of the execution of the contract was not admissible. The particular language sought to be proved did not tend to prove fraud in the execution of the contract, in that it did not appear that the supposed words, if spoken, were intended to induce or did induce the defendant to sign the contract, they being merely suggestions upon which the defendant might or might not act as he saw fit.

"**Proof of the Violation of an Alleged Contemporaneous Parol Agreement** does not establish fraud in the procurement of the written contract." Slaughter *v.* Smither, 97 Va. 202, 33 S. E. 544.

52. See *post* II. 1. C. a. (1.)

53. See *post* II. 1. C. b. (1.)

54. See *post* II. 3. B. a.

55. *United States* — Farrar *v.* Churchill, 135 U. S. 609; Gregg *v.* The Lessee of Sayre, 8 Pet. 244.

Alabama. — Thames *v.* Rembert, 63 Ala. 561.

Arkansas. — Toney *v.* McGehee, 38 Ark. 419.

California. — Smith *v.* Yule, 31 Cal. 180, 89 Am. Dec. 167.

Delaware. — Meares *v.* Waples, 3 Houst. 581; Boyce *v.* Cannon, 5 Houst. 409; Kent Co. R. Co. *v.* Wilson, 5 Houst. 49.

Illinois. — Dexter *v.* McAfee, 163 Ill. 508, 45 N. E. 115; Wright *v.* Grover, 27 Ill. 426.

Indiana. — Luce *v.* Shoff, 70 Ind. 152; Morgan *v.* Olvey, 53 Ind. 6.

Iowa. — Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933.

Massachusetts. — Wood *v.* Massachusetts Mut. Acc. Ass'n, 174 Mass. 217, 54 N. E. 541.

Michigan. — Allison *v.* Ward, 63 Mich. 128, 29 N. W. 528; Michels *v.* Stork, 52 Mich. 260, 17 N. W. 833; Miller *v.* Finley, 26 Mich. 249.

Mississippi. — Parkhurst *v.* McGraw, 24 Miss. 134.

Nebraska. — Hampton *v.* Webster, 56 Neb. 628, 77 N. W. 50; Alter *v.* Bank of Stockham, 53 Neb. 223, 73 N. W. 667; Western Horse & Cattle Ins. Co. *v.* Putnam, 20 Neb. 331, 30 N. W. 246; Davidson *v.* Crosby, 49 Neb. 60, 68 N. W. 338.

New York. — Morris *v.* Talcott, 96 N. Y. 100.

Pennsylvania. — Throop *v.* Griffin, 180 Pa. St. 452, 36 Atl. 865.

Utah. — Deseret Nat. Bank *v.* Little, 13 Utah 265, 44 Pac. 930.

West Virginia. — Wood *v.* Harrison, 41 W. Va. 376, 23 S. E. 560.

Fraud Cannot Be Assumed. "Fraud, it is sometimes said, may be inferred. But this expression must not be construed to warrant the mere assumption of a fact. This inference can only be drawn legitimately from some tangible fact in proof." Funkhouser *v.* Lay, 78 Mo. 458.

expression of the abhorrence with which the law regards fraud, and does not attempt to lay down any rule as to the mode of proof.[56] Indeed, this expression has been severely criticised, and an instruction to that effect, in the absence of a proper qualification, held material error.[57] It is not true that the law will never imply or infer fraud without direct and positive proof, but, on the contrary, it is always permissible to prove it by any circumstances from which it

56. *Delaware.* — Sanders *v.* Clark, 6 Houst. 462.

Illinois. — Reed *v.* Noxon, 48 Ill. 323; Strauss *v.* Kranert, 56 Ill. 254.

Indiana. — Farmer *v.* Calvert, 44 Ind. 209.

Michigan. — O'Donnell *v.* Segar, 25 Mich. 367.

Missouri. — State of Missouri *ex rel.* Erhardt *v.* Estel, 6 Mo. App. 6.

Pennsylvania. — Stauffer *v.* Young, 39 Pa. St. 455.

Texas. — Sparks *v.* Dawson, 47 Tex. 138.

West Virginia. — Harden *v.* Wagner, 22 W. Va. 356.

In Mathews *v.* Reinhardt, 149 Ill. 635, 37 N. E. 85, the trial court instructed the jury that "fraud cannot be presumed, but must be proved." It was held that the instruction was not obnoxious to the objection that it must have been understood by the jury as holding that fraud must be proved by direct evidence and not by circumstances. "It simply holds that fraud must be proved, but does not attempt to deal in the least with the question of the mode of proof."

Distinction Between "Presumed" and "Inferred." — In Morford *v.* Peck, 46 Conn. 380, the charge to the jury that the plaintiffs must prove the fraud, and that it could not be inferred, was held erroneous, and was held not to mean the same as the maxim, "The law never presumes fraud" (which maxim itself was criticised); because the word "inferred" is a stronger word than "presumed" when preceded by the word "cannot," for the purpose of excluding indirect evidence. The court holds that while fraud cannot be presumed without proof, it may be inferred from circumstances.

In Barndt *v.* Frederick, 78 Wis. 1, 47 N. W. 6, 11 L. R. A. 199, where the court had instructed the jury that fraud is not presumed, a further addition to such instruction, viz.: "In this case, while you are not to presume it, you may infer, if you find the evidence will warrant you in that presumption, the fraudulent character of this transaction," was held proper, and not in conflict with the former part of the instruction.

57. Burch *v.* Smith, 15 Tex. 210; Spark *v.* Dawson, 47 Tex. 138; Lowry *v.* Beckner, 5 B. Mon. (Ky.) 41, and see cases cited in note 56.

In Kaine *v.* Weigley, 22 Pa. St. 179, the court uses this language: "It is said that fraud must be proved, and is never to be presumed. This proposition can be admitted only in a qualified and very limited sense. But it is often urged at the bar, and sometimes assented to by judges, as if it were a fundamental maxim of the law, universally true, incapable of modification, and open to no exception; whereas it has scarcely extent enough to give it the dignity of a general rule; and, as far as it does go, it is based on a principle which has no more application to frauds than to any other subject of judicial inquiry. It amounts but to this: that a contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence of some kind, either positive or circumstantial. It is not true that fraud can *never* be presumed. Presumptions are of two kinds, *legal* and *natural*. Allegations of fraud are sometimes supported by one and sometimes by the other, and are seldom, almost never, sustained by that direct and plenary proof which excludes all presumption. . . . A resort to presumptive evidence, therefore, becomes absolutely necessary to protect the rights of honest men from this, as from other invasions."

Error to Charge that Fraud Cannot be Presumed. — In Granrud *v.* Rea, 24 Tex. Civ. App. 209, 59 S. W. 841, the court says: "On the trial the court charged the jury, among

may follow as a legitimate inference, and in most cases such circumstances are the only evidence available.[58]

other things, that 'fraud cannot be presumed, but must be proven to the satisfaction of the jury by competent evidence.' The charge is erroneous in two particulars: (1) The jury should never be charged that fraud can never be presumed, because it can be presumed by the jury from facts and circumstances proved, and often the only way of establishing it is to presume its existence from other facts and circumstances proved to exist."

58. *United States.* — Gregg *v.* The Lessee of Sayre, 8 Pet. 244; Mudsill Min. Co. *v.* Watrous, 61 Fed. 163.

Alabama. — Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435; Loeb *v.* Flash, 65 Ala. 526; Pickett *v.* Pipkin, 64 Ala. 520; Adams *v.* Thornton, 78 Ala. 489.

Arkansas. — Bank of Little Rock *v.* Frank, 63 Ark. 16, 37 S. W. 400, 58 Am. St. Rep. 65; Gavin *v.* Armistead, 57 Ark. 574, 22 S. W. 431, 38 Am. St. Rep. 262; Hanger *v.* Evins, 38 Ark. 334.

California. — McDaniel *v.* Baca, 2 Cal. 325, 56 Am. Dec. 339; Maxson *v.* Llewellyn, 122 Cal. 195, 54 Pac. 732; Belden *v.* Henriques, 8 Cal. 88.

Colorado. — Marsh *v.* Cramer, 16 Colo. 331, 27 Pac. 169; Grimes *v.* Hill, 15 Colo. 359, 25 Pac. 698.

Connecticut. — Quinebaug Bank *v.* Brewster, 30 Conn. 559.

Delaware. — Brown *v.* Dickerson, 2 Marv. 119, 42 Atl. 421; Freeman *v.* Topkis, 1 Marv. 174, 40 Atl. 948; Slessinger *v.* Topkis, 1 Marv. 140, 40 Atl. 717; Sanders *v.* Clark, 6 Houst. 462.

Florida. — Smith *v.* Hines, 10 Fla. 258.

Georgia. — Hoffer *v.* Gladden, 75 Ga. 532.

Idaho. — Sears *v.* Lydon, 5 Idaho 358, 49 Pac. 122.

Illinois. — Gill *v.* Crosby, 63 Ill. 190; Reed *v.* Noxon, 48 Ill. 323; Bowden *v.* Bowden, 75 Ill. 143; Bullock *v.* Narroti, 49 Ill. 62; Strauss *v.* Kranert, 56 Ill. 254; Johnson *v.* Worthington, 30 Ill. App. 617.

Indiana. — Timmis *v.* Wade, 5 Ind. App. 139, 31 N. E. 827; McCoy *v.* Able, 131 Ind. 417, 31 N. E. 453; Parrish *v.* Thurston, 87 Ind. 437; Kelly *v.* Lenihan, 56 Ind. 448; Rhodes *v.* Green, 36 Ind. 7; Furry *v.* O'Connor, 1 Ind. App. 573, 28 N. E. 103.

Iowa. — Lindauer *v.* Hay, 61 Iowa 663, 17 N. W. 98; Oswego Starch Factory *v.* Lendrum, 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53.

Kentucky. — Ward *v.* Crutcher, 2 Bush 87.

Maine. — Franklin Bank *v.* Cooper, 39 Me. 542.

Maryland. — Keller *v.* Gill, 92 Md. 190, 48 Atl. 69; Hiss *v.* Weik, 78 Md. 439, 28 Atl. 400.

Massachusetts. — Cook *v.* Moore, 11 Cush. 213.

Michigan. — Ferris *v.* McQueen, 94 Mich. 367, 54 N. W. 164.

Minnesota. — Berkey *v.* Judd, 22 Minn. 287.

Mississippi. — Parkhurst *v.* McGraw, 24 Miss. 134.

Missouri. — Hopkins *v.* Sievert, 58 Mo. 201; State of Missouri *ex rel.* Erhardt *v.* Estel, 6 Mo. App. 6.

Nebraska. — Alter *v.* Bank of Stockham, 53 Neb. 223, 73 N. W. 667.

New York. — Clark *v.* Baird, 9 N. Y. 183; Marsh *v.* Falker, 40 N. Y. 562; Booth *v.* Powers, 56 N. Y. 22.

Pennsylvania. — Kaine *v.* Weigley, 22 Pa. St. 179; Stauffer *v.* Young, 39 Pa. St. 455.

Texas. — Sparks *v.* Dawson, 47 Tex. 138; Burch *v.* Smith, 15 Tex. 219; Graham *v.* Roder, 5 Tex. 141; Briscoe *v.* Bronaugh, 1 Tex. 326.

Virginia. — Todd *v.* Sykes, 97 Va. 143, 33 S. E. 517; Saunders *v.* Parrish, 86 Va. 592, 10 S. E. 748; Jones *v.* McGruder, 87 Va. 360, 12 S. E. 792; Ferguson *v.* Daughtrey, 94 Va. 308, 26 S. E. 822; Hazlewood *v.* Forrer, 94 Va. 703, 27 S. E. 507.

Washington. — Tacoma *v.* Tacoma L. & W. Co., 16 Wash. 288, 47 Pac. 738; Millar *v.* Plass, 11 Wash. 237, 39 Pac. 956.

West Virginia. — Bronson *v.* Vaughn, 44 W. Va. 406, 29 S. E. 1022; Goshorn Ex'r *v.* Snodgrass, 17 W. Va. 717; White *v.* Perry, 14 W. Va. 66.

Wisconsin. — Barndt *v.* Frederick,

D. Opinion or Conclusion of Witness. — Fraud is an inference or conclusion of fact to be drawn by the court or jury from all the evidence in a case,[59] and the general rule is that the opinion or conclusion of a witness that a transaction was or was not fraudulent is incompetent.[60] Some of the decisions, however, seem to have digressed materially from this rule and have held such evidence competent.[61]

78 Wis. 1, 47 N. W. 6, 11 L. R. A. 199.

In Hennequin *v.* Naylor, 24 N. Y. 139, the court said: "I accede to the proposition of the counsel for the defendant that fraud must be proved. It can never be presumed, in the absence of all evidence on the subject. Nevertheless, the motive with which an act is done may be, and often is, ascertained and determined by inferences drawn from the proof of facts and circumstances connected with the transaction, and the parties to it. . . . In cases where there is no overt act of fraud it is often very difficult to prove a dishonest purpose. In all such cases, instead of proving false representations or other fraudulent purposes, resort is had to various incidents and circumstances which are calculated to exhibit the hidden purposes of the actor's mind."

Difficulty in Proving Fraud. "It would, in most cases, be extremely difficult, and in many cases absolutely impossible, to procure direct evidence of this nature. In all cases it is permissible to prove fraud by circumstances, and in most cases it is the only evidence available. In aid of the direct facts proved, legitimate inferences are permitted to be indulged to establish others not directly in evidence." Maxson *v.* Llewellyn, 122 Cal. 195, 54 Pac. 732.

Difficulty in Laying Down Rule. Mears *v.* Waples, 3 Houst. (Del.) 581. And see Gill *v.* Crosby, 63 Ill. 190.

"Sometimes Negative Circumstances Are Quite as Cogent in manifesting its influence as are affirmative and direct statements." Berger *v.* Bullock, 85 Md. 441, 37 Atl. 368.

Circumstantial Proof Exclusively. For a strong case in which it was held that fraud was satisfactorily made out by circumstantial proof exclusively, see Mudsill Min. Co. *v.* Watrous, 61 Fed. 163.

59. See *post*, "Weight and Sufficiency of the Evidence."

60. Liveright *v.* Greenhouse, 61 N. J. L. 156, 38 Atl. 697; Stone *v.* Denny, 4 Metc. (Mass.) 151; Sweet *v.* Wright, 62 Iowa 215, 17 N. W. 468; Kipp *v.* Chamberlin, 20 N. J. L. 656; Bunting *v.* Mick, 5 Ind. App. 289, 31 N. E. 378, 31 N. E. 1055; Hoyle *v.* Southern Saw Wks., 105 Ga. 123, 31 S. E. 137.

The testimony of a witness that he had discovered that the representation was absolutely false (Borone *v.* Titus, 30 N. J. L. 340), or that a person had misrepresented the facts (German Fire Ins. Co. *v.* Grunert, 112 Ill. 68), or that a person obtained certain property honestly (Johnson *v.* State, 35 Ala. 370), or that the witness purchased in good faith (Pope *v.* Branch Co. Sav. Bank, 23 Ind. App. 210, 54 N. E. 835), is a conclusion of the witness and is incompetent.

Incompetent to Contradict Witness. — The statement of a witness that the transaction "was a swindle," it being claimed that he had made such statement as a previous declaration, or admission, is incompetent even to contradict the testimony of such witness tending to show good faith in the transaction. It was the province of the jury, and not the witness, to determine this question. Sunberg *v.* Babcock, 66 Iowa 515, 24 N. W. 19.

61. See McLeod *v.* Bullard, 84 N. C. 515; Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217.

Opinion that Fraud Had Been Practiced. — In McLean *v.* Clark, 47 Ga. 24, which was an action by the vendor of property to set aside the sale thereof on the grounds that defendant had falsely represented to complainant that his life and prop-

3. Relevancy. — A. Liberal Rule of Admissibility. — The courts are a unit in allowing the greatest liberality in the method of examination, in the scope of the inquiry, and in the latitude of the direct and cross-examination of witnesses in all cases where the issue of fraud is involved.[62] It has been held, however, that this very

erty were in danger by reason of the indignation of the people of the community for his having raised the British flag over his premises as a means of protection from the federal forces, whereby he was induced to convey his property for a sum far less than its value, it was held error for the court to rule out the testimony of a witness who was present at the transaction, and who had testified as follows: "The sale in all its features was a compulsory one, and effected through the misrepresentations of his (plaintiff's) legal adviser, who negotiated the whole transaction; the sale was not of his own free will and accord, because Mr. Clark (plaintiff's legal adviser), made statements to plaintiff that if he did not sell the factory his life would be in constant danger," and further, "The impression on my mind was, and still is, that plaintiff would not have sold the property if he had not believed that his own life and the lives of his family were in danger, and that this belief was caused by the persistent misrepresentations of Clark," and further that "The property was sold because the plaintiff was fraudulently led to believe by Clark's representations that his life would be in danger." The court said that a witness who was present at the time of the transaction, and who testified to the general statement that McLean was alarmed, did not act of his own free will, and that his legal adviser misrepresented the facts (the legal adviser being one of the defendants and a partaker of the benefits of the fraud, if there was a fraud), was giving competent testimony; that he might, when questioned, go into greater detail, and that it was in the power of the other side to push the inquiry into those details. The testimony did go into some of those details, and the other portions of what he said were to be considered in determining the weight to be given to the general statements. The witness stated that he was present He stated that Clark negotiated the trade; that Clark was McLean's legal adviser; that he deceived McLean and put him in fear, so that he had no free will. He stated, in other parts of his testimony, the character of the misrepresentations, etc. So far as this was a statement of facts it was surely competent. That it did not sufficiently go into details; that it was general; that the witness stated, as facts, what other parts of the testimony showed he was mistaken in. or did not know; these were objections to its weight, and not to its competency. Some of it was matter of opinion; but so far as the state of McLean's mind was concerned, whether he was or was not alarmed, and the cause of his alarm, were necessarily matters of opinion; and, under the law (Code, § 3811), a witness may, in such matters, give his opinion, if he states the ground of that opinion. The whole goes to the jury for what it is worth. If the grounds stated show that the circumstances were such as to justify the opinion, or if they show the contrary, the opinion has more or less weight with the jury.

62. *United States.* — Castle *v.* Bullard, 23 How. 172; Butler *v.* Watkins, 80 U. S. 456; Spurr *v.* United States, 87 Fed. 701.

Alabama. — Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435; Benning *v.* Nelson, 23 Ala. 801; Snodgrass *v.* Branch Bank of Decatur, 25 Ala. 161, 60 Am. Dec. 505.

California. — Butler *v.* Collins, 12 Cal. 457; Richards *v.* Fraser, 122 Cal. 456, 55 Pac. 246.

Colorado. — Grimes *v.* Hill, 15 Colo. 359, 25 Pac. 698.

Connecticut. — Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240.

Georgia. — Kidd *v.* Huff, 105 Ga. 209, 31 S. E. 430; Robinson *v.* Woodmansee, 80 Ga. 249, 4 S. E. 497; Roberts *v.* Neal, 62 Ga. 163.

latitude of evidence imposes upon the jury the duty of closest scrutiny.[63]

B. Relevant Circumstances. — a. *In General.* — Every fact or circumstance from which a legal inference of fraud may be drawn is relevant.[64]

b. *Individual Weight Immaterial.* — It is the "bearing" and not the independent force or weight of the particular fact or circumstance upon which its relevancy depends, and although it may be of very little consequence intrinsically, still if it has a "breath of importance," it is relevant and admissible.[65]

Idaho. — Sears *v.* Lydon, 5 Idaho 358, 49 Pac. 122.

Illinois. — Vigus *v.* O'Bannon, 118 Ill. 334, 8 N. E. 778.

Kansas. — Smith *v.* Smidt, 5 Kan. 30.

Maryland. — McAleer *v.* Horsey, 35 Md. 439; Cook *v.* Carr, 20 Md. 403.

Michigan. — Kirschbaum *v.* Jasspon, 119 Mich. 452, 78 N. W. 473; Barnett *v.* Farmers Mut. Fire Ins. Co., 115 Mich. 247, 73 N. W. 372; Dibble *v.* Nash, 47 Mich. 589, 11 N. W. 399; Gumberg *v.* Treusch, 103 Mich. 543, 61 N. W. 872.

Minnesota. — Pfefferkorn *v.* Seefield, 66 Minn. 223, 68 N. W. 1072.

Missouri. — Bank of North America *v.* Crandall, 87 Mo. 208; Smalley *v.* Hale, 37 Mo. 102; Mosby *v.* Commission Co., 91 Mo. App. 500; Hopkins *v.* Sievert, 58 Mo. 201; Erfort *v.* Consalus, 47 Mo. 208.

New York. — Townsend *v.* Felthousen, 156 N. Y. 618, 51 N. E. 279; Benham *v.* Cary, 11 Wend. 83; White *v.* Benjamin, 150 N. Y. 258, 44 N. E. 956; Viele *v.* Goss, 49 Barb. 96.

Pennsylvania. — Cole *v.* High, 173 Pa. St. 590, 34 Atl. 292; Glessner *v.* Patterson, 164 Pa. St. 224, 30 Atl. 355; Baltimore & O. R. Co. *v.* Hoge, 34 Pa. St. 214; Reinhard *v.* Keenbartz, 6 Watts 93; Winters *v.* Mowrer, 163 Pa. St. 239, 29 Atl. 916; Van Sciver Co. *v.* McPherson, 199 Pa. St. 331, 49 Atl. 73; Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552.

South Carolina. — Gist *v.* McJunkin, 2 Rich. L. 154.

Texas. — Loftus *v.* Ivy, 14 Tex. Civ. App. 701, 37 S. W. 766; Burnham *v.* Logan, 88 Tex. 1, 29 S. W. 1067.

Utah. — Leedom *v.* Earls Furn. & C. Co., 12 Utah 172, 42 Pac. 208.

Virginia. — Piedmont Bank *v.* Hatcher, 94 Va. 229, 26 S. E. 505.

Meaning of Maxim. — In Stauffer *v.* Young, 39 Pa. St. 455, the reason of the rule was fully and clearly stated: The meaning of the maxim that great liberality of evidence is to be allowed in the trial of questions of fraud is that every circumstance in the condition and relation of the parties, and every act and declaration of the person charged with the fraud, shall be competent evidence, if in the opinion of the judicial mind it bears such a relation to the transaction under investigation as in its nature is calculated to persuade the reasonable men in the jury box to the belief that the allegation of fraud is or is not well founded.

Cross-Examination of Party. — A wide latitude will generally be allowed in cross-examinations where the issue is fraud, especially of witnesses who are parties to the alleged fraudulent transaction. Altschuler *v.* Coburn, 38 Neb. 881, 57 N. W. 836.

63. Freeman *v.* Topkis, 1 Marv. (Del.) 174, 40 Atl. 948.

64. Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552; Tillman *v.* Fountaine, 98 Ga. 672, 27 S. E. 149.

65. *United States.* — Castle *v.* Bullard, 23 How. 172; United States *v.* Kenney, 90 Fed. 257.

Alabama. — Nelms *v.* Steiner Bros., 113 Ala. 562, 22 So. 435.

Colorado. — Grimes *v.* Hill, 15 Colo. 359, 25 Pac. 698.

Delaware. — Sanders *v.* Clark, 6 Houst. 462.

Indiana. — Robinson *v.* Reinhart, 137 Ind. 674, 36 N. E. 519.

Maine. — Franklin Bank *v.* Cooper, 39 Me. 542; Walker *v.* Thompson, 61 Me. 347.

c. *The Transaction Itself and Its Results.* — The form or intrinsic characteristics of the transaction or instrument itself,[66] and all the circumstances, whether preceding, accompanying, or following it, if bearing upon it or tending to throw any light upon it, are relevant and admissible to prove or disprove fraud therein.[67] The trans-

Massachusetts. — Stebbins *v.* Miller, 12 Allen 591.

New York. — White *v.* Benjamin, 150 N. Y. 258, 44 N. E. 956.

"It is a great error, generally insisted on by defendants, in cases involving questions of fraud, that each item of testimony is to be tested by its own individual, intrinsic force, without reference to anything else in the case; and if on such a test it does not prove fraud, it must be excluded. . . . Courts have the power, and must prevent such a system of assault, otherwise fraud would ever after be victorious." Baltimore & O. R. Co. *v.* Hoge, 34 Pa. St. 214.

66. *Colorado.* — Lewis *v.* Dodge, 3 Colo. App. 59, 31 Pac. 1022.

Connecticut. — See Salmon *v.* Richardson, 30 Conn. 360.

Illinois. — Bowman *v.* Wettig, 39 Ill. 416.

Iowa. — Terhune *v.* Henry & Carmichael, 13 Iowa 99.

Maine. — Brown *v.* Blunt, 72 Me. 415.

Maryland. — Brooke *v.* Berry, 2 Gill 83.

Massachusetts. — Sullivan *v.* Langley, 128 Mass. 435.

Michigan. — Adams *v.* Bowman, 51 Mich. 189, 16 N. W. 373.

Minnesota. — Goddard *v.* King, 40 Minn. 164, 41 N. W. 659.

New York. — Booth *v.* Powers, 56 N. Y. 22.

Texas. — Briscoe *v.* Bronaugh, 1 Tex. 326.

Presumption. — In Frazier *v.* Miller, 16 Ill. 48, which was an action to set aside for fraud, a contract by which plaintiff had conveyed to defendant all of his real and personal property, constituting his whole fortune, in consideration of defendant's agreement to support plaintiff and wife during their lives, the court said: "The bill is silent as to the ages of Miller and wife, and their constitutional vigor, but we might indulge a presumption, without violence, of their age and feebleness, from the nature and character of the transaction."

Extravagance of Representations. If the representations were so extravagant that a sensible, cautious person would not have believed them, this is a proper consideration for the jury in determining whether the plaintiff believed and relied upon them. Barndt *v.* Frederick, 78 Wis. 1, 47 N. W. 6, 11 L. R. A. 199, and see James *v.* Work, 54 N. Y. St. 166, 24 N. Y. Supp. 49.

Transaction Conclusively Disproving Fraud. — See Binney's Appeal, 116 Pa. St. 169, 9 Atl. 186, in which it was held that the face of the public record of a mortgage on which B, as an administrator, had entered satisfaction of the mortgage, which his decedent had not owned, but such satisfaction on its face showing plainly a reference to the record of a mortgage which his decedent did own, was sufficient and conclusive of itself to show that there was no fraud on the part of B in entering the satisfaction in the wrong place, and that it simply amounted to a mistake.

Exaggerated Representations. The representation itself, when compared with the actual condition of the subject-matter, which has been viewed and examined by the party charging the fraud, may be so grossly exaggerated or false as to negative the claim that the party relied thereon. See Allison *v.* Ward, 63 Mich. 128, 29 N. W. 528.

67. *Delaware.* — Brown *v.* Dickerson, 2 Marv. 119, 42 Atl. 421.

Illinois. — Kingman *v.* Reinemer, 166 Ill. 208, 46 N. E. 786; Eames *v.* Morgan, 37 Ill. 260.

Indiana. — Bloomer *v.* Gray, 10 Ind. App. 326, 37 N. E. 819.

Louisiana. — Smith *v.* Berwick, 12 Rob. 20.

Massachusetts. — Sullivan *v.* Langley, 128 Mass. 435; Smith *v.* Livingston, 111 Mass. 342.

action may, of itself and by itself, furnish the most satisfactory proof of fraud, so conclusive as to outweigh the answer of the party charged and even the evidence of witnesses.[68]

Result. — The result accomplished by the act charged as fraudulent may be relevant as clearly indicating the purpose or intent with which the act was done,[69] and a comparison between the actual result of an alleged fraudulent act and what would have been the result of a similar act if fair and equitable, is competent.[70]

d. *Acts, Conduct, and Declarations of the Parties.* — **(1.) In General.** The statements of the parties at the time of the transaction,[71] their

Missouri. — Smalley *v.* Hale, 37 Mo. 102.

New Hampshire. — Blodgett Paper Co. *v.* Farmer, 41 N. H. 398.

Pennsylvania. — Cole *v.* High, 173 Pa. St. 590, 34 Atl. 292.

In an action by the vendor counting on the fraud of the vendee in delivering to such vendor a false and fraudulent promissory note as the purchase price of the goods without any active misrepresentation, which note was signed "E. K. P.," evidence that there was only one person bearing that name in the county; that he was a man of great wealth; that the signature to the note resembled his signature and that the vendor believed the signature to be his, when in reality the real maker was the vendee's brother residing in another county, and who was financially embarrassed, is relevant and admissible to establish the fraudulent intent and as proof of the inducement. Parrish *v.* Thurston, 87 Ind. 437.

68. Todd *v.* Sykes, 97 Va. 143, 33 S. E. 517; Jones *v.* McGruder, 87 Va. 360, 12 S. E. 792; Parr *v.* Saunders (Va.), 11 S. E. 981; Hazlewood *v.* Forrer, 94 Va. 703, 27 S. E. 507.

Instrument from Execution Debtor to Sheriff. — In Gist *v.* Frazier, 2 Litt. (Ky.) 118, in speaking of an instrument in and by which an execution debtor recited the holding by the sheriff of a number of executions against him, and fully authorized and directed such sheriff to sell the debtor's premises without complying with the ordinary requirements concerning such sales, the court said: "Although the present instrument may not be styled a contract, yet it is such a total dispensation of the duties of the officer on the one hand and such an annihilation of the legal rights and privileges of the debtor on the other, that it must have been procured by the officer taking an undue advantage of the attitude in which he was placed, and was as injurious to the interest of the debtor as any extorted sacrifice by contract could be."

69. United States *v.* Kenney, 90 Fed. 257; Kisterbock's Appeal, 51 Pa. St. 483.

In Keller *v.* Gill, 92 Md. 190, 48 Atl. 69, the court, in speaking of the effect of an act charged to have been fraudulent, said: "It is impossible to ascribe to an honest purpose a result so obviously inequitable and unjust."

Agent Making Unusual Profit. In an action involving the fraud of plaintiff's broker, whereby plaintiff was induced to enter into a transaction to his damage, although the evidence of the fraud was not as satisfactory as might reasonably have been expected, it was held that the fact that the agent made an unusually large profit out of the transaction had a strong tendency toward establishing the fraud and was properly submitted to the jury. Wyeth *v.* Morris, 13 Hun (N. Y.) 338.

70. Turnbull *v.* Boggs, 78 Mich. 158, 43 N. W. 1050.

Discrepancy Conclusive of Fraud. The discrepancy between the actual result of an act claimed to have been fraudulent and what the result would have been had no fraud been practiced, may be so gross as to conclusively establish fraud in the act. See Cleveland Iron M. Co. *v.* Eastern R. Co., 75 Minn. 505, 78 N. W. 84.

71. Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643; Meek *v.* State, 117 Ala. 116, 23 So. 155; Milliken *v.* Thorndike, 103 Mass. 382; Miller *v.*

correspondence during the negotiations leading thereto,[72] and their acts and declarations both precedent and subsequent thereto, if tending at all to elucidate the motive or intent of the parties therein, are relevant and admissible.[73] The acts and declarations of a party made at a former time may be relevant and competent to prove[74] or disprove[75] his fraudulent intent in a subsequent transaction. Likewise, the acts and declarations of a party subsequent to the trans-

Barber, 66 N. Y. 558; Lovejoy *v.* Isbell, 73 Conn. 368, 47 Atl. 682.

Self-Serving Declarations of Party Charging the Fraud. — The declarations of the party charging the fraud, accompanying the transaction, or so nearly connected therewith in time as to free them from suspicion of device or afterthought, are relevant and admissible to explain the influences that moved him to enter into the transaction. McLean *v.* Clark, 47 Ga. 24. And see Cook *v.* Carr, 20 Md. 403, wherein it was held that the declarations of the party upon whom the fraud was practiced, and who had since died, to the effect that she had been induced to act by the fraud and intimidation of defendant, were held competent.

72. Moses *v.* Katzenberger, 84 Ala. 95, 4 So. 237.

73. *Alabama.* — Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643.

Connecticut. — Salmon *v.* Richardson, 30 Conn. 360, 79 Am. Dec. 255.

Georgia. — Kidd *v.* Huff, 105 Ga. 209, 31 S. E. 430.

Kansas. — Elerick *v.* Reid, 54 Kan. 579, 38 Pac. 814.

Massachusetts. — Brownell *v.* Briggs, 173 Mass. 529, 54 N. E. 251; Somes *v.* Skinner, 16 Mass. 348; Com. *v.* Jeffries, 7 Allen 548, 83 Am. Dec. 712.

Michigan. — Stackable *v.* Estate of Stackable, 65 Mich. 515, 32 N. W. 808.

Missouri. — Smalley *v.* Hale, 37 Mo. 102.

New York. — Crary *v.* Sprague, 12 Wend. 41; Hennequin *v.* Naylor, 24 N. Y. 139; Hersey *v.* Benedict, 15 Hun 282.

74. Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241; Dibble *v.* Nash, 47 Mich. 589, 11 N. W. 399; Maxwell *v.* Brown Shoe Co., 114 Ala. 304, 21 So. 1009.

Previous Unguarded Declaration. The previous unguarded declaration of the person charged with fraud, that he was going home to live with his mother "until he made his scheme," leaves no room for doubt as to the motive that prompted him in obtaining a conveyance from his mother while he was at home, after which he left her. Berger *v.* Bullock, 85 Md. 441, 37 Atl. 368.

In an action for fraud in selling plaintiff a second mortgage, representing it to be a first mortgage, evidence that at the time of the making of the mortgage defendant stated that he did not want it to contain an exception in the covenant against incumbrances, as it might prejudice its sale, is relevant. Cronkhite *v.* Dickerson, 51 Mich. 177, 16 N. W. 371.

Statements of Vendee to Person Recommending Him. — Everything occurring between the alleged fraudulent vendee (defendant) and the witness, at the time a letter was written by such witness, at the request of the defendant, to the plaintiff, to the effect that such vendee was entitled to credit, is admissible as tending to establish the fraud of such vendee in procuring the sale. Van Sciver Co. *v.* McPherson, 199 Pa. St. 331, 49 Atl. 73.

Reason for Rule. — "The only mode of showing a present intent is often to be found in proof of a like intent previously entertained. The existence in the mind of a deliberate design to do a certain act, when once proved, may properly lead to the inference that the intent once harbored continued and was carried into effect by acts long subsequent to the origin of the motive by which they were prompted." Cook *v.* Moore, 11 Cush. (Mass.) 213.

75. The fact that the party charged with the fraud had, previous to the time he made the representations complained of, and when he

action are often strong evidence to prove[76] or disprove[77] fraud therein.

(A.) Fraud of Vendee in Purchase. — Thus, where a vendee of goods is charged with purchasing them with the intent not to pay therefor, the fact that immediately preceding such purchase he bought large and unusual quantities on credit,[78] or that a short time there-

could have had no motive to misrepresent, made similar statements to another person, is relevant and competent to disprove his alleged fraudulent intent in making the representations complained of. McCracken *v.* West, 17 Ohio 16.

76. *Colorado.* — Brewster *v.* Crossland, 2 Colo. App. 446, 31 Pac. 236.

Connecticut. — Elwell *v.* Russell, 71 Conn. 462, 42 Atl. 862.

Illinois. — Honchett *v.* Mansfield, 16 Ill. App. 407.

Indian Territory. — Noble *v.* Worthy, 1 Ind. Ter. 458, 45 S. W. 137.

Iowa. — Bartlett *v.* Falk, 110 Iowa 346, 81 N. W. 602.

Massachusetts. — Lynde *v.* McGregor, 13 Allen 172; Packer *v.* Lockman, 115 Mass. 72; Kline *v.* Baker, 106 Mass. 61; Cheney *v.* Gleason, 125 Mass. 166.

Michigan. — Ross *v.* Miner, 64 Mich. 204, 31 N. W. 185.

Missouri. — Rennolds *v.* Insurance Co., 62 Mo. App. 104.

Texas. — O'Neill *v.* Willis Point Bank, 67 Tex. 36, 2 S. W. 75. *Compare* Mosler Safe Co. *v.* Hartog, 26 Misc. 14, 55 N. Y. Supp. 624.

Subsequent Contradictory Statements. — A subsequent declaration of the wrongdoer contradictory to or inconsistent with the representation complained of is admissible. Potter *v.* Mellen, 41 Minn. 487, 43 N. W. 375; Meek *v.* State, 117 Ala. 116, 23 So. 155.

Subsequent Repetition of Misrepresentation. — The fact that the party charged subsequently repeated the alleged false representation at a time when he could not have been ignorant of its falsity is relevant and competent to prove his bad faith from the beginning. Cummings *v.* Cummings, 5 Watts & S. (Pa.) 553.

"In cases of this character, where fraud is alleged, it is always permissible to prove every act of the party charged, connected in any way with the subject-matter of the fraud; and sometimes the subsequent action of the party more clearly demonstrates the fraudulent intent than any or all of the circumstances that occurred prior to or at the particular time of the transaction that is alleged to be fraudulent." Minx *v.* Mitchell, 42 Kan. 688, 22 Pac. 709. And see Butler *v.* Collins, 12 Cal. 457.

Letters Written by the Wrongdoer to Third Persons tending to explain the conduct charged to have been fraudulent are competent against such wrongdoer. Furry *v.* O'Connor, 1 Ind. App. 573, 28 N. E. 103.

Subsequent Admission Insufficient to Prove Prior Guilty Knowledge. Where an attempt is made to hold the defendant liable for moneys misappropriated by a guardian, evidence of a statement made by defendant five years after the misappropriation, to the effect that he (defendant) had sold the ward's property and paid the money to the guardian, who was financially embarrassed and guilty of fraud with respect to his creditors and with respect to his ward, is insufficient to raise the inference that the defendant knew or had reason to believe at the time of the misappropriation that the guardian intended to commit a breach of his trust. Armitage *v.* Snowden, 41 Md. 119.

77. Sackett *v.* Stone, 115 Ga. 466, 41 S. E. 564.

Inconsistent Statements of Plaintiff. — Shaffer *v.* Cowden, 88 Md. 394, 49 Atl. 786.

The admissions of a parent, since deceased, that he had made a gift of his property to his son, made after a conveyance of such property to said son, are admissible to disprove the alleged fraud of such son in obtaining such conveyance. Howell *v.* Howell, 47 Ga. 492.

78. Cox Shoe Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316; Kirschbaum

after he was insolvent and made an assignment to his creditors,[79] is relevant and admissible.

(B.) Admission of Fraud by Person Since Deceased. — It has been held that the mere admission of a person, since deceased, that he had committed a fraud, standing alone, is incompetent against his representatives in an action in which such fraud is in issue.[80]

(C.) Newspaper Article or Printed Circular. — A newspaper article[81] or printed circular[82] containing the representation and shown to have been authorized by the party charged, is relevant and competent evidence to prove the fraud.

(2.) Concealment or Suppression of a Material Fact. — (A.) In General. A positive, false affirmation is not the only foundation upon which fraud may be based.[83] The fraudulent intent may be inferred from

v. Jasspon, 119 Mich. 452, 78 N. W. 473; Jacobs *v.* Shorey, 48 N. H. 100, 97 Am. Dec. 586.

Unusual or extraordinary methods of conducting business on the part of the vendee are relevant. Phelps, Dodge & Palmer Co. *v.* Sampson, 113 Iowa 145, 84 N. W. 1051.

79. Horton *v.* Weiner, 124 Mass. 92; Haskins *v.* Warren, 115 Mass. 514; Hersey *v.* Benedict, 15 Hun (N. Y.) 282; Cincinnati Cooperage Co. *v.* Gaul, 170 Pa. St. 545, 32 Atl. 1093; Rennolds *v.* Insurance Co., 62 Mo. App. 104; Noble *v.* Worthy, 1 Ind. Ter. 458, 45 S. W. 137.

Presumption. — "Every man may be presumed to have some knowledge of his pecuniary condition. If unforeseen circumstances arrive which change his situation, he is the proper party to explain them. In the absence of satisfactory explanations, it is not a violent presumption to infer that a man who stops payment today, because he is hopelessly insolvent, must have known and contemplated it six days before." Johnson *v.* Monell, 2 Keyes (N. Y.) 655, *explaining* Nichols *v.* Pinner, 18 N. Y. 295.

But see New York & H. Cigar Co. *v.* Bernheim, 81 Ala. 138, 1 So. 470, and Thompson *v.* Peck, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201, in which it is held that mere proof of such assignment for the benefit of creditors does not warrant the inference of fraud in the previous purchase.

80. Declarations of Decedent Incompetent. — "The evidence of an admission by the deceased that he had committed a fraud would be competent to be given in corroboration of other and direct evidence of such fraud. But proof that the fraud was actually perpetrated must, in some manner, be shown. A mere declaration of a deceased person given in evidence, that he had perpetrated a fraud, unsupported by direct evidence, is not competent to establish the fact of fraud, so as to avoid, for fraud in its inception, a written obligation sued upon by his personal representatives. The declaration of a deceased party to a written instrument made to a third person prior to the execution of the instrument, and offered to be proved at the trial for the purpose of impeaching and annulling that instrument for the fraud of the deceased, but which was not communicated by the witness to the other parties, is but hearsay evidence, and that, too, of an extremely dangerous character, and when standing alone, and not merely in aid of direct evidence, is incompetent to destroy the validity of the writing." Hard *v.* Ashley, 44 N. Y. St. 702, 18 N. Y. Supp. 413, *affirmed* 136 N. Y. 645, 32 N. E. 1015.

81. Timmerman *v.* Bidwell, 62 Mich. 205, 28 N. W. 866; Bradbury *v.* Bardire, 35 Conn. 577.

82. Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241, in which it is said: "The statements therein may be regarded as of a more deliberate character than if made in a conversation." See also Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

83. In Devoe *v.* Brandt, 53 N. Y.

a suppression of the truth or the willful concealment of a material fact by a person who, by reason of the circumstances, is in duty bound to disclose the same.[84] And in such case, proof of such suppression or concealment is relevant and justifies the inference of fraud,[85] but is not necessarily conclusive thereof.[86]

(B.) Concealment of Insolvency by Vendee. — The most common application of this principle occurs in transactions where an insolvent vendee purchases goods on credit without intending to pay for them, in which case his concealment of his known insolvency and intent raises the presumption of fraud in the purchase, and justifies

462, the court, in speaking of the fraud of a vendee in the purchase of goods, said: "Such a fraud may be as easily consummated by a suppression of the truth as by the suggestion of a falsehood. The law is guilty of no such absurdity as to require a false affirmation as the only basis on which to prove a fraud among merchants."

84. *Florida.* — Stephens *v.* Orman, 10 Fla. 9.

Georgia. — Hoffer *v.* Gladden, 75 Ga. 532; Gordon *v.* Irvine, 105 Ga. 144, 31 S. E. 151; Southern Express Co. *v.* Wood, 98 Ga. 268, 25 S. E. 436.

Iowa. — Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58.

Kansas. — Webb *v.* Branner, 59 Kan. 190, 52 Pac. 429; Wafer *v.* Harvey Co. Bank, 46 Kan. 597, 26 Pac. 1032.

Kentucky. — Singleton's Adm'r *v.* Kennedy, 9 B. Mon. 222; Ward *v.* Crutcher, 65 Ky. 87.

Massachusetts. — Lobdell *v.* Baker, 1 Metc. 193, 35 Am. Dec. 358.

Minnesota. — Marsh *v.* Webber, 13 Minn. 99.

Missouri. — Morley *v.* Harrah, 167 Mo. 74, 66 S. W. 942.

Nebraska. — Forbes *v.* Thomas, 22 Neb. 541, 35 N. W. 411.

New York. — Viele *v.* Goss, 49 Barb. 96; Devoe *v.* Brandt, 53 N. Y. 462; Ward *v.* Center, 3 Johns. 271.

Peckham, J., in Johnson *v.* Monell, 2 Keyes (N. Y.) 655, in speaking of the fraud of a vendee in purchasing goods, said: "To my mind, there seems to be an absurdity in holding that such false statement is the only evidence that can establish the fraud. That is the simple principle upon which alone such a decision can be based, and there is no such principle in the law."

Where No Obligation to Speak. But fraud cannot be established by proof of a party's mere silence where he is under no obligation to speak. May *v.* Dyer, 57 Ark. 441, 21 S. W. 1064; Comer *v.* Grannis, 75 Ga. 277; Diggs *v.* Denny, 86 Md. 116, 37 Atl. 1037; Crowell *v.* Jackson, 53 N. J. L. 656, 23 Atl. 426; Sankey *v.* McElevey, 104 Pa. St. 265.

85. Poullain *v.* Poullain, 76 Ga. 420; Hall *v.* Naylor, 18 N. Y. 588; Ballard *v.* Fuller, 32 Barb. 68; Devoe *v.* Brandt, 53 N. Y. 462; Huber *v.* Wilson, 23 Pa. St. 178; Beatty *v.* Bulger, 28 Tex. Civ. App. 117, 66 S. W. 893; Stewart *v.* Wyoming Cattle Ranch Co., 128 U. S. 383.

Concealment from Surety. — Proof that the obligee in a bond concealed facts material to the risk from the surety raises a presumption of fraud therein. First Nat. Bank *v.* Mattingly, 92 Ky. 650, 18 S. W. 940; Burks *v.* Wonterline, 6 Bush (Ky.) 20; Franklin Bank *v.* Cooper, 39 Me. 542; National Bank *v.* Fidelity & C. Co., 89 Fed. 819.

86. *Alabama.* — Moses *v.* Katzenberger, 84 Ala. 95, 4 So. 237.

Georgia. — Robinson *v.* Woodmansee, 80 Ga. 249, 4 S. E. 497.

Indiana. — Parrish *v.* Thurston, 87 Ind. 437.

Kansas. — Small *v.* Small, 56 Kan. 1, 42 Pac. 323, 54 Am. St. Rep. 581, 30 L. R. A. 243.

Massachusetts. — Tryon *v.* Whitmarsh, 1 Metc. 1, 35 Am. Dec. 339.

New York. — Hall *v.* Naylor, 8 N. Y. 588.

North Carolina. — Lunn *v.* Shermer, 93 N. C. 164; Brown *v.* Gray, 51 N. C. 103, 72 Am. Dec. 563.

a rescission by the vendor.[87] But the mere fact of concealment of insolvency, in the absence of proof of a fraudulent intent, is insufficient,[88] and it is held in some decisions that even when such concealment and intent not to pay are proved, this does not justify the inference of fraud in the purchase in the absence of proof of an affirmative, overt act of fraud.[89]

Texas. — Beatty *v.* Bulger, 28 Tex. Civ. App. 117, 66 S. W. 893.

"Suppression of circumstances is evidence of insincerity, though not conclusive." Sharswood, J., in Huber *v.* Wilson, 23 Pa. St. 178.

87. *United States.* — Donaldson *v.* Farwell, 93 U. S. 631.

Alabama. — LeGrand *v.* Eufaula Nat. Bank, 81 Ala. 123, 1 So. 460, 60 Am. Rep. 140; Maxwell *v.* Brown Shoe Co., 14 Ala. 304, 21 So. 1009; Hudson *v.* Bauer Grocery Co., 105 Ala. 200, 16 So. 693.

Arkansas. — Bugg *v.* Wertheimer-Schwartz Shoe Co., 64 Ark. 12, 40 S. W. 134.

California. — Seligman *v.* Kalkman, 8 Cal. 208.

Connecticut. — Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121.

Georgia. — Johnson *v.* O'Donnell, 75 Ga. 453.

Iowa. — Reid, Murdock & T. Co. *v.* Cowduroy, 79 Iowa 169, 44 N. W. 351, 18 Am. St. Rep. 359; Cox Shoe Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316.

Maryland. — Powell *v.* Bradlee, 9 Gill & J. 220.

Massachusetts. — Kline *v.* Baker, 99 Mass. 253.

Michigan. — Edson *v.* Hudson, 83 Mich. 450, 47 N. W. 347.

Minnesota. — Newell *v.* Randall, 32 Minn. 171, 19 N. W. 972.

Tennessee. — Belding *v.* Frankland, 8 Lea 67, 41 Am. Rep. 630.

Texas. — Aultman, M. & Co. *v.* Carr, 16 Tex. Civ. App. 430, 42 S. W. 614; Boaz *v.* Coulter Mfg. Co. (Tex. Civ. App.), 40 S. W. 866.

Vermont. — Redington *v.* Roberts, 25 Vt. 686.

"If a purchaser of goods has knowledge of his own insolvency and of his inability to pay for them, his intent not to pay should be presumed, but such inference may be rebutted by other facts and circumstances." Talcott *v.* Henderson, 31 Ohio St. 162, 27 Am. Rep. 507.

The Vendor of Goods Is Authorized to Presume that the vendee intends to and will pay for them; and although no affirmative misrepresentations are made if the vendee does not intend to pay for the goods, and the proof shows that he concealed the fact, this justifies setting aside the sale for fraud. Oswego Starch Factory *v.* Lendrum, 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53; Phelps, Dodge & P. Co. *v.* Sampson, 113 Iowa 145, 84 N. W. 1051. And see Stewart *v.* Emerson, 52 N. H. 301.

88. *Alabama.* — LeGrand *v.* Eufaula Nat. Bank, 81 Ala. 123, 1 So. 460, 60 Am. Rep. 140; Barnett *v.* Stanton, 2 Ala. 181.

Delaware. — Mears *v.* Waples, 3 Houst. 581.

Indiana. — Thompson *v.* Peck, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201.

Maine. — Burrill *v.* Stevens, 73 Me. 395, 40 Am. Rep. 366.

Maryland. — Powell *v.* Bradlee, 9 Gill & J. 220; Diggs *v.* Denny, 86 Md. 116, 37 Atl. 1037.

Minnesota. — Sprague *v.* Kempfe, 74 Minn. 465, 77 N. W. 412.

Missouri. — Bidault *v.* Wales, 19 Mo. 36.

New Hampshire. — Hanson *v.* Edgerly, 29 N. H. 343.

New York. — Phoenix Iron Co. *v.* "Hopatcong" and "Musconetcong," 127 N. Y. 206, 27 N. E. 841; Nichols *v.* Pinner, 18 N. Y. 295; Hall *v.* Naylor, 8 N. Y. 588; Morris *v.* Talcott, 96 N. Y. 100; Williams *v.* Hay, 21 Misc. 73, 46 N. Y. Supp. 895.

Ohio. — Talcott *v.* Henderson, 30 Ohio St. 162, 27 Am. Rep. 501.

Contra. — See Mooney *v.* Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425.

89. Smith *v.* Smith, 21 Pa. St. 367; Backentoss *v.* Speicher, 31 Pa. St. 324; see also Cincinnati Cooperage Co. *v.* Gaul, 170 Pa. St. 545, 32 Atl. 1093; Rodman *v.* Thalheimer, 75 Pa. St. 232; Diggs *v.* Denny, 86 Md. 116, 37 Atl. 1037.

(3.) Undue Activity or Unusual Conduct. — The acts and conduct of the alleged wrongdoer, evincing an unusual desire to bring about the transaction,[90] or to deter the other party from an examination of the subject-matter,[91] his extreme activity, indicative of a desire to make the transaction appear fair and equitable,[92] and his unreasonable delay,[93] or his urgent and undue haste in taking advantage of the results of the transaction,[94] or in speedily disposing of the fruits thereof,[95] are relevant circumstances, and are admissible as tending to establish his fraud in such transaction.

On the other hand, the anxiety of the person charging the fraud and the reluctance of the party charged therewith to enter into the

90. Perkins *v.* Embry, 24 Ky. L. Rep. 1990, 72 S. W. 788; Turnbull *v.* Boggs, 78 Mich. 158, 43 N. W. 1050; Patrick *v.* Leach, 8 Neb. 530. And see Jackson *v.* Armstrong, 50 Mich. 65, 14 N. W. 702.

The Alleged Fraudulent Vendor's representation that a third person had offered and stood ready to give a certain amount for the property if he purchased it is relevant and material. Ives *v.* Carter, 24 Conn. 391.

Undue Haste to Procure Release of claim for damages. Railway Co. *v.* Goodholm, 61 Kan. 758, 60 Pac. 1066.

91. Stubly *v.* Beachboard, 68 Mich. 401, 36 N. W. 192.

92. Keller *v.* Gill, 92 Md. 190, 48 Atl. 69; Mann *v.* Parker, 6 N. C. 262; Morehouse *v.* Northrop, 33 Conn. 380, 89 Am. Dec. 211.

Wrongdoer's Insisting on Examination by Plaintiff. — The undue acts of the wrongdoer in trying to induce the other party to examine the property misrepresented may have been for the very purpose of throwing such other party off his guard, and the jury may consider this fact in determining whether fraud was practiced. Woolenslagle *v.* Runals, 76 Mich. 545, 43 N. W. 454.

Attempt of Wrongdoer to Avoid Suit for Fraud. — In an action by the vendee against his vendor for deceit in a sale, the plaintiff's testimony to the effect that defendant followed him into another state, where he happened to go for a day, and there, in an action for the purchase price, caused his arrest, just as he was about to start for home, on the alleged ground that he was about to leave the state with intent to defraud his creditors, is relevant and admissible as tending to show that defendant was unwilling to submit his claim to the usual course of litigation and felt the need to resort to oppression to compel a settlement, and that he was conscious of some infirmity in his claim. Pearson *v.* Dover Beef Co., 69 N. H. 584, 44 Atl. 113.

Statements made by one defendant after the fraudulent transaction, endorsing it and declaring it to be a good thing, are competent as tending to show his collusion with the other defendant who was an active party. Stubly *v.* Beachboard, 68 Mich. 401, 36 N. W. 192.

93. Woodbridge *v.* DeWitt, 51 Neb. 98, 70 N. W. 506.

Where, in a suit against an estate based on a check signed by the deceased, the defense alleged fraud in the procurement of such check, the fact that the plaintiff held the check for eighteen months and failed to present it, during which time he had frequent interviews with the executors concerning his claim, is relevant. Terhune *v.* Henry, 13 Iowa 99.

94. National Bank *v.* Fidelity & Casualty Co., 89 Fed. 819.

95. Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217; Arnold *v.* Lane, 71 Conn. 61, 40 Atl. 921; Morley *v.* Harrah, 167 Mo. 74, 66 S. W. 942; Wafer *v.* Harvey Co. Bank, 46 Kan. 597, 26 Pac. 1032; Wiggin *v.* Day, 9 Gray (Mass.) 97; McCready *v.* Phillips, 56 Neb. 446, 76 N. W. 885.

Failure to Indorse Fraudulent Note. — In an action charging the former holder of a note with fraud in procuring the same from the plaintiff, evidence showing that such holder immediately disposed of the note, and carefully refrained from indorsing it, is competent to show

transaction,[96] and the staleness of the demand of the party complaining,[97] are relevant circumstances in disproof of the charge.

(4.) **Conduct of Parties During Litigation.**—(A.) In Proof of the Charge. Thus, the neglect or failure of the alleged wrongdoer to testify,[98] or to produce available evidence explanatory of suspicious circumstances,[99] or his conduct in destroying evidence that might be material,[1] is a strong circumstance tending to establish the charge against him. But it has been held that if the evidence not produced is equally as accessible to the party charging the fraud as to his adversary, no presumption of fraud is raised from its non-production.[2]

(B.) To Disprove the Charge.— The fact that the party charging the fraud prevented the attendance of the alleged fraudulent actor as a witness,[3] or failed to produce the person to whom the representations are alleged to have been made,[4] has been held a relevant circumstance and competent evidence in disproof of the charge. The fact that the party charging the fraud employed a detective to hunt up evidence in the case is irrelevant and inadmissible.[5]

(C.) Fraud in Former Proceeding.—The fact that an action was submitted for decision upon an agreed statement of facts under stipulation of the respective attorneys,[6] or that no appeal was taken

guilty knowledge on the part of such former holder. Glaspie *v.* Keator, 56 Fed. 203.

96. Curtis *v.* Hoxie, 88 Wis. 41, 59 N. W. 581; Blackwell *v.* Cummings, 68 N. C. 121.

97. Nelson *v.* Steen, 192 Pa. St. 581, 44 Atl. 247; Straight *v.* Wilson, 176 Pa. St. 520, 35 Atl. 230. And see People *v.* Lott, 36 Ill. 447.

98. Hess *v.* Weik, 78 Md. 439, 28 Atl. 400; Zimmerman *v.* Bitner, 79 Md. 115, 28 Atl. 820; Berger *v.* Bullock, 85 Md. 443, 37 Atl. 368; Keller *v.* Gill, 92 Md. 190, 48 Atl. 69; Mooney *v.* Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425.

"When the charge of fraud is distinctly made and is not denied by one who, if innocent, could truthfully repel it, his silence, when he ought to speak, becomes, if not convincing, at least persuasive evidence of the bad faith imputed to him." Berger *v.* Bullock, 85 Md. 441, 37 Atl. 368.

But it has been held that where defendant in equity answers under oath, specifically denying the fraud alleged, no presumption arises against him because of his failure to offer himself as a witness, inasmuch as the plaintiff can call and cross-examine him. United States *v.* Budd, 144 U. S. 154.

99. Hoffer *v.* Gladden, 75 Ga. 532; Redfern *v.* Cornell, 6 App. Div. 436, 39 N. Y. Supp. 656; Briscoe *v.* Bronough, 1 Tex. 326; Baldwin *v.* Whitcomb, 71 Mo. 651; Franklin Bank *v.* Cooper, 39 Me. 542.

In Cheney *v.* Gleason, 125 Mass. 166, the party charged with fraud failed to produce material evidence which was available to him, and it was held that this was a strong circumstance against him.

1. Baldwin *v.* Threlkeld, 8 Ind. App. 312, 34 N. E. 851.

2. Nelms *v.* Steiner Bros., 113 Ala. 562, 22 So. 435.

3. Easter *v.* Allen, 8 Allen (Mass.) 7.

4. The neglect of the party charging the fraud to call as a witness the person to whom the alleged fraudulent representations were made, he being available, raises the presumption that nothing was said by the party charged with the fraud to this person which would show an intent to defraud. Kern *v.* Simpson, 126 Pa. St. 42, 17 Atl. 523.

5. Hudson *v.* Bauer Grocery Co., 105 Ala. 200, 16 So. 693.

6. Wetherbee *v.* Fitch, 117 Ill. 67, 7 N. E. 513.

from the judgment rendered therein,[7] does not raise any inference that fraud was practiced upon the losing party in such proceeding, and is irrelevant.

(5.) Offer of Settlement. — The general rule is that evidence that the party charged with the fraud offered to settle or compromise the subject of controversy is irrelevant either to prove[8] or to refute[9] the charge, but there are exceptional cases in which this rule does not apply.[10]

(6.) Other Fraudulent Acts. — (A.) GENERALLY. — Where the fraudulent intent of a party in the performance of an act is in issue, proof of other similar fraudulent acts is relevant and admissible to establish his intent or motive in the performance of the act in question, when it appears that there is such a connection between such other acts and the act in question as to authorize the inference that both are parts of one scheme or plan, in which the same motive is operative,[11] and it is immaterial whether such other fraudulent acts

7. Doig *v.* Morgan Machine Co., 89 Fed. 489.

8. Cox *v.* Highley, 100 Pa. St. 249.

9. Carlisle *v.* State, 77 Ala. 71; Finlay Brg. Co. *v.* Prost, 111 Mich. 635, 70 N. W. 137.

10. In Brown *v.* Shields, 6 Leigh (Va.) 440, in which the defendant was charged with fraud, a letter which contained an offer to settle and compromise the matter was held relevant and competent, and the rule which excludes offers of compromise from being given in evidence and the proper application thereof was considered.

Where a defendant charged with purchasing goods from plaintiff with the intent not to pay therefor claims that he had been ready to pay the debt whenever he could have got settlement of a claim as to the freight on the goods, it was held proper to allow plaintiff's counsel to ask defendant if he had not offered to allow defendant this discount in full if defendant would settle. Whitney Wagon Wks. *v.* Moore, 61 Vt. 230, 17 Atl. 1007.

11. *United States.* — Jack *v.* Mutual Reserve Fund Life Ass'n, 113 Fed. 39; United States *v.* Kenney, 90 Fed. 257; Mudsill Min. Co. *v.* Watrous, 61 Fed. 163; Castle *v.* Bullard, 23 How. 172; Wood *v.* United States, 16 Pet. 342; New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 591; Butler *v.* Watkins, 13 Wall. 456; Lincoln *v.* Claflin, 7 Wall. 132; Penn Mut. Life Ins. Co. *v.* Mechanics Sav. Bank & Trust Co., 72 Fed. 413; Spurr *v.* United States, 87 Fed. 701; American Surety Co. *v.* Pauly, 72 Fed. 470. *Compare* United States *v.* Budd, 144 U. S. 154.

Alabama. — Davidson *v.* Kahn, 119 Ala. 364, 24 So. 583; Dent *v.* Portwood, 21 Ala. 588.

California. — Bancroft *v.* Heringhi, 54 Cal. 120.

Connecticut. — Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240.

Delaware. — Freeman *v.* Topkis, 1 Marv. 174, 40 Atl. 948.

Florida. — West Fla. Land Co. *v.* Studebaker, 37 Fla. 28, 19 So. 176.

Georgia. — Farmer *v.* State, 100 Ga. 41, 28 S. E. 26. But see Wright *v.* Zeigler Bros., 70 Ga. 501.

Illinois. — Huthmacher *v.* Lowman, 66 Ill. App. 448; Gray *v.* St. John, 35 Ill. 222; Lockwood *v.* Doane, 107 Ill. 235.

Iowa. — Foster *v.* Trenary, 65 Iowa 620, 22 N. W. 898; Porter *v.* Stone, 62 Iowa 442, 17 N. W. 654; Zimmerman *v.* Brannon, 103 Iowa 144, 72 N. W. 439; Cox Shoe Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316; State *v.* Brady, 100 Iowa 191, 69 N. W. 290, 62 Am. St. Rep. 560, 36 L. R. A. 693.

Kansas. — Elerick *v.* Reid, 54 Kan. 579, 38 Pac. 814. And see Minx *v.* Mitchell, 42 Kan. 688, 22 Pac. 709.

Kentucky. — First Nat. Bank of Paducah *v.* Wisdom, 23 Ky. L. Rep. 530, 63 S. W. 461.

Maine. — Cragin *v.* Tarr, 32 Me.

55; Nichols *v.* Baker, 75 Me. 334; Aldrich *v.* Warren, 16 Me. 465. But see Flagg *v.* Willington, 6 Me. 386.

Maryland. — McAleer *v.* Horsey, 35 Md. 439; Carnell *v.* State, 85 Md. 1, 36 Atl. 117.

Massachusetts. — Com. *v.* Shephard, 1 Allen 575; Horton *v.* Weiner, 124 Mass. 92; Lynde *v.* McGregor, 13 Allen 172; Rowley *v.* Bigelow, 12 Pick. 306; Wiggins *v.* Day, 9 Gray 97; Com. *v.* Coe, 115 Mass. 481; Brown *v.* Greenfield Life Ass'n, 172 Mass. 498, 53 N. E. 129. And see Foster *v.* Hall, 12 Pick. 89.

Michigan. — Beard *v.* Hill, 131 Mich. 246, 90 N. W. 1065; Beebe *v.* Knapp, 28 Mich. 65; People *v.* Summers, 115 Mich. 537, 73 N. W. 818; Ross *v.* Miner, 67 Mich. 410, 35 N. W. 60; French *v.* Ryan, 104 Mich. 625, 62 N. W. 1016. *Compare* Parker *v.* Armstrong, 55 Mich. 176, 20 N. W. 892.

Minnesota. — Manwaring *v.* O'Brien, 75 Minn. 542, 78 N. W. 1; Berkey *v.* Judd, 22 Minn. 287.

Mississippi. — *Compare* Uhler *v.* Adams, 73 Miss. 332, 18 So. 367, 654.

Nevada. — Swinney *v.* Patterson, 25 Nev. 411, 62 Pac. 1.

New Hampshire. — Blake *v.* White, 13 N. H. 267; Whittier *v.* Varney, 10 N. H. 291; Jacobs *v.* Shorey, 48 N. H. 100, 97 Am. Dec. 586.

New York. — People *v.* Dimick, 107 N. Y. 13, 14 N. E. 178; Mayer *v.* People, 80 N. Y. 364; Miller *v.* Barber, 66 N. Y. 558; Amsden *v.* Manchester. 40 Barb. 158; The Naugatuck Cutlery Co. *v.* Babcock, 22 Hun 481; Hersey *v.* Benedict, 15 Hun 282; Chisholm *v.* Eisenhuth, 69 App. Div. 134, 74 N. Y. Supp. 496; Benham *v.* Cary, 11 Wend. 83; Hall *v.* Naylor, 18 N. Y. 588; Hawthorn *v.* Hodges, 28 N. Y. 485; People *v.* Garrahan, 19 App. Div. 347, 46 N. Y. Supp. 497; Ballard *v.* Fuller, 32 Barb. 68.

Ohio. — Edwards *v.* Owen, 15 Ohio 500.

Pennsylvania.—Schofield *v.* Shiffer, 156 Pa. St. 65, 27 Atl. 69; Catasauqua Mfg. Co. *v.* Hopkins, 141 Pa. St. 30, 21 Atl. 638; Wheeler *v.* Ahlers, 189 Pa. St. 138, 42 Atl. 40.

South Carolina. — Brown *v.* Newell, 64 S. C. 27, 41 S. E. 835.

Texas. — Raby *v.* Frank, 12 Tex. Civ. App. 125, 34 S. W. 777.

Vermont. — Eastman *v.* Premo, 49 Vt. 355; McCasker *v.* Enright, 64 Vt. 488, 24 Atl. 249, 33 Am. St. Rep. 938; Bradley Fertilizer Co. *v.* Fuller, 58 Vt. 315, 2 Atl. 162; Pierce *v.* Hoffman, 24 Vt. 525.

Virginia. — Trogdon *v.* Com., 31 Gratt. 862; Piedmont Bank *v.* Hatcher, 94 Va. 229, 26 S. E. 505.

Washington. — Stack *v.* Nolte, 29 Wash. 188, 69 Pac. 753, *distinguishing* McKay *v.* Russell, 3 Wash. 378, 28 Pac. 908, 28 Am. St. Rep. 44; Oudin *v.* Crossman, 15 Wash. 519, 46 Pac. 1047.

Insurance Cases. — In an action on an insurance policy where the insurer defends on the ground of the insured's false and fraudulent representations, evidence that the insured had practiced frauds on other insurance companies in the procurement of other policies is competent when a like motive may be imputed to the other acts. Jack *v.* Mutual Reserve Fund Life Ass'n, 113 Fed. 49; Brown *v.* Greenfield Life Ass'n, 172 Mass. 498, 53 N. E. 129; New York Mut. Life Ins. Co. *v.* Armstrong, 117 U. S. 591; Barnett *v.* Farmers Mut. Fire Ins. Co., 115 Mich. 247, 73 N. W. 372. But see Supreme Lodge of Knights of Honor *v.* Wollschlager, 22 Colo. 213, 44 Pac. 598.

Cumulative or Corroborative Evidence. — It has been said that proof of the making of similar fraudulent representations to others is nothing more than cumulative evidence upon the question of the intent with which the representations in issue were made. Bach *v.* Tuch, 126 N. Y. 53, 26 N. E. 1019; while in Schofield *v.* Shiffer, 156 Pa. St. 65, 27 Atl. 69, such evidence was denominated as corroborative.

Contra. — *Compare* the Gate City Land Co. *v.* Heilman, 80 Iowa 477, 45 N. W. 760, in which it was said, in speaking of similar representations to others: "This testimony is clearly inadmissible, as such representations were not made to, and could not have influenced, the defendant to make the contracts."

occurred before or after the act in question, as remoteness in point of time affects only their weight.[12]

(B.) Purposes for Which Competent. — Evidence of such other fraudulent acts is usually offered upon the issue of motive or intent,[13] and some of the decisions limit its competency to the proof of these issues.[14] Such evidence, however, has been held competent to establish the party's knowledge of the falsity of his representations,[15] to prove a system of fraud[16] or a fraudulent conspiracy,[17]

12. *United States.* — Mudsill Min. Co. *v.* Watrous, 61 Fed. 163; Penn Mut. Life Ins. Co. *v.* Mechanics Sav. Bank & T. Co., 72 Fed. 413; *affirmed* 73 Fed. 653; Wood *v.* United States, 16 Pet. 342.

Connecticut. — Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240.

Massachusetts. — Horton *v.* Weiner, 124 Mass. 92; Rowley *v.* Bigelow, 12 Pick. 307, 23 Am. Dec. 607.

New York. — Sommer *v.* Oppenheim, 19 Misc. 605, 44 N. Y. Supp. 396; Allison *v.* Matthieu, 3 Johns. 235.

Pennsylvania. — White *v.* Rosenthal, 173 Pa. St. 175, 33 Atl. 1027.

In Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240, the other transactions admitted extended over a period of five or six years.

13. See cases cited in note 11, *ante.*

14. People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883; Jordan *v.* Osgood, 109 Mass. 457, 12 Am. Rep. 731.

Contra. — The New York court, in Boyd *v.* Boyd, 164 N. Y. 234, 58 N. E. 118, in discussing evidence of other fraudulent acts, says: "The grounds upon which evidence of this character is admitted have not always been stated by the courts in the same language, but I think there is neither reason nor authority to support the proposition that it must be limited to cases where motive is material."

15. Mudsill Min. Co. *v.* Watrous, 61 Fed. 163; Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240; Zimmerman *v.* Brannon, 103 Iowa 144, 72 N. W. 439; Kelley *v.* Owens (Cal.), 30 Pac. 506; Dwyer *v.* Bassett, 1 Tex. Civ. App. 513, 21 S. W. 621; Oudin *v.* Crossman, 15 Wash. 519, 46 Pac. 1047; Com. *v.* White, 145 Mass. 392, 14 N. E. 611. *Compare* Haskins *v.* Warren, 115 Mass. 514; Easter *v.* Allen, 8 Allen (Mass.) 7.

Limited to Scienter and Intent. It has been held in Nebraska, where the scienter or intent of the person making a false representation is an immaterial issue in an action for deceit, that proof of other fraudulent acts is incompetent and immaterial for any purpose, because the only facts which they are relevant to prove — viz., the scienter and intent — are not in issue. Johnson *v.* Gulick, 46 Neb. 817, 65 N. W. 883, 50 Am. St. Rep. 629, and see Insurance Co. *v.* Wright, 33 Ohio St. 533.

Incompetent to Prove Falsity. It was held in Dwyer *v.* Bassett, 1 Tex. Civ. App. 513, 21 S. W. 621, that evidence of other fraudulent acts was not admissible to prove that the representations in question were false in fact.

16. Rafferty *v.* State, 91 Tenn. 655, 16 S. W. 728.

17. Edwards *v.* Warner, 35 Conn. 517; Raby *v.* Frank, 12 Tex. Civ. App. 125, 34 S. W. 777.

Competency Limited to Cases of Conspiracy. — In Knotwell *v.* Blanchard, 41 Conn. 614, the court said: "Suffice it to say that in cases of conspiracy to defraud, embracing a number of similar cases in which there is one common design, . . . the proceedings of the conspirators may be regarded as one continuous act. In such cases each part has an important relation to the whole and may throw light upon the entire transaction. There is a difficulty in carrying the principle further than cases of conspiracy and applying it to the case of an individual who should form a design by some fraudulent operation to cheat a number of persons successively. The difficulty of proving that the party had such design — that he had one object to accomplish by all the frauds, may be the reason why the principle is not extended to such cases."

and to identify the person charged as the fraudulent actor.[18] By the great weight of authority, such evidence is not admissible to prove the fact of the making or utterance of the particular representations in suit,[19] although some of the decisions hold it competent as affording a ground of presumption to prove the main charge.[20]

(C.) Reasons for Rule. — Necessary Caution. — This is an exception to the general rule of evidence which prohibits proof of other acts or crimes to establish the act or crime in issue, and is justifiable only by reason of the difficulty, if not impossibility, of proving a guilty knowledge and purpose of mind by direct evidence.[21] Care must be used in limiting such evidence to its proper effect.[22]

(D.) Same Motive Must be Imputable to Both. — Where the object in offering evidence of the commission of other fraudulent acts is to establish the motive or intent of a party in the act or transaction

18. Boyd *v.* Boyd, 164 N. Y. 234, 58 N. E. 118.

Identity. — "Acts which are parts of one general scheme or plan of fraud, designed and put into execution by the same person, are admissible to prove that an act which has been done by some one was in fact done by the person who designed and pursued the plan, if the act in question is a necessary part of the plan." Fowle *v.* Child, 164 Mass. 210, 41 N. E. 291, 49 Am. St. Rep. 451.

19. *Iowa.* — See Gardner *v.* Trenary, 65 Iowa 646, 22 N. W. 912.

Kentucky. — Claus *v.* Evans, 17 Ky. L. Rep. 1085, 33 S. W. 620.

Maine. — Hawes *v.* Dingley, 17 Me. 341.

Massachusetts. — Jordan *v.* Osgood, 109 Mass. 457, 12 Am. Rep. 731.

Minnesota. — Faribault *v.* Staer, 13 Minn. 210.

Nebraska. — Johnson *v.* Gulick, 46 Neb. 817, 65 N. W. 883, 50 Am. St. Rep. 629.

New York. — Mayer *v.* People, 80 N. Y. 364.

Ohio. — Edwards *v.* Owen, 15 Ohio 500.

Pennsylvania. — Schofield *v.* Shiffer, 156 Pa. St. 65, 27 Atl. 69.

Vermont. — Eastman *v.* Premo, 49 Vt. 355.

Wisconsin. — Cahn *v.* Ladd, 94 Wis. 134, 68 N. W. 52; Huganir *v.* Cotter, 92 Wis. 1, 65 N. W. 364. And see Birdseye *v.* Flint, 3 Barb. 500.

"It cannot be presumed that fraudulent representations are made to one person because the same or other fraudulent representations were made to another." Mather *v.* Robinson, 47 Iowa 403.

20. Barbar *v.* Martin (Neb.), 93 N. W. 722. And see Castle *v.* Bullard, 23 How. (U. S.) 172; Lockwood *v.* Doane, 107 Ill. 235; Rowley *v.* Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607.

In Porter *v.* Stone, 62 Iowa 442, 17 N. W. 654, the court, in speaking of similar representations made by the vendors to other prospective purchasers, said: "Evidence that they had made such representations to those with whom they had negotiated, to induce them to enter into a contract, tends to support plaintiff's testimony to the effect that like representations were made to him for that purpose."

21. Cook *v.* Moore, 11 Cush. (Mass.) 213; Cary *v.* Hotailing, 1 Hill (N. Y.) 311.

The court, in Com. *v.* Stone, 4 Metc. (Mass.) 43, in discussing the admissibility of this class of evidence, says: "This is an exception to the general rule of evidence, but it must be considered that it is to prove a fact not provable by direct evidence — that is, guilty knowledge and purpose of mind, which can rarely be proved by admissions or declarations. The rule can generally be proved only by extraordinary acts and conduct."

22. Com. *v.* Shephard, 1 Allen (Mass.) 575.

which forms the basis of the action, it must be shown that such other acts are so connected with the fraud, which is the subject of controversy, as to make it apparent that the same motive or purpose may be imputed to the party in both,[23] and if such other acts are distinct from and not connected with the fraud they are designed to prove, they are inadmissible.[24]

(E.) Common Motive May Appear From Circumstances. — The fact that the fraudulent act in issue and the other acts or transactions sought to be offered in evidence have a common motive or purpose need not be shown by direct evidence, but may be inferred from the circumstances, and if it appear that one reasonable explanation of the facts and circumstances is that they disclose such motive

23. White *v.* Beal & Fletcher Grocer Co., 65 Ark. 278, 45 S. W. 1060; Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200; Williams *v.* Robbins, 15 Gray (Mass.) 590; Com. *v.* Damon, 136 Mass. 441; Hall *v.* Naylor, 18 N. Y. 588; Bradley Fertilizer Co. *v.* Fuller, 58 Vt. 315, 2 Atl. 162; McKay *v.* Russell, 3 Wash. 378, 28 Pac. 908, 28 Am. St. Rep. 44.

In the leading cases of Jordan *v.* Osgood, 109 Mass. 457, 12 Am. Rep. 731, the court said: "The question whether the evidence objected to was admissible under the second issue appears from some of the authorities to be one of more difficulty. The plaintiff's position is that the defendant obtained the goods with the intention not to pay for them. This, if proved, would authorize them to repudiate the sale. Dow *v.* Sanborn, 3 Allen 181. It is obvious that the principal element involved in this issue is the intention of the defendant at the time of the transactions, and any evidence which directly tends to show such intention is competent. Therefore, contemporaneous frauds committed by the defendant are admissible if they tend to prove the motive or intention which actuated the defendant in the transaction under investigation. . . . We think the result of the authorities is, as stated in substance in Williams *v.* Robbins, 15 Gray (Mass.) 590, that the transaction proposed to be proved for the purpose of showing the fraud which is the subject of controversy must be shown by some evidence, direct or circumstantial, to be so connected with it as to make it apparent that the defendant had a common purpose in both; but if the transaction is distinct and with no connection of design, it is not admissible."

24. *Alabama.* — Johnston *v.* Branch Bank of Montgomery, 7 Ala. 379; Nelms *v.* Steiner Bros., 113 Ala. 562, 22 So. 435.

California. — Cohn *v.* Mulford, 15 Cal. 51.

Connecticut. — Edwards *v.* Warner, 35 Conn. 517.

Illinois. — Henderson *v.* Miller, 36 Ill. App. 232; Johnston *v.* Beeney, 5 Ill. App. 601; Hanchett *v.* Riverdale Distillery Co., 15 Ill. App. 57; Burroughs *v.* Comegys, 17 Ill. App. 653.

Iowa. — Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200.

Kentucky. — Perkin *v.* Embry, 24 Ky. L. Rep. 1990, 72 S. W. 788.

Maine. — Flagg *v.* Willington, 6 Me. 386.

Massachusetts. — Williams *v.* Robbins, 15 Gray 590; Com. *v.* Jackson, 132 Mass. 16; Whiting *v.* Withington, 3 Cush. 413.

Mississippi. — Uhler *v.* Adams, 73 Miss. 332, 18 So. 367, 654.

New York. — *Compare* Townsend *v.* Felthousen, 70 N. Y. St. 124, 35 N. Y. Supp. 538; *affirmed* in 156 N. Y. 618, 51 N. E. 270.

South Dakota. — Tootle *v.* Petrie, 8 S. D. 19, 65 N. W. 43.

"Proof of fraud in a transaction with one person is not even presumptive proof of fraud in another and different transaction with another person." Simpkins *v.* Bergren, 2 Ill. App. 101, and see McKay *v.* Russell, 3 Wash. 378, 28 Pac. 908, 28 Am. St. Rep. 44, wherein the court said: "The mere fact that a man has cheated his neighbor in some transaction does not justify the inference

or purpose as common to both, this is sufficient.[25] It has been held that this question is for the jury.[26]

(F.) Must Have Been Fraudulent. — Such other acts on the part of the party charged with the fraud, in order to be competent to show his intent in the transaction in suit, must have been tainted with fraud, and if this does not appear as an element of the offered evidence, it is immaterial and should be excluded.[27]

(G.) Different Means of Accomplishment. — In order to render evidence of such other fraudulent acts competent, it is not necessary that the means of accomplishing them should be the same as that practiced in the transaction. Thus, where the fraud counted on consists in the suppression or concealment of a material fact, it

that he has formed a general scheme to cheat other men."

Where the plaintiff, in a personal injury suit against a railroad company, is charged with fraudulently prosecuting such suit against such company, evidence that plaintiff made other fraudulent claims against insurance companies, arising out of accidents, is inadmissible in the absence of proof of a common design. Hood *v.* Chicago & N. W. R. Co., 95 Iowa 331, 64 N. W. 261.

Reasons for Rule. — Other distinct acts of fraud, not shown to be connected with the fraud they are designed to prove, are excluded as introducing collateral issues and as tending to prejudice the jury by impeaching the general character of the party charged, when he had no right to expect such an attack and could not be prepared to protect himself, however unimpeachable his conduct might have been. Somes *v.* Skinner, 16 Mass. 348.

25. Fowle *v.* Child, 164 Mass. 210, 41 N. E. 291, 49 Am. St. Rep. 451; Lynde *v.* McGregor, 13 Allen (Mass.) 172; Stubly *v.* Beachboard, 68 Mich. 401, 36 N. W. 192.

"The plaintiff had the right to show, if he could, a fraudulent intent, purpose or motive on the part of the defendant. . . . Proof of other similar fraudulent acts is admissible when it appears that there is such a connection between the transactions as to authorize the inference that both frauds are part of one scheme, and where transactions of a similar character by the same party are closely connected in point of time, and otherwise, the inference is reasonable that their purpose and origin are the same." Boyd *v.* Boyd, 164 N. Y. 234, 58 N. E. 118.

26. Nelms *v.* Steiner Bros., 113 Ala. 562, 22 So. 435.

27. *Alabama.* — New York & H. Cigar Co. *v.* Bernheim, 81 Ala. 138, 1 So. 470.

California. — Cohn *v.* Mulford, 15 Cal. 51.

Massachusetts. — Williams *v.* Robbins, 15 Gray 590; Klein *v.* Baker, 106 Mass. 61.

Michigan. — Parker *v.* Armstrong, 55 Mich. 176, 20 N. W. 892.

New Hampshire. — Blake *v.* White, 13 N. H. 267.

New York. — Hall *v.* Naylor, 18 N. Y. 588.

Ohio. — See Insurance Co. *v.* Wright, 33 Ohio St. 553.

Texas. — Tarkington *v.* Brunett (Tex. Civ. App.), 51 S. W. 274.

It was held in West Fla. Land Co. *v.* Studebaker, 37 Fla. 28, 19 So. 176, that statements of the vendor as to the character and quality of land which had been published in a newspaper as an advertisement to induce the sale thereof, but which were different from the express representations relied upon by the plaintiff in the purchase of the land, were inadmissible to show fraud in the sale, in the absence of proof that they were false and fraudulent.

Similar Suits by Others Incompetent. — In a replevin suit by the vendor to recover goods sold, counting on fraud of vendee in purchase, evidence of the institution of other similar suits by the other creditors is inadmissible. White *v.* Beal & Fletcher Grocer Co., 65 Ark. 278, 45 S. W. 1060.

is competent to prove instances in which the fraud consisted in actual misrepresentation concerning the material facts.[28]

(H.) Competency Against Assignee or Transferee. — Evidence of such other fraudulent acts is admissible to prove the original fraud, although the action is against the subsequent purchaser or assignee of the original wrongdoer.[29]

(I.) Order of Proof. — Although the party claiming fraud has failed to introduce evidence of other frauds as a part of his affirmative case, it may be competent in rebuttal.[30]

(J.) Rebuttal. — Acquittal in Criminal Prosecution. — It has been held that where evidence of the commission of a similar fraudulent act has been admitted, an offer on the part of the alleged wrongdoer to prove that he had been acquitted of such charge on a criminal prosecution is incompetent as being *res inter alias acta*.[31]

(7.) Other Transactions to Disprove Fraud. — It has been held proper for a vendor charged with fraud in the sale, by preventing a fair examination of the goods, to prove that on a former occasion another person who was contemplating the purchase was accorded a full and fair examination.[32]

e. *Statements to Mercantile Agency.* — **(1.) In General.** — A person furnishing information by statement or otherwise to a mercantile agency in relation to his financial condition is presumed to do so with the intent that the agency shall communicate such information to persons who may be interested in obtaining it, and that it will be relied upon by them in giving credit to such person thereafter.[33] Evidence showing the furnishing of such statement,

28. Hall *v.* Naylor, 18 N. Y. 588. And see Hersey *v.* Benedict, 15 Hun (N. Y.) 282.

Statements to Commercial Agencies. — Such other fraudulent acts may consist in statements made by a vendee to commercial agencies for the purpose of obtaining credit from other creditors. Bliss *v.* Sickles, 142 N. Y. 647, 36 N. E. 1064.

29. Howe *v.* Reed, 12 Me. 515; Hersey *v.* Benedict, 15 Hun (N. Y.) 282; McCasker *v.* Enright, 64 Vt. 488, 24 Atl. 249, 33 Am. St. Rep. 938. *Contra.* — Wright *v.* Zeigler Bros., 70 Ga. 501.

Where the question at issue is whether a judgment confessed by a debtor in failing circumstances was confessed with the intent to defraud other creditors, or in good faith to secure future advances, evidence that soon after the confession of such judgment the debtor confessed another judgment to a third person for a fraudulent purpose is incompetent against the creditor in the former judgment in the absence of proof of his knowledge of such second judgment. Miller *v.* McAlister, 178 Pa. St. 140, 35 Atl. 594.

30. Ankersmit *v.* Tuch, 114 N. Y. 51, 20 N. E. 819.

31. Fowle *v.* Child, 164 Mass. 210, 41 N. E. 291, 49 Am. St. Rep. 451.

32. Salem India Rubber Co. *v.* Adams, 23 Pick. (Mass.) 256.

33. *Arkansas.* — Triplett *v.* Rugby Distilling Co., 66 Ark. 219, 49 S. W. 975.

Iowa. — Cox Shoe Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316.

Michigan. — Genesee Sav. Bank *v.* The Michigan Barge Co., 52 Mich. 164, 17 N. W. 790, 18 N. W. 206, 438; Hinchman *v.* Weeks, 85 Mich. 535, 48 N. W. 790.

Minnesota. — Stevens *v.* Ludlun, 46 Minn. 160, 48 N. W. 771.

New York. — Eaton C. & B. Co. *v.* Avery, 83 N. Y. 31; Naugatuck Cutlery Co. *v.* Babcock, 22 Hun 481.

Texas. — Aultman *v.* Carr, 16 Tex. Civ. App. 430, 42 S. W. 614.

Wisconsin. — Nat. Bank of M. *v.*

knowledge thereof by the creditor and his reliance thereon, together with proof of its falsity, is competent in favor of a creditor of such person claiming to have been defrauded by relying thereon.[34] The fact that such statement was made some time before it was relied upon does not affect the rule,[35] provided it was not too remote.[36] It has been held that if the statement was true when made it constitutes no evidence of fraud in a subsequent transaction,[37] but there is authority to the contrary.[38]

(2.) Ratings or Report of Mercantile Agency. — The authorities seem to distinguish between statements made by the person himself to the mercantile agency and their reports or ratings upon his financial condition based upon their own conclusions, and in the absence of proof that the party authorized or had knowledge thereof, such reports or ratings are irrelevant on the question of fraud.[39] However, it has been held that it is not necessary that the statement actually made or authorized by the party charged with fraud be shown to have been, itself, communicated to the creditor, but the rating or report of the agency, although in one sense its mere conclusion, if founded or based upon information derived from the debtor, or if referred to by him, is sufficient.[40]

f. *Customs and Usages.* — Custom cannot sanction a fraud either in fact or in law,[41] but in many cases evidence of a general custom

Illinois & W. L. Co., 101 Wis. 247, 77 N. W. 185.

But see Macullar *v.* McKinley, 99 N. Y. 353, 2 N. E. 9, and Curtis *v.* Hoxie, 88 Wis. 41, 59 N. W. 581.

34. See Furry *v.* O'Connor, 1 Ind. App. 573, 28 N. E. 103; Kirschbaum *v.* Jasspon, 119 Mich. 452, 78 N. W. 473; Soper Lumber Co. *v.* Halstead, 73 Conn. 547, 48 Atl. 425; Robinson *v.* Levi, 81 Ala. 134, 1 So. 554. And see cases cited in previous note.

Best Evidence. — It is not necessary that the writing itself be produced. See Triplett *v.* Rugby Distilling Co., 66 Ark. 219, 49 S. W. 975.

In Schwartz *v.* Mittenthal (Tex. Civ. App.), 50 S. W. 182, the court, in speaking of statements made by a buyer to a mercantile agency, said: "The burden was upon appellees to show these facts: That Mrs. S. made a statement to the agency as a basis for credit rating. Second. That the statement was materially fraudulent. Third. That the agency gave her a rating upon such false statement to which she was not entitled upon a fair statement of her financial condition. Fourth. That such false rating was known to appellees, and on the truth of it the credit was extended." *Citing* Bank *v.* Bamberger, 77 Tex. 54, 13 S. W. 959, and other cases.

35. Lindauer *v.* Hay, 61 Iowa 663, 17 N. W. 98; Cox Shoe Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316.

36. Curtis *v.* Hoxie, 88 Wis. 41, 59 N. W. 581; Treadwell *v.* State, 99 Ga. 779, 27 S. E. 785.

37. Reid *v.* Kempe, 74 Minn. 474, 77 N. W. 413, and see Taylor *v.* Mississippi Mills, 47 Ark. 247, 1 S. W. 283.

38. Boaz *v.* Coulter Mfg. Co. (Tex. Civ. App.), 40 S. W. 866, and see cases cited in note 35, *ante*.

39. Henderson *v.* Miller, 36 Ill. App. 232; Curtis *v.* Hoxie, 88 Wis. 41, 59 N. W. 581; Poska *v.* Stearns, 56 Neb. 541, 76 N. W. 1078, 71 Am. St. Rep. 688; Kilpatrick-Koch Dry Goods Co. *v.* McPheely, 37 Neb. 800, 56 N. W. 389; Richardson *v.* Stringfellow, 100 Ala. 416, 14 So. 284.

40. See Tindle *v.* Birkett, 171 N. Y. 520, 64 N. E. 210; Aultman *v.* Carr, 16 Tex. Civ. App. 430, 42 S. W. 614; Mooney *v.* Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425; Cox Shoe Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316.

41. See Flannery *v.* Jones, 180 Pa. St. 338, 36 Atl. 856, 57 Am. St. Rep.

or usage[42] in vogue in the community in which the transaction occurs, or of a violation thereof in the particular instance,[43] may be relevant and competent as tending to establish the fraud or some of its constituent elements. And it seems that proof of a compliance with a uniform and reasonable custom may be competent to refute the fraud charged.[44]

g. *Status and Relation of the Parties.* — **(1.) In General.** — Anything tending to show the relations existing between the parties to the transaction and the feelings likely to influence their actions therein is relevant.[45]

648, which was a suit to set aside an auction sale of property on the ground that the owners ran up the price by puffing or fictitious bidding, and in which it was held that evidence that such puffing or fictitious bidding at public sales is and has been customary is incompetent and inadmissible. See also Fuller *v.* Robinson, 86 N. Y. 306.

42. Where the fraud complained of was the acts and conduct of the seller in fraudulently inducing the purchaser to believe that a private letter mark on each of the articles purchased indicated the cost thereof to the seller, when in fact it indicated a price greatly in excess thereof, the testimony of merchants as to the custom of merchants in marking goods with private marks and figures, and that in their opinion it would not subserve any purpose in the ordinary way of transacting retail business, was held competent and proper. Elerick *v.* Reid, 54 Kan. 579, 38 Pac. 814.

To Prove Reliance. — Thus, the custom and usage of loan agencies (whose business it is to procure loans for the owners of property) to require written applications from the party desiring the loan, stating the value and condition of the property offered for security, is a circumstance to be considered on the question of whether a person making a loan through such agency relied on such application. It is presumed that these applications are made for the very purpose of giving investors reliable information, and that such investors relied thereupon. King *v.* Sioux City Loan & Investment Co., 76 Iowa 11, 39 N. W. 919.

43. Thus, in Kaiser *v.* Hamburg-Bremen Fire Ins. Co., 59 App. Div. 525, 69 N. Y. Supp. 344, evidence as to the general custom practiced in relation to appraising insurance losses by arbitration, and the violation of such custom in the particular instance, was held competent to prove that the insured was defrauded in the appraisement in question.

In an action involving the fraud of defendant in putting up wool in such a manner as from appearances to indicate that it was of good quality, while the facts showed that the appearances were deceptive, and the interior was of poor quality and filled with tags, evidence of the custom of putting up wool in that section of the country is admissible on the question of a fraudulent intent in the manner in which the wool in question was put up. Willard *v.* Merritt, 45 Barb. (N. Y.) 295.

Contrary to Regular Course of Business. — In an action involving fraudulent intent of a vendee in the purchase of goods, evidence that he used and disposed of them in a manner contrary to the usual and customary course of business was held relevant and admissible to establish such fraudulent intent. Loeb *v.* Flash, 65 Ala. 526. And see Phelps, Dodge & P. Co. *v.* Sampson, 113 Iowa 145, 84 N. W. 1051.

44. See Fuller *v.* Robinson, 86 N. Y. 306, and Jacobs *v.* Shorey, 48 N. H. 100, 97 Am. Dec. 586, in which it is implied that proof of a general custom and compliance therewith by the alleged wrongdoer may be competent to rebut the charge of fraud, but which evidence in those cases was held incompetent because the custom sought to be proved was absurd and unreasonable.

45. Blodgett Paper Co. *v.* Farmer, 41 N. H. 398; Somes *v.* Skin-

(2.) **Friendship, Confidence, Etc.** — The fact that defendant is an intimate friend[46] or relative[47] of plaintiff, or occupies a position of confidence[48] or advantage[49] over him, is relevant on the question of whether fraud was practiced in a transaction between them.

(3.) **Intelligence, Skill and Capacity.** — Among the circumstances always pertinent to the inquiry is whether, in intelligence, skill and capacity, the parties are upon an equal footing, or whether the more wary has overreached the unwary.[50]

(4.) **Mutual Course of Dealings.** — Evidence of a course of dealings existing between the parties for a period of time may be relevant and competent as tending to prove the intent of the alleged wrongdoer,[51] or that the complaining party was justified in relying upon

ner, 16 Mass. 348; Whitaker Iron Co. *v.* Preston Nat. Bank of Detroit, 101 Mich. 146, 59 N. W. 395; James *v.* Work, 54 N. Y. St. 166, 24 N. Y. Supp. 149.

As to confidential relations see article "UNDUE INFLUENCE."

In Equity. — "The attitude of the parties to a contract, in relation to each other, has often been made a conspicuous figure by the chancellor in testing the soundness of the transaction." Gist *v.* Frazier, 2 Litt. (Ky.) 118.

46. Wells *v.* Houston, 29 Tex. Civ. App. 619, 69 S. W. 183, *explaining s. c.* in former appeal, 23 Tex. Civ. App. 629, 57 S. W. 584; Nolte *v.* Reichelm, 96 Ill. 425.

47. Durrell *v.* Richardson, 119 Mich. 592, 78 N. W. 650; Tucke *v.* Buchholz, 43 Iowa 415.

48. Brooke *v.* Berry, 2 Gill (Md.) 83.

Defendant, Plaintiff's Physician. Dibble *v.* Nash, 47 Mich. 589, 11 N. W. 399.

49. Gist *v.* Frazier, 2 Litt. (Ky.) 118.

Where a Deputy Sheriff Purchases at a sale made by his employer, although the sale may not be expressly illegal, "equity will narrowly watch the actions of a person possessing such opportunities for questionable practices." Massey *v.* Young, 73 Mo. 260.

50. *Alabama.* — Thompson *v.* Lee, 31 Ala. 292.

California. — Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376.

Illinois. — Nolte *v.* Reichelm, 96 Ill. 425; Frazier *v.* Miller, 16 Ill. 48.

Indiana. — Bloomer *v.* Gray, 10 Ind. App. 326, 37 N. E. 819; Worley *v.* Moore, 77 Ind. 567.

Massachusetts. — Somes *v.* Skinner, 16 Mass. 348.

Missouri. — Beck & P. L. Co. *v.* Obert, 54 Mo. App. 240.

Washington. — Tacoma *v.* Tacoma L. & W. Co., 17 Wash. 458, 50 Pac. 55.

Distress of Mind; Nervousness. The fact that the party complaining was in great sorrow and distress of mind (Stewart *v.* Stewart, 7 J. J. Marsh. (Ky.) 183, 23 Am. Dec. 393), or was in a feeble and nervous condition (Railway Co. *v.* Goodholm, 61 Kan. 758, 60 Pac. 1066), at the time of the transaction, is relevant.

The fact that the party complaining is a lawyer of experience is relevant on the question of whether he relied or had a right to rely upon the representations. Lucas *v.* Crippen, 76 Iowa 507, 41 N. W. 205.

Woman Unskilled in Business. Woodbridge *v.* DeWitt, 51 Neb. 98, 70 N. W. 506.

Municipal Corporation. — "In the consideration of questions of fraud and misrepresentation arising upon a contract for the sale of property by a private corporation to a municipal corporation, it is a fact properly for the consideration of the jury that the less expert business capacity, skill and experience may be with the municipal corporation." Tacoma *v.* Tacoma L. & W. Co., 17 Wash. 458, 50 Pac. 55, and cases cited.

51. Nelms *v.* Steiner Bros., 113 Ala. 562, 22 So. 435; Johnson *v.* Monell, 2 Keyes (N. Y.) 655; O'Neil *v.* Wills Point Bank, 67 Tex. 36, 2 S. W. 754; Finlay Brg. Co. *v.* Prost, 111 Mich. 635, 70 N. W. 137.

the representations.[52] Likewise, such course of dealings may be a strong circumstance in favor of the good faith of the alleged wrongdoer in the transaction,[53] or to prove that the party complaining relied upon such course of dealings and not upon the particular representations complained of as the inducement.[54]

h. *Financial Condition.* — (1.) **In General.** — The insolvency of either of the parties standing alone is not sufficient to justify the inference of fraud in a transaction between them,[55] but the financial condition of a party in connection with other facts is often relevant to prove[56] or it may, by disclosing the ability of the

Fraudulent Use of Well-known "Brand." — The fact that the merchandise which is charged to have been fraudulently misrepresented to the purchaser was put onto the market under a "brand" previously well and favorably known, and was sold by the vendor without disclosing the fact, well known to him, that it was inferior to the former and usual make of the vendor sold under such "brand," is relevant. Singleton's Adm'r *v.* Kennedy, S. & Co., 9 B. Mon. (Ky.) 222.

52. Johnson *v.* Monell, 2 Keyes (N. Y.) 655.

53. In Monroe *v.* O'Shea, 27 N. Y. St. 91, 7 N. Y. Supp. 540, which was an action based upon the purchase of cattle in New Jersey by the defendant from the plaintiffs with the alleged intent of defrauding plaintiffs out of the purchase price, the facts showing that it was a cash transaction, but the sale being made on October 15th, the defendant, on the 16th, drew his check for the price upon a bank in New Jersey, which check was delivered to plaintiffs in Massachusetts, and was by them presented to the bank for payment on October 20th, when payment was refused on account of shortage of funds; and it further appearing that defendant on the 16th had more than the amount of the check to his credit, but most of this amount had been drawn out before the 20th; and it further appearing that defendant, on October 19th, was insolvent and made a general assignment, it was held that evidence of a previous course of dealings of the same description between the parties tending to show that it was their custom for defendant to send checks to plaintiffs in Massachusetts and for them to be returned to New Jersey to be paid, was competent to show that defendant had reason to believe in good faith that he would be able to sell the cattle, and thereby procure the necessary money to pay the check when returned to New Jersey.

54. See Gregory *v.* Schoenell, 55 Ind. 101.

55. Edson *v.* Hudson, 83 Mich. 450, 47 N. W. 347; Foster *v.* Brown, 65 Ind. 234.

Poverty of Plaintiff. — In an action counting on defendant's fraud in inducing plaintiff to exchange his land for a stock of goods, evidence adduced merely to show plaintiff's poverty is irrelevant and incompetent. DeWulf *v.* Dix, 110 Iowa 553, 81 N. W. 779.

56. Kingman *v.* Reinemer, 166 Ill. 208, 46 N. E. 786.

Where plaintiff claims to have loaned deceased a large sum of money during his lifetime, for the recovery of which she has brought an action against his estate, proof of circumstances tending to show that plaintiff was without means and dependent upon deceased is relevant and competent to show fraud in her claim. Glessner *v.* Patterson, 164 Pa. St. 224, 30 Atl. 355.

Where an insolvent debtor confessed judgment in a large sum in favor of an alleged creditor and transferred valuable property in payment of such judgment, and the scheme is charged as fraudulent in an action by other creditors, evidence of the general financial condition of such alleged judgment creditor is relevant and competent, it appearing unreasonable that a person of such small means would own such a large claim. Sanders *v.* Clark, 6 Houst. (Del.) 462.

party to respond in damages, tend to disprove[57] the charge.

(2.) Fraud of Vendee in Purchase. — Thus, in an action in which a vendor is charged with a fraudulent intent in the purchase of goods, evidence of the vendee's insolvency at the time of such purchase is always relevant and competent in connection with other facts and circumstances to establish such fraudulent intention,[58] but does not of itself amount to conclusive proof thereof.[59]

Evidence of insolvency may be relevant to prove the party's fraudulent motive in the transaction. Mosby *v.* Commission Co., 91 Mo. App. 500.

Embarrassment of Party Complaining. — The financial embarrassment of the party claiming fraud in the transaction may be relevant to prove the fraud when the opposite party avails himself of such embarrassment. Stephens *v.* Orman, 10 Fla. 9.

57. Where the fraudulent representations relied upon consisted of false statements by defendant as to the value of a bond and mortgage which he had previously taken as security for a debt owing to him, and which were purchased from him by plaintiff under such representations, the fact that the defendant was financially responsible and had verbally agreed to guarantee the mortgage was held competent evidence from which the jury might infer a lack of fraudulent intent in the making of representations. Newell *v.* Chapman, 56 N. Y. St. 380, 26 N. Y. Supp. 361.

58. *United States.* — Castle *v.* Bullard, 23 How. 172.

Alabama. — Johnston *v.* Bent, 93 Ala. 160, 9 So. 581; Hudson *v.* Bauer Grocery Co., 105 Ala. 200, 16 So. 693.

Arkansas. — Taylor *v.* Mississippi Mills, 47 Ark. 247, 1 S. W. 283; Gavin *v.* Armistead, 57 Ark. 574, 22 S. W. 431, 38 Am. St. Rep. 262.

Colorado. — Brock *v.* Schradsky, 6 Colo. App. 402, 41 Pac. 512.

Iowa. — Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217; Phelps-Dodge & P. Co. *v.* Sampson, 113 Iowa 145, 84 N. W. 1051; Reid Murdock & F. T. Co. *v.* Cowduroy, 71 Iowa 169, 44 N. W. 351, 18 Am. St. Rep. 359.

Massachusetts. — Watson *v.* Silsby, 166 Mass. 57, 43 N. E. 1117.

Michigan. — Edson *v.* Hudson, 83 Mich. 450, 47 N. W. 347.

Minnesota. — Slagle *v.* Goodnow, 45 Minn. 531, 48 N. W. 402.

Missouri. — Strauss P. &. Co. *v.* Hirsch, 63 Mo. App. 95.

New Hampshire. — Jacobs *v.* Shorey, 48 N. H. 100, 97 Am. Dec. 586.

New York. — Bullis *v.* Montgomery, 50 N. Y. 352; Hennequin *v.* Naylor, 24 N. Y. 139; Hersey *v.* Benedict, 15 Hun. 282.

Pennsylvania. — Cincinnati Cooperage Co. *v.* Gaul, 170 Pa. St. 545, 32 Atl. 1093; Rodman *v.* Thalheimer, 75 Pa. St. 232.

In Com. *v.* Jeffries, 7 Allen (Mass.) 548, 83 Am. Dec. 712, the court said: "The inability of the person making the false pretenses to pay for the goods which he has received becomes a significant circumstance bearing on his intent, and tends to show that the pretense, which otherwise would be innocent or harmless, was made for the purpose of accomplishing a fraud. The insolvency of the party has a direct tendency to show the intent with which the false pretense was used. Indeed, it is evidence of the most stringent and satisfactory character. The law affirms that every man intends the natural and necessary consequence of his acts. . . . If at the time of the transaction he was deeply insolvent, and was cognizant of his condition, the necessary consequence of the act was to deprive the vendor of his property without recompense or the chance of payment, and leads to the just and almost unavoidable inference that it was done with an intent to defraud."

59. *Alabama.* — Wilk *v.* Key, 117 Ala. 285, 23 So. 6; Kyle *v.* Ward, 81 Ala. 121, 1 So. 468.

Arkansas. — Gavin *v.* Armistead, 59 Ark. 574, 22 S. W. 431, 38 Am. St. Rep. 262.

(3.) When Irrelevant. — But where a party is charged with having fraudulently obtained money or goods by a positive affirmation as to a specific fact, which is shown to have been false, his financial condition or ability to pay the debt is immaterial on the question of intent, and evidence thereof is incompetent.[60]

i. *Inadequacy of Consideration.* — **(1.) In General.** — Mere inadequacy of price or consideration is not, of itself, sufficient to justify the inference of fraud in the transaction,[61] unless the inadequacy is so great as to impress every reasonable person with its grossness, in which case it may, *per se*, raise the presumption of fraud,[62] and it has been held to amount to conclusive evidence thereof.[63] There is no certain rule as to the degree of grossness necessary to accomplish this result.[64]

(2.) Relevancy with Other Circumstances. — But, in all ordinary cases where fraud is involved, such inadequacy is always a relevant circumstance to be considered in connection with other facts and circumstances as tending to establish the fraud,[65] and when the

Colorado. — Brock *v.* Schradsky, 6 Colo. App. 402, 41 Pac. 512.

Indiana. — Sweet *v.* Campbell, 14 Ind. App. 570, 43 N. E. 236.

Iowa. — Starr Bros. *v.* Stevenson, 91 Iowa 684, 60 N. W. 217.

New York. — Williams *v.* Hay, 21 Misc. 73, 46 N. Y. Supp. 895.

Pennsylvania. — Cincinnati Cooperage Co. *v.* Gaul, 170 Pa. St. 545, 32 Atl. 1093; Rodman *v.* Thalheimer, 75 Pa. St. 232.

60. Com. *v.* Coe, 113 Mass. 481. Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959.

Where the false representation counted upon was that defendant had money in the bank, and he is charged with obtaining goods under such false representation, evidence that he owned real estate is irrelevant and incompetent. Carnell *v.* State, 85 Md. 1, 36 Atl. 117.

61. *Georgia.* — Comer *v.* Grannis, 75 Ga. 277.

Illinois. — Reed *v.* Peterson, 91 Ill. 288.

Indiana. — Cagney *v.* Cuson, 77 Ind. 494.

Kentucky. — Gist *v.* Frazier, 2 Litt. 118.

Nebraska. — Hanson *v.* Berthelsen, 19 Neb. 433, 27 N. W. 423.

New York. — Fleming *v.* Slocum, 18 Johns. 403; Swett *v.* Colgate, 20 Johns. 196.

Texas. — Wells *v.* Houston, 29 Tex. Civ. App. 619, 69 S. W. 183.

Vermont. — Howard *v.* Edgell, 17 Vt. 9.

Virginia. — Moore *v.* Triplett, 23 S. E. 69.

Wisconsin. — Risch *v.* Lillienthal, 34 Wis. 250.

62. Burch *v.* Smith, 15 Tex. 219; Rennolds *v.* Insurance Co., 62 Mo. App. 104; Briscoe *v.* Bronaugh, 1 Tex. 326; Reed *v.* Peterson, 91 Ill. 288; Zeigler *v.* Hughes, 55 Ill. 288; Parker Adm'r *v.* Glenn, 72 Ga. 637; Cagney *v.* Cuson, 77 Ind. 494.

63. In Jones *v.* Galbraith (Tenn. Ch.), 59 S. W. 350, it is held that the mere inadequacy of the consideration, in certain cases, may be so great as to shock the conscience, and of itself to conclusively show the fraud. And see Burch *v.* Smith, 15 Tex. 219. But *compare* Wells *v.* Houston, 29 Tex. Civ. App. 619, 69 S. W. 183, in which case it was held that although the inadequacy might be so great as, of itself, to *justify the jury in finding fraud*, yet it was error for the court to instruct that it was *conclusive evidence* thereof.

64. Howard *v.* Edgell, 17 Vt. 9.

65. *United States.* — Baldwin *v.* National Hedge & Wire Fence Co., 73 Fed. 574.

Georgia. — Hoyle *v.* Southern Saw Wks., 105 Ga. 123, 31 S. E. 137.

Illinois. — Macoupin Co. *v.* People, 58 Ill. 191; Reed *v.* Peterson, 91 Ill. 288; Ross *v.* Payson, 160 Ill. 349, 43 N. E. 399.

disparity is very great, it may, in connection with other circumstances, amount to conclusive proof thereof.[66]

(3.) When Irrelevant. — It has been held that the question of whether inadequacy of price is admissible as evidence of fraud depends upon the facts known to the parties at the time of the transaction, and where the value of the subject-matter is known to neither of the parties and is open to the investigation of both, evidence of such inadequacy, no matter how great, is incompetent.[67]

(4.) Deficiency in Quantity. — A deficiency in the quantity of property received is not, of itself, sufficient to prove fraud, but if such deficiency is great in proportion to the whole, it is evidence of

Iowa. — Tucke *v.* Buchholz, 43 Iowa 415.

Kentucky. — Gist *v.* Frazier, 2 Litt. 118.

Minnesota. — Christianson *v.* Chicago, St. P., M. & O. R. Co., 67 Minn. 94, 69 N. W. 640.

Missouri. — Massey *v.* Young, 73 Mo. 260.

North Carolina. — Futrill *v.* Futrill, 58 N. C. 61; McLeod *v.* Bullard, 84 N. C. 515; Hartly *v.* Estis, 62 N. C. 167.

Texas. — Wells *v.* Houston, 29 Tex. Civ. App. 619, 69 S. W. 185; Burch *v.* Smith, 15 Tex. 219; Weekes *v.* City of Galveston, 21 Tex. Civ. App. 102, 51 S. W. 544.

Vermont. — Howard *v.* Edgell, 17 Vt. 9.

In Lloyd *v.* Higbee, 25 Ill. 495, the court said: "And where fraud is charged and it appears that the price given is much less than the real value of the property, it is a strong circumstance to prove the fraud; as the love of gain, and the disinclination of all men to abandon their property, is so strong that it is unusual for persons knowingly to part with property of great value for only a trifle."

Settlement of Damages. — Where the question at issue is as to whether a certain alleged settlement of plaintiff's claim for damages for personal injuries was obtained by defendant in fraud of the rights of plaintiff, the gross inadequacy of the amount of the consideration for which the claim is alleged to have been settled is a circumstance material to the inquiry whether the settlement was procured by fraud. Featherstone *v.* Betlejewski, 75 Ill. App. 59.

Shifts Burden of Proof. — The gross inequality of the bargain, followed by proof of other circumstances justifying the inference of a confidential relation, shifts the burden of proof as to the fairness and equality of the transaction. Stepp *v.* Frampton, 179 Pa. St. 284, 36 Atl. 177.

Fraudulent Sale of Mortgaged Chattels. — The fact that the property covered by a chattel mortgage was sold thereunder in a lump, and brought much less than its actual value, is relevant as proof that the mortgagee, who purchased the property himself, did so with a fraudulent intent. Wygal *v.* Bigelow, 42 Kan. 477, 22 Pac. 612, 16 Am. St. Rep. 495.

Where a person for the sum of $50 is induced to assume the responsibility of worthless paper of the amount of over $5000, the inadequacy of the consideration is strong evidence of fraud. Walker *v.* Thompson, 61 Me. 347.

Sales on Execution. — This rule applies to sales under execution. Parker Adm'r *v.* Glenn, 72 Ga. 637.

66. Burch *v.* Smith, 15 Tex. 219; Allore *v.* Jewell, 94 U. S. 506; Risch *v.* Lillienthal, 34 Wis. 250; Kuelkamp *v.* Hidding, 31 Wis. 503; Lester *v.* Mahan, 25 Ala. 445, 60 Am. Dec. 530.

"That circumstance [inadequacy of price] taken in connection with others of a suspicious nature, may afford such a vehement presumption of fraud as will authorize the court to set it aside." Wormack *v.* Rogers, 9 Ga. 60.

67. Wood *v.* Boynton, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610; Mosher *v.* Post, 89 Wis. 602, 62 N. W. 516.

fraud,[68] and in cases where quantity is an essential part of the contract, gross deficiency alone raises the presumption of fraud.[69]

(5.) Comparison of Values. — Evidence of the actual value of the property parted with by the alleged defrauded party,[70] and of a comparison between such value and the value of the property received by him in the transaction,[71] or between the actual value and the value as represented,[72] may have and often has a relevant bearing on the question of the motives and intentions of the parties.

(6.) Equivalent in Return. — **(A.) Generally.** — Where the proof shows that, if the false representations complained of had been true, the property received by the defrauded party would have been worth more or would have been different from its real value or condition, the fact that he has received an equivalent to that

68. Griswold *v.* Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878; Kreiter *v.* Bomberger, 82 Pa. St. 59.

69. "In cases of gross deficiency, presumptive fraud is usually held to exist where quantity is an essential part of the contract." Carney *v.* Harbert, 44 W. Va. 30, 28 S. E. 712; Crislip *v.* Cain, 19 W. Va. 441.

70. Bloomer *v.* Gray, 10 Ind. App. 326, 37 N. E. 819; Weidner *v.* Phillips, 114 N. Y. 458, 21 N. E. 1011.

It is proper to prove the value of land given in exchange for other property where the contract of exchange was procured by fraud. Johnson *v.* Culver, 116 Ind. 278, 19 N. E. 129.

To Disprove Fraud and Reliance. In Likes *v.* Baer, 10 Iowa 89, the defendant was charged with fraudulently representing the land exchanged by him to plaintiff to be of a quality far superior and worth very much more than it really was, and it was held competent for the defendant to prove the actual value of the property received by him in the exchange from the plaintiff, for the purpose of proving that he made no such representations, or that if he did, plaintiff did not rely upon them, it appearing that the actual value of the land exchanged by plaintiff was so small as to make it unreasonable that, for the purpose of obtaining such land, defendant would overestimate the quality of his own land to such an extent as was claimed by plaintiff.

71. Cheney *v.* Gleason, 125 Mass. 166; Lloyd *v.* Higbee, 25 Ill. 495; Legrand *v.* Eufaula Nat. Bank, 81 Ala. 123, 1 So. 460, 60 Am. Rep. 140; Stewart *v.* Stewart, 7 J. J. Marsh. (Ky.), 183, 23 Am. Dec. 393.

Improbability of Making the Alleged Misrepresentations. — Relative values of the two properties may be relevant to show the improbability of the making of the representation complained of. See Gustafson *v.* Rustmeyer, 70 Conn. 125, 39 Atl. 104, 66 Am. St. Rep. 92, 39 L. R. A. 644.

Fraudulent Issue of Corporate Stock. — Gross and obvious overvaluation of property given by stockholders in payment for stock, which is claimed to have been "fully paid up," is strong evidence of fraud in payment for such stock in a suit by a creditor on a stockholder's liability. Coit *v.* Gold Amal'g Co., 119 U. S. 343; Boynton *v.* Hatch, 47 N. Y. 225.

72. Where the fraudulent representations complained of consisted of statements of the vendor that a certain lot pointed out by him during the negotiations was included within the property he proposed to sell to the vendee by a sale thereafter consummated, and it subsequently appeared that such lot was not owned by the vendor, nor covered by the conveyance, evidence of the value of that lot and its appearance and character is admissible and relevant on the question of fraudulent intent. Lovejoy *v.* Isbell, 73 Conn. 368, 47 Atl. 682.

To Prove that Representations Caused the Damage. — Where the plaintiff (mortgagor) complains that by reason of the fraud of the defendant in making false representations to the mortgagee, which representations induced the mortgagee to take the property on grounds that, from the

with which he parted is immaterial, and evidence thereof is incompetent.[73]

(B.) Cross-Petition. — But where the defendant files a cross-petition charging plaintiff with fraudulent representation as to the value of property exchanged by him with defendant in the same transaction, the real value of plaintiff's property is directly involved, and evidence thereof is competent.[74]

j. *Character and Reputation.* — Although fraud, to some extent,

representations, he thought himself unsafe, evidence showing the value of the property to be amply sufficient to satisfy the mortgage is competent as tending to prove that the representations complained of were the direct cause of the damage. O'Horo *v.* Kelsey, 60 App. Div. 604, 70 N. Y. Supp. 14.

Overvaluation of Insured Property. — Question for Jury. — Whether the discrepancy between the actual value of the property insured and the amount for which it is insured is so great as to make it certain that the overestimate was made with a fraudulent motive, is a question for the jury. Williams *v.* Phoenix Fire Ins. Co., 61 Me. 67.

73. *Colorado.* — Herfort *v.* Cramer, 7 Colo. 483, 4 Pac. 896.

Connecticut. — Murray *v.* Jennings, 42 Conn. 1.

Illinois. — Antle *v.* Sexton, 137 Ill. 410, 27 N. E. 691; *distinguishing* Hiner *v.* Richter, 51 Ill. 299.

Maryland. — Pendergast *v.* Reed, 29 Md. 398, 96 Am. Dec. 539.

Missouri. — Chase *v.* Rusk, 90 Mo. App. 25.

Nebraska. — *Compare* Hankins *v.* Majors, 56 Neb. 290, 76 N. W. 544.

Pennsylvania. — Staines *v.* Share, 16 Pa. St. 200.

Wisconsin. — Bergeron *v.* Miles, 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911.

Thus in an action counting on the fraud of the vendor in the sale of a business, the fraudulent representations alleged being confined to the value of the stock of goods, the assets and liabilities of the firm, evidence of the value of the *good will* of the business is inadmissible on the part of the vendor to disprove the fraud. Hines *v.* Driver, 72 Ind. 125.

Incompetent to Show Non-reliance. — The value of the property parted with by the party complaining of the fraud is irrelevant and incompetent to prove that he did not rely upon the alleged false representations where the property concerning which the representations were made was valued at a fixed price. Matlock *v.* Reppy, 47 Ark. 148, 14 S. W. 546; Lee *v.* Tarplin, 183 Mass. 52, 66 N. E. 431.

Plaintiff Having no Title. — In Watson *v.* Atwood, 25 Conn. 313, an offer on the part of the defendant charged with fraudulent representations, inducing the exchange of properties between himself and the plaintiff, to prove that the plaintiff at the time of such exchange had no title to the property which he conveyed to defendant, was held irrelevant and inadmissible.

But see Carson *v.* Houssels (Tex. Civ. App.), 51 S. W. 290, in which it was held that on the issue of the materiality of the alleged false representations as to the number of cattle in a herd, made by the vendor to the vendee, evidence that the cattle actually received by the vendee were worth more than the price paid was admissible. And see Springstead *v.* Lawson, 23 How. Pr. (N. Y.) 302, which was an action for deceit in the sale of a horse by the defendant to plaintiff, based on false representations as to the health and condition of such horse, and in which it was held that, where the plaintiff had testified that the horse was worth only $125 when purchased, whereas it would have been worth $500 if as represented, defendant might properly prove on plaintiff's cross-examination that in less than three months plaintiff sold the horse for what he had paid for it — to wit, $400 — no change in the animal having been shown.

74. Jackson *v.* Armstrong, 50 Mich. 65, 14 N. W. 702.

involves moral turpitude, it is a general rule, supported by the great weight of modern authority, that evidence of the character or reputation of the party charged is irrelevant and inadmissible to prove or refute the fraud in a civil action in which it is in issue.[75] But there are authorities and exceptional cases where the contrary doctrine has been affirmed.[76]

k. *Interest of Alleged Wrongdoer in the Transaction.* — The fact that the party charged with the fraud or with the making of the fraudulent representations constituting the inducement had no interest of his own to subserve, does not exempt him from liability from the damages resulting from his acts,[77] nor is it sufficient proof of one's commission of a fraudulent act that it was to his interest and not that of any one else to have the act done.[78] But his interest or lack of interest in connection with the subject-matter may be relevant as a circumstance tending to prove his intent or motive in the transaction.[79]

75. American Fire Ins. Co. *v.* Hazen, 110 Pa. St. 530, 1 Atl. 605; Brooke *v.* Berry, 2 Gill (Md.) 83. And see article "CHARACTER," Vol. III, p. 5, *et seq.*

Especially is this true when the fraud is shown not merely by circumstance, but the intent is conclusively presumed by the law from the facts of the transaction. McBean *v.* Fox, 1 Ill. App. 177.

In Rosenagle *v.* Handley, 151 Pa. St. 107, 25 Atl. 42, it was held error for a court to charge the jury to the effect that the reputation of the party charged with the fraud was at stake and that one's reputation is precious to him.

That the Purchaser Kept a House of Ill-fame at the time of the purchase is irrelevant on the question of his good faith in making such purchase. Johnson *v.* Carnley, 10 N. Y. 570.

76. Rule in Tennessee. — "But we think the rule is that, in cases where a party is charged with a great moral wrong [fraud], he may introduce evidence of good character and invoke the presumption of innocence." Continental Nat. Bank *v.* First Nat. Bank, 108 Tenn. 374, 68 S. W. 497.

Character of Counsel in Former Suit. — Where a party attacks a judgment rendered against him in a former suit, on the grounds of fraud in the manner in which it was conducted, the character of counsel therein is relevant. Doig *v.* Morgan Mach. Co., 89 Fed. 489.

Reputation Competent to Show Knowledge. — The general reputation that the fraudulent vendee was slow about paying his debts is admissible as tending to show knowledge of such fact, and of the insolvency of the vendee, on the part of his subsequent purchaser. Hudson *v.* Bauer Grocery Co., 105 Ala. 200, 16 So. 693.

See article "CHARACTER," Vol. III, p. 5, *et seq.*, and especially notes 7 and 9.

77. *United States.* — United States *v.* Kenney, 90 Fed. 257; Hindman *v.* First Nat. Bank, 112 Fed. 931.

Georgia. — James *v.* Crosthwaite, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 631.

Illinois. — Leonard *v.* Springer, 197 Ill. 532, 64 N. E. 299.

Kansas. — Wafer *v.* Harvey Co. Bank, 46 Kan. 597, 26 Pac. 1032; Carpenter *v.* Wright, 52 Kan. 221, 34 Pac. 798.

Maryland. — McAleer *v.* Horsey, 35 Md. 439.

Massachusetts. — Page *v.* Bent, 2 Metc. 371; Fisher *v.* Mellen, 103 Mass. 503.

Missouri. — Brownlee *v.* Hewitt, 1 Mo. App. 360.

New York. — Williams *v.* Wood, 14 Wend. 127.

78. Hanna *v.* Rayburn, 84 Ill. 533.

79. Hanna *v.* Rayburn, 84 Ill. 533.

4. Weight and Sufficiency of the Evidence. — A. In General. If the facts and circumstances in evidence are such as to lead a reasonable man to believe that fraud existed, this is all that the law requires.[80]

B. Question of Fact for Jury. — Actual fraud is a question of fact to be determined by the jury from a consideration of all the evidence before them,[81] and where the evidence, upon the whole, to a reasonable degree of certainty, tends to sustain the charge of fraud, it should be submitted to the jury.[82]

C. Preliminary Question for Court. — However, there is always a preliminary question for the court, not whether there is literally no evidence, but whether there is any that might reasonably satisfy the jury that fraud is established, and if this question

To prove that defendant was a party to the alleged fraudulent conspiracy, evidence showing him to be interested in the fruits of the transaction is competent. Hughes *v.* Waples-Platter Grocer Co., 25 Tex. Civ. App. 212, 60 S. W. 981.

Defendant Acting for Third Person. — In an action counting on the fraud of defendant in the purchase of a business from the plaintiff, evidence on the part of the defendant tending to show that the purchase, although made in his own name, was in fact made for a third person who advanced the consideration, and that defendant did not make anything out of the transaction, is competent, as it tends to show that he would be less liable to practice fraud if he were acting for another than if he were acting for himself. Hidden *v.* Hooker, 70 Vt. 280, 40 Atl. 748, *citing* Hadley *v.* Bordo, 62 Vt. 285, 19 Atl. 476.

In Refutation of Charge. Where the owners of a boat, sunk in navigation, in an action on an insurance policy covering the freight thereof, are charged with a fraudulent motive to destroy the boat, evidence showing that the boat was not insured, and that she was worth $5000, is competent on the part of such owners to disprove such fraudulent motive. Louisville Ins. Co. *v.* Monarch, 98 Ky. 578, 36 S. W. 563.

80. White *v.* Perry, 14 W. Va. 66; Williams *v.* Harriss, 4 S. D. 22, 54 N. W. 926, 46 Am. St. Rep. 753.

81. *Delaware.* — Mears *v.* Waples, 3 Houst. 581; Clayton *v.* Cavender, 1 Marv. 191, 40 Atl. 956.

Georgia. — Trice *v.* Rose, 80 Ga. 408, 7 S. E. 109; Hickson *v.* Bryan, 75 Ga. 392.

Indiana. — Adams *v.* Langel, 144 Ind. 608, 42 N. E. 1017; Luce *v.* Shoff, 70 Ind. 152; Baltimore & O. C. R. Co. *v.* Scholes, 14 Ind. App. 524, 43 N. E. 156, 56 Am. St. Rep. 307.

Iowa. — Sunberg *v.* Babcock, 66 Iowa 515, 24 N. W. 19.

Maryland. — McAleer *v.* Horsey, 35 Md. 439.

Michigan. — Davidson *v.* Bennett, 84 Mich. 614, 48 N. W. 279; Woolenslagle *v.* Runals, 76 Mich. 545, 43 N. W. 454.

Missouri. — Bidault *v.* Wales, 19 Mo. 36.

North Carolina. — Atkins *v.* Withers, 94 N. C. 581.

Texas. — Graham *v.* Roder, 5 Tex. 141.

Wisconsin. — Castenholz *v.* Heller, 82 Wis. 30, 51 N. W. 432.

82. *United States.* — Iasigi *v.* Brown, 17 How. 183.

California. — White *v.* Leszynsky, 14 Cal. 166.

Georgia. — Dooley *v.* Gorman, 104 Ga. 767, 31 S. E. 203; Hixon *v.* Bryan Adm'r, 75 Ga. 392; Hoyle *v.* Southern Saw Wks., 105 Ga. 123, 31 S. E. 137; James *v.* Crosthwaite, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 631.

Kentucky. — Jackson *v.* Holliday, 3 Mon. 363; Ward *v.* Crutcher, 2 Bush 87.

Michigan. — Francis *v.* Hurd, 113 Mich. 250, 71 N. W. 582; Whitaker

is answered in the negative the case should be withdrawn from the jury.[83]

D. Character and Degree of Proof. — a. *In General.* — The courts are not in entire harmony as to the character or degree of proof required in order to establish a charge of fraud. The general rule is that the proof must be clear and strong, and amount to something more than a suspicion,[84] and the party alleging the fraud

Iron Co. *v.* Preston Nat. Bank, 101 Mich, 146, 59 N. W. 395; Ferris *v.* McQueen, 94 Mich. 367, 54 N. W. 164; Watkins *v.* Wallace, 19 Mich. 57.

Minnesota. — Haven *v.* Neal, 43 Minn. 315, 45 N. W. 612; Berkey *v.* Judd, 22 Minn. 287; Christianson *v.* Chicago, St. P., M. & O. R. Co., 67 Minn. 94, 69 N. W. 640.

New York. — Devoe *v.* Brandt, 53 N. Y. 462; Monroe *v.* O'Shea, 27 N. Y. St. 91, 7 N. Y. Supp. 540; Wyeth *v.* Morris, 13 Hun 338; Second Nat. Bank *v.* Dix, 101 N. Y. 684, 5 N. E. 563. And see Yates *v.* Alden, 41 Barb. 172.

North Carolina. — Quinn *v.* Pinson, 25 N. C. 47.

Pennsylvania. — Cincinnati Cooperage Co. *v.* Gaul, 170 Pa. St. 545, 32 Atl. 1093; Cole *v.* High, 173 Pa. St. 590, 34 Atl. 292.

Virginia. — New York Life Ins. Co. *v.* Davis, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 345.

Slight Circumstances Sufficient. Very slight circumstances will warrant the submission of an issue involving fraud to the jury. Mosby *v.* Commission Co., 91 Mo. App. 500; Freedman *v.* Campfield, 92 Mich. 118, 52 N. W. 630.

Where the maker of a negotiable note, in an action thereon by the holder, shows that it was originally procured by fraud, the evidence of the holder alone as to the circumstances attending his purchase and his knowledge of the party from whom he obtained it, although tending positively to show good faith on his part in the purchase, is insufficient of itself, he being the interested party, to justify the court in taking the question of his good faith from the jury. Joy *v.* Diefendorf, 130 N. Y. 6, 28 N. E. 602; Canajoharie Nat. Bank *v.* Diefendorf, 123 N. Y. 191, 25 N. E. 402.

83. Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552, *citing* Hyatt *v.* Johnston, 91 Pa. St. 196; Macullar *v.* McKinley, 99 N. Y. 353, 2 N. E. 9; Armstrong *v.* Penn, 105 Ga. 229; Wright *v.* Grover, 27 Ill. 426; Hatch *v.* Spooner, 37 N. Y. St. 151, 13 N. Y. Supp. 642. But see Freedman *v.* Campfield, 92 Mich. 118, 52 N. W. 630.

84. *United States.* — Lalone *v.* United States, 164 U. S. 255; United States *v.* Hancock. 133 U. S. 193; Colorado Coal & Iron Co. *v.* United States, 123 U. S. 307; Baltzer *v.* Railway Co., 115 U. S. 634; Farrar *v.* Churchill, 135 U. S. 609; Evans *v.* Mansur, 87 Fed. 275.

Arkansas. — Holt *v.* Moore, 37 Ark. 145.

California. — Bryan *v.* Ramirez, 8 Cal. 462; Union Trans. Co. *v.* Bassett, 118 Cal. 604, 50 Pac. 754; Truett *v.* Onderdonk, 120 Cal. 581, 53 Pac. 26.

Delaware. — Mears *v.* Waples, 3 Houst. 581; Massey *v.* Stout, 4 Del. Ch. 274; Terry *v.* Platt, 1 Penn. 185, 40 Atl. 243; Boyce *v.* Cannon, 5 Houst. 409; Freeman *v.* Topkis, 1 Marv. 174, 40 Atl. 948.

Georgia. — Lewin *v.* Thurber, 62 Ga. 25.

Illinois. — Union Nat. Bank *v.* State Nat. Bank, 168 Ill. 256, 48 N. E. 169; Gubbins *v.* Bank of Commerce, 79 Ill. App. 150.

Iowa. — Drummon *v.* Couse, 39 Iowa 442; Schofield *v.* Blind, 33 Iowa 175.

Kansas. — Wood *v.* Staudemayer, 56 Kan. 399, 43 Pac. 760.

Maryland. — Lynn *v.* Railway Co., 60 Md. 404, 45 Am. Rep. 739; Hill *v.* Reifsnider, 46 Md. 555.

Michigan. — Darling *v.* Hurst, 39 Mich. 765.

Minnesota. — Christianson *v.* Chicago, St. P., M. & O. R. Co., 67 Minn. 94, 69 N. W. 640.

must assume the burden of proving it by a preponderance of evidence.[85]

b. *Strict Rule.* — Numerous cases have adopted the rule that where the whole of the evidence is susceptible of a reasonable interpretation which makes it as consistent with the innocence of the party charged as with his guilt, the fraud is not proved.[86] It has

Mississippi. — Parkhurst *v.* McGraw, 24 Miss. 134.

Missouri. — Priest *v.* Way, 87 Mo. 16; Waddingham *v.* Loker, 44 Mo. 132; Mapes *v.* Burns, 72 Mo. App. 411; Redpath Bros. *v.* Lawrence, 48 Mo. App. 427.

Nebraska. — Alter *v.* Bank of Stockham, 53 Neb. 223, 73 N. W. 667; Davidson *v.* Crosby, 49 Neb. 60, 68 N. W. 338.

New York. — Myers *v.* Myers, 15 App. Div. 448, 44 N. Y. Supp. 513; Swett *v.* Colgate, 20 Johns. 196.

North Carolina. — Cobb *v.* Fogalman, 23 N. C. 440.

Pennsylvania. — Bierer's Appeal, 92 Pa. St. 265; Nelson *v.* Steen, 192 Pa. St. 581, 44 Atl. 247.

Virginia. — Engleby *v.* Harvey, 93 Va. 440, 25 S. E. 225; Saunders *v.* Parrish, 86 Va. 592, 10 S. E. 748.

Washington. — Kleeb *v.* Frazer, 15 Wash. 517, 47 Pac. 11.

West Virginia. — Armstrong *v.* Bailey, 43 W. Va. 778, 28 S. E. 766; Board of Trustees *v.* Blair, 45 W. Va. 812, 32 S. E. 203; Harden *v.* Wagner, 22 W. Va. 386.

Wisconsin. — Fick *v.* Mullholland, 48 Wis. 310, 4 N. W. 527.

85. *Alabama.* — Moses *v.* Katzenberger, 84 Ala. 95, 4 So. 237.

Colorado. — Allen *v.* Elerick, 29 Colo. 118, 66 Pac. 891.

Illinois. — East St. L. P. & P. Co. *v.* Hightower, 9 Ill. App. 297; Means *v.* Flanagan, 79 Ill. App. 296; Geneser *v.* Telgman, 37 Ill. App. 374; Walker *v.* Hough, 59 Ill. 375.

Iowa. — Allison *v.* Jack, 76 Iowa 205, 40 N. W. 811.

Kentucky. — Kentucky Life & Acc. Ins. Co. *v.* Thompson, 18 Ky. L. Rep. 79, 35 S. W. 550.

Maryland. — Shaffer *v.* Cowden, 88 Md. 394, 49 Atl. 786.

Balance in Evidence. — "And where two witnesses affirm and two others, no more interested in the subject-matter, and, for all that appears, fully as creditable, deny the fraud, it is not proved." Allison *v.* Ward, 63 Mich. 128, 29 N. W. 528. But see Hubbard *v.* Rankin, 71 Ill. 129, and Stevens *v.* Matthewson, 45 Kan. 594, 26 Pac. 38, in the former of which cases it was held that a verdict finding fraud would not be disturbed, although the evidence as to fraud was confined to two witnesses testifying contradictorily to each other.

86. *United States.* — Herring *v.* Richards, 3 Fed. 439; Conara *v.* Nicoll, 4 Pet. 291; Gregg *v.* The Lessee of Sayre, 8 Pet. 244.

Alabama. — Smith *v.* Branch Bank, 21 Ala. 125; Stiles *v.* Lightfoot, 26 Ala. 443; Crommelin *v.* McCauley, 67 Ala. 542; Thames *v.* Rembert, 63 Ala. 561.

Connecticut. — Bulkley *v.* Morgan, 46 Conn. 393.

Delaware. — Kent Co. R. Co. *v.* Wilson, 5 Houst. 49.

Illinois. — State Bank of Freeport *v.* Norton, 78 Ill. App. 174; Mey *v.* Gulliman, 105 Ill. 277; Bowden *v.* Bowden, 75 Ill. 143; McConnell *v.* Wilcox, 2 Ill. 344; Chicago Stamping Co. *v.* Hanchett, 25 Ill. App. 198; Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70. And see People *v.* Lott, 36 Ill. 447.

Iowa. — Connors *v.* Chingren, 111 Iowa 437, 82 N. W. 934; Lyman *v.* Cessford, 15 Iowa 229; Schofield *v.* Blind, 33 Iowa 175; Drummond *v.* Couse, 39 Iowa 442; Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933; Turner *v.* Hardin, 80 Iowa 691, 45 N. W. 758.

Kansas. — McPike *v.* Atwell, 34 Kan. 142, 8 Pac. 118.

Louisiana. — Winter *v.* Davis, 48 La. Ann. 260, 19 So. 263; Lewis *v.* Western Assur. Co. of Toronto, 49 La. Ann. 658, 21 So. 736.

Maine. — Burleigh *v.* White, 64 Me. 23.

Maryland. — Brewer *v.* Bowersox, 92 Md. 567, 48 Atl. 1060.

Minnesota. — Sprague *v.* Kempfe, 74 Minn. 465, 77 N. W. 412.

also been held that the proof must be "clear and convincing,"[87] that it must be stronger than is required in ordinary cases;[88] and that the evidence must "necessarily tend" to establish the fraud.[89]

c. *Liberal Rule.* — On the other hand, there are many authorities holding that the rule is the same in actions involving fraud as in any other civil action,[90] and that a preponderance of the evidence

Missouri. — Muenks *v.* Bunch, 90 Mo. 500, 3 S. W. 63; Funkhouser *v.* Lay, 78 Mo. 458; Page *v.* Dixon, 59 Mo. 43. *Compare* Gay *v.* Gillilian, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712.

Nebraska. — Alter *v.* Bank of Stockham, 53 Neb. 223, 73 N. W. 667.

New Mexico. — First Nat. Bank of Albuquerque *v.* Lesser, 65 Pac. 179, *citing* Dallam *v.* Renshaw, 26 Mo. 533.

New York. — McIntyre *v.* Buell, 132 N. Y. 192, 30 N. E. 396; Morris *v.* Talcott, 96 N. Y. 100.

Washington. — Tacoma *v.* Tacoma L. & W. Co., 16 Wash. 288, 47 Pac. 738; Roberts *v.* Washington Nat. Bank, 11 Wash. 550, 40 Pac. 225.

Inconsistent with Integrity. "Something should be made to appear inconsistent with integrity, so as to admit of no reasonable interpretation but meditated fraud." Slessinger *v.* Topkis, 1 Marv. (Del.) 140, 40 Atl. 717.

Question of Law. — The court in Hatch *v.* Spooner, 59 Hun 625, 13 N. Y. Supp. 642, in speaking of the inference of innocence when the facts were as consistent therewith as with fraud, said: "Such inference must be drawn as a matter of law; and a jury cannot be permitted to speculate upon the question as to whether fraud did or did not exist."

"In this case, while there are circumstances in and of themselves unusual, or perhaps in their nature suspicious — circumstances upon which respondent builds a somewhat plausible 'theory' of collusion and fraud — these circumstances comport equally with the theory of honesty and fair dealing, and there is nothing in them inconsistent with the claim that the transactions of plaintiff, from beginning to end, were upright and honorable." Levy *v.* Scott, 115 Cal. 39, 46 Pac. 892.

Presumption. — "It is a fundamental principle that where an act may be traced to an honest intent as well as to a corrupt one, the former should be preferred." Dexter *v.* McAfee, 163 Ill. 508, 45 N. E. 115; Massey *v.* Stout, 4 Del. Ch. 274.

87. Hickman *v.* Trout, 83 Va. 478, 3 S. E. 131.

88. "We think it not contrary to any principle or rule of law for the judge to inform the jury that as the charge of fraud is a charge against a presumption of fact, perhaps often a slight one, yet the jury, in order to be satisfied, might require somewhat stronger evidence than would suffice to prove the acknowledgment of an obligation or the delivery of a chattel." Shaw, C. J., in Hatch *v.* Bayley, 12 Cush. (Mass.) 27. *Explained* and *distinguished* in Bullard *v.* His Creditors, 56 Cal. 600. *Compare* Kline *v.* Baker, 106 Mass. 61.

89. Hatch *v.* Spooner, 37 N. Y. St. 151, 13 N. Y. Supp. 642. In Morris *v.* Talcott, 96 N. Y. 100, the court said: "The fraud charged against the defendant herein is of the nature of a crime, and cannot be presumed, but must be established by evidence. . . . A party, therefore, relying upon the establishment of a cause of action, or a right to a remedy against another, based upon the alleged commission of a fraud by such a person, must show affirmatively facts and circumstances necessarily tending to establish a probability of guilt, in order to maintain his claim."

90. Kline *v.* Baker, 106 Mass. 61; Reed *v.* Noxon, 48 Ill. 323.

In Lea *v.* Pearce, 68 N. C. 76, the court said: "The rule is, if the evidence creates in the mind of the jury a belief that the allegation is true, they should so find." And see Smith *v.* Berwick, 12 Rob. (La.) 20.

is all that is required.[91] Accordingly, instructions requiring that the evidence be "conclusive,"[92] or "irresistible,"[93] or that it be "most clear and satisfactory,"[94] or that the facts and circumstances in evidence must be such as to exclude any other hypothesis than that of fraud,[95] or that the evidence must be inconsistent with honesty,[96] or in any manner suggesting that fraud requires a differ-

91. *California.* — Ford *v.* Chambers, 28 Cal. 13.

Illinois. — Eames *v.* Morgan, 37 Ill. 260.

Indiana. — Baltimore & O. C. R. Co. *v.* Scholes, 14 Ind. App. 524, 43 N. E. 156, 56 Am. St. Rep. 307.

Iowa. — Lillie *v.* McMillan, 52 Iowa 463, 3 N. W. 601.

Massachusetts. — Gordan *v.* Parmelee, 15 Gray 413.

Nebraska. — Patrick *v.* Leach, 8 Neb. 530.

Ohio. — Strader *v.* Mullane, 17 Ohio St. 624.

Pennsylvania. — Catasauqua Mfg. Co. *v.* Hopkins, 141 Pa. St. 30, 21 Atl. 630.

Texas. — Sparks *v.* Dawson, 47 Tex. 138.

Vermont. — Cutter *v.* Adams, 15 Vt. 237.

Mere Preponderance Sufficient. In Bullard *v.* His Creditors, 56 Cal. 600, a lengthy instruction, the several parts of which, taken by themselves, were perhaps correct statements of the law, was held erroneous because, taken as a whole, it conveyed to the mind of the jury the idea that they were not authorized to find fraud upon a mere preponderance of evidence.

Testimony of Single Witness Sufficient. — "The plaintiff's claim that the evidence of a single witness is insufficient in law to prove fraud, if denied by the person against whom fraud is charged, has no foundation. The quality of the testimony given, as well as the number of the witnesses produced, must be considered in determining questions of credibility or preponderance of evidence." Beckwith *v.* Ryan, 66 Conn. 589, 34 Atl. 488.

92. McDaniel *v.* Baca, 2 Cal. 326, 56 Am. Dec. 339; Kingman *v.* Reinemer, 166 Ill. 208, 46 N. E. 786.

Compare Turner *v.* Hardin, 80 Iowa 691, 45 N. W. 758, in which an instruction informing the jury that the proof must be of "such a character as to produce in the mind of the jury a *conviction*" of the fraud, was held not erroneous as requiring too high a degree of proof, although the word *conviction* was disapproved.

93. In Carter *v.* Gunnels, 67 Ill. 270, an instruction that in order to be sufficient to prove fraud the testimony should possess such a degree of force as to be irresistible, was held error, the court saying: "Had it been of sufficient force to produce in the mind nothing more than a mere preponderance of assent in favor of the fact in dispute, it could not have been pronounced insufficient."

94. Painter *v.* Drum, 40 Pa. St. 467; Rider *v.* Hunt, 6 Tex. Civ. App. 238, 25 S. W. 314.

"Clear, Distinct and Positive." In Patrick *v.* Leach, 8 Neb. 530, an instruction to the jury that the evidence must "satisfy their minds thoroughly, and produce a clear, distinct and positive conviction, in which they rest in confidence that they are right" was held properly refused as exacting too high a degree of proof.

95. Phoenix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108; Adams *v.* Thornton, 78 Ala. 489; Seligman *v.* Kalkman, 8 Cal. 208; Linn *v.* Wright, 18 Tex. 337.

Contra. — Tompkins *v.* Bennett, 3 Tex. 36; Steele *v.* Kinkle, 3 Ala. 352; the latter case being overruled in Adams *v.* Thornton, *ante.*

96. State of Missouri *ex rel.* Erhardt *v.* Estel, 6 Mo. App. 6.

In Diefenthaler *v.* Hall, 96 Ill. App. 639, the court, in speaking of an instruction informing the jury, in effect, that where the circumstances are equally capable of two constructions — one that the transaction was fair and honest and the other that it was fraudulent — then the law is that the former construction must prevail, said: "Whether it be a

ent or higher degree of proof than any other civil issue,[97] have been disapproved and held erroneous. Indeed, it has been held that if there is a mere "scintilla" of evidence tending to establish the fraud the case is properly submitted to the jury, and the verdict will not be disturbed.[98]

d. *In Equity.* — It is not safe to define what degree of proof will justify a court of equity in granting relief against fraud,[99] but it seems that a lesser degree of proof is required to establish fraud in equity than in law.[1]

presumption of law or a presumption of fact that all men are presumed to be fair and honest or not, or whether, when a transaction is called in question equally capable of two constructions — one fair and honest and one that is dishonest — then the law is that the transaction called in question is presumed to be fair and honest, depends upon the evidence of the case. All that follows the first sentence of the instruction is in no manner qualified by it, and seems to be wholly regardless of the evidence. The jury might well infer that while it was necessary to prove fraud affirmatively, still the law is that, notwithstanding this and without regard to the evidence, the presumptions are that men are fair and honest, and the transaction was equally capable of being considered honest or dishonest, and therefore must be deemed honest. The vice of the instruction is that the law only presumes all men honest until the evidence proves the contrary, the qualifying clause having been omitted from the instruction. In every case where the burden of proof rests upon either party, it is because the presumptions either of law or fact are against such party, and it is always error to assume that such presumption prevails if there is evidence to rebut it. This we think the instruction under consideration did, and it was error to give it in the form in which it was given to the jury."

97. Ferris *v.* McQueen, 94 Mich. 367, 54 N. W. 164; Watkins *v.* Wallace, 19 Mich. 57.

In Granrud *v.* Rea, 24 Tex. Civ. App. 299, 59 S. W. 841, it is held error to charge the jury that fraud must be proved "to the satisfaction of the jury by competent evidence."

Same as Other Issues. — An instruction to the effect that stronger proof was required to establish fraud than to prove an ordinary sale or agreement, was held properly refused in the absence of a further instruction that the one reason which would entitle the jury to require extra clear proof of fraud was the mere presumption of honest dealings; otherwise the instruction was held likely to mislead. Kline *v.* Baker, 106 Mass. 61.

"Clear Proof" — "Hearty Conviction." — In Gumberg *v.* Treusch, 103 Mich. 543, 61 N. W. 872, an instruction stating that fraud could not be established except by "clear proof" that carries to the mind a "hearty conviction," was held erroneous as exacting too high a degree of proof.

98. Freedman *v.* Campfield, 92 Mich. 118, 52 N. W. 630.

99. In Armstrong *v.* Lachman, 84 Va. 726, 6 S. E. 129, this language is used: "It is not safe to define what degree of proof will justify a court of equity in granting relief against fraud, for the proof must satisfy the conscience of the court, and no man would deem it prudent to attempt to define the extent of that indispensable qualification in the judge or court."

1. Lester *v.* Mahan, 25 Ala. 445, 60 Am. Dec. 530; Arnold *v.* Grimes, 2 Iowa 77. And see Cheney *v.* Gleason, 125 Mass. 166.

In Orton *v.* Madden, 75 Ga. 83, the court said: "The courts of equity more readily raise and act upon a presumption of fraud than courts of law, from facts pointing thereto."

But a preponderance of evidence is required in equity as well as at law. Braddock *v.* Louchheim, 87 Fed. 287.

E. Reasonable Doubt. — Although the charge of fraud involves moral turpitude, and is in the nature of a crime, it is not necessary that it be established beyond a reasonable doubt.[2]

F. Exceptional Cases. — a. *In General.* — Owing to the gravity of the particular offense charged, the courts have, in certain cases, required a higher degree of proof than would have been sufficient if the fraud charged had not been so gross. This principle has been applied in an action involving the fraud of a notary public in taking an acknowledgment,[3] in a suit by the United States to cancel a pension,[4] or a patent to its public lands[5] on the grounds of fraud in the procurement thereof, in an action involving the fraud of public officials in the discharge of their duties,[6] and where it was sought to set aside the award of an arbitrator, who was a disinterested employe of the party charging the fraud, and whose decision was made final by the contract.[7] It has been held that a lesser degree of proof is required to prove the fraud of a third person not directly interested in the purchase than that of the vendor with whom the purchaser dealt at arm's length.[8] Some of the decisions require exceedingly clear and strong proof where it is attempted to set aside or cancel an executed written instrument by parol evidence.[9]

2. *Alabama.* — Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643.
California. — Ford *v.* Chambers, 19 Cal. 143.
Illinois. — Bryant *v.* Simoneau, 51 Ill. 324.
Indiana. — Baltimore & O. C. R. Co. *v.* Scholes, 14 Ind. App. 524, 43 N. E. 156, 56 Am. St. Rep. 307.
Iowa. — Lillie *v.* McMillan, 52 Iowa 463, 3 N. W. 601.
Maine. — Knowles *v.* Scribner, 57 Me. 495.
Massachusetts. — Schmidt *v.* New York U. M. F. Ins. Co., 1 Gray 529.
Minnesota. — Burr *v.* Wilson, 22 Minn. 206.
Missouri. — Gay *v.* Gillilian, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712; Shinnabarger *v.* Shelton & Lane, 41 Mo. App. 147.
New York. — Phoenix Iron Co. *v.* "Hopatcong" and "Musconetcong," 127 N. Y. 206, 27 N. E. 841; Sommer *v.* Oppenheim, 19 Misc. 605, 44 N. Y. Supp. 396.
Ohio. — Strader *v.* Mullane, 17 Ohio St. 624.
Pennsylvania. — Catasauqua Mfg. Co. *v.* Hopkins, 141 Pa. St. 30, 21 Atl. 638.
Texas. — Sparks *v.* Dawson, 47 Tex. 138.
And see Welch *v.* Jugenheimer, 56 Iowa 11, 8 N. W. 673, where the question of reasonable doubt, as applied to civil cases, is exhaustively treated.

3. Brady *v.* Cole, 164 Ill. 116, 45 N. E. 438, and see Shell *v.* Holston Nat. B. & L. Ass'n (Tenn. Ch.), 52 S. W. 909.

4. Lalone *v.* United States, 164 U. S. 255.

5. United States *v.* San Jacinto Tin Co., 125 U. S. 273; Maxwell Land Grant Case, 121 U. S. 325; Colorado Coal and Iron Co. *v.* United States, 123 U. S. 307; United States *v.* Iron Silver Min. Co., 128 U. S. 673, *distinguishing* Moffatt *v.* United States, 112 U. S. 24.

6. Kingsley *v.* City of Brooklyn, 78 N. Y. 215; Baird *v.* Mayor of New York, 96 N. Y. 593; Tacoma *v.* Tacoma L. & W. Co., 16 Wash. 288, 47 Pac. 738; Pioneer Iron Co. *v.* City of Negaunee, 116 Mich. 430, 74 N. W. 700.

7. Elliott *v.* Missouri, K. & T. R. Co., 74 Fed. 707.

8. Medbury *v.* Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726.

9. Walton *v.* Blackman (Tenn. Ch.), 36 S. W. 195; De Douglass *v.* Union Traction Co., 198 Pa. St. 430, 48 Atl. 262; Walker *v.* Hough, 59

b. *Where the Charge Involves a Crime. — Conflict of Authority.* Some decisions have held that where the offense charged as the basis of a civil action constitutes a crime it must be established beyond a reasonable doubt,[10] but later and seemingly better considered opinions hold the contrary.[11]

II. PARTICULAR ELEMENTS OF FRAUD.

1. Intent and Scienter. — A. CONFLICT OF AUTHORITIES. — The question as to when and in what cases the intent and guilty knowledge of the party charged with fraud are essential elements, which must be proved in order to establish the fraud, is one upon which the decisions are not in entire harmony.[12] But this question is one of substantive law and not of evidence, and consequently its treatment is not proper here.

Ill. 375; Hand *v.* Waddell, 167 Ill. 402, 47 N. E. 772.

10. McConnell *v.* Delaware M. S. Ins. Co., 18 Ill. 228; Barton *v.* Thompson, 46 Iowa 30; Thayer *v.* Boyle, 39 Me. 475.

In Lexington Ins. Co. *v.* Paver, 16 Ohio 324, the court instructed the jury "that the belief of the defendants that the plaintiff fraudulently caused the said steamboat to be burned charged plaintiff with a crime, and that they ought not to find a verdict . . . unless the evidence . . . was so strong as to satisfy them of the fact beyond a reasonable doubt," and this instruction was held proper. See also Strader *v.* Mullane, 17 Ohio St. 624; Catasauqua Mfg. Co. *v.* Hopkins, 141 Pa. St. 30, 21 Atl. 638. See article "BURDEN OF PROOF."

11. Heiligmann *v.* Rose, 81 Tex. 222, 16 S. W. 931; Cary *v.* Hotailing, 1 Hill (N. Y.) 311; Gordan *v.* Parmelee, 15 Gray (Mass.) 413; Continental Ins Co. *v.* Jachnichen, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194; and cases cited.

Fraud Involving Murder. — In a civil action it is not necessary to establish fraud beyond a reasonable doubt, although the proof of such fraud involves as an essential ingredient the implication of the alleged wrongdoer in the crime of murder. Jack *v.* Mutual Reserve Fund Life Ass'n, 113 Fed. 49.

Same Representations Constituting False Pretenses. — Although the fraud charged may have been such as to subject the party to a criminal prosecution for the false and fraudulent representations, it is not necessary that the proof should be of such a degree or character as to warrant the conviction of the defendant in a criminal prosecution for such false and fraudulent representations. Eames *v.* Morgan, 37 Ill. 260.

12. **Necessity of Proving Scienter. Conflict.** — Thus, in Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915, the court said: "We regard it as well settled in this state that . . . the law will not afford relief on the grounds of false and fraudulent representations unless it be shown that the party making the representations knew them to be false, or that he made them under circumstances from which such knowledge will be inferred;" and see Kountze *v.* Kennedy, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360; while in Field *v.* Morse, 54 Neb. 789, 75 N. W. 58, it is said: "It is the settled law of this state that to entitle a party to relief on the ground of false representations it is not necessary for him to allege or prove that the party making them, at the time, knew they were false; in other words, whether the defendant acted in good faith or not is immaterial."

For leading and instructive cases in which the question is discussed *pro* and *con*, in addition to the cases hereinbefore cited, see the following:

England. — Derry *v.* Peek, 14 App. Cas. 337; Peek *v.* Gurney, L. R. 6 H. L. 377.

United States. — Penn. Mut. Life

B. Presumptions and Burden of Proof. — a. *In General.* But, in all cases where the intent and scienter are material and essential elements, it is incumbent upon the party charging the fraud to establish either directly or by proof of facts from which the law will raise the presumption, the existence of a fraudulent intent[13] and of guilty knowledge[14] on the part of the person charged with the fraud.

Ins. Co. *v.* Mechanics Sav. Bank & T. Co., 73 Fed. 653.

Alabama. — Brown *v.* Freeman, 79 Ala. 406; Sledge *v.* Scott, 56 Ala. 202.

Connecticut. — Scholfield G. & P. Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046.

Indiana. — Kirkpatrick *v.* Reeves, 121 Ind. 280, 22 N. E. 139.

Iowa. — Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769.

Massachusetts. — Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 726; Litchfield *v.* Hutchinson, 117 Mass. 95; Nash *v.* Minnesota Title Ins. & T. Co., 163 Mass. 574, 40 N. E. 1039, 47 Am. St. Rep. 489, 28 L. R. A. 753.

Michigan. — Totten *v.* Burhans, 91 Mich, 495, 51 N. W. 1119.

Nebraska. — Hitchcock *v.* Gothenburg Water P. & I. Co., 95 N. W. 638; Johnson & Gulick, 46 Neb. 817, 65 N. W. 883, 50 Am. St. Rep. 629.

New Jersey. — Cummings *v.* Cass, 52 N. J. L. 77, 18 Atl. 972.

Pennsylvania. — Erie City Iron Works *v.* Barber, 106 Pa. St. 125.

Texas. — Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742; Beatty *v.* Bulger, 28 Tex. Civ. App. 117, 66 S. W. 893.

13. *Arkansas.* — Taylor *v.* Mississippi Mills, 47 Ark. 247, 1 S. W. 283.

Colorado. — Brock *v.* Schradsky, 6 Colo. App. 402, 41 Pac. 512.

Delaware. — Grier *v.* Dehan, 5 Houst. 401.

Louisiana. — Winter *v.* Davis, 48 La. Ann. 260, 19 So. 263.

Maine. — Burrill *v.* Stevens, 73 Me. 395, 40 Am. Rep. 366.

Maryland. — Phelps *v.* George's Creek & C. R. Co., 60 Md. 536; Melville *v.* Gary, 76 Md. 221, 24 Atl. 604; McAleer *v.* Horsey, 35 Md. 439.

Massachusetts. — Page *v.* Bent, 2 Metc. 371; Tryon *v.* Whitmarsh, 1 Metc. 1, 35 Am. Dec. 339.

New Hampshire. — Page *v.* Parker, 43 N. H. 363, 80 Am. Dec. 172.

New York. — Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123; Hemenway *v.* Keeler, 68 N. Y. St. 819, 34 N. Y. Supp. 808.

Pennsylvania. — Kern *v.* Simpson, 126 Pa. St. 42, 17 Atl. 523; Cincinnati Cooperage Co. *v.* Gaul, 170 Pa. St. 545, 32 Atl. 1093.

14. *England.* — Derry *v.* Peek, 14 App. Cas. 337.

Alabama. — Barnett *v.* Stanton, 2 Ala. 181.

Arkansas. — Morton *v.* Scull, 23 Ark. 289; Plant *v.* Condit, 22 Ark. 454.

California. — Kelley *v.* Owens, 30 Pac. 596.

Connecticut. — Morehouse *v.* Northrop, 33 Conn. 380, 89 Am. Dec. 211.

Delaware. — Grier *v.* Dehan, 5 Houst. 401.

Florida. — Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

Illinois. — Nolte *v.* Reichelm, 96 Ill. 425; Merwin *v.* Arbuckle, 81 Ill. 501; Johnson *v.* Beeney, 9 Ill. App. 64; Hiner *v.* Richter, 51 Ill. 299; Mitchell *v.* Deeds, 49 Ill. 416, 95 Am. Dec. 621; Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241; Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240; White *v.* Watkins, 23 Ill. 482.

Indiana. — Gregory *v.* Schoenell, 55 Ind. 101.

Iowa. — Shaw *v.* Jacobs, 89 Iowa 713, 55 N. W. 333, 56 N. W. 684, 48 Am. St. Rep. 411, 21 L. R. A. 440; Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915; Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769; Holmes *v.* Clark, 10 Iowa 423.

Kansas. — Farmers' Stock Breeding Ass'n *v.* Scott, 53 Kan. 534, 36 Pac. 978.

Kentucky. — Campbell *v.* Hillman, 15 B. Mon. 508, 61 Am. Dec. 195.

Massachusetts. — Emerson *v.* Brigham, 10 Mass. 197, 6 Am. Dec. 109; Tryon *v.* Whitmarsh, 1 Metc. 1, 35

b. *Scienter Not Presumed from Falsity.* — Proof of the fact that the representation was false raises no presumption that the maker thereof knew it was false.[15]

c. *Former or Subsequent Knowledge.* — Proof of knowledge of facts inconsistent with or contradictory to the facts as represented, at some time before[16] or after[17] the time of the representation, does not necessarily raise the presumption of knowledge of the falsity of such representation at the time when made.

d. *Intention Not to Perform Promise.* — It has been held that where a person has promised to do or perform an act, proof of his failure and refusal to perform such act justifies the inference that he made such promise with the intent not to perform it.[18]

e. *Exceptional Cases.* — In some exceptional cases the rule is laid down that the burden is upon the alleged wrongdoer to prove that he had no guilty knowledge. Thus, it has been held that where the false representation was, in form, a warranty,[19] or where it consisted of an assumption of authority to act for another,[20] or where one is shown to have made a false statement, from the consequences of which he will be relieved if he honestly believed it to be true,[21]

Am. Dec. 339; Stone *v.* Denny, 4 Metc. 151; Page *v.* Bent, 2 Metc. 371.

Mississippi. — Selma, M. & M. R. Co. *v.* Anderson, 51 Miss. 829.

New Hampshire. — Page *v.* Parker, 40 N. H. 47.

New Jersey. — Cowley *v.* Smyth, 46 N. J. L. 380, 50 Am. Rep. 432.

New York. — Hubbell *v.* Meigs, 50 N. Y. 480; Marsh *v.* Falker, 40 N. Y. 562; Hemenway *v.* Keeler, 68 N. Y. St. 819, 34 N. Y. Supp. 808; Arthur *v.* Griswold, 55 N. Y. 400; Meyer *v.* Amidon, 45 N. Y. 169; Oberlander *v.* Spiess, 45 N. Y. 175; Wakeman *v.* Dalley, 51 N. Y. 27, *criticising* and *distinguishing* Bennett *v.* Judson, 21 N. Y. 238; Townsend *v.* Felthousen, 156 N. Y. 618, 51 N. E. 279; Hatch *v.* Spooner, 37 N. Y. St. 151, 13 N. Y. Supp. 642; Duffany *v.* Ferguson, 66 N. Y. 482; Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123; Daley *v.* Wise, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236.

North Carolina. — Cobb *v.* Fogalman, 23 N. C. 440.

Ohio. — Taylor *v.* Leith, 26 Ohio St. 428.

Pennsylvania. — High *v.* Berret, 148 Pa. St. 261, 23 Atl. 1004; Griswold *v.* Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878; Hexter *v.* Bast, 125 Pa. St. 52, 17 Atl. 252, 11 Am. St. Rep. 874; Staines *v.* Shore, 16 Pa. St. 200.

Vermont. — Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57.

15. Southern Development Co. *v.* Silva, 125 U. S. 248; Barnett *v.* Stanton, 2 Ala. 181; McDonald *v.* Trafton, 15 Me. 225; Griswold *v.* Sabin, 51 N. H. 167, 12 Am. Rep. 76; Anderson *v.* McPike, 86 Mo. 293; Tryon *v.* Whitmarsh, 1 Metc. (Mass.) 1, 35 Am. Dec. 339.

16. Morgan *v.* Skiddy, 62 N. Y. 319.

17. Morriss *v.* Talcott, 96 N. Y. 100; Nichols *v.* Pinner, 18 N. Y. 295. But see Johnson *v.* Monell, 2 Keyes (N. Y.) 655.

18. Dowd *v.* Tucker, 41 Conn. 203; Chicago T. & M. C. R. Co. *v.* Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39.

And see Porter *v.* Stone, 62 Iowa 442, 17 N. W. 654, and Frazier *v.* Miller, 16 Ill. 48.

19. **Warranty — Presumption.** "One will be presumed to know of the existence or non-existence of a fact which he undertakes to warrant." Hexter *v.* Bast, 125 Pa. St. 52, 17 Atl. 252, 11 Am. St. Rep. 874.

20. Jackson *v.* Holliday, 3 Mon. (Ky.) 363. And see Mendenhall *v.* Stewart, 18 Ind. App. 262, 47 N. E. 943.

21. Griswold *v.* Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878.

the burden of proof in each instance is upon the party charged with the fraud.

C. Substance and Mode of Proof. — a. *As to Intent or Motive.* **(1.) Direct Evidence. — Testimony of Party.** — (A.) In General. — Whenever a person is charged with a fraudulent motive or intent in a particular act or transaction, and such motive or intent becomes a material issue in the cause, it is competent for such person to testify directly that he did or did not intend to cheat or defraud,[22] and this is true, notwithstanding the diminished credit to which such testimony may be entitled as coming from an interested witness, and notwithstanding its unsatisfactory character[23] or the difficulty in

22. *United States.* — National Cash Register Co. *v.* Leland, 94 Fed. 502.

Georgia. — Acme Brg. Co. *v.* Central R. & Bkg. Co., 115 Ga. 494, 42 S. E. 8; Hale *v.* Robertson, 100 Ga. 168, 27 S. E. 937.

Indiana. — Shockey *v.* Mills, 72 Ind. 288. *Compare* Curme *v.* Rauh, 100 Ind. 247.

Iowa. — Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769; Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833; Frost *v.* Rosecrans, 66 Iowa 405, 23 N. W. 895; Watson *v.* Cheshire, 18 Iowa 202.

Kansas. — Gentry *v.* Kelley, 49 Kan. 82, 30 Pac. 186; Bice *v.* Rogers, 52 Kan. 207, 34 Pac. 796; Gardom *v.* Woodward, 44 Kan. 758, 25 Pac. 199, 21 Am. St. Rep. 310.

Maine. — Edwards *v.* Currier, 43 Me. 474; Wheelden *v.* Wilson, 44 Me. 11.

Maryland. — Phelps *v.* George's Creek & C. R. Co., 60 Md. 536.

Massachusetts. — Com. *v.* Woodward, 102 Mass. 155; Snow *v.* Payne, 114 Mass. 520; Thacher *v.* Phinney, 7 Allen 146.

Michigan. — Spalding *v.* Lowe, 56 Mich. 366, 23 N. W. 46.

Missouri. — And see Van Sickle *v.* Brown, 68 Mo. 627.

Nebraska. — Campbell *v.* Holland, 22 Neb. 587, 35 N. W. 871.

New Hampshire. — See Delano *v.* Goodwin, 48 N. H. 203, 97 Am. Dec. 601. See Norris *v.* Morrill, 40 N. H. 395.

New York. — Pope *v.* Hart, 35 Barb. 630; McKown *v.* Hunter, 30 N. Y. 625; Bullis *v.* Montgomery, 50 N. Y. 352; Forbes *v.* Waller, 25 N. Y. 430; Seymour *v.* Wilson, 14 N. Y. 567; Bedell *v.* Chase, 34 N. Y. 386; Starin *v.* Kelly, 88 N. Y. 418.

Pennsylvania. — Cole *v.* High, 173 Pa. St. 590, 34 Atl. 292.

Texas. — Fox *v.* Robbins (Tex. Civ. App.), 70 S. W. 597.

Financial Condition of Vendee. The vendee charged with fraud may testify that at the time of the purchase he considered himself responsible, and was of good credit. "It seems to be conceded that it was proper to show his belief in his own pecuniary responsibility; and the question as to his credit does not differ. Each was to the purpose of showing that he did not intend to obtain the property fraudulently, inasmuch as, if he was responsible and of good credit, it needed not that he should have such purpose, or that he should falsely represent." Bullis *v.* Montgomery, 50 N. Y. 352.

Contra. — Rule in Alabama. — "It is well settled in this state, whatever the rule may be elsewhere, that witnesses are not permitted to testify to their motive, belief or intention, when secret and uncommunicated; such mental status, when relevant, being a matter of inference to be determined from the circumstances of the case by the jury." McCormick *v.* Joseph, 77 Ala. 236; Wheless *v.* Rhodes, 70 Ala. 419; Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 318; Richardson *v.* Stringfellow, 100 Ala. 416, 14 So. 284.

23. Bullis *v.* Montgomery, 50 N. Y. 352; Watkins *v.* Wallace, 19 Mich. 57.

"A party, when charged with an intent to deceive or cheat or defraud, or with fraud and deceit, must be allowed to testify as a witness in his own behalf, that he did not intend to cheat, deceive or defraud, or to practice any fraud or deceit in the trans-

directly contradicting it, which objections go to the credibility of the testimony — not its competency.[24]

(B.) When Incompetent. — (a.) *In General.* — But the intent to defraud is shown by acts and declarations, and where the law attaches to certain acts the conclusive presumption that they were done in bad faith, testimony of the party affected to contravene the legal imputation is incompetent and inadmissible.[25]

(b.) *Where Representations Are in Writing.* — Where the fraudulent representations constituting the inducement have been reduced to writing, it has been held that the writing is the only proper evidence of such representations, and the intent of the person in making them, and testimony on his part, for the purpose of showing an intent different from that conveyed by the writing, is incompetent.[26]

Exception. — It has been held that this rule does not apply where the representation was made by one having no direct interest in the subject-matter, and standing in the position of a mere gratuitous informer.[27]

action wherein he is charged with having had such motive, however inconclusive, unsatisfactory or inconsistent his evidence may be." Pope *v.* Hart, 35 Barb. (N. Y.) 630.

24. "Whether one has acted in good faith or not is better known to himself than anybody else; and in many cases the statement of a person whose conduct is in question that he did so act is the only way in which good faith can be proved. The objection sometimes made to such testimony, that it cannot be directly contradicted, and therefore must be of little value, is one which might properly be urged to the credibility of the testimony, but is not one which should render it incompetent." Hale *v.* Robertson, 100 Ga. 168, 27 S. E. 937.

25. *Colorado.* — Bell *v.* Kaufman, 9 Colo. App. 259, 47 Pac. 1035.

Georgia. — See Hale *v.* Robertson, 100 Ga. 168, 27 S. E. 937.

Kentucky. — See Drake *v.* Holbrook, 23 Ky. L. Rep. 1941, 66 S. W. 512.

Maryland. — Phelps *v.* George's Creek & C. R. Co., 60 Md. 536; Ecker *v.* McAllister, 45 Md. 290-309.

Massachusetts. — Fisher *v.* Mellen, 103 Mass. 503.

Missouri. — Dulaney *v.* Rogers, 64 Mo. 201.

Nebraska. — See McCready *v.* Phillips, 56 Neb. 446, 76 N. W. 885.

New Jersey. — Cowley *v.* Smyth, 46 N. J. L. 380, 50 Am. Rep. 432.

North Carolina. — Cheatham *v.* Hawkins, 80 N. C. 161.

Tennessee. — Tennessee Nat. Bank *v.* Elbert, 9 Heisk. 154.

"In such case, his good or bad faith must be decided by what he did, and not by what he intended, and . . . the question of intent must be answered from his actions, and not from what he now says was his purpose." Forbes *v.* Thomas, 22 Neb. 541, 35 N. W. 411.

Intent of Party Making Statement to Commercial Agency. Where the party charged with fraud has made a statement of his financial standing to a commercial agency, the fact that he did not have the person charging the fraud, and relying on such statement, in mind, when he made the statement, is of no consequence, and his testimony to that effect is incompetent. Soper Lumber Co. *v.* Halstead, 73 Conn. 547, 48 Atl. 425.

Where Representations Constitute Warranty. — This rule applies where the defendant is sued on a warranty in a sale, although his fraudulent representations as to the subject of the warranty are also relied upon. Zimmerman *v.* Brannon, 103 Iowa 144, 72 N. W. 439.

26. Flower *v.* Brumbach, 131 Ill. 646, 23 N. E. 335; Williams *v.* Wood, 14 Wend. (N. Y.) 127.

27. In Nash *v.* Minnesota Title Ins. & T. Co., 163 Mass. 574, 40 N. E. 1039, 47 Am. St. Rep. 489, 28 L. R. A.

(C.) Weight and Effect. — The direct testimony of the party charged with the fraud that he acted in good faith and without any fraudulent intention is never conclusive of such fact,[28] even when given by such party as a witness for the party charging the fraud.[29]

(2.) Inferred from Circumstances. — But direct evidence of the

753 (*s. c.* on former appeal, 159 Mass. 437, 34 N. E. 625), the court, after distinguishing between the case where a representation is made by a party in interest, and that where a representation is made by a gratuitous informer having no interest in the subject, said: "Of course, one will be presumed to have intended his language to be understood according to its usual meaning, and in ordinary cases, in the absence of a reasonable explanation of his mistake, his testimony that he meant something different from what he said will have but little, if any, weight. But inasmuch as the question involved is, What was his state of mind, and his actual intent, as distinguished from his apparent intent? he is entitled to explain his language as best he can, if it is susceptible of explanation, and to testify what was in his mind in reference to the subject to which the alleged fraud relates. In this respect his expressions, whether spoken or written, are not dealt with in the same way as when the question is, What contract has been made between two persons who were mutually relying upon the language used in their agreement? . . . In the present case we need not determine whether the excluded evidence on this subject was very important. It is obvious that, if the defendant's officers knew that their statement in regard to the title was false in the sense in which they supposed it would generally be understood, it is immaterial whether or not they had a purpose to do injury or cause loss to anybody who might rely upon it. It is enough to furnish the foundation for a liability if they used language in regard to the title which they intended should be understood as a representation that the title was perfect, when they knew it was not perfect. . . . But a majority of the court are of opinion that it was competent for them to testify what their understanding and intention were in regard to the meaning of the representation, and that the presiding justice gave too broad an interpretation to our former decision in the case."

28. *Georgia.* — Royce *v.* Gazan, 76 Ga. 79; Powell *v.* Watts, 72 Ga. 770.

Illinois. — Geneser *v.* Telgman, 37 Ill. App. 374. *Compare* Shinn *v.* Shinn, 91 Ill. 477.

Maine. — Edwards *v.* Currier, 43 Me. 474.

Maryland. — Phelps *v.* George's Creek & C. R. Co., 60 Md. 536.

New York. — Thurston *v.* Cornell, 38 N. Y. 281; Forbes *v.* Waller, 25 N. Y. 430; More *v.* Deyoe, 22 Hun 208.

Wisconsin. — Anderson *v.* Wehe, 62 Wis. 401, 22 N. W. 584; Wilson *v.* Noonan, 35 Wis. 355.

When Immaterial. — "There are cases which present circumstances in themselves conclusive evidence of a fraudulent intent, and in which no proof of innocent motives, however strong, will overcome the legal presumption." Seymour *v.* Willson, 14 N. Y. 567.

"The intent to defraud is shown by acts and declarations. If a party is guilty of an act which defrauds another, his declaration that his intentions were honest cannot be taken as sufficient to overthrow the act." Wafer *v.* Harvey Co. Bank, 46 Kan. 597, 26 Pac. 1032. *Citing* Babcock *v.* Eckler, 24 N. Y. 623.

Admission of Guilt Not Conclusive. Where a party charged with fraud in a transaction testifies to facts tending to show that he was guilty of fraud, such testimony is not conclusive of such fact against the purchaser or assignee of such witness, or other person whose rights are affected by such fraud. Griffin *v.* Marguardt, 21 N. Y. 121.

29. Ferguson *v.* Daughtrey, 94 Va. 308, 20 S. E. 822; Barnum *v.* Hockett, 35 Vt. 77.

fraudulent motive or intent is not necessary, as it may in all cases be proved by circumstances,[30] and where it is shown that the party charged with the fraud knowingly made a false statement of a material fact calculated to induce the party to whom made to act, his fraudulent intent is presumed, and no further proof thereof is required.[31]

b. *As to Scienter.* — **(1.) Direct Evidence. — Testimony of Party.** Where the scienter is directly in issue, the party charged may testify directly that he had no knowledge of the true state of the facts which he is charged with fraudulently representing.[32]

Source of Information. — It is likewise competent for him to show what, if any, information he had on the subject, and the source from which he received it, in order to establish his good faith in making the representation.[33]

30. Scholfield G. & P. Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046; Lindauer *v.* Hay, 61 Iowa 663, 17 N. W. 98; Taylor *v.* Mississippi Mills, 47 Ark. 247, 1 S. W. 283. And see *infra*, "Circumstantial Proof."

"It [the fraudulent intention] may be shown by proof of its manifestations. These are usually the acts done by the wrongdoer and the circumstances surrounding him and the transaction." Oswego Starch Factory *v.* Lendrum, 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53.

31. *Illinois.* — Endsley *v.* Johns, 120 Ill. 469, 12 N. E. 247; Case *v.* Ayers, 65 Ill. 142; John V. Farwell Co. *v.* Nathanson, 99 Ill. App. 185; Reed & Co. *v.* Pinny, 35 Ill. App. 610; McBean *v.* Fox, 1 Ill. App. 177.

Maryland. — McAleer *v.* Horsey, 35 Md. 439.

Massachusetts. — Cole *v.* Cassidy, 138 Mass. 437, 52 Am. Rep. 284; Collins *v.* Denison, 12 Metc. 549; Arnold *v.* Teel, 182 Mass. 1, 64 N. E. 413.

Minnesota. — Haven *v.* Neal, 43 Minn. 315, 45 N. W. 612; Humphrey *v.* Merriam, 32 Minn. 197, 20 N. W. 138.

New York. — Redfern *v.* Cornell, 6 App. Div. 436, 39 N. Y. Supp. 656; Williams *v.* Wood, 14 Wend. 127.

Pennsylvania. — Huber *v.* Wilson, 23 Pa. St. 178.

32. Beach *v.* Bemis, 107 Mass. 498; Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769. And see Norriss *v.* Morrill, 40 N. H. 395; Elwell *v.* Russell, 71 Conn. 462, 42 Atl. 862.

33. *Georgia.* — See Hunt *v.* Hardwick, 68 Ga. 100.

Iowa. — Boddy *v.* Henry, 113 Iowa 462, 85 N. E. 771, 53 L. R. A. 769.

Massachusetts. — Beach *v.* Bemis, 107 Mass. 498; Cole *v.* Cassidy, 138 Mass. 437, 52 Am. Rep. 284. And see Cooper *v.* Lovering, 106 Mass. 77.

Nebraska. — Moore *v.* Scott, 47 Neb. 346, 66 N. W. 441.

New York. — Oberlander *v.* Spies, 45 N. Y. 175; Weed *v.* Case, 55 Barb. 534. But see Vines *v.* Chisolm, 15 N. Y. St. 820, 1 N. Y. Supp. 102.

North Carolina. — Hinson *v.* King, 51 N. C. 393.

Vermont. — Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57.

Advice of Counsel. — Where the secretary of a corporation is charged with fraudulently representing the condition of the company in a statement filed by him as a public record, testimony that he was acting under the advice of counsel and of the auditor of the state is competent. Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833. And see Cole *v.* High, 173 Pa. St. 590, 34 Atl. 292.

Same Representations Made to Defendant. — Where defendant (grantor) is charged with falsely and fraudulently representing the quality and condition of the land to the purchaser, it is competent for him to prove that a former owner of the land had described it to him as he described it to the plaintiff, the defendant never having seen the land himself. The court said: "It would have tended to show that

(2.) Circumstantial Proof. — (A.) In General. — Positive and direct proof of knowledge of the falsity of the representations by the person making them is not required; such knowledge may be inferred from other facts and circumstances that are proved.[34]

(B.) The Representation Itself. — The form or inherent characteristics of the representation itself may be such as to constitute, *per se*, strong evidence of the party's knowledge[35] or lack of knowledge[36] of its falsity.

(C.) Inferred From Position of Party. — (a.) *In General.* — The fact that the person making the false representation had knowledge of the falsity thereof may be inferred from proof of circumstances showing the position occupied by such person in relation to the subject-matter of the representation.[37]

plaintiff in error did not make the statement recklessly and without foundation, or that he had fabricated the representations. It would have tended to show the animus with which they were made, and, as fraud consists largely of intention, this evidence was proper, and should have been admitted. If Taylor made the statements to plaintiff in error, and he believed them, and had not been informed to the contrary, then it would be difficult to see in what manner he committed a fraud on defendant in error." Merwin *v.* Arbuckle, 81 Ill. 501.

Where the representations consisted of statements that flour was sound and sweet, when in reality it was unsound and sour, it was held proper for the defendants to show that the flour was received by them as part of a large consignment, the rest of which was sound, and the whole of which, so far as they knew, was all alike and kept in the same manner until the sale to plaintiff. Bowker *v.* Delong, 141 Mass. 315, 4 N. E. 834.

Remoteness. — Where the grantor in a sale of real estate is charged with having falsely and fraudulently represented the condition and quality of the land at the time he sold to plaintiff, evidence of the representations made to such grantor by the former owner from whom he purchased eleven years before may be relevant on the question of such grantor's honest belief, but, the representations in suit having been made as of his personal knowledge, and the statements of such former owner being directed to the condition of the land eleven years before, the offered evidence was of such little weight that its rejection was held not error. Drew *v.* Beall, 62 Ill. 164.

Contra — When Rule Not Applicable. — This rule does not apply in those jurisdictions or in those cases where proof of a scienter is unnecessary or immaterial. McCready *v.* Phillips, 56 Neb. 446, 76 N. W. 885; Mendenhall *v.* Stewart, 18 Ind. App. 262, 47 N. E. 943; and see cases cited in note 25 immediately preceding.

34. Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376; Hiner *v.* Richter, 51 Ill. 299; Jacobs *v.* Marks, 83 Ill. App. 156; Timmis *v.* Wade, 5 Ind. App. 139, 31 N. E. 827; Baker *v.* Hallam, 103 Iowa 43, 72 N. W. 419; Wafer *v.* Harvey Co. Bank, 46 Kan. 597, 26 Pac. 1032.

35. The Gate City Land Co. *v.* Heilman, 80 Iowa 477, 45 N. W. 760.

Thus, if a person (a lawyer especially) says that he owns a judgment to which he has no title whatever, no other proof of his guilty knowledge need be given. Goring *v.* Fitzgerald, 105 Iowa 507, 75 N. W. 385.

36. Covenants in Deed. — Where the alleged fraud consists in the grantor's representing that he owned the whole title, when in fact he owned only an undivided portion of the land, "the very fact that he conveyed with full covenants is strong evidence that he believed the truth of the statement and did not know of its falsity." Tone *v.* Wilson, 81 Ill. 529.

37. Gordon *v.* Irvine, 105 Ga. 144,

(b.) *Financial Condition.* — Thus, a person is ordinarily presumed to know the state of his financial condition which he undertakes to represent to another.[38]

(c.) *Owner Representing His Property.* — It is likewise presumed that the owner knows the truth concerning the title[39] and the quality and condition[40] of his property, concerning which he makes statements.

(d.) *Manager of Corporation.* — A person connected with the management of a corporation and intimately identified with its interests is presumed to be acquainted with its affairs.[41]

But it has been held that this rule does not apply where the party

31 S. E. 151; Corbett *v.* Gilbert, 24 Ga. 454; Van Velsor *v.* Seeberger, 59 Ill. App. 322; Rabinowitz *v.* Cohen, 44 N. Y. St. 123, 17 N. Y. Supp. 502.

Personal Capacity. — Where one falsely represents himself to be an experienced well-digger, the presumption is that he knew the falsity of such representation. Davis *v.* Driscoll, 22 Tex. Civ. App. 14, 54 S. W. 43.

Attorney's Knowledge of Client's Condition. — It is not an irrebuttable presumption that an attorney knows the financial condition of his client. Evans *v.* Mansur, 87 Fed. 275.

38. Johnson *v.* Monell, 2 Keyes (N. Y.) 655; Cox Shoe Co. *v.* Adams, 105 Iowa 402, 75 N. W. 316. But see Quinebaug Bank *v.* Brewster, 30 Conn. 559; see article "INSOLVENCY."

39. Burns *v.* Dockray, 156 Mass. 135, 30 N. E. 551; Barns *v.* Union P. R. Co., 54 Fed. 87.

40. Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240; Catling *v.* Newell, 12 Ind. 118; Velsor *v.* Seeberger, 35 Ill. App. 598; Simmons *v.* Horton, 51 N. C. 278; Mitchell *v.* Zimmerman, 4 Tex. 75.

A vendor of a patented machine is presumed to have knowledge of the truth or falsity of his representations as to its manufacture, selling qualities and success. Scholfield G. & P. Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046.

Value. — The owner of a merchandise store must be presumed to have known the value of his interest therein, which he is charged with falsely representing. Ward *v.* Crutcher, 2 Bush (Ky.) 87.

"The law presumes that the owner knows his property and that he truly represents it." Equitable Trust Co. *v.* Milligan, 31 Ind. App. 20, 65 N. E. 1044; and see Hanson *v.* Tompkins, 2 Wash. 508, 27 Pac. 73.

41. *Connecticut.* — Shelton *v.* Healey, 74 Conn. 265, 50 Atl. 742.

Iowa. — Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915.

Kentucky. — Ward *v.* Trimble, 19 Ky. L. Rep. 1801, 44 S. W. 450; Drake *v.* Holbrook, 23 Ky. L. Rep. 1941, 66 S. W. 512.

Minnesota. — Redding *v.* Wright, 49 Minn. 322, 51 N. W. 1056.

Nebraska. — Gerner *v.* Mosher, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244.

New York. — Gould *v.* Cayuga Co. Nat. Bank, 56 How. Pr. 505; Morgan *v.* Skiddy, 62 N. Y. 319; Yates *v.* Alden, 41 Barb. 172.

Texas. — Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742.

In Prewett *v.* Trimble, 92 Ky. 176, 17 S. W. 356, 36 Am. St. Rep. 586, in speaking of the knowledge to be imputed to the president of a bank, as to the status of affairs of the bank, which he is alleged to have misrepresented, the court says: "For leaving out of view the question whether he did in fact know the statement was untrue, being in a situation to know, and where it was his duty to know, he, in contemplation of law, did know it, and consequently such statement is to be held fraudulent."

Contra. — It was held in Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833, that an instruction informing the jury that the secretary of a corporation was charged with knowledge of

making the representation is merely a director, and the action concerns him only as such.[42]

(3.) **Admissibility.** — (A.) In General. — It may be laid down as a general rule that, for the purpose of proving that the person making the false representations knew them to be false, any evidence, direct or circumstantial, which tends to prove such knowledge or to place such person in a position from which such knowledge may reasonably and naturally be inferred is competent.[43] The scienter may be shown by evidence of the party's admissions of facts contradictory to the statements relied upon, in his conversation with other persons,[44] or by evidence tending to show that other persons had previously informed him of facts inconsistent with the truth of those representations.[45]

(B.) Similar Representations to Others. — Evidence to show that the party charged with the fraud had previously made similar rep-

the true condition of the company at the date he made and filed a public statement thereof, and that if the statement did not correctly report such condition it was untrue and false, "and so known to be by the defendant," was erroneous. This point was decided on the strict rule in Iowa, that in order to establish legal fraud, an active, conscious and intentional misrepresentation must be shown. And see Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915, and Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769.

42. Wakeman *v.* Dalley, 51 N. Y. 27; and see Arthur *v.* Griswold, 55 N. Y. 400; Reeve *v.* Dennett, 145 Mass. 23, 11 N. E. 938.

Burden of Proof. — The rule presuming knowledge of corporate affairs in the president or managing agent does not apply where the person is merely a director, and the action concerns him only as such. *Held*, therefore, in Ward *v.* Trimble, 19 Ky. L. Rep. 1801, 44 S. W. 450, that where the representations complained of were made to the agent of plaintiff, who was a director and attorney of the corporation, the presumption that he knew the truth of the matters misrepresented and, therefore, could not have relied thereon, does not apply. But where the facts in addition show that the signature of such agent as a director was signed to the published statement concerning the affairs of the corporation, this raises a rebuttable presumption that he knew whether the same was true or false. And in this case the burden is upon him or his principal to show that he did not know that such statement was in fact untrue.

43. For cases illustrating this rule, see the following: Shelton *v.* Healy, 74 Conn. 265, 50 Atl. 742; Salmon *v.* Richardson, 30 Conn. 360, 79 Am. Dec. 255; Walker *v.* Thompson, 61 Me. 347; Quinn *v.* Pinson, 25 N. C. 47, and see *ante* "Relevancy."

The state of defendant's bank account, and his mode of overdrawing a week or more before the purchase, is competent to show that he must have been aware of his financial condition at the time of the purchase. Haskins *v.* Warren, 115 Mass. 514.

In order to show knowledge of defendant that his representation to the effect that one S. was in July solvent and able to pay his debts was false, a mortgage given by S. to the defendant in the previous March, which was undischarged at the trial and was held by defendant at the time of the representation, is competent and admissible. Safford *v.* Grout, 120 Mass. 20.

44. Parrish *v.* Thurston, 87 Ind. 437; Cope *v.* Arberry, 2 J. J. Marsh. (Ky.) 296; Endsley *v.* Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572; Redding *v.* Godwin, 44 Minn. 355, 46 N. W. 563.

45. Safford *v.* Grout, 120 Mass. 20; Allin *v.* Millison, 72 Ill. 201; Walker *v.* Thompson, 61 Me. 347.

resentations to another is not competent to prove that he knew the representations in suit to have been false when made,[46] although some of the courts, in particular cases, have held such evidence competent for such purpose.[47]

2. Falsity of Representation. — A. Burden of Proof. — It is incumbent upon the party charging the fraud to prove that the representations alleged to have been fraudulent and deceitful were, in fact, false.[48]

B. Substance and Mode of Proof. — a. *In General.* — The liberal rule of admissibility applicable to the proof of fraud in general[49] applies with equal force to the proof of the truth or falsity of the representation.[50] But such truth or falsity must follow as a reasonable inference from the offered evidence, and must not be too remote; otherwise, such evidence is inadmissible.[51]

b. *Evidence Based on Experiment.* — The falsity of the represen-

46. Johnston *v.* Beeney, 5 Ill. App. 601.

47. Edwards *v.* Owen, 15 Ohio 500. And see *ante* "Other Fraudulent Acts," and especially cases cited thereunder.

In Insurance Co. *v.* Wright, 33 Ohio St. 533, it is held that evidence of similar representations made to others is admissible "for no other purpose than to show that the representations made to the plaintiff were known by the agent [person making them] to be false," and in the absence of proof showing that such other statements were false or known to be false, they were irrelevant upon the point on which alone they were admissible. And see *ante* "Other Fraudulent Acts," and especially cases cited in note 73.

48. *California.* — Belden *v.* Henriques, 8 Cal. 88.

Illinois. — Case *v.* Ayers, 65 Ill. 142; Mitchell *v.* Deeds, 49 Ill. 416, 95 Am. Dec. 621.

Indiana. — Gregory *v.* Schoenell, 55 Ind. 101.

Iowa. — Allison *v.* Jack, 76 Iowa 205, 40 N. W. 811.

Michigan. — Hoeft *v.* Kock, 119 Mich. 458, 78 N. W. 556.

New York. — Sherling *v.* Bole, 10 App. Div. 290, 41 N. Y. Supp. 889.

North Carolina. — Cobb *v.* Fogalman, 23 N. C. 440.

Pennsylvania. — Cox *v.* Highley, 100 Pa. St. 249.

Texas. — Dwyer *v.* Bassett, 1 Tex. Civ. App. 513, 21 S. W. 621.

Wisconsin. — Mosher *v.* Post, 89 Wis. 602, 62 N. W. 516.

Foreign Laws as Part of Fraud. In Willoughby *v.* Fredonia Nat. Bank, 52 N. Y. St. 387, 23 N. Y. Supp. 46, it was said: "It was the plaintiffs who alleged that the defendant's representation that it had a lien for the amount of the three notes was false. The burden was upon them to prove it so, and, if its truth or falsity depended upon the laws of Pennsylvania, it was incumbent upon them to make proof of those laws."

49. See *ante* I. 3, "Relevancy," A. "Liberal Rule of Admissibility."

50. For cases illustrating this principle, see: Townsend *v.* Felthousen, 156 N. Y. 618, 51 N. E. 279; Stubly *v.* Beachboard, 68 Mich. 401, 36 N. W. 192; Daniels *v.* Fowler, 123 N. C. 35, 31 S. E. 598; Whitney Wagon Works *v.* Moore, 61 Vt. 230, 17 Atl. 1007; Bradbury *v.* Bardin, 35 Conn. 577; Louisville Ins. Co. *v.* Monarch, 18 Ky. L. Rep. 444, 36 S. W. 563.

51. For cases in which the offered evidence, although having a possible bearing, was held too remote, see: Harmon *v.* Harmon, 61 Me. 222; Taylor *v.* Saurman, 110 Pa. St. 3, 1 Atl. 40; Bradbury *v.* Bardin, 34 Conn. 452.

The falsity of a representation that a man owned considerable land and was a man of means cannot be inferred from proof merely that shortly after the representation he was often borrowing money. Blackman *v.*

tation may be shown by the testimony of persons who, from experiment, have ascertained its falsity.[52]

c. *Expert Evidence.* — Expert evidence is sometimes competent to prove the falsity[53] or to establish the truth[54] of the representation.

d. *Comparison.* — Where the representation relates to a state of facts not certain and definite, but changeable in their nature, such as the condition or profits of a business, evidence of a comparison between the subject-matter as it actually existed before or after the time to which the representation relates, and as it was represented, is competent on the question of the falsity of such representation.[55] But the circumstances between which the comparison is drawn must be similar in all respects; otherwise the evidence is inadmissible.[56]

e. *Judgment Record in Another Action.* — The judgment record of an action in which the maker of the representation was a party or participant, and in which the falsity of such representation was determined, is competent evidence of such falsity,[57] and some decis-

Wright, 96 Iowa 541, 65 N. W. 843.

52. Nelson *v.* Wood, 62 Ala. 175, and see Merrillat *v.* Plummer, 111 Iowa 643, 82 N. W. 1020.

53. See Kelley *v.* Owens (Cal.), 30 Pac. 596.

In an action counting on defendant's fraudulent representations as to the soundness of a horse, the testimony of a veterinary surgeon as to the nature and character of the disease which the horse had before and at the time of the trade is competent to establish the falsity. Bennett *v.* Gibbons, 55 Conn. 450.

54. In an action where the owners of a boat, lost by the perils of navigation, are charged by the insurance company with falsely representing its seaworthiness, testimony of an expert that the boat was properly handled is admissible in answer to the charge that it was sunk because of the willful, fraudulent misconduct of its owners and crew. Louisville Ins. Co. *v.* Monarch, 18 Ky. L. Rep. 444, 36 S. W. 563.

55. Markel *v.* Moudy, 13 Neb. 322, 14 N. W. 409; Markel *v.* Moudy, 11 Neb. 213, 7 N. W. 853.

Profits of Business. — Where a business is purchased by plaintiff on the representation that it was large and remunerative and had a large custom, "if plaintiff in this case continued the business under substantially the same conditions, and there was found to be a marked discrepancy between the amount and value thereof and the state of the case as represented by the defendants, it is a circumstance proper to be considered upon the question of the truth of their alleged representations." Potter *v.* Mellen, 41 Minn. 487, 43 N. W. 375.

56. Gatling *v.* Newell, 12 Ind. 118; Mosher *v.* Post, 89 Wis. 602, 62 N. W. 516; Linn *v.* Gilman, 46 Mich. 628, 10 N. W. 46.

Profits of Business. — In deceit to recover for defendant's false representations as to the income and profits of a business sold to plaintiff, the fact that the business had fallen off in the hands of the purchaser is no evidence that it was not as valuable as the defendant represented it to be, especially where such business was of a kind in which skill, judgment and tact are essential to success. Taylor *v.* Saurman, 110 Pa. St. 3, 1 Atl. 40.

57. Burns *v.* Dockray, 156 Mass. 135, 30 N. E. 551; Bank of North America *v.* Crandall, 87 Mo. 208. *Compare* Hexter *v.* Bast, 125 Pa. St. 52, 17 Atl. 252, 11 Am. St. Rep. 874.

Where the false representation of the defendant consisted of a statement that the property sold to the plaintiff was free and clear of incumbrances, and that the statement of D., made in the presence of the parties at the time of the sale, that he held a mortgage on such property was false, a judgment subsequently obtained by D., foreclosing said mortgage in an action in which the de-

ions have held such evidence competent, although the maker of the representation was not a party to nor at all represented in such other action.[58]

Legal Decision. — But, "a legal decision, adverse to an opinion expressed, cannot establish fraud for which a party can be held liable in an action."[59]

f. *Time to Which Evidence Directed.* — The evidence offered to prove the falsity[60] or to establish the truth[61] of the representation should be directed to the time when the representation was made or to which it relates, but when the evidence shows such a condition of facts to have existed at some other time as to render it incredible with the facts as represented, it is competent and admissible.[62]

3. Inducement and Reliance. — A. Presumptions and Burden of Proof. — a. *In General.* — In an action based on an alleged fraud, the plaintiff must show that the fraud was the immediate and proximate cause of the damage, and hence, proof that the plaintiff

fendant was a party, is competent. Haight *v.* Hayt, 19 N. Y. 464.

Former Judgment Conclusive. For a case in which such former judgment was held conclusive and the testimony of the party to the contrary inadmissible, see Carvill *v.* Jack, 43 Ark. 439.

58. Hersey *v.* Benedict, 15 Hun (N. Y.) 282; Hadcock *v.* Osmer, 4 App. Div. 435, 38 N. Y. Supp. 618; Cope *v.* Arberry, 2 J. J. Marsh. (Ky.) 296; but see Baldwin *v.* Threlkeld, 8 Ind. App. 312, 34 N. E. 851.

Record Proof Not Essential. Where a suit is brought by the assignee of a note for the fraud of the assignor in representing the maker to be solvent, the falsity of such representation may be shown by parol, and evidence of a judgment obtained by the assignee against the maker is not essential. Cope *v.* Arberry, 2 J. J. Marsh (Ky.) 296. This rule applies to representations relating to the title to real property. Culver *v.* Avery, 7 Wend. (N. Y.) 380.

59. Duffany *v.* Ferguson, 66 N. Y. 482.

60. Redding *v.* Wright, 49 Minn. 322, 51 N. W. 1056; Morris *v.* People, 4 Colo. App. 136, 35 Pac. 188; Hemenway *v.* Keeler, 68 N. Y. St. 819, 34 N. Y. Supp. 808.

Proof that a horse had been diseased when a colt raises but a slight presumption of the falsity of a representation that such horse was sound when fully grown. Staines *v.* Shore, 16 Pa. St. 200.

Evidence of the condition of property, at a time subsequent to the making of a false representation as to such condition, in order to be admissible, must be such as to render it incredible that the facts as alleged by the representation could have been true at the time to which the representation refers. The question then is one for the jury. Mason *v.* Raplee, 66 Barb. (N. Y.) 180.

61. Gatling *v.* Newell, 12 Ind. 118; Bradley *v.* Carter, 37 N. Y. St. 416, 13 N. Y. Supp. 945.

Financial Condition Before and After. — The fact that defendant had abundant means shortly before and shortly after the time when he obtained plaintiff's signature to the note, by false representation, is immaterial, and in order to prove that plaintiff relied on defendant's own responsibility, and not upon the particular misrepresentation alleged, the evidence as to defendant's solvency should be directed alone to the time when he obtained the note. People *v.* Herrick, 13 Wend. (N. Y.) 87.

62. Sledge *v.* Scott, 56 Ala. 202; Mason *v.* Raplee, 66 Barb. (N. Y.) 180.

The written statement of the corporation's condition upon April 1st, made by defendant as president and manager thereof, and duly filed July 2nd, is competent to show the falsity of his alleged fraudulent representation as to its condition on May 20th of the same year. Shelton *v.* Healy, 74 Conn. 265, 50 Atl. 742.

knew of the representations and relied upon them, and that they were the inducement which caused him to act, is essential.[63] No presumption that the representations were relied upon by the party complaining arises from proof merely that they were made to him immediately before he acted.[64]

Standing and Reputation of Corporation. — A person dealing with a corporation is presumed to do so in reliance upon its financial standing and reputation in the community.[65]

b. *When Burden on Wrongdoer.* — It is held in some decisions that when representation is shown to have been material and false, and made under circumstances calculated to induce a reasonable person to act thereon, the burden is upon the party charged to show that such representation was not relied upon.[66]

63. *United States.* — McHose *v.* Earnshaw, 55 Fed. 584.

Alabama. — Robinson *v.* Levi, 81 Ala. 134, 1 So. 554; Darby *v.* Kroell, 92 Ala. 607, 8 So. 384; Moses *v.* Katzenberger, 84 Ala. 95, 4 So. 237.

Colorado. — Morris *v.* People, 4 Colo. App. 136, 35 Pac. 188.

Delaware. — Grier *v.* Dehan, 5 Houst. 401; Mears *v.* Waples, 3 Houst. 581.

Illinois. — White *v.* Watkins, 23 Ill. 426.

Indiana. — Gregory *v.* Schonell, 55 Ind. 101.

Iowa. — Jandt *v.* Potthast, 102 Iowa 223, 71 N. W. 216.

Kansas. — White *v.* Smith, 39 Kan. 752, 18 Pac. 931.

Maryland. — Ranstead *v.* Allen, 85 Md. 482, 37 Atl. 15.

Minnesota. — Humphrey *v.* Merriam, 32 Minn. 197, 20 N. W. 138.

Mississippi. — Selma M. & M. R. Co. *v.* Anderson, 51 Miss. 829.

Missouri. — See Parker *v.* Marquis, 64 Mo. 38.

Nebraska. — Campbell *v.* Holland, 22 Neb. 587, 35 N. W. 871; Upton *v.* Levy, 39 Neb. 331, 58 N. W. 95; State Ins. Co. *v.* New Hampshire T. Co., 47 Neb. 62, 66 N. W. 9, 1106; Stetson *v.* Riggs, 37 Neb. 797, 56 N. W. 628; Runge *v.* Brown, 23 Neb. 817, 37 N. W. 660.

New York. — Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376; Taylor *v.* Guest, 58 N. Y. 262; Newell *v.* Chapman, 56 N. Y. St. 380, 26 N. Y. Supp. 361.

Pennsylvania. — Swazey *v.* Herr, 11 Pa. St. 278.

Tennessee. — Continental Nat. Bank *v.* First Nat. Bank, 68 S. W. 497.

Insufficient Offer of Proof. An offer to prove that the representations were false and that the offerer believed them to be true, was held insufficient because the party did not further propose to show that he relied on such representations. Ackman *v.* Jaster, 179 Pa. St. 463, 36 Atl. 324.

Fraudulent Intent Alone Insufficient. — It must be shown, not only that the representations were fraudulent and intended to deceive, but that they were successful in deceiving. Bennett *v.* Gibbons, 55 Conn. 450.

64. Railway Co. *v.* Goodholm, 61 Kan. 758, 60 Pac. 1066.

Proof of Right to Rely, Insufficient. — Plaintiff has the burden of showing not only that he had a right to rely, but that he did, in fact, rely upon the representations in question. Curtis *v.* Hoxie, 88 Wis. 41, 59 N. W. 581.

65. A person dealing with a corporation is presumed to rely upon the fact that its financial standing and reputation in the community are founded upon the amount of its professed and supposed capital, and does so on the faith of that standing and reputation, although, as a matter of fact, he may have no personal knowledge of the amount of its professed capital. Hospes *v.* Northwestern Mfg. & Car Co., 48 Minn. 174, 50 N. W. 1117, 31 Am. St. Rep. 637, 15 L. R. A. 470. But see Brackett *v.* Griswold, 112 N. Y. 454, 20 N. E. 376.

66. Fishback *v.* Miller, 15 Nev.

c. *Representations Partly in Writing.* — Although some of the representations were reduced to writing, there is no presumption that only those reduced to writing were relied upon.[67]

d. *Knowledge of Contents of Writing.* — It is presumed that a person who has signed a written instrument knows the contents thereof and understands its true legal import,[68] but this presumption is not conclusive when it is claimed that such instrument by reason of fraud does not embrace the contract as actually made.[69]

e. *Knowledge of the Law.* — Where the representation affirms something not allowed by or contrary to the law, the presumption is conclusive that the party knows the law and consequently does not rely upon the false representation,[70] but there are decisions to the contrary.[71]

f. *Investigation of Subject-matter.* — Likewise, proof that the complaining party investigated and examined the subject-matter of the representations or made inquiries of others from whom he obtained information concerning the same raises the presumption that he relied thereon and not upon the representation.[72]

g. *Where Means of Knowledge Are Available.* — It has been held that where the subject-matter of the representation is patent and open to investigation, and the means of acquiring knowledge thereof are easily available to the party complaining, he is presumed to have knowledge thereof;[73] but if such means are not easily available,[74] or

428; Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241; Hiner *v.* Richter, 51 Ill. 299; Holbrook *v.* Burt, 22 Pick. (Mass.) 546; Linhart *v.* Foreman, 77 Va. 540; Grosh *v.* Ivanhoe Land & Imp. Co., 95 Va. 161, 27 S. E. 841. See also: Fargo Gas & C. Co. *v.* Fargo Gas & E. Co., 4 N. D. 219, 59 N. W. 1066; Cabot *v.* Christie, 42 Vt. 121; Neff *v.* Landis, 110 Pa. St. 204, 1 Atl. 177; Triplett *v.* Rugby Distilling Co., 68 Ark. 219, 49 S. W. 975.

67. Jandt *v.* Potthast, 102 Iowa 223, 71 N. W. 216. See also Cummings *v.* Cass, 52 N. J. L. 47, 18 Atl. 972.

68. Kingman *v.* Shawley, 61 Mo. App. 54; Beck *v.* O'Bert, 54 Mo. App. 240; Wood *v.* Massachusetts Mut. Acc. Ass'n, 174 Mass. 217, 54 N. E. 541; Freyer *v.* McCord, 165 Pa. St. 539, 30 Atl. 1024.

69. Kingman *v.* Reinemer, 166 Ill. 208, 46 N. E. 786; Ward *v.* Spelts, 39 Neb. 809, 58 N. W. 426; Woodbridge *v.* DeWitt, 51 Neb. 98, 70 N. W. 506.

70. Insurance Co. *v.* Reed, 33 Ohio St. 283; Fish *v.* Cleland, 33 Ill. 237; Wight *v.* Shelby R. Co., 16 B. Mon. (Ky.) 6, 63 Am. Dec. 522; Selma M. & M. R. Co. *v.* Anderson, 51 Miss. 829; Beall *v.* McGehee, 57 Ala. 438; Upton *v.* Tribilcock, 91 U. S. 45.

71. Hess *v.* Culver, 77 Mich. 598, 43 N. W. 994, 18 Am. St. Rep. 421, 6 L. R. A. 498; Motherway *v.* Wall, 168 Mass. 333, 47 N. E. 135.

A person is not debarred from relying on false representations "because he is presumed to know the law." Averill *v.* Wood, 78 Mich. 342, 44 N. W. 381.

72. Wakeman *v.* Dalley, 51 N. Y. 27; Farrar *v.* Churchill, 135 U. S. 609; Anderson *v.* McPike, 86 Mo. 293; Fauntleroy *v.* Wilcox, 80 Ill. 477.

73. Van Velsor *v.* Seeberger, 35 Ill. App. 598; Martin *v.* Harwell, 115 Ga. 156, 41 S. E. 686; Castenholz *v.* Heller, 82 Wis. 30, 51 N. W. 432.

74. In Fargo Gas & C. Co. *v.* Fargo Gas & E. Co., 4 N. D. 219, 59 N. W. 1066, it is held, *citing* Mead *v.* Bunn, 32 N. Y. 280, that every contradicting party has an absolute right to rely on the express statements of an existing fact, the truth of which is known to the opposite party and is unknown to him, as a

if, for any reason, the complaining party has an absolute right to rely on the representation,[75] or if the party charged with fraud uses artifice to prevent such investigation, the presumption cannot be invoked.[76] And, in any event, such presumption extends only to knowledge of facts which such an investigation would disclose.[77]

h. *When Burden Shifted.* — It has been held that when the party charging the fraud testifies directly that he relied upon the representation, the burden is shifted to his adversary to prove the contrary.[78]

B. Substance and Mode of Proof. — a. *Direct Evidence. Testimony of Party.* — The fact that the representations complained of were the inducement which caused the party to act may be proved by his own testimony. He may testify directly that he believed the representations to be true, and in reliance upon them changed his position,[79] or he may be asked by his adversary whether he would

basis of mutual engagement, and he is under no obligation to investigate and verify the statements to the truth of which the other party has deliberately pledged his fate. *Held*, therefore, that an instruction informing the jury that if the means were at defendant's hands to discover the truth or untruth of the plaintiff's statements, defendant must be presumed to have had knowledge of the actual facts, was erroneous, the only means being an investigation requiring a great amount of time and trouble. The authorities are thoroughly reviewed in this case.

75. If from the character, situation or surrounding of the thing traded for one party is compelled to trust the representations of the other, and, reposing special confidence in him for that purpose, relies on such representations, the law will protect him in such trust, although it may have been possible for him to have ascertained for himself all that it was important for him to know. Chase *v.* Rusk, 90 Mo. App. 25, and Cahn *v.* Reid, 18 Mo. App. 115.

76. Castenholz *v.* Heller, 82 Wis. 30, 51 N. W. 432.

77. Risch *v.* Lillienthal, 34 Wis. 250; Jackson *v.* Armstrong, 50 Mich. 65, 14 N. W. 702. And see Rhoda *v.* Annis, 75 Me. 17, 46 Am. Rep. 354.

78. Sprague *v.* Taylor, 58 Conn. 542, 20 Atl. 612.

79. *Illinois.* — Miner *v.* Phillips, 42 Ill. 123.

Indiana. — Parrish *v.* Thurston, 87 Ind. 437; Shockey *v.* Mills, 71 Ind. 288.

Iowa. — Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769; Bartlett *v.* Falk, 110 Iowa 346, 81 N. W. 602.

Massachusetts. — Pedrick *v.* Porter, 5 Allen 324; Safford *v.* Grant, 120 Mass. 20; Kline *v.* Baker, 106 Mass. 61.

Michigan. — Averill *v.* Wood, 78 Mich. 342, 44 N. W. 381; Stubly *v.* Beachboard, 68 Mich. 401; 36 N. W. 192; Berkey *v.* Judd, 22 Minn. 287.

Nebraska. — Bennett *v.* Apsley Rubber Co., 54 Neb. 553, 74 N. W. 821.

New York. — Thorn *v.* Helmer, 2 Keyes 27; Gould *v.* Cayuga Co. Nat. Bank, 56 How. Pr. 505; Hardt *v.* Schulting, 13 Hun 537; Vines *v.* Chisholm, 15 N. Y. St. 820, 1 N. Y. Supp. 102.

Pennsylvania. — Weaver *v.* Cone, 174 Pa. St. 104, 34 Atl. 551.

Rhode Island. — Charbonnel *v.* Seabury, 23 R. I. 543, 51 Atl. 208.

Vermont. — Whitney Wagon Wks. *v.* Moore, 61 Vt. 230, 17 Atl. 1007.

Wisconsin. — Castenholz *v.* Heller, 82 Wis. 30, 51 N. W. 432.

"There is no reason why a person claiming to be defrauded cannot tell how it was done and what he relied upon." Parker *v.* Armstrong, 55 Mich. 176, 20 N. W. 892.

Form of Question. — The party complaining may be asked, "What induced you to sign the papers and complete the trade?" Knight *v.* Peacock, 116 Mass. 362.

not have acted independent of the representations.[80]

Alabama Rule. — As in the case of proof of intent,[81] the courts of Alabama hold this character of evidence incompetent to prove reliance.[82]

b. *Circumstantial Proof.* — (1.) **In General.** — It is not essential that the party complaining of the fraud produce direct evidence that he relied upon the representations. Such fact may be inferred from the nature of the transaction, the relation of the parties, and the circumstances surrounding the entire transaction,[83] in the absence

"This is one of the facts which is always a part of the *res gestae*, and which it is always competent for the party to prove. And, now that the party is a witness, there is no sound reason why he should not prove it by his own testimony, so long as he is confined to the facts, and does not undertake to contradict his words or acts by an undisclosed motive or intent." Com. *v.* Julius, 173 Pa. St. 322, 34 Atl. 21, *distinguishing* Spencer *v.* Colt, 89 Pa. St. 314, and other cases.

Reasons for Reliance. — Where the plaintiff has testified that he was fraudulently induced to sign a note in favor of defendant, upon defendant's representation as to a certain specified fact, and that he did not rely upon the personal responsibility of the defendant, it is competent for him (plaintiff) to give the reason why he did not so rely upon defendant's responsibility, although this testimony is unnecessary. People *v.* Herrick, 13 Wend. (N. Y.) 87.

Agent. — Where the transaction was had with the agent of the party defrauded, such agent may testify that he relied upon the representations and that they induced the transaction. Kline *v.* Baker, 106 Mass. 61, *s. c.* on former appeal, 99 Mass. 253; Jandt *v.* Potthast, 102 Iowa 223, 71 N. W. 216.

Contra. — Conclusion Incompetent. In Hoyle *v.* Southern Saw Wks., 105 Ga. 123, 31 S. E. 137, the testimony of the party complaining of the fraud, that the purchase was made under a misunderstanding of the value of the goods, caused by misrepresentations of the defendant, was held properly excluded, as a conclusion of the witness, it not appearing what the misrepresentations were, or how they induced the purchase.

One Cannot Speak for Several. One of several defrauded parties cannot be asked what effect the representations had upon the minds of all of them; his testimony must be confined to himself. Fairbault *v.* Sater, 13 Minn. 210.

80. Carson *v.* Houssels (Tex. Civ. App.), 51 S. W. 290.

But see Cabot *v.* Christie, 42 Vt. 121, in which it is said, in speaking of an instruction that the jury must find that plaintiff would not have acted but for the representation: "What the plaintiff would have done but for the false representation is often a mere speculative inquiry, and is not the test of the plaintiff's right. If the false representation is often a terial and relied upon, and were intended to operate and did operate as one of the inducements to the trade, it is not necessary to inquire whether the plaintiff would or would not have made the purchase without this inducement."

81. See *ante*, cases cited in note 22 immediately preceding.

82. Ball *v.* Farley, 81 Ala. 288, 1 So. 253; Sledge *v.* Scott, 56 Ala. 202.

In McCormick *v.* Joseph, 77 Ala. 236, it was held error to allow the vendor, seeking to avoid the sale on the grounds of fraud of the vendee therein, to state that he believed the vendee to be insolvent and that "he would not have sold had he known of such insolvency."

83. Allin *v.* Millison, 72 Ill. 201; Nolte *v.* Reichelm, 96 Ill. 425; Taylor *v.* Guest, 58 N. Y. 262; Baker *v.* Hallam, 123 Iowa 43, 72 N. W. 419.

Presumption. — The relation existing between the parties and the circumstances surrounding the transaction may be such as to raise the presumption that the party alleging fraud relied upon the representations

of any direct evidence,[84] and it has been held that such circumstances afford much stronger and more satisfactory evidence of the inducement which moved the party than his direct testimony to the same effect.[85]

(2.) **Common Knowledge.** — The fact that the truth of the matters misrepresented was generally known in the community may be considered in determining whether the complainant had a right to rely on the representation.[86]

(3.) **Position of Party.** — Any evidence tending to show that the person charging the fraud occupied a position from which it may be inferred that he possessed knowledge or the means of knowledge of the subject-matter, is relevant to prove that he did not rely on the representation,[87] but is not conclusive thereof.[88]

(4.) **Information from Other Sources.** — The party charged may show that the complainant had acquired knowledge concerning the subject-matter from other sources than the representation.[89]

c. *To Whom Representation Made.* — (1.) **In General.** — While some connection, direct or indirect, between the person making the representation and the person relying thereon must be shown,[90] it is not essential that the representation be shown to have been made directly to the party claiming to have relied thereon in order to entitle him to prove that he had a right to and did rely thereon.[91]

where such reliance is material. Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241.

84. Direct Testimony Not Essential. — If from the nature of the transaction, the relation of the parties, or the surrounding circumstances, it may fairly be presumed that the plaintiff relied upon the representations, and that they were the inducing cause, the mere fact that he has or has not sworn to the conclusion that he relied upon them is immaterial. Hatch *v.* Spooner, 37 N. Y. St. 151, 13 N. Y. Supp. 642.

85. Lucas *v.* Crippen, 76 Iowa 507, 41 N. W. 205.

86. Perkin *v.* Embry, 24 Ky. L. Rep. 1990, 72 S. W. 788.

87. Gustafson *v.* Rustemeyer, 70 Conn. 125, 39 Atl. 104, 66 Am. St. Rep. 92, 39 L. R. A. 644; Mires *v.* Summerville, 85 Mo. App. 183; Cahn *v.* Reid, 18 Mo. App. 115; Ranstead *v.* Allen, 85 Md. 482, 37 Atl. 15; Weaver *v.* Shriver, 70 Md. 530, 30 Atl. 189; Allen *v.* Gibson, 53 Ga. 600; Goring *v.* Fitzgerald, 105 Iowa 507, 75 N. W. 385.

88. Goring *v.* Fitzgerald, 105 Iowa 507, 75 N. W. 385. And see Swinney *v.* Patterson, 25 Nev. 411, 62 Pac. 1.

89. Mather *v.* Robinson, 47 Iowa 403; High *v.* Kistner, 44 Iowa 79; Bowker *v.* Delong, 141 Mass. 315, 4 N. E. 834; Cameron *v.* Paul, 11 Pa. St. 277; Bennett *v.* Gibbons, 55 Conn. 450, 12 Atl. 99; Byrd *v.* Turpin, 62 Ga. 591.

90. Hindman *v.* First Nat. Bank, 112 Fed. 931; Smither *v.* Calvert, 44 Ind. 242; Phelps *v.* George's Creek & C. R. Co., 60 Md. 536.

91. Carville *v.* Jack's Adm'r, 43 Ark. 454; Brown *v.* Brown, 62 Kan. 666, 64 Pac. 599; Alexander *v.* Beresford, 27 Miss. 747; Scholfield G. & P. Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046. And see Morse *v.* Swifts, 19 How. Pr. (N. Y.) 275.

Where a grantor in a deed, in which the name of the grantee is left blank, delivers such deed to another person, he is presumed to have known that he might thereby become the grantor of a person with whom he had no personal dealings, and by accompanying the deed with an abstract, he is presumed to have intended to thereby represent to any person taking the title under him that he believed the abstract to be

(2.) Representations to Agent. — The party complaining may show that the representations were made to his agent and were by such agent communicated to him, and that he relied thereon.[92]

d. *Time of Representation.* — The false representation and the reliance thereon need not concur in point of time,[93] but the representation must have been the inducement which caused the party to act, and therefore evidence of a false representation made after the party had changed his position is incompetent on the question of reliance.[94]

C. Sufficiency of Evidence. — It has been held that "it does not require very strong proof to establish" the fact of reliance,[95] and the question is ordinarily one for the jury.[96]

4. Injury and Damages. — A. In General. — Essential Proof. "In the absence of averment and proof to that effect, fraud cannot be presumed to have been injurious."[97]

B. Burden of Proof. — It is incumbent upon the party charging

correct, and such person is justified in relying thereon. Baker *v.* Hallam, 123 Iowa 43, 72 N. W. 419.

Public Record of Corporate Condition. — The reports and statements required by law to be filed by certain corporations with the state records are presumed to be filed for the protection and perusal of the public, and a person may rely upon such reports as fully as he would were they personal communications to him, and may treat them as frauds if he is deceived thereby. Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833; Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742. But see Hunnewell *v.* Duxbury, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733, and Hindman *v.* First Nat. Bank, 112 Fed. 931.

92. Sigafus *v.* Porter, 84 Fed. 430; Jandt *v.* Potthast, 102 Iowa 223, 71 N. W. 216; Banner *v.* Schlessinger, 109 Mich. 262, 67 N. W. 116; Schumaker *v.* Mather, 38 N. Y. St. 542, 14 N. Y. Supp. 411; Tate *v.* Watts, 42 Ill. App. 103.

Contra. — *Compare* Henderson *v.* Miller, 36 Ill. App. 232.

93. Chilson *v.* Houston, 9 N. D. 498, 84 N. W. 354.

False representations inducing plaintiff to purchase property at an auction sale are admissible, although made after the property was struck off, if made before the final consummation of the sale by writings. Haight *v.* Hayt, 19 N. Y. 464.

Representations in Former Transaction. — Evidence of false representations made by defendant in a prior and similar transaction some months before may be competent as the grounds of reliance in a subsequent transaction between the same parties. Reeve *v.* Dennett, 145 Mass. 23, 11 N. E. 938. See also Chisholm *v.* Eisenhuth, 69 App. Div. 134, 74 N. Y. Supp. 496. But see Morris *v.* Talcott, 96 N. Y. 100.

94. Matlock *v.* Reppy, 47 Ark. 148, 14 S. W. 546; Farmers Stock Breeding Ass'n *v.* Scott, 53 Kan, 534, 36 Pac. 978; Robinson *v.* Levi, 81 Ala. 134, 1 So. 554; Mahoney *v.* O'Neill, 36 Misc. 843, 74 N. Y. Supp. 918; Birdseye *v.* Flint, 3 Barb. (N. Y.) 500. And see Kline *v.* Baker, 106 Mass. 61; Manhattan Brass Co. *v.* Reger, 168 Pa. St. 644, 32 Atl. 64.

95. Taylor *v.* Guest, 58 N. Y. 262.

96. *Indiana.* — Ingalls *v.* Miller, 121 Ind. 188, 22 N. E. 995.

Iowa. — Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 833.

Maryland. — McAleer *v.* Horsey, 35 Md. 439.

Massachusetts. — Nash *v.* Minnesota Title Ins. & T. Co., 159 Mass. 437, 34 N. E. 625.

North Dakota. — Chilson *v.* Houston, 9 N. D. 498, 84 N. W. 354.

Vermont. — Whitney Wagon Wks. *v.* Moore, 61 Vt. 230, 17 Atl. 1007.

Wisconsin. — Farr *v.* Peterson, 91 Wis. 182, 64 N. W. 863; Barndt *v.* Frederick, 78 Wis. 1, 47 N. W. 6, 11 L. R. A. 199.

97. Missouri Valley Land Co. *v.* Bushnell, 11 Neb. 192, 8 N. W. 389.

the fraud to prove that the fraudulent conduct of his adversary resulted directly in loss or injury to himself.[98]

III. RELEVANCY TO PLEADINGS.

1. In General. — The evidence of fraud must follow and correspond to the allegations in the pleading.[99]

2. Proof of Scienter. — Thus, where the pleading alleges positively that the defendant knew the representation to be false, this must be established affirmatively,[1] and in order for plaintiff to recover on a showing of any facts short of positive knowledge of such falsity, such facts must be alleged.[2]

3. Allegation of Specific Representations. — Where the pleading alleges certain specific representations as the basis of the action and as the inducement, evidence of representations other than those alleged for the purpose of proving the inducement is incompetent.[3]

98. *Illinois.* — White *v.* Watkins, 23 Ill. 426.

Kansas. — Stinson *v.* Aultman, 54 Kan. 537, 38 Pac. 788.

Kentucky. — Wilson *v.* Laffoor, 1 J. J. Marsh. 6.

Maine. — Brown *v.* Blunt, 72 Me. 415; Fuller *v.* Hodgdon, 25 Me. 243.

Maryland. — Melville *v.* Gary, 76 Md. 221, 24 Atl. 604.

Massachusetts. — Packer *v.* Lockman, 115 Mass. 72.

Michigan. — Bristol *v.* Braidwood, 28 Mich. 191.

Mississippi. — Moss *v.* Davidson, 1 Smed. & M. 112.

Texas. — Read *v.* Chambers (Tex. Civ. App.), 45 S. W. 742.

99. Means *v.* Flanagan, 79 Ill. App. 296; Foster *v.* Kennedy, 38 Ala. 359, 81 Am. Dec. 56; Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240; Cutter *v.* Adams, 15 Vt. 237. And see Sills Stove Works *v.* Brown, 71 Vt. 478, 45 Atl. 1040; Clark *v.* Ralls, 58 Iowa 201, 12 N. W. 260; Dudley *v.* Scranton, 57 N. Y. 424.

1. Pearson *v.* Howe, 1 Allen (Mass.) 207; Corbett *v.* Gilbert, 24 Ga. 454. And see Ross *v.* Mather, 51 N. Y. 108, 10 Am. Rep. 562.

2. Marshall *v.* Fowler, 7 Hun (N. Y.) 237.

Contra. — In Kelly *v.* Allen, 34 Ala. 663, it was held that although the pleading alleged that the defendant knew the falsity of the representation, the evidence was sufficient if it merely proved that he professed to know such facts. This was decided on the theory that where the representation was absolute, the scienter was immaterial.

Belief of Defendant in Truth of Representation. — If the party charged with fraud intends to rely on his belief in the truthfulness of his representation it is incumbent upon him to frame his pleadings on such hypothesis; and if in his pleadings he admits making representations and positively alleges that they were true, he should not be permitted to introduce evidence merely that he believed them to be true. Brewster *v.* Crossland, 2 Colo. App. 446, 31 Pac. 236.

3. Nash *v.* Minnesota Title Ins. & T. Co., 159 Mass. 437, 34 N. E. 625; Meek *v.* State, 117 Ala. 116, 23 So. 155; Hubbard *v.* Long, 105 Mich. 442; 62 N. W. 644. And see Pedrick *v.* Porter, 5 Allen (Mass.) 324; Hemenway *v.* Keeler, 68 N. Y. St. 819, 34 N. Y. Supp. 808.

Where Representation Verbally Repeated. — Where plaintiff's declaration in deceit was based upon alleged written representations of the defendant which induced him to act, parol evidence that such representations were verbally repeated is inadmissible where the declaration counts only on the written statement. Sills Stove Wks. *v.* Brown, 71 Vt. 478, 45 Atl. 1040.

Evidence Limited to Representations Alleged as Fraudulent. — In Johnson *v.* Beeney, 9 Ill. App. 64, it was held that where the declaration

4. Whole Conversation Competent. — But none of the foregoing rules preclude proof of all the statements made by the party charged with the fraud at the time he made the representations complained of. The whole of such conversation is competent as illustrative and explanatory of the transaction and intent, although only the words relied upon are set forth in the pleading.[4]

5. Substantial Proof Sufficient. — The party alleging the fraud is not bound to prove the same precisely as alleged in his pleading. It is sufficient if he prove such allegations substantially.[5]

sets forth several representations, only part of which are specifically alleged to have been false and fraudulent, the evidence is confined to the representations which are alleged to have been false and fraudulent, and evidence offered to prove that the rest of the representations were false and fraudulent is inadmissible, the court saying: "He cannot be allowed to make one case by his pleading and another by his proof."

Distinction. — In Thurman *v.* Mosher, 1 Hun (N. Y.) 344, it was held that there was a distinction between those cases where *specific charges* of fraud are made the basis of recovery and those where a *fraudulent intent* constitutes the gravamen of the action. In the latter case any representations or statement of a fraudulent character bearing on the motive of the party is competent evidence; but where a specific fraudulent act or statement is alleged as the basis of the action, such act or statement must be proved substantially as alleged in the pleading, and evidence of other fraudulent representations is irrelevant and improper.

4. Pedrick *v.* Porter, 5 Allen (Mass.) 324; Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376; Averill *v.* Wood, 78 Mich. 342, 44 N. W. 381; Jones *v.* State, 99 Ga. 46, 25 S. E. 617; Scholfield G. & P. Co. *v.* Scholfield, 71 Conn. 1, 40 Atl. 1046.

"Representations differing from but tending to prove those alleged, may be shown, and to enable the court or jury to understand the meaning of the statements made by the defendant, and relied upon as proving the alleged representations, the plaintiff may often properly be permitted to prove the entire conversation in which statements occur, even though representations materially different from those alleged are thereby shown." Shelton *v.* Healy, 74 Conn. 265, 50 Atl. 742.

5. *California.* — Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376.

Connecticut. — Shelton *v.* Healy, 74 Conn. 265, 50 Atl. 742.

Illinois. — Ladd *v.* Pigott, 114 Ill. 647, 2 N. E. 503.

Iowa. — Dashiel *v.* Harshman, 113 Iowa 283, 85 N. W. 85.

Maryland. — McAleer *v.* Horsey, 35 Md. 439.

Massachusetts. — Packard *v.* Pratt, 115 Mass. 405; Cunningham *v.* Kimball, 7 Mass. 64; Com. *v.* Coe, 115 Mass. 481.

New York. — James *v.* Work, 54 N. Y. St. 166, 24 N. Y. Supp. 149; Craig *v.* Ward, 1 Abb. Dec. 184.

Language of Representation. — It is not necessary to prove the exact language of the representation as set out in the pleading, but proof of it in substance and legal effect is sufficient. Weaver *v.* Shriver, 79 Md. 530, 30 Atl. 189; Endsley *v.* Johns, 120 Ill. 469, 12 N. E. 247.

In Bly *v.* Brady, 113 Mich. 176, 71 N. W. 521, where defendant alleged that the written instrument upon which suit was brought was obtained without any consideration, he was properly allowed to prove that he was induced to sign the instrument by reason of false representation.

Representations Alleged, Not Sole Inducement. — Although the declaration alleges that the plaintiff relied exclusively upon the representations set forth therein, the fact that the proof shows that they were not the sole inducement is not a material variance, if plaintiff mainly and substantially relied upon the representations alleged. Cook *v.* Gill, 83 Md. 117, 34 Atl. 248.

6. Proof of One of Several Alleged Representations. — Although several fraudulent representations are alleged in the pleading as the inducement upon which the party acted, proof of any one of them, if material, is sufficient.[6]

IV. WAIVER AND SATISFACTION OF FRAUD.

1. Knowledge of Fraud Essential to Waiver. — A. In General. The acts or conduct on the part of the person charging the fraud, in order to be sufficient to preclude him from obtaining the desired relief, must be shown to have been done or performed after he had obtained knowledge or the means of knowledge of such fraud.[7]

B. Presumptions and Burden of Proof. — a. *Generally.* Intent is an essential element in waiver or acquiescence, and unless the facts show knowledge and are such as to make the inference of intent natural and free from doubt, no presumption of waiver arises,[8] and, in ordinary cases, the burden of proving knowledge of the fraud and the time of its discovery rests upon the person alleging the waiver or acquiescence.[9]

b. *When Burden on Party Charging Fraud.* — It has been held that where the time prescribed by a statute of limitations has run since the commission of the fraud,[10] or where the party charging the fraud has done or performed an act *prima facie* indicating his intent to abide by the transaction,[11] the burden of showing a lack of knowledge is upon him.

c. *Constructive Knowledge From Record.* — Under a statute pro-

Thus where the pleading alleges that the vendee, being insolvent, knowingly concealed his insolvency from the vendor, proof of false statements made by such vendee respecting his financial standing, whereby he represented himself to be possessed of a large amount of property over and above his liabilities, is admissible, and does not constitute a variance. First Nat. Bank. *v.* McKinney, 47 Neb. 149, 66 N. W. 280.

6. Dashiel *v.* Harshman, 113 Iowa 283, 85 N. W. 85; People *v.* Haynes, 11 Wend. (N. Y.) 557; Yates *v.* Alden, 41 Barb. (N. Y.) 172.

7. Loeb *v.* Flash, 65 Ala. 526; Melick *v.* First Nat. Bank, 52 Iowa 94, 2 N. W. 1021; Hays *v.* Midas, 104 N. Y. 602, 11 N. E. 141.

8. McLean *v.* Clark, 47 Ga. 24.

Knowledge not Presumed. — Where a stockholder has been defrauded in the purchase of his stock, the fact that he has a right to examine the books of the corporation, from which he could have discovered the fraud, does not raise the presumption of knowledge of the fraud so as to start the running of the statute of limitations. Gerner *v.* Mosher, 58 Neb. 135, 18 N. W. 384, 46 L. R. A. 244. And see cases cited in note 43 under "Intent and Motive," *ante.* But see *contra,* Truett *v.* Onderdonk, 120 Cal. 581, 53 Pac. 26, in which it is held that where the party is shown to have been possessed of the means of acquiring knowledge, he is presumed to have such knowledge.

9. Pence *v.* Langdon, 99 U. S. 578; Wells *v.* Houston, 29 Tex. Civ. App. 619, 69 S. W. 183; Baker *v.* Lever, 67 N. Y. 304, 23 Am. Rep. 117; Smith's Adm'r *v.* Smith, 30 Vt. 139.

Principal and Agent. — Where the transaction attacked is between principal and agent, the burden is on the agent to show plaintiff's knowledge of the fraud. Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58.

10. Teall *v.* Slaven, 40 Fed. 774; Wood *v.* Carpenter, 101 U. S. 135.

11. First Nat. Bank *v.* McKinney, 47 Neb. 149, 66 N. W. 280.

viding that a recorded instrument is constructive notice of its contents to subsequent purchasers or incumbrancers, it has been held that an instrument, duly recorded, which bears the evidence of fraud on its face affords just as strong evidence of fraud to the parties defrauded as it does to such subsequent purchasers or incumbrancers.[12]

C. Direct Evidence — Testimony of Party. — The party charging the fraud may testify directly when he learned thereof.[13]

2. Relevant Circumstances. — A. Acts in Affirmance of Contract. — Evidence of any acts or conduct on the part of the person charging the fraud, evincive of an intent to abide by the contract or transaction, is relevant and competent on the question of his waiver of the right to rescind.[14]

B. Acceptance and Retention of Benefits. — Likewise, evidence of an acceptance and retention of the benefits of the transaction is relevant to establish the waiver.[15]

C. Delay. — Delay in rescinding the contract or transaction is a relevant circumstance tending to prove a waiver of the right to rescind.[16]

D. Newspaper Article. — A newspaper article, describing and publishing the fraud, has been held competent to show the party's knowledge thereof.[17]

E. Not Conclusive. — But evidence of such circumstances, while competent and relevant, is not conclusive of such waiver.[18] Evidence is admissible on the part of the person charging the fraud to explain such circumstances.[19]

3. In Deceit for Damages. — But where the action is brought, not to rescind, but in deceit for damages, evidence as to whether plain-

12. Teall *v.* Slaven, 40 Fed. 774.

13. Berkey *v.* Judd, 22 Minn. 287; Dean & Co. *v.* Zenor, 96 Iowa 752, 65 N. W. 410.

14. *United States.* — Pence *v.* Langdon, 99 U. S. 578; Mudsill Mining Co. *v.* Watrous, 61 Fed. 163.

California. — Ruhl *v.* Mott, 120 Cal. 668, 53 Pac. 304.

Connecticut. — Bulkley *v.* Morgan, 46 Conn. 393; Soper Lumber Co. *v.* Halstead, 73 Conn. 547, 48 Atl. 425.

Georgia. — Hunt *v.* Hardwick, 68 Ga. 100.

Indiana. — Gregory *v.* Schoenell, 55 Ind. 101.

Kansas. — Evans *v.* Rothschild, 54 Kan. 747, 39 Pac. 701.

Record of Action Brought on Contract. — The record of a former action brought by the vendor on the contract of sale for the price of the goods is admissible in evidence to show a waiver of the fraud in a subsequent action to rescind the sale on the grounds of fraud. First Nat. Bank *v.* McKinney, 47 Neb. 149, 66 N. W. 280.

15. Pollock *v.* Smith, 49 Neb. 864, 69 N. W. 312; Martin *v.* Butler, 111 Ala. 422, 22 So. 352; Brewer *v.* Keeler, 42 Ark. 289; Walker *v.* Thompson, 61 Me. 347; Cobb. *v.* Hatfield, 46 N. Y. 533.

16. Ruhl *v.* Mott, 120 Cal. 668, 53 Pac. 304; Blackman *v.* Wright, 96 Iowa 541, 65 N. W. 843; Wood *v.* Staudemayer, 56 Kan. 399, 43 Pac. 760.

17. Martin *v.* Butler, 111 Ala. 422, 20 So. 352.

18. Hawthorne *v.* Hodges, 28 N. Y. 486; Hinchman *v.* Weeks, 85 Mich. 535, 48 N. W. 790, and see cases cited in next note. But see Evans *v.* Rothschild, 54 Kan. 747, 39 Pac. 701.

19. Soper Lumber Co. *v.* Halstead, 73 Conn. 547, 48 Atl. 425; Morford *v.* Peck, 46 Conn. 380;

tiff had received or retained the fruits derived from the transaction or had ever offered to return the same is immaterial.[20]

4. Satisfaction of Fraud. — The defendant charged with fraud may prove that the damages occasioned by the fraud have been satisfied by another person,[21] or, that the plaintiff, by a subsequent agreement between the parties, agreed that a promise or obligation executed by defendant was taken in satisfaction of the original fraud.[22]

Hoyle *v.* Southern Saw Wks., 105 Ga. 123, 31 S. E. 137.

20. *Arkansas.* — Matlock *v.* Reppy, 47 Ark. 148, 14 S. W. 546.

Florida. — Williams *v.* McFadden, 23 Fla. 143, 1 So. 618, 11 Am. St. Rep. 345.

Indiana. — Johnson *v.* Culver, 116 Ind. 278, 19 N. E. 129; St. John *v.* Hendrickson, 81 Ind. 350.

Maryland. — Weaver *v.* Shriver, 79 Md. 530, 30 Atl. 189; McAleer *v.* Horsey, 35 Md. 439; Groff *v.* Hansel, 33 Md. 160.

Massachusetts. — Arnold *v.* Teel, 182 Mass. 1, 64 N. E. 413.

Missouri. — Parker *v.* Marquis, 64 Mo. 38.

Nebraska. — Pollock *v.* Smith, 49 Neb. 864, 69 N. W. 312.

No Presumption from Performance of Contract. — In Pryor *v.* Foster, 130 N. Y. 171, 29 N. E. 123, which was an action by a tenant to recover damages from his landlord on the grounds of fraudulent representations made by such landlord, prior to the lease, as to the quality and condition of the premises, it was held that the fact that the tenant occupied the premises for the entire term of the lease — to wit, fifteen months — and paid the rent thereon from month to month, did not raise the presumption of an intent to waive the fraud.

21. Merchants Bank *v.* Curtiss, 37 Barb. (N. Y.) 317.

22. Tallant *v.* Stedman, 176 Mass. 460, 57 N. E. 683.

FRAUDULENT CONVEYANCES.

By Clark Ross Mahan.

CROSS-REFERENCES:

Consideration; Conspiracy;
Deeds;
Fraud;
Husband and Wife;
Intent;
Vendor and Purchaser.

I. RELATIONSHIP OF DEBTOR AND CREDITOR.

1. Burden of Proof. — A. In General. — When a party claiming to be a creditor of the grantor in a conveyance alleged to be fraudulent seeks to set it aside, he must prove that the grantor is his debtor.[1]

1. *Alabama.* — Russell *v.* Davis, 133 Ala. 647, 31 So. 514; Lawson *v.* Alabama Warehouse Co., 73 Ala. 289; Deposit Bank of Frankfort *v.* Caffee, 135 Ala. 208, 33 So. 152.

Colorado. — Arnett *v.* Coffey, 1 Colo. App. 34, 27 Pac. 614.

Illinois. — Moritz *v.* Hoffman, 35 Ill. 553; Merrill *v.* Johnson, 96 Ill. 224; Tunison *v.* Chamblin, 88 Ill. 378.

Kentucky. — Warren *v.* Hall, 6 Dana 450.

Michigan. — Bodine *v.* Simmons, 38 Mich. 682.

Minnesota. — Schmitt *v.* Dahl, 88 Minn. 506, 93 N. W. 665; Bloom *v.* Moy, 43 Minn. 397, 45 N. W. 715, 19 Am. St. Rep. 243.

Nebraska. — Citizens State Bank *v.* Porter, 93 N. W. 391.

Texas. — Kerr *v.* Hutchins, 46 Tex. 384.

Wisconsin. — Norton *v.* Kearney, 10 Wis. 443; Jones *v.* Lake, 2 Wis. 210.

Rule Stated. — In Yeend *v.* Weeks, 104 Ala. 331, 16 So. 165, the court said: "The fact of primary importance in such a proceeding — whether it be to set aside the conveyance, as constructively fraudulent, and therefore voidable as against past due debts, or actually fraudulent, and voidable as to future as well as to past obligations — is the existence of a debt, for the payment of which, except for the conveyance, the property transferred could be made liable. The grantee in the conveyance must have an opportunity to dispute the debt, and may plead any defense, not merely personal, which the grantor debtor could have made against it."

Open Account as Proof of Debt. In Pidcock *v.* Voorhies, 84 Iowa 705, 42 N. W. 646, 49 N. W. 1038, it was held that proof of an open account against the grantor, commencing at a date prior to said conveyance, and showing almost daily debits and credits to a date subsequent thereto, but not disclosing the

An Attaching Creditor who seeks, prior to the recovery of a judgment, to have a conveyance or incumbrance set aside as fraudulent, has the burden of showing that he is a creditor of the defendant.[2]

B. Validity of Claim and Judgment. — Although a creditor attacking a conveyance by his debtor as fraudulent must establish the fact that the relationship of creditor and debtor existed between himself and the vendor prior to or at the time of the conveyance, it is not incumbent upon him to establish the fact that the claim on which his subsequent judgment was rendered was lawful;[3] nor is it incumbent upon him to show the character and validity of his judgment.[4]

2. Mode of Proof. — Judgment, Pleadings, etc. — A judgment in favor of the creditor and against the grantor is competent evidence of the indebtedness at the time of the rendition of the judgment,[5] but not for the purpose of proving the existence of a debt prior to the date of the judgment.[6]

amount of the indebtedness at any time up to the date of certain notes given by the defendant in settlement subsequent to said conveyance, was not sufficient to establish such prior indebtedness of the defendant, though the plaintiff testified that before the notes were given, and at other times, there were arrearages upon the account against said defendant.

In an Action Against a Third Person by the Grantee in a Deed of Trust to recover the property conveyed, it is not incumbent on the plaintiff to prove the consideration of the deed until the defendant has shown that he claims as a creditor of the grantor. Pennington *v.* Woodall, 17 Ala. 685.

Sheriff Justifying Seizure Under Attachment. — In Braley *v.* Byrnes, 20 Minn. 435, an action in replevin by a chattel mortgagee against a sheriff who justified the seizure under a writ of attachment against the mortgagor, claiming that the mortgage was fraudulent as to creditors, it was held incumbent upon the sheriff to show that the attachment debt existed, and that it was not enough merely for the sheriff to show that the mortgagor was indebted to creditors other than himself against whom the mortgage would be fraudulent; that as only creditors of the mortgagee could "be defrauded, so only a creditor can question the *bona fides* of the mortgage; and the respondent must therefore show that he is himself a creditor, or that he represents such a creditor, and not a mere general creditor, but one who has acquired a lien upon the mortgaged property either by proceedings in equity, or by virtue of process by which such property, if the mortgagor's, might lawfully be seized."

2. Cocks *v.* Varney, 45 N. J. Eq. 72, 17 Atl. 108. See also Bogert *v.* Phelps, 14 Wis. 88; Remington *v.* Bailey, 13 Wis. 370; Blue *v.* Pennisston, 27 Mo. 272, wherein a third person intervened claiming the property attached as trustee for a wife of the defendant, by virtue of a deed executed and recorded two years prior to the date of the plaintiff's claim; and it was held incumbent upon the plaintiff to show that his debt was really due long before the note was given, and that evidence to that effect was proper, notwithstanding that the note bore date subsequent to the execution of the trust deed.

3. Schmitt *v.* Dahl, 88 Minn. 506, 93 N. W. 665.

4. Eller *v.* Lacy, 137 Ind. 436, 36 N. E. 1088.

5. Vogt *v.* Ticknor, 48 N. H. 242; Hunsinger *v.* Hofer, 110 Ind. 390, 11 N. E. 463; Damon *v.* Bryant, 2 Pick. (Mass.) 401; Church *v.* Chapin, 35 Vt. 223; Yeend *v.* Weeks, 104 Ala. 331, 16 So. 165.

6. Snodgrass *v.* Branch Bank, 25 Ala. 161, 60 Am. Dec. 505; Bloom *v.*

The Pleadings in the Original Action in which judgment was rendered against the alleged fraudulent grantor are not competent evidence as against the grantee to show when the debt was created.[7]

II. THE CONSIDERATION FOR THE CONVEYANCE.

1. Presumptions and Burden of Proof. — A. In General. — The question as to who has the burden to prove the consideration for the conveyance attacked is one upon which the authorities do not agree. This disagreement, however, seems to correspond to a like disagreement as to whether or not the recital in such a conveyance regarding the consideration is competent evidence against attacking creditors, as will be shown in a subsequent portion of this article.[8] Accordingly on the one hand it is held that the attacking creditor has the burden of showing that the grantee paid no consideration,[9] although it is said to be wholly immaterial by whom this proof is made.[10]

Moy, 43 Minn, 397, 45 N. W. 715, 19 Am. St. Rep. 243; Schmitt *v.* Dahl, 88 Minn. 506, 93 N. W. 665; Citizens State Bank *v.* Porter (Neb.), 93 N. W. 391. See also Yeend *v.* Weeks, 104 Ala. 331, 16 So. 165, where the court, quoting from Lawson *v.* Alabama Warehouse Co., 73 Ala. 289, said: "It is not evidence of an indebtedness existing at any time anterior to its rendition; and if the conveyance is impeached as *merely* voluntary, as wanting in a valuable consideration, if the time of rendition is subsequent to the conveyance, there must be other evidence than the judgment affords to show the existence of the debt when the conveyance is made. But if, as in the present case, the gift or conveyance is assailed as tainted with actual fraud, as having been made to hinder, delay or defraud existing creditors, it is void, not only as to such creditors, but as to subsequent creditors; and the judgment, of itself, establishes the right of the creditor to impeach the gift of conveyance." *Compare* State Ins. Co. *v.* Prestage, 116 Iowa 466, 90 N. W. 62.

7. Arnett *v.* Coffey, 1 Colo. App. 34, 27 Pac. 614.

8. See *infra*, "Substance and Mode of Proof," wherein the question of the competency of such recitals is discussed.

9. *Indiana.* — Andrews *v.* Flanagan, 94 Ind. 383; American Varnish Co. *v.* Reed, 154 Ind. 88, 55 N. E. 224.

Iowa. — Johnson *v.* McGrew, 11 Iowa 151, 77 Am. Dec. 137; Wright *v.* Wheeler, 14 Iowa 8; Eisfield *v.* Dill, 71 Iowa 442, 32 N. W. 420; Wolf *v.* Chandler, 58 Iowa 569, 12 N. W. 601; Allen *v.* Wegstein, 69 Iowa 598, 29 N. W. 625.

Maryland. — Totten *v.* Brady, 54 Md. 170; Crooks *v.* Brydon, 93 Md. 640, 49 Atl. 921.

Mississippi. — Brown *v.* Bartee, 19 Smed. & M. 268. See also Hundley *v.* Buckner, 6 Smed. & M. 70.

Exchange of Property. — In Waterbury Lumb. & Coal Co. *v.* Hinckley, 75 Conn. 187, 52 Atl. 739, it appeared that the property in question had been conveyed to the grantee in exchange for property owned by the debtor, on which the grantee had a mortgage, and the grantee asserted that the conveyance to her was in consideration of her relinquishing her mortgage on the debtor's property; and it was held error for the court to impose upon the grantee the burden of proving that the property in question was conveyed to her upon a good consideration.

10. Eisfield *v.* Dill, 71 Iowa 442, 32 N. W. 420, where the conveyance in question was made by a husband to his wife at a time when he was likely to be called upon to pay debts as surety for his son, and the wife, to show the consideration for the conveyance to her, introduced a written contract signed by herself and her husband, which bore date of thirty years previous, at which time

On the other hand many of the courts hold that the grantee has the burden of showing that his conveyance was executed upon an adequate and valuable consideration;[11] that the recitals in the instrument of conveyance as to the consideration therefor are not competent evidence of that fact against creditors,[12] and that production and proof of a mere formal transfer of property by the debtor is not

they both testified it was executed; which contract was an agreement on the part of the wife to furnish the husband with certain moneys and an agreement on his part to repay them, which moneys so furnished, they testified, formed the consideration for the conveyance; but the paper appeared on its face to have been recently written and experts testified to that effect. It was held that the conveyance was properly set aside as being without consideration and in fraud of creditors.

11. *Alabama.* — Dolin *v.* Gardner, 15 Ala. 758; Houston *v.* Blackman, 66 Ala. 559, 41 Am. Rep. 756; Yeend *v.* Weeks, 104 Ala. 331, 16 So. 165; Miller *v.* Rowan, 108 Ala. 98, 19 So. 9; Wooten *v.* Steele, 109 Ala. 563, 19 So. 972; McCain *v.* Wood, 4 Ala. 258; Gordon *v.* Tweedy, 71 Ala. 202; Lipscomb *v.* McClellan, 72 Ala. 151; McTeers *v.* Perkins, 106 Ala. 411, 17 So. 547; Schall *v.* Weil, 103 Ala. 411, 15 So. 829; Chipman *v.* Glennon, 98 Ala. 263, 15 So. 822; Sparks *v.* Rawls, 17 Ala. 211; Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Roswald *v.* Hobbie, 85 Ala. 73, 4 So. 177; Stix *v.* Keith, 85 Ala. 465, 5 So. 184; Norwood *v.* Washington, 136 Ala. 657, 33 So. 869.

New Hampshire. — Kimball *v.* Fenner, 12 N. H. 248.

Pennsylvania. — Redfield & R. Mfg. Co. *v.* Dysart, 62 Pa. St. 62.

Virginia. — Flynn *v.* Jackson, 93 Va. 341, 25 S. E. 1.

West Virginia. — Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847. See also Harrington *v.* Johnson, 7 Colo. App. 483, 44 Pac. 368, an action to set aside a mortgage as having been given in fraud of creditors, wherein the fraudulent character of the original transaction was fully established; and it was held that the burden of proof was upon the defendant holder of the note to show that he was a *bona fide* purchaser for value before maturity.

A Transfer of Property Made by a Debtor Upon a Secret Trust is *prima facie* fraudulent as against creditors, and as against them the burden of proof is upon the party claiming under it to show adequacy of consideration and good faith in the transaction. Ferguson *v.* Gilbert, 16 Ohio St. 88, so holding on the ground that the facts in respect to the consideration were peculiarly within the knowledge of the grantee and the grantor.

On a trial of a right of property in a stock of goods, between a plaintiff in attachment and a purchaser from the debtor, the burden is on the plaintiff, in the first instance, to show that the goods belonged to the defendant at the time of the levy; but, when he has proved that his debt antedates the claimant's alleged purchase; that the defendant was insolvent at the time; that the sale conveyed substantially all of his property, in payment of an antecedent debt, the burden is shifted to the claimant to establish the validity of his purchase. Waxelbaum *v.* Bell, 91 Ala. 331, 8 So. 571.

12. Leonhard *v.* Flood, 68 Ark. 162, 56 S. W. 781. See also Foster *v.* Haglin, 64 Ark. 505, 43 S. W. 763.

In Prescott *v.* Hayes, 43 N. H. 593, the court, in holding that a recital acknowledging a consideration received is not evidence of that fact against existing creditors, and that the conveyance is presumed to be fraudulent as against them until proof of consideration is made, said: "The party who alleged that a deed was made *mala fide* and without consideration, and is consequently void as to him as a creditor, upon the ordinary principles of evidence would be required to prove the fact. But the rules of evidence are subject to exceptions based upon principles of public policy, and designed to throw the burden of proof upon the party who, from the nature of the

enough to cast upon antecedent creditors the burden of showing a want of a valuable consideration.[13] Other courts, however, hold that this burden is not imposed until the attacking creditor has shown that the conveyance was made by the debtor with a fraudulent intent.[14]

A Prima Facie Case is made and the burden of proof put upon the attacking creditor by the production of the securities recited in the

transaction, has the best means of knowing the facts, and of showing that his own conduct has been honest and free from fraud. The question as to this point was early raised and considered in this State, in the case of Kimball *v.* Fenner, 12 N. H. 248, where it was held that the acknowledgment in a deed of the receipt of a consideration is not of itself evidence against existing creditors that a consideration was in fact received. As to creditors who have levied on the land, the deed is to be regarded as a mere voluntary conveyance, and presumed to be fraudulent until some evidence is offered of the consideration; and that, even if the admission contained in the deed were held to be *prima facie* evidence of a showing, that evidence would be sufficiently rebutted by showing that a person who had levied on the land was a creditor when the deed was made. This decision goes far beyond any natural construction of the statutes, which merely provide that if deeds are made without good faith, or without a valuable consideration, they shall be void as to creditors; yet it was competent for the court, for the purpose of carrying into effect the policy of these statutes, to prescribe a rule of presumption different from that existing in ordinary cases. The rule established in this case is distinctly recognized in Belknap *v.* Wendell, 21 N. H. 184, where it is said, by Gilchrist, C. J., that there is no doubt that the general rule is that a party claiming under a deed must show, as against existing creditors, that the deed was made upon good consideration. And the same point was held in Ferguson *v.* Clifford, 37 N. H. 97."

13. Ferguson *v.* Gilbert, 16 Ohio St. 88.

14. Jones *v.* Simpson, 116 U. S. 609; Leonhard *v.* Flood, 68 Ark. 162, 56 S. W. 781; Ross *v.* Wellman, 102 Cal. 1, 36 Pac. 402; Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847; Knight *v.* Nease, 53 W. Va. 50, 44 S. E. 414; First National Bank *v.* Prager, 50 W. Va. 660, 41 S. E. 363; Blackshire *v.* Pettit, 35 W. Va. 547, 14 S. E. 133.

In Texas a statute declares in effect that a conveyance intended to defraud creditors is void as to them, and provides also among other things that "this article shall not affect the title of a purchaser for a valuable consideration, unless it appear that he had notice," etc. And in Tillman *v.* Heller, 78 Tex. 597, 14 S. W. 700, the court held that the order of these several provisions seems to indicate how it was intended the burden of proof should shift during the progress of the trial: (1) The creditor, in order to defeat the conveyance, is bound to show the fraudulent intent; (2) when such intent is shown, the purchaser, in order to sustain the transaction, must show that he has paid value; (3) this being shown, the burden again shifts, and the creditor, in order to prevail in the action, must prove that at the time of the payment the purchaser had notice of the fraud. "This seems to us the most reasonable and satisfactory rule. Another argument in its favor is that the payment of the purchase money is a fact peculiarly within the knowledge of the purchaser. 1 Stark. Ev. 421. This reason is especially applicable to the present case. The appellee testified in his own behalf that he gave two notes for the agreed price of the goods, but did not say whether they were negotiable or not. The appellant did not know the truth of the matter. Under such circumstances it would be unreasonable to place the burden of proof upon the creditor and compel him to go to his adversary for his evidence." See

conveyance without showing the considerations upon which securities were based or executed.[15]

The Attacking Creditor May Admit the Sufficiency of the Consideration, or he may introduce evidence himself to show it, and when he does this he cannot be permitted to say, by way of exception, that the grantee was bound to prove the consideration.[16]

Application of Proceeds. — If the grantee undertakes to relieve himself from liability by showing that he has applied the property to the discharge of the debts of his grantor, or paid to the creditors a sum of money equal to the value of the property, the burden of proof rests upon him not only to show such an appropriation by him of the property, or the payment of a sum of money equal to its value, but also to show that the debts discharged were subsisting, legal, *bona fide* demands against his grantor.[17]

B. Subsequent Creditor. — So also the recital in the instrument as to the consideration therefor is not any evidence thereof as against a subsequent creditor, and the burden of proof as to the consideration is upon the grantee.[18]

C. Subsequent Purchaser. — The mere fact that a deed, attacked as voluntary and fraudulent as against subsequent purchasers, expresses no consideration, does not affect its validity; the deed itself imports a consideration, and to avoid it the party objecting must prove that no consideration was given.[19]

also Martel *v.* Somers, 26 Tex. 551; King *v.* Russell, 40 Tex. 124; Compton-Ault & Co. *v.* Marshall, 88 Tex. 50, 27 S. W. 121, 28 S. W. 518, 29 S. W. 1059.

15. Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458. See also Hundley *v.* Buckner, 6 Smed. & M. (Miss.) 70.

16. Belknap *v.* Wendell, 21 N. H. 175, where the attacking creditor offered the statement of one of the grantees in a disclosure that the consideration of the conveyance was money advanced.

17. Cottingham *v.* Greeley-Barnham Grocery Co., 129 Ala. 200, 30 So. 560.

18. Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847, where the court, in so holding, said: "While, then, there can be no doubt that, as against a grantor and his heirs, the acknowledgment in a deed that a consideration has been paid is *prima facie* evidence of the truth of the fact recited, yet the decided weight of the authorities is that such a recital in a deed is not any evidence of such fact, as against a stranger, or as against a creditor of the grantor, assailing such deed as voluntary. The real basis of these decisions would seem to be that, if the payment of a valuable consideration is a fact essential to the maintaining a claim, this fact must be proven as other facts are proven. This acknowledgment of the receipt of a valuable consideration for a deed made by the grantor in the body of his deed, should have the weight of a like acknowledgment made by him in writing in any other manner, as by a receipt signed by him. It is, after all, nothing but an admission by the grantor that he has received a valuable consideration for the land conveyed. And, on general principles, declarations or admissions made by a person out of the presence of another cannot prejudice such other, when there is no relation of privity, mutual interest, or agency between the person making such declaration or admission and such third person."

19. Boynton *v.* Rees, 8 Pick. (Mass.) 329, 19 Am. Dec. 326.

The Grantee of a Wife, to whom property had been conveyed by her husband, has not the burden in a contest with a creditor of the hus-

D. Creditors Not Assenting to Assignment by Debtor. — In the case of an assignment by an insolvent debtor in trust for some of his creditors by a conveyance to which the others are not parties, nor assenting,, it is incumbent on the grantees to show a valuable consideration.[20]

E. Conveyance in Payment of Pre-Existing Debt. — The same conflict among authorities seems to exist in the case of a conveyance claimed to have been made in payment of a pre-existing debt, some courts holding that the attacking creditor must show that the conveyance was not made to pay a debt justly due.[21] On the other hand some courts hold that the burden is on the purchasing creditor to show by clear and satisfactory evidence not only a *bona fide* debt, but also that the amount thereof was not materially less than the fair and reasonable value of the property.[22] But it is not necessary in such case that each of the items involved should also be separately proved to the satisfaction of the jury; it is enough if they

band to establish the *bona fides* of the conveyance to the wife by that positive and cogent proof which would be required of her, but the burden of proof is upon the party seeking to impeach the conveyance. Hooser *v.* Hunt, 65 Wis. 71, 26 N. W. 422.

20. Widgery *v.* Haskell, 5 Mass. 144, 4 Am. Dec. 41. See also article "Assignment for Benefit of Creditors," Vol. I.

21. Coates *v.* Miller, 99 Ill. App. 227; Hasie *v.* Connor, 53 Kan. 713, 37 Pac. 128; Nichols *v.* Bancroft, 74 Mich. 191, 41 N. W. 891. *Compare* Krolik *v.* Graham, 64 Mich. 226, 31 N. W. 307.

22. Buford *v.* Shanon, 95 Ala. 205, 10 So. 263; Penney *v.* McCullough, 134 Ala. 580, 33 So. 665; Robert Graves Co. *v.* McDade, 108 Ala. 420, 19 So. 86; Mitcham *v.* Schuessler, 98 Ala. 635, 13 So. 617; Thompson *v.* Tower Mfg. Co., 104 Ala. 140, 16 So. 116; Calhoun *v.* Hannan, 87 Ala. 277, 6 So. 291; Murray *v.* Heard, 103 Ala. 400, 15 So. 565. See also Wright *v.* Wheeler, 14 Iowa 8. *Compare* Goodgame *v.* Cole, 12 Ala. 77.

Note. — A grantee claiming the consideration for a conveyance to be the delivering up of a note held by him against his grantor must, as against existing creditors of his grantor, show that the note evidenced a real debt. McCaskle *v.* Amarine, 12 Ala. 17. See also Valley Distilling Co. *v.* Atkins, 50 Ark. 289, 7 S. W. 137, where the only evidence of a consideration aside from the recital in the bill of sale attacked as fraudulent was evidence of a delivery by the vendee to the vendor of a note which the witness supposed to be the one described in the bill of sale. It was held that, conceding that this established the fact that the vendee surrendered to the vendor the note executed by the latter, it was not sufficient to prove an honest debt between the parties as against the attaching creditor. "It was no better evidence than the vendor's receipt as for money paid, or what the parties said about the transaction at the time, and was insufficient to establish the payment of a good consideration."

Where the Validity of a Deed of Trust is Assailed by a creditor whose debt existed at the time of its execution, the burden is on the grantee to show the existence of the alleged debt, and the statements in the note and deed are not available for this purpose. Howell *v.* Carden, 99 Ala. 100, 10 So. 640.

A Creditor Taking a Mortgage From His Debtor's Grantee, with knowledge of the fraud in the original conveyance, has the burden of showing, as against existing creditors at the time of the original conveyance, the existence of his debt before such conveyance. Rilling *v.* Schultze, 95 Tex. 352, 67 S. W. 401.

are satisfied from the evidence that the amount of the debt as claimed was due and allowed on a settlement between the parties.[23]

F. Grantor Remaining in Possession. — In the case of a conveyance of land or transfer of chattels, where the grantor retains possession of the property after the conveyance and exercises acts of ownership over it, the burden is on the grantee as against existing creditors to show the existence and payment of the consideration named in the conveyance.[24]

G. Conveyances Between Relatives. — a. *In General.* — It is held by some courts that the burden of proving that such a conveyance is voluntary and fraudulent is upon creditors assailing the conveyance on that ground;[25] but by others that although the deed recites a valuable consideration and the allegations of fraud are denied and a valuable consideration asserted, the grantee has the burden of showing that the consideration was paid, and that the recital in the instrument is no evidence of that fact against the creditor.[26]

Cogency of Proof Required. — And it is held also that when a near relationship exists between the grantor and grantee, the burden resting upon the grantee to show a valuable consideration must be dis-

Where a Husband Undertakes to Prefer His Wife to the exclusion of other creditors, the proof should be clear and satisfactory that the wife has a valid subsisting debt, one which is to be enforced and payment exacted regardless of the fortune or misfortune of the husband. Frank *v.* King, 121 Ill. 250, 12 N. E. 720.

23. Buford *v.* Shannon, 95 Ala. 205, 10 So. 263.

24. Neal *v.* Gregory, 19 Fla. 356; Phillips *v.* Reitz, 16 Kan. 396; Hayden *v.* Smith, 31 Mo. 566.

25. Hasie *v.* Connor, 53 Kan. 713, 37 Pac. 128; Williamson *v.* Williams, 11 Lea (Tenn.) 355; King *v.* Russell, 40 Tex. 124.

Rule Stated. — In Klay *v.* McKellar, 122 Iowa 163, 97 N. W. 1091, wherein the conveyance expressing a valuable consideration was made to a brother of the grantor, the court said: "It is true that dealing between parties intimately related, resulting in delay or hindrance to creditors, will be scrutinized closely, and promptly be set aside if fraud be established; but, so far as we are aware, that rule has never been so far extended as to hold that a deed, fair in form, from one brother to another, is presumptively fraudulent or voluntary. Bump on Fraud. Con. 54; Wait on Fraud. Con. §§ 242, 271. The creditor may, however, allege the fraudulent or voluntary character of the conveyance, and if the charge be made good by proof, may subject the property to the payment of his claim."

26. *Georgia.* — Scott *v.* Winship, 20 Ga. 429; Kelly *v.* Simmons, 73 Ga. 716.

Nebraska. — Plummer *v.* Rummel, 26 Neb. 142, 42 N. W. 336; Bartlett *v.* Cheesebrough, 23 Neb. 767, 37 N. W. 652; Lusk *v.* Riggs, 91 N. W. 243; Knudson *v.* Parker, 91 N. W. 850; Nat. Bank of Commerce *v.* Chapman, 50 Neb. 484, 70 N. W. 39.

Oregon. — Mendenhall *v.* Elwert, 36 Or. 375, 59 Pac. 805.

West Virginia. — Himan *v.* Thorn, 32 W. Va. 507, 9 S. E. 930; Stauffer *v.* Kennedy, 47 W. Va. 714, 35 S. E. 892.

Emancipation of Minor Son. — In Crary *v.* Hoffman, 115 Iowa 332, 88 N. W. 833, an action to set aside a conveyance by a parent to an infant son on a purported consideration of the payment by the infant son of his wages to the parent grantor, it was held that the burden of proving the emancipation of the infant was upon the defendants.

The Purchase of Land by a Parent

charged by clearer and more convincing proof than when the parties are strangers.[27]

b. *Conveyance Between Husband and Wife.* — (1.) Generally. Again, some of the courts hold that a conveyance from a husband to his wife which purports to have been made for a valuable consideration is not presumptively a gift, and a creditor who attacks the conveyance as fraudulent has the burden to show a want of consideration;[28] and that this burden is not sustained by mere inference based on the presumption that the testimony of the wife is untruthful.[29] The majority of the courts, however, hold that the fact of a conveyance between husband and wife of itself raises a suspicion of unfairness whenever the result is to throw a loss upon the creditors of the husband, and that in all cases of contest between the creditors of the husband and wife there is a strong presumption against her which must be overcome by affirmative proof.[30] But when these

in the Name of a Child is presumptively an advancement. Brown *v.* Burke, 22 Ga. 574.

27. Lehman-Durr & Co. *v.* Greenhut, 88 Ala. 478, 7 So. 299; Thorington *v.* Montgomery, 88 Ala. 548, 7 So. 363.

28. Meredith *v.* Schaap (Iowa), 85 N. W. 628; Stephenson *v.* Cook, 64 Iowa 265, 20 N. W. 182; Rhodes *v.* Wood, 93 Tenn. 702, 28 S. W. 294; Cox *v.* Scott, 9 Baxt. (Tenn.), 305.

Rule Stated. — In Fishel *v.* Motta (Conn.), 56 Atl. 558, it was insisted that as to conveyances between husband and wife, there is, in the absence of evidence to the contrary, a legal presumption of want of consideration. The court said: "Such a rule makes the mere relation of husband and wife in such cases, as matter of law, in the absence of any evidence to the contrary, *prima facie* proof of want of consideration. That the relation of husband and wife gives special opportunities for fraudulent transfers of property, and that conveyances between them 'should be subject to a rigorous scrutiny,' are considerations to be addressed to the trier in passing upon the question of want of consideration. Gilligan *v.* Lord, 51 Conn, 567; Norwalk *v.* Ireland, 68 Conn. 2, 35 Atl. 804; Throckmorton *v.* Chapman, 65 Conn. 441, 32 Atl. 930. Any presumption of want of consideration in such cases is one of fact, having simply the force of an argument. 'The difference between a presumption of fact and one of law, as these terms are commonly used, is that the former may be, the latter must be, regarded by the trier.' Ward *v.* Metropolitan Life Ins. Co., 66 Conn. 227-239, 33 Atl. 902, 50 Am. St. Rep. 80. We are not aware of the existence in the law of this state of any such legal presumption as the plaintiffs claim."

29. Gilbert *v.* Glenny, 75 Iowa 513, 39 N. W. 818.

30. *United States.* — Seitz *v.* Mitchell, 94 U. S. 580.

Alabama. — Noble *v.* Gilliam, 136 Ala. 618, 33 So. 861.

Florida. — Claflin *v.* Ambrose, 19 So. 628.

Georgia. — Richardson *v.* Subers, 82 Ga. 427, 9 S. E. 172.

Indiana. — Gable *v.* Columbus Cigar Co., 140 Ind. 563, 38 N. E. 474.

Maryland. — Levi *v.* Rothschild, 69 Md. 348, 14 Atl. 535; Hinkle *v.* Wilson, 53 Md. 287.

Minnesota. — Minneapolis Stock Yards & Pack. Co. *v.* Halonen, 56 Minn. 469, 57 N. W. 1135.

Nebraska. — Citizens State Bank *v.* Porter, 93 N. W. 391; Lusk *v.* Riggs, 91 N. W. 243; Lynch *v.* Engelhardt-Winning-Davison Merc. Co., 96 N. W. 524.

New Jersey. — Adoue *v.* Spencer, 62 N. J. Eq. 782, 49 Atl. 10.

Pennsylvania. — Winter *v.* Walter, 37 Pa. St. 155; Gault *v.* Saffin, 44 Pa. St. 307; Keeney *v.* Good, 21 Pa. St. 349; Wilson *v.* Silkman, 97 Pa. St. 509.

Virginia. — Runkle *v.* Runkle, 98 Va. 663, 37 S. E. 279; Spence *v.*

Repass, 94 Va. 716, 27 S. E. 583; Robinson *v.* Bass, 100 Va. 190, 40 S. E. 660.

West Virginia. — Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847; Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780.

Wisconsin. — Le Saulnier *v.* Krueger, 85 Wis. 214, 54 N. W. 774; Evans *v.* Rugee, 57 Wis. 623, 16 N. W. 49; Hoey *v.* Pierron, 67 Wis. 262, 30 N. W. 692.

Rule Stated. — "All transactions between the husband and the wife relative to the property of the former must be regarded with suspicion, when the object of such transactions is to create a preference over other creditors in favor of the wife, and when such preference comes in competition with the actual claims of such other creditors. In such cases, when these transactions are attacked for fraud and collusion, it is incumbent on the wife to show the truth and genuineness of the claim upon which her judgment against her husband is founded. The burthen of proof is upon her to show that her judgment was fairly obtained. Deblanc *v.* Deblanc, 4 La. 19; Malone *v.* Kitching, 10 Annual 85; Phelps *v.* Rightor, 15 Annual 33." Darcy *v.* Labennes, 31 La. Ann. 404.

Where Improvements Are Erected by the Husband With His Own Money, on lands belonging to his wife, the presumption is that such improvements are intended as a gift to the wife; and on a contest between her and existing creditors of her husband seeking to subject such improvements to the payment of their debts, the burden is on the wife to overcome this presumption by evidence that it was in payment of a debt. Seasongood *v.* Ware, 104 Ala. 212, 16 So. 51.

Conveyance to Trustee. — In Cruger *v.* Tucker, 69 Ga. 557, where a husband, being heavily involved, had conveyed his property to a trustee for his wife and children, alleging as a consideration therefor that he was indebted to the trust estate, and that the funds of such estate had been invested therein, it was held that in a contest with creditors who obtained their judgments after the conveyance, the burden of proving the existence of the debt was on the trustee, notwithstanding the recitals in the conveyance.

Wisconsin Rule. — In Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889, the court, in qualifying the rule as stated in Horton *v.* Dewey, 53 Wis. 410, 10 N. W. 599; Fisher *v.* Shelver, 53 Wis. 498, 10 N. W. 681, said: "When these opinions speak about the *onus* of showing the *bona fides* or good faith of her purchase from her husband being cast upon the wife, reference is had to the question of the consideration as her separate property, upon which the presumption of the law is against her. These facts clearly established by her, the question of whether the conveyance or mortgage from her husband was taken in good faith, or with the intent to defraud, rests upon the same general principle as between other parties, and the burthen of showing the fraud is upon the party alleging it. The *onus* of proving the fraud being thus upon the party attacking the conveyance or mortgage on that ground, and the *onus* of showing that the consideration thereof arose from some other source than her husband, and consisted of her separate estate being cast upon her, then the principle laid down in Hoxie *v.* Price, 31 Wis. 82, that, on account of their peculiar relationship, 'the transactions should be closely examined and scrutinized to see that they are fair and honest,' may have full force. To illustrate, the language of the statute in respect to cases where the defendant is an officer alleging fraud in the mortgage by which the plaintiff claims the property levied on or attached, § 2319, R. S., is, 'then the burden of proof shall be upon the plaintiff to show that such mortgage was given *in good faith,* and to secure an actual indebtedness and the amount thereof.' In respect to this statute Mr. Justice Taylor says, in James *v.* Van Duyn, 45 Wis. 512: 'We do not think the statute was intended to put upon the plaintiff the burden of proof throughout the whole case, and compel him to prove affirmatively that his mortgage was not in fact fraudulent and void as to

facts are clearly established the burden of showing fraud in the conveyance is upon the party alleging it.[31]

(2.) Exempt Property. — But this rule does not apply where the property conveyed was exempt from execution while held by the husband.[32] But where the grantor claims the property to be exempt from execution, he has the burden of showing that fact.[33]

(3.) Voluntary Conveyance. — The rule just stated imposing the burden of proof upon a creditor is not recognized where the conveyance is upon its face partly or wholly voluntary.[34]

(4.) Post-Nuptial Settlements. — Where the husband is indebted at the time post-nuptial settlements are made, they are, as against his creditors, fraudulent and void, and will be conclusively presumed to be voluntary in the absence of proof by those claiming under them that they were made for a valuable consideration.[35]

creditors. Where the mortgagee has proved that the mortgage was given to secure an actual indebtedness and the amount thereof, he has in fact established *prima facie* that it was given in good faith, unless there be something on the face of the mortgage which shows it to be fraudulent.' So, wherever general language is used in any opinion which associates good faith or *bona fides* with the fact of consideration or separate property, as the burden of proof which is thrown upon the wife, proof of her separate property, and that it constituted the consideration of the conveyance or mortgage, is proof of the good faith and *bona fides* used in this sense."

Relationship of Debtor and Creditor. — A conveyance from husband to wife in prejudice of the rights of creditors of the husband cannot be sustained without satisfactory evidence of contractual relations between them with reference to the wife's separate money or property; in other words, the relationship of debtor and creditor must be shown. Woods *v.* Allen, 109 Iowa 484, 80 N. W. 540.

In the case of a conveyance between husband and wife, if the conveyance was "made under suspicious circumstances, as where the husband was insolvent and failed to meet his pressing obligations, and the wife was not previously known to have or possess any sufficient separate means or estate with which to acquire an estate in her right — under such and like circumstances, the wife is called upon to show by affirmative proof that the property she claims under deeds to herself, made under such circumstances, was purchased and paid for out of her own separate means and estate as against the creditors of the insolvent husband. The relation of husband and wife, and the suspicious circumstances of the case, imposed this burden of proof upon the wife. This is the principle established by the case of Seitz *v.* Mitchell, 94 U. S. 580, the first authoritative exposition of the Married Woman's Act of April 10, 1869, Ch. 23 (16 Stat. 45), relating to this district, which we have to guide us." Turner *v.* Gottwals, 15 App. D. C. 43.

31. Semmens *v.* Walters, 55 Wis. 675, 13 N. W. 889.

32. Allen *v.* Perry, 56 Wis. 178, 14 N. W. 3.

33. Pace *v.* Robbins (Ark.), 54 S. W. 213; Blythe *v.* Jett, 52 Ark. 547, 13 S. W. 137. See also Graham *v.* Culver, 3 Wyo. 639, 29 Pac. 270, 30 Pac. 957.

34. Ruppert *v.* Hurley (N. J. Eq.), 47 Atl. 280; Baldwin *v.* Tuttle, 23 Iowa 66, *holding* that in such case the burden is on the party claiming under the conveyance to show that it was made for a valuable consideration.

35. Flynn *v.* Jackson, 93 Va. 341, 25 S. E. 1; DeFarges *v.* Ryland, 87 Va. 404, 12 S. E. 805; Yates *v.* Law, 86 Va. 117, 9 S. E. 508, where the court, *quoting* from Seitz *v.* Mitchell, 94 U. S. 580, said: "Purchases of

c. *Conveyance to Wife from Third Person.* — Again, it is held that one who alleges that a conveyance to the wife of a debtor was paid for with money of the debtor and was fraudulent, has the burden of proof.[36] Other courts, however, hold that purchases of property by the wife of an insolvent debtor during coverture are regarded with suspicion, unless it clearly appears that the consideration was paid out of her separate estate, and that in a contest between her and creditors of her husband the burden is on her to overcome the presumption which the law in such case raises.[37] Nor has the

either real or personal property, made by the wife of an insolvent debtor during coverture, are justly regarded with suspicion, unless it clearly appears that the consideration was paid out of her separate estate. Such is the community of interest between husband and wife — such purchases are so often made a cover for a debtor's property, so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors, and preserving it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny. In a contest between the creditors of the husband and the wife there is, and there should be, a presumption against her which must be overcome by affirmative proof." *Citing* numerous cases.

36. Richardson *v.* Subers, 82 Ga. 427, 9 S. E. 172; Wolf *v.* Chandler, 58 Iowa 569, 12 N. W. 601; Osborne *v.* Wilkes, 108 N. C. 651, 13 S. E. 285. See also Stephenson *v.* Cook, 64 Iowa 265, 20 N. W. 182.

Under the Minnesota Statute giving a married woman absolute control over her own personal property, and authorizing her to carry on business on her own account, and, except as respects her own real estate, to constitute her husband her agent, and authorizing husband and wife to contract with each other as fully as if the marriage relation did not exist between them, a controversy between the wife and her husband's creditors as to whether certain personal property belonged to her or her husband is, as in other cases, to be determined upon the fair preponderance of the evidence. Laib *v.* Brandenburg, 34 Minn. 367, 25 N. W. 803. See also Ladd *v.* Newell, 34 Minn. 107, 24 N. W. 366.

In Maine it is held that since the passage of the statute authorizing a married woman to hold property exempt from the payment of her husband's debts, if a creditor of the husband would impeach her title to any property conveyed to her, the burden is on such creditor to prove that it came to her directly or indirectly from her husband after coverture. Winslow *v.* Gilbreth, 50 Me. 90.

37. *Alabama.* — Kelley *v.* Connell, 110 Ala. 543, 18 So. 9; Wimberly *v.* Montgomery Fertilizer Co., 132 Ala. 107, 31 So. 524.

Mississippi. — Mangum *v.* Finucane, 38 Miss. 354.

Missouri. — Hoffman *v.* Nolte, 127 Mo. 120, 29 S. W. 1006; Patton *v.* Bragg, 113 Mo. 595, 20 S. W. 1059; Sloan *v.* Torrey, 78 Mo. 623.

Pennsylvania. — Seeds *v.* Kahler, 76 Pa. St. 262.

Virginia. — Grant *v.* Sutton, 90 Va. 771, 19 S. E. 784; Yates *v.* Law, 86 Va. 117, 9 S. E. 508.

West Virginia. — Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780; Rose *v.* Brown, 11 W. Va. 122.

Wisconsin. — Gettelmann *v.* Gitz, 78 Wis. 439, 47 N. W. 660.

Rule Stated. — In Kelley *v.* Connell, 110 Ala. 543, 18 So. 9, the court said: "While in ordinary cases (in all cases except where the relation of husband and wife exists between the debtor and the grantee) it is upon the complainant to prove, as a matter of fact, that the consideration moved from the debtor (Bank *v.* Kennedy, 91 Ala. 470, 472, 8 So. 652), a distinction is taken where that relation does exist, and it is well established that in such case the presumption is that the consideration moved from the husband, and to overcome this

effect of a statute as to married women and their property rights been to change this rule.[38]

The Introduction of the Deed to the Wife from such third person is not of itself sufficient proof that the property did not come to her in some way from the husband during coverture.[39]

A Voluntary Conveyance for the Benefit of a Wife or child when the grantor is largely indebted at the time of its execution is presumptive evidence of fraud.[40]

2. Mode of Proof. — A. PAROL EVIDENCE. — a. *As Respects the Attacking Creditor.* — As has been stated elsewhere herein,[41] it is competent to receive evidence on behalf of a creditor attacking a conveyance by his debtor to show the actual consideration, whatever consideration may be expressed in the instrument, or that the consideration expressed was not in fact paid, where the purpose of such evidence is to establish the fact that the conveyance was executed to defraud creditors.[42]

presumption the wife (grantee in the conveyance from a third person) must affirmatively show that the consideration moved from her — that she paid the purchase money with her own funds, and not with the funds of her husband, directly or indirectly. Thus it is said by the supreme court of the United States: 'Such is the community of interest between husband and wife, such purchases are so often made a cover for a debtor's property — are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, and they hold forth such temptations for fraud — that they require close scrutiny. In a contest between creditors and the wife, there is and there should be a presumption against her, which she must overcome by proof.' Seitz *v.* Mitchell, 94 U. S. 580. And this court has fully committed itself to this view. Booker *v.* Waller, 81 Ala. 549, 8 So. 225; Bangs *v.* Edwards, 88 Ala. 382, 6 So. 764; Lammons *v.* Allen, 88 Ala. 417, 6 So. 915. The burden thus resting on the grantee, Mrs. E. E. Kelley, in the case at bar, was not discharged. She offered no evidence in rebuttal of the presumption that the land conveyed to her by the third person was paid for with the money of her husband, who is debtor to the complainants."

Judgment Confessed. — In Wilson *v.* Silkman, 97 Pa. St. 509, where a husband had confessed a judgment to a trustee in favor of his wife, it was held that on a controversy with existing creditors of her husband it was incumbent on the wife to show that the judgment given to her was to secure a *bona fide* debt due from the husband to her out of her separate estate.

38. Sikking *v.* Fromm, 23 Ky. L. Rep. 2138, 66 S. W. 760. See also Smith *v.* Curd, 24 Ky. L. Rep. 1960, 72 S. W. 744, where the evidence was held insufficient to establish that the consideration for the purchase of the property was derived from the wife's separate estate.

39. Eldridge *v.* Preble, 34 Me. 148.

40. Moritz *v.* Hoffman, 35 Ill. 553, *holding*, however, that this presumption is rebutted where it appears that the debtor retained in his possession property sufficient to discharge all debts existing at the time of making the conveyance.

41. See article "CONSIDERATION," Vol. III, p. 399.

42. *Alabama.* — Graham *v.* Lockhart, 8 Ala. 9.

Arkansas. — Clinton *v.* Estes, 20 Ark. 216.

Kentucky. — Staton *v.* Com., 2 Dana 397.

Louisiana. — Testart *v.* Belot, 31 La. Ann. 795.

b. *As Respects the Grantor.* — It is also proper to permit a grantor to show, as against the grantee, that the conveyance was executed for the purpose of defrauding creditors of the former.[43]

c. *As Respects the Vendee or Grantee.* — **(1.) Instrument Not Expressing Consideration.** — Where the instrument of conveyance attacked expresses no consideration, the vendee may, for the purpose of rebutting the presumption arising from the grantor's retention of possession after the sale, show what consideration passed.[44]

Massachusetts. — Rogers *v.* Abbott, 128 Mass. 102.

Mississippi. — Leach *v.* Shelby, 58 Miss. 681.

Nebraska. — Karll *v.* Kuhn, 38 Neb. 539, 57 N. W. 379.

New Jersey. — Silvers *v.* Potter, 48 N. J. Eq. 539, 22 Atl. 584.

See also Crawford *v.* Beard, 12 Or. 447, 8 Pac. 537; Hirsch *v.* Norton, 115 Ind. 341, 17 N. E. 612.

Defeasance. — It is competent for a creditor attacking a conveyance by his debtor as fraudulent, to show by parol that the conveyance, a deed absolute on its face, was in fact intended to operate only as a mortgage. Hartshorn *v.* Williams, 31 Ala. 149.

Books of Account. — Where the issue was whether or not a conveyance was made in payment of a pre-existing debt, books of account of the grantee, since deceased, properly proved, may be received in evidence against those claiming under him for the purpose of showing the state of accounts existing between him and the grantor. Archer *v.* Long, 38 S. C. 272, 16 S. E. 998. And in Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, where the issue was as to whether or not a bond, the amount of which was claimed to be the consideration for the conveyance in question, was ever a subsisting obligation, and whether there was anything due on it, it was held proper to permit evidence that books of account kept by the grantors as bankers, in which their financial transactions were entered, contained no entry of indebtedness from them to the grantee upon any such bond or any other debt.

Tax Lists Returned by Grantee. On an issue as to the validity of a mortgage claimed to have been given in consideration of a pre-existing debt, it is competent for the purpose of showing that the grantor was not indebted to the grantee, to introduce in evidence tax lists for several years in the county and town of the residence of the grantee in which were listed no solvent credits. While this may not be absolute and convincing proof, it is surely some evidence competent to go to the jury upon that issue. Allen *v.* McLendon, 113 N. C. 321, 18 S. E. 206.

43. Demerit *v.* Miles, 22 N. H. 523, an action on a promissory note secured by mortgage, in which the mortgagor defendant was permitted to make such proof. And it was also held that the fact that the mortgagor made oath to the mortgage, that it was intended to secure the debt therein specified, and for no other purpose, did not preclude him from making this proof. The court said: "The oath made upon the mortgage by both parties can have no effect in depriving the defendant of his defense. The parties merely added perjury to fraud."

"As between the parties to a written instrument and their privies, its recitals are conclusive, and neither can contradict them by parol evidence; but this rule does not apply to a note and mortgage executed by husband and wife to her father, so as to estop them from showing, in a subsequent contest with a creditor of the husband attacking a conveyance to the wife as fraudulent, that the money for which they were given was intended by the father as an advancement to his daughter, to be invested in the purchase of the land." Robinson *v.* Moseley, 93 Ala. 70, 9 So. 372.

44. Howell *v.* Elliott, 12 N. C. 66, wherein proof was permitted to be made to the effect that the con-

(2.) Consideration Differing in Quantity or Amount. — As shown in the article just referred to, the true or real consideration of a conveyance may be supported by the grantee by evidence showing the consideration to be different in quantity or amount from that expressed in the instrument,[45] provided the consideration so shown is not inconsistent with the consideration expressed.[46]

Nominal Consideration Recited. — So, also, where the conveyance recites a mere nominal consideration it has been held competent for the grantee to support the conveyance by evidence showing an adequate pecuniary consideration.[47]

Pre-Existing Debt. — Where the conveyance in question recites a money consideration, the grantee may support it by parol evidence

sideration was in fact the payment, by the vendee, of a debt as surety for the vendor.

45. *United States.* — Hinde *v.* Longworth, 11 Wheat. 199.

Alabama. — Miller *v.* Rowan, 108 Ala. 98, 19 So. 9; Troy Fertilizer Co. *v.* Norman, 107 Ala. 667, 18 So. 201; Gordon *v.* Tweedy, 71 Ala. 202; Graham *v.* Lockhart, 8 Ala. 9.

Maryland. — Cole *v.* Albers, 1 Gill 412; Glenn *v.* McNeal, 3 Md. Ch. 349; Clagett *v.* Hall, 9 Gill & J. 80; Anderson *v.* Tydings, 3 Md. Ch. 167.

South Carolina. — Garrett *v.* Stuart, 1 McCord 514.

46. Buford *v.* Shannon, 95 Ala. 205, 10 So. 263; Helfrich *v.* Stem, 17 Pa. St. 143; Hamburg *v.* Wood, 66 Tex. 168, 18 S. W. 623; Barnes *v.* Black, 193 Pa. St. 447, 44 Atl. 550; Pomeroy *v.* Bailey, 43 N. H. 118.

Mortgage Given to Secure Advances. — Where the consideration stated in the mortgage in controversy is money in hand paid, and the mortgage is taken to secure that sum, it may be shown that the mortgage was given in part or wholly to secure advances made or to be made. Such evidence does not affect the nature of the conveyance; it is still founded on a money consideration. Cole *v.* Albers, 1 Gill (Md.) 412; Lawson *v.* Alabama Warehouse Co., 80 Ala. 341.

Liability as Indorser. — In McKimster *v.* Babcock, 26 N. Y. 378, the mortgage attacked recited a present, absolute indebtedness, and it was held that although no such debt existed, and no money was advanced when the mortgage was executed, the mortgagee could introduce evidence that he had indorsed certain notes in reliance upon the mortgage as security therefor, and that the purpose of the mortgage was to secure such liabilities.

In Morse *v.* Powers, 17 N. H. 287, the mortgage attacked was conditioned to save the mortgage harmless from certain liabilities, and also to save a third person harmless from a certain note to which he, with the mortgagor, was a party, but which was in reality the debt of the mortgagor. It was held that the note referred to was admissible in evidence for the purpose of repelling an inference of fraud which might otherwise have been drawn from its nonproduction.

47. Cunningham *v.* Dwyer, 23 Md. 219. *Compare* Ogden State Bank *v.* Barker, 12 Utah 13, 40 Pac. 765, where the court said: "In the absence of mistake or fraud, the written instrument speaks for itself, and, when attacked by creditors, its stipulations are conclusive as to the grantor and grantee; and the instrument cannot be supported by falsifying its recitals, because they must be presumed to have been made and accepted deliberately, and to express the intention of the parties thereto. The law presumes that every man intends the necessary and natural consequences of his own acts, and where the proximate and natural results of a debtor's acts are to hinder, delay or defraud creditors, it will be presumed that he intended his acts to produce such results."

showing that the consideration was a pre-existing debt due to him from the grantor.[48]

(3.) Consideration Differing in Character or Species. — Again, as shown in the same article, the grantee cannot support the conveyance by parol evidence showing a consideration differing in character or species from that recited in the instrument,[49] although there are

48. Cunningham *v.* Dwyer, 23 Md. 219. See also Howell *v.* Carden, 99 Ala. 100, 10 So. 640.

And in Waters *v.* Riggin, 19 Md. 536, where the grantee under the deed in question offered in evidence copies of certain bills obligatory and judgments against him, and the testimony of their payment by the grantee under the first deed, and their assignment to him to show the payment of the consideration set forth in the deed in question, it was held that the evidence so offered proved nothing inconsistent with the consideration in the deed; that the claims paid by the defendant will be considered as paid by the grantor himself.

In Baze *v.* Arper, 6 Minn. 220, an action of ejectment wherein the defense was that the title of the plaintiff was founded on a conveyance to his grantor in fraud of the creditors of the first grantor, it was held permissible for the defendant to show that the conveyance to the plaintiff was in consideration of a pre-existing debt from his grantor, and not for a new and valuable consideration advanced by the plaintiff at the time of the purchase, inasmuch as, if the plaintiff had merely relinquished a precedent debt for the property, he would not occupy the position of a *bona fide* purchaser, and the defendant would be relieved from the necessity of convicting him of notice of the fraud. It was held, however, that the exclusion of such evidence did not, under the peculiar circumstances of that case, constitute fatal error.

In Credle *v.* Carrawan, 64 N. C. 422, the consideration as recited in the conveyance was an agreement between the grantor and his wife, who was the grantee, made prior to their marriage. Evidence was offered in support of the conveyance to explain and render more specific the consideration thus recited, and to show that the agreement referred to constituted a *bona fide* and valuable consideration. The evidence offered tended to show that the grantor had purchased the land from the trustee of the defendants; that a large part of the purchase money was still due, and that a mortgage had been taken to secure it and had existed for some time, and that the property was then of less value than the debt. Under these circumstances the grantor and his intended wife entered into an agreement that the debt and mortgage should be canceled, and for this consideration the grantor should execute a deed to the defendants. It was held that this parol agreement was afterwards executed before the marriage by the cancellation of the debt and mortgage, and constituted a valuable consideration for the deed afterwards executed to the defendants, and that the evidence offered should have been admitted.

In Connelly *v.* Walker, 45 Pa. St. 449, an action by an execution creditor against a sheriff for a false return, wherein the latter was permitted in defense to assert title in the assignee of the debtor under a bill of sale which was executed and possession delivered thereunder before the levy, it was held that evidence of an indebtedness by the debtor to the vendee as a consideration for the sale was relevant and admissible on the part of the defendant.

49. *Arkansas.* — Carmack *v.* Lovett, 44 Ark. 180; Galbreath *v.* Cook, 30 Ark. 417.

Maryland. — Anderson *v.* Tydings, 3 Md. Ch. 167; Cole *v.* Albers, 1 Gill 412; Glenn *v.* McNeal, 3 Md. Ch. 349.

Pennsylvania. — Buscley's Appeal, 48 Pa. St. 491, 88 Am. Dec. 468.

See also article "CONSIDERATION," Vol. III, p. 399.

Rule Stated. — In Houston *v.* Blackman, 66 Ala. 559, 41 Am. Rep. 756, where the conveyance in ques-

cases which hold to the contrary.[50]

(4.) Parol Evidence Negativing Secret Trust. — Where a deed of assignment is not fraudulent on its face, it is competent to show by parol evidence that no secret fraud was intended to be consummated by it.[51]

(5.) Payment of Consideration Subsequent to Suit. — The grantee cannot, in support of the conveyance, introduce evidence showing payment of the consideration after the commencement of the action attacking the conveyance.[52]

tion recited a consideration of love and affection and one dollar, it was held that the grantee could not be permitted to introduce evidence that it was founded on a valuable consideration. The court said: "It is, at all times, dangerous to relax the conservative principle of law which declares that when parties enter into a contract, and reduce its stipulations to writing, the written memorial is the sole expositor of the contract, and cannot, in the absence of fraud, be varied by parol evidence. Mistakes may occur requiring a court of equity to intervene and correct, so that the contract may conform to the intention the parties proposed expressing. But, without fraud or mistake, as between the parties, the written contract is conclusive. When assailed by creditors, it must be taken, as to the parties to it, as it may be written. It cannot be supported by falsifying express recitals, which, it must be presumed, were deliberately made, and deliberately accepted. . . . A valuable, as distinguished from a good, consideration is necessary to support a bargain and sale; while a good consideration is essential to support a covenant to stand seized. When either of these considerations singly is expressed in a conveyance of lands, to receive parol evidence that the other was the real consideration would alter the character of the conveyance." See also Potter *v.* Gracie, 58 Ala. 303, 29 Am. Rep. 748; Murphy *v.* Branch Bank of Mobile, 16 Ala. 90; Maigley *v.* Hauer, 7 Johns. (N. Y.) 341; Wilkinson *v.* Wilkinson, 17 N. C. 377.

50. Ferguson *v.* Harrison, 41 S. C. 340, 19 S. E. 619; Leach *v.* Shelby, 58 Miss. 681, where the court, in holding that a grantee of a conveyance, assailed for fraud, may show a consideration different from that expressed in the instrument, said: "Truth is the proper object of investigation, and both parties stand on the same footing and have equal opportunity to establish it."

51. Abercrombie *v.* Bradford, 16 Ala. 560, where the court said: "When a deed is void because of fraudulent provisions incorporated in it, parol testimony cannot be received to expunge from the deed these fraudulent provisions; for inasmuch as they exist in the deed and form a part of it, they could not be stricken out by parol proof, and if the deed is fraudulent on its face, no parol evidence can be received to avoid the legal consequences that attach to the deed in consequence of such provisions. The construction of a deed is a question of law, and if by the terms of the instrument it is void, no other judgment can be pronounced than that it is null and void. To sustain a deed void on its face, by resorting to parol proof, would in my judgment be to create a new instrument and then to give effect to its validity. See Grover *v.* Wakeman, 11 Wend. 187; Gazzam *v.* Poyntz, 4 Ala. 374. But as the deed is not fraudulent on its face, the admission of the parol proof, showing under what circumstances the provision was inserted, and the intent that governed the parties in inserting it, is not an error of which the plaintiff in error can complain, for the deed being *prima facie* good, the plaintiff had the right to show by parol proof that no secret fraud, not apparent on the deed, was intended to be consummated by it."

52. Angrave *v.* Stone, 45 Barb. (N. Y.) 35, where the court said:

B. RECITALS. — Recitals in a conveyance as to the consideration therefor are regarded as mere hearsay, and are not competent evidence against the creditors,[53] although there is authority to the effect that they are *prima facie* proof of the consideration.[54]

C. ADMISSIONS BY GRANTOR. — The admissions of the grantor to third persons before the conveyance was made to the effect that he was indebted to the grantee, are admissible in evidence to show that fact,[55] although they are held to be entitled to little or no weight as proof of consideration as against a creditor whose debt was in existence at the time of the sale.[56]

"The payment of the consideration after the commencement of the suit could not change the character of the transaction. The defendants cannot make evidence to purge the fraud and at so late a period."

53. *Alabama.* — Schall *v.* Weil, 103 Ala. 411, 15 So. 829; Chipman *v.* Glennon, 98 Ala. 263, 15 So. 822; McCain *v.* Wood, 4 Ala. 258.

Arkansas. — Valley Distilling Co. *v.* Atkins, 50 Ark. 289, 7 S. W. 137.

Georgia. — Cruger *v.* Tucker, 69 Ga. 557.

Kentucky. — Jarboe *v.* Colvin, 4 Bush 70.

New Hampshire. — Vogt *v.* Ticknor, 48 N. H. 242.

Pennsylvania. — Redfield & R. Mfg. Co. *v.* Dysart, 62 Pa. St. 62.

Virginia. — Flynn *v.* Jackson, 93 Va. 341, 25 S. E. 1; William & Mary College *v.* Powell, 12 Gratt. 372; Blow *v.* Maynard, 2 Leigh 29; Massey *v.* Yancey, 90 Va. 626, 19 S. E. 184; DeFarges *v.* Ryland, 87 Va. 404, 12 S. E. 805.

West Virginia. — Childs *v.* Hurd, 32 W. Va. 66, 9 S. E. 362.

The recitals are admissible to prove the fact of the existence of the instrument recited as the consideration, so as to show that, as between the grantor and grantee, there had been an effectual transfer of title to the property claimed; and the instruments themselves are admissible, in connection with other evidence afterwards adduced, as tending to show a valuable consideration. Howell *v.* Carden, 99 Ala. 100, 10 So. 640.

54. Moore *v.* Blondheim, 19 Md. 172.

55. Moss *v.* Dearing, 45 Iowa 530. *Compare* McKane *v.* Wood, 4 Ala. 258.

Admissions by an Alleged Fraudulent Vendor that he was indebted to the vendee, if made at a time previous to contracting the debt with the creditor attacking the sale, are admissible, where it is shown that the consideration of the sale was notes due from him to his vendee. Goodgame *v.* Cole, 12 Ala. 77. It was also held in this case that admissions to the same effect made at the time of the sale were admissible as part of the transaction.

On an issue as to the *bona fides* of a conveyance alleged to have been executed without consideration, but claimed by the grantee to have been given in consideration of a pre-existing debt due from the grantor, evidence of declarations by the grantee, since deceased, showing that he knew and had spoken of the indebtedness, is admissible as being evidence of declarations against interest. Byrne *v.* Reed, 75 Cal. 277, 17 Pac. 201.

On an issue as to the consideration of a mortgage attacked as being in fraud of creditors, declarations of the mortgagor before the execution of the mortgage, made in the presence of the mortgagee and while they were apparently in the act of settling accounts for which the mortgage was claimed to have been given, relative to the result of such settlement, are admissible as part of the *res gestae*. Cook *v.* Swan, 5 Conn. 140.

56. Goodgame *v.* Cole, 12 Ala. 77.

In Bicknell *v.* Mellett, 160 Mass. 328, 35 N. E. 1130, an action by an assignee in insolvency to recover the value of the insolvent's stock in trade from the holder of a mortgage upon it, alleged to have been made in fraud of the insolvent laws, declara-

Want of a Consideration for a conveyance cannot be shown by evidence of *ex parte* statements or admissions of the grantor made subsequent to the conveyance.[57]

D. CIRCUMSTANTIAL EVIDENCE. — a. *Pecuniary Condition of Parties.* — The pecuniary condition at and about the time of the conveyance, of the parties thereto, is competent and important proof.[58]

Thus, evidence of the financial ability of the grantee to purchase, loan money and the like, at and about the time of the conveyance, is relevant and admissible, not only on behalf of the grantee,[59] but

tions of the insolvent that he had received full consideration for the mortgage, are not admissible. The court said: "In cases of this sort, where a voluntary petition is filed shortly after making a mortgage, and the good faith of the mortgagor is the very question in issue, it is impossible to assume that his statements bearing on that question have been disinterested, or have appeared to him to be against his interest, at least without something more than the naked fact that they have been made. Whether they are not inadmissible for another reason we need not decide. They are not like declarations as to boundary by a mortgagor in possession (Flagg *v.* Mason, 141 Mass. 64, 67), or by a seeming owner showing that he holds only by a conditional title. Holt *v.* Walker, 26 Me. 107. They are addressed primarily to a collateral matter, the receipt of a certain sum of money, and although logically this statement is a step toward showing that the mortgage is valid, and so toward an admission adverse to the insolvent's title, it is a degree more remote than a direct admission."

57. Silva *v.* Serpa, 86 Cal. 241, 24 Pac. 1013. See also Hicks *v.* Sharp, 89 Ga. 311, 15 S. E. 314, where it was held that evidence of declarations of the grantor to the effect that the real consideration was for value as to one-half of the property and for a good consideration as to the other half, were not admissible, the declarations having been made when the grantees were in sole possession.

58. In Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57, where the consideration for the conveyance was alleged to be a prior indebtedness of the vendor to the vendee for money loaned, it was held competent to show in support of the allegation of the loan that the vendor, who had commenced business about the time of the loan, was possessed of little or no means of support.

59. Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906; Brickley *v.* Walker, 68 Wis. 563, 32 N. W. 773; Schaible *v.* Ardner, 98 Mich. 70, 56 N. W. 1105; Waxelbaum *v.* Bell, 91 Ala. 331, 8 So. 571, wherein it was held that as tending to show such ability, a note and mortgage executed by grantee to a bank for a loan of about the same amount, or executed by his agent for him and in his name, was relevant.

Assignment to Employee. — In Winfield *v.* Adams, 34 Mich. 437, wherein an assignment to an employee, claimed to have been given in consideration of a debt from the employer, partly for money loaned and partly for wages earned, was attacked as being fraudulent, it was held error to refuse to permit the employee to show that the money loaned was money belonging to her before entering the service of the employer. The court, in holding thus, said: "As bearing on the question of fraud, it was a very important circumstance if the woman had money of her own at a time when there could be no suspicion of a purpose on the part of the debtor to make use of her as a cover for his property. A loan by a servant to the employer is likely to be more or less suspicious, and whatever would fairly tend to show whether it was real or simulated, ought to be received. It is true, as the circuit judge said, that when one loans money it is presumed that it is his own; but

also on behalf of the attacking creditors.[60]

b. Value of Property. — The value of the property embraced in the conveyance is a material subject of inquiry.[61]

But evidence of such value at the time of the trial several years after the conveyance is not relevant, especially where it appears

the presumption in a case like this would be greatly strengthened by such evidence as was proposed."

Upon an Issue as to the Fraudulent Character of a Purchase by a Wife of the property of a corporation, of which her husband was president, in payment and satisfaction of moneys loaned by her to the corporation, it is proper to permit her to show that she had at about the time of her loans to the company borrowed various sums of money, this being relevant to show that she was possessed of a separate estate, and had the control of large sums of money. Ragland *v.* McFall, 137 Ill. 81, 27 N. E. 75.

60. It is proper to permit the attacking creditor to show that at the time of the loan and payment claimed the grantee was possessed of but little property, and that what property he did possess was mortgaged to its full value. Hoyt *v.* Olmsted, 11 Conn. 376; *overruling* Cook *v.* Swan, 5 Conn. 140, and *following* Jackson *v.* Mather, 7 Cow. (N. Y.) 301.

Indebtedness of Grantee. — In Hannis *v.* Hazlett, 54 Pa. St. 133, where the issue was as to the *bona fides* of a conveyance to the wife of the debtor, it was held that letters from herself to the administrator of an estate from which she claimed to have derived the funds with which she purchased the property, and his letters in response thereto about the time of the conveyance in question, and showing that she received larger loans from the estate than she claimed, were held to be competent evidence as to her ability to purchase.

Selling Property at Sacrifice. — In Demeritt *v.* Miles, 22 N. H. 523, it was held that for the purpose of showing that a mortgagee was not financially so situated as to loan money, evidence that fifteen months before the date of the mortgage he sold property very cheap and stated that he was pressed for money, was not too remote to be admissible.

61. Weadock *v.* Kennedy, 80 Wis. 449, 50 N. W. 393; Seals *v.* Robinson, 75 Ala. 363; Howell *v.* Carden, 99 Ala. 100, 10 So. 640; Baze *v.* Arper, 6 Minn. 220.

The Value of the Property a Short Time Subsequent to a conveyance assailed as fraudulent is proper matter for inquiry where it is made to appear that there was no material change in the property in the interval. Goldstein *v.* Morgan (Iowa), 96 N. W. 897.

Inadequacy of Price. — For the purpose of showing that a sale of property of long credit is fraudulent by reason of the inadequacy of the price agreed to be paid, it is admissible to show that the price stipulated is less than the property would have commanded at the time given. Borland *v.* Mayo, 8 Ala. 104.

On a proceeding to set aside a conveyance for inadequate consideration, the fact that the land transferred had been held under a tax title only is relevant, the purpose of the inquiry being to ascertain how the amount paid compares with the market value of the interests sold. West *v.* Russell, 48 Mich. 74, 11 N. W. 812.

Evidence as to the value of property involved when offered by either party is relevant and admissible, but its rejection is not an error of which the plaintiffs in attachment can complain when they fail to recover a judgment, since it could not have injured them, yet if they assailed the validity of the conveyance under which the claimant derived title, both being creditors of the same debtor, the value of the goods is material and the exclusion of the evidence is reversible error. Roswald *v.* Hobbie, 85 Ala. 73, 4 So. 177.

that property in the same vicinity had for various reasons greatly enhanced in value.[62]

And evidence of the value of the property without specification as to time or of its value at the time of the trial is not admissible on an issue as to the *bona fides* of a conveyance made many years before.[63]

That the value of the property included in a chattel mortgage is out of all proportion to the mortgage debt is a circumstance to be considered by the jury.[64]

III. FRAUDULENT INTENT, KNOWLEDGE, PARTICIPATION, INSOLVENCY, ETC.

1. Presumptions and Burden of Proof. — A. As Respects the Grantor. — a. *In General.* — The general rule is that fraudulent intent on the part of the debtor will not be presumed[65] — that the

62. Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254. See also Norwegian Plow Co. *v.* Hanthorn, 71 Wis. 529, 37 N. W. 825, where it was held that evidence of what the vendor had paid to his former partner for the latter's interest in the property is irrelevant in the absence of evidence connecting the vendee with that transaction, or showing his knowledge of its particulars.

Subsequent Sale. — Where a sale of goods by an insolvent debtor in payment of an alleged indebtedness is assailed on the ground of undervaluation, the amount the claimant received for the goods at a private sale, subsequently made to third persons, is not legal evidence against the attacking creditor of the value of the goods. H. B. Claflin Co. *v.* Rodenberg, 101 Ala. 213, 13 So. 272.

63. Zerbe *v.* Miller, 16 Pa. St. 488.

64. Ganong *v.* Green, 71 Mich. 1, 38 N. W. 661. *Citing* Olmstead *v.* Mattison, 45 Mich. 617, 8 N. W. 555; Allen *v.* Kinyon, 41 Mich. 281, 1 N. W. 863; Loomis *v.* Smith, 37 Mich. 595.

65. In Hatch *v.* Bayley, 12 Cush. (Mass.) 27, the jury were charged that it was necessary that there should be adduced stronger proof to establish fraud than is necessary to prove a debt or a sale; that the presumption was that every man conducted his business honestly without fraud; and when fraud was alleged, the proof must not only be sufficient to establish an innocent act, but to overcome the presumption of honesty. The court in sustaining this charge said: "As we understand them, the judge intended to say that he who alleges fraud against another is bound to prove it. That every man is presumed to act honestly until the contrary is proved; that he who charges another with an act involving moral turpitude or legal delinquency must prove it; that as this is an allegation against a presumption of fact, it requires somewhat more evidence than if no such presumption existed. It carried no direction as to the amount of evidence required, or as to the nature of evidence, whether positive or circumstantial, but only that, on the whole, it must be somewhat stronger; and we cannot perceive that such a direction is incorrect. The ordinary direction to the jury is that he who charges fraud must prove it to the satisfaction of the jury. We think it not contrary to any rule or principle of law for the judge to inform the jury that as the charge of fraud is a charge against a presumption of fact, perhaps often a slight one, yet the jury, in order to be satisfied, might require somewhat stronger evidence than would suffice to prove the acknowledgment of an obligation or the delivery of a chattel."

In Lewis *v.* Rice, 61 Mich. 97, 27 N. W. 867, the court said that the law does not prohibit "honest sales

burden of proving it is upon the creditor attacking the conveyance;[66] but if the evidence establishes a *prima facie* case of fraud the burden of showing that the transaction was fair is then imposed upon

of goods on credit merely because a merchant owes debts. A very large share of business is necessarily done in that way, and it has never been supposed that the purchaser could be held responsible for a dishonest purpose of his vendor on that account. The statute in regard to frauds against creditors makes fraud in all cases a question of fact, and has laid down no rules showing presumptions of fraud from sales on credit. Such presumptions may arise from failure to change possession, and some express deviations from the ordinary course of business, but not from mere failure to pay cash down. A large majority of business sales would fail if any such rule prevailed. There must be fraud in fact."

66. *Alabama.* — Howell *v.* Carden, 99 Ala. 100, 10 So. 640; Shealy *v.* Edwards, 75 Ala. 411; Jordan *v.* Collins, 107 Ala. 572, 18 So. 137; Yeend *v.* Weeks, 104 Ala. 331, 16 So. 165; Tompkins *v.* Nichols, 53 Ala. 197.

Arizona. — Rochester *v.* Sullivan, 11 Pac. 58.

Arkansas. — Clinton *v.* Estes, 20 Ark. 216.

California. — Visher *v.* Webster, 8 Cal. 109; Thornton *v.* Hook, 36 Cal. 223; Cohen *v.* Knox, 90 Cal. 266, 27 Pac. 215; Ross *v.* Wellman, 102 Cal. 1, 36 Pac. 402.

Colorado. — Smith *v.* Jensen, 13 Colo. 213, 22 Pac. 434; Arnett *v.* Coffey, 1 Colo. App. 34, 27 Pac. 614; Grimes *v.* Hill, 15 Colo. 359, 25 Pac. 698.

Delaware. — Brown *v.* Dickerson, 2 Marv. 119, 42 Atl. 421.

District of Columbia. — McDaniel *v.* Parish, 4 App. D. C. 213.

Georgia. — Colquit *v.* Thomas, 8 Ga. 258.

Illinois. — Edwards *v.* Story, 105 Ill. App. 433; Bear *v.* Bear, 145 Ill. 21, 33 N. E. 878; Davis *v.* Kennedy, 105 Ill. 300; Mey *v.* Gulliman, 105 Ill. 272; Mathews *v.* Reinhardt, 149 Ill. 635, 37 N. E. 85; Reed *v.* Noxon, 48 Ill. 323.

Indiana. — Andrews *v.* Flanagan, 94 Ind. 383; Hogan *v.* Robinson, 94 Ind. 138; Morgan *v.* Olvey, 53 Ind. 6; American Varnish Co. *v.* Reed, 154 Ind. 88, 55 N. E. 224; Levi *v.* Kraminer, 2 Ind. App. 594, 28 N. E. 1028.

Iowa. — Fifield *v.* Gaston, 12 Iowa 218; Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200; Jones *v.* Brandt, 59 Iowa 332, 10 N. W. 854, 13 N. W. 310; Adams *v.* Ryan, 61 Iowa 733, 17 N. W. 159; Chase *v.* Walters, 28 Iowa 460; Kuhn *v.* Gustafson, 73 Iowa 633, 35 N. W. 660; Bixby *v.* Carskaddon, 70 Iowa 726, 29 N. W. 626; Eherke *v.* Hecht, 96 Iowa 96, 64 N. W. 652; Shaffer *v.* Rhynders, 116 Iowa 472, 89 N. W. 1099.

Kansas. — Gleason *v.* Wilson, 48 Kan. 500, 29 Pac. 698.

Kentucky. — Casteel *v.* Baugh, 13 Ky. L. Rep. 916, 18 S. W. 1023; Redd *v.* Redd, 23 Ky. L. Rep. 2379, 67 S. W. 367.

Louisiana. — Martin *v.* Drumm, 12 La. Ann. 494; Chaffe *v.* DeMoss, 37 La. Ann. 186; Chaffe *v.* Lisso, 34 La. Ann. 310.

Maine. — Rice *v.* Perry, 61 Me. 145; Hartshorn *v.* Eames, 31 Me. 93; Blaisdell *v.* Cowell, 14 Me. 370.

Maryland. — Powles *v.* Dilley, 9 Gill 222; Cooke *v.* Cooke, 43 Md. 522; Anderson *v.* Tydings, 3 Md. Ch. 167; Glenn *v.* Grover, 3 Md. Ch. 29, *s. c.* 3 Md. 212.

Massachusetts. — Elliott *v.* Stoddard, 98 Mass. 145; Marsh *v.* Hammond, 11 Allen 483.

Michigan. — Bodine *v.* Simmons, 38 Mich. 682; Whitfield *v.* Stiles, 57 Mich. 410, 24 N. W. 119; Brace *v.* Berdan, 104 Mich. 356, 62 N. W. 568; Blanchard *v.* Moors, 85 Mich. 380, 48 N. W. 542; Bendetson *v.* Moody, 100 Mich. 553, 59 N. W. 252.

Minnesota. — Derby *v.* Gallup, 5 Minn. 119; McMillan *v.* Edfast, 50 Minn. 414, 52 N. W. 907; Hathaway *v.* Brown, 18 Minn. 414.

Mississippi. — Parkhurst *v.* McGraw, 2 Cushm. 134; McInnis *v.* Wiscassett Mills, 78 Miss. 52, 28 So. 725; Brown *v.* Bartee, 10 Smed. & M. 268.

Missouri. — Albert *v.* Besel, 88 Mo.

the party who seeks to uphold it.[67] And this burden of proving fraudulent intent is not changed because of the fact that the evidence to rebut the grantee's *prima facie* title comes in part or wholly from his witnesses on cross-examination.[68]

An Intent to Defraud a Particular Creditor need not be shown.[69]

Where a Creditor Purchases from an Insolvent or Failing Debtor goods or other property in payment of his debt, paying a fair and reasonable price, and other creditors assail the transaction as fraudulent on the ground that there was a reservation of a benefit to the debtor, the burden of proof rests upon the attacking creditors.[70]

150; Martin *v.* Fox, 40 Mo. App. 664; Deering & Co. *v.* Collins, 38 Mo. App. 73; Thompson *v.* Cohen, 24 S. W. 1023.

Nevada. — Gregory *v.* Frothingham, 1 Nev. 253.

North Carolina. — Feimester *v.* McRorie, 34 N. C. 287; Ferree *v.* Cook, 119 N. C. 161, 25 S. E. 856; Morgan *v.* Bostic, 132 N. C. 743, 44 S. E. 639; Madal *v.* Britton, 16 S. E. 914.

Pennsylvania. — Evans *v.* Kilgore, 147 Pa. St. 19, 23 Atl. 201.

Texas. — Edwards *v.* Anderson, 31 Tex. Civ. App. 131, 71 S. W. 555; Talcott *v.* Rose (Tex. Civ. App.), 64 S. W. 1009.

West Virginia. — Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780.

Wisconsin. — Mehlhop *v.* Pettibone, 54 Wis. 652, 11 N. W. 553, 12 N. W. 443; James *v.* VanDuyn, 45 Wis. 512.

In Maury Nat. Bank *v.* McAdams, 104 Tenn. 404, 61 S. W. 773, the original bill was filed by the complainant as a judgment creditor to reach certain promissory notes alleged to be the property of the judgment debtor, in which he and the makers of the notes were made defendants. Subsequently the complainant filed an amended bill charging a transfer of the notes by the judgment debtor soon after the filing of the original bill, and that the transfer was a device of the parties for the purpose of hindering, delaying and defrauding the complainant, which the defendants denied; and it was held that the complainant had the burden of proving his case.

In Sawyer *v.* Bradshaw, 125 Ill. 440, 17 N. E. 812, where the alleged fraudulent grantee had executed a deed of trust to secure a note given for an amount largely in excess of the actual debt, it was held that in the absence of proof of an intent to protect the property from other creditors, the difference between the apparent and real amount of the incumbrance was not enough of itself to stamp the deed of trust as fraudulent as against creditors.

An admission that a conveyance, absolute on its face, was in fact a mortgage only does not change the burden of proof as to the good faith of the transaction. Fifield *v.* Gaston, 12 Iowa 218.

67. Goshorn *v.* Snodgrass, 17 W. Va. 717; Leach *v.* Fowler, 22 Ark. 143; Smith *v.* Reid, 34 N. Y. St. 489, 11 N. Y. Supp. 739; Grambling *v.* Dickey, 118 N. C. 986, 24 S. E. 671; Lyman *v.* Tarbell, 30 Vt. 463.

68. Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400, wherein the court in so holding said that the attacking creditors might rely on such evidence solely, or strengthen it by further evidence adduced on their part; still, the burden of proof was upon them to prove the conveyance fraudulent, and that it was a question for the jury on the whole evidence to determine whether it was fraudulent so as to rebut the grantee's legal title.

69. Jordan *v.* Collins, 107 Ala. 572, 18 So. 137.

70. Wood *v.* Clark, 121 Ill. 359, 12 N. E. 271. See also Cook *v.* Thornton, 109 Ala. 523, 20 So. 14. *Compare* Demarest *v.* Terhune, 18 N. J. Eq. 532.

Where a Preference is Created by an Insolvent Debtor by a Sale, the parties claiming the preference as against existing creditors must sup-

In Attacking an Assignment for Creditors as Fraudulent it is incumbent upon the attacking parties to establish only the fraudulent intent of the assignor.[71]

b. *Insolvency of Debtor.* — Some of the courts state the rule to

port it when assailed by proving its consideration, that the debt preferred is a just debt of legal obligation, and that the property taken in payment does not materially exceed in value the amount of the debt; and upon these facts being shown the sale will be supported, unless it is shown that there was a secret trust for the benefit of the debtor or a reservation of some benefit to him which is not the mere incident of the sale itself. National Bank of the Republic *v.* Dickinson, 107 Ala. 265, 18 So. 144.

Rule Under Wisconsin Statute. In Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296, the court, after quoting from James *v.* VanDuyn, 45 Wis. 512, to the effect that they did not think the Wisconsin statute was intended to put upon the plaintiff the burden of proof throughout the whole case and compel him to prove affirmatively that his mortgage was not in fact fraudulent and void as to creditors, and that when a mortgagee has shown that the mortgage was given to secure an actual indebtedness to the amount thereof a *prima facie* case of good faith is made unless something on the face of the mortgage shows otherwise, said: "We are still inclined to give this construction to the statute, notwithstanding the very able argument made by the learned counsel for the appellant in favor of a different construction. We think the object of the statute was to negative the presumption which arises under the statute concerning chattel mortgages. By that statute the filing of a chattel mortgage in the proper clerk's office is declared to be equivalent to the delivery to, and the continued possession thereof retained by, the mortgagee, of the property described in the mortgage. Under this statute a mortgagee would make out a *prima facie* case in his favor against any one claiming under the mortgagor by simply proving the execution of his mortgage, and the filing of it in the proper office, and the burden of proof to show that the mortgage was not given to secure a real indebtedness would be upon the party claiming under the mortgagor. This statute made it difficult for the party attacking the mortgage to prove affirmatively that there was no *bona fide* debt due to the mortgagee from the mortgagor, or to show that the debt was not as great as that specified in the mortgage. These facts were generally known only to the mortgagor and mortgagee, and consequently the party attacking the validity of the mortgage would be compelled to call upon the parties hostile to him, as his witnesses, to attack the mortgage, especially if he sought to attack it on the ground that there was no *bona fide* debt from the mortgagor to the mortgagee, or that the real debt was less than that stated in the mortgage. The section of the statute removes this difficulty when an officer is a party, and requires the mortgagee to assume the affirmative upon these questions, and show that there is a debt due from the mortgagor to him, and the amount thereof, and that the mortgage was given to secure that debt; and when he has done this, we think he has done all that is necessary to make out a *prima facie* right to recover. We do not think that the mortgagee is bound to establish the negative upon all other issues in the case, which, if established affirmatively, would tend to show the mortgage fraudulent and void as to creditors."

71. Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, *holding* that if this be shown the assignment is void, and the assignee, however innocent he may be of the fraud, will not be presumed to act under it, and the creditors may then pursue their remedies as if the assignment had not been made. See also more fully on this case the article "ASSIGNMENT FOR BENEFIT OF CREDITORS."

be that before a conveyance will be set aside as being fraudulent against creditors of the grantor, it is incumbent upon the attacking creditors to show that at the time of the conveyance as well as of bringing the action the debtor did not have sufficient property subject to execution from which their debts could be paid;[72] and the fact that insolvency existed at the time the action is brought raises no presumption of the existence of insolvency prior to that time, and does not extend it back to the time when the conveyance was made.[73]

c. *Cogency of Proof.* — Where a conveyance *prima facie* vests the title in a grantee, the creditor who attacks it as fraudulent should not leave the court or jury to act upon mere conjecture,[74] nor upon proofs loose and indeterminate in their character. The rule of the criminal law requiring proof beyond a reasonable doubt does not apply in such actions,[75] and a charge to the effect that in order to justify the imputation of fraud the facts must be such that they are not explicable on any other reasonable hypothesis exacts too great

72. Nevers *v.* Hack, 138 Ind. 260, 37 N. E. 791; Boyd *v.* Vickrey, 138 Ind. 276, 37 N. E. 972; Eiler *v.* Crull, 112 Ind. 318, 14 N. E. 79; Hogan *v.* Robinson, 94 Ind. 138; Evans *v.* Hamilton, 56 Ind. 34; Bishop *v.* State *ex rel.* Lord, 83 Ind. 67. See also Erb *v.* Cole, 31 Ark. 554; Lewis *v.* Boardman, 78 App. Div. 394, 79 N. Y. Supp. 1014; *following* Kain *v.* Larkin, 131 N. Y. 300, 30 N. E. 105, and refusing to follow Smith *v.* Reid, 134 N. Y. 568, 31 N. E. 1082. *Compare* Wright *v.* Wheeler, 14 Iowa 8.

73. Nevers *v.* Hack, 138 Ind. 260, 37 N. E. 791. *Compare* Strong *v.* Lawrence, 58 Iowa 55, 12 N. W. 74; Carlisle *v.* Rich, 8 N. H. 44.

74. Urdangen *v.* Doner (Iowa), 98 N. W. 317; Miller *v.* Beadle, 65 Mich. 643, 36 N. W. 165; McDaniel *v.* Parish, 4 App. D. C. 213.

Where notes and a mortgage given for their security are fair on their face, the presumption is that they are valid and binding until that presumption is overcome by satisfactory proof. To create a mere suspicion of fraud is not sufficient. But if it exists it must be satisfactorily shown. The policy of the law is opposed to overturning solemn written instruments and deeds and conveyances on slight evidence. The law designs that such instruments shall stand until overcome by evidence that convinces the understanding that they have been entered into for a purpose that is prohibited by the law. Whilst courts are vigilant in relieving against fraud, they are careful to protect fair and honest transactions. Pratt *v.* Pratt, 96 Ill. 184.

In Casey *v.* Leggett, 125 Cal. 664, 58 Pac. 264, the court, *quoting* from Levy *v.* Scott, 115 Cal. 39, 46 Pac. 892, said: "It is quite true that evidences of fraud are not left lying patent in the sunlight; that fraud itself is always concealed, and that the truth is to be discovered more often from circumstances, from the interests of the parties, from the irregularities of the transaction, coupled with injury worked to an innocent party, than from direct and primary evidence of the fraudulent contrivance itself. Nevertheless the evidence of these matters, facts and circumstances, taken together, must amount to proof of fraud, and not to a mere suspicion thereof, for the presumption of the law, except where confidential relations are involved, is always in favor of the fair dealing of the parties."

75. Hough *v.* Dickinson, 58 Mich. 89, 24 N. W. 809. *Compare* Wilson *v.* Cunningham, 24 Utah 167, 67 Pac. 118, where the court said that the proof must be by testimony, clear, plain, convincing, and beyond a reasonable controversy.

a measure of proof, and is erroneous.[76] But in such actions fraud may be established by a preponderance of the evidence,[77] although some of the courts hold that because of the rule that where all the facts bearing upon the question of the intent with which the conveyance was made will as well consist with honesty as with dishonesty and fraud therein, fraud cannot be imputed;[78] proof of the fraud should accordingly be clear, direct and satisfactory.[79]

76. Adams *v.* Thornton, 78 Ala. 489, 56 Am. Rep. 49, *overruling* Steele *v.* Kinkle, 3 Ala. 352; and Tompkins *v.* Nichols, 53 Ala. 197. The court said: "Fraud requires no higher measure of proof for its establishment in any civil proceeding than is required in many other cases where the presumption of honesty, official uprightness, or kindred presumption is to be overcome. The assailing party encounters the presumption of honesty and fair dealing; but it is a disputable presumption, the burden of overcoming which rests on him. When he produces facts and circumstances in evidence which not only cast a suspicion on the transaction, but show a state of facts which are not fairly or reasonably reconcilable with fair dealing and honesty of purpose, then he has overcome the presumption of purity of intention and is entitled to a judgment of condemnation."

77. Lilly *v.* McMillan, 52 Iowa 463; Krolik *v.* Graham, 64 Mich. 226, 31 N. W. 307; Doxsee *v.* Waddick (Iowa), 98 N. W. 483.

In Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70, the court said: "By the words 'preponderance of evidence' is meant the greater weight of evidence, and it is difficult to see how any disputed question of fact can be found except by the greater weight of evidence. The difference in the weight may be slight, but unless it preponderates on one side, or has greater weight than on the other, the matter in dispute cannot be said to be proved. If the evidence, in its weight, is equally balanced between the contending parties, the one holding the affirmative of the issue must fail; and the same may be said when he has less than a preponderance of the evidence."

78. Dallam *v.* Renshaw, 26 Mo. 533; Rumbolds *v.* Parr, 51 Mo. 592; Shaffer *v.* Rhynders, 116 Iowa 472, 89 N. W. 1099; Eichstaedt *v.* Moses, 105 Ill. App. 634. See also Stauffer *v.* Kennedy, 47 W. Va. 714, 35 S. E. 892.

79. Fifield *v.* Gaston, 12 Iowa 218; Palmer *v.* Palmer, 62 Iowa 204, 17 N. W. 463; Rice *v.* Jerensen, 54 Wis. 248, 11 N. W. 549; Edwards *v.* Story, 105 Ill. App. 433; McDaniel *v.* Parish, 4 App. D. C. 213; Danner Lumb. & Land Co. *v.* Stonewall Ins. Co., 77 Ala. 184. See also Blanchard *v.* Moors, 85 Mich. 380, 48 N. W. 542, where the court said that the evidence must "show such a combination of facts and circumstances as will lead an unbiased mind to believe that fraud has been perpetrated."

In Pogodzinski *v.* Kruger, 44 Mich. 79, 6 N. W. 116, the court said, in speaking of the degree of proof necessary to establish fraud, that "it was necessary to adduce a species and amount of proof so convincing as to cause a very hearty and firm belief of the fact. It was not sufficient to entangle the mind in perplexity, or generate mere doubt or suspicion. A party charging fraud is not entitled to succeed unless his proof creates a clear and full impression that the charge is true. It is unnecessary to write out a discussion of the evidence in the record. Upon close examination it fails to satisfy the understanding that the mortgage was a mere sham. It may have been, but there is too much room for thinking it may not have been."

In Gumberg *v.* Treusch, 103 Mich. 543, 61 N. W. 872, the jury were charged as follows: "The proof to establish fraud should be clear and convincing. If the circumstances are equally as consistent with honesty and fair dealing as with fraudulent and dishonest transactions, then it

Equivalent of Testimony of Two Witnesses Not Necessary.— The creditor has the burden of proof to make out his case under the rules of evidence applicable in actions at law, but he is not required to do so under the rules of equity that the equivalent of the testimony of two witnesses is necessary to overcome the responsive answer to the fact averred in the bill.[80]

B. As Respects the Grantee. — a. *In General.* — Although it is not incumbent upon creditors to show a fraudulent intent upon the part of the grantee, they have the burden of showing that he had knowledge of the fraudulent intent or purpose on the part of the grantor, or that he had notice of such facts as would have put him upon an inquiry leading to knowledge of, or that he participated in, such fraudulent intent.[81] And it is not error on the part of the

must be said that the fraud is not established. The presumption of law is in favor of honesty and fair dealing, and that presumption must be overcome; and where it is sought to overcome it by circumstances, in the absence of direct or positive proof of fraudulent acts, the proof must be clear and convincing. It is not sufficient to prove facts and circumstances, or a combination of facts and circumstances, that create doubt and suspicion in the mind as to the honesty and fairness of the transaction, but the proof must be of the kind and amount as to create in the mind a hearty conviction that the charge is true. Fraud is never to be presumed, neither is it to be lightly inferred, but the proof should be clear and convincing. It is not necessary to establish it by proof beyond a reasonable doubt, but it must be proof, as I have said, that carries to the mind a conviction — a hearty conviction — that the charge is true." It was held that under the rule laid down in Ferris *v.* McQueen, 94 Mich. 367, 54 N. W. 164, the court was not justified in the use of the language given. "The words 'clear proof' and 'hearty conviction' are apt to mislead. Proof of facts and circumstances is sufficiently clear if it creates a belief that a fraud has been perpetrated, and a conviction so produced is sufficiently hearty to predicate a verdict upon."

In Ferris *v.* McQueen, 94 Mich. 367, 54 N. W. 164, where the jury had been told that fraud could "be proved by circumstantial evidence as well as positive proof," but that these facts and circumstances must not be slight and the inferences could only be drawn from strong presumptive circumstances which must amount to clear proof, it was held that the language used had a tendency to mislead the jury into a belief that more stringent proof was necessary than the law requires. See also Watkins *v.* Wallace, 19 Mich. 57.

80. Miles *v.* Lewis, 115 Pa. St. 580, 10 Atl. 123.

81. *United States.* — Van Sickle *v.* Wells-Fargo & Co., 105 Fed. 16.

Alabama. — Tompkins *v.* Nichols, 53 Ala. 197; Norwood *v.* Washington, 136 Ala. 657, 33 So. 869; Jordan *v.* Collins, 107 Ala. 572, 18 So. 137; Shealy *v.* Edwards, 75 Ala. 411; Lipscomb *v.* McClellan, 72 Ala. 151.

Arkansas. — Stephens *v.* Oppenheimer, 45 Ark. 492; Erb *v.* Cole, 31 Ark. 554.

California. — Casey *v.* Leggett, 125 Cal. 664, 58 Pac. 264; Ross *v.* Wellman, 102 Cal. 1, 36 Pac. 402; Cohen *v.* Knox, 90 Cal. 266, 27 Pac. 215.

Colorado. — Smith *v.* Jensen, 13 Colo. 213, 22 Pac. 434; Grimes *v.* Hill, 15 Colo. 359, 25 Pac. 698.

Connecticut. — Partelo *v.* Harris, 26 Conn. 480.

Georgia. — Claflin *v.* Ballance, 91 Ga. 411, 18 S. E. 309; Scott *v.* Winship, 20 Ga. 429.

Illinois. — Johnston *v.* Hirschberg, 85 Ill. App. 47; Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70; Eichstaedt *v.* Moses, 105 Ill. App. 634.

Indiana. — American Varnish Co. *v.* Reed, 154 Ind. 88, 55 N. E. 224; Scott *v.* Davis, 117 Ind. 232, 20 N. E. 139.

trial judge to withdraw from the consideration of the jury evidence of fraud on the part of the grantor offered against the grantee in

Iowa. — Aulman *v.* Aulman, 71 Iowa 124, 32 N. W. 240; Hughes *v.* Monty, 24 Iowa 499; Ray *v.* Teabout, 65 Iowa 157, 21 N. W. 497; Fifield *v.* Gaston, 12 Iowa 218; Spaulding *v.* Adams, 63 Iowa 437, 19 S. W. 341; Chase *v.* Walters, 28 Iowa 460; Thompson *v.* Zuckmayer, 94 N. W. 476.

Kansas. — LaClef *v.* Campbell, 3 Kan. App. 756, 45 Pac. 461.

Kentucky. — Barker *v.* Boyd, 24 Ky. L. Rep. 1389, 71 S. W. 528.

Maine. — Spear *v.* Spear, 97 Me. 498, 54 Atl. 1106; Tolman *v.* Ward, 86 Me. 303, 29 Atl. 1081.

Massachusetts. — Lincoln *v.* Wilbur, 125 Mass. 249; Bridge *v.* Eggleston, 14 Mass. 245, 7 Am. Dec. 209.

Michigan. — Hough *v.* Dickinson, 58 Mich. 89, 24 N. W. 809; Bedford *v.* Penny, 58 Mich. 424, 25 N. W. 381; Fisher *v.* Hall, 44 Mich. 493, 7 N. W. 72; Bauermann *v.* Van Buren, 44 Mich. 496, 7 N. W. 67; Hill *v.* Bowman, 35 Mich. 191; Loomis *v.* Smith, 37 Mich. 595; Jordan *v.* White, 38 Mich. 253; Eureka Iron & Steel Wks. *v.* Bresnahan, 66 Mich. 489, 33 N. W. 834.

Minnesota. — Hathaway *v.* Brown, 18 Minn. 414; Leqve *v.* Smith, 63 Minn. 24, 65 N. W. 121.

Mississippi. — Verner *v.* Verner, 64 Miss. 184, 1 So. 52.

Missouri. — Hurley *v.* Taylor, 78 Mo. 238.

Nebraska. — Grandin *v.* First Nat. Bank, 98 N. W. 70.

Nevada. — Gregory *v.* Frothingham, 1 Nev. 253.

New Hampshire. — Currier *v.* Taylor, 19 N. H. 189.

New Jersey. — New York F. Ins. Co. *v.* Tooker, 35 N. J. Eq. 408.

New York. — Jaeger *v.* Kelley, 52 N. Y. 274; Starin *v.* Kelly, 4 Jones & S. 366; Beals *v.* Guernsey, 8 Johns. 446, 5 Am. Dec. 348.

North Carolina. — Beasley *v.* Bray, 98 N. C. 266, 3 S. E. 497; Nadal *v.* Britton, 112 N. C. 180, 16 S. E. 914.

Pennsylvania. — Benson *v.* Maxwell, 14 Atl. 161.

South Carolina. — Wemges *v.* Cash, 15 S. C. 44.

Texas. — Hadock *v.* Hill, 75 Tex. 193, 12 S. W. 974.

West Virginia. — Bishoff *v.* Hartley, 9 W. Va. 100.

Wisconsin. — Mehlhop *v.* Pettibone, 54 Wis. 652, 11 N. W. 553, 12 N. W. 443.

Rule Stated. — Although the grantee did not have such knowledge, he may have made his purchase under such circumstances as will prevent him from being deemed a *bona fide* purchaser. If he had knowledge of facts and circumstances which were naturally and justly calculated to excite suspicion in the mind of a person of ordinary care and prudence, and which would naturally prompt him to pause and inquire before consummating the transaction, and such inquiry would have necessarily led to a discovery of the fact with notice of which he is sought to be charged, he will be considered to be affected with such notice, whether he made inquiry or not. But, while the fact of notice may be inferred from circumstances as well as proved by direct evidence, yet the proof must be such as to affect the conscience of the purchaser, and must be so strong and clear as to fix upon him the imputation of *mala fides.* Ferguson *v.* Daughtrey, 94 Va. 308, 312, 26 S. E. 822; Fischer *v.* Lee, 98 Va. 159, 35 S. E. 441, and cases cited.

"If the Creditor Is Guilty of Fraud it is because he is a participant in the fraudulent intent of the debtor. To charge that he is such a participant is to charge him with fraud. Upon him who charges fraud rests the burden of proof. The fact that another is guilty of fraud in the same transaction cannot, in the nature of things, shift the burden of such proof." State *ex rel.* Robertson *v.* Hope, 102 Mo. 410, 14 S. W. 985.

Under the National Bankruptcy Law a preferential transfer by an insolvent debtor four months before the filing of the petition in bankruptcy is voidable at the suit of the trustee in bankruptcy, if the preferential transferee shall have had reasonable

the absence of evidence connecting the grantee with such fraud.[82] But such knowledge need not be shown by the testimony of two witnesses, or one witness with corroborating circumstances, but it may be shown from all the circumstances surrounding the transaction.[83]

Knowledge of Each Particular Act. — The rule requiring proof of knowledge or participation on the part of the grantee does not render it necessary, however, to prove his knowledge of every particular act or declaration on the part of the grantor from which such fraudulent intent is to be inferred.[84]

Preferred Creditor. — Where it is claimed that a preferred creditor participated in the fraudulent designs of the debtor, the burden is upon the other creditors attacking the conveyance to prove such participation by a preponderance of the evidence.[85]

cause to believe that the transfer was intended to give him a preference; and in Cullinane *v.* State Bank of Waverley (Iowa), 98 N. W. 887, an action by a trustee in bankruptcy to recover from a mortgagee of a bankrupt on the ground that the mortgage was a preference, it was held that the burden was on the plaintiff to show that the mortgagee had reasonable cause to believe not only that insolvency existed as a fact, but that a preference was intended by the mortgage. See also Pirie *v.* Chicago, 182 U. S. 438; Deland *v.* Miller & C. Bank, 119 Iowa 368, 93 N. W. 304.

82. Mathews *v.* Reinhardt, 149 Ill. 635, 37 N. E. 85.

83. Cooke *v.* Cooke, 43 Md. 522.

84. Holmes *v.* Braidwood, 82 Mo. 610.

"**Such a Requirement** would render futile and impracticable all attacks upon fraudulent transfers, in perhaps ninety-nine out of every one hundred cases, in which it might be attempted to assail their validity. It would put a facile means within the reach of parties to destroy the force and admissibility of evidence by the artifice of management. Hence, the law does not require more than a knowledge of facts, which, however general in their nature, are sufficient to put the grantee on inquiry, by reasonably exciting a just suspicion in his mind as to the honesty or *bona fides* of the alleged fraudulent transaction." Shealy *v.* Edwards, 75 Ala. 411. The specific point ruled upon in this case was that it was not proper to permit evidence of the transfer by one of the grantors several days after the conveyance of the notes taken for the purchase-money of the property, which transfer was shown to have been made without the knowledge of the grantee and subsequent to their purchase.

85. Steinburg *v.* Buffum, 61 Neb. 778, 86 N. W. 491, where the court in so holding said that the preferred creditor "could only maintain his case by proof that he was a creditor of the vendor, and purchased the property in satisfaction of the debt. This done, the law presumes the transaction was honest, and fairly consummated. The defendant may disprove these facts, and defeat plaintiff's right to the property, or, as he attempted to do, may avoid the transfer by proving a fraud on the rights of other creditors in the sale of the property, and that the plaintiff, by reason of his actions in connection with the transaction, was chargeable with such fraud. To succeed in this aspect of the case, it was incumbent upon him to establish his defense by a preponderance of the evidence. Having charged the plaintiff with fraudulent acts on his part sufficient to void the transaction, he was required to make the charge good by evidence in support thereof preponderating in his favor. It is not, we think, the law that when he proves the fraudulent intent of the vendor, and that the vendee had notice of it, the burden is on the vendee

b. *Vendee Taking Without Consideration.* — Where the fraudulent design of the vendor is shown, it is not necessary, in addition to proof that the vendee took without consideration, to show his fraudulent participation.[86]

c. *Mere Suspicion Insufficient.* — In order to affect a vendee with knowledge of the vendor's fraudulent design, the attacking creditors must show more than the possession of facts calculated to create a mere suspicion of such design;[87] they must show facts and circumstances not fairly and reasonably reconcilable with fair dealing and honesty of purpose.[88]

Actual Relief. — It has been held necessary to show that the vendee had an actual belief that the vendor made the transfer with such intent.[89]

d. *Knowledge of Insolvency.* — Nor is it sufficient to show merely that the vendee had knowledge of the vendor's insolvency.[90]

C. Rule as to Subsequent Creditors. — a. *In General.* — The general rule is that where subsequent creditors seek to set aside a

to prove that he did not participate in the fraud. The defendant is required to proceed one step further, and prove also that the plaintiff was a participant in the fraud complained of. Blumer *v.* Bennett, 44 Neb. 873, 63 N. W. 14. The rule is well settled in this state that, as to a *bona fide* creditor of a fraudulent vendor, buying property or obtaining security for the satisfaction of his demand, the transaction cannot be avoided as to him by other creditors, except it is shown that he shared in the fraudulent designs of his vendor, and received the property or security for other purposes than protecting himself from loss by reason of his demand against the vendor. Jones *v.* Loree, 37 Neb. 816, 821, 56 N. W. 390; Grosshans *v.* Gold, 49 Neb. 599, 68 N. W. 1031; Bank *v.* Bunn (Neb.), 85 N. W. 527."

86. Preston *v.* Cutter, 64 N. H. 461, 13 Atl. 874.

87. Hooks *v.* Pafford (Tex. Civ. App.), 78 S. W. 991, where the court said: "If he did not know of the intent, then, to constitute notice, he must be in possession of facts and circumstances such as would put an ordinarily prudent person upon inquiry, which, by the use of proper diligence on his part, would lead to a knowledge of such intention. A purchaser might be in possession of facts that would create a suspicion as to the seller's fraudulent intent, but which by the use of proper diligence would not lead to a knowledge of such intention. Of course, if he knew facts which would excite the suspicion of a man of ordinary prudence, and put him upon inquiry, and by the use of diligence would discover the fraudulent intent, then he would be charged with notice. The charge was calculated to mislead, in that it did not fully state the law, as indicated."

88. Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Keller *v.* Taylor, 90 Ala. 289, 7 So. 907.

In an action by an assignee in insolvency to recover the property sold by the assignor in violation of the insolvent laws, it is not sufficient, in order to establish the fact that the vendee had at the time of the purchase reasonable cause to believe the debtor to be insolvent, that the creditor had some cause to suspect such insolvency, but it must be shown that he had such a knowledge of facts as would induce a reasonable belief of the debtor's insolvency. Cutler *v.* Dunn, 68 N. H. 394, 44 Atl. 536.

89. Knower *v.* Cadden Clothing Co., 57 Conn. 202.

90. Meyer Bros. Drug Co. *v.* Durham (Tex. Civ. App.), 79 S. W. 860; Vickers *v.* Buck Stove & Range Co., 60 Kan. 598, 57 Pac. 517; Cannon *v.* Young, 89 N. C. 264.

conveyance, the burden is upon them to show that the conveyance was made with intent to defraud them;[91] and an intent to defraud subsequent creditors is not to be presumed from the fact of an intent to defraud existing creditors.[92]

b. *Actual Intent Not Necessary.* — But a subsequent creditor does not have the burden of showing an actual intent to defraud; it is sufficient for him to show facts affording a reasonable ground to presume fraud.[93]

c. *Intent as an Independent Fact.* — Nor need the fraudulent intention be proved as an independent fact. It may be gathered from

91. *Alabama.* — Elyton Land Co. *v.* Iron City Steam Bottling Wks., 109 Ala. 602, 20 So. 51; Seals *v.* Robinson, 75 Ala. 363; Stoutz *v.* Huger, 107 Ala. 248, 18 So. 126; Stiles *v.* Lightfoot, 26 Ala. 443; Wilson *v.* Stevens, 129 Ala. 630, 29 So. 678.

Arkansas. — May *v.* State Nat. Bank, 59 Ark. 614, 28 S. W. 431.

Illinois. — Tunison *v.* Chamblin, 88 Ill. 378; Lamont *v.* Regan, 96 Ill. App. 359.

Maine. — Knight *v.* Kidder, 1 Atl. 142.

Massachusetts. — Winchester *v.* Charter, 97 Mass. 140; *s. c.* 12 Allen 606.

Mississippi. — Wynne *v.* Mason, 72 Miss. 424, 18 So. 422.

Missouri. — Ziekel *v.* Douglass, 88 Mo. 382.

Nebraska. — Ayers *v.* Wolcott, 92 N. W. 1036; *modifying* 62 Neb. 805, 87 N. W. 906.

New Jersey. — Kinsey *v.* Feller (N. J. Eq.), 51 Atl. 485; Carpenter *v.* Carpenter, 27 N. J. Eq. 502; Hagerman *v.* Buchanan, 45 N. J. Eq. 292, 17 Atl. 946, 14 Am. St. Rep. 732; Boquet *v.* Heyman, 50 N. J. Eq. 114, 24 Atl. 266.

Oregon. — Crawford *v.* Beard, 12 Or. 447.

Texas. — O'Neal *v.* Clymer (Tex. Civ. App.), 61 S. W. 545.

West Virginia. — Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847; Cohn *v.* Ward, 32 W. Va. 34, 9 S. E. 41.

92. Lawton *v.* Gordon, 34 Cal. 36, 91 Am. Dec. 670; Evans *v.* David, 98 Mo. 405, 11 S. W. 975; Stevens *v.* Morse, 47 N. H. 532; Harton *v.* Lyons, 97 Tenn. 180, 36 S. W. 851. *Compare* Hudnal *v.* Wilder, 4 McCord (S. C.) 294.

93. Snyder *v.* Free, 114 Mo. 360, 21 S. W. 847, where the court said: "Sometimes it has been loosely said that, in order for a subsequent purchaser to successfully attack a voluntary conveyance on the ground of fraud, it is necessary that he show an 'actual intent' to defraud; but this phrase is inaccurate and misleading. The statute uses no such expression. It is satisfied with 'the intent to defraud,' and courts ought to require no more. In the highest grade of crime proof of an 'actual intent' is not required, and, if required, convictions would rarely occur. So it would be in regard to instances like the present. It would be, indeed, a vain and hopeless task to set aside a voluntary conveyance if a subsequent purchaser had to prove an 'actual intent' to defraud. But, if such an intent were required, this case would furnish as strong proof of it as it is ordinarily possible to obtain. But such a high degree of proof is not necessary. Fraud under the statute is nowise different from that found elsewhere. Whatever satisfies the mind and conscience of the existence of fraud is sufficient. . . . A similar view of the law is taken in New Jersey. Claflin *v.* Mess, 30 N. J. Eq. 211, in which, after declaring that 'fraud in fact' must be shown by future creditors, it is explained that such 'may be considered found when it appears that, after deducting the property which is the subject of the gift, the grantor has not retained sufficient available assets for the payment of his debts.' This view appears to be that entertained by the learned author of a recent work on the subject now in hand. 2 Bigelow on Fr. 105, *et seq.*"

the deed itself, and from the acts of the parties and the surrounding circumstances.[94]

d. *Insolvency of Grantor.* — A subsequent creditor has the burden of showing insolvency of the grantor at the time of the conveyance.[95]

D. Rule as to Subsequent Purchaser. — As the Attacking Creditor. — A subsequent purchaser has been held to stand upon the same footing as a subsequent creditor. He can only attack a previous conveyance by showing that it was made with intent to defraud him.[96]

Against Attacking Creditors. — Although there may have been a fraudulent intent on the part of both the vendor and vendee, it is incumbent upon creditors attacking the conveyance to show that a purchaser from the vendee had actual knowledge of the first vendee's fraudulent intent.[97]

E. Circumstances Raising Presumption of Fraud. — a. *In General.* — The broad rule is sometimes laid down that fraud is never presumed.[98] This is not strictly true, however, because where badges of a fraudulent conveyance appear,[99] *bona fide* creditors

94. Baltimore High Grade Brick Co. *v.* Amos, 95 Md. 571, 53 Atl. 148, 52 Atl. 582.

95. Lewis *v.* Boardman, 78 App. Div. 394, 79 N. Y. Supp. 1014.

96. Prestige *v.* Cooper, 54 Miss. 74.

97. Thornton *v.* Hook, 36 Cal. 223; Paige *v.* O'Neil, 12 Cal. 483; Hodges *v.* Coleman, 76 Ala. 103; White *v.* Million, 102 Mo. App. 437, 76 S. W. 733, *holding* that knowledge of such facts as would put a prudent man on inquiry may be submitted as evidence tending to show actual knowledge, but that such knowledge it not itself the same as actual knowledge. See also Maddox *v.* Reynolds, 69 Ark. 541, 64 S. W. 266. *Compare* Schaible *v.* Ardner, 98 Mich. 70, 56 N. W. 1105, *holding* otherwise in the case of a conveyance presumptively fraudulent as to creditors.

98. In Sedgwick *v.* Tucker, 90 Ind. 271, it was held that the phrase "Fraud is never presumed," when used by the court in charging the jury, is not available error if it be used under such circumstances as to be understood by the jury as meaning merely that fraud cannot be found as a fact without some evidence of its existence.

In Kendall *v.* Hughes, 7 B. Mon. (Ky.) 368, it was held misleading to charge the jury that "fraud cannot be presumed, but must be proved like any other fact," because fraud may be presumed if there be sufficient evidence of other facts which will authorize the inference of fraud.

In Cooper *v.* Friedman, 23 Tex. Civ. App. 585, 57 S. W. 581, it was held error for the court to charge the jury that fraud is never presumed, but must be proved like any other fact. "Of course it is true that fraud must be proven like any other fact, and, as a matter of law, in the absence of proof it may not be presumed; but, from the existence of certain facts which have a tendency to establish fraud, the jury might be warranted in indulging in the presumption that fraud existed in the transaction complained of."

99. "A badge of fraud has been defined to be a fact which is calculated to throw suspicion upon a transaction, and calling for an explanation. Peebles *v.* Horton, 64 N. C. 374. In Terrell *v.* Green, 11 Ala. 213, it was said to be an 'inference drawn by experience from the customary conduct of mankind.' These badges of fraud do not in themselves, or *per se,* constitute fraud, but are rather signs or *indicia* from which its existence may be properly inferred as matter of evidence. They are more

have the right to require that these shall be explained, and all unfavorable presumptions arising from them be repelled by evidence of good faith on the part of those claiming under the conveyance.[1]

or less strong or weak according to their nature and number concurring in the same case. They are as infinite in number and form as are the resources and versatility of human artifice. The present case presents numerous illustrations of many such badges, which are enumerated in the various rulings of the court with explanations as to their legal force and effect, which seem correct except in one particular. The court erred in charging the jury as to the rule governing the burden of proof in such cases. The weight which is to be given badges of fraud is a matter usually for the determination of the jury. 'In some cases,' as observed by a learned author, 'fraud is *self-evident;* and when so, it is the proper province of the court to adjudge upon it.' Bigelow on Fr., p. 468. But it cannot be asserted, as a general rule, that everything which casts suspicion upon the good faith of a transaction shifts the burden of proof upon the grantee or interested party, so as to require him to explain it, and that, in the absence of explanation, such transaction is necessarily to be pronounced fraudulent. There are numerous badges or *indicia* of fraud which might, although without explanation, entirely fail to satisfy the minds of a jury that the transaction to which they relate had its origin in a fraudulent intent. There may be a suspicion, in other words, falling far short of satisfactory proof." Shealy *v.* Edwards, 75 Ala. 411.

1. Wimberley *v.* Montgomery Fertilizer Co., 132 Ala. 107, 31 So. 524. See also Harrell *v.* Mitchell, 61 Ala. 270; Watts *v.* Burgess, 131 Ala. 333, 30 So. 868; Orr *v.* Peters, 197 Pa. St. 606, 47 Atl. 849. See also Cincinnati Tobacco Warehouse Co. *v.* Matthews, 24 Ky. L. Rep. 2445, 74 S. W. 242, where the grantor executed the conveyance within a few days after suits were threatened, conveying all his property to his son and son-in-law for the recited consideration of $500, the land itself being probably worth $1500, and there was no change of possession or use of the land following the execution of the deed. O'Conner M. & M. Co. *v.* Coosa F. Co., 95 Ala. 614, 10 So. 290, 36 Am. St. Rep. 251.

Sales in Bulk. — In Maryland a statute provides that "A sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or a sale of an entire stock of merchandise in bulk, will be presumed to be fraudulent and void as against the creditors of the seller, 'unless the seller and the purchaser shall, at least five days before the sale, make an inventory as therein provided, and unless the purchaser shall in good faith make certain inquiries as to the creditors of the seller, and give them notice of such proposed sale. The seller is also required to fully and truthfully answer in writing each and all the inquiries to be made of him.'" In Hart *v.* Roney, 93 Md. 432, 49 Atl. 661, it was held that the presumption referred to in this statute was a rebuttable presumption, and that in that particular case the presumption was rebutted by the testimony of the seller to the effect that he purchased the stock to secure his rent, and to have the business conducted in a more profitable way, as the building occupied by the seller belonged to him and adjoined his own business, and that he did not suspect that the seller had any motive in selling beyond going out of business; and also proof that he had inquired as to whether a certain judgment existed against the seller. The court said: "Prior to the passage of the act, the presumption was that such a transaction was *bona fide*, and the burden was on the one attacking it to prove fraud; but the statute shifts the burden of proof unless its provisions are complied with. The difficulty in proving fraud was doubtless known to the members of the legislature, and, as those endeav-

Thus, when the necessary result of a debtor's act is to place his property beyond the reach of legal process it will be presumed that he did so with a fraudulent intent.[2]

Debtor Paying Consideration. — The presumption of fraudulent intent arising by reason of a statute of uses and trusts, of one who pays the consideration for a grant to another, casts upon the grantee the burden of disproving a fraudulent intent.[3]

Secret Reservation of Benefit to Debtor. — So also without reference to the actual intention of the parties the law condemns as offending the rights of existing creditors an absolute conveyance made by an embarrassed debtor when there is a secret reservation for his benefit.[4]

Conveyances Between Corporations Having Same Directors. — Where property of a corporation is conveyed to another corporation represented by the same directors, the fact of such relationship is a circumstance calculated to arouse suspicion, and calls for a rigid and severe scrutiny in the examination of such transaction when assailed by creditors.[5]

oring to do so were frequently without evidence unless they made the parties to the alleged fraud their witnesses, it is apparent that the legislature thought it would lessen, if not relieve, the difficulty by casting the burden on the parties to establish the *bona fides* of such transactions. To have made such sales absolutely void and conclusively fraudulent unless the parties complied with such provisions as are contained in the law might in some cases have worked great injustice."

2. Crawford *v.* Beard, 12 Or. 447, 8 Pac. 537. See also Cook *v.* Burnham, 3 Kan. App. 27, 44 Pac. 447.

3. This presumption may be overcome by proof that the one paying the consideration was at the time neither insolvent nor contemplating insolvency, but had, aside from the consideration paid for the property so granted, ample funds to pay his debts, and that an inability to meet his obligations was not and could not reasonably have been supposed to have been in his mind. Dunlap *v.* Hawkins, 59 N. Y. 342, where the court said: "By proving the pecuniary circumstances and condition of the grantor, or him who pays for and procures a grant from others, his business and its risks and contingencies, his liabilities and obligations, absolute and contingent, and his resources and means of meeting and solving his obligations, and showing that he was neither insolvent, nor contemplating insolvency, and that an inability to meet his obligations was not and could not reasonably be supposed to have been in the mind of the party, is the only way in which the presumption of fraud, arising from the fact that the conveyance is without a valuable consideration, can be repelled and overcome, except as the party making or procuring the grant may, if alive, testify to the absence of all intent to hinder, delay or defraud creditors."

4. The intent in such case is deduced from the transaction itself, the inevitable consequence being to hinder, delay or defraud creditors. A conveyance, absolute in form, but intended as security for a debt, operates a secret reservation, for the benefit of the debtor, of a valuable right and property — the equity of redemption which is capable of being subjected to the payment of his debts. On this ground rests the settled doctrine of this court, that such conveyances, when made by an embarrassed or insolvent debtor, are obnoxious to the provisions of the statute, which declares void as against creditors all conveyances "made in trust for the use of the person making the same." Hill *v.* Rutledge, 83 Ala. 162, 4 So. 135.

5. When such a relationship is

b. *Vendee's Knowledge of Vendor's Fraudulent Design.* — Where the circumstances surrounding a fraudulent conveyance by an insolvent debtor are out of the usual course of business, and are such as to excite the suspicions of a reasonably prudent man, knowledge on the part of the vendee of the fraudulent design of the vendor may be presumed.[6]

c. *Misstatement as to Consideration.* — It has been held that a misstatement of the consideration in the bill of sale attacked as fraudulent is presumptive evidence of fraud.[7]

d. *Preferences.* — The law does not presume that a transfer of all of a debtor's property in payment of the claim of one creditor is fraudulent merely because the debtor retains nothing wherewith to pay other creditors.[8]

e. *Mortgage Exceeding Amount of Indebtedness.* — The fact that a mortgage is taken for more than is due from a person known to be insolvent is presumptive evidence of fraud, and imposes upon the mortgagee the burden of showing good faith and to satisfactorily explain why the excess was thus secured.[9]

shown to exist between the contracting parties, clearer and fuller proof must be given of a valuable and adequate consideration, and of the good faith of the parties, than would be required if the transferee or grantee had been a stranger. When, however, such examination is made, and such proof is forthcoming, and the result is that no fraud or unfair dealing is shown, and it appears that the transaction was not vitiated by any infirmity of which a creditor has the right to complain, then the transaction must stand, and it is as valid, as against the creditor, as if the corporation had dealt with a stranger who was not involved in any way with the corporate representatives. O'Conner M. & M. Co. *v.* Coosa, 95 Ala. 614, 10 So. 290, 36 Am. St. Rep. 251.

6. Haskett *v.* Auhl, 3 Kan. App. 744, 45 Pac. 608. See also Urdangen *v.* Doner (Iowa), 98 N. W. 317, where the court held that if a suspicion of fraud exists and is based upon facts and circumstances known to the vendee or grantee, it is then a question for the jury to determine whether the knowledge of such facts and circumstances would have put a man of ordinary prudence upon inquiry, which, if made with diligence, would have led to knowledge of the vendor's intention; in other words, it is the facts known to the vendee which require him to act, and not his suspicions.

Conveyance by Insolvent Debtor Not Made in Course of Business. In Metcalf *v.* Munson, 10 Allen (Mass.) 491, it was held that a Massachusetts statute, providing that a conveyance of property by an insolvent debtor not made in the usual and ordinary course of business was *prima facie* evidence that the grantee had reasonable cause to believe him insolvent, applied to conveyances made to pre-existing creditors as well as to other conveyances.

7. Cottingham *v.* Greely-Barnham Grocery Co., 129 Ala. 200, 30 So 560.

8. Meachem *v.* Hahn, 46 Ill. App. 144. *Citing* Schroeder *v.* Walsh, 20 Ill. 403, 11 N. E. 70.

9. Henry *v.* Harreld, 57 Ark. 569, 22 S. W. 433; Carson, Peery, Scott & Co. *v.* Byers, 67 Iowa 606, 25 N. W. 826; Wallach *v.* Wylie, 28 Kan. 138; Worrell *v.* Vickers, 30 La. Ann. 202; Taylor *v.* Wood (N. J. Eq.), 5 Atl. 818; Liver *v.* Thielke, 115 Wis. 389, 91 N. W. 975. *Compare* Brace *v.* Berdan, 104 Mich. 356, 62 N. W. 568, *holding* that this fact, although amounting to fraud in law if the mortgage was made for the purpose of hindering or delaying creditors, does not impose upon the mortgagee the burden of proving that there was no fraud, but that

f. *Voluntary Conveyance.* — **(1.) Generally.** — If a vendor be indebted at the time of a voluntary conveyance of his property, the conveyance is presumed to be fraudulent as to those debts,[10] and it is not incumbent upon the attacking creditor to show that the debtor contemplated a fraud in making it, or that it was an immoral or corrupt act,[11] or that the debtor was actually insolvent at the

the burden still rests on the party attaching the mortgage.

If a chattel mortgage is executed for a valuable consideration and in good faith, and not for the purpose of defrauding the creditors of the mortgagor, the fact that it is given to secure a larger sum than is actually due does not affect its validity (Nazaro *v.* Ware, 38 Minn. 443, 38 N. W. 359); but where the mortgage on its face secures a sum greatly in excess of the true amount due to the mortgagee, it is an important circumstance to be taken into consideration in determining whether or not the mortgage was made in good faith and not for the purpose of defrauding the creditors, and the burden is on the mortgagees to establish the *bona fides* of the mortgage. Heim *v.* Chapel, 62 Minn. 338, 64 N. W. 825.

10. Spear *v.* Spear, 97 Me. 498, 54 Atl. 1106. Young *v.* White, 3 Cushm. (Miss.) 146, where the court said: "The law presumes a voluntary conveyance as to such creditors to be fraudulent and void, and the party claiming under it must, by clear and satisfactory proof, rebut this presumption. It will not be sufficient merely to show the fair intentions of the grantor, and that by good management the property by him retained was sufficient to pay his debts. The proof must show that, by the ordinary course of human transactions, the deed could not operate to hinder, delay, or to defeat the claims of prior creditors."

That a Conveyance Between Relatives is Without Consideration does not establish it fraudulent, as a matter of law, in an attack upon it by creditors; it but casts the burden of proof of its good faith upon the parties who desire to sustain it. Boldt *v.* First Nat. Bank, 59 Neb. 283, 80 N. W. 905.

11. *Alabama.* — Early *v.* Owens, 68 Ala. 171.

Arkansas. — Hershey *v.* Latham, 46 Ark. 542.

Florida. — McKeown *v.* Allen, 37 Fla. 490, 20 So. 556.

Indiana. — Heaton *v.* Shanklin, 115 Ind. 595, 18 N. E. 172.

Massachusetts. — Blake *v.* Sawin, 10 Allen 340.

Missouri. — Potter *v.* McDowell, 31 Mo. 62.

Nebraska. — Smith *v.* Schmitz, 10 Neb. 600, 7 N. W. 329.

New Jersey. — Boquet *v.* Heyman, 50 N. J. Eq. 114, 24 Atl. 266.

Rhode Island. — McKenna *v.* Crowley, 16 R. I. 364, 17 Atl. 354. *Compare* Burdsall *v.* Waggoner, 4 Colo. 256.

Where a Parent Immediately Before a Judgment Conveys all of his property, not exempt, to a son who is absent and who does not appear to have the means to purchase, it is sufficient to impose upon the grantee the burden of proving that it was a purchase upon an actual consideration and in good faith. Leach *v.* Fowler, 22 Ark. 143.

In Malcom Brg. Co. *v.* Wagner (N. J. Eq.), 45 Atl. 260, a debtor conveyed to her son immediately after a threat to enforce payment of the debt by her creditor, and the son immediately thereafter reconveyed to his step-father for a recited consideration of $1; the conveyance also recited that the first conveyance was given in order to have the latter execute and place the whole title to the lands described in such step-father, and it was held that the circumstances under which the conveyances were made, in connection with the consideration expressed in the two instruments and the clause recited, made out a *prima facie* case for the attacking creditor and cast on the grantee the burden of showing a good and valuable consideration paid.

time he executed it,[12] but the burden of proof to show that the conveyance was not fraudulent falls upon those claiming under it.[13] And there is authority to the effect that this presumption of fraud in such case is conclusive.[14]

A Debtor's Insolveney at the Time a Judgment Against Him is rendered will be considered as relating back beyond a voluntary conveyance of his property made during his indebtedness, unless the contrary is shown, and the burden is on the party claiming under the conveyance to show that at the time it was made his donor had other property amply sufficient to pay all his debts.[15]

(2.) Necessity of Showing Insolvency of Debtor. — There is authority, however, to the effect that merely proving that the conveyance is voluntary does not of itself impose upon the parties to the conveyance the burden of disproving fraudulent intent, but that the creditor nevertheless has the burden of showing the insolvency of the grantor, or such facts and circumstances as would authorize the presumption of insolvency.[16]

(3.) Subsequent Sale by Donor. — The subsequent sale of the property by the donor under a voluntary conveyance without notice to

To invalidate a voluntary conveyance, a fraudulent intent must be shown, and this is shown when it appears that a debtor makes a gift of such an amount or under such circumstances, taking into account all existing conditions, as must necessarily hinder, delay or defraud his creditors. In such case the donor intends to defraud, in legal contemplation, because he deliberately, intentionally, does an act which does hinder, delay or defraud his creditors, and which he must see will have that effect. Whitehouse *v.* Bolster, 95 Me. 458, 50 Atl. 240.

12. O'Kane *v.* Vinnedge, 21 Ky. L. Rep. 1551, 55 S. W. 711.

13. *United States.* — Pratt *v.* Curtis, 2 Low. 87, 19 Fed. Cas. No. 11,-375.

Alabama. — Harrell *v.* Mitchell, 61 Ala. 270.

Arkansas. — Norton *v.* McNutt, 55 Ark. 59, 17 S. W. 362.

Florida. — McKeown *v.* Allen, 37 Fla. 490, 20 So. 556; Claflin *v.* Ambrose, 37 Fla. 78, 19 So. 628.

Georgia. — Cothran *v.* Forsythe, 68 Ga. 560.

Maryland. — Ellinger *v.* Crowl, 17 Md. 361.

Mississippi. — Young *v.* White, 25 Miss. 146; Wynne *v.* Mason, 72 Miss. 424, 18 So. 422.

Missouri. — Clark *v.* Thias, 173 Mo. 628, 73 S. W. 616; Walsh *v.* Ketchum, 84 Mo. 430; Hoffman *v.* Nolte, 127 Mo. 120, 29 S. W. 1006; Snyder *v.* Free, 114 Mo. 360, 21 S. W. 847.

Ohio. — Oliver *v.* Moore, 23 Ohio St. 473.

Pennsylvania. — Woolston's Appeal, 51 Pa. St. 452. *In re* McKowan's Estate, 198 Pa. St. 96, 47 Atl. 1111.

South Carolina. — Martin *v.* Evans, 2 Rich. Eq. 368; Footman *v.* Pendergrass, 3 Rich. Eq. 33. *Compare* Hyde *v.* Chapman, 33 Wis. 391, *holding* that under the Wisconsin statute there must be proof affording an inference of fraud, other than that of the mere voluntary character of the conveyance.

14. Hutchison *v.* Kelly, 1 Rob. (Va.) 123, 39 Am. Dec. 250.

15. Strong *v.* Lawrence, 58 Iowa 55, 12 N. W. 74.

16. Kalish *v.* Higgins, 70 App. Div. 192, 75 N. Y. Supp. 397; Multz *v.* Price, 82 App. Div. 339, 81 N. Y. Supp. 931. See also Woods *v.* Allen, 109 Iowa 484, 80 N. W. 540; Merrill *v.* Johnson, 96 Ill. 224; Moritz *v.* Hoffman, 35 Ill. 553. *Compare* Baker *v.* Potts, 73 App. Div. 29, 76 N. Y. Supp. 406.

the purchaser is also presumptive evidence of fraud in the prior conveyance.[17]

(4.) Conveyance Between Husband and Wife. — Where the effect of a voluntary conveyance by a husband to his wife is to defraud his creditors, it is not incumbent upon them to show an actual intent to defraud.[18]

(5.) Vendee's Knowledge of Vendor's Intent. — In the case of a voluntary conveyance which operates to the injury of creditors, it is immaterial whether or not the vendee participated in the fraudulent design.[19]

In the Case of a Conveyance to a Wife From a Third Person, if the husband's intent was actually fraudulent, it is not incumbent upon

17. Footman *v.* Pendergrass, 3 Rich. Eq. (S. C.), 33.

18. Felker *v.* Chubb, 90 Mich. 24, 51 N. W. 110.

In Baker *v.* Hollis, 84 Iowa 682, 51 N. W. 78, a husband conveyed to his wife all of his property without consideration and without change of possession. Some time thereafter the wife reconveyed the property to her husband, who, while the property was so held, became indebted to the plaintiff. The husband being pressed for a settlement of such indebtedness again conveyed the property to his wife without consideration. On the trial both husband and wife testified that the reconveyance from the wife to the husband was in trust and that the last conveyance back to the wife was merely an execution of that trust. This testimony was not contradicted by any witness. It was held that the circumstances attending the execution of the conveyance rebutted the claim that there was any trust created, and that the last conveyance was fraudulent as against the husband's creditors. The court said that the last conveyance "was without consideration and to the prejudice of the plaintiff. It is presumptively fraudulent and it is incumbent upon appellant (the wife) to make some showing upon which the conveyance can be sustained in equity. That the conveyance is presumed to be fraudulent is one of the recognized and elementary principles which does not demand the citation of authority in its support."

Under the Michigan Statute (3 Comp. Laws, 1897, § 10,203) the burden of proving the *bona fides* of a voluntary conveyance from husband to wife is, as to creditors of the husband attacking the conveyance, upon the husband, and this burden can only be satisfied by evidence that at the time of the transfer he had sufficient property remaining in his hands to pay his indebtedness. Wilcox *v.* Hammond, 128 Mich. 516, 87 N. W. 636.

19. Schaible *v.* Ardner, 98 Mich. 70, 56 N. W. 1105; Farmers Nat. Bank *v.* Thomson, 74 Vt. 442, 52 Atl. 961; Ross *v.* Wellman, 102 Cal. 1, 36 Pac. 402; Pickett *v.* Pipkin, 64 Ala. 520; Bishop *v.* State *ex rel.* Lord, 83 Ind. 67.

Rule Stated. — "A deed of gift made by the grantor for the purpose of defrauding his creditors is none the less fraudulent because the grantee took no part in the fraud. . . . It is well settled that it is the motive of the grantor, and not the knowledge of the grantee, that determines the validity of the transfer. The grantee, however innocent, cannot retain the fruits of a voluntary fraudulent transfer. (Swartz *v.* Hazlett, 8 Cal. 128; Lee *v.* Figg, 37 Cal. 336; Peek *v.* Peek, 77 Cal. 111; Bump on Fraudulent Conveyances, § 239)." Bush *v.* Helbing, 134 Cal. 676, 66 Pac. 967.

Knowledge on the Part of a Wife as to Her Husband's Intent in conveying the property to her is immaterial and not necessary to be shown where she gave no valuable consideration for the property conveyed. Threlkel *v.* Scott (Cal.), 34 Pac. 851.

a creditor attacking the conveyance to show that the wife participated in the intent if she paid no part of the consideration.[20]

(6.) Rule as to Subsequent Creditor. — A subsequent creditor, however, attacking a prior conveyance by his debtor, cannot rely upon the voluntary character of the conveyance alone, but it is incumbent upon him to also show circumstances justifying the presumption that the intent of the conveyance was fraudulent.[21]

g. *Retention of Possession by Vendor Subsequent to Sale.*

(1.) Generally. — *Formerly* it was the rule that the retention by a vendor of the property subsequent to an absolute sale thereof was conclusive evidence of fraud as to creditors of the vendor.[22]

Conclusive Presumption Under Statute. — Sometimes by virtue of an express provision in the statute relating to fraudulent conveyances, the fact that the vendor of personal property remains in possession after the sale thereof is conclusive evidence of fraudulent intent on his part.[23]

Modern and Statutory Doctrine. — The former rule, however, has been greatly relaxed, not only by the courts in modern times, but also by express statutory enactment, and the rule is at the present day, in the absence of statutes to the contrary, that the fact of possession by the vendor subsequent to the sale is merely *prima facie* evidence of fraud,[24] and that failure on the part of the

20. Clarke *v.* Chamberlain, 13 Allen (Mass.) 257.

21. *United States.* — Hinde *v.* Longworth, 11 Wheat. 199.

Alabama. — Heinz *v.* White, 105 Ala. 670, 17 So. 185.

Connecticut. — Converse *v.* Hartley, 31 Conn. 372.

Indiana. — Barrow *v.* Barrow, 108 Ind. 345, 9 N. E. 371.

Maine. — Laughten *v.* Harden, 68 Me. 208.

Missouri. — Boatmen's Sav. Bank *v.* Overall, 90 Mo. 410, 3 S. W. 64.

New Jersey. — Boquet *v.* Heyman, 50 N. J. Eq. 114, 24 Atl. 266.

North Carolina. — Messick *v.* Fries, 128 N. C. 450, 39 S. E. 59.

Ohio. — Evans *v.* Lewis, 30 Ohio St. 11.

Oregon. — Crawford *v.* Beard, 12 Or. 447, 8 Pac. 537.

West Virginia. — Lockhard *v.* Beckley, 10 W. Va. 87.

Under the Kentucky Statute providing that a conveyance without valuable consideration therefor shall not on that account alone be void as to creditors whose debts or demands are thereafter contracted, a subsequent creditor who assails a voluntary conveyance must show in addition circumstances justifying the presumption that the conveyance was fraudulent. "It is the intent and purpose with which the grantor acts which renders the conveyance fraudulent, and this must be determined by the facts of each particular case." Rose *v.* Campbell, 25 Ky. L. Rep. 885, 76 S. W. 505. See also O'Kane *v.* Vinnedge, 21 Ky. L. Rep. 1551, 55 S. W. 711; Enders *v.* Williams, 1 Metc. (Ky.) 346.

22. Jackson *v.* Timmerman, 7 Wend. (N. Y.) 436; Seward *v.* Jackson, 8 Cow. (N. Y.) 406; Hamilton *v.* Russel, 1 Cranch (U. S.) 309.

23. As for example in California. Stevens *v.* Irwin, 15 Cal. 503, 76 Am. Dec. 500. See also Kennedy *v.* Conroy (Cal.), 44 Pac. 795.

24. *Alabama.* — Ward *v.* Shirley, 131 Ala. 568, 32 So. 489; Teague *v.* Bass, 131 Ala. 422, 31 So. 4.

Arkansas. — Cocke *v.* Chapman, 7 Ark. 197, 44 Am. Dec. 536; Field *v.* Simco, 7 Ark. 275; *s. c.* 7 Ark. 269.

Florida. — Volusia Co. Bank *v.* Bertola, 33 So. 448; Briggs *v.* Weston, 36 Fla. 629, 18 So. 852.

grantee to overcome this justifies the presumption that the interest of the vendor in the goods sold, indicated by his actions, continued to exist notwithstanding the sale.[25]

Valid Excuse for Retention of Possession. — A vendee of personal property under such a sale must show in addition to proof of the possession, of the things sold, is presumed fraudulent and void as against the creditors of the vendor, unless those claiming under the sale make it appear that the same was made in good faith, and without any intent to hinder, delay or defraud such creditors. Gen. St. 1878, ch. 41, § 15." Murch *v.* Swensen, 40 Minn. 421, 42 N. W. 290.

Georgia. — Ross *v.* Cooley, 113 Ga. 1047, 39 S. E. 471; Fleming *v.* Townsend, 6 Ga. 103, 50 Am. Dec. 318.

Indiana. — Pennington *v.* Flock, 93 Ind. 378; Kane *v.* Drake, 27 Ind. 695; Higgins *v.* Spahr, 145 Ind. 167, 43 N. E. 11.

Iowa. — Wright *v.* Wheeler, 14 Iowa 8; Osborn *v.* Ratliffe, 53 Iowa 748, 5 N. W. 746.

Louisiana. — Yale *v.* Bond, 45 La. Ann. 997, 13 So. 587; A. Baldwin & Co. *v.* Bond, 45 La. Ann. 1012, 13 So. 742; Payne *v.* Buford, 106 La. 83, 30 So. 263.

Maine. — Hartshorn *v.* Eames, 31 Me. 93.

Minnesota. — Leqve *v.* Smith, 63 Minn. 24, 65 N. W. 121.

Mississippi. — Comstock *v.* Rayford, 12 Smed. & M. 369.

Missouri. — Hartman *v.* Vogel, 41 Mo. 570.

Nebraska. — Snyder *v.* Dangler, 44 Neb. 600, 63 N. W. 20; Marcus *v.* Leake, 94 N. W. 100.

New Jersey. — Runyon *v.* Groshon, 12 N. J. Eq. 86.

New York. — Sidenbach *v.* Riley, 111 N. Y. 560, 19 N. E. 275.

North Carolina. — Howell *v.* Elliott, 12 N. C. 66.

Pennsylvania. — Baltimore & O. R. Co. *v.* Hoge, 34 Pa. St. 214.

Texas. — Mills *v.* Walton, 19 Tex. 271; Perry *v.* Patton (Tex. Civ. App.), 68 S. W. 1018.

Virginia. — Curd *v.* Miller, 7 Gratt. 185.

Wisconsin. — Kayser *v.* Hartnett, 67 Wis. 250, 30 N. W. 363; Williams *v.* Porter, 41 Wis. 422; Mayer *v.* Webster, 18 Wis. 393; Grant *v.* Lewis, 14 Wis. 528.

Rule Stated. — "Every sale by a vendor of goods and chattels in his possession or under his control, unless the same is accompanied by an immediate delivery, and followed by an actual and continued change of

The Fact That a Mortgagor of Personal Property Remains in Possession of the property after the execution of the mortgage is *prima facie* evidence of fraud, but may be explained; it is a mere rule of evidence calculated to shift the burden of proof from the creditor to the vendee. Runyon *v.* Groshon, 12 N. J. Eq. 86, wherein the court said: "There ought to be some protection to third parties where the chattels are permitted to remain in the possession of the vendor. Such possession should be considered *prima facie* evidence of fraud, and the party who claims the benefit of a mortgage under such circumstances should have the burthen thrown upon him of proving the *bona fides* of the transaction. He should be compelled to prove not only that his debt is a just one, but give reasons satisfactory to the tribunal who is to decide upon the validity of the deed for the non-delivery of the property."

Sign Remaining Over Door. — In Seavy *v.* Dearborn, 19 N. H. 351, it was held that where a purchaser of a stock of goods permitted the sign of the vendor to remain over the door, that fact was evidence that the vendor remained in possession after the sale and was so far evidence of fraud, although it admitted of explanation by evidence of a custom or usage to permit signs to so remain after such sales.

25. Teague *v.* Bass, 131 Ala. 422, 31 So. 4.

bona fides of the sale that there was a valid excuse for leaving the property in the vendor's possession.[26]

Test as to Change of Possession. — Whether there has been a delivery, and an actual change of possession, so as to avoid the presumption of fraud, depends largely on the nature and kind of chattels, the situation of the parties to the sale, and other circumstances peculiar to each case; no arbitrary test or rule can be laid down.[27]

(2.) Conveyance of Real Estate. — This rule that retention of possession by the vendor, subsequent to the conveyance, is presumptive evidence of fraud has been held in some cases[28] not to apply to the conveyance of real estate.[29]

(3.) Rebuttal of Presumption. — Although possession of property by the vendor subsequent to the sale, wholly unexplained, raises the presumption of fraud, as will be shown with more particularity, this presumption may be rebutted by such a disclosure of the circumstances as will make the possession innocent,[30] as where the pos-

26. Mitchell *v.* West, 55 N. Y. 107, so holding on the authority of Hanford *v.* Artcher, 4 Hill (N. Y.) 271.

27. Tunell *v.* Larson, 39 Minn. 269, 39 N. W. 628.

28. Where the deed postpones the day of payment for an unreasonable length of time after the maturity of the debts secured by it, and provides that the grantor shall retain the possession and use of the property until default of payment, a fraudulent intent to cover up the property for the use of the grantor, and hinder and delay creditors, may be presumed. Hafner *v.* Irwin, 23 N. C. 490; Cannon *v.* Peebles, 24 N. C. 453; Bennett *v.* Union Bank, 5 Humph. (Tenn.) 612. But if the time fixed for payment and sale upon default be reasonable, under all the circumstances, fraud is not to be inferred. Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458. But this rule does not apply to mortgages and deeds of trust where the grantor, by the terms of the deed, is permitted to retain possession of the property until default of payment.

29. Miller *v.* Rowan, 108 Ala. 98, 19 So. 9; Tompkins *v.* Nichols, 53 Ala. 197. *Compare* Neal *v.* Gregory, 19 Fla. 356.

The Reason for this Rule is said to be that to hold possession of real estate by the grantor presumptive evidence of fraud would be in effect to abolish the distinction known and acknowledged between real and personal property, and to lose sight of the different methods of transferring the title to the two kinds of property. Rochester *v.* Sullivan (Ariz.), 11 Pac. 58.

30. Norton *v.* McNutt, 55 Ark. 59, 17 S. W. 362.

In Scott *v.* Winship, 20 Ga. 429, where personal property was absolutely conveyed, and a verbal agreement entered into that the property should remain in the possession of the vendor until the performance of certain conditions, it was held that although the stipulation might not amount to a valid contract, still it was sufficient to explain the continued possession and rebut the presumption therefrom.

A father may contract with his minor son to pay the latter wages for his services, and may in satisfaction of the debt deliver to him personal property, and in such case the possession of the vendor becomes that of the son and does not of itself raise any presumption that the transaction was fraudulent. Hargrove *v.* Turner, 112 Ga. 134, 37 S. E. 89.

In Hinton *v.* Greenleaf, 118 N. C. 7, 23 S. E. 924, a father had purchased property at a sale under a mortgage given by his son and allowed it to remain in the possession of his son, and it was held that possession under such circumstances did not raise a presumption of fraud so as to impose upon the father the burden

session is inconsistent with the terms of the conveyance,[31] or the vendor holds possession merely as agent for his vendee.[32]

Proof of the Payment of a Valuable Consideration rebuts the presumption of fraud arising from the continued possession by the vendor after the sale.[33]

The Notoriety of a Sale or other transfer is always strong evidence to rebut the inference of fraud from possession by the vendor.[34]

h. *Conveyances Between Relatives.* — **(1.) Generally.** — Although there is authority supporting the proposition that transfers between relatives, if creditors are thereby delayed, hindered or defeated in the collection of their debts, should be closely scrutinized, and that those claiming under the transfers have the burden of showing the *bona fides* of the transaction,[35] the weight of authority is that the mere fact of relationship between the grantor and grantee in a conveyance, assailed as fraudulent against other creditors, without other facts and circumstances indicating fraud, affords no presump-

of proving the *bona fides* of his purchase.

In Easly *v.* Dye, 14 Ala. 158, it was held that for the purpose of repelling the inference arising from the subsequent possession of a donor it was competent to show that such donor took possession of the property by advice. The court, in holding as stated, said: "The fact that the possession was not taken simultaneously with the advice given does not furnish a test of its admissibility; for it would, notwithstanding, serve to show *quo animo* the one party parted with and the other received the possession. True, it might not be conclusive, yet it was proper for the consideration of a jury, if material. The competency of such evidence does not depend upon the principle upon which a declaration is admitted as part of the *res gestae;* but it is enough if the act follow in some reasonable time. It is still more clear that if the evidence be important, the donees might show that the money received for the hire was appropriated for their benefit."

In Mauldin *v.* Mitchell, 14 Ala. 814, it was held that the presumption of fraud arising from the fact of retention of possession by the grantor after the transfer was not repelled or explained by proof that the vendee was a man of fortune, and the vendor, his brother, poor and with a family dependent upon him.

Under the Wisconsin Statute, providing that the retention of possession of chattels by a vendor after a sale is presumptive evidence of fraud as against creditors, this presumption is overcome by evidence that the consideration for the transfer had been credited upon an existing *bona fide* indebtedness from the vendor to the vendee. Griswold *v.* Nichols, 117 Wis. 267, 94 N. W. 33.

31. Footman *v.* Pendergrass, 3 Rich. Eq. (S. C.) 33.

32. Troy Fertilizer Co. *v.* Norman, 107 Ala. 667, 18 So. 201, where the grantors held the property, not as their own, but as the agents of the vendee, for the latter's convenience, or for the purpose of sale on account of the principal.

33. Scott *v.* Winship, 20 Ga. 429; Rose *v.* Colter, 76 Ind. 590.

34. Walcott *v.* Keith, 22 N. H. 196.

35. *Connecticut.* — Thomas *v.* Beck, 39 Conn. 241.

Minnesota. — Shea *v.* Hynes, 89 Minn. 423, 95 N. W. 214.

Nebraska. — Marcus *v.* Leake, 94 N. W. 100; Fisher *v.* Herron, 22 Neb. 183, 34 N. W. 365; Heffley *v.* Hunger, 54 Neb. 776, 75 N. W. 53; Lusk *v.* Riggs, 91 N. W. 243; Ayers *v.* Wolcott, 92 N. W. 1036, *modifying* 62 Neb. 805, 87 N. W. 906; Plummer *v.* Rummel, 26 Neb. 142, 42 N. W. 336; Bartlett *v.* Cheesebrough, 23 Neb. 767, 37 N. W. 652.

tion of law against the *bona fides* of the conveyance; that the only effect of this relationship is to excite suspicion and require a less degree of proof on the part of the attacking creditor to show fraud.[36]

(2.) Conveyance Between Parent and Child. — Conveyances between parent and child are to be treated as are the transactions of other people; and if the *bona fides* of such conveyances is attacked, the fraud will not be presumed, but must be established.[37]

(3.) Conveyance Between Husband and Wife. — But in the case of a conveyance from husband to wife, although there is authority to the effect that in a contest between the wife and her husband's creditors the mere fact of relationship does not raise a presumption of fraud,[38] the weight of authority is to the effect that the burden of

North Carolina. — Hinton *v.* Greenleaf, 118 N. C. 7, 23 S. E. 924; Tredwell *v.* Graham, 88 N. C. 208.

West Virginia. — Reynolds *v.* Gawthrop, 37 W. Va. 3, 16 S. E. 364. *Compare* Bierne *v.* Ray, 37 W. Va. 571, 16 S. E. 804.

A Brother-in-law is a relative within the contemplation of the rule requiring the *bona fides* of a conveyance between relatives to be established by affirmative evidence on the part of a grantee. Marcus *v.* Leake (Neb.), 94 N. W. 100.

36. *United States.* — Gottlieb *v.* Thatcher, 151 U. S. 271.

Alabama. — Teague *v.* Lindsey, 106 Ala. 266, 17 So. 538; Smith *v.* Collins, 94 Ala. 394, 10 So. 334.

Arkansas. — Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458.

District of Columbia. — Clark *v.* Krause, 2 Mackey 559.

Illinois. — Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70; Martin *v.* Duncan, 156 Ill. 274, 41 N. E. 43; Nelson *v.* Smith, 28 Ill. 495; Wightman *v.* Hart, 37 Ill. 123; Waterman *v.* Donalson, 43 Ill. 29; Meachem *v.* Hahn, 46 Ill. App. 144.

Indiana. — Rockland Co. *v.* Summerville, 139 Ind. 695, 39 N. E. 707.

Iowa. — Oberholtzer *v.* Hazen, 92 Iowa 602, 61 N. W. 365; Wilcox *v.* Williamson Law Book Co., 92 Iowa 215, 60 N. W. 618.

Kentucky. — Redd *v.* Redd, 23 Ky. L. Rep. 2379, 67 S. W. 367.

Minnesota. — Shea *v.* Hynes, 89 Minn. 423, 95 N. W. 214.

Missouri. — Martin *v.* Fox, 40 Mo. App. 664.

New Jersey. — Demarest *v.* Terhune, 18 N. J. Eq. 45.

Pennsylvania. — Reehling *v.* Byers, 94 Pa. St. 316.

Tennessee. — Bumpas *v.* Dotson, 7 Humph. 310, 6 Am. Dec. 81.

West Virginia. — Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780; Bierne *v.* Ray, 37 W. Va. 571, 16 S. E. 804; Farmers Transp. Co. *v.* Swaney, 48 W. Va. 272, 37 S. E. 592. See also Fry Fertilizer Co. *v.* Norman (Ala.), 18 So. 201.

The fact that a vendee was a brother-in-law of the vendor is not in itself sufficient to establish fraud. Transactions between members of a family or others in close confidential relations will be scrutinized closely, but the law gives a relative or friend the same right to protect himself in the collection of a claim, and the same right to purchase property which is enjoyed by a stranger, and in order to justify such a transaction being set aside as fraudulent against creditors the burden rests on the creditor alleging such fraud to prove it. Thompson *v.* Zuckmayer (Iowa), 94 N. W. 476.

37. Curry *v.* Lloyd, 22 Fed. 258; Gray *v.* Galpin, 98 Cal. 633, 33 Pac. 725; State *ex rel.* Johnson *v.* True, 20 Mo. App. 176; Weaver *v.* Wright, 13 Rich. L. (S. C.) 9; Bleiler *v.* Moore, 88 Wis. 438, 60 N. W. 792. See also Douglass *v.* Douglass, 41 W. Va. 13, 23 S. E. 671.

38. Allen *v.* Perry, 56 Wis. 178, 14 N. W. 3; Grant *v.* Ward, 64 Me. 239. Virden *v.* Dwyer, 78 Miss. 515, 30 So. 45, where the court, *quoting* from Kaufman *v.* Whitney, 50 Miss. 103, said: "Such dealings, though to be carefully scrutinized on account of the temptation to give an unfair ad-

proof is on the wife to show by clear and satisfactory evidence the *bona fides* of the transaction; that in all such cases the presumptions are in favor of the creditors and not in favor of the wife.[39]

i. *Presumption From Non-Production of Testimony.* — On an issue as to the *bona fides* of a conveyance, the omission of the grantee to testify,[40] or to produce the debtor when it is not

vantage to the wife over other creditors, must be tested by the same principles as a conveyance by a debtor to a stranger when brought into question as fraudulent against creditors." *Citing* numerous Mississippi cases.

39. *Alabama.* — Wedgworth *v.* Wedgworth, 84 Ala. 274, 4 So. 149; McTeers *v.* Perkins, 106 Ala. 411, 17 So. 547.

Iowa. — Elwell *v.* Walker, 52 Iowa 256, 3 N. W. 64.

Nebraska. — Glass *v.* Zutavern, 43 Neb. 334, 61 N. W. 579.

North Carolina. — Woodruff *v.* Bowles, 104 N. C. 197, 10 S. E. 482.

South Dakota. — Williams *v.* Harris, 4 S. D. 22, 54 N. W. 926, 46 Am. St. Rep. 753.

Virginia. — Baker *v.* Watts, 44 S. E. 929.

West Virginia. — Maxwell *v.* Hanshaw, 24 W. Va. 405.

"**The Reasons for Distinguishing Transactions Between Husband and Wife** from those between other near relatives are obvious. The financial relation and the community of interest existing between husband and wife are entirely different from those existing between other relatives. While their respective rights and relations, as existing at common law, have been greatly changed and modified by statute, the confidential relation is still preserved and protected. Contracts between them with respect to the sale of real estate are prohibited, and each is charged with knowledge of the contracts and debts of the other. The same is not true as to other near relatives." Shea *v.* Hynes, 89 Minn. 423, 95 N. W. 214.

In Neighbor *v.* Hoblitcel, 84 Iowa 598, 51 N. W. 53, where a husband, pending litigation against him and just before trial, conveyed to his wife, on demand, certain property in payment of his indebtedness to her, exceeding the value of the property, it was held that in the absence of evidence that the conveyance was taken in part to hinder the creditors of the husband, it was not fraudulent.

40. Whitney *v.* Rose, 43 Mich. 27, 4 N. W. 557, where the court said: "If the transaction were an honest one on his part, he should not have permitted any doubtful matter of right to have stood in his way of making a full explanation. A person certainly is not obliged to answer vague and indefinite charges, but when made a party defendant in a litigation where the question at issue is the *bona fides* of a purchase made by him, and evidence is given tending to show that the sale was made with an evident intent to defraud creditors, silence under such circumstances may well prevent the court from presuming too much in favor of the honesty of the transaction. The inferences from the facts proved against the validity of the sale should be allowed to have their full force and effect where the party defendant was called upon to remove them, had an opportunity so to do, and did not avail himself of it."

First Nat. Bank *v.* Prager, 50 W. Va. 660, 41 S. E. 363, was to the effect that failure of the alleged fraudulent grantee and grantor to go upon the stand and testify and to explain the many acts charged and proved against them were circumstances tending strongly to support the allegations of fraud. The court said: "If the transactions had been honest and square, they could have been well explained. Truth is consistent in all its parts and in harmony with all its surroundings. It antagonizes nothing but error. It is in perfect accord with every other truth; while falsehood comes in conflict with everything that is true, and is inconsistent with itself. A fair, square transaction is always suscep-

shown to be impossible,[41] or other important witnesses, or evidence in support of the conveyance, is ground for an unfavorable presumption, and frequently exercises an important influence upon the final determination of the issue.[42]

2. Mode of Proof. — A. DIRECT EVIDENCE. — a. *As Respects the Grantor.* — **(1.) Generally.** — Whether or not a conveyance by a debtor was executed with a fraudulent intent on his part is ultimately a question for the jury, and one that cannot be proved by the opinions or conclusions of witnesses.[43]

tible of satisfactory explanation. Indeed, as a rule it needs no explanation. There were evidently large sums of money taken in by the firm shortly before the assignment which were never accounted for, and which could only be accounted for by the Pragers, Keller, and Katzenstein, or some of them, and why they failed to appear as witnesses can only be explained on one theory, and that is that they were each and every one unable to make an explanation of their transactions consistent with the truth, and show that they were free from the fraud and conspiracy charged in the bill, and of which there was so much convincing proof."

41. Presumption from Non-Production of Debtor. — Smith *v.* Bigelow (Iowa), 99 N. W. 590, where the record presented the alleged fraudulent grantor sitting in the court room during the trial, but without being heard as a witness. See also McDaniel *v.* Parish, 4 App. D. C. 213.

42. Goshorn *v.* Snodgrass, 17 W. Va. 717. See also Glenn *v.* Glenn, 17 Iowa 498.

When fraud is proven and suspicious circumstances are shown which implicate a grantee, and those circumstances are peculiarly within his knowledge, an unfavorable presumption of fact is raised if he fails to offer some affirmative proof that his part in the transaction is an honest one. "If he has acted honestly he should not permit his conduct to wear a doubtful aspect, when, by making a statement, he can clear up the whole matter." Dawson *v.* Waltemeyer, 91 Md. 328, 46 Atl. 994.

Failure to Produce Inventory. Failure of the vendees to file notice of the inventory of the stock of goods taken at the time of the sale, when questioned as witnesses and invited by the attacking creditors to do so, warrants the inference that its production would have been prejudicial to their case. Carter *v.* Richardson, 22 Ky. L. Rep. 1204, 60 S. W. 397.

In Shealy *v.* Edwards, 78 Ala. 176, where the alleged fraudulent vendee had given his notes for the purchase price, it was held that failure on his part to produce such notes was not ground for an unfavorable presumption as to whether the contract of sale was valid or invalid as to creditors.

43. Cullers *v.* Gray (Tex. Civ. App.), 57 S. W. 305; Ward *v.* Shirley, 131 Ala. 568, 32 So. 489; McKnight *v.* Reed, 30 Tex. Civ. App. 204, 71 S. W. 318, wherein the court said it would have been proper for the witnesses to state the conduct of the grantor and what was said, if anything, by him concerning his purpose and intention prior to the time when the deeds were intended to take effect.

Testimony of an Attorney Who Drew a Bill of Sale, which has been assailed as being fraudulent, to the effect that he regarded the transaction as an honest one, is not admissible on the question of the *bona fides* of the conveyance; that is an ultimate question of fact for the jury. Sweet *v.* Wright, 62 Iowa 215, 17 N. W. 468.

Efforts of Debtor to Fraudulently Convey Property. — On an issue as to the wrongful suing out of an attachment it is not competent to ask a witness what efforts were being made by the defendant in attachment to convey his property with intent to defraud his creditors. Carey

A Conclusion Reached by a Judicial Officer Upon Ex Parte Affidavits to the effect that they contained sufficient evidence to prove the perpetration of fraud on the part of the debtor in incurring the debt is not competent evidence in an action between third persons to establish the fraud.[44]

Knowledge of Surrounding Circumstances. — It has been held proper to ask a witness if a subsequent purchaser knew, at the time of his purchase, of certain specific circumstances attending the original sale.[45]

Appearance as to Control Subsequent to Sale. — Where the issue is as to the *bona fides* of a sale of personal property, it is proper to ask a witness whether he observed any difference in the management of the property subsequent to the sale.[46]

(2.) Testimony of Grantor. — (A.) GENERALLY. — The grantor may testify, as a witness, as to what his intent in fact was.[47] Nor does

v. Gunnison, 51 Iowa 202, 1 N. W. 510. The court said: "It is very plain that in replying to the question the witness determined in his own mind whether the acts of defendant were or were not with the intention to defraud creditors. His answer was an expression of his opinion as to the fraudulent character of the acts and intentions of defendant. He could not have answered the question negatively as he did, nor affirmatively, without expressing an opinion upon all the acts of defendant upon which he based his reply."

44. Bookman *v.* Stegman, 105 N. Y. 621, 11 N. E. 376, where the court, in so holding, said: "Such proof derives no force from the judicial order and is merely hearsay, having no greater effect as proof of the facts stated therein than *ex parte* affidavits made under any other circumstances. No statute makes them evidence and no rule of common-law evidence justifies their admission."

45. Hodges *v.* Coleman, 76 Ala. 103.

46. Gallagher *v.* Williamson, 23 Cal. 332. *Compare* Richardson Bros. *v.* Stringfellow, 100 Ala. 416, 14 So. 283, wherein the statement of a witness that "it seems" the assignor was in control of the business after the assignment, was a mere conclusion of the witness.

47. *Colorado.* — Brown *v.* Potter, 13 Colo. App. 512, 58 Pac. 785.

Indiana. — Sedgwick *v.* Tucker, 90 Ind. 271.

Iowa. — Selz *v.* Belden, 48 Iowa 451.

Kansas. — Gardom *v.* Woodward, 44 Kan. 758, 25 Pac. 199.

Maine. — Law *v.* Payson, 32 Me. 521.

Massachusetts. — Thatcher *v.* Phinney, 7 Allen 146.

Michigan. — Hart *v.* Newton, 48 Mich. 401, 12 N. W. 508; Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680.

Nebraska. — Hackney *v.* Raymond Bros. & Clark Co., 94 N. W. 822.

South Carolina. — McGhee *v.* Wells, 57 S. C. 280, 35 S. E. 529.

Texas. — Wade *v.* Odle, 21 Tex. Civ. App. 656, 54 S. W. 786. See also Acme Brewing Co. *v.* Central R. & Bkg. Co., 115 Ga. 494, 42 S. E. 8.

Rule Stated. — In Love *v.* Tomlinson, 1 Colo. App. 516, 29 Pac. 666, the court, *quoting* from Seymour *v.* Wilson, 14 N. Y. 567, said: "In this case the party who made the alleged fraudulent transfer was a competent witness, and he was examined as to the facts of the transaction by the plaintiff, who sought to set aside the conveyance. It may be that the circumstances disclosed by him would lead to the conclusion that the assignment was fraudulent, notwithstanding anything which he might say as to his motives in making it. That was a question for the referee to determine after he had heard all the testimony respecting it, and it

such testimony come within the rule excluding evidence of the declarations of a vendor, made after the sale and with the knowledge of the vendee, offered to defeat the vendee's title to the property conveyed.[48]

(B.) Circumstances Surrounding Transfer. — And it is proper to permit the alleged fraudulent vendor to testify directly to the facts and circumstances connected with the transfer, tending to show the fraudulent character thereof.[49]

(C.) Character of Transfer. — So on an issue as to the fraudulent character of a sale of personal property, it is competent for the vendor to state whether the transfer, which was evidenced by a writing, was an absolute sale, and whether there were any reservations outside of it.[50]

(D.) Character of Vendor's Possession. — Where the issue is whether or not there had been a change of possession of property alleged to have been conveyed for the purpose of defrauding creditors, it is proper to permit the grantor to testify that he continued in possession of the property after the conveyance merely as an employe of his grantee.[51]

(E.) Belief of Creditors as to Grounds for Attachment. — The rule permitting a party charged with fraud to testify as to his intent does not apply where the issue is whether the attaching plaintiffs had reasonable grounds to believe at the time of the attachment that the witness was disposing of his property with intent to defraud creditors.[52]

is one upon which we express no opinion. There are cases which present circumstances in themselves conclusive evidence of a fraudulent intent; and there, no proof of innocent motives, however strong, will overcome the legal presumption. . . . But where the facts do not necessarily prove fraud, but only tend to that conclusion, the evidence of the party who made the conveyance, when he is so circumstanced as to be a competent witness, should be received for what it may be considered worth."

48. Schmitt *v.* Jacques, 26 Tex. Civ. App. 125, 62 S. W. 956.

49. Schmitt *v.* Jacques, 26 Tex. Civ. App. 125, 62 S. W. 956, where the court, in so holding, said: "Instances are not numerous where the parties to the fraud, or either of them, will testify to the facts constituting it, but there is no rule contravening the right of either to testify when the facts indicate that both parties to a contract were parties to the fraud." See also Drake *v.* Steadman, 46 S. C. 474, 24 S. E. 458.

On an issue as to the *bona fides vel non* of an assignment for creditors, it is competent for the assignor to detail all the circumstances under which the instrument was executed, including the fact that it was made after taking legal advice. Richardson *v.* Stringfellow, 100 Ala. 416, 14 So. 283.

50. Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680.

51. Benjamin *v.* McElwaine-Richards Co., 10 Ind. App. 76, 37 N. E. 362.

52. Selz *v.* Belden, 48 Iowa 451, where the court, in so holding, said: "The object of the testimony introduced was not to set aside the sale, but to enable the defendants to recover on their counter-claim, because of the alleged fact that the attachment had been wrongfully sued out; the gist of the issue being whether the plaintiffs at that time had reasonable grounds to believe the defend-

(F.) Presumption of Fraud From Facts. — The rule permitting a witness to testify to his own intent does not apply where the law conclusively presumes fraud from a certain state of facts.[53]

(G.) Scope of Cross-Examination. — Where a grantor testifies as to his intent, his cross-examination at the instance of the attacking creditors is not subject to the usual limitation of cross-examination, but a wide latitude within the range of material facts should be allowed.[54]

ants had disposed of their property with intent to defraud their creditors. It was immaterial what the intent of the defendants in fact was; they may have acted with the utmost good faith. The true question is, had they so conducted themselves as to give the plaintiffs reasonable grounds to believe their intent was fraudulent?"

53. Selz *v.* Belden, 48 Iowa 451. *Citing* Seymour *v.* Wilson, 14 N. Y. 567; Forbes *v.* Waller, 25 N. Y. 430. See also Hale *v.* Robertson, 100 Ga. 168, 27 S. E. 937.

In Snyder *v.* Free, 114 Mo. 360, 21 S. W. 847, the court said: "If the necessary consequence of a conceded transaction was defrauding another, then, as a party must be presumed to have foreseen and intended the necessary consequences of his own act, the transaction itself is conclusive evidence of a fraudulent intent, for a party cannot be permitted to say that he did not intend the necessary consequence of his own voluntary act. Intent or intention is an emotion or operation of the mind, and can usually be shown only by acts or declarations, and, as acts speak louder than words, if a party does an act which must defraud another, his declaring that he did not by the act intend to defraud is weighed down by the evidence of his own act."

54. Bixby *v.* Carskaddon, 70 Iowa 726, 29 N. W. 626; Chapman *v.* James, 96 Iowa 233, 64 N. W. 795; Clark *v.* Reiniger, 66 Iowa 507, 24 N. W. 16; Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296; Ganong *v.* Green, 71 Mich. 1, 38 N. W. 661; Weadock *v.* Kennedy, 80 Wis. 449, 50 N. W. 393, where the court said: "Fraud, as a question of fact, depends generally upon circumstantial evidence alone, and on a great variety of minor facts, and the court should not be technical or illiberal in sustaining objections to questions having the least bearing upon the issue. If there is any doubt about their materiality, they ought to be answered rather than rejected as immaterial. If the questions are immaterial they injure no one. To reject seemingly doubtful questions, in such a case, might sometimes result in great injustice by shutting out important facts."

In Robinson *v.* Woodmansee, 80 Ga. 249, 4 S. E. 497, where the debtor had testified that he applied to a third person for a loan of money, who introduced him to the mortgagee in the first mortgage given, and which was attacked in the bill, and took part in obtaining the loan for him and a subsequent extension of time, it was held that the debtor might be asked on cross-examination whether or not the person to whom he had applied for the loan had not shortly thereafter failed and had made him a preferred creditor.

An alleged fraudulent grantor may, upon cross-examination, be asked if he conveyed the property in question in order to prevent its being seized on attachment. Hallock *v.* Alvord, 61 Conn. 194, 23 Atl. 131.

Statements Contradicting Testimony in Chief. — In Beuerlien *v.* O'Leary, 149 N. Y. 33, 43 N. E. 417, where the vendor had testified as a witness for the vendee and in support of the good faith of the sale, it was held that he might be asked, on cross-examination, as to his having made statements out of court and in the absence of the vendee, to the effect that the sale was colorable

(H.) Weight of Testimony. — Where the facts and circumstances show a conveyance to be fraudulent as against creditors, the testimony of the grantor that the conveyance was made in good faith and without fraudulent intent will avail but little.[55]

(3.) Testimony of Grantee. — An alleged fraudulent grantee is not a competent witness to testify concerning the intent of the grantor in making the conveyance.[56]

b. *As Respects the Grantee.* — **(1.) Testimony of the Grantee.** An alleged fraudulent grantee is a competent witness to testify that he did not know that the conveyance was made by the grantor with intent to defraud his creditors,[57] and that in taking the conveyance he had no intent to defraud the creditors of his grantor.[58]

only. And in Whittle *v.* Bailes, 65 Mich. 640, 32 N. W. 874, an action to recover the value of property sold on execution brought by an alleged purchaser from the judgment debtor, it was held that the defendant should have been permitted to show by the debtor, on cross-examination, that he was insolvent and had transferred all of his property with intent to defraud his creditors.

55. Bell *v.* Devore, 96 Ill. 217. See also Pickett *v.* Pipkin, 64 Ala. 520, where the parties to the transaction professed their good faith and vigorously disclaimed all purpose to defraud, yet it was held that these professions were but their own estimate of their conduct and transactions, and could not relieve them from offering a reasonable and just explanation of facts which are inconsistent with their opinions.

In Personette *v.* Cronkhite, 140 Ind. 586, 40 N. E. 59, it was held that although the alleged fraudulent grantor had testified positively that he did not intend or design that the conveyance should operate as a fraud upon all of his creditors, but that he had made the conveyance in order to hinder or defraud a particular creditor, he must be charged with the probable and necessary consequences of his own acts, and the result of his fraud must be attributed to him.

56. Manufacturers & Traders Bank *v.* Koch, 105 N. Y. 630, 12 N. E. 9. See also Cothran *v.* Forsythe, 68 Ga. 560, to the effect that the grantee is not a competent witness to testify as to the intention of the grantor without giving facts to show the basis for such conclusion.

57. Frost *v.* Rosecrans, 66 Iowa 405, 23 N. W. 895; Richolson *v.* Freeman, 56 Kan. 463, 43 Pac. 772; Lincoln *v.* Wilbur, 125 Mass. 249. In Wade *v.* Odle, 21 Tex. Civ. App. 656, 54 S. W. 786, an alleged fraudulent trustee was held to have been properly permitted to testify that "he had no knowledge whatever of any fraudulent intent or of any intent on the part of Odle Bros. to hinder or delay their creditors in making the deed of trust. There was no secret agreement or understanding between them and him that he was to handle the property and become the owner of it. Neither was there any secret understanding or agreement between them by which any of their property was to be covered up or secreted. His intention in accepting the position of trustee was to endeavor to go ahead and execute the trust, and to sell the property for every dollar he could, and, if possible, make it pay every dollar they owed."

58. *California.* — Byrne *v.* Reed, 75 Cal. 277, 17 Pac. 201.

Colorado. — Brown *v.* Potter, 13 Colo. App. 512, 29 Pac. 666; Love *v.* Tomlinson, 1 Colo. App. 516, 58 Pac. 785.

Indiana. — Wilson *v.* Clark, 1 Ind. App. 182, 27 N. E. 310.

Iowa. — Frost *v.* Rosecrans, 66 Iowa 405, 23 N. W. 895.

Kansas. — Gentry *v.* Kelley, 49 Kan. 82, 30 Pac. 186.

Michigan. — Bedford *v.* Penny, 58 Mich. 424, 25 N. W. 381; Blanchard

(2.) Cross-Examination. — The court should permit a wide latitude in the cross-examination of the grantee.[59]

B. INDIRECT EVIDENCE. — a. *Circumstances Surrounding Transaction.* — **(1.) Generally. — As Respects the Grantor.** — While the burden of proving a deed fraudulent in fact as to creditors is upon the creditors, positive evidence of fraudulent intent on the part of the

v. Moors, 85 Mich. 380, 48 N. W. 542.

New York. — Bedell *v.* Chase, 34 N. Y. 386. *Compare* Hathaway *v.* Brown, 18 Minn. 414.

Rule Stated. — In Hamburg *v.* Wood, 66 Tex. 168, 18 S. W. 623, the court said: "The motive which actuated the witness in a given act was not opinion or legal conclusion, but knowledge as direct as that derived from the senses. Such testimony lacks some of the sanctions of an oath. It would perhaps be impossible to convict the witness of perjury; he cannot be directly contradicted in what he states. But he is allowed to testify, and knows the truth, known absolutely only to himself; and authority, almost without dissent, holds such testimony admissible. Abb. Tr. Ev. 739; Bump Fraud. Conv. 574; 1 Whart. Ev. §§ 482, 508, and cases cited in the notes; Wait Fraud. Conv. § 205. That the truth of the testimony cannot be tested in the usual methods, and the witness cannot be detected and disgraced, or convicted and punished, in the usual or in fact in any way, affects the weight, and not the competency, of the evidence. The evil can be remedied by the legislature, but not by the courts. Wheelden *v.* Wilson, 44 Me. 18; Berkey *v.* Judd, 22 Minn. 297."

Alabama Rule. — In Richardson *v.* Stringfellow, 100 Ala. 416, 14 So. 283, an action by a creditor attacking an assignment for creditors as being fraudulent, wherein a witness had testified to a conversation, occurring shortly before the assignment, between him and the assignor concerning certain failures, in which the latter remarked that he did not know but that he might be forced to make an assignment himself — that if it were not for the name of the thing he would do so — it was held that the assignor might, in rebuttal, testify to any reasonable explanation of such remark, but that he could not state the uncommunicated intention or purpose which actuated him to make the statement, because such purpose or intention was to be arrived at from what he then said and all then existing circumstances throwing light on the conversation.

59. Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906; Weadock *v.* Kennedy, 80 Wis. 449, 50 N. W. 393; Woodruff *v.* Wilkinson, 73 Ga. 115; Krolik *v.* Graham, 64 Mich. 226, 31 N. W. 307; Bowersock *v.* Adams, 55 Kan. 681, 41 Pac. 971; Nicolay *v.* Mallery, 62 Minn. 119, 64 N. W. 108.

In Trumbull *v.* Hewitt, 65 Conn. 60, 31 Atl. 492, an action to set aside conveyances made by a husband to his wife, as being fraudulent, the wife had testified on her own behalf that at the time of the conveyance she had no knowledge that her husband was in embarrassed circumstances, and knew nothing about his business or of any intent to defraud creditors, and it was held, as bearing on this question of knowledge, that she might properly be inquired of on cross-examination respecting transfers of other property made to her by her husband about a year previous.

In Hathaway *v.* Brown, 18 Minn. 414, where the issue was as to the good faith of a sale by a debtor to the plaintiff, attacked by the defendant as having been made in fraud of creditors, it was held that the plaintiff, while testifying as a witness on his own behalf, might be asked on cross-examination what reasons the debtor gave for wishing to sell out when he proposed the sale.

In Urdangen *v.* Doner (Iowa), 98 N. W. 317, the testimony of the alleged fraudulent vendee relative to his having been offered another stock of goods at a certain price was brought out on his cross-examination and was held competent.

grantor is not required,[60] but it may be inferred from the circumstances surrounding the transaction, and the relation and situation of the parties to it and to each other.[61] This circumstantial evidence, if adequate to satisfy the court or jury of such fraudulent

60. "Where a fraud is contemplated and committed upon creditors, concealment of it is the first and generally the most persistent effort of those who re engaged in it. Publicity would render their acts vain and useless. Leaving direct and positive evidence accessible to those injured by it would be the equivalent of a confession of the culpable intent, and of the defeasible character of the transaction. There are numerous circumstances, so frequently attending sales, conveyances and transfers, intended to hinder, delay and defraud creditors that they are known and denominated *badges of fraud*. They do not constitute — are not elements of — fraud, but merely circumstances from which it may be inferred. So there are many circumstances from which crime and the identity of the criminal agent may be inferred, yet no one of them, in itself, criminal. When a fact is proved, or to be proved, by circumstantial evidence, the concurrence of a number of independent circumstances, each tending to prove it, increases and strengthens the probability of its truth. They may be, each and all, explained, and their probative force lessened, if not destroyed. But the absence of evidence in explanation or weakening or neutralizing their force adds to the probability of the truth of the conclusion to which they point." Thames *v.* Rembert, 63 Ala. 561.

In Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70, the jury were charged as follows: "Fraud is never to be presumed, but must be affirmatively proved by the party alleging the same. The law presumes that all men are fair and honest — that their dealings are in good faith, and without intention to disturb, cheat, hinder, delay or defraud others; and if any transaction called in question is equally capable of two constructions — one that is fair and honest, and the other that is dishonest — there the law is that the transaction questioned is presumed to be honest and fair." To the objection that this instruction required fraud to be shown by affirmative testimony, and excluded all circumstantial evidence, the court said: "We do not think it does so, by any fair and reasonable construction. Fraud in fact, as contradistinguished from fraud in law, is never presumed without evidence, but must be proved by either direct or indirect evidence. The instruction does not undertake to say what *kind* of evidence must be adduced, but its drift and purpose is to show that the party charging fraud has the affirmative of the issue, and must sustain the charge by proof on his part. He may do this by showing facts or circumstances from which fraud is inferred, and thus establish fraud affirmatively. This instruction is not obnoxious to the objection made to it." See also Mathews *v.* Reinhardt, 149 Ill. 635, 37 N. E. 85.

"The proposition that 'fraud must be proved and not presumed' is to be understood only as affirming that a contract honest and lawful on its face must be treated as such until it is shown to be otherwise by evidence either positive or circumstantial. Fraud may be inferred from facts calculated to establish it. If the facts established afford a sufficient and reasonable ground for drawing the inference of fraud, the conclusion, to which the proof tends, must in the absence of explanation or contradiction be adopted. A deduction of fraud may be made not only from deceptive assertions and false representations, but from facts, incidents and circumstances which may be trivial in themselves, but may in a given case be often decisive of a fraudulent design." Goshorn *v.* Snodgrass, 17 W. Va. 717.

61. Heath *v.* Koon, 130 Mich. 54, 89 N. W. 559; Meyer *v.* Baird, 120 Iowa 597, 94 N. W. 1129; Burrill *v.* Kimbell, 65 Mich. 217, 31 N. W.

intent, is sufficient, and, indeed, is often the only evidence attainable.[62] Thus, it is proper to receive evidence tending to show transactions contemporaneous with the conveyance in question indi-

842; New York Store Merc. Co. *v.* West (Mo. App.), 80 S. W. 923; Merrill *v.* Meachum, 5 Day (Conn.) 341.

"In every transaction where fraud is imputed, it must be conceded to be of essential importance that the jury should be put in possession of every fact and circumstance tending to elucidate the question. It is impossible to say the same conclusion would arise in the mind of any one, of the validity of a transaction carried on by parties secretly and without any known motive, and one which was transacted at the instance or on the advice of another." Goodgame *v.* Cole, 12 Ala. 77.

The entire antecedents of the dealings between a principal defendant and a garnishee and their agents, and all transactions regarding the property and its disposal, are admissible in evidence on an issue as to the fraudulent character of the dealings of the garnishee as against the principal defendant's creditors. Cummings *v.* Fearey, 44 Mich. 39, 6 N. W. 98.

In an action by a fraudulent grantee to quiet the title in himself against a subsequent purchaser in good faith and for value, a contract between the fraudulent grantor acting as attorney in fact for the plaintiff and the defendant for the purchase of the property in controversy, is admissible. Hurley *v.* Osler, 44 Iowa 642.

On an issue as to the fraudulent intent on the part of a vendor it is competent to show that at the place where the sale was negotiated he went to a hotel and registered under an assumed name as if to conceal his identity. Freese *v.* Kemplay, 118 Fed. 428.

The fact that an alleged fraudulent grantee did not return the property conveyed for taxation is some evidence that he did not consider himself as the owner thereof, and is admissible to establish fraud. Shober *v.* Wheeler, 113 N. C. 370, 18 S. E. 328.

On an issue as to whether a debtor was attempting to fraudulently convey his property, it is competent to show that he tried to collect certain garnished claims and offered to give receipts for payments therefor antedating the garnishment. Milwaukee Harvester Co. *v.* Tymich, 68 Ark. 225, 58 S. W. 252.

"The purpose or intent of the parties to a sale of goods must be judged of by the conduct of the parties and by all the circumstances connected with and surrounding the transaction. Circumstances apparently trivial or unimportant in themselves when considered singly, may, when taken in connection with others, form important links in the chain of evidence that fixes the character of the transaction." Kane *v.* Drake, 27 Ind. 29.

62. *United States.* — Vansickle *v.* Wells-Fargo & Co., 105 Fed. 16.

Alabama.—Constantine *v.* Twelves, 29 Ala. 607; Whelan *v.* McCreary, 64 Ala. 319; Pickett *v.* Pipkin, 64 Ala. 520; Coal City & C. Co. *v.* Hazard Powder Co., 108 Ala. 218, 19 So. 392.

Arkansas. — Erb *v.* Cole, 31 Ark. 554.

Delaware. — Brown *v.* Dickerson, 2 Marv. 119, 42 Atl. 421.

Georgia. — Colquit *v.* Thomas, 8 Ga. 258.

Illinois. — Reed *v.* Noxon, 48 Ill. 323; Bear *v.* Bear, 145 Ill. 21, 33 N. E. 878; Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70.

Indiana. — Levi *v.* Kraminer, 2 Ind. App. 594, 28 N. E. 1028.

Iowa. — Zimmerman *v.* Heinrichs, 43 Iowa 260; Turner *v.* Hardin, 80 Iowa 691, 45 N. W. 758; Craig *v.* Fowler, 59 Iowa 200, 13 N. W. 116.

Kansas. — LaClef *v.* Campbell, 3 Kan. App. 756, 45 Pac. 461.

Louisiana. — King *v.* Atkins, 33 La. Ann. 1057; Worrell *v.* Vickers, 30 La. Ann. 202.

Maryland. — Anderson *v.* Tydings, 3 Md. Ch. 167; Powles *v.* Dilley, 9

cating a general purpose of fraud.[63] So also the manner in which the debtor had recently obtained goods from his creditors, as well

Gill 222; Kolb *v.* Whitely, 3 Gill & J. 188.

Massachusetts.—Sweetser *v.* Bates, 117 Mass. 466; O'Donnell *v.* Hall, 157 Mass. 463, 32 N. E. 666; Mansir *v.* Crosby, 6 Gray 334.

Michigan. — Ferris *v.* McQueen, 94 Mich. 367, 54 N. W. 164; Judge *v.* Vogel, 38 Mich. 569; Carew *v.* Mathews, 49 Mich. 302, 13 N. W. 600.

Minnesota. — Blackman *v.* Wheaton, 13 Minn. 326; Filley *v.* Register, 4 Minn. 391, 77 Am. Dec. 522.

Mississippi. — Parkhurst *v.* McGraw, 2 Cushm. 134.

Missouri. — New York Store Merc. Co. *v.* West (Mo. App.), 80 S. W. 923; Deering *v.* Collins, 38 Mo. App. 73; Peters-Miller Shoe Co. *v.* Casebeer, 53 Mo. App. 640; Thompson *v.* Cohen, 24 S. W. 1023.

Virginia. — Knight *v.* Nease, 53 W. Va. 50, 44 S. E. 414.

63. Debtor Taking Notes for Outstanding Accounts in Wife's Name, etc. — In Dyer *v.* Taylor, 50 Ark. 314, 7 S. W. 258, where the issue was as to the *bona fides* of a sale by a merchant, in embarrassed circumstances, to his brother-in-law, it was held that evidence showing that at about the time of the sale the merchant took notes in his wife's name in settlement of accounts, that his books were mutilated, that dates were altered, and that balances on the books were changed, was admissible, as it tended to prove transactions indicating a general purpose of fraud, and thus to show the motive which actuated the debtor in making the sale. In Chapman *v.* James, 96 Iowa 233, 64 N. W. 795, an action by a mortgagee against attaching creditors who attacked the mortgage as being in fraud of their rights, and also claimed that a bill of sale by one of the mortgagors to the other was fraudulent, the defendant called the vendee under the bill of sale and inquired of him as to the disposition made by him of his property, including that embraced in the bill of sale made soon after such sale. It was claimed by the plaintiffs that this evidence came within the rule that evidence of acts and declarations of a grantor, after he has parted with title, are not admissible against his grantee. But the court held that as it was alleged that the mortgagors had considered that the mortgage was voluntary and without consideration, the evidence offered tended to support the charge of conspiracy, and the transactions proved were so connected in point of time and circumstances as to constitute a part of the *res gestae,* and were hence admissible.

In Gumberg *v.* Treusch, 103 Mich. 543, 61 N. W. 872, the principal defendant and the garnishees had been engaged in the same kind of business. The principal defendant had been at one time an employe of the garnishees, and later a partner with them, and later still had purchased from them the stock owned by the firm, and another broken stock belonging to a branch store which the garnishees had operated for a time at a loss. The theory of the plaintiffs was that the principal defendant had transferred a large amount of goods to the garnishees in payment of an indebtedness which was not *bona fide,* and which goods were procured for that purpose pursuant to a fraudulent scheme entered into by the principal and garnishee defendants. And it was held competent for the plaintiffs to show whether orders for goods given by the garnishees were filled in the usual course of business or otherwise; and that, immediately after the sale of the stock of goods by the garnishees to the principal defendant, he sent out a number of letters to different dealers, asking for quotations and samples, it appearing that he was without capital, and, according to the claim of the garnishees, his indebtedness equaled, if it did not exceed, his assets.

In Rosenthal *v.* Bishop, 98 Mich. 527, 57 N. W. 573, an action involving the *bona fides* of a chattel mortgage given by a retail dealer to a firm with whom he had dealt for several years, to secure the existing indebtedness and the price of a bill of

as the manner in which he had disposed of them, is proper to be shown.[64]

As Respects the Grantee. — Again, on an issue as to the knowledge and intent of the grantee, it is proper to show what preceded and followed the transaction, the relations of the parties prior and subsequent thereto, and all the facts and circumstances surrounding the principal event.[65]

goods which the mortgagees claimed had been ordered by him, but which the mortgagor denied, and testified that the mortgage was given for a larger amount in fraud of other creditors, it was held competent for the assailants of the mortgage to show in what quantities the mortgagor had usually ordered goods from the mortgagees, and that the alleged order was an unusual one, and out of all proportion to the business carried on by him.

Unusual Extension of Credit. — In Spaulding *v.* Adams, 63 Iowa 437, 19 N. W. 341, where the property embraced in the conveyance attacked had been sold under an agreement for an unusual extension of credit to the purchaser, it was held that that fact might be considered by the jury in determining the good faith of the transaction; and that it was error for the court to charge the jury as a matter of law that such fact should have no tendency to show an intent on the part of the vendor to defraud his creditors in case they should find an intent on his part to apply the proceedings of the sale, when collected, to the payment of his debts.

64. Gray *v.* St. John, 35 Ill. 222.

65. Craig *v.* Fowler, 59 Iowa 200, 13 N. W. 116; Zimmerman *v.* Heinrichs, 43 Iowa 260; Buckingham *v.* Tyler, 74 Mich. 101, 41 N. W. 868; Showman *v.* Lee, 86 Mich. 556, 49 N. W. 578; Erfort *v.* Consalus, 47 Mo. 207; Reynolds *v.* Cawthrop, 37 W. Va. 3, 16 S. E. 364; Knower *v.* Cadden Clothing Co., 57 Conn. 202.

In Levi *v.* Kraminer, 2 Ind. App. 594, 28 N. E. 1028, the alleged fraudulent vendee claimed that he had bought the property of his vendor to prevent its sale at a sacrifice and thus injure the local market; and it was held that newspaper advertisements published at the instance of the vendee, advertising the property for sale at a sacrifice as a bankrupt stock, were properly received in evidence as tending to show that he at once advertised and sold the stock in the manner in which he pretended to be fearful it would be sold by his vendor.

In First Nat. Bank *v.* Marshall, 56 Kan. 441, 43 Pac. 774, it was held on a controversy between a chattel mortgagee and a sheriff claiming possession by virtue of an attachment wherein it was claimed that the mortgage was fraudulent, that letters written by the managing officer of the chattel mortgagee to creditors while the rights of the parties remained undetermined, calculated to influence their action with reference to the collection of their claims, as well as telegrams sent by creditors to the mortgagee with reference thereto, were admissible in evidence, although written and sent after the execution of the mortgage, and after the levy of the attachment. The court said: "Although the chattel mortgages had been executed and attachments had been levied on the goods, the rights of the parties had not been determined. The bank was still seeking to hold the property as against creditors, and its communications with them, through its president, with reference to litigation pending or prospective, and with reference to the action they might or ought to take for the protection of their interests, and with reference to the claims of the bank, were all properly admissible in evidence."

In Bridge *v.* Eggleston, 14 Mass. 245, 7 Am. Dec. 209, it was held that as a fraudulent intent of the grantor and a knowledge thereof or participation therein by the grantee are both to be proved, the evidence may apply separately to the two branches of the case. To prove the fraud of the grantor, his conduct and declara-

(2.) Scope of Inquiry. — Great latitude is generally allowed in the admission of evidence tending to prove the fraud.[66]

tions before the conveyance may be the best evidence of his fraudulent purpose. And if this be proved, the knowledge of it on the part of the grantee may be proved by circumstances tending to show a knowledge of the designs of the grantor.

On an issue as to whether or not an assignment of a bank deposit was fraudulent, evidence that the assignee knew of the creditor's claim against his assignor, and that they were attempting to hold the fund represented by the deposit, is admissible to aid in determining whether the assignment was made in good faith, for a good consideration. Sullivan *v.* Langley, 124 Mass. 264.

66. *Alabama.* — Shealy *v.* Edwards, 75 Ala. 411.

Florida. — Armour *v.* Doig, 34 So. 249.

Iowa. — McNorton *v.* Akers, 24 Iowa 369; Price *v.* Mahoney, 24 Iowa 582; Kelliher *v.* Sutton, 115 Iowa 632, 89 N. W. 26.

Louisiana. — Chaffe *v.* Lisso, 34 La. Ann. 310.

Maryland. — Cooke *v.* Cooke, 43 Md. 522.

Michigan. — Hart *v.* Newton, 48 Mich. 401, 12 N. W. 508; Fury *v.* Strohecker, 44 Mich. 337, 6 N. W. 834; Flanigan *v.* Lampman, 12 Mich. 58; Gumberg *v.* Treuesch, 103 Mich. 543, 61 N. W. 872.

Minnesota. — Ladd *v.* Newell, 34 Minn. 107, 24 N. W. 366.

Missouri. — Field *v.* Liverman, 17 Mo. 218.

Pennsylvania. — Heath *v.* Slocum, 115 Pa. St. 549, 9 Atl. 259; Zerbe *v.* Miller, 16 Pa. St. 488; Garrigues *v.* Harris, 17 Pa. St. 344; Snayberger *v.* Fahl, 195 Pa. St. 336, 45 Atl. 1065.

Rhode Island. — Sarle *v.* Arnold, 7 R. I. 582.

South Carolina. — Archer *v.* Long, 38 S. C. 272, 16 S. E. 998.

Texas. — Cox *v.* Trent, 1 Tex. Civ. App. 639, 20 S. W. 1118.

Utah. — Ogden State Bank *v.* Barker, 12 Utah 13, 40 Pac. 765.

Parties committing such frauds usually seek to conceal the direct and positive evidence of their guilt. Hence, resort may generally be had to proof of circumstances somewhat remotely connected with the transaction. Circumstances, however slight, relating to the transaction and tending to throw light upon its character are competent evidence so far as the same are connected with the parties. Grimes *v.* Hill, 15 Colo. 359, 25 Pac. 698.

As a general rule, great latitude is allowed in the range of evidence, when the question of fraud is involved. It is indispensable to truth and justice that it should be so; for it is hardly ever possible to prove fraud, except by a comprehensive and comparative view of the actions of the party to whom the fraud is imputed, and his relative position a reasonable time before, at and after the time at which the act of fraud is alleged to have been committed. No more precise general rule can be laid down in such cases. Snodgrass *v.* Branch Bank, 25 Ala. 161, 60 Am. Dec. 505.

In Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, wherein it was claimed that the consideration for the conveyance was a balance due on a bond then held by the grantee, executed by the grantors, and the question was as to whether the bond was ever a subsisting obligation, and whether there was anything due on it. It appeared that the grantors kept books of account as bankers, in which their financial transactions were entered. On the trial, evidence was received that those books contained no entry of indebtedness of the grantors to the grantee upon any such bond or any other indebtedness. The court, in holding that this evidence was properly received, said: "The scope of the inquiry where fraud is under investigation may be a very broad one, and the inquiry may, subject to some control of the trial judge, extend over a wide field, and it should not be limited, as it must be in an action by a creditor simply to recover his debt from his debtor."

In Robinson *v.* Woodmansee, 80

(3.) Evidence Supporting Validity of Conveyance. — And the rule permitting a wide latitude of inquiry applies with equal force to evidence to support the conveyance,[67] and the grantee has a full and perfect right to prove any fact or circumstance, not otherwise objectionable, which will in any way tend to avoid the actual fraud and prove the real intention of the parties.[68] Thus, it is proper to permit

Ga. 249, 4 S. E. 497, where a bill had been filed by creditors against a debtor, alleging that the latter had made a fraudulent sale of his property to his brother and others, and an injunction was granted, it was held that it was not error to receive in evidence on the trial a petition filed by the complainants against the debtor and his vendee, praying for an attachment for contempt against them for violating the injunction and their answer thereto; that one of the questions in the case was whether or not the debtor had made a fraudulent sale, and these documents tending to show that he persisted in trying to give effect to such sale were admissible against him.

67. Heath *v.* Slocum, 115 Pa. St. 549, 9 Atl. 259; Barnett *v.* Vincent, 69 Tex. 685, 7 S. W. 525.

Evidence that an alleged fraudulent vendor of chattels was in ill-health and required a change of climate is admissible to show the good faith of the transaction. Vyn *v.* Keppel, 108 Mich. 244, 65 N. W. 966.

It is proper to permit the transferee to show that he was advised by a third person to come to the debtor's place of residence for the purpose of securing a debt due to him, and that he came for that purpose. His purpose in coming is a part of the *res gestae*. Goodgame *v.* Cole, 12 Ala. 77.

On a controversy between attaching creditors and an alleged fraudulent grantee it is proper to permit the latter to introduce evidence showing that the grantors, within four months preceding the execution of the conveyance in question, had paid out to their creditors and expended in their business a large sum of money. Troy Fertilizer Co. *v.* Norman, 107 Ala. 667, 18 So. 201, where the court said: "They reduced their actual indebtedness by the amount they paid their creditors, and if they expended the money in their business, these facts were competent to be considered by the jury, together with all the evidence in the cause tending to show that defendants were not contemplating a failure and closing up of their business and defrauding their creditors at the time."

In Evans *v.* Lewis, 30 Ohio St. 11, an action by a subsequent creditor to set aside a voluntary conveyance on the ground that it was made with intent to defraud the plaintiff, which intent the plaintiff had offered evidence to disprove, it was held error to exclude evidence offered by the defendant tending to show that sometime prior to the conveyance in question, and before the cause of action for which the plaintiff's judgment was recovered has accrued, the grantor had promised his wife that he would convey the property in question to her.

Applying Proceeds to Payment of Debts. — It is proper to show that the entire proceeds of the sale in question were immediately applied by the vendor in payment of his debts. Bedell *v.* Chase, 34 N. Y. 386.

68. Filley *v.* Register, 4 Minn. 391.

In Rice *v.* Bancroft, 11 Pick. (Mass.) 469, an action of trespass for seizing the plaintiff's property wherein the defendant relied on evidence that a debtor in failing circumstances fraudulently conveyed the property to his son and that the plaintiff with knowledge of the fraud received it from the son in exchange for other property, it was held proper for the plaintiff to rebut evidence of such knowledge by introducing evidence that before the debtor was in failing circumstances he had been heard to speak of exchanging property with the plaintiff.

On a controversy between a vendee of personal property under a bill of

an alleged fraudulent grantee to show that he had insured the property,[69] and had used it as his own.[70]

sale, absolute on its face, and a creditor of the vendor, the fact that the vendee filed the bill of sale in the proper recording office is relevant upon the claim made by him that the transfer was absolute and not by way of security. Wessels *v.* Beeman, 87 Mich. 481, 49 N. W. 483, where the court said: "It was proper for the jury to consider the fact in determining whether it was an absolute sale, as claimed by plaintiff, or intended as a security, as claimed by defendants. If the jury found that there was an absolute sale, then the question of delivery and actual and continued change of possession was important, for, if there was no actual delivery, followed by a continued change of possession, the burden of proof was upon the plaintiff to show that the sale was made in good faith, and without any intention to defraud creditors; but if it was intended as a security, and the affidavit was not filed as required by the statute, then it would be void as against such creditors as should acquire a lien after the expiration of a year and before the filing of the renewal affidavit; and in this case it is conceded that no renewal affidavit was filed. The act of the party in filing a bill of sale had some significance upon the question as to whether it was an absolute transfer or only a security."

Rebutting Presumption From Grantor's Acts. — On an issue as to the fraudulent character of a deed of trust it is competent for the trustee to show that his actions, with reference to the trust property, have been in accordance with the deed for the purpose of rebutting any presumption which might arise from the acts of the grantor. Graham *v.* Lockhart, 8 Ala. 9.

On an issue as to whether or not a transfer of a stock of goods was fraudulent, the fact that the goods had been delivered to the transferee and that sales therefrom had been made by his clerk in due course of trade prior to the levy of attachments issued against his vendor, is relevant evidence as tending to show his *bona fide* ownership of the goods. Shealy *v.* Edwards, 75 Ala. 411.

Purchase of Property Under Advice to Secure Debt. — In Goodgame *v.* Clifton, 13 Ala. 583, a purchase made by a ward from his former guardian was attacked for fraud; it was held that the ward might show that he was advised to come to the guardian's place of residence and secure the debt by a purchase of the property in controversy, and that he did come within a very short time and make the purchase. This was for the purpose of explaining the transaction and the motives which prompted the purchase. But in Bicknell *v.* Mellett, 160 Mass. 328, 35 N. E. 1130, an action by an assignee in insolvency to recover the value of the insolvent's stock in trade from the holder of a mortgage upon it alleged to have been made in fraud of the insolvent laws, it was held that the defendant could not introduce evidence of what he had been told by counsel with reference to his legal right to make the mortgage loan.

If the debtor intended a fraud on the insolvent laws, all that is necessary to be proved against the defendant is that he had reasonable cause to believe that the debtor was insolvent and had such an intent. This depends on the opinion of the jury or court, as the case may be, as to what conclusion a prudent business man would draw from the facts known by the defendant, and the only matter for evidence, therefore, is as to what facts were known.

69. Brickley *v.* Walker, 68 Miss. 563.

70. Hall *v.* Moriarty, 57 Mich. 345, 24 N. W. 96.

In Flood *v.* Clemence, 106 Mass. 299, the plaintiff proved the conveyance to him by mortgage and sale of the property in question and offered evidence to show that before the attachment of it by the defendant he took possession of the property and the building thereon. These conveyances the defendant alleged to be fraudulent, and produced evidence

b. *Unduly Withholding Instrument from Record.* — The circumstance of unduly withholding the instrument of conveyance in question from record is undoubtedly indicative of a fraudulent design and proper to be shown; although, like other facts, it may be explained.[71]

c. *Retention of Possession by Vendor.* — The fact that after the transfer alleged to be fraudulent the vendor retained possession of the property may be shown on an issue as to whether or not the conveyance was made in fraud of creditors.[72]

d. *Subsequent Fraudulent Use of Instrument.* — Although a deed which at the time of its execution may be fair and valid as against creditors cannot become fraudulent and void by matters occurring subsequently, yet, in determining the intent with which the deed was made, it is competent, as against the parties to it, to show the use to which they applied it subsequently.[73]

e. *Existence of Other Debts.* — It may be shown as against an alleged fraudulent vendee that the vendor had creditors at the time of the alleged fraudulent conveyance, and that their claims were so large as to furnish a probable motive to defraud,[74] and that the vendee knew of such indebtedness.[75]

that there was no change in the building inside or outside after the sale up to the time of the trial, and that the business was carried on apparently by the same person and in the same manner as before. In reply the plaintiff offered to prove that before the final sale to him the former owner offered to sell to another party who applied to him for his consent, and that after the attachment other stock was purchased for the store by the plaintiff in his own name. It was held that even though the evidence rejected would materially contradict the evidence to which it was offered in reply, it was not so significant in character as to make its rejection error.

Evidence on the part of an alleged fraudulent grantee to the effect that after the conveyance he had put improvements upon the property, is admissible. Stewart *v.* Fenner, 81 Pa. 177.

71. McDaniel *v.* Parish, 4 App. D. C. 213.

72. Moog *v.* Benedicks, 49 Ala. 512. See also Ashcroft *v.* Simmons, 163 Mass. 437, 40 N. E. 171, and Cowles *v.* Coe, 21 Conn. 220.

73. Kelliher *v.* Sutton, 115 Iowa 632, 89 N. W. 26; Lynde *v.* McGregor, 13 Allen (Mass.) 172; Shipman *v.* Seymour, 40 Mich. 274; Farmers Bank *v.* Douglass, 11 Smed. & M. (Miss.), 469. See also Tolerton *v.* First Nat. Bank, 63 Neb. 674, 88 N. W. 865.

74. Helfrich *v.* Stem, 17 Pa. St. 143; Stewart *v.* Fenner, 81 Pa. St. 177. See also Ross *v.* Wellman, 102 Cal. 1, 36 Pac. 402.

Records of Judgments against the party whose property has been purchased at a sheriff's sale, one obtained before the sale and others soon thereafter, are competent evidence to establish the fact of the existence of creditors who might be injured by the sale. McMichael *v.* McDermott, 17 Pa. St. 353, 55 Am. Dec. 560.

75. Hallock *v.* Alford, 61 Conn. 194, 23 Atl. 131, where the court said: "Considering the relationship of the parties [mother and son], it was a circumstance bearing upon the probability that there was an actual sale of the property, a question upon which it was the right of the defendant to turn all the light which the surrounding circumstances would afford."

The fact that a vendor of property was largely in debt for it, and that that fact was known to his vendee, on a purchase of most of the prop-

f. *Pendency of Actions Against Vendor.* — It is competent for the attacking creditor to prove the pendency of actions against his debtor at the time of the execution of the conveyance.[76]

g. *Claim of Vendee Barred by Statute of Limitations.* — The fact that some of the items of the claim of indebtedness relied on to constitute the consideration for a conveyance were barred by the statute of limitations may be shown as a circumstance proper to be considered on the question of good faith.[77]

h. *Mortgage Exceeding Amount of Indebtedness.* — The fact that a mortgage attacked as fraudulent was given for a greater sum than the amount due is a circumstance proper to be shown.[78]

i. *Inadequacy of Consideration.* — Inadequacy of consideration, although of itself not sufficient to invalidate a deed as against the grantee, is a circumstance affording inferences upon the question of *bona fides* more or less strong, according to the circumstances of the particular case;[79] and there are cases in which it has been given much weight.[80]

j. *Relationship of Parties.* — The relationship existing between the vendor and the vendee is a fact proper to be shown and considered.[81]

erty on a credit extending beyond the time when the vendor's original indebtedness for the property should become due, may be shown for the consideration of the jury in connection with other evidence in determining the question of fraud. Hughes *v.* Monty, 24 Iowa 499, where the court said: "It cannot be true that the law will presume fraud from the fact that property is bought on credit, and especially so when such party purchased it for the purpose of sale. If this proposition was true, it would be dangerous for any one to deal with a person indebted. The sale of property on credit is often made, and such sale being fully legal, the law ought not to be held to presume fraud from it. Of course, if there are unusual circumstances attending a sale on credit, or for cash even, such circumstances may be proper to go to and be considered by the jury in determining the fraudulent intent on the part of the vendor or the knowledge of such intent on the part of the vendee."

76. Barber *v.* Terrill, 54 Ga. 146; Evans *v.* Hamilton, 56 Ind. 34; Sherman *v.* Hogland, 73 Ind. 472; Wright *v.* Nostrand, 94 N. Y. 31.

77. Vansickle *v.* Wells-Fargo & Co., 105 Fed. 16.

78. Brace *v.* Berdan, 104 Mich. 356; 62 N. W. 568.

79. Stix *v.* Keith, 85 Ala. 465, 5 So. 184, Urdangen *v.* Doner (Iowa), 98 N. W. 317; Downs *v.* Miller, 95 Md. 602, 53 Atl. 445; Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375; Fuller *v.* Brewster, 53 Md. 358; Woodruff *v.* Bowles, 104 N. C. 197, 10 S. E. 482; Fisher *v.* Shelver, 53 Wis. 498, 10 N. W. 681.

80. McNeal *v.* Glenn, 4 Md. 87; Worthington *v.* Bullitt, 6 Md. 172.

81. *United States.* — Vansickle *v.* Wells-Fargo & Co., 105 Fed. 16.

Alabama. — Tompkins *v.* Nichols, 53 Ala. 197.

Illinois. — Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70; Rindskoph *v.* Kuder, 145 Ill. 607, 34 N. E. 484.

Indiana. — Sherman *v.* Hogland, 73 Ind. 472; Adams *v.* Ryan, 61 Iowa 733, 17 N. W. 159.

Kansas. — Hasie *v.* Connor, 53 Kan. 713, 37 Pac. 128; Hough *v.* Dickinson, 58 Mich. 89, 24 N. W. 809.

Missouri. — Martin *v.* Fox, 40 Mo. App. 664.

In Davis *v.* Zimmerman, 40 Mich. 24, a controversy between a wife and creditors of her husband as to the *bona fides* of an alleged gift of property from him to her, the court said:

k. *Character.* — Evidence of good character and reputation for honesty and fair dealing is not admissible on the part of the alleged fraudulent vendee on a controversy between himself and creditors of his vendor.[82]

l. *Pecuniary Condition of Parties.* — (1.) Generally. — It has been held that under some circumstances evidence as to the pecuniary circumstances of both parties is a proper subject of inquiry.[83]

(2.) As Respects the Grantor. — (A.) Generally. — Thus, it is competent to show that the grantor was insolvent at the time of the conveyance;[84] or that he had or retained no other property than the property embraced in the conveyance,[85] and that the vendee knew of such insolvency.[86] And it is error to exclude evidence of such

"No doubt the circumstances of the relation, and the facility with which frauds may be accomplished under the pretense of sales or gifts between husband and wife, ought to be carefully weighed in determining whether or not a gift has been made, but when all are considered, the one question and the only question is, whether the wife has established her right by a fair preponderance of evidence; if she has, no court has any business to require more."

82. Simpson *v.* Westenberger, 28 Kan. 756, 42 Am. Dec. 195; Heywood *v.* Reed, 4 Gray (Mass.) 574.

83. Miller *v.* Hanley, 94 Mich. 253, 53 N. W. 962, where the debtor had undertaken to assign and convey his property in recognition of a debt due to his wife, originating twenty-five years previously, no account of which had been kept, no evidence thereof given, and no interest or principal paid or requested.

On an issue as to the knowledge on the part of the grantee of the grantor's insolvency at the time of the conveyance in question, it is proper to permit a witness to testify that a short time previous the grantee had told him that the grantor's father-in-law wished to see him in respect to his liability on certain notes which he had signed for the grantor and which the latter could not take care of, and that the father-in-law afterward did see the witness. Lynde *v.* McGregor, 13 Allen (Mass.) 172.

84. Goldstein *v.* Morgen (Iowa), 96 N. W. 897; Vickers *v.* Buck Stove & Range Co., 60 Kan. 598, 57 Pac. 517; Helfrich *v.* Stem, 17 Pa. St. 143; Martin *v.* Fox, 40 Mo App. 664; Beeson *v.* Wyley, 28 Ala. 575; Price *v.* Mazange, 31 Ala. 701; *overruling* Stanley *v.* State, 26 Ala. 26.

In Marsh *v.* Hammond, 11 Allen (Mass.) 483, it was held that for the purpose of establishing the grantor's fraudulent intent it is proper to prove his pecuniary condition; and that evidence that he obtained an extension of certain notes about to fall due a few months before the conveyance in question, by representations to the holders that he should not be able to pay them at maturity, tended to prove that he knew himself to be insolvent at that time.

85. Dumangue *v.* Daniels, 154 Mass. 483, 28 N. E. 900; Bristol Co. Sav. Bank *v.* Keavey, 128 Mass. 298; Boyd *v.* Jones, 60 Mo. 454; Threlkel *v.* Scott (Cal.), 34 Pac. 851.

The fact that a grantor by the conveyance attacked as being fraudulent strips himself of all visible, tangible property subject to execution at law, retaining only choses in action of uncertain, doubtful value, while not in itself conclusive (but, it may be, weak and inconclusive) evidence of fraud, will awaken suspicion and add strength to other circumstances which may also be, in themselves, insufficient to establish a fraudulent intent. Seals *v.* Robinson, 75 Ala. 363.

86. Helfrich *v.* Stem, 17 Pa. St. 143.

The fact that an alleged fraudulent grantor was slow in paying his debts is admissible as some evidence of insolvency; and the fact that

insolvency merely because it cannot also be shown by direct testimony that the grantee had knowledge thereof.[87]

(B.) VENDEE'S KNOWLEDGE. — The transferee may, for the purpose of showing that he had no reasonable cause to believe the vendor insolvent, show inquiries by him, and what he had been told, as to the financial standing of the vendor;[88] and whether these were made in the presence or absence of the vendor is immaterial.[89]

Exempt Property. — In the case of a conveyance of property exempt from seizure under execution, evidence that the grantee had

he had the reputation of being slow in that regard, while not admissible to prove insolvency, is admissible as tending to show the grantee's knowledge of his embarrassed condition at the time of the conveyance as shown by other evidence. Hudson *v.* Bauer, 105 Ala. 200, 16 So. 693.

87. Bernheim *v.* Dibrell, 66 Miss. 199, 5 So. 693.

88. Hough *v.* Dickinson, 58 Mich. 89, 24 N. W. 809.

In Carpenter *v.* Leonard, 3 Allen (Mass.) 32, an action by the assignee of an insolvent debtor to set aside a mortgage alleged to have been given as a preference to the defendant, it was held competent for the defendant, for the purpose of showing that he had no ground for believing the mortgagor to be insolvent, to introduce evidence of representations and statements made to him long prior to the mortgage by the mortgagor as to his means and ability to carry on business, in reply to inquiries made by him prior to forming a copartnership with the mortgagor, provided such evidence was coupled with other evidence that subsequent to the representations neither the firm nor the mortgagor had met with losses; but that it was not competent to put in evidence the opinion of one who had examined the books and papers of the firm, and cast up the receipts and disbursements, having no knowledge as to their correctness or completeness except by information from the mortgagee, for the purpose of showing that there had been no losses in the business. The court, in speaking of the declarations, said: "It is true that they were hearsay, and in the trial of an ordinary issue would have been for that reason incompetent. But they were declarations made directly to the tenant, under circumstances calculated to impress his mind, at a time when his attention was especially turned to the subject of the mortgagor's pecuniary condition, and of such a nature that they might properly affect the belief of any reasonable man concerning the solvency of the mortgagor. They were made, too, *ante litem motam*, not for the purpose of influencing the mind of the tenant to induce him to take the mortgage, the validity of which is now called in question, but to effect an entirely different object. Indeed, if it be competent to offer in evidence the declarations and opinions of third persons concerning the solvency and credit of a party, as has been decided in the cases above cited, *a fortiori* it would seem to be proper to admit the declarations of the debtor himself, as having a tendency to create a reasonable belief in the mind of an honest and reasonable man that he was not insolvent. To the objection that the declarations offered in evidence were made long previous to the execution of the mortgage in question, and that therefore they were too remote to have any legitimate bearing on the issue before the jury, we think there is an obvious and decisive answer. The tenant did not rely on proof of the declarations alone. If he had, the objection would have been entitled to some weight. But he coupled his offer to prove his statements of the mortgagor in October, 1856, with the additional fact, which he was also ready to prove, that the tenant had suffered no loss in his business from that date down to the time of the execution of the mortgage."

89. Boardman *v.* Kibbee, 10 Cush. (Mass.) 545.

knowledge of the grantor's condition as to insolvency is irrelevant.[90]

(3.) As Respects the Grantee. — It is competent to show the pecuniary condition of the grantee at the time of the conveyance,[91] that he was insolvent,[92] and his character for honesty and fair dealing bad,[93] even though the purchase was made on time.[94]

m. *Other Conveyances.* — **(1.) As Respects the Grantor.** — (A.) GENERALLY. — On an issue as to the fraudulent intent of a grantor it is proper to show that other fraudulent conveyances had been made by him about the same time and as a part of the same scheme to defraud.[95] And it is not necessary to the admissibility of such

90. Pollak *v.* McNeil, 100 Ala. 203, 13 So. 937, where the court said in so holding that the grantor had the right to sell exempt property whether he was solvent or insolvent.

91. Jones *v.* Meyer Bros. Drug Co., 25 Tex. Civ. App. 234, 61 S. W. 553; Sherman *v.* Hogland, 73 Ind. 472; Bernard *v.* Guidry, 109 La. 451, 33 So. 558.

In Dale *v.* Gower, 24 Me. 563, it was held that declarations of the plaintiff tending to show that he was not in a condition to have paid the consideration named in the conveyance were admissible.

92. Robinson *v.* Woodmansee, 80 Ga. 249, 4 S. E. 497.

In Rowland *v.* Plummer, 50 Ala. 182, where the issue was as to the *bona fides* of a transfer of a promissory note by a husband to a trustee for his wife, it was held that attacking creditors could not show the insolvency of the trustee at the time of the transfer, since the fact of his insolvency in no way affected the validity of the transfer nor the rights of the party under it.

93. Holmberg *v.* Dean, 21 Kan. 67, where the court in so holding said: "If the assignee be so deficient in business capacity or standing, in pecuniary responsibility or character for integrity, that a prudent man, honestly looking to the interest of the creditors alone, would not likely select him as a proper person for the performance of the trust, then his selection will furnish an inference, more or less strong, according to the circumstances, that the assignor in making the selection was actuated by some other motive than the desire to promote the interest of creditors; in other words, an inference of intent to hinder, delay, or defraud his creditors. If the assignment was made with this intent, the transaction was fraudulent."

94. Borland *v.* Mayo, 8 Ala. 104, where the court said: "Such testimony, it is true, might not establish a fraud, yet, in connection with other facts, the indebtedness of the claimant might exert a controlling influence. No matter what may be the extent of one's property, prudent men, who are indebted, are less disposed to make heavy purchases, even on time; especially if they do not expect or intend to realize by a re-sale."

95. *United States.* — Wilson *v.* Prewett, 3 Woods 631, 30 Fed. Cas. No. 17,828, 103 U. S. 22.

California. — Landecker *v.* Houghtaling, 7 Cal. 391.

Connecticut. — Thomas *v.* Beck, 39 Conn. 241; Knower *v.* Cadden Clothing Co., 57 Conn. 202.

Iowa. — Gollobitsch *v.* Rainbow, 84 Iowa 567, 51 N. W. 48; Doxsee *v.* Waddick, 98 N. W. 483; Kelliher *v.* Sutton, 115 Iowa 632, 89 N. W. 26.

Maine. — Howe *v.* Reed, 12 Me. 515.

Massachusetts. — Stockwell *v.* Silloway, 113 Mass. 384; Lynde *v.* McGregor, 13 Allen 174; Taylor *v.* Robinson, 2 Allen 562.

Michigan. — Krolik *v.* Graham, 64 Mich. 266, 31 N. W. 307.

New Hampshire. — Hills *v.* Hoitt, 18 N. H. 605.

New York. — Angrave *v.* Stone, 45 Barb. 35; Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99; Beuerlien *v.* O'Leary, 149 N. Y. 33, 43 N. E. 417.

North Carolina. — Brink *v.* Black, 77 N. C. 59.

Pennsylvania. — Deakers *v.* Temple, 41 Pa. St. 234.

evidence as against the vendor that there be also proof that the vendee had knowledge of or participated in the fraudulent purpose of such other conveyances.[96] But where two transactions are claimed to be fraudulent, only one of which, however, is attacked, it

Rhode Island. — Sarle *v.* Arnold, 7 R. I. 582.

South Carolina. — Thorpe *v.* Thorpe, 12 S. C. 154.

Texas. — Day *v.* Sloan, 59 Tex. 612.

In Bernheim *v.* Dibrell, 66 Miss. 199, 5 So. 693, it was held proper to permit proof that the debtor had on the day following the conveyance in question conveyed other property with the intent to defraud creditors. The court said: "It is not essential to the competency of such evidence that it should relate to transactions contemporaneous with the one investigated. If they are so closely related in time that the intent that governed in the one may fairly and reasonably be inferred to be the intent that controlled the other, then the one sheds light upon the other, and is therefore a relevant subject of investigation. If Mrs. Pollard, on the night of the day on which she sold the goods levied on to the claimants, made transfers of other portions of her estate for the fraudulent purpose of defeating her creditors, it is for the jury to say whether such was the purpose of the transfer to the claimants. The intervening time was too short for the court to say as matter of law that the one act could not shed light upon the other."

In Engraham *v.* Pate, 51 Ga. 537, it was held error to reject evidence that at about the time of the conveyance in question the debtor had sold to the same grantee, who was his son-in-law, all his other real estate. The court said: "The fact, if it be so, that about the same time he sold to the same son-in-law property in a different locality—in fact, all his real estate — is surely some evidence going to cast suspicion upon the transaction at present under investigation. It is a circumstance which, from its very nature, will affect the mind in coming to a conclusion upon the matter in issue. As a matter of course, it is but one fact, and did it stand alone it would not amount to much. But the evidence in this case leaves the transaction open to strong suspicion, and the verdict is by no means demanded by the evidence. Perhaps, had this additional fact gone to the jury the verdict would have been different."

96. In Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400, evidence of other fraudulent conveyances made at or about the same time with the conveyance in question had been held inadmissible, unless some evidence was offered that the grantee knew of these particular conveyances or of a general purpose of the grantor to convey away his property to the injury of his creditors. The appellate court, in holding the ruling to be incorrect, said that the law does not hold a conveyance to be void on proof that it was made with a fraudulent intent to delay or defeat the creditors of the grantor, unless there was a fraudulent intent in both parties, nor that the grantee's estate could be defeated by showing a fraudulent intent in the grantor, unless it was also shown that the grantee participated therein or by his concurrence promoted it. "The proposition to be established, then, by the attaching creditor, who seeks to vacate a prior conveyance on the ground of fraud, is that the grantor made his conveyance with the intent and for the purpose of defrauding his creditors by a pretended and colorable sale, or by a sale without consideration, or upon a secret trust contrary to good faith, and that the grantee knew of this intent and purpose, and participated in it. These propositions are in some measure independent of each other, inasmuch as there may be a fraudulent intent on the part of the grantor, but not known to the grantee, though proof of both must concur to make out a case for the creditor. But the evidence to prove these several propositions may be of different kinds and drawn from different sources."

must be shown that they are so connected as to evince a common purpose before the transaction not attacked can be admitted in evidence for the purpose of establishing the fraudulent character of the other.[97]

Other Attachments. — On an issue as to the fraudulent character of a conveyance, evidence that other creditors of the grantor had sued out an attachment, on hearing of the conveyance in question, is not admissible for the purpose of proving the fraudulent character of the conveyance.[98]

Best Evidence Rule Not Applicable. — The rule in regard to the production of the best evidence does not apply in such cases in a way requiring the written evidence of such other conveyance, because the inquiry in such case relates to a fact collateral to the main issue.[99]

(B.) Fraudulent Character of Other Conveyance. — In order to justify the admission of such evidence it must appear that the other transactions were in fact fraudulent; thus, evidence of such other conveyance cannot be received where it does not appear that at the time when they were executed the grantor had any creditors to be defrauded.[1]

(C.) Other Independent Conveyances. — But evidence tending to show fraud on the part of the vendor in other conveyances, independent of and having no connection with the conveyance in controversy, is not competent.[2] Nor is evidence of other transfers between the same parties, but apparently valid and not shown to have been in any way connected with the transfer in controversy, admissible.[3]

97. Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200.

98. Miner *v.* Phillips, 42 Ill. 123, where the court, in so holding, said: "The fact that other creditors had sued out attachments is not evidence of fraud. To so hold would enable creditors in any case to defeat the fairest transaction and a sale made in the utmost good faith. It would only be necessary for one creditor to sue out an attachment, and for other creditors to prove that fact, to establish a fraud that would impeach the fairest sale that could be made."

99. In Phinney *v.* Holt, 50 Me. 570, where the grantor was a witness to disprove any fraudulent intent, it was held that he might be asked on cross-examination if he had not on the same day made a conveyance of other property to a third person.

1. McAulay *v.* Earnhart, 46 N. C. 502.

2. Uhler *v.* Adams, 73 Miss. 332, 18 So. 654; Staples *v.* Smith, 48 Me. 470. See also Clark *v.* Reiniger, 66 Iowa 507, 24 N. W. 16.

3. Cocke *v.* Carrington Shoe Co. (Miss.), 18 So. 683; Holmesly *v.* Hogue, 47 N. C. 391.

Williams *v.* Robbins, 15 Gray (Mass.) 590, where the court, in so holding, said: "To allow proof of the design and purpose of the parties in the latter for the purpose of showing that the former, which otherwise appears to be perfectly legal and valid as having been made upon a just and sufficient consideration, was infected by the fraudulent intention of the parties to hinder and delay the creditors of the grantor in the collection of their respective claims and demands, would authorize an effect to be given to it to which it is in no respect entitled. There was in fact no connection whatever between them. Each was the result, so far as is known from anything disclosed upon the trial, or then offered to be proved, of a distinct, separate and independent negotiation; and the one

(2.) As Respects the Grantee. — Evidence of other frauds committed by a grantor in which his grantee did not participate, and of which he had no notice, cannot be received for the purpose of defeating the title of his grantee.[4] Nor is it permissible to show that the grantor proposed to others fraudulently to convey the property to them, unless it is also shown that the grantee had knowledge thereof, and of the object and motive of the grantor in making them.[5] Nor is evidence of other fraudulent transactions between the grantor and third persons admissible, even if the grantee had knowledge thereof before the conveyance, unless the two transactions were so connected as to evince a common fraudulent purpose.[6] But evidence that an alleged fraudulent grantee had, in other transactions about the time of the transaction in question, aided and advised the grantors in preventing their creditors from availing themselves of their legal remedies, is competent.[7]

n. *Acts and Declarations of the Parties.* — **(1.) Generally.** — On an issue as to the *bona fides* of a conveyance, whatever is said by the parties in the progress of the negotiations and contemporaneous therewith, and having a tendency to give character to the transaction, and which derives credit from it, is admissible.[8] And such evidence

had therefore no tendency to characterize or to evince the purpose and design of the parties in the other."

4. *Alabama.* — Shealy *v.* Edwards, 75 Ala. 411; Moog *v.* Farley, 79 Ala. 246; Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70.

Illinois. — Mathews *v.* Reinhardt, 149 Ill. 635, 37 N. E. 85.

Iowa. — Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200; Doxsee *v.* Waddick, 98 N. W. 483.

Maine. — Blake *v.* Howard, 11 Me. 202.

Michigan. — Keating *v.* Ritan, 80 Mich. 324, 45 N. W. 141.

New Hampshire — Blake *v.* White, 13 N. H. 267.

New York. — Ford *v.* Williams, 13 N. Y. 577, 67 Am. Dec. 83.

Pennsylvania. — Wolf *v.* Koler, 133 Pa. St. 13, 19 Atl. 284.

Wisconsin. — Rozek *v.* Redzinski, 87 Wis. 525, 58 N. W. 262.

A creditor attempting to impeach a conveyance as fraudulent will not be permitted to give evidence of other conveyances by the same grantor of other land at other times without connecting it with proof of privity or knowledge on the part of the grantee upon whom the testimony is intended to bear. Blake *v.* Howard, 11 Me. 202. See also Flagg *v.* Wellington, 6 Me. 386; Grant *v.* Libby, 71 Me. 427; Staples *v.* Smith, 48 Me. 470.

5. Reed *v.* Smith, 14 Ala. 380.

6. Bixby *v.* Carskaddon, 70 Iowa 726, 29 N. W. 626.

7. Adams *v.* Kenney, 59 N. H. 133. *Citing* Whittier *v.* Varney, 10 N. H. 291; Lee *v.* Lamprey, 43 N. H. 13; Pomeroy *v.* Bailey, 43 N. H. 118.

In an action to set aside a conveyance as fraudulent, the plaintiff is not confined to evidence of the one transaction, but has a right to give evidence of the general course of business between the grantor and grantee, as well as of distinct transactions. Hunsinger *v.* Hofer, 110 Ind. 390, 11 N. E. 463.

In Dent *v.* Portwood, 21 Ala. 588, it was held that for the purpose of showing a bill of sale to be fraudulent, a deed for land executed by the vendor, on the same day, to the vendee, is admissible as tending to show that the vendor was disposing of his whole estate, and thus adding to the other proof of the *mala fides* of the bill of sale.

8. *California.* — Eppinger *v.* Scott, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723; Tevis *v.* Hicks, 41 Cal. 123.

Connecticut. — Lesser *v.* Brown, 54 Atl. 205.

is not only competent to show fraud, but to rebut it, its object being not to vary or alter the terms of the written contract representing the transaction, but to show its good faith.[9]

Subsequent Acts of the Parties to the conveyance may be submitted to the jury as they may reflect light back upon the original intent and help to characterize and discern it more correctly.[10]

Declarations by Agent. — So, also, are declarations admissible which are shown to have been made by a duly authorized agent at or prior to the consummation of the transfer.[11]

(2.) As Respects the Grantor. — (A.) GENERALLY. — Fraudulent intent on the part of the grantor may be shown by his acts and declarations so immediately connected with the transaction as to throw light upon or illustrate its nature.[12] This evidence often consists of a series of

Iowa. — Hurley *v.* Osler, 44 Iowa 642; Bener *v.* Edgington, 76 Iowa 105, 40 N. W. 117; Moss *v.* Dearing, 45 Iowa 530; Whitney *v.* Brownewell, 71 Iowa 251, 32 N. W. 285.

Maine. — Littlefield *v.* Getchell, 32 Me. 390.

Maryland. — Cooke *v.* Cooke, 43 Md. 522.

Massachusetts. — Elliott *v.* Stoddard, 98 Mass. 145.

Michigan. — Leland *v.* Collver, 34 Mich. 418; Gumberg *v.* Treuesch, 103 Mich. 543, 61 N. W. 872.

Nebraska. — Bennett *v.* McDonald, 60 Neb. 47, 82 N. W. 110.

New Hampshire. — Banfield *v.* Parker, 36 N. H. 353.

9. Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680.

10. Messick *v.* Fries, 128 N. C. 450, 39 S. E. 59.

11. Grimes *v.* Hill, 15 Colo. 359, 25 Pac. 698; Potts *v.* Hart, 99 N. Y. 168, 1 N. E. 605. See also Kaufman *v.* Burchinell (Colo. App.), 63 Pac. 786, where it was held that statements of a creditor's agent, who was in possession of the property and packing it up for shipment, as to the disposition that was being made of the property, were admissible against the creditor. *Compare* Reed *v.* Noxon, 48 Ill. 323, wherein it was held that declarations of a mortgagee made at a time when he was not acting as the mortgagor's agent were not admissible in evidence in an attachment by a creditor against the mortgagor alone charging the mortgage to have been made with intent to defraud creditors.

12. *England.* — Phillips *v.* Eames, 1 Esp. 357.

United States. — Freese *v.* Kemplay, 118 Fed. 428.

Alabama.—Shealy *v.* Edwards, 75 Ala. 411.

Arkansas. — Hiner *v.* Hawkins, 59 Ark. 303, 27 S. W. 65.

California. — Visher *v.* Webster, 8 Cal. 109; Landecker *v.* Houghtaling, 7 Cal. 391; Threlkel *v.* Scott, 34 Pac. 851.

Connecticut. — Cook *v.* Swan, 5 Conn. 140.

Florida. — Hardee *v.* Langford, 6 Fla. 13.

Georgia. — Pearson *v.* Forsyth, 61 Ga. 537.

Illinois. — Reed *v.* Noxon, 48 Ill. 323.

Indiana. — Hunsinger *v.* Hofer, 110 Ind. 390, 11 N. E. 463; Benjamin *v.* McElwaine-Richards Co., 10 Ind. App. 76, 37 N. E. 362.

Iowa. — Chapman *v.* James, 96 Iowa 233, 64 N. W. 795; Risser *v.* Rathburn, 71 Iowa 113, 32 N. W. 198.

Kansas. — LaClef *v.* Campbell, 3 Kan. App. 756, 45 Pac. 461; Haskett *v.* Auhl, 3 Kan. App. 744, 45 Pac. 608.

Maine. — White *v.* Chadbourne, 41 Me. 149; Fisher *v.* True, 38 Me. 534.

Maryland. — Sanborn *v.* Lang, 41 Md. 107; Kolb *v.* Whitely, 3 Gill & J. 188.

Massachusetts. — Winchester *v.* Charter, 97 Mass. 140.

Michigan. — Wyckoff *v.* Carr, 8 Mich. 44; Heath *v.* Koon, 130 Mich.

acts and declarations more or less significant antecedent to,[13] con-

54, 89 N. W. 559; Sweetzer *v.* Mead, 5 Mich. 107; Krolik *v.* Graham, 64 Mich. 226, 31 N. W. 307.

Missouri. — Blue *v.* Penniston, 27 Mo. 272; Gage *v.* Trawick, 94 Mo. App. 307; 68 S. W. 85; Potter *v.* McDowell, 31 Mo. 62; Gamble *v.* Johnston, 9 Mo. 605; Holmes *v.* Braidwood, 82 Mo. 610.

Nevada. — Gregory *v.* Frothingham, 1 Nev. 253.

New Hampshire. — Pomeroy *v.* Bailey, 43 N. H. 118.

North Carolina. — Harshaw *v.* Moore, 34 N. C. 247.

Pennsylvania. — Helfrich *v.* Stem, 17 Pa. St. 143; Stewart *v.* Fenner, 81 Pa. St. 177.

Tennessee. — Carney *v.* Carney, 7 Baxt. 284.

Vermont. — McLane *v.* Johnson, 43 Vt. 48.

In Taliaferro *v.* Evans, 160 Mo. 380, 61 S. W. 185, the court, in holding it error to exclude evidence of statements made by the vendor, who was a party defendant, although several months after the conveyance in question, to the effect that he was then insolvent, that he would not pay anything, that he had nothing to pay with, and that he was rendered insolvent by the making of the deed in question, said: "There could have been no better way of proving his insolvency than by his own admissions or statements to that effect. He being one of the defendants, and one of the parties to the conveyance, his admissions that he was insolvent, and had no property, were admissible in evidence as against himself, although made after the execution of the deed from him to his wife."

Admissions of the vendor in the presence of the vendee and before the latter parted with the consideration, as to the intent with which the sale was made, were competent, though coming after the vendee had taken possession, since they tend to show notice of the vendor's intent to the vendee. Bender *v.* Kingman, 62 Neb. 469, 87 N. W. 142.

In an action by an assignee in insolvency to recover the value of the insolvent's stock in trade from the holder of a mortgage upon it, alleged to have been made in fraud of the insolvent laws, it is proper to receive in evidence the insolvent's books of account in his own handwriting as tending to show at least what he thought his condition was at the time of making the mortgage. Bicknell *v.* Mellett, 160 Mass. 328, 35 N. E. 1130.

In Merrill *v.* Meachum, 5 Day (Conn.) 341, the attacking creditor was permitted to show that at the time of the execution of the deed the grantor declared to the witness that a certain named creditor was "about to attach the land, but he intended to let him know he would be quick enough for him"; and also other declarations of the grantor tending to show that the deed was executed for the purpose of securing the land against the attachment of his creditors.

13. Hiner *v.* Hawkins, 59 Ark. 303, 27 S. W. 65; Threlkel *v.* Scott (Cal.), 24 Pac. 851; Seeleman *v.* Hoagland, 19 Colo. 231, 34 Pac. 995; C. B. Rogers Co. *v.* Meinhardt, 37 Fla. 480, 19 So. 878; McKinnon *v.* Reliance Lumber Co., 63 Tex. 30; O'Hare *v.* Duckworth, 4 Wash. 470, 30 Pac. 724.

Declarations by Grantor When Purchasing Property. — Upon an issue as to whether or not a conveyance is fraudulent and void, evidence of statements made and language used by the grantor when he purchased the goods of the creditor attacking the conveyance, tending to show a fraudulent intent on his part, is admissible. Spalding *v.* Adams, 63 Iowa 437, 19 N. W. 341. And in Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296, wherein it was held that such statements tended to show the fraudulent intent of the mortgagor, the court said: "His intent was a material fact in issue, and for that purpose the evidence was admissible, although the fraudulent intent on the part of the mortgagor would not prejudice the mortgagee unless he were privy to such intent, and aided in its execution. The objection being general, if the evidence was admissible for any purpose it should have been received, and the court should have instructed

temporaneous with,[14] and even sometimes immediately subsequent to the principal fact.[15]

(B.) Test of Admissibility. — It has been held that whether declarations of a vendor showing an intent on his part to defeat an execution creditor are relevant to the issue or not, depends on whether they were made before or after the conveyance, and where the evidence is conflicting as to when the declarations were made, the evi-

the jury as to how far it would affect the rights of the plaintiff."

In Picket *v.* Garrison, 76 Iowa 347, 41 N. W. 38, for the purpose of avoiding a conveyance to the plaintiff of certain property, on the ground that it was made with a fraudulent intent on the part of the grantor to defeat a claim made by his wife for alimony, evidence was admitted that on the day previous to the conveyance he had consulted an attorney about the matter. This was also before the action for divorce had been begun, and the plaintiff was not at the conference with the attorney. It was held that this evidence was, notwithstanding properly admitted in connection with other matters for the purpose of showing the grantor's motive in the whole proceeding.

14. In Bussard *v.* Bullitt, 95 Iowa 736, 64 N. W. 658, the controversy was between an attaching creditor and an intervening mortgagee as to whether or not the mortgage was given in fraud of creditors; it was held proper for the court to compel the mortgagor to testify, as bearing on his intent in making the mortgage, whether he did not tell the mortgagee when he made it that he had conveyed his homestead to his wife. The court said that it was true that the mortgagee had the right to secure his debt if he took all the property, provided he did so in good faith, but that as the question of intent with which the parties acted was being tried, the amount of property which the mortgagor had and the way it was being used was proper to be considered as bearing on that question, and to the extent that the mortgagee knew such facts they could be considered in determining his intent.

15. Hogan *v.* Robinson, 94 Ind. 138; Exchange Bank *v.* Russell, 50 Mo. 531; Burbank *v.* Wiley, 79 N. C. 501. Hardee *v.* Langford, 6 Fla. 13, where it was held that a few days or even a week did not constitute such a remoteness of time as would of itself be ground for excluding such evidence. See also Landecker *v.* Houghtaling, 7 Cal. 391.

The Reason for This Exception to the general rule is that one fact to be established by the defense was his fraudulent intent in making the conveyance, which might be inferred from his declarations respecting it, or respecting other sales made by him about the same time. Fisher *v.* True, 38 Me. 534.

A proposal by an alleged fraudulent grantor, made long after the conveyance in question, to a creditor, enumerating certain debts owed by him, and in which he proposes to mortgage certain property standing in his wife's name, is not competent evidence against the wife in an action by her against the husband's creditors to quiet her title. In Jones *v.* Snyder, 117 Ind. 229, 20 N. E. 140, the court said that as it did not appear, nor was it proposed to show, that the debts spoken of in the letter were subsisting claims against the husband at the time the conveyances complained of were made, or that they had not been contracted since, the letter could cast no light upon the financial condition of the writer at any time material to the inquiry before the court.

In Marsh *v.* Hammond, 11 Allen (Mass.) 483, where the alleged fraudulent grantor had testified that he had no fraudulent intent in making the conveyance in question, and in removing with his goods from the state, it was held that the letters written by him or on his authority shortly after reaching the place of his destination, and tending to show that he had such fraudulent intent, were admissible.

dence is properly admitted.[16] Nor is it necessary to the admissibility of such evidence that the acts or declarations should have been done or made in the presence of the vendee.[17] Nor is the presence of the vendor in court, when such evidence is offered, any objection to it.[18]

(C.) As Evidence of Good Faith.— The good faith of a vendor whose sale of property is assailed as fraudulent cannot be proved by the evidence of his declarations that he honestly owed certain debts and intended to pay them.[19]

(3.) As Respects the Grantee.— (A.) Generally. — Declarations of an alleged fraudulent vendee prior to the conveyance, tending to show knowledge on his part, are admissible in evidence.[20]

(B.) Declarations by Grantor Subsequent to Conveyance. — It is a settled rule in the law of evidence that acts or declarations of a grantor made after a conveyance or sale by him, and after he has parted with the possession to his grantee, and in the absence and without the knowledge of the latter, cannot be received in evidence against the grantee for the purpose of affecting or impeaching the *bona fides* of the conveyance or sale, or of defeating the title on the ground that the transaction was in fraud of creditors.[21] And it is

16. Clark *v.* Reiniger, 66 Iowa 507, 24 N. W. 16.

17. White *v.* Chadbourne, 41 Me. 149; Buckingham *v.* Tyler, 74 Mich. 101, 41 N. W. 868; Covanhovan *v.* Hart, 21 Pa. St. 495, 60 Am. Dec. 57.

18. White *v.* Chadbourne, 41 Me. 149.

19. Harwick *v.* Weddington, 73 Iowa 300, 34 N. W. 868.

20. Hunsinger *v.* Hofer, 110 Ind. 390, 11 N. E. 463.

21. *England.* — Roberts *v.* Justice, 1 Car. & K. 93, 47 E. C. L. 93.

Alabama. — Reed *v.* Smith, 14 Ala. 380; H. B. Claflin Co. *v.* Rodenberg, 101 Ala. 213, 13 So. 272; Strong *v.* Brewer, 17 Ala. 706; Moog *v.* Farley, 79 Ala. 246; Foote *v.* Cobb, 18 Ala. 585.

California. — Garlick *v.* Bowers, 66 Cal. 122, 4 Pac. 1138; Eppinger *v.* Scott, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723; Jones *v.* Morse, 36 Cal. 205; Ross *v.* Wellman, 102 Cal. 1, 36 Pac. 402.

Connecticut. — Partelo *v.* Harris, 26 Conn. 480; Beach *v.* Catlin, 4 Day 284, 4 Am. Dec. 221; Redfield *v.* Buck, 35 Conn. 328, 95 Am. Dec. 241.

Georgia. — James *v.* Kerby, 29 Ga. 684; Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254; Oatis *v.* Brown, 59 Ga. 711; Roberts *v.* Neale, 62 Ga. 163.

Idaho. — Deasey *v.* Thurman, 1 Idaho 775. *Compare* Ferbracher *v.* Martin, 3 Idaho 573, 32 Pac. 252.

Illinois. — Meachem *v.* Hahn, 46 Ill. App. 144; Durand *v.* Weightman, 108 Ill. 489; Nichols *v.* Wallace, 31 Ill. App. 408; Sawyer *v.* Bradshaw, 125 Ill. 440, 17 N. E. 812.

Indiana. — Bishop *v.* Redmond, 83 Ind. 157; Garner *v.* Graves, 54 Ind. 188.

Iowa. — Neuffer *v.* Moehn, 96 Iowa 731, 65 N. W. 334; Bixby *v.* Carskaddon, 70 Iowa 726, 29 N. W. 626; Chapman *v.* James, 96 Iowa 233, 64 N. W. 795; Benson *v.* Lundy, 52 Iowa 265; Turner *v.* Hardin, 80 Iowa 691, 45 N. W. 758; Urdangen *v.* Doner, 98 N. W. 317.

Kansas. — Crust *v.* Evans, 37 Kan. 263, 15 Pac. 214; Stickel *v.* Bender, 37 Kan. 457, 15 Pac. 580.

Kentucky. — Nelson *v.* Terry, 22 Ky. L. Rep. 111, 56 S. W. 672.

Louisiana. — Burg *v.* Rivers, 105 La. 144, 29 So. 482. *Compare* Carrollton Bank *v.* Cleveland, 15 La. Ann. 616.

Maryland. — Sanborn *v.* Lang, 41 Md. 107; Hall *v.* Hinks, 21 Md. 406.

Massachusetts. — Tapley *v.* Forbes, 2 Allen 20; Horrigan *v.* Wright, 4 Allen 514; Parry *v.* Libbey, 166 Mass. 112, 44 N. E. 124; Lincoln *v.* Wilbur, 125 Mass. 249; Roberts *v.* Medbery, 132 Mass. 100; Holbrook *v.*

error for the court to admit evidence of such subsequent declarations.[22] Nor can evidence of declarations by a grantor prior to the sale and not connected with it, and in the absence and without the knowledge of the grantee, be received to involve the transaction in fraud as against the grantee,[23] although such evidence may be received if it be shown that he had notice thereof.[24]

Holbrook, 113 Mass. 74; O'Donnell *v.* Hall, 154 Mass. 429, 28 N. E. 349; Taylor *v.* Robinson, 2 Allen 562.

Michigan. — Blanchard *v.* Moors, 85 Mich. 380; 48 N. W. 542; Merritt *v.* Stebbins, 86 Mich. 342, 48 N. W. 1084; Ganong *v.* Green, 71 Mich. 1, 38 N. W. 661; Hedstrom *v.* Kingsbury, 40 Mich. 636.

Minnesota. — Derby *v.* Gallup, 5 Minn. 119; Shaw *v.* Robertson, 12 Minn. 445; Adler *v.* Apt, 30 Minn. 45, 14 N. W. 63; Hathaway *v.* Brown, 18 Minn. 414.

Mississippi. — Taylor *v.* Webb, 54 Miss. 36.

Missouri. — Boyd *v.* Jones, 60 Mo. 454; Wall *v.* Beedy, 161 Mo. 625, 61 S. W. 864; Peters-Miller Shoe Co. *v.* Casebeer, 53 Mo. App. 640; Sammons *v.* O'Neill, 60 Mo. App. 530; Albert *v.* Besel, 88 Mo. 150; Weinrich *v.* Porter, 47 Mo. 293.

Nebraska. — Simpson *v.* Armstrong, 20 Neb. 512, 30 N. W. 941.

Nevada. — Hirschfield *v.* Williamson, 18 Nev. 66, 1 Pac. 201.

New Hampshire. — Banfield *v.* Parker, 36 N. H. 353.

New York. — Multz *v.* Price, 82 App. Div. 339, 81 N. Y. Supp. 931; Kalish *v.* Higgins, 70 App. Div. 192, 75 N. Y. Supp. 397; Burnham *v.* Brennan, 74 N. Y. 597; Flannery *v.* VanTassel, 127 N. Y. 631, 27 N. E. 393; Kain *v.* Larkin, 131 N. Y. 300, 30 N. E. 105; Bush *v.* Roberts, 111 N. Y. 278, 18 N. E. 732.

North Carolina. — Burbank *v.* Wiley, 79 N. C. 501.

Oregon. — Crawford *v.* Beard, 12 Or. 447, 8 Pac. 537.

Pennsylvania. — Widdall *v.* Garsed, 125 Pa. St. 358, 17 Atl. 418.

South Carolina. — McLemore *v.* Powell, 32 S. C. 582, 10 S. E. 287.

Texas. — Hinson *v.* Walker, 65 Tex. 103.

Vermont. — Eaton *v.* Cooper, 29 Vt. 444.

Virginia. — Thornton *v.* Gaar, 87 Va. 315, 12 S. E. 753.

Wisconsin. — Norton *v.* Kearney, 10 Wis. 443; Bogert *v.* Phelps, 14 Wis. 88; Grant *v.* Lewis, 14 Wis. 528; Rindskopf *v.* Myers, 71 Wis. 639, 38 N. W. 185.

22. Strauss *v.* Murray, 31 Misc. 69, 63 N. Y. Supp. 201.

23. Murphy *v.* Butler, 75 Ala. 381; Hodge *v.* Thompson, 9 Ala. 131; Simpkins *v.* Smith, 94 Ind. 470; Benson *v.* Lundy, 52 Iowa 265, 3 N. W. 149; McElfatrick *v.* Hicks, 21 Pa. St. 402.

In Bush *v.* Rogan, 65 Ga. 320, 38 Am. Rep. 785, an action of ejectment by a vendee against one claiming under his vendor, it was held that declarations by the vendor, whether made before or after the execution of the deed, as to his embarrassed condition, and that the deed to the plaintiff was made to defraud the grantor's creditors, were not admissible against his grantee.

24. Farmers Bank *v.* Douglass, 11 Smed. & M. (Miss.) 469.

Knowledge on the part of an alleged fraudulent grantee of declarations and statements by his grantor indicating a fraudulent intent on the part of the latter need not be established by positive and direct proof. It may be inferred from circumstances. Farmers Bank *v.* Douglass, 11 Smed. & M. (Miss.) 469.

In Armor *v.* Doig (Fla.), 34 So. 249, an action by a creditor of an assignor for the benefit of creditors attacking the assignment as fraudulent, it was held that declarations made by the assignor within six months prior to the date of the assignment tending to show that he had a much larger amount of property than he had turned over to his assignee, it also appearing that he had suffered no material losses between the date of his declarations and the date of his assignment, were competent evidence upon the questions whether he did

The Object of the Rule prohibiting evidence of acts or declarations by a grantor subsequent to the conveyance is to prevent prejudice to the title of an innocent grantee from acts or declarations of the vendor subsequent to the transaction.[25]

Voluntary Conveyance. — The rule prohibiting evidence of subsequent acts or declarations of a grantor applies not only where the object of the conveyance is to prevent the property from going to satisfy existing debts, but in the case of a voluntary conveyance sought to be impeached by subsequent creditors.[26]

Conveyance Between a Husband and Wife. — And this rule has also been applied to a case where the husband, who was the grantor, and the wife, who, through the intervention of a third person, had acquired the title, were both parties to the record and pleaded jointly.[27]

(C.) Grantor and Grantee Acting As Conspirators. — The rule excluding evidence of the acts or declarations by a grantor subsequent to the conveyance does not apply where the parties to the instrument entered into the conspiracy to defraud the grantor's creditors, and the acts or declarations in question were done or made by the grantor while engaged in the furtherance of the conspiracy,[28]

turn over all his property to his assignee, and whether the assignment was fraudulent.

25. Derby *v.* Gallup, 5 Minn. 119.

26. Winchester *v.* Charter, 97 Mass. 140.

27. Aldrich *v.* Earle, 13 Gray (Mass.) 578.

In Barnes *v.* Black, 193 Pa. St. 447, 44 Atl. 550, where the conveyance was from a husband to his wife, who claimed that the consideration for the conveyance was an antenuptial agreement, it was held that declarations by the husband before and at the time of the agreement to the effect that he was in debt at that time were admissible as against the wife on a subsequent controversy between her and his creditors. The court said: "The fact inquired into was whether the husband was in debt to the parties named at the time referred to, which was long prior to his marriage to the plaintiff and to the antenuptial agreement. At the time they were made they were adverse to his own interest, and his future wife had no interest in the matter. His declarations, therefore, even as against her, stand on the same footing as those of a grantor before he has parted with his title."

28. Cox *v.* Vise, 50 Ark. 283, 7 S. W. 134; Borland *v.* Mayo, 8 Ala. 104; Higgins *v.* Spahr, 145 Ind. 167, 43 N. E. 11; Hunsinger *v.* Hofer, 110 Ind. 390, 11 N. E. 463; Sherman *v.* Hogland, 73 Ind. 472; Benjamin *v.* McElwaine-Richards Co., 10 Ind. App. 76, 37 N. E. 362; Cowles *v.* Coe, 21 Conn. 220.

"The general rule that the declarations of a grantor made after the execution of a grant cannot be used to impeach it has been so far modified that, when the good faith of a transfer has been attacked by creditors, and some evidence has been advanced to show a common purpose or design by the parties to hinder, delay or defraud creditors, subsequent declarations by the grantor are admissible. Hartman *v.* Diller, 62 Pa. 37; Souder *v.* Schechterly, 91 Pa. 83." Boyer *v.* Weimer, 204 Pa. St. 295, 54 Atl. 21.

In Little *v.* Lichkoff, 98 Ala. 321, 12 So. 429, where there was evidence of a conspiracy between the debtor and another to defraud creditors by false transfers or sales shortly before the attachment, it was held proper to ask the debtor on cross-examination if such other person had not changed the labels on a quantity of goods obtained from him.

even though the acts or declarations in question were done or made subsequent to the execution of the transfer itself.[29]

Existence of Conspiracy. — But as in cases of other conspiracy proof must be given of the existence of such conspiracy[30] by evidence other than the declarations themselves before evidence thereof can be received.[31]

Declarations Narrating Past Events. — But even on the theory of a conspiracy between the grantor and grantee, declarations of the former subsequent to the conveyance and independent of it come within the rule that a mere recital or narrative of past events not made in furtherance of the conspiracy and not connected with the transaction in question are not admissible against co-conspirators.[32]

(D.) GRANTOR REMAINING IN POSSESSION OF PROPERTY. — The rule that the declarations of a grantor subsequent to the conveyance cannot affect the title of his grantee does not apply where he remains in possession of the property after the conveyance, and in such case his statements explanatory of such possession and of the relation which he holds to the property are admissible as original evidence for the purpose of showing fraud in the sale if they have that tendency;[33]

29. "It cannot be assumed that the execution of the transfer was a consummation of the fraudulent conspiracy, and that, therefore, no declarations made after the transfer are admissible, for there is no consummation of the conspiracy until the purpose thereof has been accomplished." Benjamin *v.* McElwaine-Richards Co., 10 Ind. App. 76, 37 N. E. 362.

30. Hathaway *v.* Brown, 18 Minn. 414. See also Nicolay *v.* Mallery, 62 Minn. 119, 64 N. W. 108.

31. Wall *v.* Beedy, 161 Mo. 625, 61 S. W. 864; Boyd *v.* Jones, 60 Mo. 454; Exchange Bank *v.* Russell, 50 Mo. 531.

32. Clinton *v.* Estes, 20 Ark. 216; Smith *v.* Jensen, 13 Colo. 213, 22 Pac. 434; Knower & Cadden Clothing Co., 57 Conn. 202; Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906; Adler *v.* Apt, 30 Minn. 45, 14 N. W. 63.

33. *United States.* — United States *v.* Griswold, 8 Fed. 556.

Alabama. — Byrd *v.* Jones, 84 Ala. 336, 4 So. 375; Reed *v.* Smith, 14 Ala. 380; Goodgame *v.* Cole, 12 Ala. 77; Price *v.* Branch Bank, 17 Ala. 374.

Arkansas. — Bowden *v.* Spellman, 59 Ark. 251, 27 S. W. 602.

California. — Murphy *v.* Mulgrew, 102 Cal. 547, 36 Pac. 857.

Connecticut. — Redfield *v.* Buck, 35 Conn. 328, 95 Am. Dec. 241.

Georgia. — Williams *v.* Hart, 65 Ga. 201.

Indiana. — Skelley *v.* Vail, 27 Ind. App. 87, 60 N. E. 961; Tedrowe *v.* Esher, 56 Ind. 443; Higgins *v.* Spahr, 145 Ind. 167, 43 N. E. 11.

Iowa. — Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200.

Minnesota. — Cortland Wagon Co. *v.* Sharvy, 52 Minn. 216, 53 N. W. 1147.

New Hampshire. — Walcott *v.* Keith, 22 N. H. 196.

New York. — Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250.

North Carolina. — Woodley *v.* Hassell, 94 N. C. 157; Marsh *v.* Hampton, 50 N. C. 382; Hilliard *v.* Phillips, 81 N. C. 99.

Texas. — Hamburg *v.* Wood, 66 Tex. 168, 18 S. W. 623; Cooper *v.* Friedman, 23 Tex. Civ. App. 585, 57 S. W. 581.

Wisconsin. — Grant *v.* Lewis, 14 Wis. 528.

Rule Stated. — In Murch *v.* Swensen, 40 Minn. 421, 42 N. W. 290, the court said: "As proof of continued possession of the vendor is competent evidence to impeach the transfer, it logically follows that any acts or declarations of the possessor, while

even though the declarant is not a party to the action.[34] There is authority, however, that such evidence is not admissible, even if the grantor was in possession at the time of making the declarations.[35]

Delivery Doubtful. — Declarations by the vendor, made after the sale, may be given in evidence against his vendee, if it appears that the delivery of the property in question is doubtful.[36]

Possession as Agent. — Declarations of a vendor subsequent to the conveyance, but whilst in possession of the property, to the effect that he had conveyed his property beyond the reach of his creditors are admissible, notwithstanding it is shown that his possession was merely as that of agent for the vendee.[37]

Possession Consistent with Terms of Conveyance. — Evidence of such declarations is not admissible when the possession of the grantor is consistent with the terms of the conveyance.[38]

(E.) As Evidence of Good Faith. — The declarations of a vendor, whether living or dead, as to the purpose he had in view in making the conveyance, are self-serving, and cannot be used to show the good faith of the parties in making the sale when it is attacked by creditors as fraudulent,[39] especially if they were no part of the *res*

so retaining the property, must also be competent as characterizing his possession. These are received in such cases upon the ground that they show the nature and object of the act which they accompany, and which is the subject of the inquiry. They are admitted as part of the *res gestae*, for, so long as the debtor remains in possession of property which once belonged to him, the *res gestae* of the fraud, if any, may be considered as in progress, and his declarations, though made after he has parted with the formal paper title, may be given in evidence in favor of the creditor, and against the vendee, by reason of the continuous possession which accompanied them."

In Kendall *v.* Hughes, 7 B. Mon. (Ky.) 368, where the vendee left the property in the possession of a son of the vendor on the same farm, it was held that the acts and declarations of the vendor in regard to the property might be considered by the jury in determining the character of the transaction, and that the fact that the vendee was ignorant of such acts and declarations did not necessarily prevent them from being evidence against him if they were known to his agent and acquiesced in by him.

34. Burlington Nat. Bank *v.* Beard, 55 Kan. 773, 42 Pac. 320, where the declarations were made at or about the time of the transfer, and there had been no open and visible change of possession.

35. Smith *v.* Tarbox, 70 Me. 127; Gates *v.* Mowry 15 Gray (Mass.) 564, where the grantor afterward conveyed part of the land in his own name to a third person and procured a release of that part from the first grantee.

36. Helfrich *v.* Stem, 17 Pa. St. 143.

37. Hamburg *v.* Wood, 66 Tex. 168, 18 S. W. 623.

38. Williamson *v.* Williams, 11 Lea (Tenn.) 355.

39. Johnson *v.* Burkus (Mo. App.), 77 S. W. 133; Fisher *v.* True, 38 Me. 534; Colquit *v.* Thomas, 8 Ga. 258; Heywood *v.* Reed, 4 Gray (Mass.) 574.

Buckingham *v.* Tyler, 74 Mich. 101, 41 N. W. 868, wherein a debtor had exchanged his stock of goods for a farm, expecting, as he claimed, to get a loan from his vendee which the vendee refused to make after the levy of attachments on the goods by creditors, and on the trial of an action brought by the vendee for the value of the goods he sought to show the statements of the debtor made to him after the attachments

gestae of the conveyance;[40] although of course if a grantor's statements have been received against the vendee, whatever else the

as to his efforts to secure the loan from other persons.

In Tucker *v.* Tucker, 32 Mo. 464, the court said: "No assertions or protestations of the maker of the deeds, of their honest intent, can be stronger than those implied in his execution of the deeds; and therefore his declarations were properly excluded."

In Wheeler *v.* McCorristen, 24 Ill. 40, wherein the issue was whether or not certain property, which had been seized by creditors, was owned by the execution debtor or by the plaintiff in replevin, it was held that the only evidence of a sale from the debtor to the plaintiff was the bill of sale executed, as was proved, after the commencement of the action, which the court said could not affect the right of an execution creditor, and that such evidence would amount to no more than a parol declaration of the debtor after other rights had accrued, and to receive the written or oral declarations of a vendor after a sale under such circumstances would be opening the door to fraudulent combinations between vendors and vendees which would be of the most dangerous tendency.

Upon the question of the good faith of a deed alleged to have been made in fraud of a contemplated marriage, what the husband, who was the grantor, said in favor of the deed even before the marriage is not admissible because the wife claims by act of law paramount to the husband. Pinner *v.* Pinner, 47 N. C. 398.

40. Borland *v.* Mayo, 8 Ala. 104. In Carter *v.* Gregory, 8 Pick. (Mass.) 165, a note had been made by a failing debtor upon which the payee immediately caused an attachment to be made of the debtor's property. Part of the alleged consideration for the note was an acceptance made by the payee of an order drawn on him by the debtor in favor of another creditor. In an action on the note in which a subsequent attaching creditor was admitted under the statute to defend, it was held that the plaintiff payee could not introduce evidence of his own declarations made on the date when the note was given to show that the acceptance was made before the attachment, inasmuch as they were not part of the *res gestae,* but were mere naked assertions of a fact.

In Barber *v.* Terrill, 54 Ga. 146, where it was held that as the declarations of an alleged fraudulent grantor cannot be used in evidence on behalf of the grantee, a memorandum and schedule of debts made out by the grantor and attached to his petition in bankruptcy, executed after the conveyance in question and after the attacking creditor had obtained his judgment, were not admissible in evidence for the grantee to show that the grantor was indebted to him.

Book Entries as Res Gestae. — In Fleming *v.* Yost, 137 Ind. 95, 36 N. E. 705, an action to set aside a conveyance as fraudulent, it was held that the grantee was properly permitted to introduce in evidence book entries of the various amounts of money paid to the grantor, at various times, the entries being made at the time of payment, such evidence being admissible as a part of the *res gestae,* to illustrate and bring out fully the whole transaction in regard to the transfer and the consideration therefor, and that it made no difference in regard to the admissibility of such evidence that the entries were made in the absence of the attacking creditor. The court said: "In a suit of this character, where the creditors of the grantor assail a conveyance, if the grantee could not show both the manual and verbal acts of the grantor and himself respecting both the consideration and the transfer, except such as were done in the presence of the attacking party, the grantee would have no chance of retaining his property honestly acquired. It would place him at the mercy of any one who might confront him and challenge his

vendor said at the same time and in the same conversation, even in his favor, is legal testimony for him.[41]

Previous Offer to Sell. — On an issue as to whether or not a conveyance was made to defraud creditors, evidence that the alleged fraudulent grantor previously offered to sell the property to other persons is not admissible to disprove fraud.[42]

Subsequent Honest Act. — It is not permissible for an alleged fraudulent vendee to show that the vendor, after the conveyance, had performed an honest act relative to the same subject-matter.[43]

Public Statements by the Owner of Property, of his intent and purpose to dispose of it, are competent evidence to show that a subsequent sale of the property by him was made in good faith and without intent to defraud creditors.[44]

IV. QUESTIONS OF LAW AND FACT.

The definition of fraud is a question of law.[45] But the existence of fraud, whether actual or constructive, is, at least in the absence of a statute to the contrary, a question of fact to be established by the evidence in each particular case,[46] and courts are not permitted

right." See also Pollak *v.* Searcy, 84 Ala. 259, 4 So. 137; Beaver *v.* Taylor, 1 Wall. (U. S.) 637.

"The creditors were not parties to the transfer in any way, and if they subsequently bring suit to set aside the conveyance, the position they thereby take against the grantee is that they are entitled to judgments on their claims against the grantor, which shall be declared liens against the land, because the conveyance thereof is fraudulent and void. That is, they proceed against the grantee through and under the grantor, and the grantee, in his defense, may introduce all the acts and declarations which are connected with the transaction." Fleming *v.* Yost, 137 Ind. 95, 36 N. E. 705.

41. Brown *v.* Upton, 12 Ga. 505. In Martin *v.* Duncan, 181 Ill. 120, 54 N. E. 908, the alleged fraudulent grantee had previously been in possession as agent of his brother, the mortgagor, and it was held proper to permit him to show certain acts of his own in dealing with the property after he took possession of it under the mortgage, as tending to prove a change in the character of his possession, and that he then openly claimed, treated, and dealt with the property as his own.

42. Tufts *v.* Bunker, 55 Me. 178. See also Fisher *v.* True, 38 Me. 534.

43. Law *v.* Payson, 32 Me. 521, where the evidence in question was that subsequent to the commencement of that action the grantor had offered to turn over to a creditor the note given by the grantee for the purchase price of the property in question, and the court said that "fraud can not be purged by subsequent honesties."

44. Heywood *v.* Reed, 4 Gray (Mass.) 574.

45. Whitehouse *v.* Bolster, 95 Me. 458, 50 Atl. 240.

46. *United States.* — Knowlton *v.* Mish, 17 Fed. 198; Morse *v.* Riblet, 22 Fed. 501.

Alabama. — Jordan *v.* Collins, 107 Ala. 572, 18 So. 137.

California. — Threlkel *v.* Scott, 34 Pac. 851.

Delaware. — Brown *v.* Dickerson, 2 Marv. 119, 42 Atl. 421.

Indiana. — Personette *v.* Cronkhite, 140 Ind. 586, 40 N. E. 59; Pence *v.* Croan, 51 Ind. 336; Bishop *v.* State *ex rel.* Lord, 83 Ind. 67; Rose *v.* Colter, 76 Ind. 590.

Maine. — Whitehouse *v.* Bolster, 95 Me. 458, 50 Atl. 240.

Massachusetts. — O'Donnell *v.*

to indulge in presumptions of fraud and therefrom conclusively judge as a matter of law that a particular conveyance is fraudulent.[47] So, also, whether or not the alleged fraudulent vendee participated in the fraudulent intent of the grantor is a question of fact.[48]

Hall, 154 Mass. 429, 28 N. E. 349.

Michigan. — State Bank *v.* Chapelle, 40 Mich. 447; Bedford *v.* Penney, 65 Mich. 667, 32 N. W. 888; Johnson *v.* Crispell, 43 Mich. 261, 5 N. W. 299; Partlow *v.* Swigart, 90 Mich. 61, 51 N. W. 270; Ferris *v.* McQueen, 94 Mich. 367, 54 N. W. 164.

Missouri. — Potter *v.* McDowell, 31 Mo. 62; Hungerford *v.* Greengard, 95 Mo. App. 653, 67 S. W. 602.

Nebraska. — Pope *v.* Kingman & Co., 96 N. W. 519.

New Hampshire. — Pomeroy *v.* Bailey, 43 N. H. 118.

Pennsylvania. — McMichael *v.* McDermott, 17 Pa. St. 353, 55 Am. Dec. 560.

Wisconsin. — Hoey *v.* Pierron, 67 Wis. 262, 30 N. W. 692; Weadock *v.* Kennedy. 80 Wis. 449, 50 N. W. 393; Hooser *v.* Hunt, 65 Wis. 71, 26 N. W. 442.

47. Personnette *v.* Cronkhite, 140 Ind. 586, 40 N. E. 59.

48. Landecker *v.* Houghtaling, 7 Cal. 391.

FUTURES. — See Gaming.

GAMING.

By Clarence Meily.

CROSS-REFERENCE:

Disorderly House.

I. CIVIL RIGHTS AND LIABILITIES.

1. Stock and Produce Gambling. — A. INTENT AS ESSENCE OF ILLEGALITY. — The character of a speculative purchase or sale of commodities as a wagering transaction is determined by the intention of the parties,[1] and it is to the ascertainment of this intent that the evidentiary inquiry is directed.

1. *United States.* — Kirkpatrick *v.* Adams, 20 Fed. 287.
Illinois. — Pixley *v.* Boynton, 79 Ill. 351.
Michigan. — Gregory *v.* Wendell, 39 Mich. 337, *s. c.* 40 Mich. 433.
Mississippi. — Clay *v.* Allen, 63 Miss. 426.
Missouri. — Cockrill *v.* Thompson, 85 Mo. 510.
New York. — Yerkes *v.* Salomon, 11 Hun 471.
Pennsylvania. — Fareira *v.* Gabell, 89 Pa. St. 89.
And see also Hentz *v.* Miner, 58 Hun 428, 12 N. Y. Supp. 474; Grizewood *v.* Blane, 11 C. B. 526, 73 E. C. L. 525, and Williams *v.* Tiedemann, 6 Mo. App. 269, where the different varieties of contracts of sale are

carefully analyzed and the importance of the element of intent is made apparent.

In Gregory *v.* Wendell, 40 Mich. 432, Justice Cooley said that the question of legality was one of fact depending on intent.

It has been held that in determining the validity of a purchase of stocks through a broker, as between him and a client as principals, the real question is not whether the latter secretly intended to receive the stock or not, but whether he intended to obligate himself to do so. Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106.

Rule in Missouri. — It was formerly held in Missouri that merely an illegal intent was insufficient to invalidate a contract as a wagering transaction, but that a positive agreement that an actual delivery should not take place was necessary. Kent *v.* Miltenberger, 13 Mo. App. 503. But afterward this doctrine was repudiated and the unlawful intention or understanding of the parties that the contract should constitute a wagering transaction was held sufficient to invalidate it. See Hill *v.* Johnson, 38 Mo. App. 383, for a discussion of the decisions in which the rule was changed.

Somewhat in conformity with the former rule in Missouri it has been held that the mere expectation on the part of a broker and his client that the third person with whom the broker dealt would be willing to adjust the transaction by a payment of differences, would not render the contracts illegal where there was no agreement to that effect, or to the effect that the broker should protect the client from actual delivery. Barnes *v.* Smith, 159 Mass. 344, 34 N. E. 403.

Time When Intent is Entertained. It is the intent of the parties at the time when the contract is made which fixes its invalidity. Lehman *v.* Strassberger, 2 Wood (U. S.) 554, 15 Fed. Cas. No. 8216; Melchert *v.* American Union Tel. Co., 11 Fed. 193; Kingsbury *v.* Kirwan, 77 N. Y. 612.

Character of Intent. — The intent must be not merely to make a speculative profit, but to avoid an actual transfer of the property.

United States. — Kirkpatrick *v.* Adams, 20 Fed. 287.

Connecticut. — Hatch *v.* Douglas, 48 Conn. 116, 40 Am. Rep. 154.

Michigan. — Gregory *v.* Wendell, 40 Mich. 432.

Minnesota. — Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

Missouri. — Kent *v.* Miltenberger, 13 Mo. App. 503.

North Dakota. — Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60.

Pennsylvania. — Smith *v.* Bouvier, 70 Pa. St. 325; Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; Peters *v.* Grim, 149 Pa. St. 163, 24 Atl. 192; Wagner *v.* Hildebrand, 187 Pa. St. 136, 41 Atl. 34.

Rhode Island. — Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106.

Wisconsin. — Barnard *v.* Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595.

And the fact that one who buys for future delivery resolves, before making the purchase, that he will resell before the day of delivery, does not tend to show that the transaction was illegal as a gambling transaction. Sawyer *v.* Taggart, 77 Ky. 727.

Mutuality of Intent. — A transaction which is legitimate on its face is not invalidated by showing that one party thereto understood and meant it to be a wagering contract; but the proof must go further and show that both so understood it.

United States. — Irwin *v.* Williar, 110 U. S. 507; Bibb *v.* Allen, 149 U. S. 481; Lehman *v.* Strassberger, 2 Woods 554, 15 Fed. Cas. No. 8216; Hentz *v.* Jewell, 20 Fed. 592; Ward *v.* Vosburgh, 31 Fed. 12; Edwards *v.* Hoeffinghoff, 38 Fed. 635; Sampson *v.* Camperdown Cotton Mills, 82 Fed. 833; Hill *v.* Levy, 98 Fed. 94; Boyle *v.* Henning, 121 Fed. 376.

Illinois. — Pixley *v.* Boynton, 79 Ill. 351; Carroll *v.* Holmes, 24 Ill. App. 453; Jamieson *v.* Wallace, 167 Ill. 388, 47 N. E. 762; Benson *v.* Morgan, 26 Ill. App. 22; Staninger *v.* Tabor, 103 Ill. App. 330.

Indiana. — Whitesides *v.* Hunt, 97 Ind. 191.

Iowa. — First Nat. Bank of Lyons

v. Oskaloosa Pack. Co., 66 Iowa 41, 23 N. W. 355; Counselman *v.* Reichart, 103 Iowa 430, 72 N. W. 490.

Louisiana. — Conner *v.* Robertson, 37 La. Ann. 814.

Michigan. — Gregory *v.* Wendell, 40 Mich. 432.

Minnesota. — Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

Missouri. — Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745.

Mississippi. — Clay *v.* Allen, 63 Miss. 426.

Nebraska. — Rogers *v.* Marriott, 59 Neb. 759, 82 N. W. 21.

North Dakota. — Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60.

And see Kingsbury *v.* Kirwan, 43 N. Y. Super. Ct. 451. The rule that all parties to a contract, in order to invalidate it, must have intended a wagering transaction, is altered by statute in Missouri (Rev. St. 1889, §§ 3931, 3936), so that if one party does not intend a delivery, and the other is aware of such intent, the contract is invalid whether the latter shares in the intent or not. Schreiner *v.* Orr, 55 Mo. App. 406. Where a customer entertaining an illegal intent engages in fraudulent transactions through a broker, and the broker is aware of his illegal purpose, the intention of the third persons with whom the broker deals is immaterial when the question of the legality of the contract arises between the broker and the client. First Nat. Bank of Lyons *v.* Oskaloosa Pack. Co., 66 Iowa 41, 23 N. W. 255; Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60; Coffman *v.* Young, 20 Ill. App. 76; Carroll *v.* Holmes, 24 Ill. App. 453; Miles *v.* Andrews, 40 Ill. App. 155; Hill *v.* Johnson, 38 Mo. App. 383.

But in Missouri this rule does not obtain. See Teasdale *v.* McPike, 25 Mo. App. 341; Cockrill *v.* Thompson, 85 Mo. 510. In this latter case the court said: "If a party, actuated by the spirit of a gambler, authorizes his agent to buy or sell an article for him as a trader, and the agent does so, at the same time knowing that his principal does not mean to receive or deliver the commodity, as the case may be, but means, when the proper time comes, to settle the business by paying losses or receiving gains, according to the fluctuations of the market, still the contract is valid and binding, unless the other party made it as, or understood it to be, a wagering arrangement, a good contract in form, but, in fact, a mere wager upon the future state of the market."

See also Ward *v.* Bosburgh, 31 Fed. 12; and Kirkpatrick *v.* Adams, 20 Fed. 237, in which the intention of the brokers' customers was held immaterial, the only important evidence being the intentions of the brokers and the third persons with whom they deal.

When the question of the legality of the contract arises between the broker and his client, it is not necessary to prove that the broker had express notice of his client's illegal intention. Mohr *v.* Miesen, 42 Minn. 228, 49 N. W. 862.

Intent of Agent. — In statutory actions (as authorized in Massachusetts) against brokers to recover money paid out on speculative deals, the intent of the agent of the client through whom the contracts with the brokers were made becomes a material factor in determining their legality. Crandall *v.* White, 164 Mass. 54, 41 N. E. 204.

Intent of Both Principal and Agent. — To enable a person to recover money paid out through an agent to brokers on speculative transactions in stocks, he must prove that neither he nor his agent intended to perform the contracts made by the brokers, by the actual receipt and delivery of the securities and payment of their prices. Davy *v.* Bangs, 174 Mass. 238, 54 N. E. 536.

Intent of Agent Controls. — Where it appears that an agent dealing with brokers had no intention that the contracts made at his direction by the brokers should be actually performed, the fact that his principal had an undisclosed intention to engage in real transactions is immaterial to her recovery of money paid out to the brokers on the deals. Marks *v.* Metropolitan Stock Exchange, 181 Mass. 251, 63 N. E. 410.

B. Presumptions and Burden of Proof. — Contracts of purchase or sale for future delivery are presumed to be valid.[2] And the burden of showing that a sale or purchase for future delivery is illegal as a gaming transaction rests on the party attacking it, where the contract is valid on its face.[3]

2. *United States.* — Irwin *v.* Williar, 110 U. S. 507; Bibb *v.* Allen, 139 U. S. 481; Edwards *v.* Hoeffinghoff, 38 Fed. 635; Hill *v.* Levy, 98 Fed. 94; Boyle *v.* Henning, 121 Fed. 376.

Kentucky. — Beadles *v.* M'Elrath, 8 Ky. L. Rep. 848, 3 S. W. 152.

Louisiana. — Conner *v.* Robertson, 37 La. Ann. 814.

Mississippi. — Clay *v.* Allen, 63 Miss. 426.

Missouri. — Cockrill *v.* Thompson, 85 Mo. 510; Kent *v.* Miltenberger, 13 Mo. App. 503; Williams *v.* Tiedemann, 6 Mo. App. 269.

New York. — Kenyon *v.* Luther, 50 Hun 602, 4 N. Y. Supp. 498; Story *v.* Salomon, 71 N. Y. 420; Dykers *v.* Townsend, 24 N. Y. 57.

And see Bennett *v.* Covington, 22 Fed. 816, where the evidence relating to cotton futures in general, to the usual customs of persons speculating in them, and to an alleged expectation or understanding that such contracts were to be settled without an actual delivery, was held insufficient to take the issue of the illegality of such a contract to the jury, the court saying that if it held otherwise it would be compelled to presume contracts for future delivery were illegal.

In Bangs *v.* Hornick, 30 Fed. 97, the only evidence to show that contracts for the purchase and sale of stock for future delivery were wagering contracts, was the testimony of defendant that he left orders with his brokers to purchase or sell, depositing a margin, and that if a profit was made his account was credited, less a commission, and if a loss resulted it was in like manner debited, defendant never receiving any certificates of stock, never having seen any, and not knowing if any were bought or sold. This was held not sufficient to invalidate the contracts, the court saying: "Counsel for defendant insist that it is the absolute duty of the court to denounce this transaction, unless it clearly appears that it was valid and honest. I think the duty of the court is precisely the reverse, and that it is the duty of the court to uphold it, unless it appears that it was an invalid and dishonest one."

3. *United States.* — Irwin *v.* Williar, 110 U. S. 507; Bibb *v.* Allen, 149 U. S. 481; Bennett *v.* Covington, 22 Fed. 816; Ward *v.* Vosburgh, 31 Fed. 12; Boyd *v.* Hanson, 41 Fed. 174; Sampson *v.* Camperdown Cotton Mills, 82 Fed. 833; Hill *v.* Levy, 98 Fed. 94; Boyle *v.* Henning, 121 Fed. 376.

Georgia. — Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485.

Illinois. — Benson *v.* Morgan, 26 Ill. 22; Pixley *v.* Boynton, 79 Ill. 351; Carroll *v.* Holmes, 24 Ill. App. 453; Marvel *v.* Marvel, 96 Ill. App. 609.

Kentucky. — Beadles *v.* M'Elrath, 8 Ky. L. Rep. 848, 3 S. W. 152.

Louisiana. — Conner *v.* Robertson, 37 La. Ann. 814.

Mississippi. — Clay *v.* Allen, 63 Miss. 426.

Missouri. — Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Williams *v.* Tiedemann, 6 Mo. App. 269.

New Jersey. — Pratt *v.* Boody, 55 N. J. Eq. 175, 35 Atl. 1113.

New York. — Bigelow *v.* Benedict, 70 N. Y. 202; Harris *v.* White, 81 N. Y. 532; Mackey *v.* Rausch, 60 Hun 583, 15 N. Y. Supp. 4.

North Dakota. — Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60.

In a suit by a client against his brokers to recover money lost on wager contracts on the price of grain, the rule is the same, and the burden is on the plaintiff to prove that the contract, which in form is a genuine one, was in fact made with the intent to gamble. Peck *v.* Doran-Wright Co., 57 Hun 343, 10 N. Y. Supp. 401. And he must make out his case by

Presumption As to Conduct of Broker. — But where a broker is directed to make a deal to be settled upon differences alone, and

a fair preponderance of the evidence. Post *v.* Leland, 184 Mass. 601, 69 N. E. 361.

In Edwards *v.* Hoeffinghoff, 38 Fed. 635, the court said: "The defendant having denied all the allegations of the petition, goes on to state affirmatively . . . that his transactions . . . were not real or *bona fide* transactions at all; that they were nothing more than wagering contracts, having the form and semblance of reality, but being in fact nothing more than bets upon the prices of the markets. This is an affirmative defense . . . and the burden of making that out devolves upon the defendant, not only for the reason that I have stated, but for another reason: that the presumption of law is in favor of the validity of contracts and not in favor of their invalidity, and therefore he who sets up the invalidity is bound to prove it."

In Dwight *v.* Badgley, 60 Hun 144, 14 N. Y. Supp. 498, which was an action by brokers to recover advances from a client, the court said: "In this case it is sought to stamp a transaction as illegal, as being in contravention of the provisions of the revised statutes against wagers or gaming. The statute is penal in its nature, and the burden of proof is upon the defendant to establish the illegality of the contract." And in Dykers *v.* Townsend, 24 N. Y. 57, it was held that under 1 Rev. Stat., p. 710, § 6, providing that contracts for the sale of stocks are void unless the seller has at the time actual possession of the certificates or is otherwise entitled thereto in his own right, or duly authorized to sell the shares contracted for, the burden of proof is upon the purchaser seeking to invalidate a transaction under the statute to show that the seller did not have the stocks contracted to be sold; and hence evidence on the purchaser's part that the seller had other outstanding contracts to sell the same stock is inadmissible, without further proof that this was all the stock the seller owned. In this case the court disapproved. Stebbins *v.* Leowolf, 3 Cush. (Mass.) 137.

And the burden is on the party asserting it to prove that a sale of stocks was within Mass. Gen. Stat., ch. 105, § 6, making void sales of stocks where the seller does not own or is not authorized to sell them. Wyman *v.* Fiske, 3 Allen (Mass.) 238. Or within the Illinois statute prohibiting option deals. Jackson *v.* Foote, 12 Fed. 37; Barnett *v.* Baxter, 64 Ill. App. 544.

But in Cobb *v.* Prell, 15 Fed. 774, the court said: "It is the duty of the courts to scrutinize very closely these time contracts, and if the circumstances are such as to throw doubt upon the question of the intention of the parties, it is not too much to require a party claiming under such a contract to show affirmatively that it was made with actual view to delivery and receipt of the grain." See also First Nat. Bank of Lyons *v.* Oskaloosa Pack. Co., 66 Iowa 41, 23 N. W. 255; Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862; Sprague *v.* Warren, 26 Neb. 326, 41 N. W. 1113, 3 L. R. A. 679.

In Bartlett *v.* Collins, 109 Wis. 477, 85 N. W. 703, the court expressly approved the rule as to the burden of proof laid down in Barnard *v.* Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595, saying: "This rule has not been departed from, so far as we can ascertain, by this court. It is not, in our judgment, unreasonable. It is based on the well-known fact that a very large majority of the transactions on such boards (as the Chicago board of trade) are not really transactions, but simply betting on future prices. . . . We are aware that many courts do not approve of this rule, but it has been definitely approved by respectable courts." It was also held that statutes 1898, § 2319*a*, passed after this decision, did not change the rule. In this case Chief Justice Cassoday and Justice Dodge dissented as to the burden of proof. See also Wheeler *v.* McDermid, 36 Ill. App. 179.

does make the deal, the presumption is that he made it as directed.[4]

But the broker has a right to assume that orders given him contemplate real transactions, and he is presumed to have expected his clients to execute the contracts which he made for them.[5]

Presumption As to Illegal Participation. — Where it is shown that the broker and his client intended to engage in a fictitious sale, the presumption has been held to obtain that all the parties to such sale entered into it with a like view;[6] but it has also been held that the burden of proof is on the client seeking to invalidate transactions negotiated for him by his broker, to show that the third persons with whom the broker dealt intended to enter into illegal transactions.[7]

C. Evidence Admissible in General. — a. *Party's Evidence as to His Own Intent.* — A party may testify to his own intent in making a contract for future delivery,[8] and this has been said

4. Phelps *v.* Holderness, 56 Ark. 300, 19 S. W. 921.

It is presumed that a cotton broker, employed to purchase "cotton futures" for the purpose of speculation, understood the terms of the employment as they were delivered, and that he executed the orders according to the client's illegal intent. Hill *v.* Johnson, 38 Mo. App. 383.

5. Williar *v.* Irwin, 11 Biss. 57, 30 Fed. Cas. No. 17,761; Kirkpatrick *v.* Adams, 20 Fed. 287; but see Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60, in which it was said that if the brokers were aware of their clients' illegal purpose when negotiating transactions for them, it was the inevitable inference that the brokers participated in the gambling project and aided the clients therein.

6. Beveridge *v.* Hewitt, 8 Ill. App. 467.

In Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60, which was an action by commission merchants against a client to recover money advanced in transactions in grain, the court said: "There is no direct evidence as to the intention of the other parties to the several purchases and sales. The transactions on both sides appear to have been precisely alike, and it is a fair inference that the transactions which defendant intended should be mere wagers, which the plaintiffs, with knowledge of such intention, entered into on behalf of defendant, and which were in the form in which gambling in all kinds of commodities is carried on, were in fact intended by all the parties thereto — principals and agents on both sides — to be mere bets with reference to the future price of wheat."

7. Kent *v.* Mittenberger, 13 Mo. 503.

In Bennett *v.* Covington, 22 Fed. 816, it was held that a party seeking to invalidate transactions had through his broker, in a suit between them, must not only show the illegal intent of the parties with whom the broker dealt, but also that the broker himself was privy to the general unlawful design. *Contra.* — Holding that the burden of proof was on the broker to show the innocence of the persons with whom he dealt. Beveridge *v.* Hewitt, 8 Ill. App. 467.

8. Yerkes *v.* Salomon, 11 Hun (N. Y.) 471; Kenyon *v.* Luther, 50 Hun 602, 4 N. Y. Supp. 498; Waite *v.* Frank, 14 S. D. 626, 86 N. W. 645; Counselman *v.* Reichart, 103 Iowa 430, 72 N. W. 490.

Dwight *v.* Badgley, 60 Hun 144, 14 N. Y. Supp. 498. In this case the court said that while the party's answer to his own intent would not have conclusively shown what the intention of the opposite parties was in entering upon the course of dealing, it involved an answer which the first party was entitled to have presented to the jury, and which might have aided them in determining what was the real intention of the parties.

In an action to recover money paid out on speculative deals in stocks, the

to be the best evidence.[9] But circumstantial evidence may be adduced.[10]

b. *Declarations of Agent.* — Evidence of what was said by the agent of a party to a contract for future delivery at the time he negotiated it, is admissible on the issue of whether or not it was a gambling transaction.[11]

D. Significance of the Contract. — a. *Conclusiveness.* **(1.) In General.** — It is the real intention of the parties to a contract for future delivery and not the form a contract may take, or the designation the parties may give it, that is controlling.[12]

testimony of plaintiffs that they did not intend any stocks to be in fact bought, though incompetent on direct examination, is admissible and may be considered by the jury when called out by the defendants themselves on cross-examination. Allen *v.* Fuller, 182 Mass. 202, 65 N. E. 31.

Where in a suit to recover money lost in speculating in provisions the plaintiff testifies that defendant's agent, when urging him to speculate, stated that if he wanted him to buy one thousand bushels of wheat he had to pay ten dollars, and if the market went up a cent he would make ten dollars, and if it went down a cent he would lose that amount, and also stated there was no delivery on it, but that defendants dealt merely on margins, it is not error to permit plaintiff to then testify that he himself had no intention of actually receiving or delivering his purchase or sales, but intended to settle by the payment of difference. Staninger *v.* Tabor, 103 Ill. App. 330.

But it has been held in an action by a broker to recover a balance due on a contract to purchase wheat, made for him by the defendant, in which the defense was that the transaction was a gambling deal, that defendant's evidence that he did not intend to make an actual purchase is rendered inadmissible by the accompanying admission of counsel that he did not expect to prove that such intention was known to the plaintiff. Amsden *v.* Jacobs, 75 Hun 311, 26 N. Y. Supp. 1000.

9. Crandell *v.* White, 164 Mass. 54, 41 N. E. 204; First Nat. Bank of Lyons *v.* Oskaloosa Pack. Co., 66 Iowa 41, 23 N. W. 255.

But in Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60, in speaking of the proof of commission merchants' knowledge of their clients' intention to gamble in grain transactions, the court said that they insisted that the sales were genuine and that they did not know of such purpose, but that "courts are not bound by the testimony of interested parties, but may look to the surrounding circumstances to ascertain the true character of the transactions."

And in Melchert *v.* American Union Tel. Co., 11 Fed. 193, the court said that in seeking to ascertain the intentions of parties to alleged grain-gambling transactions it would not do to place any great stress on their own declarations, whether under oath or not; and that all its experience admonished it to receive with extreme caution, if not with absolute distrust, what parties charged with transactions apparently illegal say respecting the innocence of their own intentions.

10. Edwards *v.* Hoeffinghoff, 38 Fed. 635.

11. Cassard *v.* Hinman, 6 Bosw. (N. Y.) 8.

In Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60, evidence of the statement of an agent of commission merchants to a client, that his transactions would be mere wagers on the price of wheat, was held admissible to show the client's intention to gamble, and that he had ground for believing that that was all he was doing, notwithstanding the contention of the commission merchants that the agent had no authority to represent them in illegal transactions.

12. *United States.* — Williar *v.* Irwin, 11 Biss. 57, 30 Fed. Cas. No. 17,761; Melchert *v.* American Union Tel. Co., 11 Fed. 193; Kirkpatrick *v.*

(2.) Admissibility of Parol Evidence. — Parol evidence is admissible to show that a contract for future delivery, though in writing and apparently legal, is a mere gambling transaction.[13]

(3.) Brokers' Memoranda and Accounts. — Memoranda of transactions upon the board of trade and entries on brokers' books are not conclusive evidence of the legitimate character of the trans-

Adams, 20 Fed. 287; Embrey *v.* Jemison, 131 U. S. 336.

Illinois. — Jamison *v.* Wallace, 167 Ill. 388, 47 N. E. 762; Tenney *v.* Foote, 4 Ill. App. 594; Coffman *v.* Young, 20 Ill. App. 76; Carroll *v.* Holmes, 24 Ill. App. 453; Beveridge *v.* Hewitt, 8 Ill. App. 467; Staninger *v.* Tabor, 103 Ill. App. 330.

Indiana. — Whitesides *v.* Hunt, 97 Ind. 191.

Maine. — Morris *v.* Western Union Tel. Co., 94 Me. 423, 47 Atl. 926.

Maryland. — Stewart *v.* Schall, 65 Md. 289, 4 Atl. 399, 57 Am. Rep. 327.

Massachusetts. — Barnes *v.* Smith, 159 Mass. 344, 34 N. E. 403.

Michigan. — Gregory *v.* Wendell, 37 Mich. 337.

Minnesota. — Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

Missouri. — Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Kent *v.* Miltenberger, 13 Mo. App. 503; Ream *v.* Hamilton, 15 Mo. App. 577; Schriener *v.* Orr, 55 Mo. App. 406.

Nebraska. — Sprague *v.* Warren, 26 Neb. 326, 41 N. W. 1113, 3 L. R. A. 679.

New York. — Amsden *v.* Jacobs, 75 Hun 311, 26 N. Y. Supp. 1000; Yerkes *v.* Salomon, 11 Hun 471.

Pennsylvania. — Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; Brua's Appeal, 55 Pa. St. 294; Gaw *v.* Bennett, 153 Pa. St. 247, 25 Atl. 1114.

Rhode Island. — Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106.

South Dakota. — Waite *v.* Frank, 14 S. D. 626, 86 N. W. 645.

Wisconsin. — Barnard *v.* Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595.

And see Press *v.* Duncan, 100 Iowa 355, 69 N. W. 543.

In Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60, the court said: "Mere wagering contracts invariably wear the garb of *bona fide* sales. This is common knowledge. Myriads of gambling operations are daily arrayed by two interested brokers, who fatten on the folly of their dupes, in the decent and decorous habiliments of lawful business transactions. The naivete of a tribunal which in such cases should unquestioningly take the semblance for the substance would indeed be pitiable, if it did not excite derision and contempt. The courts have always sought to pierce the disguise and ascertain the real intention of the parties."

13. Beadles *v.* M'Elrath, 8 Ky. L. Rep. 848, 3 S. W. 152; Peck *v.* Doran, 57 Hun 343, 10 N. Y. Supp. 401; Counselman *v.* Reichart, 103 Iowa 430, 72 S. W. 490.

The Rule Excluding Parol Evidence to vary written contracts only protects valid transactions. Cassard *v.* Hinman, 1 Bosw. (N. Y.) 207, and see Cassard *v.* Hinman, 6 Bosw. (N. Y.) 8. But in Porter *v.* Veits, 1 Biss. 177, 19 Fed. Cas. No. 11,291, it was held that parol evidence was inadmissible to show that a contract for future delivery, valid on its face, was vitiated by a contemporaneous oral agreement that it should be closed out by a payment of differences, the court saying: "No doubt all contracts which are illegal may be attacked, but no case has been shown which authorizes a party to prove verbally that another contract (in itself illegal) existed, and so get rid of a written contract on its face unexceptionable."

Evidence of Previous Conversations. — In an action by grain brokers against their clients to recover advances made on a purchase of grain, the order for which called for a certain number of bushels "more" of January wheat, it was permissible to prove previous conversations between the parties to explain what was meant by such order and whether or not the transaction

actions; but the surrounding circumstances and the conduct of the parties may be looked to.[14]

b. *Form and Circumstances of the Contract.* — **(1.) In General. Failure to Reduce Contract to Writing.** — The fact that the contract has not been reduced to writing, when, without at least a written memorandum, the sale would be invalid, is a circumstance showing that commission merchants knew their client's intent to engage in wagering transactions.[15]

Unintelligible Business Methods. — The fact that the method of conducting the business is not intelligible to the court is a suspicious circumstance.[16]

Interpretation of Contract. — Where a contract for future delivery is susceptible of two interpretations, it must be accorded that which renders it lawful.[17]

(2.) Purchase for Future Delivery. — The fact that a purchase is made for future delivery does not *ipso facto* invalidate it as a wagering transaction,[18] while on the other hand the fact that the contract

was a gambling deal. Brand *v.* Henderson, 107 Ill. 141.

Evidence of Usage is admissible to fix the meaning of a technical phrase used in an order to a stock broker to purchase stock, as bearing on the issue of the legality of the transaction. Also expert evidence is admissible to show the meaning of the expression: "I want to buy, say, 100 shares Union Pacific stock on margin," contained in an order to a stock broker. Hatch *v.* Douglas, 48 Conn. 116, 40 Am. Rep. 154.

14. Kullman *v.* Simmens, 104 Cal. 595, 38 Pac. 362. See also Boyd *v.* Hanson, 41 Fed. 174; *In re* Green, 7 Biss. 338, 10 Fed. Cas. No. 5751. In this last case the court said: "The fact that the parties charged the bankrupt with the price of the grain when he ordered it purchased, and credited him with the price sold for, when sold, does not prove what the real transaction was. That only represents the form, not the nature of the transaction. It was as well to keep the account in that way when the real intention was to speculate and pay only the difference, as when the sale was of the article itself."

But in Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106, the court, in speaking of a broker's account which showed items of interest charged to and dividends credited to his client, said: "The bookkeeper who kept the account had no suspicion that the entries did not represent real transactions. The account appears to be a record of genuine purchases and sales, and belongs to a class of evidence which is given much weight by our court."

15. Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60.

16. Lowry *v.* Dillman, 59 Wis. 197, 18 N. W. 4, in which the court said that after reading over more than once the testimony of the broker and his clerk, no member of the court was certain that he understood how the business was transacted.

17. Clay *v.* Allen, 63 Miss. 426. For an instance of a contract held to show on its face that it contemplated a wager, see Marks *v.* Metropolitan Stock Exchange, 181 Mass. 251, 63 N. E. 410.

18. *United States.* — Edwards *v.* Hoeffinghoff, 38 Fed. 635.

Illinois. — Cole *v.* Milmine, 88 Ill. 349.

Maine. — Pumsey *v.* Berry, 65 Me. 570.

Michigan. — Gregory *v.* Wendell, 40 Mich. 432.

Minnesota. — Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

Mississippi. — Clay *v.* Allen, 63 Miss. 426.

Missouri. — Crawford *v.* Spencer,

is in the form of immediate instead of future purchases and sales does not entitle it to be viewed in a more favorable light.[19]

And so the fact that one selling goods for future delivery does not have them in his possession, and has not arranged for them, does not affect the validity of the contract.[20]

92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745.

Pennsylvania. — Brua's Appeal, 55 Pa. St. 294; Wagner *v.* Hildebrand, 187 Pa. St. 136, 41 Atl. 34; Smith *v.* Bouvier, 70 Pa. St. 325; Peters *v.* Grim, 149 Pa. St. 163, 24 Atl. 192.

Vermont. — Noyes *v.* Spaulding, 27 Vt. 420.

In Logan *v.* Musick, 81 Ill. 415, the court said: "The statute [prohibiting options] does not prohibit a party from selling or buying grain for future delivery. Such was not the purpose of the statute."

But in Barnard *v.* Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595, the court said that it was the manifest duty of courts to scrutinize closely time contracts, and determine whether they were really intended to be what their language imported — real contracts for the future sale and delivery of grain — or whether in fact that were simply wagers.

19. In Flagg *v.* Gilpin, 17 R. I. 10, 19 Atl. 1084, the court remarked that the case of stock-gambling presented by the proof differed from a contract for future delivery in that it was the understanding of the parties, a client and his broker, that the client should order the broker to buy stock and that the broker should then be treated as having bought, and that the client should order the broker to sell and he should then be treated as having sold, at which time the differences between the market price as it then was, and as it was when the purchase was made, should be settled between them. But the court said that it did not see any essential difference, for in the one case, as in the other, the cause of action was merely a wager masked under the semblance of a sale, or of a sale and resale.

20. *United States.* — Irwin *v.* Williar, 110 U. S. 507; Porter *v.* Viets, 1 Biss. 177, 19 Fed. Cas. No. 11,291.

Illinois. — Logan *v.* Musick, 81 Ill. 415.

Indiana. — Whitesides *v.* Hunt, 97 Ind. 191.

Kentucky. — Sawyer *v.* Taggart, 77 Ky. 727.

Louisiana. — Conner *v.* Robertson, 37 La. Ann. 814.

Michigan. — Gregory *v.* Wendell, 39 Mich. 337, *s. c.* 40 Mich. 432.

Minnesota. — Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

Mississippi. — Clay *v.* Allen, 63 Miss. 426.

Missouri. — Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; Williams *v.* Tiedman, 6 Mo. App. 269; Kent *v.* Miltenberger, 13 Mo. App. 503; Cockrill *v.* Thompson, 85 Mo. 510.

Nebraska. — Rogers *v.* Marriott, 59 Neb. 759, 82 N. W. 21.

New York. — Bigelow *v.* Benedict, 70 N. Y. 202; Stanton *v.* Small, 3 Sand. 230; Cassard *v.* Hinman, 1 Bosw. 207.

Ohio. — Kahn *v.* Walton, 46 Ohio St. 195, 20 N. E. 203.

Wisconsin. — Barnard *v.* Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595. And see Whitehead *v.* Root, 2 Metc. (Ky.) 584; Dickson *v.* Thomas, 97 Pa. St. 278.

The contrary doctrine announced in some early English cases (see Bryan *v.* Lewis, R. & M. 386, 21 E. C. L. 467) has been long since overruled. See cases cited above.

A sale "short," while evidence of a wager transaction, is not *ipso facto* a wager, but there must be other facts to characterize the transaction and show the illegal intent of the parties. Maxton *v.* Gheen, 75 Pa. St. 166.

From the rule in the text it follows that on an issue as to whether contracts for future delivery were legal, questions asked of parties whether at the time of making such sales they had the commodities on hand, may be properly excluded.

So also the fact that goods sold for future delivery are not identified is, of course, not significant of illegality.[21]

(3.) Option Contracts. — An option contract is not *per se* invalid as a wagering transaction.[22]

Mackey *v.* Rausch, 60 Hun 583, 15 N. Y. Supp. 4.

But in Watte *v.* Wickersham, 27 Neb. 457, 43 N. W. 259, in support of a contention that certain sales of grain were gambling deals, evidence that the person selling did not own or have possession of any grain, and particularly of the grain sold at the time he ordered the plaintiff brokers to sell, was held admissible in connection with proof that the plaintiffs knew the fact.

In Donovan *v.* Daiber, 124 Mich. 49, 82 N. W. 848, a statute (Comp. L. Mich. 1897, § 11,373) prohibiting the pretended buying or selling of stocks or produce on margins when the seller does not have the property on hand to deliver or when the purchaser does not intend actually to receive the property, was held not to invalidate contracts for future delivery, though the seller did not have the property, where it was the understanding of both parties that an actual delivery could be enforced.

21. Sawyer *v.* Taggart, 77 Ky. 727; Conner *v.* Robertson, 37 La. Ann. 814.

"The law does not require that the stock [purchased] should be in existence, and that the customer should acquire such control by the purchase as to be able to deliver the title to it, if called for, when he sells." Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106.

22. North *v.* Phillips, 89 Pa. St. 250; Williams *v.* Tiedemann, 6 Mo. App. 269.

But see Dickson *v* Thomas, 97 Pa. St. 278, where the testimony of a broker concerning an option contract was held to show it to be merely a wager. An option to purchase within a certain time is not illegal as a gaming transaction, and the case is not altered if, instead of paying for an option to buy, the person pays for an option to sell. Story *v.* Salomon, 71 N. Y. 420.

A contract providing that in consideration of a certain sum, the makers bind themselves to deliver a certain amount of petroleum should the opposite party call on them to do so at any time within six months, and if the oil is called for, the call becomes a contract, the opposite party agreeing to receive and pay for the commodity, is not on its face a gambling contract, but as it is evident that such an agreement can be readily prostituted to the worst kind of gambling ventures, its character may be weighed by the jury in connection with other facts in considering whether the bargain was a mere scheme to gamble. Kirkpatrick *v.* Bonsall, 72 Pa. St. 155.

Right to Insist on Actual Delivery. Where it is agreed by the parties that the contract shall be actually performed if either party requires it, it is not a wagering contract, though one or both of the parties intend when the time for performance arrives to substitute therefor a settlement by the payment of differences, such an intention being immaterial except so far as it is made a part of the contract. Harvey *v.* Merrill, 150 Mass. 1, 22 N. E. 49, 15 Am. St. Rep. 159, 5 L. R. A. 200. See also Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106; and Ward *v.* Bosburgh, 31 Fed. 12, in which the court said: "It has been of late repeatedly decided that if the parties intend in fact to buy or sell property to be delivered at a future time agreed upon by them, it is not a gambling transaction, although they exercise the option of settling the difference in price rather than make delivery of the property."

But see *contra*, Melchert *v.* American Union Tel. Co., 11 Fed. 193; and Kirkpatrick *v.* Adams, 20 Fed. 287, in which latter case the court said: "It is not sufficient that the parties reserve to themselves an option of converting the contracts into a real transaction of buying and selling for actual delivery, if the original intent

Option as to Time of Delivery. — So a mere option within certain limits as to the time of delivery does not invalidate the contract.[23]

(4.) Effect of Requiring Margin. — Deals on margin are not necessarily wagering transactions.[24] And the fact that brokers assume no risk on deals made for a client is evidence of the legality.[25]

was to make a contract which contemplated in fact no delivery, but a mere adjustment of differences in price. It would be none the less a gambling transaction if such was the original purpose, because of the option. . . . The existence of the option in the contract is merely one element of fact to which you may look, with all the others, in arriving at the real *bona fide* intent of the parties."

23. *United States.* — Melchert *v.* American Union Tel. Co., 11 Fed. 193; Ward *v.* Vosburgh, 31 Fed. 12.

Illinois. — Pixley *v.* Boynton, 79 Ill. 351; Wolcott *v.* Heath, 78 Ill. 433.

Iowa. — Gregory *v.* Wattowa, 58 Iowa 711, 12 N. W. 726.

Missouri. — Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 475; Williams *v.* Tiedemann, 6 Mo. App. 269.

An option by which a seller secures the right to deliver a commodity within a certain time, and to receive therefor a certain price, though containing an element of hazard, is not necessarily inconsistent with the fact that the seller owned the commodity when making the contract or had an existing contract to receive it; and hence is not void as a wager. Bigelow *v.* Benedict, 70 N. Y. 202. So the existence of an option as to the time of delivery does not bring the contract within the Illinois statute prohibiting option contracts. Logan *v.* Musick, 81 Ill. 415.

24. *United States.* — Edwards *v.* Hoeffinghoff, 38 Fed. 635.

Connecticut. — Hatch *v.* Douglas, 48 Conn. 116, 40 Am. Rep. 154.

Indiana. — Whitesides *v.* Hunt, 97 Ind. 191.

Massachusetts. — Marks *v.* Metropolitan Stock Exchange, 181 Mass. 251, 63 N. E. 410.

Pennsylvania. — Wagner *v.* Hildebrand, 187 Pa. St. 136, 41 Atl. 34; Hopkins *v.* O'Kane, 169 Pa. St. 478, 32 Atl. 421; Peters *v.* Grim, 149 Pa. St. 163, 24 Atl. 192.

"The fact that after the stocks have been bought by the broker he is to actually receive them from the seller, and to pay for them for the most part out of his own pocket, or with funds raised on his personal responsibility and the pledge of the stocks, and then carry them for his customer so long as his customer keeps him indemnified from loss by keeping the margin agreed upon good, and that in so carrying the stocks the relation between the customer and the broker is a contractual one, does not make the transaction a wagering transaction." Rice *v.* Winslow, 180 Mass. 500, 62 N. E. 1057.

But the fact that orders for wagering stock transactions are marked "Protect in full," by which is meant that the stock was not to be sold out, and that the margin would be kept good, does not validate the transaction on the theoretic possibility that under such an order margins might be furnished until the stock had lost all its value, and the then worthless certificate turned over; this being very far from establishing an intent to make an actual purchase. Thompson *v.* Brady, 182 Mass. 321, 65 N. E. 419.

25. In Hatch *v.* Douglas, 48 Conn. 116, 40 Am. Rep. 154, the court referred to the fact that the brokers did not assume any risk, as indicative of the legality of transactions in stocks made by them for a client.

In Brown *v.* Speyers, 20 Gratt. (Va.) 296, the court regarded the circumstance that a broker could sustain no loss nor realize any profit from speculative transactions, beyond his commissions, as conclusive against their invalidity as wagers, saying it had yet to see a case in which it had been held that a contract was a wager, by the terms of

(5.) Nature of Commodity Dealt In. — The nature of the commodity dealt in is not, apparently, suggestive of illegality.[26]

(6.) Place Where Transaction Occurs. — And it would seem that the fact that the transaction occurs on a stock exchange or board of trade is not evidence of its illegality, at least beyond suggesting the propriety of its close scrutiny.[27]

But the importance of a certain city as a grain market has been regarded as a circumstance to be considered in determining whether brokers there were aware of their client's intention to engage in wagering transactions in grain.[28]

Rules of Exchange or Board of Trade. — The weight of authority seems to favor the view that the rules of an exchange or board of trade on which transactions are conducted are not admissible[29] to

which the loss and profit were all on one side.

But in Flagg *v.* Baldwin, 38 N. J. Ep. 219, the fact that a broker speculating for his client on margins had retained, or attempted to retain, perfect indemnity against loss on his part, was said not to affect the illegal character of the transactions as wagering contracts.

26. The only difference between stocks and other commodities is that as stocks are more commonly made the vehicle of gambling speculation than some other things, courts are disposed to look more closely into stock transactions to ascertain their character. Hopkins *v.* O'Kane, 169 Pa. St. 478, 32 Atl. 421.

An option for the sale of gold does not warrant the inference that it is a wagering contract on account of the nature of the commodity dealt in, notwithstanding contracts for the purchase and sale of gold are a convenient cover for gambling transactions, in view of the frequent fluctuations in the value of gold, the opportunities for combinations affecting the market, and the ability to ascertain the market value on any day or hour. Bigelow *v.* Benedict, 70 N. Y. 202.

27. Sawyer *v.* Taggart, 77 Ky. 727.

Contra. — Rogers *v.* Marriott, 59 Neb. 759, 82 N. W. 21, in which the court remarked that it is a matter of common knowledge that many millions of bushels of wheat are annually, in form, bought and sold on the Chicago board of trade, which are not in existence, never change hands, and are never intended to, and that as the transactions representing *bona fide* sales are but a small part of the sum total, the most natural and probable inference would be that any particular transaction occurring there would fall within the category of speculative ventures.

Judicial Notice. — Courts are bound to take notice that stock and grain gambling is carried on at the exchanges in the commercial centers of the country; and in view of this contracts for future delivery will be very carefully scrutinized. Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

Transactions Between Other Parties. — Evidence as to transactions on a board of trade between parties other than those before the court is inadmissible to characterize the transaction engaged in on the board by the parties to the suit. Edwards *v.* Hoeffinghoff, 38 Fed. 635.

28. Williar *v.* Irwin, 11 Biss. 57, 30 Fed. Cas. No. 17,761; Roundtree *v.* Smith, 108 U. S. 269.

29. Waite *v.* Frank, 14 S. D. 626, 86 N. W. 645; Whitesides *v.* Hunt, 97 Ind. 191; Pardridge *v.* Cutler, 168 Ill. 504, 48 N. E. 125; Mackey *v.* Rausch, 60 Hun 583, 15 N. Y. Supp. 4.

In Bartlett *v.* Collins, 109 Wis. 477, 85 N. W. 703, the court held that where a client authorizes his

characterize them, and when admitted, the significance attached to them has varied greatly.[30]

E. Circumstances and Conduct of the Parties. — a. *Importance in General.* — More than the provisions of the contract itself or the declarations of the parties, their circumstances and conduct furnish the most cogent and reliable evidence of their true intent.[31]

brokers to enter into transactions for him, under the auspices of a board of trade, he impliedly submits himself to the lawful rules of the organization, which are therefore admissible in an action between them, as bearing on the illegality of the transactions entered into.

Parties Ignorant of the Rules. See Davy *v.* Bangs, 174 Mass. 238, 54 N. E. 536.

Failure to Offer Rules Referred to in Contract. — But in Lowry *v.* Dillman, 59 Wis. 197, 18 N. W. 4, the court enumerated among the suspicious circumstances tending to discredit a grain broker's testimony that he made an actual purchase for his client, the fact that though the written contract provided that it was subject to the rules of a chamber of commerce, these rules were not introduced in evidence.

30. In Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745, the fact that contracts made by grain brokers for a client were not written, and under the rules of the exchange under which they operated the purchaser had the right to call for the commodity bought, was not regarded as establishing the legitimate character of the transactions.

In Sawyer *v.* Taggart, 77 Ky. 727, a rule of the New York cotton exchange providing that either party to a contract might close out on notice, the party receiving the notice having the option either to make settlement by paying or receiving the difference, or to accept a satisfactory person in the room of the party giving the notice, and also a rule relating to margins, and one governing settlements on default in delivery or receipt of goods sold, were considered, and it was said that they seemed to provide for real and not fictitious trade, that they provided against unreal transactions, and that so large a portion of the real business in great cities is done on 'change as to wholly forbid the conclusion that the contracts made there are unlawful.

In Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60, the court, in referring to a rule of a board of trade providing that in cases of sales of produce the parties selling should deliver the property unless the purchaser should accept or consent to pay the defendant in cash but in all cases the buyer should have the right to demand the property, as confirming its views that transactions on the board of trade were known by the commission merchant making them to be wagering deals, said: "In this very rule the purchaser is given the option to accept or pay the difference in price when the seller so requests him to do. In other words, the rule provides that the parties may agree to do what every layman knows they can agree to do without any such rule. Why mention this right to agree to settle by paying differences when it is a right which exists independently of any rule? The reason is obvious, when the almost universal practice is considered. When brokers, by their rules, inform their speculating customers that no delivery is necessary if the parties agree to dispense with it, and this is followed by the almost uniform practice of settling by paying differences, we are constrained to believe that no delivery was intended from the very outset of any of these transactions, and that the brokers were well aware of it."

31. In Melchert *v.* American Union Tel. Co., 11 Fed. 193, in speaking of the legality of transactions in grain futures, the court said: "We must look at the actions of interested or accused persons, rather than their mere words, to ascertain their real intention. We must consider what they have done, rather

And a statute making certain conduct *prima facie* evidence of the illegal nature of the transaction in futures, is constitutional.[32]

Even the moral estimate which a party put upon the transaction he was about to engage in has been held significant.[33]

b. *Course of Dealing Between Parties.* — At least in those circumstances in which the question of the legitimate character of a transaction arises between the broker and his client, the field of inquiry into conduct includes the whole course of dealing between the parties.[34]

c. *Delivery.* — **(1.) In the Course of Dealing.** — Thus the fact that numerous deals in commodities for future delivery were uniformly closed out without delivery is significant evidence of the intention

than what they have said, when called to account for their actions. We can best learn what interpretation the parties themselves have put upon their own contract by considering what they have done under and in pursuance of it, with a view to its settlement or fulfillment."

32. Crandell *v.* White, 164 Mass. 54, 41 N. E. 204.

33. In Wheeler *v.* McDermid, 36 Ill. App. 179, the court, remarking on the circumstances that the defendant, who purchased grain through the plaintiff broker, was a clergyman, and doubtful about the propriety of engaging in speculative deals, said: "The very fact that the conscience of this honest clergyman pricked him as he stood in the charmed circle of the 'corn pit' and watched the conflict between the 'bulls and bears,' and looked with longing eyes upon the golden calf he was about to worship is a circumstance not without significance as showing what the intent of appellant [the defendant] was."

34. Williar *v.* Irwin, 11 Biss. 57, 30 Fed. Cas. No. 17,761; Kenyon *v.* Luther, 50 Hun 602, 4 N. Y. Supp. 498; Carroll *v.* Holmes, 24 Ill. App. 453; Edwards *v.* Hoeffinghoff, 38 Fed. 635; Waite *v.* Frank, 14 S. D. 626, 86 N. W. 645.

In Crandell *v.* White, 164 Mass. 54, 41 N. E. 204, which was an action by a principal against his agents to recover money paid out on speculative deals in futures, evidence was admitted concerning transactions which took place during the five days preceding that on which those in suit began, the court saying: "It is a general rule that separate and distinct acts, unconnected with those in suit, are inadmissible for the purpose of raising an inference that the party did the particular things which he is charged with doing. But we think in this case that the transactions objected to were of such a nature and were so connected with those in suit, and so near to them in time, that they might fairly be regarded as having some tendency to show what the defendant had reasonable cause to believe that no intention existed actually to perform the contracts which form the basis of the present suit."

In an action on a note, defended on the ground that it was based on speculations of a gambling nature on a board of trade, evidence as to other similar transactions between the parties for three months after the note was given, as well as evidence of transactions prior thereto, is admissible to show the intention of the parties. Gardner *v.* Meeker, 169 Ill. 40, 48 N. E. 307.

But in Dwight *v.* Badgley, 60 Hun 144, 14 N. Y. Supp. 498, which was an action by brokers to recover differences from a client, the court held that evidence as to whether grain had been actually delivered in previous transactions was inadmissible to characterize those in suit as wagering contracts, saying: "Even if the parties had been guilty of entering into illegal contracts prior to the transactions upon which this action is based, as the plaintiff is entitled to the strictest proof in this case, we think that proof of former transactions alleged to be illegal, not embraced within the time

of the parties to gamble.[35] And is also evidence that brokers or commission merchants were aware of the illegal intent of their customer.[36]

But instances of actual delivery in the course of a series of deals will rob the failure to deliver, in the majority of instances, of its evidentiary force.[37]

(2.) In the Particular Transaction. — The fact that a particular contract for future delivery is closed out before maturity does not, however, prove its invalidity.[38] But while not conclusive, it is admissi-

specified in the bill of particulars, is not competent."

So in Benson *v.* Morgan, 26 Ill. App. 22, the court refused to notice evidence of a transaction between the maker of a note and his brokers prior to the execution of the instrument, as bearing on the question whether it was given for a gambling consideration arising out of speculations in grain; saying that it did not consider the evidence relevant.

35. Colderwood *v.* McCrea, 11 Ill. App. 543; Carroll *v.* Holmes, 24 Ill. 453; Beveridge *v.* Hewitt, 8 Ill. App. 467; Curtis *v.* Wright, 40 Ill. App. 491; Fareira *v.* Gabell, 89 Pa. St. 89; Miles *v.* Andrews, 40 Ill. 155; Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745.

Contra. — Sawyer *v.* Taggart, 77 Ky. 727, in which the fact that in the whole course of dealing between brokers and their clients, covering about two years and aggregating several hundred thousand dollars, no goods were actually received by either, was denied significance as indicating gambling transactions, the court saying that all the purchases were had with an intention to resell, and that resales were actually made in all instances. See also Ward *v.* Bosburg, 31 Fed. 12, and Williar *v.* Irwin, 11 Biss. (U. S.) 57, 30 Fed. Cas. No. 17,761, in which latter case the custom of commission merchants to reciprocally surrender or cancel their contracts and adjust differences in price between themselves was said to be founded in commercial convenience and not to be in contravention of the law.

36. Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60, in which, in speaking of the proof of the knowledge of commission merchants concerning their client's illegal intent, the court said: "From the very beginning the defendant pursued the course of closing out these purchases long before the day of delivery had arrived; in some cases ordering sold within a few days after the purchase all or a portion of the wheat purchased for May delivery. What did this indicate to the mind of the plaintiffs, if it did not tend to show them that defendant was merely gambling in options? . . . His [the client's] indifference to the matter of delivery, all through these transactions, was certainly suggestive to plaintiffs, who were familiar with such indifference, and the reasons for it, they having witnessed it in a multitude of similar transactions." And see to the same effect, Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

37. Ward *v.* Vosburg, 31 Fed. 12.

In Pratt *v.* Boody, 55 N. J. Eq. 175, 35 Atl. 1113, it appeared that a client purchased in one month from a broker stocks amounting to over $200,000, and that the actual deliveries to the client amounted to $47,000. During the next ten months the purchases amounted to $1,500,000, with deliveries only to the amount of $556. During the succeeding year the purchases amounted to over $650,000, with actual deliveries amounting to $57,337, and the court held that the small proportion of deliveries was insufficient to justify the conclusion that both parties intended a mere settling of differences, without actual delivery, saying that the importance of the deliveries actually made in deciding as to the validity of the whole account was very great.

38. Ward *v.* Bosburgh, 31 Fed. 12; Kirkpatrick *v.* Adams, 20 Fed. 287; Conner *v.* Robertson, 37 La.

ble,[39] and has been regarded as not devoid of weight in indicating the intent of the parties.[40]

On the other hand the fact of actual delivery, under a contract

Ann. 814; Sawyer *v.* Taggart, 77 Ky. 727; Williams *v.* Tiedemann, 6 Mo. App. 269; Kent *v.* Miltenberger, 13 Mo. App. 503; Edwards *v.* Hoeffinghoff, 38 Fed. 635; Fareira *v.* Gabell, 89 Pa. St. 89.

Where in a contract for future delivery the actual transfer of the goods is contemplated, the vendee may, before the time for delivery has arrived, agree to sell or transfer his right to the goods, or, under the contract, to some one else who, should he retain the same, would be entitled to receive possession at the time agreed; and such transfer would not affect the validity of the transaction. Gregory *v.* Wendell, 39 Mich. 337.

But in Rogers *v.* Marriott, 59 Neb. 759, 82 N. W. 21, which was an action by commission merchants to recover advances from a client, the court said it was not amiss to note that both parties were contemplating selling the "trades," as these transactions were termed, as soon as the market would permit of a profit being realized, and that there was not in any of their communications the remotest suggestion or inference of an actual delivery at any time, or of any intention to transfer wheat to the client.

39. Curtis *v.* Wright, 40 Ill. App. 491; Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

In Edwards *v.* Hoeffinghoff, 38 Fed. 635, the court said that the jury had a right to look to the circumstance of the absence of deliveries, in connection with other circumstances, to determine whether or not the purchases and sales were actual.

40. Lyon *v.* Culbertson, 83 Ill. 33.

In Melchert *v.* American Union Tel. Co., 11 Fed. 193, the court, after holding that it was no objection to a *bona fide* contract for future delivery that the parties afterward settled it by payment of differences, added that, notwithstanding their subsequent conduct might, as evidence, cast "strong reflected light" upon their intent in making the contract, and said: "How can we judge of their intentions except by considering what they actually did in adjusting their contracts? Is it not just to conclude, in the absence of proof to the contrary, that parties to a contract adjusted it according to their understanding of their own intents in making it?"

In Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60, the circumstance that a purchase of grain by commission merchants for a client for future delivery was closed out by selling a like amount, was regarded by the court as cogent evidence that the commission merchants knew their client intended to gamble. The court said: "How could the plaintiffs [the commission merchants] expect that the defendant would regard a *bona fide* purchase by him closed out, and himself released from all further liability on the contract by ordering a new contract to be made with another person — a contract of sale — thus increasing, rather than extinguishing, his liability, if the two transactions were *bona fide* sales? The natural mode of wiping out an obligation is to reach the party who holds it, and agree with him as to the terms on which he will release the other party who desires to be discharged. Yet the plaintiffs knew that the defendant was willing to pursue a widely different course and close out his purchase at a profit by obligating himself to sell more wheat to another without securing a release from the contract of purchase which he wiped out."

Stat. 1890, ch. 437, § 4, making the fact that settlements had been made *prima facie* evidence of the wagering character of contracts for future delivery embraces, if it is not confined to, settlements of the transactions concerned; and the fact that a transaction of that sort is not completed in fact is *prima facie* evidence of its illegal character. Thompson *v.* Brady, 182 Mass. 321, 65 N. E. 419. And see Marks *v.* Metropolitan Stock Exchange, 181 Mass. 251, 63 N. E. 410.

for future delivery, is not conclusive evidence of the intention of the purchaser to receive the property when the order for its purchase was given.[41]

(3.) Preparations for Receipt or Delivery of Commodity. — Lack of preparation by a party to a contract for future delivery, for the delivery or receipt of the commodity dealt in, has been regarded as a circumstance tending to show the wagering character of the transactions, and to charge the party's broker with knowledge of his illegal intent.[42]

(4.) Delivery by Broker to Client. — The fact that a broker who has purchased stocks and commodities for his client does not deliver them to him does not indicate illegality, and is irrelevant to that issue when it arises between them.[43] So the client's intent as to delivery is quite immaterial.[44]

41. Miles *v.* Andrews, 40 Ill. App. 155.

The fact that a commission merchant, who made a contract for his client without intending a delivery, and afterward, when the client's demeanor began to inspire mistrust, bought the grain, to make a show of fulfilling the contract, would not validate it. Edwards *v.* Hoeffinghoff, 38 Fed. 635.

42. Melchert *v.* American Union Tel. Co., 11 Fed. 193; Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745.

In Watte *v.* Wickersham, 27 Neb. 457, 43 N. W. 259, in support of the contention that certain transactions in grain were gambling deals, evidence that the purchasers were not the owners of elevators, or other means of receiving or storing grain, was held admissible in connection with proof that the fact was known to the plaintiff brokers.

43. Young *v.* Glendenning, 194 Pa. St. 550, 45 Atl. 364; Post *v.* Leland, 184 Mass. 601, 69 N. E. 361; Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106. And see Davy *v.* Bangs, 174 Mass. 238, 54 N. E. 536.

The *prima facie* case under Stat. 1890, ch. 437, § 4, making the fact of settlement *prima facie* evidence that the transaction was a wagering contract, is not made out by showing that the broker purchased stocks for his client, and retained them until resold, instead of delivering them to the client, and that on the resale a settlement was made between them, there having been *bona fide* transfers of stocks between the broker and third persons with whom he dealt. Rice *v.* Winslow, 180 Mass. 500, 62 N. E. 1057.

But in Hill *v.* Johnson, 38 Mo. App. 383, the fact that no cotton was ever delivered or tendered to a client by commission merchants employed to purchase for him, was said to be "certainly a material circumstance" bearing on the validity of the transactions as gambling deals.

And in Walters *v.* Comer, 79 Ga. 796, 5 S. E. 292, the fact that brokers who had bought cotton for their client did not deliver it to him, was apparently regarded as a circumstance tending to show the gambling nature of the transaction.

44. Where a broker purchases stock for a client it is entirely immaterial to the character of the transaction as a gambling deal, whether the client intends to have the broker hold the securities for him until they shall actually be sold, and then to settle with the broker, or whether he intends ultimately to pay the balance of the purchase money and receive the securities. Rice *v.* Winslow, 180 Mass. 500, 62 N. E. 1057.

In Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106, it was held that where a broker actually purchased stock on his client's account, the fact that the client did not intend to receive it from the broker is immaterial to the legality of the transaction, the court saying: "If the defendants [the clients] had ostensibly bought stock of the plaintiff [the

(5.) Validity of Broker's Transaction with Third Person. — On the other hand, the fact that a broker making contracts for future delivery for a client actually purchases the stocks and commodities, or intends an actual delivery thereof to the third persons concerned, is also immaterial when the issue of the legality of the transaction arises between the broker and the client;[45] but the failure of evidence to affirmatively disclose that the broker made an actual purchase indicates a wagering contract,[46] as does also the client's indifference to the pecuniary responsibility of the persons with whom the broker is supposed to deal.[47]

broker] and sold stock to him, then their intention to deliver certificates would have been of importance. But when they directed him to buy for their account, the question is, did they intend that he should actually buy and receive the certificates, and did they intend that he should deliver certificates when they ordered him to sell?"

45. Flagg *v.* Baldwin, 38 N. J. Eq. 219; Pardridge *v.* Cutler, 168 Ill. 504, 48 N. E. 125.

In Rogers *v.* Marriott, 59 Neb. 759, 82 N. W. 21, the court held that the fact that commission merchants made actual purchases and sales of commodities for a client was not conclusive of the legality of the transactions as between them and the client, remarking that there was no evidence as to the parties from whom the nominal purchases were made, or that any third party appeared, in any order, to enter into the transaction.

In an action to recover from brokers money lost in an alleged gambling transaction on a board of trade, the nature of the contract that the brokers may have made on the board of trade or elsewhere, with some third party, is immaterial or a mere circumstance of corroboration. Kennedy *v.* Stout, 26 Ill. App. 133.

In Griswold *v.* Gregg, 24 Ill. App. 384, it was held that the fact that brokers dealing for a client on a board of trade intended in making such deals an actual performance by delivery, was not the criterion of the validity of the transactions as between the broker and the client, but if, as between them, it was intended that the broker should only deal in options, the transactions were illegal.

In Harvey *v.* Merrill, 150 Mass. 1, 22 N. E. 49, 15 Am. St. Rep. 159, 5 L. R. A. 200, the court held that the fact that brokers bound themselves to actual deliveries on a client's account would not prevent the transactions, as between them and the client, being void as gambling deals, they being treated as having bound themselves on their own account merely.

But in Post *v.* Leland, 184 Mass. 601, 69 N. E. 361, which was an action to recover money paid out on speculative deals in stocks, the fact that the defendant broker purchased the stock at plaintiff's request and held it subject to his control was held to be an element to be considered on the question whether the broker had reasonable cause to believe that plaintiff was carrying on a wagering contract.

46. Peck *v.* Doran, 57 Hun 343, 10 N. Y. Supp. 401; First Nat. Bank of Lyons *v.* Oskaloosa Pack. Co., 66 Iowa 41, 23 N. W. 255.

Where a commission merchant testifies that he never had a warehouse receipt for grain claimed to have been purchased on the order of a client, that he did not know in what elevator the alleged grain was, and that he settled the alleged loss by "ringing up" in the board of trade, his evidence fails to show a *bona fide* purchase for actual delivery. Sprague *v.* Warren, 26 Neb. 326, 41 N. W. 1113, 3 L. R. A. 679.

47. "The purchaser in an honest business sale naturally wishes to know something of the pecuniary responsibility and of the character of the man who has agreed to deliver property to him at a certain time for a specified price. If the vendor will not perform his contract, and

d. *Pecuniary Responsibility of Purchaser.* — Evidence of the financial inability of one purchasing for future delivery to pay for the goods is admissible to show that he was gambling,[48] and is a strong circumstance in demonstration of that fact;[49] and a broker's

cannot be made to pay damages for breach of it, the contract is of no value to the purchaser." Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60.

48. Watte *v.* Wickersham, 27 Neb. 457, 43 N. W. 259; Kirkpatrick *v.* Bonsall, 72 Pa. St. 155.

The means of a purchaser of grain for future delivery may be considered in determining the wagering character of the contract, and if they are inadequate to carry the contract into effect, it is a circumstance which, though not conclusive, may be viewed in determining the purchaser's intention. And the purchaser's own evidence as to his lack of means is admissible. Myers *v.* Tobias (Pa.), 16 Atl. 641.

In Stewart *v.* Schall, 65 Md. 289, 4 Atl. 399, 57 Am. Rep. 327, evidence that defendant, sued by his brokers for a balance of account which he asserted arose out of gambling transactions, was worth only thirty-five hundred dollars, while the transactions aggregated eight hundred thousand dollars, was a lawyer by occupation and resided next door to plaintiffs, who knew him well, was held competent to go to the jury.

49. *United States.* — Williar *v.* Irwin, 11 Biss. 57, 30 Fed. Cas. No. 17,761.

Illinois. — Jamieson *v.* Wallace, 167 Ill. 388, 47 N. E. 762; Colderwood *v.* McCrea, 11 Ill. App. 543; Carroll *v.* Holmes, 24 Ill. App. 453; Beveridge *v.* Hewitt, 8 Ill. App. 467.

Kentucky. — Beadles *v.* M'Elrath, 8 Ky. L. Rep. 848, 3 S. W. 152.

Minnesota. — Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

New Jersey. — Flagg *v.* Baldwin, 38 N. J. Eq. 219.

Pennsylvania. — Kirkpatrick *v.* Bonsall, 72 Pa. St. 155.

South Dakota. — Waite *v.* Frank, 14 S. D. 626, 86 N. W. 645. And see Rogers *v.* Marriott, 59 Neb. 759, 82 N. W. 21; Sprague *v.* Warren, 26 Neb. 326, 41 N. W. 1113, 3 L. R. A. 679; North *v.* Phillips, 89 Pa. St. 250; Ruchizky *v.* De Haven, 97 Pa. St. 202.

In Wheeler *v.* McDermid, 36 Ill. App. 179, the fact that a country clergyman bought and sold within three months hundreds of thousands of bushels of corn, that on a single day he sold four hundred thousand bushels and made a single purchase for a like amount, and that not a bushel of corn was ever seen, received, delivered, tendered or demanded by anybody, was regarded as evidence of the wagering character of the transactions, the court saying: "Was this country parson a merchant prince, that he could 'corner' the corn of Illinois, or a Joseph, that he could buy and crib such vast quantities of corn without money and without credit? To believe that such a thing was possible is to tax the credulity to the utmost limit, and to substitute for reason and common sense mere fairy tales, and gullibility that would put Baron Munchausen himself to shame." But see Stewart *v.* Schall, 65 Md. 289, 4 Atl. 399, 57 Am. Rep. 327; Edwards *v.* Hoeffinghoff, 38 Fed. 635.

In Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106, the court said: "The defendants urged, and some of the cases which they cited took the view, that the pecuniary inability of the defendants to pay the full price charged for the stocks bought ought to have great weight in inclining the court to believe that the intention was not to buy, but to fix a starting point for a wager. We do not find any force in this argument, particularly when the purchase is made through his broker and the purchaser avails himself of the broker's credit and facilities for borrowing on the stocks themselves. It only indicates at the most that the customer is buying for speculation rather than for permanent investment."

knowledge of such inability on the part of his client is a circumstance to be considered in determining his knowledge of the client's illegal intent.[50]

e. *Residence.* — So also a party's residence may be relevant evidence as to his intent to gamble in futures.[51]

f. *Occupation.* — And his occupation, and that he was not a dealer in the commodity involved in the transaction, is also admissible.[52]

g. *Broker's Failure to Demand Purchase-money.* — Among the features of conduct indicating wagering contracts conducted by a broker, the fact that he never calls upon his client for purchase-money, but only for margins, will sustain the inference that there was no intention actually to receive the property,[53] and also indicates the broker's knowledge of the client's intent.[54]

50. Williar *v.* Irwin, 11 Biss. (U. S.) 57, 30 Fed. Cas. No. 17,761; Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60.

In Waite *v.* Frank, 14 S. D. 626, 86 N. W. 645, the circumstances that a broker and his client resided in the same town, and that the broker was fully acquainted with the client's financial condition and knew that he could not make payment for the amount of commodities which he ordered purchased, and that he was not a shipper of such commodities nor interested in any business requiring their use, were held to sustain a finding that the broker had no intention of making deliveries of the commodities purchased, but did intend a settlement of differences. First Nat. Bank of Lyons *v.* Oskaloosa Pack. Co., 66 Iowa 41, 23 N. W. 255.

To charge grain brokers with knowledge that a client, ordering purchase and sales to be made for future delivery, intended to gamble, the fact that at the time the brokers made contracts for the client he was behind with his margins and was being pressed by them for money to make his margins good, should be considered by the jury. Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

51. Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

In Rumsey *v.* Berry, 65 Me. 570, it was held by practically an evenly divided court that the circumstance that a client of Chicago grain brokers lived in Bangor and had no wheat of his own, though making it appear "singular and even suspicious" that he should undertake to sell and deliver ten thousand bushels of wheat in Chicago, was an immaterial circumstance so far as the validity of the contract, or the broker's knowledge of the client's intent, was concerned; the dissenting judges regarding this circumstance, with proof that the client furnished the brokers with a margin which he failed to keep good, as sufficient evidence to go to the jury on the question of the intent of the parties to gamble.

52. Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862; Williar *v.* Irwin, 11 Biss. (U. S.) 57, 30 Fed. Cas. No. 17,761.

In Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60, in speaking of the proof on the issue of commission merchants' knowledge of their client's intention to gamble in grain transactions, the court said: "The defendant was a lawyer, as plaintiff well knew. Why was he buying thousands of bushels of wheat for future delivery, and then closing out the transaction in a short time?" So, conversely, it may be shown that the client was producing the commodity sold. Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485.

53. Jamieson *v.* Wallace, 167 Ill. 388, 47 N. E. 762. And see Wagner *v.* Hildebrand, 187 Pa. St. 136, 41 Atl. 34; Phelps *v.* Holderness, 56 Ark. 300, 19 S. W. 921; Wheeler *v.* McDermid, 36 Ill. App. 179.

54. Dows *v.* Glaspel, 4 N. D. 251,

h. *Broker's Statements and Accounts.* — A broker's statements and accounts have been held evidence to show the legality of a transaction or to cast suspicion upon it.[55]

i. *Correspondence.* — Correspondence between a broker and his client, couched in the language of illicit speculation, is evidence of gambling.[56]

j. *Method and Appliances of Broker's Business.* — And the method and appliances of a broker's business may be indicative of the illegal character of transactions had with him.[57]

60 N. W. 60; Melchert *v.* American Union Tel. Co., 11 Fed. 193.

As bearing on grain broker's knowledge that the client ordering purchases and sales to be made for future delivery intended to gamble, the fact that immediately after closing the deals the broker treated the transaction as at an end, and instead of charging the client with the purchase of grain sent him statements charging or crediting him, as the case might be, with the differences between the purchase and sale price, should be considered by the jury. Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

55. Lowry *v.* Dillman, 59 Wis. 197, 18 N. W. 4.

In Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. 106, the circumstance that a broker's client was credited on the former's books with the dividends on stocks purchased for him, was regarded as evidence of the actuality of the purchases, the court saying that it seemed quite improbable that this would have been done had no purchases in fact been made, and in the same case the court also said: "Another circumstance shown by the account seems to us remarkable, if it represented fictitious transactions. The final sale was on December 21st, entered on Monday, the 23rd. There were ninety shares of St. Paul sold—fifty at 62, and forty at 61⅞. If the contract had been to close out marginal stock at market quotations, the closing quoted prices for the day would have fixed the market price for the whole."

56. In Wheeler *v.* McDermid, 36 Ill. App. 179, letters by a grain broker to his client, saying: "You insisted on trading in such large amounts that we were obliged to urge some closing of it to prevent our making a loss." "We trusted you, or rather I trusted you, because your trades would have been closed out when the margins expired had it not been for me," and "You know, of course, you can sell at any time and draw your profits and margins as soon as sold," were said to be not apt for describing a real transaction, but exactly the reverse.

In Dows *v.* Glaspel, 4 N. D. 251, 60 N. W. 60, on the issue of commission merchants' knowledge of their client's intention to gamble in grain transactions, the court referred to correspondence in which the client distinguished between his "actual wheat account" and his "option account," and in which the commission merchants advised the client to close out wheat bought for future delivery and buy it back cheaper, as furnishing strong evidence of such knowledge.

57. Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745.

In Ballou *v.* Willey, 180 Mass. 512, 62 N. E. 1064, the fact that the defendant maintained an "exchange" on a shopping street for the purpose of enabling women to watch the stock market and speculate thereon, and that there was telephonic communication between living-rooms in the hotel, where there was a "ticker," and defendant's office, were referred to as circumstances tending to show that defendant had reasonable cause to believe that plaintiff did not intend to carry out her contract, the court saying that they might be "considered fairly, if unexplained, as trade tools or appliances, justifying . . . such inferences as are drawn in an-

k. *General Character of Broker's Business.* — But evidence of the illegal nature of transactions between a broker and other customers is inadmissible to characterize those had between him and a particular client.[58]

2. Recovery of Money Wagered. — A. Actions by Winner. a. *Burden of Proof.* — It is incumbent on a party suing to recover winnings on a gambling transaction to prove facts taking the case out of the general rule that courts will not aid parties to gambling contracts.[59] On the other hand, where the defense that the obligation sued on and fair on its face was given for a gambling debt is sought to be established, the proof on the part of the defendant must be clear and strong;[60] and evidence from which it may be imagined or suspected merely that the obligation originated in gambling transactions is insufficient.[61]

It has been held, however, that an indorsee, suing on a non-negotiable certificate of deposit averred by the defendant to have been originally transferred in settlement of a gaming debt, must negative the fact of the gambling transaction in order to have any standing in court.[62]

b. *Evidence Relevant to Defense of Wagering Transaction.* Where an action on a note is defended on the ground that it was given for a gambling consideration, evidence that the payee had the

other class of cases from the use of beer pumps, or the possession of liquor glasses containing heeltaps."

58. In Edwards *v.* Hoeffinghoff, 38 Fed. 635, the court permitted the books of a commission merchant, exhibiting transactions between him and third persons, to be examined by the jury to aid them in determining whether there was anything exceptional in selling wheat for cash, and whether the absence of entries showing such transactions tended to show that the commission merchant was not conducting a legitimate business. See also Gregory *v.* Wendell, 40 Mich. 432.

And in Staninger *v.* Tabor, 103 Ill. App. 330, which was an action to recover money lost in speculating in produce, evidence of defendants' deals with other customers than plaintiff was held admissible to show that defendants were running a "bucket shop," and that no grain or provisions were ever received or delivered.

59. Thus in an action by a client against a broker to recover profits made on a wagering contract for the future delivery of produce, it is incumbent on the plaintiff to show affirmatively that the money was paid to the broker by some third person; and the fact that the defendant held himself out as a broker, and may have ostensibly contracted as such, is insufficient to prove that in the particular transaction in question he had a principal who paid him money for the plaintiff. Floyd *v.* Petterson, 72 Tex. 202, 10 S. W. 526.

60. Pixley *v.* Boynton, 79 Ill. 351; Johnson *v.* Godden, 33 Ark. 600.

But in McCormick *v.* Nichols, 19 Ill. App. 334, it was held that an instruction that the defense of a gambling consideration pleaded in an action of assumpsit must be "clearly proven by a preponderance of the evidence" was properly refused, the court saying "A criminal offense was not necessarily, nor in fact, imputed to the plaintiffs, but we hold that as against them it was sufficient to prove a gambling contract . . . by the measure of evidence generally required in civil actions."

61. West *v.* Marquart, 78 Ill. App. 61.

62. Savings Bank of Kansas *v.* National Bank of Commerce, 38 Fed. 800.

general character of a gambler is inadmissible.[63] But evidence that he was in truth and fact a gambler is properly admitted.[64]

In an action on a note in the handwriting of a professional gambler, and executed by the maker while drunk, evidence that whenever he was in that condition he had a propensity to gamble is not admissible for the defense.[65]

B. Actions by Loser. — a. *Presumptions and Burden of Proof.* In an action to recover money lost in gambling, the defendants will be presumed to have known that they were receiving money which the owner could recover if he chose.[66] In such an action, the burden of proof is on the plaintiff to establish his case by a preponderance of the testimony.[67]

Matters Material to Be Shown. — It is sufficient for plaintiff to show the aggregate amount of his losses or their excess over his winnings between specified dates, without proving the amount and date of each particular loss, or the particular agent to whom each sum was paid.[68] It is not material in whose name the money lost was paid or deposited.[69]

Where suit is brought to recover money paid on a note given for a loss at gaming, the burden is upon the plaintiff to show the fact of payment, and the amount paid.[70]

63. Chambers *v.* Simpson, 3 Litt. (Ky.) 290. But in Fowler *v.* Chapman, 1 W. & W. Civ. Cas. Ct. App. (Tex.), § 963, evidence of the payee's reputation as a gambler was held admissible to prove that the transferee of a check had notice, when he obtained it, of its illegality.

64. Chambers *v.* Simpson, 3 Litt. (Ky.) 290.

65. Thompson *v.* Bowie, 4 Wall. (U. S.) 463. In this case the court said: "All evidence must have relevancy to the question in issue, and tend to prove it. If not a link in the chain of proof, it is not properly receivable. Could the habit of B. to gamble, when drunk, legally tend to prove that he did gamble on the day the notes were executed? . . . That B. gambled at other times, when in liquor, was surely no legal proof that because he was in liquor on the first day of January, 1857, he gambled with S. It is very rare that in civil suits the character of the party is admissible in evidence, and it is never permitted, unless the nature of the action involves or directly affects the general character of the party. B. was not charged with fraud, nor with any action involving moral turpitude. He was simply endeavoring to show that his own negotiable paper was given for money lost at play; and to allow him as tending to prove this to give evidence of his habit to gamble when drunk, would overturn all the rules established for the investigation of truth."

66. Parker *v.* Otis, 130 Cal. 322, 62 Pac. 571, 927.

67. Perry *v.* Gross, 25 Neb. 826, 41 N. W. 799.

68. Lear *v.* McMillen, 17 Ohio St. 464.

But where a statute authorizes the recovery of money lost at gaming by a person who "shall, at any time or sitting," lose a sum amounting in whole to $10, the plaintiff must prove a loss of $10 at some one time or fail in his case. Ranney *v.* Flinn, 60 Ill. App. 104.

69. Harnden *v.* Melby, 90 Wis. 5, 62 N. W. 535.

70. Buckley *v.* Saxe, 10 Mich. 328, in which it was also held that the mere production of the note by the plaintiff would not be evidence either of payment or the amount paid, since plaintiff's possession of the instrument is as consistent with

Money Wagered on Horse-Races.— In an action to recover money lost on a horse-race, it is immaterial whether the race was properly conducted, who was the winner, or who promoted the contest.[71]

b. *Competency and Relevancy of Evidence.* — Checks, drawn by the loser, to obtain, as he testifies, money afterward lost at gaming, are admissible in his action to recover it, as tending to corroborate him to the extent of showing that at that time he had money with which to gamble.[72]

Evidence in defense of an action to recover money lost on a wager, that part of that staked was counterfeit, is admissible, though the defendant does not produce the counterfeit notes.[73]

In an action against a stakeholder for money paid over on a wager after notice not to do so, one of the plaintiffs is a proper witness to prove such notice, though the wager was made by his co-plaintiff, he being an undisclosed principal.[74]

II. CRIMINAL RESPONSIBILITY.

1. General Rules. — A. Circumstantial Evidence. — In criminal prosecutions for violations of the laws against gambling, a conviction may be had on circumstantial evidence alone.[75]

the presumption that it was surrendered to him because void, as that it was given up upon payment.

71. Perry *v.* Gross, 25 Neb. 826, 41 N. W. 799.

Where a statute authorizing an action by the loser of money at gaming excepts money or property lost on any "turf race," the plaintiff, in such action, having shown that he lost his horse in a horse-race, must negative the possibility that it was a "turf race." Nelson *v.* Waters, 18 Ark. 570.

72. Kizer *v.* Walden, 96 Ill. App. 593.

73. App *v.* Coryell, 3 Pen. & W. (Pa.) 494. But the court said that the defendant's refusal to produce notes was a strong circumstance to rebut the evidence that they were counterfeit.

74. Turner *v.* Thompson, 21 Ky. L. Rep. 1414, 55 S. W. 210.

75. Rice *v.* State, 10 Tex. 545; Com. *v.* Warren, 161 Mass. 281, 37 N. E. 172; Padgett *v.* State, 68 Ind. 46. In a prosecution for keeping a gambling-house, evidence from which the jury may infer the fact that defendant was a keeper is sufficient, since from the nature of the thing positive proof on the part of the state can neither be expected nor required. State *v.* Worith, R. M. Charlt. (Ga.) 5.

In Roberts *v.* State, 25 Ind. App. 366, 58 N. E. 203, which was a prosecution for visiting a gambling-house, certain circumstantial evidence was held to warrant the inference that the room where defendant was found was a gambling-room, notwithstanding the direct testimony of the persons found there that no gambling was being carried on, the court saying: "If it was necessary to establish the fact by direct and positive evidence, the state has wholly failed. But such is not the law. It often occurs in prosecutions for the violation of criminal statutes, that it is impossible to establish the defendant's guilt by direct and positive evidence, and, if the state did not have resort to other means of proof, the guilty would go unpunished. . . . Circumstantial evidence is one of the means of establishing the fact in dispute." See also Need *v.* State, 25 Ind. App. 603, 58 N. E. 734.

On a prosecution for keeping a gambling-house, evidence that defendant was seen in certain rooms dealing cards at faro, that the rooms

B. Expert and Opinion Evidence. — Though a witness who saw a game may testify in general terms what it was, expert evidence that certain acts constitute a gambling game is not admissible;[76] and testimony that the witness supposed defendant was the

were kept and used as common gambling-rooms, that defendant had charge of them, and that whenever any questions arose about the games played there disputes were referred to him for settlement, is sufficient to warrant an inference that the gambling there carried on was for money or other valuable things, and will support a conviction, though explicit testimony to that effect was not given. Robbins *v.* People, 95 Ill. 175.

In a prosecution for renting a house to be used for gaming, the illegal purposes for which the lease was made need not be shown by direct evidence. Rodifer *v.* State, 74 Ind. 21. At least, where there is a statute providing that it shall be sufficient evidence of the unlawful purpose, if gaming is actually carried on in the building and the owner or lessor knows or has reason to believe that such is the fact and does not prevent it. Voght *v.* State, 124 Ind. 358, 24 N. E. 680.

76. People *v.* Rose, 85 Cal. 378, 24 Pac. 817; People *v.* Gosset, 93 Cal. 641, 29 Pac. 246; People *v.* Carroll, 80 Cal. 153, 22 Pac. 129. In this last case, the court said: "We do not concur in the view, however, that one witness can describe the game, and another can be allowed to testify that, from the description, the game was a banking game, or any other. We think a person who knows the game may testify in general terms what the game he witnessed was. If not familiar with the game, he may describe it, and the court should instruct the jury as to what constitutes the game charged to have been played or conducted, leaving the jury to determine whether the game played was the one charged or not. To leave the question open to be proved or disproved in every case by experts would lead to great uncertainty in the administration of justice." But in this case it was held not a ground for reversing a conviction of gambling, that a witness had been permitted to define a "banking game," the definition being substantially correct, and such as the court should have given in its instructions.

In People *v.* Sam Lung, 70 Cal. 515, 11 Pac. 673, the court said: "The testimony of the witnesses Carrow and Nesbit was not expert testimony in the proper sense of such term. One of them was called, who testified in effect that he saw the defendant conducting a certain game for money or its equivalent, and described it before the jury; the other witness was called, who had illustrated to him the game which was shown before the jury. He said: 'That is the game of tan.' This did not take away from the jury the determination of the material thing at issue — that is, whether or not the defendant had carried on or conducted such a game for money as that illustrated by one witness, and identified as being a certain kind of a game by another witness. A given individual may have witnessed the playing of some ordinary game of cards for money but twice or thrice in his life, and heard the players denominate it by its proper name, and yet he may be able readily (when he has such a game as he formerly observed illustrated before him) to declare that such game is the game he formerly saw played; and in such recollection or identification no special skill or science is a necessary ingredient. And such evidence is entirely proper, and may sometimes be all that can be had in a given case upon a special point. The evidence given was competent and pertinent to the issue; of its force the jury alone were the judges."

But in Com. *v.* Adams, 160 Mass. 310, 35 N. E. 851, which was a prosecution for being present in a common gaming-house when gambling implements were found there, the court said: "The witness O. was properly permitted to testify as an expert. It is not to be assumed that

banker in a gambling game from the position he occupied at the table has been excluded as opinion evidence.[77]

C. Proof of Value. — It will be presumed that things bet at a gambling game were of some value,[78] and courts will take judicial notice that money used in gambling has value,[79] so that fact need not be proved.[80] So a jury may infer that tokens used in play at a gaming table represented money or something of value.[81] Still the fact that such tokens represented different denominations of money may be proved, the fact being material and relevant.[82]

D. Evidence of Other Offenses — Evidence of other offenses or of convictions thereof is generally inadmissible,[83] but where such

the jury were acquainted with the mode of playing an unlawful game, and the presiding justice might allow the witness to testify to his special knowledge, derived from playing the game more than one thousand times during a period of ten years, although the last occasion was more than a year before the trial, and there had since been changes and alterations in the game of which the witness knew only by hearsay. Even if he testified on the strength of information which he had not personally verified, such testimony might be admissible." The testimony of the witness, or the issue on which it was offered, is not disclosed in the opinion. See also Hall *v.* State, 6 Baxt. (Tenn.) 522.

So in a prosecution for selling "lottery policies," under a statute containing no definitions of the terms, and the papers themselves not being before the court, it has been held competent to show by one who has familiarized himself with such documents, precisely what is known among those who use them, as a "lottery policy." People *v.* Emerson, 25 N. Y. St. 466, 6 N. Y. Supp. 274.

77. People *v.* Ah Own, 85 Cal. 580, 24 Pac. 780.

78. Simms *v.* State, 60 Ga. 145.

79. Grant *v.* State, 89 Ga. 393, 15 S. E. 488.

80. Mallory *v.* State, 62 Ga. 164.

81. In order to convict for betting at faro, it is not necessary to prove that defendant wagered some particular piece of coin, it being sufficient to show that he bet small pieces of silver money, the denomination or legal character of which the witness did not know. State *v.* Douglass, 1 Mo. 527; Stevens *v.* State, 3 Ark. 66; but see *contra,* State *v.* Brooks, 94 Mo. App. 57, 67 S. W. 942.

82. And the state may prove generally, in chief, that poker-chips, such as defendant had, commonly represented money in gambling, leaving the source and extent of the witness' knowledge to be tested upon cross-examination. Wilson *v.* State, 113 Ala. 104, 21 So. 487.

83. Thus in a prosecution for gambling it is error to ask defendant on cross-examination whether he ever before played cards for money. State *v.* Trott, 36 Mo. App. 29. In this case the court said: "The question thus put to the witness by the state's attorney was not only not pertinent to the witness' direct examination, or to the issues, but it was inadmissible as evidence against him on any theory, and it thrust into the minds of the jurors an irrelevant matter which was highly prejudicial to the accused."

So in a prosecution for keeping and exhibiting a gaming-table, evidence that defendant had often been seen gambling, that he and his partner kept a gambling-house, and that defendant had frequently played poker, is irrelevant and inadmissible. Ah Kee *v.* State (Tex. Crim.), 34 S. W. 269.

And in a prosecution for playing cards in a public place, evidence that defendant had been previously convicted of gambling is not competent. Goldstein *v.* State (Tex. Crim.), 35 S. W. 289.

evidence illustrates, explains or corroborates the previous proof it is admissible.[84]

2. Evidence in Particular Cases. — A. Prosecutions for Gambling. — a. *Presumptions, Burden of Proof and Matters to be Proved.* — **(1.) In General.** — In conformity no doubt to the usual presumption of innocence, it has been held in a criminal prosecution for dealing in options, that telegrams from the defendant to the firm with which he was charged to have dealt unlawfully, but which were within the lines of his legitimate business, would be presumed to relate to lawful business matters.[85]

And yet it has also been held in a prosecution for betting at a gaming table that if it were material to make out the offense, the keeper of the table would be presumed to have known of and consented to the gambling.[86]

The nature of the game is the important element, and its name is immaterial.[87] It is sufficient to show that defendant, with others, played at cards for money, without explaining the character of the game, or which of the players lost or won.[88]

Though in a prosecution for betting money on an alleged gaming table, the character of the table must be shown, proof of a single instance of unlawful playing, even by the defendant himself, is sufficient for that purpose.[89]

(2.) Necessity of Showing Wager. — In a prosecution for gambling, the state must show that defendant bet money or some other thing of value.[90] And this must be proved beyond a reasonable doubt.[91]

84. Thus in a prosecution for keeping a gaming-house, evidence of other acts than the one relied on as constituting the offense is admissible for the purpose stated in the text. Toll *v.* State, 40 Fla. 566, 23 So. 942.

And in a prosecution for selling lottery tickets, evidence that defendant, for a period of time covering the particular offense charged, had been engaged in the lottery business, is relevant. People *v.* Noelke, 94 N. Y. 137.

So where the defendant has pleaded guilty to violating an ordinance, that fact may be shown on the trial of an indictment for an offense consisting of the same acts. Bibb *v.* State, 83 Ala. 84, 3 So. 711.

85. State *v.* Gritzner, 134 Mo. 512, 36 S. W. 39.

86. Ramey *v.* State, 14 Tex. 409.

87. Smith *v.* State, 17 Tex. 191.

88. Arnold *v.* State, 117 Ga. 706, 45 S. E. 59.

89. Ramey *v.* State, 14 Tex. 409.

90. Thompson *v.* State, 99 Ala. 173, 13 So. 753.

But in a prosecution for betting at a pool-table it seems that the money or thing bet must have been in excess of the charge for the use of the table, and the mere statement of a witness that defendant bet at a game is insufficient to show this. Bone *v.* State, 63 Ala. 185.

91. Russ *v.* State (Ala.), 35 So. 107.

In Moss *v.* State, 17 Ark. 327, the affirmative testimony of one witness to an act of betting was held sufficient as against that of another witness that he was present and saw no bet made, the court saying that testimony of the latter witness was of a negative character, which did not counterpoise that of the witness for the state, but that the jury had a perfect right to discredit the statements of one and found their verdict upon those of the other.

In Tatum *v.* State, 33 Fla. 311, 14 So. 586, a conviction of gambling

So it must be shown that defendant himself did the betting.[92] It is also necessary to show that other persons were present besides defendant who played and bet on the game.[93]

It seems that it is unnecessary to prove the actual payment over to defendant of money won by him at the gaming for which he is prosecuted.[94]

b. *Competency and Relevancy of Evidence.* — The articles used in gambling are admissible to aid in illustrating the kind of game, and also as part of the *res gestae*.[95]

Where one witness has testified to the commission of the offense by the defendant, the evidence of another that he saw defendant at the place where the gambling occurred is admissible in corroboration, though the latter witness did not see defendant play.[96]

On a prosecution for betting on an election parol evidence is admissible to show that one of the persons on whom the wager was placed was a candidate.[97]

c. *Testimony of Accomplice.* — The general rule that a conviction of a criminal offense cannot be had on the uncorroborated testimony of an accomplice obtains in prosecutions for gaming,[98] but the views of the court as to what constitutes an accomplice vary widely.[99]

was sustained on the evidence of a witness who testified that he saw some money on the ground where defendant and others were playing cards, but did not know whether they were betting or not. But see Oder *v.* State, 26 Fla. 520, 7 So. 856.

92. Jackson *v.* State, 117 Ala. 155, 23 So. 47.

Evidence that defendant was playing poker when a pool was up warrants the conclusion that he put up his money, though there is no direct proof to that effect. Cohen *v.* State, 17 Tex. 142.

The fact that defendant has not paid for the chips with which he gambles at poker is immaterial. Robinson *v.* State, 77 Ga. 101.

For an instance of evidence held sufficient to warrant the inference by the jury that defendant bet money on a game of "craps," see Thompson *v.* State, 99 Ala. 173, 13 So. 753.

93. Thompson *v.* State, 99 Ala. 173, 13 So. 753.

94. Branscum *v.* State, 7 Ind. 503.

95. People *v.* Sam Lung, 70 Cal. 515, 11 Pac. 673. In this case the game in question was "tan," and the articles used in carrying it on were styled the "layout."

96. Washington *v.* State (Tex. Crim.), 50 S. W. 341.

97. Brand *v.* Com., 23 Ky. L. Rep. 416, 63 S. W. 31.

98. Bird *v.* State, 36 Ala. 279.

But in Grant *v.* State, 89 Ga. 393, 15 S. E. 488, which was a prosecution for gambling, the court says that the uncorroborated testimony of an accomplice is sufficient to warrant a conviction of a misdemeanor.

In Texas it is provided by statute (Penal Code, Art. 367) that a conviction for gaming may be had on the unsupported evidence of an accomplice or participant, and this statute has been sustained as constitutional. Wright *v.* State, 23 Tex. App. 313, 5 S. W. 117. And see article "ACCOMPLICES," Vol. I.

99. Thus it has been held that a participant in a game of cards is an accomplice of his adversary. Davidson *v.* State, 33 Ala. 350.

But it has also been held that one who bets at a game of pool with others, the players betting with and against each other, is not an accom-

B. Prosecutions for Gaming at Particular Place. — a. *Burden of Proof and Matters to be Proved.* — **(1.) Fact of Bet.** — In a prosecution for playing cards in a public house, it has been held unnecessary for the state to show that anything was bet on the game, the fact that no wager was made being a matter of defense which the defendant must affirmatively establish.[1]

(2.) Character of Place. — In a prosecution for playing cards in a public place the state must show the place to have been such as the general public had access to for business, pleasure, religious worship or other public purpose.[2]

plice of the others. Stone *v.* State, 3 Tex. App. 675. In this case the court said: "There is not that oneness of intent and oneness of offense between them to make them principals. No one of them is aiding or assisting another by acts or encouraging by words in the commission of the offense. Each acts independently for himself against the others, and without concert mediately or immediately with the other betters. . . . Each one, as he takes part in the game and bets money on it, is guilty of a separate offense." And in Branscum *v.* State, 7 Ind. 593, a conviction of gambling seems to have been sustained on the uncorroborated testimony of the defendant's adversary in the game, the question of corroboration not having been raised.

It has been held that one who plays without participating in the betting is not an accomplice. Bass *v.* State, 37 Ala. 469, and, *contra,* that a dealer in a game of stud-poker is an accomplice with those who bet at the game, though he does not bet himself and receives no compensation or share of the profits. State *v.* Light, 17 Or. 358, 21 Pac. 132. But it seems that one who participates in the betting, sharing the gains and losses of a player and advancing money to him to be used in wagers on the game, is an accomplice of the player, though he does not play himself. English *v.* State, 35 Ala. 428.

Merely assisting a player who does not understand the game, by instructing him from time to time how to play, occasionally taking a card from his hand and throwing it on the table for him, and in one instance, during the player's momentary absence, playing one of his cards for him, is insufficient to constitute an accomplice. Smith *v.* State, 37 Ala. 472.

In Day *v.* State, 27 Tex. App. 143, 11 S. W. 36, it was held that a witness who had engaged in playing "craps" during the night on which defendant had also played, was not an accomplice to an extent that would exclude his testimony in defendant's behalf, under a statute making persons indicted as accomplices incompetent witnesses for the principal defendant.

One who purchases a lottery ticket for the purpose of detecting and punishing the crime of selling the same is not an accomplice of the seller, since he lacks the criminal intent. People *v.* Noelke, 94 N. Y. 137. And see also, People *v.* Emerson, 53 Hun 437, 6 N. Y. Supp. 274, where such a purchaser was held not an accomplice of the seller because the statute did not make the purchase of a lottery ticket a criminal act.

1. Wilcox *v.* State, 26 Tex. 146.

2. But a house to which all who wish can go night or day and indulge in gaming is a public place, though it is also otherwise used and entrance can be obtained only by permission and after surveillance. Smith *v.* State, 52 Ala. 384. The playing must be shown to have taken place at the time when the house was accessible to the public, and proof that it occurred at night when the house was closed for its regular business is insufficient. Turbeville *v.* State, 37 Tex. Crim. 145, 38 S. W. 1010. But a mere temporary closing for the purposes of the game

Propinquity to Public Place. — In Alabama, in a prosecution for playing cards in a public place, the same being an upper room in a house occupied below for business purposes, it has been held that the house is *prima facie* an entirety, a presumption which is not overthrown by evidence of mere non-user, or by use as a storeroom for waste material.[3] But in Texas this idea of entirety, which formerly prevailed, is now overthrown; and some business connection must be shown between the portion of the building used for business purposes and that in which the gaming occurs.[4] Nor will it be presumed that the proprietor of the business establishment had control over rooms in the building not connected with his own.[5] Proof, however, that the room in which the playing occurred was in any manner connected with or used for the purposes of the business established is sufficient.[6]

In a prosecution for playing cards in a public place, proof of playing within view of a public place sufficiently makes out the state's case.[7]

b. *Competency and Relevancy of Evidence.* — In a prosecution for playing cards at a gambling-house, evidence that gamblers were

will not defeat a conviction. Gomprecht *v.* State, 36 Tex. Crim. 434, 37 S. W. 734.

Where the prosecution is for playing cards at a store, the state need not prove that the proprietor sold his goods to all persons in general, the presumption being that merchants sell to all who choose to become their customers. Redditt *v.* State, 17 Tex. 610.

In a prosecution for playing cards at a gambling-house, it must be shown that gaming was carried on there as a business and the house devoted to that purpose. Anderson *v.* State (Tex. App.), 12 S. W. 868. Card-playing on but one occasion when no one is present but those concerned in the game will not show the place to be one where people resort. Wheelock *v.* State, 15 Tex. 260.

3. Cochran *v.* State, 30 Ala. 542.

4. In O'Brien *v.* State, 10 Tex. App. 544, the court said: "If defendant used the room in connection with his beer saloon, or the business carried on in the saloon; if he had sent drinks into the room to the players, thus using it in connection with and in aid of his business, the allegation that it was a beer saloon would be sustained. The learned judge must have fallen into the opinion of the Supreme Court in Cole *v.* State, 9 Tex. 42; Pierce *v.* State, 12 Tex. 210; Redditt *v.* State, 17 Tex. 610. In these cases it was held that a house for retailing spirituous liquors included the whole house, from cellar to garret, regardless of approaches. These cases have been overruled, and now the room in which the game is played must be shown to have the inhibited character. It is not necessary that it is in the main business room; if it be auxiliary to or used in connection with the business of the principal room, this will suffice. Holtzclaw *v.* State, 26 Tex. 682; Horan *v.* State, 24 Tex. 161."

5. Holtzclaw *v.* State, 26 Tex. 682. And see Robinson *v.* State (Tex. App.), 19 S. W. 894; Stebbins *v.* State, 22 Tex. App. 32, 2 S. W. 617.

6. Watson *v.* State, 13 Tex. App. 160.

But in a prosecution for playing cards at a house where spirituous liquors are retailed, evidence that liquors were served from the saloon to the players in the room where the gaming occurs establishes a sufficient connection. Stebbins *v.* State, 22 Tex. App. 32, 2 S. W. 617.

7. White *v.* State, 39 Tex. Crim. 269, 45 S. W. 702.

But proof of playing in a hollow

in the habit of resorting to the house is admissible as tending to show its character.[8]

So evidence that lights were seen at different times in a house is admissible to prove that people commonly resorted there,[9] and evidence that whisky was sold at a certain place is admissible to show public patronage thereof.[10]

In a prosecution for gaming at a place other than a private residence, evidence of the particular place where the offense occurred may be introduced.[11] Evidence of a group of persons playing cards where and when the offense was charged to have been committed is admissible in corroboration, though defendant was not recognized by the witness.[12]

C. Prosecution for Being a Common Gambler. — Competency and Relevancy of Evidence. — On a prosecution for being a common gambler, evidence of the defendant's reputation is improper,[13] but evidence of a single act of gaming by the defendant is admissible.[14]

D. Prosecutions for Keeping or Permitting Gaming-house or Device. — a. *Burden of Proof and Matters to be Proved.* (1.) **In General.** — The general rule that in a criminal case guilt must be established beyond a reasonable doubt has been extended to an action to recover from a railroad company a penalty for suffering gaming on its cars — the action being, in effect, a criminal prosecution.[15] In a prosecution for keeping a gambling-room, the names of the persons who gamble at the place are immaterial,[16] and likewise, in a prosecution for exhibiting a gaming-table, it is imma-

more than a hundred yards from a public place, and not in view therefrom, nor from which the public place may be seen, and where no one has played before, is insufficient. Smith *v.* State, 23 Ala. 39.

8. Anderson *v.* State (Tex. App.), 12 S. W. 868, in which it was, however, held that evidence that one of the players who played with defendant was a professional gambler was immaterial and irrelevant. See also Washington *v.* State (Tex. Crim.), 50 S. W. 341.

9. Moore *v.* State, 35 Tex. Crim. 74, 31 S. W. 649.

10. White *v.* State, 39 Tex. Crim. 269, 45 S. W. 702.

11. Washington *v.* State (Tex. Crim.), 50 S. W. 341.

12. Franklin *v.* State, 91 Ala. 23, 8 So. 678.

13. Com. *v.* Hopkins, 2 Dana (Ky.) 418. In this case the court said: "It is the general course of conduct in pursuing the business or practice of unlawful gaming which constitutes a common gambler. A man's character is, no doubt, formed by and results from his habits and practices; and we may infer, by proving his character, what his habits and practices have been. But we do not know any principle of law which sanctions the introduction of evidence to establish the character of the accused with a view to convict him of offending against the law upon such evidence alone."

14. A single act may be attended with such circumstances as will justify a conviction. Com. *v.* Hopkins, 2 Dana (Ky.) 418.

15. Louisville & N. R. Co. *v.* Com., 23 Ky. L. Rep. 1900, 66 S. W. 505.

16. Winemiller *v.* State, 11 Ind. 516.

terial to whom the token was sold which entitled a player to participate in the game.[17]

(2.) Character of House or Device. — To convict of keeping a common gaming-house, the state must prove two essential things: first, that the house was a gaming-house; second, that it was kept by defendant.[18]

It seems that proof of a single instance of gambling is insufficient to fix the character of the house.[19] While it is held in one state that if the house was kept with the intent that gambling should be carried on there, it is sufficient to establish the offense, whether gambling was actually carried on or not.[20] Certainly, it is not necessary to show that the house was open to the public generally.[21]

It is not necessary to show that defendant carried on gaming at the place as a business for profit, or that gambling was the only business for which the place was used, or that it was constantly kept for that purpose, or that the gaming was visible from the exterior, or that defendant occupied the whole house.[22] Nor need it be shown that the mechanism of the defendant's business constituted a gambling device.[23]

In a prosecution for exhibiting a gaming-table, the nature of the game played must be shown sufficiently to establish its incriminating character.[24]

17. Dalton *v.* State (Tex. Crim.), 74 S. W. 25.

18. State *v.* Mosby, 53 Mo. App. 571.

19. White *v.* State, 115 Ga. 570, 41 S. E. 986; Bell *v.* State, 92 Ga. 49, 18 S. E. 186.

Thus proof of occasional games of poker privately played with acquaintances for money is insufficient. State *v.* Mosby, 53 Mo. App. 571.

But in State *v.* Cooster, 10 Iowa 453, in commenting on an instruction that a single act of gambling was sufficient to show that defendant kept a gambling-house, the court said that while some of the old authorities seemed to sustain the contention that this was erroneous, it did not think that a fair construction of the statute punishing a person "who kept a place resorted to for the purpose of gambling" required that the place kept must be first frequented by numbers before the crime was complete. So evidence of a single act of gaming is admissible, and is sufficient to sustain a conviction if the jury chooses to so regard it. Armstrong *v.* State, 4 Blackf. (Ind.) 247. A single act, with attending circumstances and surrounding indications, may be sufficient evidence to show that the house was really a gaming-house. Bell *v.* State, 92 Ga. 49, 18 S. E. 186.

20. State *v.* Miller, 5 Blackf. (Ind.) 502; McAlpin *v.* State, 3 Ind. 567.

21. State *v.* Mosby, 53 Mo. App. 571; Com. *v.* Blankinship, 165 Mass. 40, 42 N. E. 115. In this latter case, the fact that an unincorporated club of one hundred and fifty members occupied rooms commonly used for gambling by them and such others as they invited, was held to establish a common gaming-house, though it was not open to the public generally.

22. State *v.* Mosby, 53 Mo. App. 571.

23. State *v.* Grimes, 74 Minn. 257, 77 N. W. 4.

24. Jackson *v.* State (Tex. Crim.), 25 S. W. 773, and see Ramey *v.* State (Tex. App.), 18 S. W. 417.

Proof that defendant owned the table, exhibited the game, and took the bets, and that the players bet against him, is sufficient to show that the game was played as a table

(3.) **Scienter.** — The state must prove that the defendant had knowledge that gambling was taking place on his premises.[25] But where defendant is in possession of the premises, the fact that gaming occurs there raises a presumption of knowledge.[26] Supplying instrumentalities for gaming is, of course, sufficient evidence of knowledge.[27] Defendant's presence while gambling is going on in his premises, even though he is inattentive, will also show knowledge.[28]

(4) **Permission.** — In a prosecution for permitting gambling in one's house, proof of express permission, while the best evidence, is not essential, proof of facts from which permission may be fairly inferred being sufficient.[29]

or banking game. Mohan *v.* State, 42 Tex. Crim. 410, 60 S. W. 552.

But the principle of one against the many need not be shown to permeate the game played. Dalton *v.* State (Tex. Crim.), 74 S. W. 25.

In a prosecution for keeping a faro-table for the purpose of betting thereat, proof that the things bet were of value is not essential. Simms *v.* State, 60 Ga. 145.

Judicial Notice. — In a prosecution for setting up and keeping a contrivance in general use for gaming purposes, proof must show that the contrivance was ordinarily used for gambling, and the court will not take judicial notice that a keno-table is such a contrivance. Com. *v.* Monarch, 6 Bush (Ky.) 298.

25. Harris *v.* State, 5 Tex. 11.

Mere proof that gambling occurs on the defendant's premises is a circumstance tending to show the scienter. State *v.* Cooster, 10 Iowa 453. But standing alone it is not sufficient evidence thereof. Padgett *v.* State, 68 Ind. 46; State *v.* Currier, 23 Me. 43; State *v.* Cooster, *supra,* in which latter case an instruction that the law would presume defendant's permission from the fact that gambling occurred on the premises, was held improper.

See *post,* "E.— Prosecution for Renting Houses for Gambling Purposes. a. — Burden of Proof and Matters to be Proved."

26. McGaffey *v.* State, 4 Tex. 156; Robinson *v.* State, 24 Tex. 152, and see Ward *v.* People, 23 Ill. App. 510.

But the mere fact of ownership without possession would not raise such presumption. The presumption is commensurate with the size of the house and the defendant's exclusive occupancy. Harris *v.* State, 5 Tex. 11. The burden is of course on the defendant to rebut the presumption. McGaffey *v.* State, 4 Tex. 156; Robinson *v.* State, 24 Tex. 152.

27. State *v.* Cooster, 10 Iowa 453, and see Mohan *v.* State, 42 Tex. Crim. 410, 60 S. W. 552.

But where such instrumentalities may also be innocently used, and defendant has expressly forbidden their improper use, there must be further evidence of the scienter. Wells *v.* State, 22 Tex. App. 18, 2 S. W. 609; Smith *v.* State, 28 Tex. App. 102, 12 S. W. 412.

28. Hamilton *v.* State, 75 Ind. 586.

29. Harris *v.* State, 5 Tex. 11, in which it was also held that proof that defendant witnessed the occurrence and did not immediately stop it or prevent its recurrence showed permission.

So, evidence that persons came together and gambled at defendant's house has been held to warrant an inference of permission. Stoltz *v.* People, 5 Ill. 168. And see also Ward *v.* People, 23 Ill. App. 510, in which it was held that proof that after assembling at defendant's house the persons so meeting there engaged in gambling with his consent would be strong evidence that he permitted them to meet for that purpose, but that such proof of playing was not indispensable to establish his guilt of the offense of permitting persons to come together to gamble.

(5.) Participation. — In a prosecution for keeping and exhibiting a gaming-table, the state must show that defendant actually participated in the exhibition, or was interested therein.[30]

Proof that defendant dealt the cards as keeper of a faro-table is *prima facie* evidence that he was keeper of the house.[31]

Evidence that defendant conducted the business of a gambling-room and took out a "chip" when certain cards were played, the take-out going to pay for drinks, etc., warrants the inference that he received compensation, though it does not directly appear that he received the balance of the take-out after the expenses were paid.[32] So the fact that persons came together and gambled at defendant's saloon warrants an inference that he benefited thereby.[33]

In a prosecution for permitting gaming in a house under defendant's control, evidence that the house was under the control of defendant's tenant will not sustain a conviction.[34]

(6.) Permitting Minor to Play at Billiard-Table. — On the trial of the keeper of a billiard-table for permitting a minor to play thereat without his parents' consent, the burden of proving the absence of such consent is upon the state.[35]

(7.) Keeping Pool-Room. — On a prosecution for keeping a pool-room where bets were registered on horse-races, evidence that the defendant was the mere agent of the person making the bet, to place it on a certain horse, for a commission, does not show the offense.[36] Where defendant, by the part he takes in registering

30. Jackson *v.* State (Tex. Crim.), 25 S. W. 773.

But he need not be shown to be the owner or have an interest where the proof shows that he exhibited the table. Lettz *v.* State (Tex. Crim.), 21 S. W. 371; Rice *v.* State, 3 Kan. 135.

On the other hand, proof that the business was in the immediate control of an agent will not defeat a conviction where the defendant was the actual owner; and this is true notwithstanding that the fact that defendant is the person whose establishment or business the gambling room is must be shown beyond a reasonable doubt. Wooten *v.* State, 24 Fla. 335, 5 So. 39.

But actual participation must be shown, and proof of defendant's mere presence is insufficient. Blum *v.* State (Tex. Crim.), 47 S. W. 1002; Erwin *v.* State, 25 Tex. App. 330, 8 S. W. 276.

Slight participation, however, such as returning the dice to the dealer, has been held to be enough. Smith *v.* State (Tex. Crim.), 33 S. W. 871.

31. United States *v.* Miller, 4 Cranch C. C. 104, 26 Fed. Cas. No. 15,773.

32. Harper *v.* Com., 93 Ky. 290, 19 S. W. 737.

33. Stoltz *v.* People, 5 Ill. 168.

34. Kimborough *v.* State, 25 Tex. App. 397, 8 S. W. 476.

But where defendant retains control in spite of the renting, the rule is otherwise. Hodges *v.* State, 44 Tex. Crim. 444, 72 S. W. 179.

35. Conyers *v.* State, 60 Ga. 103, 15 Am. Rep. 686.

But the state, having made a *prima facie* case, it is incumbent on the defendant to show that he believed in good faith and with good reason that the minor was of full age. Taylor *v.* State, 107 Ind. 483, 8 N. E. 450, in which it was also held that mere inquiries of him and his reply that he was an adult would not overthrow a conviction.

36. People *v.* Wynn, 58 Hun 609, 12 N. Y. Supp. 379.

But the agency must be *bona fide*. People *v.* Fisher, 62 Hun 622, 17 N. Y. Supp. 162.

bets, practically admits that there are horses of the names shown on the blackboard, the fact that the witness had never seen the horses is immaterial.[37] And where it appears that a witness selected a number and bet his money without anything being said as to the defendant's undertaking, the inference from the form of the transaction is that it was selling a pool and not making an ordinary bilateral wager.[38]

b. *Statutory Rules as to Prima Facie Evidence.* — A statute providing that if any gambling apparatus shall be found in any house it shall be *prima facie* evidence that the house is kept for gambling purposes is not unconstitutional.[39]

c. *Competency and Relevancy of Evidence.* — **(1.) In General.** In a prosecution for keeping a gaming-table, evidence that defendant was a professional gambler is not admissible.[40]

(2.) Character of House. — In a prosecution for keeping a gaming-house, evidence of defendant's reputation as a gambler is admissible to establish the character of the place.[41]

Evidence of what was done at the place, the kind of games played, and the character of the betting transacted is admissible for the same purpose, though defendant is not shown to have been present.[42]

And evidence of the reputation of those who frequent the place as being gamblers is relevant.[43]

37. Com. *v.* Clancy, 154 Mass. 128, 27 N. E. 1001.

38. Com. *v.* Watson, 154 Mass. 135, 27 N. E. 1003.

39. Wooten *v.* State, 24 Fla. 335, 5 So. 39. In this case it was also held that such a statute did not deprive a defendant of due process of law.

Nor does it infringe the presumption of innocence accorded to all accused persons. Houston *v.* State, 24 Fla. 356, 5 So. 48.

Such a statute does not render the discovery of gambling apparatus *prima facie* evidence of actual gambling. Richardson *v.* State, 41 Fla. 303, 25 So. 880.

40. Lettz *v.* State (Tex. Crim.), 21 S. W. 371.

41. State *v.* Mosby, 53 Mo. App. 571.

42. Bindernagle *v.* State, 60 N. J. L. 307, 37 Atl. 619, in which such evidence was also held admissible as part of the *res gestae*. See also, as to the admissibility of evidence of the *res gestae*, State *v.* Wilson, 9 Wash. 16, 36 Pac. 967, and Bibb *v.* State, 83 Ala. 84, 3 So. 711, in which latter case it was held, on the trial of an indictment for keeping a gaming table, to be competent to show by a witness that he had heard on several occasions "the rattle of chips," such as are commonly used in playing poker, going on in the room occupied by the accused; and on one occasion had heard, accompanying such sounds, words indicative of a proposal to bet money.

Evidence of gaming in the house previous to the offense charged is likewise admissible to show its character. Chase *v.* People, 2 Colo. 509; State *v.* Agudo, 5 La. Ann. 185.

But evidence for the defense of other uses to which the room and apparatus were put, such as that the room was defendant's private bedroom, and that the table found there was ordinarily used by him to eat his meals on, is properly excluded as irrelevant. Bibb *v.* State, 83 Ala. 84, 3 So. 711.

43. State *v.* Mosby, 53 Mo. App. 571. In this case the court said: "Now, proof showing the reputation of those who frequented a house, or who habitually resorted to it, is a very persuasive portion of evidence,

(3.) Scienter and Participation. — Evidence that gambling was carried on in the house previous to the offense charged is admissible to show defendant's guilty knowledge and intent.[44] And where it appears that defendant was cognizant of the gaming and frequently took part therein, evidence that he had established a rule forbidding gambling is properly excluded.[45] Evidence that defendant's saloon was connected by call bells with the rooms in which the offense occurred is admissible to show his connection with the gaming.[46] A deed to him is admissible to show his ownership of the premises.[47]

A servant charged with participating in keeping his master's gambling-house may put in evidence representations made to him by his master, respecting the nature of the business, to show his innocent intent.[48]

(4.) Opinion Evidence. — As a general rule, the mere opinions of witnesses as to whether gambling took place in the house are not admissible.[49]

(5.) Permitting Minor in Pool-Room. — In a prosecution for permitting a minor to stay in defendant's pool-room, evidence that defendant ordered him from the room after the offense had been committed, or after defendant was prosecuted, would be inadmissible.[50]

E. Prosecution for Renting House for Gambling Purposes. a. *Burden of Proof and Matters to be Proved.* — In a prosecution

tending to establish the character of a house, especially when it is supplemented with evidence of actual gaming in the house."

So in a prosecution for keeping a bucket-shop, evidence of the intent of those who frequent the place not to receive or deliver the commodities dealt in is admissible. Soby *v.* State, 31 Ill. App. 242.

44. State *v.* Agudo, 5 La. Ann. 185.

45. Humphreys *v.* State, 34 Tex. Crim. 434, 30 S. W. 1066.

46. Com. *v.* Edds, 14 Gray (Mass.) 406.

47. But evidence of impeaching the deed is also admissible on the part of the defense. Biles *v.* State, 25 Tex. App. 441, 8 S. W. 650.

48. State *v.* Ackerman, 62 N. J. L. 456, 41 Atl. 697.

49. Thus in a prosecution for permitting gambling in defendant's house, the opinion of witnesses that wagers of cigars and other things sold by defendant did not constitute betting is properly excluded. Humphreys *v.* State, 34 Tex. Crim. 434, 30 S. W. 1066.

So in a prosecution for keeping a gambling-house, a question asked a witness whether he knew of defendant's having kept a gaming-table or room is improper as calling for a conclusion. Wheeler *v.* State, 42 Md. 563.

But on the trial of a steamboat captain for suffering cards to be played on his boat, a witness was permitted to testify that he saw or participated in the game, without giving a particular description of it, the court saying that the accuracy of his knowledge was subject to the test of cross-examination. Johnson *v.* State, 74 Ala. 537.

So in a prosecution for keeping a pool-room, a witness was allowed to testify that certain names appearing in a combination bet on were, so far as he knew, those of baseball clubs. Com. *v.* Watson, 154 Mass. 135, 27 N. E. 1003.

50. Alexander *v.* State (Tex. Crim.), 67 S. W. 319.

for renting a house to be used for gaming, the state must show that the defendant let the property with that object in view.[51]

Proof that defendant had full opportunity to know the illicit occupation of his tenants places the burden on him to show that he was actually ignorant thereof.[52]

b. *Statutory Rule as to Sufficiency of Evidence.* — A statute providing that it shall be sufficient evidence that any building is rented for the purpose of gaming, if gaming is actually carried on there, and the owner or lessor knows or has good reason to believe such to be the fact, and takes no means of preventing it, is not unconstitutional as an invasion of the right of the jury to determine the facts in a criminal case.[53]

c. *Relevancy of Evidence.* — Evidence of the reputation of the tenant,[54] or of the house,[55] or that it had previously been used for gambling purposes,[56] is relevant to show the *scienter*.

51. Rodifer *v.* State, 74 Ind 21, in which it was held that mere evidence that gambling was carried on in the premises after the lease would not sustain a conviction. A point also ruled in Harris *v.* State, 5 Tex. 11. This latter case also holds that evidence that defendant knew the character of his tenants raises the inference that he knew in what way it was intended to use the house.

In Gaby *v.* Hankins, 86 Ill. App. 529, which was a civil action against the owner of a building where gambling was carried on, to recover money lost thereat, the fact that defendant had discovered a poker-table and other paraphernalia of gaming on making a visit to the place was said to have been sufficient to put him on inquiry as to what was taking place there.

52. Rivers *v.* State, 118 Ga. 42, 44 S. E. 859.

Ordinarily, however, the defendant is not required to prove his want of knowledge of his tenant's intent. Harris *v.* State, 5 Tex. 11.

53. Morgan *v.* State, 117 Ind. 569, 19 N. E. 154. See also Voght *v.* State, 124 Ind. 358, 24 N. E. 680.

54. Rivers *v.* State, 118 Ga. 42, 44 S. E. 859. In this case the court said that the tenant's reputation was a circumstance having more or less weight according as it was more or less notorious, and the fact that he had been presented before the grand jury for keeping a gaming-house was admissible to show reputation.

Voght *v.* State, 124 Ind. 358, 24 N. E. 680. In this case not only evidence of the tenant's reputation but that he had been indicted on and pleaded guilty to the charge of keeping a gambling-room, while keeping the room in question, was held competent as tending to raise an inference than the owner, who was an active man residing in the community, knew the facts.

55. Voght *v.* State, 124 Ind. 358, 24 N. E. 680.

56. Rivers *v.* State, 118 Ga. 42, 44 S. E. 859.

GAMING CONTRACTS. — See Gaming.

GARNISHMENT. — See Attachment.

GIFTS.

By G. P. Cook.

CROSS-REFERENCES:

Delivery; Descent and Distribution;
Husband and Wife.

I. GIFTS INTER VIVOS.

1. In General. — A. Degree of Proof Required. — a. *General Rule.* — As a general rule gifts *inter vivos* are watched with caution by the courts, and clear and convincing evidence is required to prove them.[1] But in the absence of suspicious circumstances the gift will be presumed to be valid.[2] It has been held that there is no presumption in favor of a gift.[3]

1. *Canada.* — McConnell *v.* McConnell, 15 Ch. 20.

Illinois. — Boudreau *v.* Boudreau, 45 Ill. 480; Barnum *v.* Reed, 136 Ill. 388, 26 N. E. 572.

Nevada. — Simpson *v.* Harris, 21 Nev. 353, 31 Pac. 1009.

New York. — Scoville *v.* Post, 3 Edw. Ch. 203; Jones *v.* Perkins, 29 App. Div. 37, 51 N. Y. Supp. 380; Gilkinson *v.* Third Ave. R. Co., 47 App. Div. 472, 63 N. Y. Supp. 792.

Ohio. — Flanders *v.* Blandy, 45 Ohio St. 108, 12 N. E. 321.

Pennsylvania. — Osthaus *v.* McAndrew, 8 Atl. 436.

It has been held that a gift *inter vivos* will not be sustained upon the uncorroborated testimony of the donee. Grant *v.* Grant, 34 Beav. (Eng.) 623.

In Freese *v.* Odd Fellows Sav. Bank, 136 Cal. 662, 69 Pac. 493, the trial court refused to sustain the gift when the only evidence supporting it was the uncorroborated deposition of the donee, although there was no direct evidence to contradict the deposition.

In Canada, by virtue of a statute, if the gift is not asserted until the death of the donor, it will not be sustained upon the uncorroborated testimony of the donee. Watson *v.* Bradshaw, 6 A. R. 666.

In the case of Gilkinson *v.* Third Ave. R. Co., 47 App. Div. 472, 63 N. Y. Supp. 792, it was held that the uncorroborated testimony of the donee's aunt was sufficient to establish a gift.

Compare Richardson *v.* Colburn, 77 Minn. 412, 80 N. W. 356.

2. Hackney *v.* Vrooman, 62 Barb. (N. Y.) 650; Yeakel *v.* McAtee, 156 Pa. St. 600, 27 Atl. 277.

3. White *v.* Warren, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723; Denigan *v.* Hibernia Loan & Sav. Soc., 127 Cal. 137, 59 Pac. 389.

The quantum of proof necessary to establish a gift, however, depends largely upon the peculiar circumstances of each particular case.[4]

b. *Mere Declarations of Intention.* — A mere promise or declaration of intention is not usually sufficient to establish a valid gift.[5]

c. *Declarations Accompanied by Possession in Donee.* — But where there is evidence of a declared intention to give, accompanied by possession in the donee, it is sufficient to raise a presumption[6] that

4. Lewis *v.* Merritt, 42 Hun (N. Y.) 161.

"The rule to be extricated from the great weight of all the authorities, and the one suggested by sound reason, it seems to us, as to the quantum of proof requisite to support a gift *inter vivos*, is that which, applied to each case, and the situation and relation of the parties, satisfies the court that the donor, understandingly, and without improper influence, intended to give the property to the donee, and did give it to him, or a bailee for him, in the unconditional and immediate control and possession of it." Hesse *v.* Hemberger (Tenn.), 39 S. W. 1063.

5. *United States.* — Backer *v.* Meyer, 43 Fed. 702.

Alabama. — Stallings *v.* Finch, 25 Ala. 518.

California. — Giselman *v.* Starr, 106 Cal. 651, 40 Pac. 8.

Connecticut. — Minor *v.* Rogers, 40 Conn. 512.

Illinois. — Meyers *v.* Malcom, 20 Ill. 621; Barnum *v.* Reed, 136 Ill. 388, 26 N. E. 572; May *v.* May, 36 Ill. App. 77.

Kentucky. — Callender *v.* Callender, 24 Ky. L. Rep. 1145, 70 S. W. 844; Rodemer *v.* Rettig, 24 Ky. L. Rep. 1474, 71 S. W. 869.

Maine. — Bath Sav. Inst. *v.* Hathorn, 88 Me. 122, 33 Atl. 836, 51 Am. St. Rep. 382, 32 L. R. A. 377.

Maryland. — Pennington *v.* Gittings, 2 Gill & J. 209; Whalen *v.* Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208.

Massachusetts. — Gerrish *v.* Institution for Savings, 128 Mass. 159, 35 Am. Rep. 365.

Michigan. — Duncombe *v.* Richards, 46 Mich. 166, 9 N. W. 149; Casserly *v.* Casserly, 123 Mich. 44, 81 N. W. 930.

Mississippi. — Wheatley *v.* Abbott, 32 Mich. 343.

New York. — Geary *v.* Page, 9 Bosw. 290; Young *v.* Young, 80 N. Y. 422; Adler *v.* Davis, 31 Misc. 120, 63 N. Y. Supp. 875; Tyrrel *v.* Emigrant Industrial Sav. Bank, 77 App. Div. 131, 79 N. Y. Supp. 49.

Ohio. — Larimore *v.* Wells, 29 Ohio St. 13; Flanders *v.* Blandy, 45 Ohio St. 108, 12 N. E. 321.

Pennsylvania. — Crawford's Appeal, 61 Pa. St. 52.

Texas. — Doyle *v.* First Nat. Bank (Tex. Civ. App.), 50 S. W. 480.

Vermont. — Frost *v.* Frost, 33 Vt. 639; Pope *v.* Savings Bank, 56 Vt. 284, 48 Am. Rep. 781.

Virginia. — Yancey *v.* Field, 85 Va. 756, 8 S. E. 721.

6. *Illinois.* — Breier *v.* Weier, 33 Ill. App. 386; Morey *v.* Wiley, 100 Ill. App. 75.

Iowa. — Wescott *v.* Wescott, 75 Iowa 628, 35 N. W. 649.

Kentucky. — Jones *v.* Jones, 102 Ky. 450, 43 S. W. 412; Scollard *v.* Scollard, 22 Ky. L. Rep. 33, 56 S. W. 648.

Maryland. — Gardner *v.* Merritt, 32 Md. 78.

New Hampshire. — Liscomb *v.* Manchester & L. R. Co., 70 N. H. 312, 48 Atl. 284.

New York. — Hackney *v.* Vrooman, 62 Barb. 650; Rix *v.* Hunt, 16 App. Div. 540, 44 N. Y. Supp. 988.

South Carolina. — McCluney *v.* Lockhart, 1 Bail. 117.

Tennessee. — Mason *v.* Willhite, 61 S. W. 298.

On the question whether the delivery of a promissory note by a mother, since deceased, to her son, was a gift *inter vivos* or *mortis*

the gift was actually made. Mere possession by the donee, however, is, in itself, insufficient.[7]

d. *Admissions of Donor.* — It has been held that the admissions of the donor to the effect that he had made the gift are not conclusive in themselves, but are to be weighed by the jury with the other evidence.[8]

e. *Gift Not Asserted Until After Death of Donor.* — Where the gift is not asserted until after the death of the donor it is regarded as an additional reason for requiring the transaction to be proved by clear and convincing evidence.[9]

causa — *held,* that though there was no evidence to show that it was a gift *mortis causa,* yet the possession of the note with his mother's indorsement on it was sufficient to support a common gift and to corroborate the donee's testimony concerning it. Phelps *v.* Hopkinson, 61 Ill. App. 400.

The fact that the alleged donee had possession of certain notes up to the time of the donor's death, and that this was with the knowledge and approval of the donor, is sufficient to raise a presumption in favor of the validity of the gift. Rix *v.* Hunt, 16 App. Div. 540, 44 N. Y. Supp. 988.

7. Possession of Donee Insufficient. Thus where a husband purchased a piano, under an agreement that title was to remain in the vendors until paid for, and that he was not to part with possession without their written consent, it was held that a gift to his wife, so as to subject the instrument to levy upon execution by her creditors, was not to be presumed from the fact that he afterward abandoned his home, leaving the instrument in her possession. Dawson *v.* Lindsay, 111 Mich. 200, 69 N. W. 495.

Where two sisters were the owners of a mortgage as the heirs of their mother, and one of them, who had possession of the mortgage, delivered it to the other, saying at the time that she gave it to her, but no notice of this transaction was given to the mortgagee, and he subsequently paid interest to both the sisters in the same manner that he had been doing previously, and also paid a part of the principal to both of them — *held,* that the evidence did not establish a gift *inter vivos,* since the word "give" was probably not used in its technical sense and the transfer of possession lost a great deal of significance inasmuch as the sisters were already joint owners, either of them being entitled to possession. Thompson *v.* West, 56 N. J. Eq. 660, 40 Atl. 197.

In an action of replevin to recover a slave, the proof was that when plaintiff's son J. was about leaving home, plaintiff told him he would let him have one of three negro boys, that he might take choice, and J. selected the boy in controversy, and that plaintiff then remarked to him that he would let him have the boy he selected "as a loan," to be delivered when called for, and J. assented to this and left with the boy; that plaintiff had given slaves to several of his children in the same way. *Held,* to be clearly a loan and not a gift. Smith *v.* Jones, 8 Ark. 109.

8. Rooney *v.* Minor, 56 Vt. 527. (See this case commented upon in Gross *v.* Smith, 132 N. C. 604, 44 S. E. 111.)

But in an action by a daughter against the executor of her father to recover certain money which she alleged was due to her as a gift, *held,* that the deliberate admissions of the father made to third persons relating to facts and not to mere intentions to give were sufficient to establish the gift. Sourwine *v.* Claypool, 138 Pa. St. 126, 20 Atl. 840.

9. Fitzpatrick *v.* Graham, 122 Fed. 401; Denigan *v.* Hibernia Loan & Sav. Soc., 127 Cal. 137, 59 Pac. 389; DePuy *v.* Stevens, 37 App. Div. 289, 55 N. Y. Supp. 810; *In re* Munson, 25 Misc. 586, 56 N. Y. Supp. 151; *In re* Taber, 30 Misc. 172, 63 N. Y. Supp. 728; Robinson *v.* Car-

B. Burden of Proof. — It is obvious from the foregoing that the burden of proof usually rests upon the donee, or those claiming under him, to establish every element of a valid gift.[10]

C. Essential Elements of Proof. — a. *The Donor's Intent.* **(1.) Mode of Proof in General.** — As a general rule the intent of the donor to make the gift is to be gathered from all the surrounding circumstances.[11]

(2.) Evidence Bearing Upon Intent. — (A.) Reasons and Motives. As bearing upon the proof of intent, evidence showing the reasons and motives of the donor is usually competent and relevant.[12]

(B.) Declarations of Intention. — On the question of intent the declarations of the donor, made prior to the gift, showing an intent to make it, are admissible in favor of the donee;[13] and it has been

penter, 77 App. Div. 520, 79 N. Y. Supp. 283; Bray *v.* O'Rourke, 89 App. Div. 400, 85 N. Y. Supp. 907.

"He who attempts to establish title to property through a gift *inter vivos*, as against the estate of a decedent, takes upon himself a heavy burden, which he must support by evidence of great probative force, which clearly establishes every element of a valid gift — that the decedent intended to divest himself of the title in favor of the donee, and accompanied his intent by a delivery of the subject-matter of the gift." *In re* O'Connell, 33 App. Div. 483, 53 N. Y. Supp. 748.

10. Burden of Proof.

England. — Cooke *v.* Lamotte, 15 Beav. 234.

Canada. — Murray *v.* Murray, 8 Ch. 293.

United States. — Wright *v.* Bragg, 106 Fed. 25.

Alabama. — Wheeler *v.* Glasgow, 97 Ala. 700, 11 So. 758.

Arkansas. — Norton *v.* McNutt, 55 Ark. 59, 17 S. W. 362.

Georgia. — Porter *v.* Allen, 54 Ga. 623.

Maine. — Hansan *v.* Millett, 55 Me. 184.

New York. — Doty *v.* Willson, 47 N. Y. 580.

When a person attempts to take a benefit under a voluntary settlement or deed of gift, he has the burden of proving that there was a distinct intent upon the part of donor to make the deed irrevocable. Coults *v.* Acworth, L. R. 8 Eq. 558.

11. Dille *v.* Webb, 61 Ind. 85; Porter *v.* Gardner, 39 N. Y. St. 671, 15 N. Y. Supp. 398.

In an action of replevin for a piano stool and cover which plaintiff claimed as a gift from her infant brother, who had been emancipated by his father, it was held that "the general circumstances of the family at the time of the pretended purchase and gift were proper to be shown to sustain and corroborate and make probable the transaction as testified to by the plaintiff and her brother, and therefore were not irrelevant." Wambold *v.* Vick, 50 Wis. 456, 7 N. W. 438.

12. Gilham *v.* French, 6 Colo. 196.

Thus the testimony of the donee's wife that she had rendered services to the donor's wife during her last illness is competent for this purpose. Hurlburt *v.* Hurlburt, 18 N. Y. St. 407, 2 N. Y. Supp. 317.

And where it is sought to establish a gift of a deposit in a savings bank, the fact that the alleged donor had on deposit in his own name all that he was allowed to have under the statute is of material importance as showing a reason for depositing in the name of another. Cogswell *v.* Newburyport Inst. for Savings, 165 Mass. 524, 43 N. E. 296.

13. *United States.* — Miller *v.* Clark, 40 Fed. 15.

Georgia. — Sanderlin *v.* Sanderlin, 24 Ga. 83.

Iowa. — Sherman *v.* Sherman, 75 Iowa 136, 39 N. W. 232.

held that such declarations are admissible whether made before or after the transaction.[14]

Such declarations, however, are weaker in proportion as they recede from the time of delivery.[15]

(C.) Donee Not Told of Gift. — It has been held that the fact that the alleged donor never communicated to the donee the fact that he had made the gift is relevant evidence on the question of intent.[16]

b. *Delivery.* — **(1.) Mode of Proof in General.** — (A.) Acts and Conduct of Donor. — As a general rule, the fact of delivery may be arrived at from the acts, conduct and declarations of the alleged donor.[17] It has been held, however, that the declarations of the

New York. — Hunter *v.* Hunter, 19 Barb. 631.

Ohio. — Larimore *v.* Wells, 29 Ohio St. 13.

See *contra*, Barnum *v.* Reed, 136 Ill. 388, 26 N. E. 572.

"The declarations of the donor made prior to the gift are admissible in evidence if made during the time the gift was under consideration and discussion by the donor, and were in reference to and contemplation of it, and explanatory of the donor's intention." Gillespie *v.* Burleson, 28 Ala. 551.

In an action against certain administrators to recover two promissory notes which plaintiff claimed as a gift from defendant's intestate, the court instructed the jury that the mere declarations of the decedent of her purpose to give plaintiff her property or any portion of it would not vest him with any right or interest in the notes unless they believed from the evidence that decedent delivered the notes to plaintiff with the purpose and intent of giving them to him. *Held*, that this instruction was improper and that these declarations of deceased should have been allowed to go to the jury without any expression of opinion by the court as to the weight to be given to them. Jones *v.* Jones, 102 Ky. 450, 43 S. W. 412.

A deed of gift which was invalid to pass title for want of proper execution has been admitted in evidence as a declaration of the donor's intent. Sewall *v.* Glidden, 1 Ala. 52; Myers *v.* Peck, 2 Ala. 648.

Although a mere recital in a deed referring to a previous conveyance has been held inadmissible for this purpose. Stephens *v.* Murray, 132 Mo. 468, 34 S. W. 56.

14. Prior and Subsequent Declarations. — Ruiz *v.* Dow, 113 Cal. 490, 45 Pac. 867. In this case a husband made out a deed to his wife of all his property, both real and personal, and completed the transaction by a valid delivery to the wife, with the understanding that the deed was not to be recorded until after his death. Subsequent to the delivery of the deed he collected some money on a promissory note and deposited it in the bank in his own name. On the question as to whether the deed transferred the money, so collected, to the wife as a gift *inter vivos* — *held*, that it was purely a question of the intent of the donor, to prove which his own declarations made both before and after the transaction were admissible.

15. Powell *v.* Olds, 9 Ala. 861.

16. Ide *v.* Pierce, 134 Mass. 260.

17. "All courts hold that delivery is necessary to the validity of the gift, but the fact of delivery may be found by the jury from the actions, conduct and declarations of the alleged donor, just as any other material fact may be found in the same way from the acts, conduct and declarations of a party to be affected thereby." Gross *v.* Smith, 132 N. C. 604, 44 S. E. 111.

"In the case of a gift *inter vivos*, the evidence should be sufficient to render a finding of the fact of delivery reasonable, and should disclose the circumstances under which the delivery occurred; that it may appear that the gift was absolute, not

donor are insufficient, of themselves, to prove an actual delivery,[18] but other authorities have disputed this doctrine.[19]

Where the intent of the donor is proved by a writing under his own hand, the courts will presume a delivery in support of the gift on slight evidence.[20]

(2.) Delivery Inferred from Circumstances. — Where the parties stand in close personal relation, such as members of the same family, it often becomes unnecessary to prove an actual manual delivery, the law presuming one in such cases from the attendant circumstances.[21]

conditional; that it was complete, not made in the donor's last sickness or on his deathbed and in view of death." Bean *v.* Bean, 71 N. H. 538, 53 Atl. 907.

And though proof of delivery is necessary, still, where the property has passed into the possession of the donee, an actual manual tradition at the time of making the gift may be dispensed with. Wing *v.* Merchant, 57 Me. 383.

18. Declarations to Prove Delivery. — *United States.* — Chambers *v.* McCreery, 106 Fed. 364.

Alabama. — Bryant *v.* Ingraham, 16 Ala. 116.

Georgia. — Anderson *v.* Baker, 1 Ga. 595.

New Jersey. — Smith *v.* Burnet, 34 N. J. Eq. 219; Smith *v.* Burnet, 35 N. J. Eq. 314.

New York. — Johnson *v.* Spies, 5 Hun 468.

North Carolina. — Adams *v.* Hayes, 24 N. C. 361; Medlock *v.* Powell, 96 N. C. 499, 2 S. E. 149.

Pennsylvania. — Schiehl's Estate, 179 Pa. St. 308, 36 Atl. 181.

The indorsement on a promissory note to a third party for the benefit of another is strong evidence of an intention, but not, in itself, sufficient evidence of delivery. Yokem *v.* Hicks, 93 Ill. App. 667.

Where the subjects of the alleged gift, a note and mortgage, were placed in the hands of an agent who placed them in an envelope upon which he made an indorsement showing the nature of the transaction, *held*, the donor and the agent being dead, that this envelope with the indorsement thereon was inadmissible in evidence to show a delivery. Wright *v.* Bragg, 106 Fed. 25.

The fact that a father when buying a piano stated that it was for his daughter is not sufficient to make out a valid gift to her, when there was no actual or constructive delivery to her at the time of the purchase or afterward. Cambreleng *v.* Graham, 60 N. Y. St. 855, 29 N. Y. Supp. 419.

19. See Blake *v.* Jones, 1 Bail. Eq. (S. C.) 141, 21 Am. Dec. 530; Gross *v.* Smith, 132 N. C. 604, 44 S. E. 111; Lord *v.* New York Life Ins. Co., 95 Tex. 216, 66 S. W. 290, 56 L. R. A. 596; Yancey *v.* Stone, 7 Rich. Eq. (S. C.) 16; Grangiac *v.* Arden, 10 Johns. (N. Y.) 293.

20. Brinckerhoff *v.* Lawrence, 2 Sandf. Ch. (N. Y.) 400; Matson *v.* Abbey, 53 N. Y. St. 794, 24 N. Y. Supp. 284; Pennington *v.* Lawson, 23 Ky. L. Rep. 1340, 65 S. W. 120.

21. *England.* — Grant *v.* Grant, 34 Beav. 623.

Canada. — Queen *v.* Carter, 13 C. P. 611; Viet *v.* Viet, 34 Q. B. 104.

Alabama. — Sewall *v.* Glidden, 1 Ala. 52.

Arkansas. — Danley *v.* Rector, 10 Ark. 211; Dodd *v.* McCraw, 8 Ark. 83; Prater *v.* Frazier, 11 Ark. 249.

Georgia. — Moore *v.* Cline, 115 Ga. 405, 41 S. E. 614; Poullain *v.* Poullain, 79 Ga. 11, 4 S. E. 81.

Indiana. — Tenbrook *v.* Brown, 17 Ind. 410.

Kansas. — Schwindt *v.* Schwindt, 61 Kan. 377, 59 Pac. 647.

Kentucky. — Meriwether *v.* Morrison, 78 Ky. 572.

Maine. — Wing *v.* Merchant, 57 Me. 383.

Maryland. — Isaac *v.* Williams, 3 Gill 278; Hitch *v.* Davis, 3 Md. Ch. 266.

Michigan. — Harris *v.* Hopkins, 43 Mich. 272, 5 N. W. 318, 38 Am. Rep. 180.

c. *Acceptance.* — (1.) **When Presumed.** — (A.) When Beneficial to Donee. — Where the gift is for the advantage of the donee he will be presumed to have accepted it until the contrary appears.[22]

(B.) When Unaccompanied by Any Condition. — When the gift is unaccompanied by any condition to be performed by the donee his acceptance will be presumed.[23]

(C.) When Donee is a Minor. — So when the donee is a minor the

New York. — Crouse *v.* Judson, 41 Misc. 338, 84 N. Y. Supp. 755; Scott *v.* Simes, 10 Bosw. 314.

Pennsylvania. — Crawford's Appeal, 61 Pa. St. 52.

South Carolina. — McLure *v.* Lancaster, 24 S. C. 273, 58 Am. Rep. 259; Bennett *v.* Cook, 28 S. C. 353, 6 S. E. 28; Reid *v.* Colcock, 1 Nott & McC. 592.

Tennessee. — Davis *v.* Garrett, 91 Tenn. 147, 18 S. W. 113.

Texas. — Hillebrant *v.* Brewer, 6 Tex. 45.

D., while a minor, was engaged by his father in carrying the mail, in consideration of which he gave to D. a negro slave. D. lived with his father on the farm, and subsequent to this transaction the father exercised the same control over the slave that he had before. *Held,* that since D. was a minor this transaction could be treated as a gift, and that, where an infant child resides with his father and continues a member of his family, the possession will be presumed to be in the infant, although the father exercises control over the slave and appropriates his labor. Danley *v.* Rector, 10 Ark. 211.

Where the donee had lived in the donor's family for a number of years, it was held that a complete gift *inter vivos* to her of a promissory note was shown when he gave her the note and told her so, and, as evidence of the gift, indorsed it to her, although she allowed him to retain possession of the note as her agent. Royston *v.* McCulley (Tenn.), 59 S. W. 725.

"It requires less positive and unequivocal testimony to establish the delivery of a gift from a father to his children than it does between persons who are not related, and in cases where there is no suggestion of fraud or undue influence very slight evidence will suffice." Love *v.* Francis, 63 Mich. 181, 29 N. W. 843, 6 Am. St. Rep. 290.

22. *California.* — De Levillain *v.* Evans, 39 Cal. 120.

Indiana. — Goelz *v.* People's Sav. Bank, 31 Ind. App. 67, 67 N. E. 232; Pruitt *v.* Pruitt, 91 Ind. 595; Rinker *v.* Rinker, 20 Ind. 185.

Kentucky. — Denunzio *v.* Scholtz, 25 Ky. L. Rep. 1294, 77 S. W. 715.

Michigan. — Dunlap *v.* Dunlap, 94 Mich. 11, 53 N. W. 788; Holmes *v.* McDonald, 119 Mich. 563, 78 N. W. 647, 75 Am. St. Rep. 430.

New York. — Adler *v.* Davis, 31 Misc. 120, 63 N. Y. Supp. 875.

Reason for Rule. — "The rule that requires acceptance to complete a gift rests largely upon the very reasonable ground that the donee may not desire to have the property intended as a gift, for the reason that there may be burdens growing out of its ownership which he does not desire to assume, and the law will not enforce a gift against his will. But the rule prevails that, where the gift is entirely beneficial to the donee, his acceptance of it will ordinarily be presumed, unless the contrary appears." Goelz *v.* People's Sav. Bank, 31 Ind. App. 67, 67 N. E. 232. See also Armitage *v.* Widoe, 36 Mich. 124.

Every Gift Supposed to Be Beneficial. — Goss *v.* Singleton, 2 Head (Tenn.) 67.

It has been held that an acceptance might be inferred from the fact that the donor informed the donee of the gift, with the express or implied assent of the donee. Scott *v.* Berkshire Co. Sav. Bank, 140 Mass. 157, 2 N. E. 925.

23. Blanchard *v.* Sheldon, 43 Vt. 512.

law will imply an acceptance, even though the infant be ignorant of the gift.[24]

(D.) When Donee is Non Compos. — And where the donee is a person of unsound mind the law will presume an acceptance.[25]

(2.) Acts of Acceptance.— Any acts of the donee displaying an intent to receive the gift or to take advantage of it are admissible in evidence for the purpose of proving an acceptance.[26]

D. Admissibility of Evidence in General. — a. *Declarations of Donor.* — **(1.) When Admissible.**— (A.) When Part of Res Gestae. As a general rule the declarations of the donor are always admissible when they are properly a part of the *res gestae*.[27]

24. Pruitt *v.* Pruitt, 91 Ind. 595; De Levillain *v.* Evans, 39 Cal. 120.

25. Malone *v.* Lebus, 20 Ky. L. Rep. 1146, 77 S. W. 180.

26. Thus where the gift is delivered to a third person for the use of the donee, his subsequent demand for possession of the written evidence of the gift from such third person is evidence of his acceptance. Hunter *v.* Hunter, 19 Barb. (N. Y.) 631.

On the question as to whether the donee in a deed of gift of real estate intended to accept the gift and comply with its conditions, *held*, that evidence showing that the donee bought land contiguous to the property described in the deed, and which would be needed to make the use of the latter more beneficial, was competent and relevant as showing the donee's attitude towards the transaction. Pierce *v.* Brown University, 21 R. I. 392, 43 Atl. 878.

27. *United States.* — King *v.* Smith, 110 Fed. 95, 54 L. R. A. 708; Miller *v.* Clark, 40 Fed. 15.

Alabama. — Olds *v.* Powell, 7 Ala. 652; Powell *v.* Olds, 9 Ala. 861; Caldwell *v.* Pickens, 39 Ala. 514; Gillespie *v.* Burleson, 28 Ala. 551; Gunn *v.* Barrow, 17 Ala. 743; Bragg *v.* Massie, 38 Ala. 89, 79 Am. Dec. 82; Hale *v.* Stone, 14 Ala. 803; Jennings *v.* Blocker, 25 Ala. 415.

California. — Ruiz *v.* Dow, 113 Cal. 490, 45 Pac. 867.

Connecticut. — Meriden Sav. Bank *v.* Wellington, 64 Conn. 553, 30 Atl. 774.

Georgia. — Burney *v.* Ball, 24 Ga. 505; Sanderlin *v.* Sanderlin, 24 Ga. 583; Evans *v.* Lipscomb, 31 Ga. 71.

Illinois. — Weaver *v.* Weaver, 73 Ill. App. 301; Martin *v.* Martin, 174 Ill. 371, 51 N. E. 691.

Indiana. — Woolery *v.* Wollery, 29 Ind. 249, 95 Am. Dec. 630; Durham *v.* Shannon, 116 Ind. 403, 19 N. E. 190, 9 Am. St. Rep. 860; Durling *v.* Johnson, 32 Ind. 155.

Iowa. — Sherman *v.* Sherman, 75 Iowa 136, 39 N. W. 232.

Kentucky. — Smith *v.* Montgomery, 5 Mon. 502.

Maryland. — Bowie *v.* Bowie, 1 Md. 87; Graves *v.* Spedden, 46 Md. 527; Parks *v.* Parks, 19 Md. 323; Cecil *v.* Cecil, 20 Md. 153.

Massachusetts. — Gerrish *v.* Institute for Savings, 128 Mass. 159, 35 Am. Rep. 365; Scott *v.* Berkshire Co. Sav. Bank, 140 Mass. 157, 2 N. E. 925; Whitwell *v.* Winslow, 132 Mass. 307.

Mississippi. — Carradine *v.* Collins, 7 Smed. & M. 428.

New Jersey. — Skillman *v.* Wiegand, 54 N. J. Eq. 198, 33 Atl. 929.

New York. — Grangiac *v.* Arden, 10 Johns. 293; Hunter *v.* Hunter, 19 Barb. 631; Smith *v.* Maine, 25 Barb. 33; Hurlburt *v.* Hurlburt, 18 N. Y. St. 407, 2 N. Y. Supp. 317; Devlin *v.* Farmer, 30 N. Y. St. 541, 9 N. Y. Supp. 530; Hill *v.* Froehlich, 38 N. Y. St. 24, 14 N. Y. Supp. 610.

North Carolina. — Collier *v.* Poe, 16 N. C. 55; Moore *v.* Gwyn, 26 N. C. 275; Cowan *v.* Tucker, 30 N. C. 426.

Pennsylvania. — Swab *v.* Mille, 9 Atl. 667; Jacques *v.* Fourthman, 137 Pa. St. 428, 20 Atl. 802; Stewart's Estate, 137 Pa. St. 175, 20 Atl. 554.

South Carolina. — Banks *v.* Hat-

(B.) When Against His Interest. — They are also admissible when made against his interest.[28]

(C.) Subsequent Admissions. — And the declarations of the donor made subsequent to the gift, and admitting that it was made, are admissible on behalf of the donee and those claiming under him.[29]

ton, 1 Nott & McC. 211; Brashears *v.* Blassingame, 1 Nott & McC. 223; Davis *v.* Davis, 1 Nott & McC. 224; Snowden *v.* Logan, Rice Eq. 174; Watson *v.* Kennedy, 3 Strob. Eq. 1; Blake *v.* Jones, 1 Bail. Eq. 141, 21 Am. Dec. 530.

Texas. — Higgins *v.* Johnson, 20 Tex. 389; Smith *v.* Strahan, 25 Tex. 103.

Wisconsin. — Wainbold *v.* Vick, 50 Wis. 456.

In Lark *v.* Cunningham, 7 Rich. L. (S. C.) 376, the plaintiff claimed title to a slave as a parol gift from his father-in-law. *Held,* that the defendant might put in evidence, as part of the *res gestae,* a receipt, signed by the wife of plaintiff, showing that at the time the slave was delivered to her it was considered a loan to be returned when called for; even though such receipt was not given in the presence of the husband and was not known to him.

Where a father gave a slave to his daughter upon her marriage, but afterward obtained possession of the property and mortgaged it to a third party, *held,* that a recital in his will, made at the time of the gift and acknowledging it, was admissible in evidence as part of the *res gestae.* Jennings *v.* Blocker, 25 Ala. 415.

28. Rule Stated. — "In almost all the cases in which gifts have been the subject of litigation, the declarations of the donor have been received in evidence, without objection, or any question that they were not competent. If the donor were living, and suing for the property, it is quite clear that his declarations in reference to a gift to the donee would be admissible on the most elementary principles of the law of evidence. When the contest, as to the gift, is between the donee and the representatives of the donor, the declarations of the donor are undoubtedly admissible, *being against his interest when made;* and the admissions of the testator or intestate, as a universal rule, are admissible against the representatives." Hackney *v.* Vrooman, 62 Barb. (N. Y.) 650.

29. Subsequent Admissions. *England.* — Ivat *v.* Finch, 1 Taunt. 141.

Georgia. — Poullain *v.* Poullain, 76 Ga. 420, 79 Ga. 11, 4 S. E. 81.

Indiana. — Dean *v.* Wilkerson, 126 Ind. 338, 26 N. E. 55.

Massachusetts. — Fellows *v.* Smith, 130 Mass. 378.

Missouri. — Gunn *v.* Thruston, 130 Mo. 339, 32 S. W. 654.

North Carolina. — Gross *v.* Smith, 132 N. C. 604, 44 S. E. 111.

South Carolina. — Richards *v.* Munro, 30 S. C. 284, 9 S. E. 108.

Upon a trial involving the question of a parol gift of land the subsequent declarations of the donor tending to show a motive for the gift are admissible in favor of the donee; but they would not be admissible for the purpose of fastening a parol trust upon a deed previously made to the donor. Rives *v.* Lamar, 94 Ga. 186, 21 S. E. 294.

In an action brought against the administrator of plaintiff's father for the value of board and lodging furnished the deceased by the plaintiff, the defendant set up as a counterclaim certain promissory notes which the deceased held against the plaintiff, but which plaintiff claimed had been given up to him. *Held,* that it was competent to put in evidence declarations of the deceased made to third persons to the effect that he had made the gift. Pritchard *v.* Pritchard, 69 Wis. 373, 34 N. W. 506.

In an action brought by a husband against his wife's administrator, to recover money which he alleged had been given to him by her, *held,* that it was proper to receive in evidence her declarations made during

(2.) When Inadmissible. — (A.) When Subsequent to Gift. — (a.) *General Rule.* — As a general rule the declarations of the donor, made after the consummation of the gift, are not competent to qualify it or to affect the title conferred.[30]

her last sickness to the effect that she had given her personal property to her husband, and also a letter written by her to him, saying that he could have the money after a certain date. Dean *v.* Dean, 43 Vt. 337.

"When money is delivered, as in this case, from father to son, and no writing is made, and no evidence of debt taken, and under circumstances rendering it uncertain as to whether it was intended as a loan or gift, and not inconsistent with either, then a distinct declaration to the donee, made afterward, that it was intended as a gift, may have the effect, not of changing it, but of determining which it was." Doty *v.* Willson, 47 N. Y. 580.

If the donee introduce subsequent declarations of the donor, his opponent may introduce other declarations of the donor denying the gift. Stallings *v.* Finch, 25 Ala. 518; Hansell *v.* Bryan, 19 Ga. 167; Sims *v.* Saunders, Harp. L. (S. C.) 374; McKane *v.* Bonner, 1 Bail. (S. C.) 113; Stone *v.* Stroud, 6 Rich. L. (S. C.) 306; Bennett *v.* Cook, 28 S. C. 353, 6 S. E. 28.

See this doctrine disputed in Woodruff *v.* Cook, 25 Barb. (N. Y.) 505, and *compare* Doty *v.* Willson, 47 N. Y. 580; Young *v.* Young, 80 N. Y. 422.

In an action brought by a wife against her husband's administrator for the recovery of a slave which plaintiff claimed as a gift from her husband, the only evidence of the gift was the declarations of the husband. *Held,* that it was error to exclude from evidence on behalf of the defendant a will executed by the husband subsequent to the gift, in which he bequeathed the slave, together with other property, to his wife for life only with remainder to her children. Barziza *v.* Graves, 25 Tex. 322.

And the declarations of the donor made prior to the gift and in his own favor are sometimes admissible against the donee to rebut previous declarations put in evidence by the donee. Sherman *v.* Sherman, 75 Iowa 136, 39 N. W. 232.

30. When Subsequent to Gift. General Rule. — Gillespie *v.* Burleson, 28 Ala. 551; Cowan *v.* Tucker, 30 N. C. 426; Hicks *v.* Forrest, 41 N. C. 528; Lam *v.* Brock (Va.), 23 S. E. 224.

It has been held that the subsequent declarations of the donor impeaching or denying the gift are incompetent and irrelevant; that "the donor's subsequent denials of the gift no more disprove the gift than the disavowal of his hand and seal would have been disproof of his bond, nor is the evidence a whit more competent in the one case than in the other. The denial is not an operative act in itself. It lays no other foundation for disbelieving the witness who proves the act of giving than the mere veracity of the declarant. It is the mere statement of a fact, without the sanction of an oath." Snowden *v.* Logan, Rice's Eq. (S. C.) 191. See also Newman *v.* Wilbourne, 1 Hill Eq. (S. C.) 9; Hunter *v.* Parsons, 2 Bail. (S. C.) 59; *compare* Sims *v.* Saunders, Harper 374.

Gift of Judgment to Wife. Reese *v.* Reese, 157 Pa. St. 200, 27 Atl. 703.

Some authorities hold that the subsequent declarations of the donor are inadmissible against the donee unless they explain other declarations already put in evidence by the donee. Blagg *v.* Hunter, 15 Ark. 246; Howell *v.* Howell, 59 Ga. 145.

When too Remote to Be Part of Res Gestae. — *Georgia.* — Carter *v.* Buchannon, 3 Ga. 513.

Indiana. — Thistlewaite *v.* Thistlewaite, 132 Ind. 355, 31 N. E. 946; Hamlyn *v.* Nesbit, 37 Ind. 284; Harness *v.* Harness, 49 Ind. 384.

New Jersey. — Lister *v.* Lister, 35 N. J. Eq. 49.

b. *Declarations of Donee.*— **(1.) When Admissible.** — (A.) Made in Presence of Donor. — The declarations of the donee asserting title to the property in dispute, made in the presence of the donor, and acquiesced in by him, are admissible on behalf of the donee and those claiming under him.[31]

The declarations and acts of the donee, while in possession of the gift, against his interest and acknowledging title in the donor are admissible on behalf of the donor and those claiming under him.[32]

c. *Declarations of Party in Possession.* — **(1.) When Admissible.** (A.) To Explain Nature of Possession. — The declarations of the

Vermont. — Ross *v.* White, 60 Vt. 558, 15 Atl. 184.

In an action to recover possession of a tract of land, it appeared that defendant was an adopted son of the person through whom plaintiffs claimed title, while plaintiffs were nieces and nephews. Defendant claimed title by parol gift and sought to put in evidence a conversation between his natural father and plaintiff's uncle, the alleged donor, in which the latter agreed to adopt the defendant and make a parol gift to him of the property in dispute. *Held,* that this conversation, occurring nearly twenty-five years before the alleged gift was made, was too remote to be a part of the *res gestae,* and was inadmissible as evidence. Ward *v.* Edge, 100 Ky. 757, 39 S. W. 440.

Subsequent to Gift and in his Own Favor. — Gunn *v.* Barrow, 17 Ala. 743; High *v.* Stainback, 1 Stew. (Ala.) 24; Kimball *v.* Leland, 110 Mass. 325; Scott *v.* Berkshire Co. Sav. Bank, 140 Mass. 157, 2 N. E. 925; Duff *v.* Leary, 146 Mass. 533, 16 N. E. 417; Woodruff *v.* Cook, 25 Barb. (N. Y.) 505. *Compare* Sanderlin *v.* Sanderlin, 24 Ga. 583.

On the question whether a parent had given certain negro slaves to her child upon the marriage of the latter, *held,* that since the parent on the morning before the marriage had made certain admissions acknowledging the gift, any after declarations of hers tending to defeat the gift were inadmissible. Eelbank *v.* Burt, 3 N. C. 330.

While Donee is in Possession. Gillespie *v.* Burleson, 28 Ala. 551; Porter *v.* Allen, 54 Ga. 623; Baxter *v.* Knowles, 12 Allen (Mass.) 114; Fellows *v.* Smith, 130 Mass. 378.

After Donor Has Parted With Possession. — Walden *v.* Purvis, 73 Cal. 518, 15 Pac. 91.

Where Donor Has Regained Possession. — Cornett *v.* Fain, 33 Ga. 219.

When not Made in Presence of Donee. — Prater *v.* Frazier, 11 Ark. 249; Dixon *v.* Labry, 16 Ky. L. Rep. 522, 29 S. W. 21; Mulliken *v.* Greer, 5 Mo. 480; Griffin *v.* Stadler, 35 Tex. 695; Whittaker *v.* Marsh, 62 N. H. 477; Cowan *v.* Tucker, 30 N. C. 426; Rumbley *v.* Stainton, 24 Ala. 712; Miller *v.* Hartle, 53 Pa. St. 108; Ray *v.* Loper, 65 Mo. 470.

To Defeat Deed of Gift. — Julian *v.* Reynolds, 8 Ala. 680; Strong *v.* Brewer, 17 Ala. 706; Gregory *v.* Walker, 38 Ala. 26; Hatch *v.* Straight, 3 Conn. 31; Blalock *v.* Miland, 87 Ga. 573, 13 S. E. 551; Grooms *v.* Rust, 27 Tex. 231.

31. Thomas *v.* Degraffenreid, 17 Ala. 602.

Declarations of Wife in Presence of Husband. — In an action brought by the administrator of a husband against the vendee of his wife to recover certain slaves which the defendant claimed had been a gift to the wife as her separate estate from her father, *held,* first, that any declarations of the husband admitting the separate estate in his wife, and second, any declarations of the wife while she was in possession of the slaves asserting her own title thereto, made in the presence of the husband and acquiesced in by him, were admissible against his administrator. Gillespie *v.* Burleson, 28 Ala. 551.

32. Parr *v.* Gibbons, 23 Miss. 92.

party in possession of the gift, when properly a part of the *res gestae,* are usually admissible to explain the nature of his possession.[33]

d. *Other Evidence Bearing Upon the Issue.* — **(1.) Ability of Donor.** Evidence showing the financial standing of the donor and his ability to make the gift is relevant as corroborating the other evidence of the gift.[34]

(2.) Acts of Ownership. — Any acts of ownership exercised over the subject of the gift, either by the donor or the donee, and acquiesced in by the other party, are competent as evidence either to support or defeat the gift.[35]

33. Degraffenreid *v.* Thomas, 14 Ala. 681; Nelson *v.* Iverson, 17 Ala. 216; Nelson *v.* Iverson, 19 Ala. 95; Vincent *v.* State, 74 Ala. 274; Bachman *v.* Killinger, 55 Pa. St. 414.

In an action of replevin brought by a daughter against her mother, who was administratrix to her father's estate, to recover a piano claimed as a gift from her father, it appeared that an inventory of the estate had been filed nearly five years previous in which the piano was not included among the goods of the decedent. The defendant was sued, not as administratrix, but personally. *Held,* that the declarations of the defendant made at the time the piano was replevied, to the effect that it belonged to her daughter and not to the deceased, were admissible against her; that since she was sued personally they were not the declarations of a trustee offered to divest the title of the *cestui que trust.* Swab *v.* Miller (Pa.), 9 Atl. 667.

Personal property belonging to the wife was sold by her husband. In an action by her to recover the property, in which the defense was that it had been given by her to her husband—*held,* that his declarations made before the sale, that he was not the owner, was important proof to negative the idea of a gift. Although if the property had formerly belonged to the husband, his declarations would have been inadmissible to vest title in the wife as against creditors. Musser *v.* Gardner, 66 Pa. St. 242.

When the declarations are not merely explanatory of possession, but are offered to disprove a title derived from the declarant, they are inadmissible as evidence in favor of the party making them. Walker *v.* Blassingame, 17 Ala. 810.

But before such declarations can be put in evidence the main fact, the possession, must be proved. Thomas *v.* Degraffenreid, 17 Ala. 602.

34. Thus, in an action to recover a sum of money claimed by the defendant as a gift from plaintiff's intestate to his wife, the decedent's daughter—*held,* that evidence showing the financial standing of the decedent and his ability to give the amount claimed was relevant to corroborate the other evidence of the gift. Blaisdell *v.* Davis, 72 Vt. 295, 48 Atl. 14.

Family Connections. — In an action brought for money alleged to have been loaned by plaintiff's testator to the defendant, to whom he was engaged to be married, but which the defendant claimed as a gift — *held,* that evidence was admissible showing that the testator had no child, wife or parents to provide for as bearing upon the probability of the gift to the defendant. Also his will, executed shortly after the alleged gift, was competent evidence to show his family relationship. Russell *v.* Langford, 135 Cal. 356, 67 Pac. 331.

35. Acts of Ownership. — In an action to recover possession of certain bonds which plaintiff claimed as a gift from her deceased aunt — *held,* that it was competent for the defendant, the aunt's executor, to show that, at the time of her death, the bonds were deposited in bank in her own name, as tending to refute any

(3.) Discrediting Acts. — Evidence showing any acts of the claimant which are inconsistent with the theory of a gift, or which cast suspicion upon his conduct, is relevant and material.[36]

(4.) Evidence of Other Gifts. — In contests involving gifts to children, evidence showing gifts or advancements to other children of the same parent is relevant as bearing upon the probability of the parent having made the gift in question.[37]

inference of a gift. Patterson *v.* Dushane, 137 Pa. St. 23, 20 Atl. 538.

In an action by the heirs of a deceased wife to recover certain money which the husband claimed as a gift from her — *held,* that it was competent to show that he afterward loaned the money and took a note therefor, payable to himself, with her knowledge and without any objection on her part. Whitaker *v.* Marsh, 62 N. H. 477.

On the question as to whether a piano had been given to a wife by her husband — *held,* that the manner in which the piano was treated by the husband and wife, and their acts respecting it, were relevant, and consequently it was not error to admit evidence showing that the piano had been insured in the wife's name. Fletcher *v.* Wakefield, 75 Vt. 257, 54 Atl. 1012.

"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." Oelke *v.* Theis (Neb.), 97 N. W. 588.

Evidence of improvements made by the donee under a parol gift of land, after the commencement of the controversy involving the gift, is inadmissible. Aurand *v.* Wilt, 9 Pa. St. 54.

36. Discrediting Acts. — Where a person claimed certain property by virtue of a will and also by deed of gift, the fact that she did not produce the deed until after the will had been declared invalid was held strong evidence to contradict the validity of the gift, but not sufficient to work as an estoppel. Bishop *v.* Hendrick, 42 N. Y. St. 296, 17 N. Y. Supp. 241.

Where a son in settling up his father's estate first credits the estate with a judgment standing in the testator's name, and afterward claims the judgment by an assignment to himself as a gift, the fact that he first recognized the judgment as belonging to the estate, and that the assignment is without consideration, is evidence from which it might be inferred that the assignment was not intended to operate as a gift. Stewart's Estate, 137 Pa. St. 175, 20 Atl. 554.

The fact that a deed of gift was executed at the instigation of one of the donees is of material importance as bearing upon the question of fraud. Sears *v.* Shafer, 1 Barb. (N. Y.) 408.

Threats. — In an action for certain bonds and bank stock which plaintiff claimed as a gift from defendant's intestate, it appeared that plaintiff had possession of the property after the death of the donor, but had given them up to the administrator. *Held,* that plaintiff's evidence showing that she had been threatened by the administrator with imprisonment, if she did not give them up, was competent and relevant evidence as tending to explain her surrender of possession. Pryor *v.* Morgan, 170 Pa. St. 568, 33 Atl. 98.

37. "In order to show the motive which prompted the intestate in giving plaintiffs the amounts with which the attempt is made to charge them, all the circumstances should be considered. These would include the value of the estate, the value of the donations, and what has been done by way of gifts or advancements to the other heirs. The law ascribes to the parent the intention to deal equally with all his children in the distribution of his estate, and evidence that he had made absolute gifts to other children would tend to prove that the same motive prompted him in giving to these plaintiffs. Evidence

2. Particular Classes of Gifts. — A. With Reference to Nature of Transaction. — Where money is deposited in a savings bank in the name of a person other than the depositor, some authorities hold that the mere form of the deposit raises a presumption of a gift.[38] But the weight of authority and better reasoning is to the

that he had made advancements to other children would tend to fortify the presumption that these gifts were intended as advancements. We think it was competent, therefore, for plaintiffs to prove that deceased had, in his lifetime, made absolute gifts to his other children, and to show their value. The evidence would tend to prove the intention of the intestate in making the gifts in question, and would be admissible for that purpose, without pleading the facts." Gunn *v.* Thruston, 130 Mo. 339, 32 S. W. 654. See also Lam *v.* Brock (Va.), 23 S. E. 224.

Contra. — In an action by a father-in-law against his son-in-law to recover a slave which defendant claimed as a gift — *held*, that evidence showing that plaintiff had not given his other sons-in-law any property upon their marriage, and his declarations to the effect that he did not intend to make any donations to his future sons-in-law, were irrelevant and improperly admitted. Olds *v.* Powell, 7 Ala. 652. See also Porter *v.* Allen, 54 Ga. 623.

38. *Connecticut.* — Minor *v.* Rogers, 40 Conn. 512; Kerrigan *v.* Rautigan, 43 Conn. 17.

Maryland. — Gardner *v.* Merritt, 32 Md. 78.

New Hampshire. — Blasdel *v.* Locke, 52 N. H. 238; Kimball *v.* Norton, 59 N. H. 1.

New York. — Hannon *v.* Sheehan, 51 N. Y. St. 902, 22 N. Y. Supp. 935; Millspaugh *v.* Putnam, 16 Abb. Pr. 380; Witzel *v.* Chapin, 3 Bradf. 386; Orr *v.* McGregor, 43 Hun 528; Martin *v.* Funk, 75 N. Y. 134.

Rhode Island. — Ray *v.* Simmons, 11 R. I. 266, 23 Am. Rep. 447.

Vermont. — Howard *v.* Savings Bank, 40 Vt. 597; Pope *v.* Savings Bank, 56 Vt. 284, 48 Am. Rep. 781.

D. deposited in a savings bank a certain sum of money in her own name as trustee for W., a minor. She afterward drew out the whole sum and signed a receipt in the bank-book in her own name without the word trustee, and delivered the book up to the bank. She had always retained the book in her possession. A few days after making the deposit she informed W.'s father of it and afterward alluded to it in conversations with his parents. W. knew nothing of the deposit until after D.'s death. *Held*, in a suit against her executor, that the evidence established a complete and executed gift at the time of the deposit, that was irrevocable by the donor. Minor *v.* Rogers, 40 Conn. 512.

Presumption May Be Rebutted. Bath Sav. Inst. *v.* Hathorn, 88 Me. 122, 33 Atl. 836, 51 Am. St. Rep. 382, 32 L. R. A. 377; Parret *v.* Craig, 56 N. J. Eq. 280, 38 Atl. 305. *Compare* McDermott's Appeal, 106 Pa. St. 358, 51 Am. Rep. 526.

"While we think that the deposit of one's own money in a savings bank to the credit of another, without any qualification expressed at the time, is of itself *prima facie* evidence of a gift to the latter of the fund deposited, an intent to the contrary may be shown, and the retention by the depositor of the deposit-book (like the one in question) is some evidence of intent not to perfect the gift at the time of making the deposit. In this fact, and in withholding knowledge from the person to whom the credit is so given, may indicate a purpose as of the time the deposit is made not to surrender dominion over the fund to the latter." Orr *v.* McGregor, 43 Hun (N. Y.) 528.

"Where it clearly appears that such deposit is made merely for the convenience of the parent in drawing money, and not with the intention to make a gift to the child in case of its surviving the parent, a subsequent change of intention and determination to make a gift to the child must

effect that a gift will not be presumed merely from the form of the deposit, without corroborating circumstances.[39]

The authorities differ as to the necessity of showing a transfer of possession of the deposit-book, but where the gift is otherwise completely executed, it is immaterial that the deposit-book remains in the possession of the donor.[40]

be proven by clear and satisfactory evidence. The mere permitting the account to remain in joint names, and loose declarations indicating a gift, are not sufficient." Skillman *v.* Wiegand, 54 N. J. Eq. 198, 33 Atl. 929.

Question of Fact in Each Case. Ide *v.* Pierce, 134 Mass. 260; Bartlett *v.* Remington, 59 N. H. 364; Marcy *v.* Amazeen, 61 N. H. 131.

"It is a matter wholly between the depositor and the bank. If, by the delivery of the book, or a sufficient declaration of trust, or other act between the depositor and the claimant, the latter should acquire a right, the form of deposit would estop the depositor, as against the bank, from denying that right." Sherman *v.* New Bedford Sav. Bank, 138 Mass. 581.

39. *England.* — Green *v.* Carlill, 4 Ch. Div. 882.

United States. — Stone *v.* Bishop, 4 Cliff. 593, 23 Fed. Cas. No. 13,482.

California. — Denigan *v.* Hibernia Loan and Sav. Bank, 127 Cal. 137, 59 Pac. 389.

Connecticut. — Burton *v.* Savings Bank, 52 Conn. 398.

Maine. — Bath Sav. Inst. *v.* Hathorn, 88 Me. 122, 33 Atl. 836, 51 Am. St. Rep. 382, 32 L. R. A. 377; Fairfield Sav. Bank *v.* Small, 90 Me. 546, 38 Atl. 551; Getchell *v.* Biddeford Sav. Bank, 94 Me. 452, 47 Atl. 895, 80 Am. St. Rep. 408.

Maryland. — Pennington *v.* Gittings, 2 Gill & J. 209; Whalen *v.* Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208.

Massachusetts. — Alger *v.* North End Sav. Bank, 146 Mass. 418, 15 N. E. 916, 4 Am. St. Rep. 331; Adams *v.* Brackett, 5 Metc. 280; Ide *v.* Pierce, 134 Mass. 260; Sherman *v.* Savings Bank, 138 Mass. 581.

New York. — Beaver *v.* Beaver, 117 N. Y. 421, 22 N. E. 940, 15 Am. St. Rep. 531, 6 L. R. A. 403; Geary *v.* Page, 9 Bosw. 290.

"It may be justly said that a deposit in a savings bank by one person of his own money to the credit of another, is consistent with an intent on the part of the depositor to give the money to the other. But it does not, we think, of itself, without more, authorize an affirmative finding that the deposit was made with that intent, when the deposit was to a new account, unaccompanied by any declaration of intention, and the depositor received at the time a passbook, the possession and presentation of which, by the rules of the bank, known to the depositor, is made the evidence of the right to draw the deposit. We cannot close our eyes to the well-known practice of persons depositing in savings banks money to the credit of real or fictitious persons, with no intention of divesting themselves of ownership. It is attributable to various reasons; reasons connected with taxation; rules of the bank limiting the amount which any one individual may keep on deposit; the desire to obtain high rates of interest where there is a discrimination based on the amount of deposits, and the desire, on the part of many persons, to veil or conceal from others knowledge of their pecuniary condition. In most cases where a deposit of this character is made as a gift, there are contemporaneous facts or subsequent declarations by which the intention can be established, independently of the form of the deposit. We are inclined to think that to infer a gift from the form of the deposit alone would, in the great majority of cases, and especially where the deposit was of any considerable amount, impute an intention which never existed and defeat the real purpose of the depositor." Beaver *v.* Beaver, 117 N. Y. 421, 22 N. E. 940, 15 Am. St. Rep. 531, 6 L. R. A. 403.

40. Possession of Deposit-Book. Rule Stated. — "There is some confusion in the authorities respecting the disposition of a

As Between Husband and Wife. — As between husband and wife it has been held that a deposit by the husband in the name of himself *and his wife* raises no presumption of a gift to the wife.[41]

B. With Reference to the Parties. — a. *Confidential Relations in General.* — **(1.) General Rule.** — As a general rule, where it is shown that a relation of special trust and confidence exists between the parties, a gift to the party in the ascendency is *prima facie* void.[42]

bank-book, showing a deposit in the name of the donee, as affecting the rights of the parties, and there is no reasonable hypothesis upon which they can be reconciled. The weight of the authorities, however, and better reason support the proposition that, where a completely executed gift of the money deposited is shown, it is immaterial that the deposit-book has not been delivered to the donee, but remains in the possession of the donor." Goelz *v.* People's Sav. Bank, 31 Ind. App. 67, 67 N. E. 232.

On the other hand, the mere possession of a check-book and bank-book by the alleged donee is insufficient in itself to raise a presumption of a gift. Dinlay *v.* McCullagh, 72 N. Y. St. 416, 36 N. Y. Supp. 1007.

41. As Between Husband and Wife. — Marshal *v.* Cruttwell, L. R. 20 Eq. 328; Brown's Estate, 113 Iowa 351, 85 N. W. 617; Getchell *v.* Biddeford Sav. Bank, 94 Me. 452, 47 Atl. 895, 80 Am. St. Rep. 408; *In re* Ward 51 How. Pr. (N. Y.) 316; Greeno *v.* Greeno, 23 Hun (N. Y.) 478; Slee *v.* Kings Co. Sav. Inst., 78 App. Div. 534, 79 N. Y. Supp. 630. See *contra*, Payne *v.* Marshall, 18 O. R. (Can.) 488. *Compare* Brown *v.* Brown, 174 Mass. 197, 54 N. E. 532, 75 Am. St. Rep. 292.

42. Confidential Relation. — General Rule. — *England.* — Griffiths *v.* Robins, 3 Madd. 191; Hunter *v.* Atkins, 3 Myl. & K. 113; Consett *v.* Bell, 1 Y. & C. Ch. 569; Gibson *v.* Russell, 2 Y. & C. Ch. 104; Huguenin *v.* Baseley, 14 Ves. Jr. 273.

Canada. — Mason *v.* Seney, 11 Ch. 447.

California. — White *v.* Warren, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723.

Iowa. — Samson *v.* Samson, 67 Iowa 253, 25 N. W. 233.

Maryland. — Todd *v.* Grove, 33 Md. 188; Brooke *v.* Berry, 2 Gill 83; Griffith *v.* Diffenderffer, 50 Md. 466.

Missouri. — Hall *v.* Knappenberger, 97 Mo. 509, 11 S. W. 239, 10 Am. St. Rep. 337; Garvin *v.* Williams, 44 Mo. 465, 100 Am. Dec. 314; Hamilton *v.* Armstrong, 20 S. W. 1054; McClure *v.* Lewis, 72 Mo. 314; Reed *v.* Carroll, 82 Mo. App. 102.

New York. — Sears *v.* Shafer, 1 Barb. 408; Decker *v.* Waterman, 67 Barb. 460; Ross *v.* Ross, 6 Hun 80.

Tennessee. — Graves *v.* White, 4 Baxt. 38.

But where the relation of principal and agent exists between donor and donee, the fact that the donor was in a declining state of health at the time the gift was made does not necessarily raise a presumption of fraud and undue influence. Ralston *v.* Turpin, 129 U. S. 663.

Sisters. — The fact that the donor and donee were sisters, that the business relation of principal and agent did not exist between them, and that whatever was done for the donee by the donor was through sisterly affection, does not show such a confidential relation as to raise a presumption of undue influence. Funston *v.* Twining, 202 Pa. St. 88, 51 Atl. 736.

Half-Sisters. — The fact that the donee is the half-sister of the donor does not show such a confidential relation as to raise a presumption of undue influence. Richardson *v.* Smart, 152 Mo. 623, 54 S. W. 542, 75 Am. St. Rep. 488.

The English Courts have adopted even a more stringent rule in the case of confidential relations, requiring it to be shown that the donor had free and independent advice in making the gift.

England. — Rhodes *v.* Bate, L. R. 1 Ch. App. 252; Liles *v.* Terry (1895), 2 Q. B. 679; Barron *v.* Willis, 2 Ch. 121; Kempson *v.* Ashbee,

The presumption of undue influence may be rebutted by showing that the donor, after the confidential relation has ceased, has elected to ratify the gift.[43]

(2.) **Burden of Proof.**— The burden of proof is upon the donee to show that the transaction is free from any fraud or undue influence.[44]

L. R. 10 Ch. App. 15; Walsh *v.* Studdart, 6 Ir. Eq. Rep. 161.

Canada. — Mason *v.* Seney, 11 Ch. 447; Fraser *v.* Rodney, 11 Ch. 426; *s. c.*, 12 Ch. 154; Dawson *v.* Dawson, 12 Ch. 278.

The English rule is not applied with the same force to a mere trifling gift as it is where the donor gives up his whole property or subjects himself to a liability involving it. Rhodes *v.* Bate, L. R. 1 Ch. App. 252. See also Cray *v.* Mansfield, 1 Ves. 379.

43. Subsequent Ratification. Mitchell *v.* Homfray, L. J. 8 Q. B. 460. See also Ralston *v.* Turpin, 129 U. S. 663.

44. Confidential Relation. — Burden of Proof. — *England.* — Hunter *v.* Atkins, 3 Myl. & K. 113; Billage *v.* Southee, 9 Hare 534; Toker *v.* Toker, 31 Beav. 629; Morley *v.* Loughnan, 1 Ch. 736; Dent *v.* Bennett, 4 Myl. & Cr. 269.

Canada. — Masan *v.* Sehey, 11 Ch. 447; Dawson *v.* Dawson, 12 Ch. 278; Kersten *v.* Tane, 22 Ch. 547.

United States. — Ralston *v.* Turpin, 129 U. S. 663.

Maryland. — Todd *v.* Grove, 33 Md. 188; Griffith *v.* Diffenderffer, 50 Md. 466.

Missouri. — Hall *v.* Knappenberger, 97 Mo. 509, 11 S. W. 239, 10 Am. St. Rep. 337; Gay *v.* Gillilan, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712; Hamilton *v.* Armstrong, 20 S. W. 1054.

New Jersey. — Parker *v.* Parker, 45 N. J. Eq. 224, 16 Atl. 537; Haydock *v.* Haydock, 34 N. J. Eq. 570, 38 Am. Rep. 385.

New York. — Adee *v.* Hallett, 73 N. Y. St. 754, 38 N. Y. Supp. 273; Cowee *v.* Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Case *v.* Case, 17 N. Y. St. 313, 1 N. Y. Supp. 714; Decker *v.* Waterman, 67 Barb. 460; Barnard *v.* Gautz, 140 N. Y. 249, 35 N. E. 430; *In re* Taber, 30 Misc. 172, 63 N. Y. Supp. 728.

Pennsylvania. — Hasel *v.* Beilstein, 179 Pa. St. 560, 36 Atl. 336.

Tennessee. — Graves *v.* White, 4 Baxt. 38.

Wisconsin. — Doyle *v.* Welch, 100 Wis. 24, 75 N. W. 400.

Parties on Unequal Terms. — *In re* Rogers, 10 App. Div. 593, 42 N. Y. Supp. 133.

"Where a confidential relationship exists, and one party is exposed to the arts and designs of the other, and a voluntary settlement or deed of gift is made, the policy of the law requires the party claiming the benefit of such a deed or settlement to show affirmatively that it proceeded from the donor's own free will, and was fully understood by him, and carried into effect by the intervention of some disinterested third person. If all this appears, the gift will be supported." Siemon *v.* Wilson, 3 Edw. Ch. (N. Y.) 36. See also Chalker *v.* Chalker, 5 Redf. (N. Y.) 480.

"**When the Gift is Disproportionate to the Means of the Giver,** and the giver is a person of weak mind, of an easy temper and yielding disposition, liable to be imposed upon, the court will look upon such a gift with a very jealous eye, and will very strictly examine the conduct and behavior of the person in whose favor it is made. If it can discover that any arts or stratagems, or any undue means, have been used by him to procure such gift; if it see the least speck of imposition at the bottom, or that the donor is in such a situation with respect to the donee as may naturally give him an undue influence over him; if there be the least scintilla of fraud, a court of equity will interpose." Sears *v.* Shafer, 1 Barb. (N. Y.) 408.

The question of undue influence in such cases is for the jury. Wood-

(3.) Property Conveyed to Dependent Person. — Where property is conveyed to a person toward whom the vendor is under moral or legal obligation for maintenance or support, the presumption is that the transaction was a gift or advancement.[45]

b. *Gifts From Husband to Wife.* — **(1.) Degree of Proof Required.** The authorities are almost universal in holding that a gift from husband to wife will be sustained only upon the clearest and most convincing evidence.[46]

bury *v.* Woodbury, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; Osthous *v.* McAndrew (Pa.), 8 Atl. 436.

45. *Illinois.* — Lux *v.* Hoff, 47 Ill. 425; Capek *v.* Kropik, 129 Ill. 509, 21 N. E. 836.

Iowa. — Cotton *v.* Wood, 25 Iowa 43.

Massachusetts. — Whitten *v.* Whitten, 3 Cush. 191.

Missouri. — Darrier *v.* Darrier, 58 Mo. 222.

New York. — Welton *v.* Divine, 20 Barb. 9.

Exception to Rule as to Resulting Trust. — "In ordinary actions, as we have said, in order to *prima facie* establish a resulting trust, all that is necessary is to establish the fact that the party seeking to enforce the trust paid the purchase money. The law then raises the presumption of the trust. It is different, however, where the purchaser, and he who seeks to establish a resulting trust, takes the conveyance in the name of a wife or child, or some other person for whom he is under some natural or moral or legal obligation to provide. When this appears, the presumption of a resulting trust is rebutted, and the law will presume, until the contrary is shown, that a gift or advancement was intended." Doll *v.* Gifford, 13 Colo. App. 67, 56 Pac. 676.

Rule Does not Apply as Between Brothers. — Atwell *v.* Watkins, 13 Tex. Civ. App. 668, 36 S. W. 103.

The mere possession by a son of a promissory note, made by himself and payable to his father, is not sufficient to raise a presumption that it had been given back to the son after being delivered to the father. Grey *v.* Grey, 47 N. Y. 552.

This presumption may be rebutted by evidence showing a different intention. Creed *v.* Lancaster Bank, 1 Ohio St. 1.

"The mere circumstance that the name of a child or a wife is inserted on the occasion of a purchase of stock is not sufficient to rebut a resulting trust in favor of the purchaser if the surrounding circumstances lead to the conclusion that a trust was intended. Although a purchase in the name of a wife, or a child, if altogether unexplained, will be deemed a gift, yet you may take surrounding circumstances into consideration, so as to say that it is a trust, not a gift. So in the case of a stranger, you may take surrounding circumstances into consideration, so as to say that a purchase in his name is a gift, not a trust." Marshal *v.* Cruttwell, L. R. 20 Eq. 328.

46. Degree of Proof Required. *England.* — Mews *v.* Mews, 15 Beav. 529; Walter *v.* Hodge, 1 Wils. Ch. 445; *s. c.*, 2 Swans. 92; Rich *v.* Cockell, 9 Ves. Jr. 369.

Canada. — O'Doherty *v.* Bank, 32 C. P. 285; McEdwards *v.* Ross, 6 Ch. 373.

Connecticut. — Jennings *v.* Davis, 31 Conn. 134.

Maine. — Lane *v.* Lane, 76 Me. 521; Trowbridge *v.* Holden, 58 Me. 117.

Maryland. — George *v.* Spencer, 2 Md. Ch. 353.

Missouri. — Walker *v.* Walker, 25 Mo. 367.

New Jersey. — Dielts *v.* Stevenson, 17 N. J. Eq. 407.

New York. — Neufville *v.* Thomson, 3 Edw. Ch. 92.

North Carolina. — Paschall *v.* Hall, 58 N. C. 108.

Pennsylvania. — Herr's Appeal, 5 Watts & S. 494.

West Virginia. — Martin *v.* Smith, 25 W. Va. 579.

Opportunity for Fraud. — "The defendant contends that the savings were received by her as a gift from

In Equity, a gift from husband to wife need not be evidenced by any formal deed of trust or of gift, but may be made and evidenced by acts and declarations.[47]

(2.) Property Conveyed to Wife. — Where a husband conveys property to his wife or furnishes the consideration for property which is conveyed to her by a third party, it raises a presumption of a gift to the wife.[48]

her husband. The burden is upon her to establish the fact by clear and incontrovertible evidence. The marital relation often affords temptation and opportunity for fraud in such matters. A strong instinctive passion for property often leads a husband or wife into schemes for the absorption and conversion of the other's possessions. And equity is watchful to defeat all such wrongful appropriations. It requires that the donor's intention to divest himself or herself of the property, and the execution of that intention by an act of delivery, shall be clearly proved by the donee." Lane *v.* Lane, 76 Me. 521.

Especially When Rights of Creditors Involved. — Little *v.* Willetts, 37 How. Pr. (N. Y.) 481; Myers *v.* King, 42 Md. 65; *In re* Sweeting, 172 Pa. St. 161, 33 Atl. 543.

47. Grant *v.* Grant, 34 Beav. (Eng.) 623; Lockwood *v.* Cullin, 4 Rob. (N. Y.) 129.

Mere Possession by the Wife of Money belonging to the husband is no evidence that it is a gift to her as her separate estate. Parvin *v.* Capewell, 45 Pa. St. 89; Resch *v.* Senn, 28 Wis. 286.

A parol gift from husband to wife of the family furniture must be proved by an actual or constructive delivery, and mere possession by the wife for the usual family purposes is insufficient. Tyrrell *v.* York, 32 N. Y. St. 368, 10 N. Y. Supp. 611; Stanton *v.* Kirsch, 6 Wis. 338.

48. Property Conveyed to Wife. *England.* — Kingdome *v.* Bridges, 2 Vern. 67; Slanning *v.* Style, 3 P. Wms. 336.

Alabama. — Tillis *v.* Dean, 118 Ala. 645, 23 So. 804.

Arkansas. — Ward *v.* Ward, 36 Ark. 586; Kline *v.* Ragland, 47 Ark. 111, 14 S. W. 474.

California. — Read *v.* Rahm, 65 Cal. 343, 4 Pac. 111.

District of Columbia. — Cohen *v.* Cohen, 1 App. D. C. 240.

Illinois. — Johnston *v.* Johnston, 138 Ill. 385, 27 N. E. 930; Pool *v.* Phillips, 167 Ill. 432, 47 N. E. 758.

Iowa. — Cotton *v.* Wood, 25 Iowa 43; Sunderland *v.* Sunderland, 19 Iowa 325.

Maine. — Stevens *v.* Stevens, 70 Me. 92; Spring *v.* Hight, 22 Me. 408; Lane *v.* Lane, 80 Me. 570, 16 Atl. 323.

Massachusetts. — Jaquith *v.* Baptist Convention, 172 Mass. 439, 52 N. E. 544; Whitten *v.* Whitten, 3 Cush. 191; Cormerais *v.* Wesselhoeft, 114 Mass. 550; Edgerly *v.* Edgerly, 112 Mass. 175.

Mississippi. — Warren *v.* Brown, 25 Miss. 66; Fatheree *v.* Fletcher, 31 Miss. 265.

Missouri. — Richardson *v* Lowry, 67 Mo. 411; Darrier *v.* Darrier, 58 Mo. 222; Alexander *v.* Worrance, 17 Mo. 228.

Nebraska. — Kobarg *v.* Greeder, 51 Neb. 365, 70 N. W. 921; First Nat. Bank *v.* Havlik, 51 Neb. 668, 71 N. W. 291; Lavigne *v.* Tobin, 52 Neb. 686, 72 N. W. 1040; Veeder *v.* McKinley-Lansing Loan & Trust Co., 61 Neb. 892, 86 N. W. 982; Doan *v.* Dunham, 64 Neb. 135, 89 N. W. 640; Solomon *v.* Solomon, 92 N. W. 124.

New Jersey. — Whitley *v.* Ogle, 47 N. J. Eq. 67, 20 Atl. 284; Leslie *v.* Leslie, 53 N. J. Eq. 275, 31 Atl. 170; Selover *v.* Selover, 62 N. J. Eq. 761, 48 Atl. 522; Lister *v.* Lister, 35 N. J. Eq. 49; Duvale *v.* Duvale, 54 N. J. Eq. 581, 35 Atl. 750; Moran *v.* Neville, 56 N. J. Eq. 326, 38 Atl. 857; Linker *v.* Linker, 32 N. J. Eq. 174; Read *v.* Huff, 40 N. J. Eq. 229.

New York. — Guthrie *v.* Gardner, 19 Wend. 414; Welton *v.* Divine, 20 Barb. 9.

North Carolina. — Arrington *v.* Arrington, 114 N. C. 116, 19 S. E. 278.

Oregon. — Parker *v.* Newitt, 18

Property Purchased with Community Funds and title taken in name of the wife is presumed to continue community property.[49] This presumption may be rebutted by parol evidence.[50] But the rebutting evidence must be clear and convincing.[51]

Or. 274, 23 Pac. 246; Taylor *v.* Miles, 19 Or. 550, 25 Pac. 143.

Pennsylvania. — Earnest's Appeal, 106 Pa. St. 310.

South Dakota. — Bem *v.* Bem, 4 S. D. 138, 55 N. W. 1102.

Texas. — Higgins *v.* Johnson, 20 Tex. 389; Smith *v.* Strahan, 16 Tex. 314; Dunham *v.* Chatham, 21 Tex. 231; Smith *v.* Boquet, 27 Tex. 507.

Vermont. — Walston *v.* Smith, 70 Vt. 19, 39 Atl. 252.

Virginia. — Irvine *v.* Greever, 32 Gratt. 411.

"If the evidence shows the consideration was the separate property of the husband, then it will be presumed that in taking the deed in the wife's name the husband intended to make a gift of the property to the wife. If the evidence shows the property was purchased with the separate estate of the wife, and the deed is taken in her name, the property remains her separate property. These rules are applicable to a case arising between husband and wife, or their heirs, legatees, or representatives." Caffey *v.* Cooksey, 19 Tex. Civ. App. 145, 47 S. W. 65.

Expenditures on Wife's Estate. "The same reasons which support the presumption that by purchasing property, and taking title thereto in the name of his wife, a husband intends to make a settlement, apply with equal force to expenditures made by him in the improvement of her separate estate, and particularly is this so when the property upon which the expenditures are made has previously been conveyed by the husband to the wife by way of a settlement upon her." Selover *v.* Selover, 62 N. J. Eq. 761, 48 Atl. 522.

49. *California.* — Higgins *v.* Higgins, 46 Cal. 260; Peck *v.* Brummagim, 31 Cal. 440, 89 Am. Dec. 195; Woods *v.* Whitney, 42 Cal. 358.

Texas. — Dunham *v.* Chatham, 21 Tex. 231; Story *v.* Marshall, 24 Tex. 305; Smith *v.* Strahan, 25 Tex. 103; Smith *v.* Boquet, 27 Tex. 507; Caffey *v.* Cooksey, 19 Tex. Civ. App. 145, 47 S. W. 65; Schwartzman *v.* Cabell (Tex. Civ. App.), 49 S. W. 113; Johnson *v.* Burford, 39 Tex. 242.

50. Bem *v.* Bem, 4 S. D. 138, 55 N. W. 1102; Darrier *v.* Darrier, 58 Mo. 222; Read *v.* Huff, 40 N. J. Eq. 229; Persons *v.* Persons, 25 N. J. Eq. 250; Walston *v.* Smith, 70 Vt. 19, 39 Atl. 252; Corey *v.* Morrill, 71 Vt. 51, 42 Atl. 976.

In an action brought by a wife to establish title to certain land as a gift from her husband, it appeared that the land had been purchased by the husband and the deed made out to the wife. Immediately afterward, to protect the husband in case of her death, she made a will devising the land to him. He afterward sold this property and bought other land in his own name and dealt with it as his own for several years. *Held*, that these facts rebutted any presumption of a gift to the wife. Moore *v.* Moore, 165 Pa. St. 464, 30 Atl. 932.

The presumption which arises in favor of a gift when a husband purchases property and has it conveyed to his wife may be rebutted by showing that he took possession of the property and occupied it with her as a homestead; that it was assessed in his name and he paid the taxes on it, and that these acts were done with his wife's knowledge and consent. Pool *v.* Phillips, 167 Ill. 432, 47 N. E. 758.

The declarations of the husband, at the time the transactions were effected, to the effect that the property was his and that the transfers were made to his wife for the purpose of enabling her to transact business for him, together with her admissions from time to time that the land and other property belonged to him and that she was holding it for him and his children, afford a better explanation of the true condition and status of the property rights than any legal inferences that might be drawn from the form of the conveyance. Parrish *v.* Parrish, 33 Or. 486, 54 Pac. 352.

51. *District of Columbia.* — Cohen *v.* Cohen, 1 App. D. C. 240.

(3.) Security in Name of Wife. — The same presumption arises where a husband takes a security in the name of his wife, even though he retains possession of the security.[52]

c. *Gifts From Wife to Husband.* — **(1.) Degree of Proof Required.** As a general rule gifts from wife to husband are regarded with suspicion, and clear and convincing evidence is required to prove them.[53]

(2.) Gift Inferred from Circumstances. — In many cases, a gift from a wife to her husband may be inferred from the attendant circumstances without showing an actual manual delivery of the gift.[54]

Iowa. — Sunderland *v.* Sunderland, 19 Iowa 325.

Nebraska. — Kobarg *v.* Greeder, 51 Neb. 365, 70 N. W. 921; Veeder *v.* McKinley-Lansing Loan & Trust Co., 61 Neb. 892, 86 N. W. 982; Doane *v.* Dunham, 64 Neb. 135, 89 N. W. 640.

New Jersey. — Lister *v.* Lister, 35 N. J. Eq. 49; Read *v.* Huff, 40 N. J. Eq. 229.

Pennsylvania. — Earnest's Appeal, 106 Pa. St. 310.

South Dakota. — Bem *v.* Bem, 4 S. D. 138, 55 N. W. 1102.

52. Scott *v.* Simes, 10 Bosw. (N. Y.) 314. In an action upon a promissory note, the defense set up was that the note was given for property purchased from plaintiff's husband and that the note was made out to the plaintiff at the husband's request, and that plaintiff was not the real owner of the note. *Held*, that the fact that the note was made out to the wife was *prima facie* evidence of a gift from her husband. Richardson *v.* Lowry, 67 Mo. 411.

53. *England.* — Rich *v.* Cockell, 9 Ves. Jr. 369; McLean *v.* Lougland, 5 Ves. Jr. 72.

Canada. — Elliott *v.* Bussell, 19 O. R. 413.

Alabama. — Smyley *v.* Reese, 53 Ala. 89, 25 Am. Rep. 598.

Georgia. — Brooks *v.* Fowler, 82 Ga. 329, 9 S. E. 1089.

Indiana. — Parrett *v.* Palmer, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479.

Kentucky. — Long *v.* Beard, 20 Ky. L. Rep. 1536, 48 S. W. 158; Scarborough *v.* Watkins, 9 B. Mon. 547.

Michigan. — Wales *v.* Newbould, 9 Mich. 45; Penniman *v.* Perce, 9 Mich. 509; White *v.* Zane, 10 Mich. 333.

New Jersey. — Black *v.* Black, 30 N. J. Eq. 215.

Ohio. — Hardy *v.* Van Harlingen, 7 Ohio St. 208.

"There can be no doubt that a wife may make a valid gift to her husband of her personal property, but courts of equity examine every such transaction with great caution, and with apprehension of some undue influence; but, unless such influence is evinced, the gift will be upheld." Long *v.* Beard, 20 Ky. L. Rep. 1036, 48 S. W. 158.

Burden of Proof is on Husband. *California.* — White *v.* Warren, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723.

Illinois. — Patten *v.* Patten, 75 Ill. 446.

Kentucky. — Broaddus *v.* Broaddus, 16 Ky. L. Rep. 330, 27 S. W. 989.

Michigan. — Wales *v.* Newbould, 9 Mich. 45.

Nebraska. — Hovorka *v.* Havlik, 93 N. W. 990.

New Jersey. — Black *v.* Black, 30 N. J. Eq. 215.

New York. — Boyd *v.* De La Montagnie, 73 N. Y. 498; Lamb *v.* Lamb, 18 App. Div. 250, 46 N. Y. Supp. 219.

West Virginia. — Berry *v.* Wiedman, 40 W. Va. 36, 20 S. E. 817, 52 Am. St. Rep. 866.

Contra. — Long *v.* Beard, 20 Ky. L. Rep. 1036, 48 S. W. 158; Scarborough *v.* Watkins, 9 B. Mon. (Ky.) 547; Hardy *v.* Van Harlingen, 7 Ohio St. 208.

In Georgia, a deed of gift from wife to husband is *prima facie* valid, but it will be declared void upon the slightest evidence of fraud or undue influence upon the part of the husband. Hadden *v.* Larned, 87 Ga. 634, 13 S. E. 806.

54. *England.* — Caton *v.* Rideout, 1 Mac. & G. 599; Beresford *v.* Armagh, 13 Sim. 643.

(A.) Use of Wife's Property by Husband. — Thus the use by the husband of the wife's money or property with her knowledge or consent has been held sufficient to raise a presumption of a gift to the husband.[55] And where the rights of the husband's creditors become involved, it requires very clear and convincing evidence to rebut this presumption.[56] But it has been held that the mere possession by the husband of the wife's chattels is not sufficient to raise a presumption of a gift to him.[57] And if the separate property of

Illinois. — Reed *v.* Reed, 135 Ill. 482, 25 N. E. 1095, 11 L. R. A. 513.

Indiana. — Hileman *v.* Hileman, 85 Ind. 1.

New Jersey. — Black *v.* Black, 30 N. J. Eq. 215; Hanford *v.* Bockee, 20 N. J. Eq. 101.

Where a husband was indebted to his wife and confessed judgment to a brother of hers for her use, the fact that the judgment was afterward entered on the record as satisfied with the assent of the wife is *prima facie* evidence of a gift by her to her husband. Kerr's Appeal, 104 Pa. St. 282.

55. *Kentucky.* — Orr *v.* Orr, 10 Ky. L. Rep. 755, 10 S. W. 640.

Maryland. — Kuhn *v.* Stansfield, 28 Md. 210; Tyson *v.* Tyson, 54 Md. 35.

Pennsylvania. — McGlinsey's Appeal, 14 Serg. & R. 64; Towers *v.* Hagner, 3 Whart. 48; Naglee *v.* Ingersoll, 7 Pa. St. 204; Johnston *v.* Johnston, 31 Pa. St. 450; Graybill *v.* Moyer, 45 Pa. St. 530; Hinney *v.* Phillips, 50 Pa. St. 382.

West Virginia. — McGinnis *v.* Curry, 13 W. Va. 29.

Compare Vinden *v.* Fraser, 28 Gr. Ch. (Can.) 502.

"The husband having been permitted by the wife to occupy her land, and receive and dispose of the products, the law will not, in the absence of proof of an express agreement that she should share in the products, or that he should account to her, imply such a contract, but will rather regard her as having made a gift of the use of the land to the husband, while such occupation continued." Van Sickle *v.* Van Sickle, 8 How. Pr. (N. Y.) 265.

"Where a husband receives funds belonging to his wife, and with her knowledge and consent invests it in real estate in his own name, the law raises a *prima facie* presumption of a gift." Crumrine *v.* Crumrine, 50 W. Va. 226, 40 S. E. 341, 88 Am. St. Rep. 859.

Presumption Rebutted. — Where it is shown that the husband, while using the wife's property, acted as her agent or attorney in fact, this will rebut any presumption of a gift. Mahon's Estate, 202 Pa. St. 201, 51 Atl. 745. So where the husband for a number of years acknowledges his indebtedness and promises to pay interest. Latimer *v.* Glenn, 65 Ky. 535.

56. Newlin *v.* McAfee, 64 Ala. 357; Ladd *v.* Smith, 107 Ala. 506, 18 So. 195.

Burden on Wife. — "Money or property delivered by a wife to her husband is presumed, in a contest between her and the creditors of her insolvent husband, to have been a gift, and the burden is upon her to show the contrary." Horner *v.* Huffman, 52 W. Va. 40, 43 S. E. 132.

Private Understanding. — "When the facts and circumstances tend to show that a gift was intended, and that the husband used and dealt with the property as his own, the mere parol testimony of the husband and wife of a private understanding between themselves that the transaction was by them considered or intended as a loan to the husband by the wife, and not a gift, will not, as against the creditors of an insolvent husband, rebut the presumption of a gift." Horner *v.* Huffman, 52 W. Va. 40, 43 S. E. 132.

57. Bachman *v.* Killinger, 55 Pa. St. 414; Bergey's Appeal, 60 Pa. St. 408; Johnston *v.* Johnston, 31 Pa. St. 450; Hamill's Appeal, 88 Pa. St. 363; Wormley's Estate, 137 Pa. St. 101, 20 Atl. 621; Dresser *v.* Zabriskie (N. J.), 39 Atl. 1066.

the wife be mortgaged and the mortgage be taken in the names of both husband and wife, the mere form of the security will not raise a presumption that the wife intended to give any portion of her property to her husband.[58]

(B.) Distinction Between Principal and Interest. — In regard to the use by the husband of the wife's separate estate, a distinction is drawn between the principal and the interest or profits, and where the husband receives the principal of the wife's separate estate it will not generally raise a presumption of a gift, but where he receives the interest or profits and spends them with her knowledge or consent, a gift will be presumed.[59] This doctrine has been disputed by some authorities.[60]

(3.) Question of Intention in Each Case. — In all such cases, whether the transaction is a gift or a loan is largely a question of intention to be determined from the facts and circumstances.[61]

d. *Gifts From Parent to Child.* — **(1.) Degree of Proof Required.** It requires less[62] evidence to establish *prima facie* a gift from parent

58. Form of Security. — Trimble *v.* Reis, 37 Pa. St. 448; McGovern *v.* Knox, 21 Ohio St. 547.

59. *England.* — Powell *v.* Hankey, 2 P. Wms. 82; Pawlet *v.* Delaval, 2 Ves. 663; Smith *v.* Camelford, 2 Ves. Jr. 698; Milnes *v.* Busk, 2 Ves. Jr. 500; Digby *v.* Howard, 4 Sim. 588.

Illinois. — Jackson *v.* Kraft, 186 Ill. 623, 58 N. E. 298.

Indiana. — Nicodemus *v.* Simons, 121 Ind. 564, 23 N. E. 521; Parrett *v.* Palmer, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479; Bristor *v.* Bristor, 93 Ind. 281; Bristor *v.* Bristor, 101 Ind. 47; Armacost *v.* Lindley, 116 Ind. 295, 19 N. E. 138; Haymond *v.* Bledsoe, 11 Ind. App. 202, 38 N. E. 530, 54 Am. St. Rep. 502.

Iowa. — Logan *v.* Hall, 19 Iowa 491.

Michigan. — Wales *v.* Newbould, 9 Mich. 45; White *v.* Zane, 10 Mich. 333; Campbell *v.* Campbell, 21 Mich. 438.

Minnesota. — McNally *v.* Weld, 30 Minn. 209, 14 N. W. 895; Chadbourn *v.* Williams, 45 Minn. 294, 47 N. W. 812; Schmidt's Estate, 56 Minn. 256, 57 N. W. 453.

New Jersey. — Black *v.* Black, 30 N. J. Eq. 215; Jones *v.* Davenport, 44 N. J. Eq. 33, 13 Atl. 652; Horner *v.* Webster, 33 N. J. L. 406; Adoue *v.* Spencer, 62 N. J. Eq. 782, 49 Atl. 10, 90 Am. St. Rep. 484, *reversing* 46 Atl. 543.

Pennsylvania. — Hauer's Estate, 140 Pa. St. 420, 21 Atl. 445, 23 Am. St. Rep. 245.

Rhode Island. — Steadman *v.* Wilbur, 7 R. I. 481.

South Carolina. — McLure *v.* Lancaster, 24 S. C. 273, 58 Am. Rep. 259; Charkes *v.* Coker, 2 S. C. 122; Reeder *v.* Flinn, 6 S. C. 216.

Tennessee. — Lishey *v.* Lishey, 2 Tenn. Ch. 5.

Wisconsin. — Lyon *v.* Railway Co., 42 Wis. 548.

60. Vreeland *v.* Vreeland, 16 N. J. Eq. 525.

61. Fritz *v.* Fernandez (Fla.), 34 So. 315; McNally *v.* Weld, 30 Minn. 209, 14 N. W. 895; Coburn *v.* Storer, 67 N. H. 86, 36 Atl. 607.

62. *Kentucky.* — Brown *v.* Brown, 4 B. Mon. 535.

New Jersey. — Betts *v.* Francis, 30 N. J. L. 152.

North Carolina. — Wessell *v.* Rathjohn, 89 N. C. 377.

Pennsylvania. — Yeakel *v.* McAtee, 156 Pa. St. 600, 27 Atl. 277.

Rhode Island. — Thurber *v.* Sprague, 17 R. I. 634, 24 Atl. 48.

South Carolina. — Davis *v.* Davis, 1 Nott & McC. 224.

to child than would be required between strangers, or than would be necessary to prove one from child to parent.[63]

(2.) Every Presumption in Favor of the Gift. — Generally every presumption is in favor of the gift.[64] But where the rights of third parties are involved, the transaction should be proved with reasonable certainty.[65]

(3.) Property Delivered to Child. — When a parent delivers property

Texas. — Saufley *v.* Jackson, 16 Tex. 579.

63. Wycott *v.* Hartman, 14 Ch. (Can.) 219.

64. *Canada.* — Armstrong *v.* Armstrong, 14 Ch. 528.

United States. — Meyer *v.* Jacobs, 123 Fed. 900.

Illinois. — Oliphant *v.* Liversidge, 142 Ill. 160, 30 N. E. 334.

Indiana. — Teegarden *v.* Lewis, 145 Ind. 98, 44 N. E. 9.

Kansas. — Schwindt *v.* Schwindt, 61 Kan. 377, 59 Pac. 647.

Maryland. — Bauer *v.* Bauer, 82 Md. 241, 33 Atl. 643.

Minnesota. — Prescott *v.* Johnson, 97 N. W. 891.

Pennsylvania. — Campbell *v.* Brown, 183 Pa. St. 112, 38 Atl. 516.

Texas. — Saufley *v.* Jackson, 16 Tex. 579; Millican *v.* Millican, 24 Tex. 426.

But age and feebleness of the parent may raise a presumption against the gift.

Canada. — Donaldson *v.* Donaldson, 12 Ch. 431; Beeman *v.* Knapp, 13 Ch. 398; McConnell *v.* McConnell, 15 Ch. 20.

Indiana. — Teegarden *v.* Lewis, 35 N. E. 24; *s. c.*, 145 Ind. 98, 40 N. E. 1047, *overruled* in 44 N. E. 9.

Maryland. — Bauer *v.* Bauer, 82 Md. 241, 33 Atl. 643; Highberger *v.* Stiffler, 21 Md. 338.

Nebraska. — Gibson *v.* Hammang, 63 Neb. 349, 88 N. W. 500.

New Jersey. — Collins *v.* Collins, 15 Atl. 849.

New York. — Chalker *v.* Chalker, 5 Redf. 480; Stubing *v.* Stubing, 27 N. Y. St. 43, 7 N. Y. Supp. 500. *In re* Rogers, 10 App. Div. 593, 42 N. Y. Supp. 133.

Pennsylvania. — Stewart's Estate, 137 Pa. St. 175, 20 Atl. 554.

Texas. — Ellis *v.* Matthews, 19 Tex. 390, 70 Am. Dec. 353.

Wisconsin. — Doyle *v.* Welch, 100 Wis. 24, 75 N. W. 400.

Where a child claimed title to certain property through a deed of gift from his father which had since been destroyed, and it was shown that if the deed had been made as alleged it would have deprived the parent of nearly all his property, both real and personal, leaving scarcely anything for the support of his wife or any children that he might have afterward, it was held that such a claim would only be supported upon the clearest and most convincing evidence. Parker *v.* Hinson, 36 N. C. 381.

There Must be Other Suspicious Circumstances besides the mere age of the parent to raise any presumption of undue influence. Chalker *v.* Chalker, 5 Redf. (N. Y.) 480; Tenbrook *v.* Brown, 17 Ind. 410; Slayback *v.* Witt, 151 Ind. 376, 50 N. E. 389; Moore *v.* Moore, 67 Mo. 192.

"In case of a gift or voluntary conveyance from parent to child, no presumption of fraud or undue influence arises, as between the parties thereto, from the mere fact of the relation. But where a conveyance from a parent to one of several children by way of gift *prima facie* is not a just or reasonable disposition of the parent's property, and the age and physical condition of the parent, the proportion of the property conveyed to the whole estate, and the circumstances surrounding the gift suggest fraud and undue influence, the transaction should be closely scrutinized, and the burden is upon the donee to overcome the presumption of fact arising from such circumstances." Gibson *v.* Hammang, 63 Neb. 349, 88 N. W. 500.

65. Berthlett *v.* Folsom, 21 Tex. 430.

to his child, allowing him to retain possession and control of it, a presumption of a gift or advancement arises.[66]

Whether the transaction is a gift or an advancement is wholly a question of intention on the part of the parent, and when there is no direct evidence of this intent it is to be gathered from the surrounding circumstances.[67]

But it has been repeatedly held that a voluntary transfer of property from parent to child will be presumed to be an advancement and not a gift.[68] But money spent by a parent for his child's education will be presumed to be a gift and not an advancement.[69]

The intent of a parent in making a voluntary conveyance to his child may be shown by parol evidence.[70] The presumption of gift

66. *Alabama.* — Merriwether *v.* Eames, 17 Ala. 330; Pharis *v.* Leachman, 20 Ala. 662.

California. — Spitler *v.* Kaeding, 133 Cal. 500, 65 Pac. 1040.

Georgia. — Daniel *v.* Frost, 62 Ga. 697.

Kentucky. — Smith *v.* Montgomery, 5 Mon. 502.

Mississippi. — Falconer *v.* Holland, 5 Smed. & M. 689.

Nebraska. — Johnson *v.* Ghost, 11 Neb. 414, 8 N. W. 391.

Ohio. — Crumbaugh *v.* Kugler, 2 Ohio St. 374.

Texas. — Cannon *v.* Cannon, 66 Tex. 682, 3 S. W. 36; Higgins *v.* Johnson, 20 Tex. 389; Smith *v.* Strahan, 16 Tex. 314.

Virginia. — Fitzhugh *v.* Anderson, 2 Hen. & M. 289, 3 Am. Dec. 625; Scott *v.* Scott, 83 Va. 251, 2 S. E. 431

But the mere possession by a son, temporarily, of a slave belonging to his father, is insufficient to raise a presumption of a gift from the father. Slaughter *v.* Tutt, 12 Leigh (Va.) 147.

Rule does Not Apply to Step-Children. — Willis *v.* Snelling, 6 Rich. L. (S. C.) 280.

67. Bradsher *v.* Cannady, 76 N. C. 445; Riddle's Estate, 19 Pa. St. 431; King's Estate, 6 Whart. (Pa.) 370.

68. *Indiana.* — Woolery *v.* Woolery, 29 Ind. 249, 95 Am. Dec. 630; Stanley *v.* Brannon, 6 Blackf. 193; Hodgson *v.* Macy, 8 Ind. 121; Dillman *v.* Cox, 23 Ind. 440; Dille *v.* Webb, 61 Ind. 85.

Maryland. — Graves *v.* Spedden, 46 Md. 527; Stewart *v.* Pattison, 8 Gill 46; Clark *v.* Willson, 27 Md. 693.

Missouri. — Gunn *v.* Thruston, 130 Mo. 339, 32 S. W. 654; Ray *v.* Loper, 65 Mo. 470.

Tennessee. — Dudley *v.* Bosworth, 10 Humph. 9.

69. Pusey *v.* Desbouvrie, 3 P. Wms. (Eng.) 318; Mitchell *v.* Mitchell, 8 Ala. 414; Meadows *v.* Meadows, 33 N. C. 148.

Presumption Rebutted. — Riddle's Estate, 19 Pa. St. 431.

Subsequent Declarations. "The presumption that a parent intended the expenses of a child's education to be an absolute gift will not be repelled by any declaration afterward of a wish that they shall be deemed an advancement, unless contained in a will legally executed." Bradsher *v.* Cannady, 76 N. C. 445, *citing* Mitchell *v.* Mitchell, 8 Ala. 414.

70. *Indiana.* — Woolery *v.* Woolery, 29 Ind. 249, 95 Am. Dec. 630; Hodgson *v.* Macy, 8 Ind. 121; Shaw *v.* Kent, 11 Ind. 80; Dillman *v.* Cox, 23 Ind. 440; Dille *v.* Webb, 61 Ind. 85.

Maryland. — Graves *v.* Spedden, 46 Md. 527; Parks *v.* Parks, 19 Md. 323; Cecil *v.* Cecil, 20 Md. 153; Clark *v.* Willson, 27 Md. 693.

Missouri. — Gunn *v.* Thurston, 130 Mo. 339, 32 S. W. 654.

New York. — Proseus *v.* McIntyre, 5 Barb. 424; Jackson *v.* Matsdorf, 11 Johns. 92.

Tennessee. — Dudley *v.* Bosworth, 10 Humph. 9.

Texas. — Higgins *v.* Johnson, 20

or advancement is very much strengthened if the transaction occurred at or about the time of the child's marriage,[71] or upon his arriving at age.[72] The presumption may also be strengthened by showing that, on like occasions, the parent had given property to his other children.[73] The same rule as to the presumption of a gift prevails where the parent furnishes the consideration for property conveyed to the child.[74]

Tex. 389; Smith *v.* Strahan, 16 Tex. 314.

71. *Alabama.* — Hill *v.* Duke, 6 Ala. 259; Cole *v.* Varner, 31 Ala. 244; Olds *v.* Powell, 7 Ala. 652; Caldwell *v.* Pickens, 39 Ala. 514; Gunn *v.* Barrow, 17 Ala. 743.

Arkansas. — Gullett *v.* Lamberton, 6 Ark. 109; Henry *v.* Harbison, 23 Ark. 25.

Georgia. — Carter *v.* Buchanan, 9 Ga. 539; Gill *v.* Strozier, 32 Ga. 688; Cornett *v.* Fain, 33 Ga. 219.

Massachusetts. — Nichols *v.* Edwards, 16 Pick. 62.

Mississippi. — Falconer *v.* Holland, 5 Smed. & M. 689; Woods *v.* Sturdevant, 38 Miss. 68; Fatheree *v.* Fletcher, 31 Miss. 265; Whitfield *v.* Whitfield, 40 Miss. 352.

Missouri. — Mulliken *v.* Greer, 5 Mo. 489; Martin *v.* Martin, 13 Mo. 37; Jones *v.* Briscoe, 24 Mo. 498.

New Jersey. — Betts *v.* Francis, 30 N. J. L. 152.

North Carolina. — Mitchell *v.* Cheeves, 3 N. C. 126; Farrel *v.* Perry, 2 N. C. 2; Carter *v.* Rutland, 2 N. C. 97; Parker *v.* Phillips, 2 N. C. 452.

(But in North Carolina, in 1806, a statute was passed requiring a transfer of slaves to be evidenced by writing. For interpretation of this statute in connection with gifts, see Barrow *v.* Pender, 7 N. C. 483; Lynch *v.* Ashe, 8 N. C. 338; Hicks *v.* Forrest, 41 N. C. 528.)

South Carolina. — Teague *v.* Griffin, 2 Nott & McC. 93; Johnston *v.* Dilliard, 1 Bay 232; Edings *v.* Whaley, 1 Rich. Eq. 301; McCluney *v.* Lockhart, 4 McCord 251; Watson *v.* Kennedy, 3 Strob. Eq. 1.

Tennessee. — Stewart *v.* Cheatham, 3 Yerg. 60; Wade *v.* Green, 3 Humph. 547.

Texas. — Owen *v.* Tankersley, 12 Tex. 405.

In Virginia, to establish a parol gift from a parent to his child upon marriage, the evidence must be clear and convincing. Collins *v.* Lofftus, 10 Leigh (Va.) 5, 34 Am. Dec. 719, *citing* Brown *v.* Handley, 7 Leigh 119, and Mahon *v.* Johnston, 7 Leigh 317.

72. Hollowell *v.* Skinner, 26 N. C. 165, 40 Am. Dec. 431.

73. Smith *v.* Montgomery, 5 Mon. (Ky.) 502.

74. *England.* — Dyer *v.* Dyer, 2 Cox Ch. 92; Whitehouse *v.* Edwards, 37 Ch. Div. 683; Christy *v.* Courtenay, 13 Beav. 96.

Colorado. — Doll *v.* Gifford, 13 Colo. App. 67, 56 Pac. 676.

New Jersey. — Hallenback *v.* Rogers, 57 N. J. Eq. 199, 40 Atl. 576, *affirmed* 43 Atl. 1098; Peer *v.* Peer, 11 N. J. Eq. 432.

New York. — Partridge *v.* Havens, 10 Paige 618; Adee *v.* Hallett, 73 N. Y. St. 754, 38 N. Y. Supp. 273. (But see Gibbons *v.* Campbell, 148 N. Y. 410, 42 N. E. 1055.)

Ohio. — Creed *v.* Bank, 1 Ohio St. 1; Tremper *v.* Barton, 18 Ohio 418; Vanzant *v.* Davies, 6 Ohio St. 52.

Pennsylvania. — Kern *v.* Howell, 180 Pa. St. 315, 36 Atl. 872, 57 Am. St. Rep. 641.

Tennessee. — Dudley *v.* Bosworth, 10 Humph. 9, 51 Am. Dec. 690.

Texas. — Shepherd *v.* White, 10 Tex. 72.

"Where one party pays the purchase-money, and the legal title is conveyed to another, the usual presumption is that the grantee holds in trust for the party paying the purchase-money; but this may be rebutted by proof that the latter intended the grantee to take beneficially. Where the parties are parent and child, the presumption is that the payment of the purchase-money was a gift, and this presump-

(4.) Security in Child's Name. — A presumption of a gift arises where the parent takes a security in the child's name, even though the parent retains possession of the security.[75]

(5.) Presumption of Gift Rebutted. — In all such cases where the parent delivers property to his child, the presumption of a gift which arises is not conclusive, but may be rebutted by other evidence.[76]

Evidence showing that it is the general plan of a parent to loan and not to give property to his children may be sufficient to rebut the presumption of a gift.[77] The subsequent admissions of the child may be sufficient for this purpose.[78] So the declarations of the parent made at the time and acquiesced in by the child may be such as to rebut the presumption of a gift.[79] The presumption may also be rebutted by showing that the parent has regained possession of the property and continued in the undisputed ownership of it for some time.[80]

(6.) Parol Gift of Land. — Parol gifts of land, from parent to child, seem to form an exception to the general rule and will not be sustained except upon the clearest and most convincing evidence.[81]

tion must be overcome by proof in order to establish a resulting trust." Hallenbeck *v.* Rogers, 57 N. J. Eq. 199, 40 Atl. 576.

Rule Denied as Against a Mother. Where a mother purchased property with money belonging to her separate estate and had the title made out to one of her sons — *held* not to be a gift, but a resulting trust in favor of the mother. Pinney *v.* Fellows, 15 Vt. 525.

75. Spitler *v.* Kaeding, 133 Cal. 500, 65 Pac. 1040; Mallett *v.* Page, 8 Ind. 364.

76. *Kentucky.* — Smith *v.* Montgomery, 5 Mon. 502; Reed *v.* Litsy, 17 Ky. L. Rep. 1125, 33 S. W. 827.

Missouri. — Beale *v.* Dale, 25 Mo. 301.

New Jersey. — Betts *v.* Francis, 30 N. J. L. 152; Peer *v.* Peer, 11 N. J. Eq. 432.

Ohio. — Creed *v.* Bank, 1 Ohio St. 1.

Pennsylvania. — Roland *v.* Schrack, 29 Pa. St. 125.

South Carolina. — Steedman *v.* McNeill, 1 Hill L. 194; Watson *v.* Kennedy, 3 Strob. Eq. 1.

Texas. — Higgins *v.* Johnson, 20 Tex. 389; Smith *v.* Strahan, 16 Tex. 314.

Taking Security. — Flower *v.* Marten, 2 Myl. & C. (Eng.) 459.

77. Lockett *v.* Mims, 27 Ga. 207; Rich *v* Mobley, 33 Ga. 85.

But evidence as to the habits of business of a man is not admissible to prove, from his conduct, whether the sending of property home with his daughter upon her marriage was a gift or a loan. Parker *v.* Chambers, 24 Ga. 518. See also Gilman *v.* Riopelle, 18 Mich. 145, as to the admissibility of evidence showing a custom among old settlers of giving land to the eldest son.

78. Rich *v.* Mobley, 33 Ga. 85.

79. Thus in North Carolina, before 1806, if a father sent home property with his daughter upon marriage it was presumed to be a gift, but this presumption could be rebutted by the declarations of the parent made to the daughter at the time that it was intended as a loan and not a gift, even though these declarations were not made in the presence of and were not known to the daughter's husband. Collier *v.* Poe, 16 N. C. 55.

80. Watson *v.* Kennedy, 3 Strob. Eq. (S. C.) 1.

81. *Georgia.* — Beall *v.* Clark, 71 Ga. 818; Poullain *v.* Poullain, 76 Ga. 420.

Illinois. — Schoonmaker *v.* Plummer, 139 Ill. 612, 29 N. E. 1114.

Iowa. — Huston *v.* Markley, 49

Some authorities even go to the extent of holding that in such cases the gift must be proved by evidence that is direct, positive, express and unambiguous.[82]

e. *Gifts From Child to Parent.* — **(1.) Presumption of Parental Influence.** — As a general rule, in cases of gifts from child to parent,

Iowa 162; Williamson *v.* Williamson, 4 Iowa 279; Holland *v.* Hensley, 4 Iowa 222; Truman *v.* Truman, 79 Iowa 506, 44 N. W. 721.

Kentucky. — Alley *v.* Hastie, 15 Ky. L. Rep. 690, 25 S. W. 274.

Maryland. — Hardesty *v.* Richardson, 44 Md. 617, 22 Am. Rep. 57; Loney *v.* Loney, 86 Md. 652, 38 Atl. 1071; Polk *v.* Clark, 92 Md. 372, 48 Atl. 67.

Michigan. — Jones *v.* Tyler, 6 Mich. 364; Gifford *v.* Gifford, 100 Mich. 258; 58 N. W. 1000; Moross *v.* Moross, 131 Mich. 339, 91 N. W. 631.

Missouri. — Anderson *v.* Scott, 94 Mo. 637, 8 S. W. 235; O'Bryan *v.* Allen, 108 Mo. 227, 18 S. W. 892, 32 Am. St. Rep. 595.

New York. — Ogsbury *v.* Ogsbury, 115 N. Y. 290, 22 N. E. 219; *In re* Munson, 25 Misc. 586, 56 N. Y. Supp. 151.

Pennsylvania. — Hugus *v.* Walker, 12 Pa. St. 173; Miller *v.* Hartle, 53 Pa. St. 108.

South Carolina. — Edings *v.* Whaley, 1 Rich. Eq. 301 (see Caldwell *v.* Williams, Bail. Eq. 175); DeVeaux *v.* DeVeaux, 1 Strob. Eq. 283.

Texas. — Wootters *v.* Hale, 83 Tex. 563, 19 S. W. 134; Murphy *v.* Stell, 43 Tex. 123; Willis *v.* Matthews, 46 Tex. 478; Woodridge *v.* Hancock, 70 Tex. 18; 6 S. W. 818; Zallmanzig *v.* Zallmanzig (Tex. Civ. App.), 24 S. W. 944.

Virginia. — Lightner *v.* Lightner, 23 S. E. 301.

Wisconsin. — Hawkes *v.* Slight, 110 Wis. 125, 85 N. W. 721; Kelley *v.* Crawford, 112 Wis. 368, 88 N. W. 296.

Improvements Made by the Son. "Where a son goes into possession of his father's land, and makes improvements, a jury is not to infer from that, in the absence of other evidence, that the father gave him the land. Neither are loose declarations of the father to his neighbors, in casual conversations, calling it his son's property, without any explanation how it came to be his, sufficient evidence of a gift." Hugus *v.* Walker, 12 Pa. St. 173. See also Cox *v.* Cox, 26 Pa. St. 375, 67 Am. Dec. 432; Brown *v.* Brown, 38 S. C. 173, 17 S. E. 452.

In Georgia, by virtue of a statute, it is held that the exclusive possession by a child of land belonging to the father, without payment of rent for the space of seven years, will create a conclusive presumption of a gift to the child, unless there is evidence of a loan or claim of dominion by the father acknowledged by the child, or a disclaimer of any title on the part of the child. But if the father die before the lapse of the seven years, the rule will not apply. McKee *v.* McKee, 48 Ga. 332. See also Hughes *v.* Hughes, 72 Ga. 173; Johnson *v.* Griffin, 80 Ga. 551, 7 S. E. 94; Burch *v.* Burch, 96 Ga. 133, 22 S. E. 718.

This presumption may arise in favor of a child whose possession began during minority, if at or before the time he received possession he had been manumitted by his parent. Holt *v.* Anderson, 98 Ga. 220, 25 S. E. 496. But the rule does not apply as to illegitimate children. Floyd *v.* Floyd, 97 Ga. 124, 24 S. E. 451.

82. *Iowa.* — Wilson *v.* Wilson, 99 Iowa 688, 68 N. W. 910.

Montana. — Story *v.* Black, 5 Mont. 26, 1 Pac. 1, 51 Am. Rep. 37.

Pennsylvania. — Sower *v.* Weaver, 78 Pa. St. 443; Erie & W. V. R. Co. *v.* Knowles, 117 Pa. St. 77, 11 Atl. 250; Poorman *v.* Kilgore, 26 Pa. St. 365; Shellhammer *v.* Ashbaugh, 83 Pa. St. 24.

West Virginia. — Harrison *v.* Harrison, 36 W. Va. 556, 15 S. E. 87.

Such a transaction will be sustained in equity if it is established by

the presumption is that the child is under the influence and control of the parent.[83]

(2.) Burden of Proof. — The burden of proof is generally upon the parent to overcome the presumption of parental influence.[84]

the evidence with reasonable certainty. Neale *v.* Neales, 9 Wall. (U. S.) 1. See also Wylie *v.* Charlton, 43 Neb. 840, 62 N. W. 220.

Collateral Attack. — In an action against a town for damages for widening a street through plaintiff's land, the plaintiff claimed title to the land through a parol gift from his father. *Held,* that for this purpose all he was required to show was a *prima facie* title, and this he did by showing possession taken and maintained for fifteen years, a house erected and improvements made, death of the father and quit-claim deed from the other heirs. Royer *v.* Ephrata, 171 Pa. St. 429, 33 Atl. 361, *distinguishing* Erie & W. V. R. Co. *v.* Knowles, 117 Pa. St. 77, 11 Atl. 250.

83. Turner *v.* Collins, L. R. 7 Ch. App. 329; Archer *v.* Hudson, 7 Beav. (Eng.) 551; Oliphant *v.* Liversidge, 142 Ill. 160, 30 N. E. 334; Bauer *v.* Bauer, 82 Md. 241, 33 Atl. 643; Whitridge *v.* Whitridge, 76 Md. 54, 24 Atl. 645.

"A child may make a gift to a parent, and such a gift is good if it is not tainted by parental influence. A child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts, it lies on the parent maintaining the gift to disprove the exercise of parental influence, by showing that the child had independent advice, or in some other way. When the parental influence is disproved, or that influence has ceased, a gift from a child stands on the same footing as any other gift; and the question to be determined is, whether there was a deliberate, unbiased intention on the part of the child to give to the parent." Wright *v.* Vanderplank, 8 De-G. M. & G. (Eng.) 146.

It has been held that undue influence of parent over the child will not be presumed. Jenkins *v.* Pye, 12 Pet. (U. S.) 253. See also Murray *v.* Hilton, 8 App. D. C. 281.

"In the case of a child's gift of its property to a parent, the circumstances attending the transaction should be vigilantly and carefully scrutinized by the court, in order to ascertain whether there has been undue influence in procuring it; but it cannot be deemed *prima facie* void; the presumption is in favor of its validity; and, in order to set it aside, the court must be satisfied that it was not the voluntary act of the donor. The same rule as to the burden of proof applies with equal, if not greater, force to the case of a gift from a parent to a child, even if the effect of the gift is to confer upon a child with whom the parent makes his home and is in peculiarly close relations, a larger share of the parent's estate than will be received by other children or grandchildren." Towson *v.* Moore, 173 U. S. 24.

Where Gift is Reasonable Provision for Parent it will not be defeated by any presumption of undue influence on the part of the parent. White *v.* Ross, 160 Ill. 56, 43 N. E. 336.

84. *England.* — Hoghton *v.* Hoghton, 15 Beav. 278; Heron *v.* Heron, 2 Atk. 162; Turner *v.* Collins, L. R. 7 Ch. App. 329; Savery *v.* King, 5 H. L. C. 627.

Illinois. — White *v.* Ross, 160 Ill. 56, 43 N. E. 336.

Maryland. — Whitridge *v.* Whitridge, 76 Md. 54, 24 Atl. 645.

Pennsylvania. — Miskey's Appeal, 107 Pa. St. 611.

"The legal right of a person who has attained his age of twenty-one to execute deeds and deal with his property is indisputable. But where a son, recently after attaining his majority, makes over property to his father without consideration, or for an inadequate consideration, a court of equity expects that the father shall be able to justify what has been

f. *Other Confidential Relations.* — Where it is shown that the donor and the donee are of the same family, and the donee in a position of authority, there is a presumption that the gift was obtained by fraud or undue influence.[85]

As between near relatives, where the interests of creditors are not involved, the rule as to the sufficiency of evidence to establish a gift is not so strict.[86]

A gift from client to attorney,[87] from patient to physician,[88] or

done; to show, at all events, that the son was really a free agent, that he had adequate independent advice, that he was not taking an imprudent step under parental influence, and that he perfectly understood the nature and extent of the sacrifice he was making, and that he was desirous of making it." Savery *v.* King, 5 H. L. Cas. (Eng.) 627.

85. *Maryland.* — Snyder *v.* Jones, 38 Md. 542.

Michigan. — Duncombe *v.* Richards, 46 Mich. 166, 9 N. W. 149.

Missouri. — Hamilton *v.* Armstrong, 20 S. W. 1054.

Pennsylvania. — Worrall's Appeal, 110 Pa. St. 349, 1 Atl. 380, 765; Scott *v.* Reed, 153 Pa. St. 14, 25 Atl. 604.

Wisconsin. — Davis *v.* Dean, 66 Wis. 100, 26 N. W. 737.

This Presumption May be Rebutted. — Eakle *v.* Reynolds, 54 Md. 305; Madeira's Appeal (Pa.), 5 Atl. 257.

86. Fowler *v.* Lockwood, 3 Redf. (N. Y.) 465; Hadden *v.* Larned, 87 Ga. 634, 13 S. E. 806.

"A voluntary gift thus made by a capable donor in pursuance of a long-cherished purpose, to a favorite nephew whom he had raised from childhood and with whom he had lived on the most intimate and affectionate terms, negatives the suspicion of fraud and undue influence; and a court ought not to set aside a deed made under such circumstances, except upon proof of the strongest and most conclusive character." Eakle *v.* Reynolds, 54 Md. 305.

87. *England.* — Gibson *v.* Jeyes, 6 Ves. Jr. 267; Wood *v.* Downes, 18 Ves. Jr. 120; Morgan *v.* Minett, L. R. 6 Ch. Div. 638; Liles *v.* Terry (1895), 2 Q. B. 679; Barron *v.* Willis, 2 Ch. 121; Walsh *v.* Studdart, 6 Ir. Eq. 161.

New York. — Decker *v.* Waterman, 67 Barb. 460; Nesbit *v.* Lockman, 34 N. Y. 167.

Contra When Made After Suit is Closed Up. — Oldham *v.* Hand, 2 Ves. (Eng.) 259.

Burden of Proof Upon Attorney. Walsh *v.* Studdart, 6 Ir. Eq. 161; Whipple *v.* Barton, 63 N. H. 613, 3 Atl. 922; Decker *v.* Waterman, 67 Barb. (N. Y.) 460; Nesbit *v.* Lockman, 34 N. Y. 167; Snook *v.* Sullivan, 53 App. Div. 602, 66 N. Y. Supp. 24, *affirmed* 167 N. Y. 536, 60 N. E. 1120.

"Where a solicitor purchases or obtains a benefit from a client, a court of equity expects him to be able to show that he has taken no advantage of his professional position; that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess, and that the solicitor has done as much to protect his client's interest as he would have done in the case of the client dealing with a stranger. This duty exists on the part of the solicitor in all cases where he is dealing with any client, but of course, where the client is a very young man who has only just attained his majority, and who is so far unemancipated as to be still living under his father's roof as part of his family, the duty is, if not stronger, at all events more obvious." Savery *v.* King, 5 H. L. C. 27.

88. Gibson *v.* Russell, 2 Y. & C. Ch. (Eng.) 104; Woodbury *v.* Woodbury, 141 Mass. 320, 5 N. E. 275, 55 Am. Rep. 479. See *contra*, Audenreid's Appeal, 89 Pa. St. 114, 33 Am. Rep. 731.

When Upheld. — Pratt *v.* Barker, 1 Sim. (Eng.) 1.

to the donee's spiritual adviser,[89] or from a nun to her convent,[90] or from a ward to his guardian, is *prima facie* void.[91] A gift to a personal attendant requires clear proof,[92] but it has been held that no presumption of undue influence arises from the fact that the donee was the donor's mistress.[93]

II. GIFTS CAUSA MORTIS.

1. Weight and Sufficiency of Evidence in General. — A. Generally Regarded With Suspicion. — Gifts *causa mortis* will not be sustained except upon clear and convincing evidence.[94]

89. Huguenin *v.* Basely, 14 Ves. Jr. (Eng.) 273; Lyon *v.* Home, L. R. 6 Eq. (Eng.) 655; Morley *v.* Loughman, 1 Ch. (Eng.) 736; *In re* Corson, 137 Pa. St. 160, 20 Atl. 588.

United States Supreme Court. Jackson *v.* Ashton, 11 Pet. (U. S.) 229. In this case, the court uses the following language: "Does the profession of a clergyman subject him to suspicion which does not attach to other men? Is he presumed to be dishonest? It would, indeed, exhibit a most singular spectacle if this court, by its decision, should fix this stain on the character of a class of men who are generally respected for the purity of their lives and their active agency in the cause of virtue. They are influential, it is true; but their influence depends upon the faithfulness and zeal with which their sacred duties are performed. Acquainted as we are with the imperfections of our nature, we cannot expect to find any class of men exempt from human infirmities. But why should the ministers of the Gospel, who as a class are more exemplary in their lives than any other, be unable to make a contract with those who know them best and love them most?"

90. *England.* — Whyte *v.* Meade, 2 Ir. Eq. 420; McCarthy *v.* McCarthy, 9 Ir. Eq. 620; but see *In re* Metcalfe, 2 De G. J. & S. 122, where a deed of gift by a nun to her convent was held valid.

91. Hylton *v.* Hylton, 2 Ves. (Eng.) 547; Hatch *v.* Hatch, 9 Ves. Jr. (Eng.) 292; Ferguson *v.* Lowery, 54 Ala. 510; Berkmeyer *v.* Killerman, 32 Ohio St. 239; Waller *v.* Armistead, 2 Leigh (Va.) 11.

92. Osthaus *v.* McAndrew (Pa.), 8 Atl. 436; Hesse *v.* Hemberger (Tenn.), 39 S. W. 1063.

93. **Rule Stated:** "A relation *par amour* carries no presumption of the exertion of an undue influence by the mistress. It does call for suspicious scrutiny of the conduct of the parties, in ascertaining whether the challenged act of the man was induced to be done by an undue interference with his free action." Schwalber *v.* Ehman, 62 N. J. Eq. 314, 49 Atl. 1085.

94. *England.* — Walter *v.* Hodge, 1 Wils. Ch. 445, 2 Swans. 92; Cosnahan *v.* Grice, 15 Moore P. C. 215; McGonnell *v.* Murray, 3 Ir. Eq. 460; Dunne *v.* Boyd, 8 Ir. Eq. 609.

California. — Knight *v.* Tripp, 121 Cal. 674, 54 Pac. 267.

Indiana. — Caylor *v.* Caylor, 22 Ind. App. 666, 52 N. E. 465.

Kentucky. — Albro *v.* Albro, 23 Ky. L. Rep. 1555, 65 S. W. 592.

Maine. — Hatch *v.* Atkinson, 56 Me. 324; Goulding *v.* Horbury, 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357.

Maryland. — Hebb *v.* Hebb, 5 Gill 506.

Massachusetts. — Rockwood *v.* Wiggin, 16 Gray 402.

New Jersey. — Buecker *v.* Carr, 60 N. J. Eq. 300, 47 Atl. 34.

New York. — Devlin *v.* Greenwich Sav. Bank, 125 N. Y. 756, 26 N. E. 744, *reversing* Devlin *v.* Farmer, 30 N. Y. St. 541, 9 N. Y. Supp. 530; Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684; Grymes *v.* Hone, 49 N. Y. 17, 10 Am. Rep. 313; Lehr *v.*

B. Modified Doctrine. — Some of the later authorities, however, hold that there is no presumption of law either for or against such gifts, and that it is sufficient if they are established by a preponderance of the evidence as in other civil cases.[95]

Jones, 74 App. Div. 54, 77 N. Y. Supp. 213; *In re* Swade, 65 App. Div. 592, 72 N. Y. Supp. 1030; Podmore *v.* Dime Sav. Bank, 29 Misc. 393, 60 N. Y. Supp. 533; Plasterstein *v.* Hoes, 37 App. Div. 421, 56 N. Y. Supp. 103; Tilford *v.* Bank for Savings, 31 App. Div. 565, 52 N. Y. Supp. 142.

North Carolina. — Shirley *v.* Whitehead, 36 N. C. 130.

Ohio. — Gano *v.* Fisk, 43 Ohio St. 462, 3 N. E. 532, 54 Am. Rep. 819.

Pennsylvania. — *In re* Wise, 182 Pa. St. 168, 37 Atl. 936.

Rhode Island. — Citizens Sav. Bank *v.* Mitchell, 18 R. I. 739, 30 Atl. 626.

Virginia. — Smith *v.* Smith, 92 Va. 696, 24 S. E. 280.

West Virginia. — Seabright *v.* Seabright, 28 W. Va. 412.

Opportunity for Fraud. — "Cases of this kind demand the strictest scrutiny. So many opportunities and such strong temptations present themselves to unscrupulous persons to attend these deathbed donations, that there is always danger of having an entirely fabricated case set up. And, without any imputation of fraudulent contrivances, it is so easy to mistake the meaning of persons languishing in a mortal illness, and, by a slight change of words, to convert their expressions of intended benefit into an actual gift of property, that no case of this description ought to prevail unless it is supported by evidence of the clearest and most unequivocal character." Cosnahan *v.* Grice, 15 Moore P. C. (Eng.) 215.

Contravene Law of Wills. — "Gifts *causa mortis* are not regarded in the law with favor, since they are in contravention of the general rules prescribed for the testamentary disposition of property, and therefore should, in all cases, be established by clear and convincing proof of the requisites of such a gift." Knight *v.* Tripp, 121 Cal. 674, 54 Pac. 267.

As Compared With Gifts Inter Vivos. — It has been held that no other or different proof is required to establish a gift *causa mortis* than is necessary to prove one *inter vivos*. Bedell *v.* Carll, 33 N. Y. 581.

On the other hand, it has been held that the burden of proof rests much more heavily upon the donee in the case of a gift *causa mortis* than when the gift is *inter vivos*. Seabright *v.* Seabright, 28 W. Va. 412. See also *In re* Murray, 9 A. R. (Can.) 369.

95. It has been held that while there was no presumption of law or fact against a gift, there was no presumption of law or fact in favor of one; and that he who claimed title to property through the gift must establish it by evidence which is "clear and convincing, strong and satisfactory." Farian *v.* Wiegel, 76 Hun 462, 31 Abb. N. C. 159, 28 N. Y. Supp. 95.

But in a later case in the same state the court used the following language: "There is no presumption of law either in favor of or against such a gift. By reason of the fact that there is some opportunity for fraud in cases of this kind, great care should be exercised by the courts to see that no wrong is done or fraud perpetrated. The necessity for care, however, does not change general rules applicable to civil cases; and when the gift is a natural one, and the evidence is reasonable and probable, and the several steps to establish the gift *causa mortis* are established by a fair preponderance of evidence, the donee is entitled to the decision or verdict." Reynolds *v.* Reynolds, 20 Misc. 254, 45 N. Y. Supp. 338.

In Trenholm *v.* Morgan, 28 S. C. 268, 5 S. E. 721, the court said: "Although we cannot say that courts lean against gifts *causa mortis*, yet the evidence to establish them should

C. Uncorroborated Testimony of Donee. — It has been intimated in one or two cases that it would establish a very dangerous precedent to allow such gifts to be maintained upon the uncorroborated testimony of the donee.[96]

D. Mere Intention Insufficient. — The mere intent to give is not a gift, and where the evidence shows such an intent without an actual gift consummated by delivery and acceptance, it will result in a failure of proof.[97] But testimony that an intention to give existed for a long time before the act of giving serves to corroborate the other evidence of the gift.[98]

2. Burden of Proof. — The burden of proof generally rests upon the donee or those claiming under him to establish every element of a valid gift *causa mortis*.[99]

be clear and unequivocal, and will be closely scrutinized."

Preponderance Sufficient. — It has been held error to charge that a gift *causa mortis* must be proved "beyond suspicion." Lewis *v.* Merritt, 113 N. Y. 386, 21 N. E. 141, reversing 42 Hun 161. See also Gibbs *v.* Carnahan, 4 Misc. 564, 25 N. Y. Supp. 786, *affirmed* in 77 Hun 607, 28 N. Y. Supp. 1135, where it was held proper to refuse to charge the jury that a gift *causa mortis* must be established "beyond a reasonable doubt" or "by the clearest evidence" or "by clear and satisfactory evidence;" that the same rule was to apply as in all other civil cases, and that it was sufficient if the gift were established by a preponderance of evidence.

Question of Fact in Each Case. Castle *v.* Persons, 117 Fed. 835; Crue *v.* Caldwell, 52 N. J. L. 215, 19 Atl. 188.

For evidence held sufficient to establish gift *causa mortis*, see Callanan *v.* Clement, 18 Misc. 621, 42 N. Y. Supp. 514; *affirmed* in 162 N. Y. 618, 57 N. E. 105; Podmore *v.* South Brooklyn Sav. Inst., 48 App. Div. 218, 62 N. Y. Supp. 961.

For evidence held insufficient, see Daniel *v.* Smith, 64 Cal. 346, 30 Pac. 575; Farmer *v.* Devlin, 32 N. Y. St. 168, 10 N. Y. Supp. 425; *affirmed* in 124 N. Y. 646, 27 N. E. 412; Podmore *v.* Dime Sav. Bank, 29 Misc. 393, 60 N. Y. Supp. 533; Plasterstein *v.* Hoes, 37 App. Div. 421, 56 N. Y. Supp. 103; Alsop *v.* Southold Sav. Bank, 66 Hun 300, 21 N. Y. Supp. 632; Wetmore *v.* Brooks, 44 N. Y. St. 327, 18 N. Y. Supp. 852.

In Emery *v.* Clough, 63 N. H. 552, 4 Atl. 796, it was held that the following memorandum was sufficient evidence to establish a valid gift *causa mortis:* "Give to Hannah K. Clough, on condition that if I regain my health it is to be returned to me in good faith, otherwise the gift is absolute. William Emery."

96. Kenney *v.* Public Administrator, 2 Bradf. (N. Y.) 319.

It has been held that there is no absolute rule that a gift of this kind may not be established by the evidence of the claimant alone; but that there is no class of questions in which it is more important that corroborating testimony should be insisted on. McDonnell *v.* Murray, 3 Ir. Eq. 460.

97. Partridge *v.* Kearns, 32 App. Div. 483, 53 N. Y. Supp. 154; Delmotte *v.* Taylor, 1 Redf. (N. Y.) 417; Wilcox *v.* Matteson, 53 Wis. 23, 9 N. W. 814, 40 Am. Rep. 754; Gano *v.* Fisk, 43 Ohio St. 462, 3 N. E. 532, 54 Am. Rep. 819.

98. Goulding *v.* Horbury, 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357.

99. *Illinois.* — Barnum *v.* Reed, 136 Ill. 388, 26 N. E. 572.

Maine. — Dole *v.* Lincoln, 31 Me. 422.

Michigan. — People's Sav. Bank *v.* Look, 95 Mich. 7, 54 N. W. 629.

New Jersey. — Snyder *v.* Harris, 61 N. J. Eq. 480, 48 Atl. 329.

3. Essential Elements of Proof. — A. In General. — There are four essential elements to be proved in order to establish a gift *causa mortis*. It must be shown that the gift was made under an apprehension of impending death, that the donor died of a present peril existing at the time of the gift, that there was a delivery of the thing given and an acceptance by the donee.[1]

a. *Apprehension of Death.* — It is necessary in all cases to prove that the gift was made under an apprehension of impending death and with the idea of reclaiming it upon recovery.[2] But it is not necessary, however, that this apprehension of death be evidenced by any express declaration of the donor; it may be inferred from the surrounding circumstances.[3] Thus when the transaction takes place

New York. — Lehr *v.* Jones, 74 App. Div. 54, 77 N. Y. Supp. 213; Flood *v.* Cain, 78 Hun 378, 29 N. Y. Supp. 156; Kirk *v.* McCusker, 3 Misc. 277, 22 N. Y. Supp. 780; Conklin *v.* Conklin, 20 Hun 278.

South Carolina. — Trenholm *v.* Morgan, 28 S. C. 268, 5 S. E. 721.

West Virginia. — Dickeschied *v.* Bank, 28 W. Va. 340; Seabright *v.* Seabright, 28 W. Va. 412.

Not to Disprove Fraud. — The fact that the burden of proof rests upon the claimant does not require him to prove in the first instance that there was no fraud practiced upon the deceased. Vandor *v.* Roach, 73 Cal. 614, 15 Pac. 354; Frantz *v.* Porter, 132 Cal. 49, 64 Pac. 92.

Not to Show Donor's Sanity. Vandor *v.* Roach, 73 Cal. 614, 15 Pac. 354.

Habits of Donor. — Evidence that the deceased donor was addicted to the excessive use of liquor is not sufficient in itself to establish mental incompetency to make the gift, but does impose upon the court the duty of a very careful scrutiny of the proof required to establish it, and is relevant upon the question of intent and understanding in determining the purpose of the deceased and in the weight to be attached to the testimony as a whole. Tilford *v.* Bank for Savings, 31 App. Div. 565, 52 N. Y. Supp. 142.

1. Essential Elements of Proof. Royston *v.* McCulley (Tenn.), 59 S. W. 725.

2. *England.* — Edwards *v.* Jones, 7 Sim. 325.

Maine. — Dresser *v.* Dresser, 46 Me. 48.

New Jersey. — Snyder *v.* Harris, 61 N. J. Eq. 480, 48 Atl. 329.

New York. — Kirk *v.* McCusker, 3 Misc. 277, 22 N. Y. Supp. 780; Bick *v.* Reese, 21 N. Y. St. 404, 3 N. Y. Supp. 757; Van Vleet *v.* McCarn, 18 N. Y. St. 73, 2 N. Y. Supp. 675.

North Carolina. — Kiff *v.* Weaver, 94 N. C. 274, 55 Am. Rep. 601.

Pennsylvania. — Gourley *v.* Linsenbigler, 51 Pa. St. 345; Rhodes *v.* Childs, 64 Pa. St. 18.

South Carolina. — Gilmore *v.* Whitesides, Dud. Eq. 14.

Texas. — Thompson *v.* Thompson, 12 Tex. 327.

Time of Donation Material. — It has been held that for the purpose of establishing a case of *donatio mortis causa* it is absolutely necessary to show at what time it was that the donation itself took place. Edwards *v.* Jones, 7 Sim. (Eng.) 325.

Expectation of Death Essential. Evidence showing a vague and general impression that death may occur from those casualties which attend all human affairs is not sufficient to sustain a gift *causa mortis*. It must be shown that the donor was in a condition to fear approaching death from a proximate and impending peril or from illness preceding expected dissolution. Irish *v.* Nutting, 47 Barb. (N. Y.) 370.

3. Blazo *v.* Cochrane, 71 N. H. 585, 53 Atl. 1026; Williams *v.* Guile, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366; Grymes *v.* Hone, 49 N. Y. 17,

during the last sickness of the donor, it will usually be presumed to have been made in contemplation of death.[4] And when the gift, under these circumstances, consists of the whole or a great portion of the donor's personal estate, it has been held to raise even a stronger presumption in favor of a gift *causa mortis* as distinguished from one *inter vivos*.[5] This presumption, however, that the gift was made in contemplation of death, is not conclusive, but may be rebutted by other evidence.[6]

b. *Death From Impending Peril.* — As a general rule it must be shown that the donor died from the very cause from which he apprehended death.[7] But it has been held sufficient to show death from

10 Am. Rep. 313; Rhodes *v.* Childs, 64 Pa. St. 18; Nicholas *v.* Adams, 2 Whart (Pa.) 17; Seabright *v.* Seabright, 28 W. Va. 412.

4. *In re* Swade, 65 App. Div. 592, 72 N. Y. Supp. 1030; Bliss *v.* Fosdick, 86 Hun 162, 33 N. Y. Supp. 317, *affirmed* in 151 N. Y. 625, 45 N. E. 1131; Merchant *v.* Merchant, 2 Bradf. (N. Y.) 432; Irish *v.* Nutting, 47 Barb. (N. Y.) 370; Delmotte *v.* Taylor, 1 Redf. (N. Y.) 417; Seabright *v.* Seabright, 28 W. Va. 412; Henschel *v.* Maurer, 69 Wis. 576, 34 N. W. 926, 2 Am. St. Rep. 757; Gardner *v.* Parker, 3 Madd. Ch. (Eng.) 185. *Cited* in Williams *v.* Guile, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366.

Gift Before Surgical Operation. So, where the donor was an invalid of rather advanced age and about to undergo a surgical operation it was held that the circumstances precluded the transaction from being considered as a gift *inter vivos;* that in such a case it must be assumed that the donor had at least a hope of recovery, and of getting well and safely out of the surgical operation, and that it would require very clear evidence to authorize a conclusion that she intended to make the gift absolute and not conditional upon death. Knight *v.* Tripp, 121 Cal. 674, 54 Pac. 267.

5. Seabright *v.* Seabright, 28 W. Va. 412.

6. Blazo *v.* Cochrane, 71 N. H. 585, 53 Atl. 1026.

Evidenced by Writing. — Where the transaction, alleged to be a gift *causa mortis,* is evidenced by an instrument in writing, purporting to be a regular assignment, exactly the same as where the purpose is absolutely and at once to pass the whole interest in the subject-matter, this is a strong circumstance against the presumption of the transaction being intended to operate as a gift *causa mortis.* Edwards *v.* Jones, 1 Myl. & Cr. (Eng.) 226. *Compare* Westerlo *v.* De Witt, 36 N. Y. 340, 93 Am. Dec. 517. But another court said: "Instead, therefore, of considering such absolute indorsement and assignment of the bond or note to the donee as conclusive evidence that it was a gift *inter vivos* and not *causa mortis,* it seems to me to be in itself no evidence whatever, and that it only shows that it is a gift *in presenti,* which may be a gift *inter vivos* or *causa mortis.* Both of such gifts are always gifts *in presenti.*" Seabright *v.* Seabright, 28 W. Va. 412, *criticising* Edwards *v.* Jones, 1 Myl. & Cr. (Eng.) 226.

Gift or Will. — It has been held that where the transaction alleged to be a gift *causa mortis* is coupled with a condition that the donee shall pay the funeral expenses, this circumstance affords a strong argument for the jury that a mere nuncupative will was made of which the donee was to be the executor. Hills *v.* Hills, 8 M. & W. (Eng.) 401.

7. Royston *v.* McCulley (Tenn.), 59 S. W. 725. See also cases cited under note 2, *supra.*

"The rule of law, in such cases of gifts made in prospect of death, demands for their validity that the proof shall show the existence of a bodily disorder, or of an illness

a peril existing at the time the gift was made, though not the one from which the donor supposed that he was going to die.[8]

c. *Delivery.* — **(1.) Requisites as Compared With Gifts Inter Vivos.** As a general rule the requisites to prove delivery are practically the same in both classes of gifts,[9] and it is necessary to show an absolute parting with possession by the donor.[10]

(2.) Previous Intent As Corroborating Evidence.— Where the evidence shows that the intent to give was obvious and clear, the delivery may be supported upon less stringent evidence.[11]

(3.) Where Subject of Gift is Chose in Action. — It has been held where the subject of the gift is a chose in action, and has been transferred by a mere manual delivery, without any written assignment, that the absence of the written assignment affords a presumption against the gift.[12]

which imperils the donor's life, and which eventually terminates it. But that he should be confined to his bed, or his room, or that he should die within a certain limited time, are not essential circumstances to support such a gift." Williams *v.* Guile, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366.

8. "It must appear that the gift was made by the donor during an illness or impending peril of such a nature as to cause him to apprehend death therefrom; and while it is not a legal requisite that he should die of the disease or peril from which he apprehends death, he must not recover from it, and his death must result from a disease or peril existing or impending at the time the gift was made." Blazo *v.* Cochrane, 71 N. H. 585, 53 Atl. 1026. See also Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684.

9. Basket *v.* Hassell, 107 U. S. 602; Yancey *v.* Field, 85 Va. 756, 8 S. E. 721; Ewing *v.* Ewing, 2 Leigh (Va.) 337.

It has been held that less stringent proof would be required to prove delivery in the case of a gift *inter vivos* than one *causa mortis*. Seabright *v.* Seabright, 28 W. Va. 412.

May be Inferred. — It is not necessary that the delivery be proved by eye-witnesses who actually saw it done, but it may be inferred from the surrounding facts and circumstances. Hitch *v.* Davis, 3 Md. Ch. 266.

In New Hampshire, it has been provided by statute that a gift *causa mortis* cannot be enforced unless the actual delivery of the property to the donee shall be proved by two indifferent witnesses. Blazo *v.* Cochrane, 71 N. H. 585, 53 Atl. 1026. See Pub. Stat. N. H. (1091), ch. 186, § 18.

10. Dole *v.* Lincoln, 31 Me. 422.

11. **Previous Intent as Corroborating Evidence.** — "Where the intent to bestow is obvious and clear, and the language and deportment of the donor indicate a belief upon his part that he has done all that is necessary to accomplish his purpose, they come to the aid of the act of delivery, if slight and ambiguous, but not to dispense with it as an essential element of a valid gift." Waite *v.* Grubbe, 43 Or. 406, 73 Pac. 206.

12. Varick *v.* Hitt (N. J.), 55 Atl. 139.

Where the subject of the gift is a chose in action, such as a bond mortgage, or promissory note not indorsed, it may be transferred by delivery only; but in such case, more and different evidence is required, in enforcing the claim, than where a specific chattel has been delivered, or an indorsement or a formal written transfer of the security has been made. Westerlo *v.* DeWitt, 36 N. Y. 340, 93 Am. Dec. 517. Reported below in 35 Barb. (N. Y.) 215.

Contra. — It has been held that where the subject of the gift consists of a bond and mortgage, the

(4.) **Possession by Donee.** — As a general rule the mere possession of the subject of the gift by the donee is not sufficient evidence of delivery,[13] especially where a close personal relation existed between the donor and donee.[14] It has been held, however, that the custody of the thing given, though not decisive upon the issue of delivery, usually throws light upon its solution.[15]

(5.) **Declarations Insufficient.** — Delivery cannot usually be proved by the mere declarations of the donor, uncorroborated by other evidence.[16]

(6.) **Re-Appropriation by Donor.** — Where the donor, subsequent to the alleged gift, takes the property into his own possession again, it shows either an ineffectual delivery or a revocation, and in either case is fatal to the validity of the gift.[17]

(7.) **Question of Fact in Each Case.** — The question of delivery must usually be decided according to the peculiar facts and circumstances of each particular case.[18]

mere possession by the donee is *prima facie* evidence of ownership in him; and that in such case the rule that the gift must be established by clear and unmistakable proof does not apply, but that the preponderance of the evidence is sufficient. Kiff *v.* Weaver, 94 N. C. 274, 55 Am. Rep. 601.

13. Hawkins *v.* Blewitt, 2 Esp. 663, 5 Rev. Rep. 761; Dickeschied *v.* Bank, 28 W. Va. 340; Seabright *v.* Seabright, 28 W. Va. 412; Buecker *v.* Carr, 60 N. J. Eq. 300, 47 Atl. 34; Podmore *v.* Dime Sav. Bank, 29 Misc. 393, 60 N. Y. Supp. 533.

Delivery, Not Possession, Essential. "It is not the possession of the donee, but the delivery to him by the donor, which is material in a *donatio mortis causa.* The delivery stands in place of nuncupation, and must accompany and form a part of the gift. An after-acquired possession of the donee is nothing; and a previous and continuing possession, though by the authority of the donor, is no better." Miller *v.* Jeffress, 4 Gratt. (Va.) 472.

It has been held that to establish a gift *causa mortis* by parol evidence alone, the mere fact that the subject of the gift has passed into the possession of the donee, even by the act of the donor himself, is not sufficient; but the circumstances must be such as are consistent with the presumption that he parted with all dominion over it, subject only to its revocation upon the happening of any of those events which make such a gift revocable and distinguish it from one *inter vivos.* Delmotte *v.* Taylor, 1 Redf. (N. Y.) 417.

14. Conklin *v.* Conklin, 20 Hun (N. Y.) 278.

15. Tomlinson *v.* Ellison, 104 Mo. 105, 16 S. W. 201.

16. Rockwood *v.* Wiggin, 16 Gray (Mass.) 402.

17. Kirk *v.* McCuster, 3 Misc. 277, 22 N. Y. Supp. 780.

18. Claytor *v.* Pierson (W. Va.), 46 S. E. 935.

See the case of Ellis *v.* Secor, 31 Mich. 185, 18 Am. Rep. 178, for facts held sufficient to constitute a delivery. Also Waite *v.* Grubbe, 43 Or. 406, 73 Pac. 206.

Question for Jury. — All questions regarding the fact of delivery, as well as of the capacity in which the person who receives the property holds it, are for determination by the jury, just as other questions of fact in actions of law. Dunn *v.* German-American Bank, 109 Mo. 90, 18 S. W. 1139.

"While every case must be brought within the general rule that, to constitute a valid gift *causa mortis,* there must be a delivery of the property or the thing given to the donee, or to a third person for his

d. *Acceptance.* — (1.) **When Presumed.** — When the gift is unaccompanied by any burden and is wholly beneficial to the donee, his acceptance will usually be presumed.[19]

4. Admissibility of Evidence. — A. Prior Declarations of Intention. — The prior declarations of the donor, showing an intention to make the gift, are usually admissible in favor of the donee.[20]

B. Declarations of Donee. — The declarations of the donee, in his own favor, made in the donor's presence, are admissible, both as part of the *res gestae* and to rebut his subsequent declarations against his interest.[21]

C. Previous Intention of Donor. — Where the intent with which the donor made the delivery is doubtful, evidence showing a previously fixed state of mind, on his part, inconsistent with the gift, is relevant and admissible.[22]

D. Conduct of Donee. — The conduct of the donee is always a material circumstance in the proof, especially where he has been guilty of concealment and falsity in such a way as to lend suspicion to the transaction.[23]

use and benefit, yet, as the circumstances under which such gifts are made must of necessity be varied and infinite, the courts must determine each case upon its own peculiar facts and circumstances." Caylor *v.* Caylor, 22 Ind. App. 666, 52 N. E. 465.

Where the subject of a gift was a trunk and its contents, and the evidence showed that the donor had directed a third person to put some dresses into the trunk, and then to lock it and put the key back where it was found, and the key remained there until after the death of the donor, it was held not sufficient to show such an absolute delivery as is necessary to establish a gift *causa mortis*. Coleman *v.* Parker, 114 Mass. 30.

19. Leyson *v.* Davis, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429; Blazo *v.* Cochrane, 71 N. H. 585, 53 Atl. 1026. *In re* Swade, 65 App. Div. 592, 72 N. Y. Supp. 1030; Darland *v.* Taylor, 52 Iowa 503, 3 N. W. 510, 35 Am. Rep. 285.

20. Leyson *v.* Davis, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429; Ridden *v.* Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684. *In re* Swade, 65 App. Div. 592, 72 N. Y. Supp. 1030; Smith *v.* Maine, 25 Barb. (N. Y.) 33; Parker *v.* Marston, 27 Me. 196.

Where the Circumstances Surrounding the Transaction are Ambiguous, the prior declarations of the donor, showing an intention to make the gift, are properly admitted upon the trial against his personal representative. Smith *v.* Maine, 25 Barb. (N. Y.) 33.

21. **Declarations of Donee.** Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170.

22. Where there is any ground for doubt as to the intent with which the delivery was made, or whether possession was obtained by the donee as a voluntary gift or in some other mode, evidence tending to show a continuous and apparently fixed state of mind and purpose inconsistent with such alleged gift, existing previously thereto, is relevant and competent as affecting the inferences to be drawn from the surrounding facts and circumstances. Whitney *v.* Wheeler, 116 Mass. 490.

23. The conduct of the donee is a material circumstance in the proof; and when he has been guilty of concealment and falsity at a period when the validity of the gift, if the trans-

E. State of Feeling. — Evidence showing the state of feeling existing between the donor and donee is generally admissible to show a motive either for or against the gift.[24]

5. Confidential Relations. — A. In General. — Where a confidential relation is shown to exist between the parties, the general rule applies as in cases of gifts *inter vivos,* and the transaction is *prima facie* void.[25]

B. Mere Personal Friendship. — But where the relation existing between the parties is one of mere personal friendship, there can be no presumption of any fraud or undue influence.[26]

action was fair and honest, might have been evidenced by competent witnesses, this circumstance in itself will cast suspicion upon the validity of the gift. Kenney *v.* Public Administrator, 2 Bradf. (N. Y.) 319.

24. Smith *v.* Maine, 25 Barb. (N. Y.) 33.

Where a Married Woman Made a Gift *causa mortis* to a person other than her husband, evidence of her husband's ill-treatment of her is admissible to show a motive for the gift. Comner *v.* Root, 11 Colo. 183, 17 Pac. 733.

25. Walsh *v.* Studdart, 4 D. & W. 159; Thompson *v.* Heffernan, 4 D. & W. 285; Varick *v.* Hitt (N. J.), 55 Atl. 139.

"When a clergyman attends upon a person in his last moments, and sets up a gift from the dying man to himself, the evidence of the transaction ought to be perfectly free from all suspicion, and such as to leave no reasonable doubt in the mind of the court as to its truth. A deathbed is not the fit place, nor the proper time, at which a clergyman of any persuasion should look to his own personal interest, or seek to obtain the property of the dying man. On such an occasion, if a man has a testamentary intention, and time allows, proper advice should be obtained, some professional person should be sent for, and disinterested witnesses called in; all due solemnities should attend the disposition of the property. Advantage ought never to be taken of a man's last moments in order to obtain dispositions of his property in favor of persons not connected with him by ties of blood; and I shall always require strong evidence, more especially in the case of a clergyman, before I support a gift made *in extremis.*" Thompson *v.* Heffernan, 4 D. & W. 285.

26. Frantz *v.* Porter, 132 Cal. 49, 64 Pac. 92.

GRAND JURY.

By Clarence Meily.

CROSS-REFERENCES:

Attendance of Witnesses;
Contempt;
Witnesses.

I. WITNESSES.

1. Attendance. — A. SUBPOENA. — A subpoena is the proper process with which to bring a witness before the grand jury.[1]

B. RECOGNIZANCE. — The Circuit Court has power to require witnesses subpoenaed to testify before the grand jury to enter into a recognizance to appear before that body, whether at the present or a future term of court.[2]

C. PRESENCE AND DEMEANOR OF WITNESS. — A witness before the grand jury has no right to leave its presence, after being sworn and placed under examination, without its permission.[3] The grand jury cannot enforce the obligation of a witness to answer a question, but must refer the matter of his refusal to the court.[4]

D. PERSONS AMENABLE TO PROCESS. — The grand jury cannot summon witnesses from other states.[5]

2. Oath. — A. NECESSITY. — Witnesses must be sworn before testifying.[6]

B. MANNER AND FORM. — Witnesses before the grand jury should be sworn in such manner that if their testimony is false they may

1. The testimony of a witness may support an indictment although he was not subpoenaed. State *v.* Parrish, 8 Humph. (Tenn.) 80. As to right of private person to voluntarily give information to grand jury, see *infra* "II. Evidence, 1. Scope of Inquiry, B. Inquisitorial Power."

Baldwin *v.* State, 126 Ind. 24, 25 N. E. 820. The decision involves the construction of numerous statutes as to the power of the grand jury to subpoena witnesses to discover the commission of offenses.

See *infra* "II. Evidence, 1. Scope of Inquiry, B. Inquisitorial Power."

The Subpoena Should Require Attendance Before the Court, not before the grand jury; if the latter, it is void. State *v.* Butler, 8 Yerg. (Tenn.) 83.

State's Attorney May Have Subpoenas Issued in Vacation. — O'Hair *v.* People, 32 Ill. App. 277.

2. Gwynn *v.* State, 64 Miss. 324.

3. People *v.* Kelly, 12 Abb. Pr. (N. Y.) 150.

4. In Heard *v.* Pierce, 9 Cush. (Mass.) 338, 54 Am. Dec. 757, the action was for assault and battery, and was brought by an officer in attendance on the grand jury against a recalcitrant witness, the question of the jury's power to place the witness in the officer's custody being raised. In passing on it the court said: "In truth, without the power to take refractory witnesses, or witnesses who honestly interpose unfounded objection to giving evidence, before the court for its direction and aid, the grand jury would be wholly unable to perform the duties imposed upon them by law, . . . and power to detain such a witness and take him to the court is manifestly essential to enable the jury to exercise the powers expressly given them, and to perform the duties imposed upon them by law."

Ex parte Hendrickson, 6 Utah 3, 21 Pac. 396. See article "CONTEMPT," Vol. III.

5. Beal *v.* State, 15 Ind. 378.

6. Testimony of unsworn witness if material is fatal to the indictment. United States *v.* Coolidge, 2 Gall. 364, 25 Fed. Cas. No. 14,858; State *v.* Roberts, 19 N. C. 540.

Where One Without Authority Administered the Oath to a witness before the grand jury it was held that the indictment found on such testimony would be quashed, the witness' statement having been given without the requisite sanction. Joyner *v.* State, 78 Ala. 448.

In Rex *v.* Dickinson, Russ. & R.

be indicted for perjury.[7] But the manner of swearing witnesses cannot be inquired into.[8]

General Oath. — An oath of a witness to give evidence touching criminal charges to be laid before the grand jury, without reference to any particular person accused, is unobjectionable.[9]

Swearing in Open Court. — A witness for the grand jury[10] should

(C. C.) 401, the fact that a defendant was indicted on the testimony of witnesses not sworn was made the occasion for recommending him for a pardon.

In State *v.* Easton, 113 Iowa 516, 85 N. W. 795, the fact that a witness was not sworn as required by statute was held not ground for setting aside the indictment, it not being among those specified in the code.

Testimony of Child. — In State *v.* Doherty, 2 Overt. (Tenn.) 80, it was held that the testimony of a child under fourteen years of age who had no sense of the obligation of an oath, and was therefore incompetent to take one, could not be heard by the grand jury without that sanction. But in People *v.* Sexton, 42 Misc. 312, 86 N. Y. Supp. 517, it was held, construing Code Crim. Proc., §§ 255, 392, to be discretionary with the grand jury to receive the testimony of children under twelve years of age without being sworn.

In King *v.* State, 5 How. (Miss.) 730, it was held that it need not appear from the record that witnesses examined before the grand jury were sworn. See also State *v.* Barnes, 52 N. C. 20; State *v.* Harwood, 60 N. C. 226.

Where the foreman of the grand jury has omitted to mark the witnesses before that body as having been sworn, the state may show by proof that they were sworn, notwithstanding a statute providing that the foreman shall so mark the witnesses. State *v.* Hines, 84 N. C. 810.

Where the witnesses for the grand jury are in fact sworn by the clerk of the court as required by statute, the fact that they did not deliver to the foreman a certificate showing that fact, or that no such certificate was ever made by the court, as the statute required, would not invalidate the indictment. Duke *v.* State, 20 Ohio St. 225.

7. State *v.* Fasset, 16 Conn. 457.

For an instance of an oath sufficient to sustain such an indictment, see State *v.* Green, 24 Ark. 591.

8. Turner *v.* State, 57 Ga. 107; Simms *v.* State, 60 Ga. 145; Reg. *v.* Russell, 1 Car. & M. 247.

But in United States *v.* Reed, 2 Blatchf. 435, 27 Fed. Cas. No. 16,134, it was held that the manner of swearing witnesses for the grand jury, when they were sworn in open court, might be inquired into.

In Reg. *v.* Russell, 1 Car. & M. 247, it was said that even if the inquiry were open, an improper mode of swearing a witness would not vitiate an indictment. This is because grand jurors may indict on their own knowledge.

9. In United States *v.* Reed, 2 Blatchf. 435, 27 Fed. Cas. No. 16,134, it was held that an indictment against R. on the testimony of witnesses sworn to give evidence touching charges against S. and others was not objectionable as based on testimony given without the sanction of an oath. *Contra* — *Construing* statute, Ashburton *v.* State, 15 Ga. 246. And see *infra* — "II. Evidence, 1. Scope of Inquiry, B. Inquisitorial Power."

10. Gilman *v.* State, 1 Humph. (Tenn.) 59; State *v.* Kilcrease, 6 S. C. 444.

But the temporary absence of the judge is immaterial. Jetton *v.* State, Meigs (Tenn.) 192.

Where a statute gives a foreman of the grand jury power to administer oaths, witnesses need not be sworn by or before the court. Bird *v.* State, 50 Ga. 585.

be sworn in open court. But the rule has been altered by statute in some states.[11]

C. Authority to Administer. — In the absence of statute, the foreman of the grand jury has no authority to swear witnesses on indictments for felony.[12]

3. Examination. — A. Mode. — a. *Discretion.* — The mode of examining witnesses is discretionary with the grand jury, and cannot be reviewed by the court.[13]

b. *Public Examination.* — The court has no right to require the grand jury to have the witnesses before it examined publicly.[14]

c. *Absence of Judge.* — An indictment is not vitiated by the fact that some of the witnesses were examined by the grand jury while the judge was absent from the county holding another term of court.[15]

Failure to swear witnesses in open court is not a ground for a motion in arrest of judgment, but of plea in abatement. Gilman *v.* State, 1 Humph. (Tenn.) 59.

11. In State *v.* Fasset, 16 Conn. 457, the swearing of witnesses in the grand jury room by a magistrate, who was himself a grand juror, was sustained, the court saying: "The practice in England and in the courts of the United States certainly is that the witnesses should be sworn in open court; growing probably out of the fact that formerly grand juries met with the court, and the proceedings seem to have been carried on under the eye of the court. . . . By the laws of this state, a provision was early made that every town should choose two or more . . . grand jurors. . . . They were to meet quarterly, or oftener, to inquire into breaches of the law; to call witnesses before them for examination; and if such persons, after being duly summoned by a warrant from an assistant or justice of the peace, refused to be examined on oath, such magistrate might commit them to gaol; . . . In 1784 the statute was altered so far that the superior and county courts might order a grand jury from those chosen by the towns, or other sufficient freeholders. Under these circumstances, it was very natural that the grand jurors of the respective towns, when eighteen of them met together, at the call of the court, should pursue the same course as to the witnesses as when they met in their respective towns; and that they should suppose that the justice of the peace might as well summon and swear the witnesses as where a smaller number of grand jurors had convened. . . . So far as we are informed, no witness has ever been sworn in our courts and sent to the grand jury for examination. A practice so ancient and so uniform, growing up under the eyes of the court, is certainly strong evidence of what is the law."

See also the statutes of the several states.

12. Ayrs *v.* State, 5 Cold. (Tenn.) 26.

But under Tex. Crim. Code, arts. 2949-2955, an indictment cannot be attacked on this ground. Morrison *v.* State, 41 Tex. 516.

In State *v.* Allen, 83 N. C. 680, a statute empowering the foreman of the grand jury to swear the witnesses whose names were indorsed on the bill was held not to abrogate the practice of swearing witnesses for the grand jury in open court. See also State *v.* White, 88 N. C. 698.

13. United States *v.* Reed, 2 Blatchf. 435, 27 Fed. Cas. No. 16,134.

For a discussion of the right of the grand jury to continue to examine witnesses after the indictment has been returned, see Coppenhaver *v.* State, 160 Ind. 540, 67 N. E. 453.

14. State *v.* Branch, 68 N. C. 186, 12 Am. Rep. 633.

15. Com. *v.* Bannon, 97 Mass. 214.

d. *Interpreter.* — Where the statute allows the presence of an interpreter before the grand jury, the prosecuting witness may properly act as such.[16]

B. Persons Present and Participating. — a. *Bailiff.* — The mere presence of the bailiff of the court who is in attendance on the grand jury during their examination of witnesses will not vitiate an indictment.[17]

b. *Prosecuting Attorney.* — The prosecuting attorney has the right to be present before the grand jury and aid in examining witnesses, but cannot make suggestions as to the weight and credibility of the testimony.[18]

c. *Attorney.* — The fact that an attorney, not an official, was present before the grand jury and examined witnesses, but left before the deliberation upon the accusation, would not invalidate an indictment.[19]

16. People *v.* Ramirez, 56 Cal. 533.

Witness Must Not Advise Grand Jury as to making a presentment. *In re* Gardiner, 31 Misc. 364, 64 N. Y. Supp. 760.

It is error for an attorney for the prosecution to procure himself to be summoned as a witness before the grand jury, and to address that body urging the finding of an indictment. Welch *v.* State, 68 Miss. 341, 8 So. 673.

17. State *v.* Kimball, 29 Iowa 267.

18. *In re* District Attorney of United States, 7 Fed. Cas. No. 3925; Charge to Grand Jury, 2 Sawy. 667, 30 Fed. Cas. No. 18,225; Stattuck *v.* State, 11 Ind. 473; State *v.* Adam, 40 La. Ann. 745, 5 So. 30; State *v.* Baker, 33 W. Va. 319, 10 S. E. 639.

So a regular assistant of the district attorney may examine witnesses. United States *v.* Kilpatrick, 16 Fed. 765; Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986.

Special counsel appointed by the court may examine witnesses before the grand jury. Raymond *v.* People, 2 Colo. App. 329, 30 Pac. 504; State *v.* Kovolosky, 92 Iowa 498, 61 N. W. 223; State *v.* Tyler, 122 Iowa 125, 97 N. W. 983.

Notwithstanding a statute limiting the persons allowed to be present before the grand jury to the prosecuting attorney and witnesses, the fact that an attorney acting for the prosecuting attorney, though not his deputy, examined witnesses, would not warrant quashing an indictment. Bennett *v.* State, 62 Ark. 516, 36 S. W. 947. *Contra* — People *v.* Scannell, 36 Misc. 40, 72 N. Y. Supp. 449.

In State *v.* District Court of Montana, 21 Mont. 25, 55 Pac. 916, a statute giving the attorney-general supervisory power over county attorneys and empowering him when required by the public service to assist the county attorney in the discharge of his duties, together with a statute requiring the county attorney to attend before the grand jury, was held to give the attorney-general the right to examine witnesses before that body, though another statute provided that an indictment must be set aside where any one but members of the grand jury, witnesses, the county attorney and the judge were present during the jury's session.

For an instance of the quashing of an indictment on account of the participation in the examination of witnesses of an examiner of the department of justice, see United States *v.* Kilpatrick, 16 Fed. 765.

19. Wilson *v.* State, 41 Tex. Crim. 115, 51 S. W. 916.

Contra. — Durr *v.* State, 53 Miss. 425, where the proper remedy was held to be a plea in abatement, and whether a motion to quash would lie was said to be doubtful.

For an instance of a refusal to quash an indictment because the

d. *Witnesses.* — The presence of an expert witness while other witnesses are being examined before the grand jury and his propounding questions to them vitiates an indictment; and the court will not inquire whether the accused was prejudiced thereby.[20]

e. *Stenographer.* — The fact that a stenographer was present during the taking of testimony would not vitiate an indictment, where he left before the grand jury began the discussion of the propriety of finding a bill.[21]

f. *Presence of Accused.* — The accused has no right to be present during the examination of witnesses before the grand jury.[22]

II. EVIDENCE.

1. Scope of Inquiry. — A. Evidence for the Defense. — One against whom a charge is being investigated by the grand jury has no right to introduce witnesses in his own behalf.[23] But where the

clerk of the grand jury, who was a practicing attorney, asked witnesses certain questions at the foreman's request, see State *v.* Miller, 95 Iowa 368, 64 N. W. 288.

For an instance of the quashing of an indictment on account of the participation of an attorney for creditors of a bank, in the grand jury's investigation of a charge of embezzlement by the bank's officers, the attorney having been originally called as a witness, see United States *v.* Farrington, 5 Fed. 343.

20. United States *v.* Edgerton, 80 Fed. 374. But see Lawrence *v.* Com., 86 Va. 573, 10 S. E. 840.

21. Sims *v.* State (Tex. Crim.), 45 S. W. 705; United States *v.* Simmons, 46 Fed. 65.

This is true, at least, where no prejudice to the defendant is shown. State *v.* Bates, 148 Ind. 610, 48 N. E. 2; State *v.* Brewster, 70 Vt. 341, 40 Atl. 1037, 42 L. R. A. 444. But see *contra*, State *v.* Bowman, 90 Me. 363, 38 Atl. 331, 60 Am. Rep. 266.

22. Billingslea *v.* State, 85 Ala. 323, 5 So. 137; United States *v.* Terry, 39 Fed. 355; People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161. *Contra* — State *v.* Fasset, 16 Conn. 457. The grand jury should permit the accused to put any proper questions he may desire to the witness. Lung's Case, 1 Conn. 428.

Whether the accused shall go before the grand jury and interrogate witnesses is discretionary with the court. State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54.

The declaration of the bill of rights that in criminal prosecutions the accused shall have the right to be confronted with the witnesses against him does not entitle, as a matter of right, a person accused of crime before the grand jury to be present during their investigation. State *v.* Wolcott, 21 Conn. 271.

As to the right of an accused person to introduce evidence, see *infra*, "II. Evidence, 1. Scope of Inquiry, A. Evidence for the Defense."

Right to Confront Witnesses does not apply to proceedings before grand jury. State *v.* Smith, 74 Iowa 580, 38 N. W. 42; People *v.* Stuart, 4 Cal. 218.

23. Respublica *v.* Shaffer, 1 U. S. 236; United States *v.* Palmer, 2 Cranch C. C. 11, 27 Fed. Cas. No. 15,989; Charge to Grand Jury, Taney 615, 30 Fed. Cas. No. 18,257; United States *v.* Terry, 39 Fed. 355; People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161; Lung's Case, 1 Conn. 428.

This is on the ground that to permit the accused to introduce evidence would amount to a usurpation by the grand jury of the functions of the trial court and petit jury, and would give to the grand jury's investigation the effect of former jeopardy, and to

grand jury has reason to believe that there is evidence within its reach which will qualify or explain away the charge under investigation, it should order it to be produced.[24]

B. Inquisitorial Power. — a. *Definition.* — The inquisitorial power of the grand jury is the authority to secure and examine witnesses with a view to the discovery of the commission of offenses, though no specific accusation has been presented to it for investigation.[25]

an indictment, when found, an undue weight with the petit jury. Respublica *v.* Shaffer, 1 U. S. 236.

The refusal of the district attorney to summon witnesses at the request of the grand jury in behalf of an accused person does no vitiate an indictment. United States *v.* Terry, 39 Fed. 355.

Evidence on behalf of one charged with crime before the grand jury cannot be received by that body, though the district attorney promised the accused that he might introduce it. United States *v.* Blodgett, 35 G. A. 336, 30 Fed. Cas. No. 18,312. See, however, United States *v.* White, 2 Wash. C. C. 29, 28 Fed. Cas. No. 16,685.

In Reg. *v.* Rhodes (1899), 1 Q. B. 77, a statute providing that every person charged with an offense should be a competent witness for the defense at every stage of the proceedings was held not to confer on one charged with crime before a grand jury the right to appear and be sworn in his own behalf, the court saying: "A grand jury have nothing whatever to do with the defense. Their functions are well known. They sit in private. They have to hear the evidence, or at any rate part of the evidence, for the prosecution, and to say whether in their opinion a *prima facie* case against the prisoner has been made out. It would be difficult to believe that the legislature intended by this section to enable the grand jury to hear evidence for the defense. Such a thing would be no less than an anomaly."

The Insanity of the Accused is not a subject which the grand jury can investigate. United States *v.* Lawrence, 4 Cranch C. C. 514, 26 Fed. Cas. No. 15,576. And in Reg. *v.* Hodges, 8 Car. & P. 195, it was held that the grand jury could not refuse to indict for murder on the ground of the defendant's insanity, though that fact clearly appeared from the evidence for the prosecution.

24. Charge to Grand Jury, 2 Sawy. 667, 30 Fed. Cas. No. 18,255; United States *v.* Kilpatrick, 16 Fed. 765. *In re* Grand Jury, 62 Fed. 840.

25. The inquisitorial power of grand juries was unknown at common law. State *v.* Lee, 87 Tenn. 114, 9 S. W. 425; Harrison *v.* State, 4 Cold. (Tenn.) 195; Glenn *v.* State, 1 Swan (Tenn.) 19; Warner *v.* State, 81 Tenn. 52. And see Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894.

"That the powers of the body [the grand jury] are inquisitorial to a certain extent is undeniable; yet they have to be exercised within well-defined limits. Anything they can find out by their own inquiry and observation is legitimate and praiseworthy, but they have no authority to force private persons or the officers of other courts to disclose to them who may have violated the public laws, and the names of persons by whom such infractions can be established; in short, to make every man a spy upon the conduct of his neighbors and associates, and compel him to violate the confidence implied in holding social intercourse with his fellows by forcing him to become a public informer. Such an exercise of power would be in derogation of general principles essential to the enjoyment of rights regarded as sacred and paramount in the intercourse between man and man; and these rights have been carefully

guarded, not only by the spirit of our law, but by its express enactments. . . . It is the right of any citizen or any individual of lawful age to come forward and prosecute for offenses against the state, or when he does not wish to become the prosecutor, he may give information of the fact to the grand jury, or any member of the body, and in either case it will become their duty to investigate the matter thus communicated to them, or made known to one of them, whose obligation it would be to lay his information before that body. This, however, differs widely from forcing a person to reveal his knowledge to the inquest. This latter process is in the nature of an unlawful search, against which citizens are protected by constitutional provisions. . . . We do not intend to intimate that the state's prosecuting officer may not, if he sees proper to do so, make search for evidence and secure its forthcoming by serving subpoenas upon witnesses in anticipation of the impaneling and qualification of the grand jury before whom the matter is to be investigated; he is certainly not bound to do so, but he violates no official duty in thus acting, provided he is careful to state in the subpoena the names of the parties and the offense to be investigated." *In re* Lester, 77 Ga. 143.

In Lewis *v.* Board of Com'rs, 74 N. C. 194, it was said that there was no authority of law to summon and send witnesses before the grand jury upon mere matters of inquiry, "a power which, if allowed, is capable of the grossest and most oppressive abuse, coupled with great temptations to abuse it." And again: "The law denounces such inquisitorial power, which may be carried to the extent of penetrating every household, and exposing the domestic privacy of every family."

Grand juries "cannot make inquisitions into the general conduct and private business of their fellow-citizens, and hunt up offenses by sending for witnesses to investigate vague accusations founded upon suspicious and indefinite rumors. The repose of society, as well as the nature of our free institutions, forbids such a dangerous mode of inquisition. A prosecuting officer has no right to send witnesses to the grand jury room merely to be interrogated whether there has been any violation of law within their knowledge." United States *v.* Kilpatrick, 16 Fed. 765.

Where an offense with respect to which inquisitorial power has not been specially conferred by statute is under investigation, the inquiry must be confined to the grand jurors themselves, and in such case they can make a lawful presentment only upon knowledge or information possessed within themselves. State *v.* Lee, 87 Tenn. 114, 9 S. W. 425.

A presentment not on the knowledge of any of the grand jury, but upon information detailed to it by others, should be abated. State *v.* McManus, 4 Humph. (Tenn.) 258.

In Ward *v.* State, 2 Mo. 120, 22 Am. Dec. 449, it appeared that the grand jury had subpoenaed a witness to appear and testify generally, without saying in what particular matter or cause he was to testify. It was objected that the grand jury had no right to interrogate a witness in this general way, but that an indictment should have been drawn up charging some particular persons with crimes, and then the witness be required to give testimony as to the matter of the indictment. The court said that if it should ever happen that a grand jury should determine to summon every person in the county with a view to experiment if, perchance, they might find out some offense, it would be the duty of the court to withhold its process and stop such a course, as this would be an abuse of power. But in ordinary cases when the jury had cause to believe that some offense had been committed, such procedure as that pursued was proper. If the jury were not to be trusted with the power to send for witnesses until some malignant prosecutor or some injured persons should cause an indictment to be sent up to them, this would strip them of their greatest utility. And in United States *v.* Kimball, 117 Fed. 156, the exercise of inquisitorial power by

b. *Existence.* — Statutes conferring it must be strictly construed.[26] And an individual has no right to communicate private information to the grand jury for the purpose of obtaining a presentment.[27]

c. *Indictment on Testimony in Other Investigation.* — The grand jury may base the indictment of a witness before it on testimony given while another offense was under investigation.[28]

2. Competency and Relevancy. — A. Duty to Receive Competent Evidence. — The evidence before the grand jury must be competent legal evidence, such as is proper before a petit jury.[29] But subject to the qualification of its legitimate character, the grand jury should receive all evidence presented tending to throw light

the grand jury seems to have been countenanced.

26. Glenn *v.* State, 1 Swan (Tenn.) 19; Harrison *v.* State, 4 Cold. (Tenn.) 195.

Under a statute conferring inquisitorial power, the fact that the presentment was not made upon the knowledge of the jurors themselves, but upon information communicated by others, would not vitiate it. Garret *v.* State, 9 Yerg. (Tenn.) 389.

Under such a statute it is no objection to an indictment that it was prepared after the witnesses were examined instead of before. State *v.* Parrish, 8 Hump. (Tenn.) 80.

A statute giving the grand jury power to send for witnesses whenever they suspect the commission of certain offenses does not confer upon the attorney-general authority to order subpoenas upon his own motion for witnesses to appear before that body. Warner *v.* State, 81 Tenn. 52.

For instances of statutes conferring inquisitorial power, see State *v.* Lee, 87 Tenn. 114, 9 S. W. 425; State *v.* Estes, 3 Lea (Tenn.) 168; State *v.* Smith, Meigs (Tenn.) 99; State *v.* Adams, 2 Lea (Tenn.) 647; State *v.* Barnes, 5 Lea (Tenn.) 398; Glenn *v.* State, 1 Swan (Tenn.) 19.

27. United States *v.* Kilpatrick, 16 Fed. 765; Charge to Grand Jury, 2 Sawy. 667, 30 Fed. Cas. No. 18,255. And see Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894.

But in State *v.* Stewart, 45 La. Ann. 1164, 14 So. 143, it was held that the fact that the leading witness for the state went without summons or request before the grand jury and gave his version of the case against the defendant, and instituted the prosecution, did not vitiate an indictment, the court saying: "The witness had the undoubted right to go before the grand jury voluntarily and disclose his knowledge of the case. As a good citizen it was his duty to do so. No one can be excused for withholding knowledge of a crime from the public until he is summoned to give his testimony of its commission."

28. People *v.* Craven-Fair, 137 Cal. 222, 69 Pac. 1041; State *v.* Beebe, 17 Minn. 241; People *v.* Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129. But see Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894; Com. *v.* McComb, 157 Pa. St. 611, 27 Atl. 794.

29. United States *v.* Reed, 2 Blatchf. 435, 27 Fed. Cas. No. 16,134. So hearsay evidence is inadmissible. United States *v.* Kilpatrick, 16 Fed. 765, and likewise mere reports and suspicions. *In re* Grand Jury, 62 Fed. 840. Charge to Grand Jury, 2 Sawy. 67, 30 Fed. Cas. No. 18,255.

In Territory *v.* Pendry, 9 Mont. 67, 22 Pac. 760, a statute directing the grand jury to receive none but legal evidence was held directory merely.

Notwithstanding a statute providing that the grand jury can receive none but legal evidence, the fact that the justice reads to it certain affidavits and instructs that if the things therein sworn to be proven the jury should indict, does not vitiate the indictment. People *v.* Glen, 173 N. Y. 395, 66 N. E. 112. Such conduct under a statute requir-

on the matter under consideration, whether it tends to show the guilt or the innocence of the accused.[30]

B. Effect of Incompetent Evidence. — The grand jury's reception of incompetent evidence will not vitiate an indictment.[31]

ing the court or justice to give the grand jury such information as he may deem proper concerning charges returned to court or likely to come before them is discretionary with him. People *v.* Glen, 64 App. Div. 167, 71 N. Y. Supp. 893.

Where there is doubt as to the admissibility of evidence, the grand jury should submit the question to the court for its instructions and directions. United States *v.* Kilpatrick, 16 Fed. 765.

A witness summoned to produce books before the grand jury, portions of which he deems immaterial, should produce the books, and on being requested to exhibit any one of them should then raise the question of materiality and have it determined by the court. *In re* Archer (Mich.), 96 N. W. 442.

30. *In re* Grand Jury, 62 Fed. 840; Charge to Grand Jury, 2 Sawy. 667, 30 Fed. Cas. No. 18,255.

31. State *v.* Fasset, 16 Conn. 457. See also People *v.* Willis, 23 Misc. 568, 52 N. Y. Supp. 808; United States *v.* Smith, 3 Wheel. Crim. Cas. 100, 27 Fed. Cas. No. 16,342. *Contra, In re* Gardiner, 31 Misc. 364, 64 N. Y. Supp. 760.

It is not a proper plea to an indictment that the grand jury received incompetent or irrelevant evidence, and for a ruling on the sufficiency of a motion to quash an indictment on account of the grand jury's reception of incompetent evidence. See Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460.

Nor can the question whether improper evidence was received by the grand jury be inquired into on *habeas corpus* brought to obtain the release of a person indicted. Harkraer *v.* Wadley, 172 U. S. 148.

Because Subject Not Open to Inquiry. — United States *v.* Cobban, 127 Fed. 713; State *v.* Boyd, 2 Hill (S. C.) 287, 27 Am. Dec. 376.

So an indictment will not be set aside because the accused's wife improperly gave evidence against him before the grand jury. Dockery *v.* State, 35 Tex. Crim. 487, 34 S. W. 281; State *v.* Tucker, 20 Iowa 508; Buchanan *v.* State (Tex. Crim.), 52 S. W. 769; Chapman *v.* State (Tex. Crim.), 49 S. W. 587. At least it is too late to raise the objection after conviction. State *v.* Houston, 50 Iowa 512.

So receiving the testimony of an accomplice will not vitiate an indictment. State *v.* Wolcott, 21 Conn. 271.

Where a statute prescribes the grounds of a motion to quash or set aside an indictment and omits as one of them the competency of the evidence before the grand jury, the effect is to remove that question from the field of inquiry.

United States *v.* Brown, 13 Int. Rev. Rec. 126, 1 Sawy. 531, 24 Fed. Cas. No. 14,671; United States *v.* Cutler, 5 Utah 608, 19 Pac. 145; People *v.* Montgomery, 36 Misc. 326, 73 N. Y. Supp. 535; Com. *v.* Minor, 89 Ky. 555, 13 S. W. 5; Territory *v.* Pendry, 9 Mont. 67, 22 Pac. 760. This last holding was made despite a statute directing the jury to receive none but legal evidence.

For a full discussion of the practice in New York, see *infra*, "4. Sufficiency. B. Review of Sufficiency of Evidence," note 51.

But in United States *v.* Reed, 2 Blatchf. 435, 27 Fed. Cas. No. 16,134, it was said that the competency of the evidence before the grand jury, whether oral or written, and the manner of the authentication of the latter species of evidence, might be inquired into. *Provided*, there is sufficient legal evidence to warrant indictment.

People *v.* Sexton, 42 Misc. 312, 86 N. Y. Supp. 517; People *v.* Winant, 24 Misc. 361, 53 N. Y. Supp. 695; Hammond *v.* State, 74 Miss. 214, 21 So. 149; State *v.* Shreve, 137 Mo. 1, 38 S. W. 548; Bloomer *v.* State, 3

C. PRESUMPTIONS. — It is to be presumed that only proper evidence will be laid before the grand jury.[32] It will not be presumed that the grand jury allowed itself to be influenced in finding an indictment by matters not properly before it.[33]

D. CONFESSIONS. — Evidence of confessions ought never to be admitted before the grand jury, except under the direction of the court, or unless the prosecuting officer is present and carefully makes the necessary preliminary inquiries.[34]

E. DOCUMENTARY EVIDENCE. — a. *Direction of Court.* — Documentary evidence ought not to be submitted to the grand jury except under the direction of the court.[35]

b. *Depositions.* — The grand jury may base an indictment on depositions taken before an examining magistrate.[36]

3. Self-Criminating Evidence. — A. INVOLUNTARY STATEMENT. The grand jury's action in compelling a witness before it to give self-criminating evidence will render his subsequent indictment void.[37]

Sneed (Tenn.) 66; State *v.* Coates, 130 N. C. 701, 41 S. E. 706.

But the jury must not have been influenced by the improper evidence. People *v.* Hayes, 28 Misc. 93, 59 N. Y. Supp. 761; People *v.* Molineux, 27 Misc. 60, 58 N. Y. Supp. 155.

It is presumed that such sufficient legal evidence existed. People *v.* Lauder, 82 Mich. 109, 46 N. W. 956.

See also *infra*, "4. Sufficiency, B. Review of sufficiency of Evidence." And note 45.

Incompetent Evidence Will Vitiate if without it evidence is insufficient. People *v.* Metropolitan Traction Co., 12 N. Y. Crim. 405, 50 N. Y. Supp. 1117; People *v.* Molineux, 27 Misc. 60, 58 N. Y. Supp. 155.

So, where the wife's testimony was vitally material to her husband's indictment. People *v.* Moore, 65 How. Pr. (N. Y.) 177; People *v.* Briggs, 60 How. Pr. (N. Y.) 17.

32. Motion to charge Grand Jury, 9 Pick. (Mass.) 495.

33. People *v.* Hayes, 28 Misc. 93, 59 N. Y. Supp. 761; State *v.* Schieler, 4 Idaho 120, 37 Pac. 272.

34. United States *v.* Kilpatrick, 16 Fed. 765. See article "CONFESSIONS."

35. United States *v.* Kilpatrick, 16 Fed. 765.

The fact that a witness has referred to a paper which on that account is wanted by the grand jury is sufficient warrant for its submission to them. United States *v.* Burr, Coombs Tr. of Aaron Burr 1, 25 Fed. Cas. No. 14,693.

36. People *v.* Stuart, 4 Cal. 218. In State *v.* Schieler, 4 Idaho 120, 37 Pac. 272, the use of depositions before the grand jury was held not a ground of reversal, where oral evidence was also introduced, and the defendants, with one exception, also testified in person.

That witnesses on whose testimony an indictment was found were not examined *viva voce*, but their written statements were accepted by the grand jury, cannot be made the subject of inquiry by the court. State *v.* Boyd, 2 Hill (S. C.) 288, 27 Am. Dec. 376.

The grand jury cannot take the depositions of witnesses in other States. Beal *v.* State, 15 Ind. 378.

37. State *v.* Gardner, 88 Minn. 130, 92 N. W. 529; State *v.* Froiseth, 16 Minn. 296; *contra*, as to the offense gaming, Wheately *v.* State, 114 Ga. 175, 39 S. E. 877 (this holding seems to be in view of constitutional and statutory provisions not referred to); and see Pointer *v.* State, 89 Ind. 255.

The admission of self-criminating evidence will vitiate an indictment, though it does not appear that the defendant was prejudiced thereby.

But the fact that in the investigation of another charge a person may have been required to give evidence material to an offense for which he is afterward indicted is no cause for setting the indictment aside, unless it appears from the indorsement of his name thereon as a witness that it was found in whole or in part on his evidence.[38]

Where the names of other witnesses are also indorsed on an indictment it will not be presumed that defendants, whose names are on the indictment, gave material or any evidence before the grand jury; and hence the indictment is not objectionable as based on self-criminating evidence.[39]

United States *v.* Edgerton, 80 Fed. 374; Boone *v.* People, 148 Ill. 440, 36 N. E. 99.

And the same is true where he attends without counsel. People *v.* Haines, 6 N. Y. Crim. 100, 1 N. Y. Supp. 55. But see People *v.* Lauder, 82 Mich. 132, 46 N. W. 956.

In United States *v.* Kimball, 117 Fed. 156, it was held that a witness who attended with counsel and testified without compulsion, and another who welcomed the opportunity for explanation, and a third who after being warned answered or not as he chose, were not coerced into giving self-criminating evidence in violation of their constitutional privilege.

Knowledge of Charge and Warning. — Where a person appears before the grand jury in response to a subpoena, and is examined touching things material to an offense for which he is afterward indicted, without being informed that the grand jury is considering a charge against him, the indictment will be quashed. United States *v.* Edgerton, 80 Fed. 374. *Contra.* — People *v.* Lauder, 82 Mich. 109, 46 N. W. 956.

In United States *v.* Kimball, 117 Fed. 156, it was held that witnesses who had been actors in a bank failure under investigation by the grand jury could not complain of a violation of their constitutional privilege on the ground that they did not know their conduct was being inquired into.

Where a defendant under arrest and in jail for an offense was brought before the grand jury and examined with relation thereto, without being informed of his right not to give incriminating evidence or the effect his answers might have, or whether they might be used against him, the indictment was held void. State *v.* Clifford, 86 Iowa 550, 53 N. W. 299, 41 Am. St. Rep. 518. But merely compelling a person charged with crime to appear before the grand jury will not vitiate an indictment where he is properly warned before testifying that he need not incriminate himself. State *v.* Trauger (Iowa), 77 N. W. 336; State *v.* Donelon, 45 La. Ann. 744, 12 So. 922. *Contra.* — People *v.* Singer, 18 Abb. N. C. (N. Y.) 96. In Indiana it is held that the grand jury is under no obligation to inform a witness before it that he is not obliged to incriminate himself. State *v.* Comer, 157 Ind. 611, 62 N. E. 452.

In State *v.* Burlingham, 15 Me. 104, a motion to quash because of the reception of self-incriminating evidence by the grand jury was held too late after arraignment and plea.

In Texas the grand jury's reception of self-incriminating evidence cannot be made a ground of a motion to quash the indictment. Mencheca *v.* State (Tex. Crim.), 28 S. W. 203. This is under a statute not including that ground among those authorizing the motion. Spearman *v.* State, 34 Tex. Crim. 279, 30 S. W. 229.

It is proper to examine each of two co-defendants against the other before the grand jury, for the purpose of obtaining an indictment against both. State *v.* Frizell, 111 N. C. 722, 16 S. E. 409 (in effect overruling State *v.* Krider, 78 N. C. 481, which is said to have been decided under a statute since altered).

38. State *v.* Hawks, 56 Minn. 129, 57 N. W. 455.

39. United States *v.* Brown, 13

The fact that the grand jury received as evidence against a pharmacist, charged with violating the prohibitory liquor law, the monthly reports which the law requires him to file with the auditor, does not vitiate his indictment as compelling him to testify against himself.[40]

B. Voluntary Statement. — The voluntary testimony before the grand jury of a person accused of crime does not vitiate a subsequent indictment against him.[41]

C. Constitutional Protection. — The constitutional privilege of a person not to be compelled to criminate himself extends to an investigation by the grand jury.[42]

D. Statutory Protection From Subsequent Prosecution. Where a statute frees the witness from prosecution for any matter he may disclose, he may be compelled to testify notwithstanding his constitutional privilege.[43] Such a statute applies to proceedings before the grand jury.[44]

Int. Rev. Rec. 126, 1 Sawy. 531, 24 Fed. Cas. No. 14,671.

40. State *v.* Smith, 74 Iowa 580, 38 N. W. 492.

41. United States *v.* Brown, 13 Int. Rev. Rec. 126, 1 Sawy. 531, 24 Fed. Cas. No. 14,671; State *v.* Comer, 157 Ind. 611, 62 N. E. 452. And see United States *v.* Kimball, 117 Fed. 156.

Where the witness has been warned, his voluntary statement will support an indictment against him. Eastling *v.* State, 69 Ark. 189, 62 S. W. 584; People *v.* Sebring, 14 Misc. 31, 35 N. Y. Supp. 237.

42. Counselman *v.* Hitchcock, 142 U. S. 547; *Ex parte* Wilson, 39 Tex. Crim. 630, 47 S. W. 996; People *v.* Haines, 6 N. Y. Crim. 100, 1 N. Y. Supp. 55; Boone *v.* People, 148 Ill. 440, 36 N. E. 99; Cullen *v.* Com., 24 Gratt. (Va.) 624 (where the privilege was accorded to a witness examined as to another's offense). And see State *v.* Froiseth, 16 Minn. 296; State *v.* Gardner, 88 Minn. 130, 92 N. W. 529.

But in People *v.* Kelly, 12 Abb. Pr. (N. Y.) 150, a constitutional provision that no person shall be compelled in any criminal case to be a witness against himself was held not to protect a witness before the grand jury from being compelled to give self-criminating evidence, the investigation being directed against other parties. See also United States *v.* Brown, 13 Int. Rev. Rec. 126, 1 Sawy. 531, 24 Fed. Cas. No. 14,671.

The fact that two members of the grand jury were present in court and heard a witness pleading his constitutional privilege against giving incriminating evidence would not vitiate an indictment afterward found against him, it not appearing that they were thereby influenced to vote for the bill. People *v.* Northey, 77 Cal. 618, 19 Pac. 685, 20 Pac. 129.

43. Hirsch *v.* State, 8 Heisk. (Tenn.) 89; People *v.* Kelly, 24 N. Y. 74. *Contra.* — Warner *v.* State, 81 Tenn. 52.

The common law rule that a witness cannot be compelled to incriminate himself does not apply to an examination before the grand jury where a statute prevents the use of the witness' testimony against himself. People *v.* Kelly, 12 Abb. Pr. (N. Y.) 150.

44. Elliott *v.* State (Tex. App.), 19 S. W. 249.

A statute providing that a witness shall not be criminally prosecuted for any offense about which he may testify does not preclude the indictment of a witness testifying before the grand jury for an offense of a similar character to that concerning which he testifies. Owens *v.* State, 2 Head (Tenn.) 455.

Nor does it preclude his indictment for a different offense voluntarily disclosed by him when testify-

4. Sufficiency. — A. KNOWLEDGE OF GRAND JURY. — The grand jury may find an indictment on its own knowledge.[45] So the fact that some of the grand jurors had personal knowledge relative to the crime does not vitiate an indictment.[46] And a grand juror may testify as a witness before that body.[47]

B. REVIEW OF SUFFICIENCY OF EVIDENCE. — The sufficiency of the evidence to warrant an indictment cannot be inquired into;[48]

ing before the grand jury as to a charge against another. People *v.* Reggel, 8 Utah 21, 28 Pac. 955.

In United States *v.* Kimball, 117 Fed. 156, where the affairs of an insolvent bank were under investigation by the grand jury, no specific charge having been made against any one, and certain persons connected with the institution being called on to testify, it was held that evidence given by them might be made the basis of their subsequent indictment without a violation of Rev. Stat., § 860, declaring that his evidence cannot be used against a witness in a subsequent prosecution.

45. State *v.* Skinner, 34 Kan. 256, 8 Pac. 420; State *v.* Schmidt, 34 Kan. 399, 8 Pac. 867; State *v.* Terry, 30 Mo. 368; Reg. *v.* Russell, Car. & M. (Eng.) 247.

But under a statute providing that if a grand juror knows or has reason to believe that a crime has been committed he must declare it to his fellow-jurors, who must thereupon investigate it, the grand jury have no right to make a presentment of facts within their own knowledge and without making an investigation. *In re* Gardiner, 31 Misc. 364, 64 N. Y. Supp. 760, and see State *v.* Grady, 12 Mo. App. 361.

So, under a statute providing that no person shall be arrested on a presentment, before the attorney for the state shall prepare a bill which shall be found by the grand jury. State *v.* Cain, 8 N. C. 352.

The absence of a prosecutor does not raise a presumption that a presentment was found upon the knowledge of the grand jurors in the face of a plea averring the contrary. State *v.* Lee, 87 Tenn. 114, 9 S. W. 425.

46. People *v.* Breen, 130 Cal. 72, 62 Pac. 408.

The fact that a grand juror, before the meeting of that body, made a personal investigation into the guilt of the accused and secreted himself in a room with an officer for the purpose of listening to declarations and admissions made by the accused concerning the crime, and heard such declarations and admissions, which, with statements of officers to the effect that the accused was guilty, led the juror to the opinion which he entertained at the time of the investigation by the grand jury, would not invalidate the indictment. Com. *v.* Woodward, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302.

47. Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; State *v.* Millain, 3 Nev. 409. But in Reg. *v.* Cunard, 2 New Brun. 500, it was held that the fact that a grand juror was the prosecutor vitiates an indictment. In State *v.* Cannon, 90 N. C. 711, the fact that the foreman of the grand jury was also the prosecuting witness was held unavailable by way of motion in arrest of judgment.

48. *United States.* — United States *v.* Reed, 2 Blatchf. 435, 27 Fed. Cas. No. 16,134; United States *v.* Cobban, 127 Fed. 713.

Alabama. — Hall *v.* State, 134 Ala. 90, 32 So. 750; Jones *v.* State, 81 Ala. 79, 1 So. 32; Bryant *v.* State, 79 Ala. 282; Washington *v.* State, 63 Ala. 189.

Indiana. — Stewart *v.* State, 24 Ind. 142; Pointer *v.* State, 89 Ind. 255; State *v.* Comer, 157 Ind. 611, 62 N. E. 452.

Iowa. — State *v.* Fowler, 52 Iowa 103, 2 N. W. 983; State *v.* Smith, 74 Iowa 580, 38 N. W. 492.

Louisiana. — State *v.* Lewis, 38 La. Ann. 680; State *v.* Chandler, 45 La. Ann. 49, 12 So. 315.

at least where the grand jury had some evidence before it.[49] But where there was no legal evidence whatever before the grand jury to sustain an indictment it will be quashed.[50]

Effect of Statute Specifying Grounds of Motion to Quash. — A statute prescribing the grounds on which an indictment may be attacked by motion and not enumerating the insufficiency of the testimony upon which the grand jury acted, in effect prohibits an inquiry by the court in regard thereto.[51]

Texas. — Clark *v.* State (Tex. Crim.), 43 S. W. 522; Cotton *v.* State, 43 Tex. 169.

Virginia. — Wadley *v.* Com., 98 Va. 803, 35 S. E. 452.

The fact that the minutes of the evidence taken before the grand jury do not show sufficient to justify the finding of an indictment is not a ground for quashing it. State *v.* Morris, 36 Iowa 272.

49. Agee *v.* State, 117 Ala. 169, 23 So. 486; State *v.* Logan, 1 Nev. 427; Sparrenberger *v.* State, 53 Ala. 481, 25 Am. Rep. 643. And see *supra*, "2. Competency and Relevancy, B. Effect of Incompetent Evidence."

50. Sparrenberger *v.* State, 53 Ala. 481, 25 Am. Rep. 643; People *v* Clark, 8 N. Y. Crim. 169, 179, 14 N. Y. Supp. 642; State *v.* Grady, 84 Mo. 220, *affirming* 12 Mo. App. 361; State *v.* Logan, 1 Nev. 427; State *v.* Lanier, 90 N. C. 714; State *v.* Roberts, 19 N. C. 540. *Contra.* — Kingsbury *v.* State, 37 Tex. Crim. 259, 39 S. W. 365; State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

Under statutes requiring the grand jury to receive none but legal evidence, and forbidding it to indict without evidence warranting a conviction, its presentment cannot be sustained where there is no evidence whatever to justify it. *In re* Gardiner, 31 Misc. 364, 64 N. Y. Supp. 760.

Where a former conviction is relied on by the prosecution to increase the defendant's sentence, and the grand jury finds an indictment alleging such former conviction without any testimony before them showing the defendant's identity with the former convict, the indictment will be quashed. People *v.* Price, 6 N. Y. Crim. 141, 2 N. Y. Supp. 414. But where a defendant was indicted for five different offenses, he was not allowed to show upon the trial that the grand jury had evidence of but one offense. People *v.* Hulbut, 4 Denio (N. Y.) 133, 47 Am. Dec. 244.

The rule in the federal courts is thus stated in United States *v.* Farrington, 5 Fed. 343: "While it is not the province of the court to sit in review of the grand jury, as upon the review of a trial when error is alleged, yet in extreme cases where the court can see that the jury's finding is based upon utterly insufficient evidence or such palpably incompetent evidence as to indicate prejudice, it should interfere and quash the indictment."

The court will not inquire whether there was any evidence before the grand jury as to a fact material to the charge. United States *v.* Reed, 2 Blatchf. 435, 27 Fed. Cas. No. 16,134.

In State *v.* Savage, 89 Ala. 1, 7 So. 7, 183, 7 L. R. A. 426, the court said that it admitted of grave doubt whether the rule as to quashing an indictment on the ground that it was found without legal evidence should be extended to a report of the grand jury which was made the basis of an impeachment proceeding against a judicial officer.

51. United States *v.* Brown, 1 Sawy. 531, 13 Int. Rev. Rec. 126, 24 Fed. Cas. No. 14,671. So, under statutes summarizing the pleadings on the part of the defendant and omitting a plea or exception on account of the insufficient proof before the grand jury. Morrison *v.* State, 41 Tex. 516.

The Rule in New York. — Prior to 1897, the New York Code of Criminal Procedure, § 313, specified the

C. Degree of Proof. — a. *In General.* — The grand jury ought not find an indictment unless the evidence before it, unexplained and uncontradicted, would warrant a conviction.[52]

b. *Indictment on Indictment.* — The grand jury cannot base an indictment merely on a previous one for the same offense, which has been quashed.[53]

c. *Re-examination of Witnesses After Indictment Quashed.* The grand jury may find an indictment without re-examining the witnesses where they have already testified before it when a prior but defective indictment was found.[54]

D. Presumptions. — It is presumed that an indictment is based upon legal and sufficient evidence,[55] and that an indictment has been

cases in which an indictment should be set aside on motion, among which the insufficiency or incompetency of the evidence was not included. Notwithstanding this, it was held that an indictment not supported by any evidence would be quashed. People *v.* Metropolitan Traction Co., 12 N. Y. Crim. 405, 50 N. Y. Supp. 1117; People *v.* Clark, 8 N. Y. Crim. 169, 179, 14 N. Y. Supp. 642; People *v.* Edwards, 25 N. Y. Supp. 480; People *v.* Brickner, 8 N. Y. Crim. 217, 15 N. Y. Supp. 528. The reception of material illegal evidence was also held a ground for the motion. In 1897 the code was amended by adding, after the enumeration of grounds for the motion to set aside, "but in no other." Since this amendment the decisions have been in conflict, it being held in People *v.* Rutherford, 47 App. Div. 209, 62 N. Y. Supp. 224, that an indictment could no longer be attacked for insufficiency or incompetency of the testimony, while in People *v.* Thomas, 32 Misc. 170, 66 N. Y. Supp. 191, the court was held to have authority under § 671, providing that it might dismiss an action after indictment to set aside an indictment found only on illegal evidence, notwithstanding § 313. But in People *v.* Montgomery, 36 Misc. 326, 73 N. Y. Supp. 535, § 671 was held not to confer any such authority. For a discussion of the right of the court under the amended statute, see People *v.* Glen, 64 App. Div. 167, 71 N. Y. Supp. 893.

52. People *v.* Clark, 8 N. Y. Crim. 169, 179, 14 N. Y. Supp. 642; People *v.* Baker, 10 How. Pr. (N. Y.) 567; People *v.* Hyler, 2 Park. Crim. (N. Y.) 570; United States *v.* Kilpatrick, 16 Fed. 765; *In re* Grand Jury, 62 Fed. 840; Charge of Grand Jury, Taney 615, 30 Fed. Cas. No. 18,257; Charge to Grand Jury, 2 Sawy. 667, 30 Fed. Cas. No. 18,255. This is provided by statute in New York (Code Crim. Proc., § 258). See People *v.* Edwards, 25 N. Y. Supp. 480.

53. Sparrenberger *v.* State, 53 Ala. 481, 25 Am. Rep. 643; State *v.* Grady, 12 Mo. App. 361.

Contra. — Terry *v.* State, 15 Tex. App. 66. As to the necessity of re-examining witnesses where same grand jury reindicts, see *infra* note 54.

54. State *v.* Clapper, 59 Iowa 279, 13 N. W. 294; State *v.* Peterson, 61 Minn. 73, 63 N. W. 171, 28 L. R. A. 324; Com. *v.* Woods, 10 Gray (Mass.) 477; Whiting *v.* State, 48 Ohio St. 220, 27 N. E. 96. See also Creek *v.* State, 24 Ind. 151.

Contra. — State *v.* Ivey, 100 N. C. 539, 5 S. E. 407.

The fact that certain grand jurors who found the original indictment were absent when a second indictment was found without a re-examination of the witnesses, and that others were present who were absent on the former occasion, does not render the second indictment invalid. Com. *v.* Clune, 162 Mass. 206, 38 N. E. 435. And see Turk *v.* State, 7 Ohio. (Pt. 2) 240.

55. *United States.* — United States *v.* Reed, 2 Blatchf. 435, 27 Fed. Cas. No. 16,134; United States *v.* Wilson, 6 McLean 604, 28 Fed. Cas. No. 16,737.

presented only after all the testimony accessible to the grand jury has been heard by it.[56]

E. PRACTICE. — A plea to an indictment is not the proper method of raising the question of the sufficiency of the evidence before the grand jury;[57] nor is a motion in arrest, but the proper remedy is a motion to quash.[58]

5. Record and Inspection Thereof. — A. PRESERVATION OF MINUTES. — Minutes of the evidence taken before the grand jury should be delivered to the district attorney and be kept by him among the governmental records.[59]

B. INSPECTION. — The right of a defendant to inspect the evidence before the grand jury has been denied in Illinois, Kentucky and Arkansas,[60] but in New York it is held discretionary with the trial court.[61]

New York. — People *v.* Glen, 173 N. Y. 395, 66 N. E. 112; People *v.* Martin, 87 App. Div. 487, 84 N. Y. Supp. 823.

North Carolina. — State *v.* Lanier, 9 N. C. 714; State *v.* McIntire, 2 N. C. Law Repos. 287.

Virginia. — Wadley *v.* Com., 98 Va. 803, 35 S. E. 452.

It is not sufficient to repel this presumption that insufficient evidence was presented to the police magistrate. People *v.* Martin, 87 App. Div. 487, 84 N. Y. Supp. 823.

Where a statute requires an indictment for perjury to be based on the testimony of two witnesses it will be presumed that an indictment for that crime was found as the law directs rather than on the knowledge of the grand jurors themselves. Mackin *v.* People, 115 Ill. 312, 3 N. E. 222, 56 Am. Rep. 167.

56. Terry *v.* State, 15 Tex. App. 66.

57. Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460; Sparrenberger *v.* State, 53 Ala. 481, 25 Am. Rep. 643.

58. United States *v.* Kilpatrick, 16 Fed. 765

Accused's affidavit, upon alleged information and belief, that only incompetent testimony was given before the grand jury, and that there was not sufficient evidence to warrant his indictment, is insufficient to sustain a motion to set the indictment aside; and is also insufficient to warrant the production, for the purposes of the motion, of the evidence taken before the grand jury. People *v.* Sebring, 14 Misc. 31, 35 N. Y. Supp. 237.

It is not error to refuse to quash an indictment on the ground that it was found and returned without evidence, where defendant does not sustain his motion to quash by any evidence or offer thereof. O'Shields *v.* State, 92 Ga. 472, 17 S. E. 845.

The report of a grand jury on which an information is filed for the impeachment of a judge cannot be attacked for the first time by motion to quash the information on the ground that the report was not based on legal and sufficient evidence. State *v.* Savage, 89 Ala. 1, 7 So. 7, 183, 7 L. R. A. 426.

59. *In re* District Attorney of U. S., 7 Fed. Cas. No. 3925.

Minutes are filed when deposited with the clerk along with the indictment, though the clerk does not indorse a certificate thereof on them. State *v.* Briggs, 68 Iowa 416, 27 N. W. 358.

60. Cannon *v.* People, 141 Ill. 270, 30 N. E. 1027; Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986; Hofler *v.* State, 16 Ark. 534.

61. The imposition of a condition on such privilege, which, were the defendant's right absolute, would have been improper, is not error. People *v.* Diamond, 72 App. Div. 281, 76 N. Y. Supp. 57.

The refusal of the court to compel a public prosecutor to furnish prisoner's counsel the evidence before

6. Use in Subsequent Proceedings. — A. Secrecy in General. Grand jurors may testify as to the evidence admitted in their investigations;[62] and so may the witnesses before them.[63] The prosecuting attorney may testify as to evidence before the grand jury

the grand jury is not subject to review upon writ of error. Eighmoy *v.* People, 76 N. Y. 546.

The practice is to permit inspection only where there has been no preliminary examination before the committing magistrate. People *v.* Proskey, 32 Misc. 367, 66 N. Y. Supp. 736. And see People *v.* Naughton, 38 How. Pr. (N. Y.) 430.

Where defendant has not had a preliminary examination he should be permitted to inspect the grand jury's minutes though he shows no extraordinary cause or necessity therefor. People *v.* Molineux, 27 Misc. 60, 57 N. Y. Supp. 936.

Where the defendant had no preliminary examination in the magistrate's court, and though tried before the commissioner of police it did not appear that the charges or the witness were the same, he should be given leave to inspect the minutes of the grand jury which indicted him. People *v.* Foody, 38 Misc. 357, 77 N. Y. Supp. 943.

62. State *v.* Benner, 64 Me. 267. State *v.* Wood, 53 N. H. 484, and see Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894; and Com. *v.* McComb, 157 Pa. St. 611, 27 Atl. 794.

Contra. — State *v.* Fasset, 16 Conn. 457; State *v.* Logan, 1 Nev. 427.

"The oath of a grand juror that he will keep secret the state's counsel, his fellows', and his own, is intended to protect the grand jury from the interference of persons interested in its action in finding bills and to prevent the accused from learning of the investigation of his offense. But when these things have been accomplished the entire purpose of secrecy is effected, so that if at a subsequent period it becomes necessary to the attainment of justice and the vindication of truth and right in a judicial tribunal that the testimony of a witness shall be inquired into it may be done." Jones *v.* Turpin, 6 Heisk. (Tenn.) 181. See also as to the effect of a grand juror's oath, State *v.* Broughton, 29 N. C. 96, 45 Am. Dec. 507; Hinshaw *v.* State, 147 Ind. 344, 47 N. E. 157.

In Fotheringham *v.* Adams Express Co., 34 Fed. 646, it was held, following the decision of the Missouri supreme court, that under the statutes of that state a grand juror could not testify in an action for malicious prosecution concerning the testimony given before the grand jury when the indictment upon which the action was based was found. In this case it was held also that the statutes of a state, construed by its courts to forbid a grand juror from disclosing the evidence before the grand jury except in certain cases, would be conformed to by the local United States District Court as not merely establishing a rule of evidence, but as declaratory of the public policy of the state.

But in Hunter *v.* Randall, 69 Me. 183, the testimony of a witness before the grand jury was held admissible in a subsequent action for malicious prosecution.

A member of the grand jury which found an indictment is a competent witness on the trial to prove that a certain person was not a witness before that body. Com. *v.* Hill, 11 Cush. (Mass.) 137. Or that he was. Rocco *v.* State, 37 Miss. 357. This last decision is under statute.

A witness before the grand jury cannot object that the secrecy of the proceedings is violated by a member's testifying as to what he swore to. People *v.* Young, 31 Cal. 564; State *v.* Broughton, 29 N. C. 96, 45 Am. Dec. 507; People *v.* Reggel, 8 Utah 21, 28 Pac. 955.

And see *infra*, "B. Use as Original Evidence," and "C. For Purposes of Impeachment."

63. People *v.* Naughton, 38 How. Pr. (N. Y.) 430; Billingslea *v.* State, 85 Ala. 323, 5 So. 137.

of which he has personal knowledge.[64] And the clerk of the grand jury is also a competent witness.[65]

The fact that testimony before the grand jury is not written has been held a sufficient reason why it cannot be disclosed.[66] But where a statute provides for the appointment of a clerk or a stenographer to preserve the evidence taken before the grand jury, the effect is to alter the rule, and it may be examined.[67]

B. Use as Original Evidence. — The admissions or confessions of a defendant made before the grand jury are admissible as original evidence against him.[68] And grand jurors are competent witnesses to prove that a witness before them committed perjury.[69]

Contra. — State *v.* Fasset, 16 Conn. 457.

64. State *v.* Van Buskirk, 59 Ind. 384. See also Hunter *v.* Randall, 69 Me. 183.

Contra. — People *v.* Thompson, 122 Mich. 411, 81 N. W. 344. And he may testify that an indictment was returned without evidence. State *v.* Grady, 84 Mo. 220.

65. State *v.* McPherson, 114 Iowa 396, 87 N. W. 421.

66. Territory *v.* Benoit, 1 Mart. (La.) 142.

67. People *v.* Hyler, 2 Park. Crim. (N. Y.) 570; People *v.* Van Horne, 8 Barb. (N. Y.) 158; *In re* Gardiner, 31 Misc. 364, 64 N. Y. Supp. 760.

68. United States *v.* Porter, 2 Cranch C. C. 60, 27 Fed. Cas. No. 16,072; United States *v.* Charles, 2 Cranch C. C. 76, 25 Fed. Cas. No. 14,786; Wisdom *v.* State, 42 Tex. Crim. 579, 61 S. W. 926; State *v.* Moran, 15 Or. 262, 14 Pac. 419; Thomas *v.* State, 35 Tex. Crim. 178, 32 S. W. 771; State *v.* Broughton, 29 N. C. 96, 45 Am. Dec. 507. See also Paris *v.* State, 35 Tex. Crim. 82, 31 S. W. 855.

Defendant's admissions before the grand jury are admissible as original evidence notwithstanding the implied restrictions of a statute providing that grand jurors may be required to disclose the testimony of witnesses for purposes of impeachment or on a prosecution for perjury. Hinshaw *v.* State, 147 Ind. 344, 47 N. E. 157; United States *v.* Kirkwood, 5 Utah 123, 13 Pac. 234.

In Gutgesell *v.* State (Tex. Crim.), 43 S. W. 1016, various statutes bearing on the secrecy of the proceedings of the grand jury were construed, and it was held that testimony was inadmissible in a criminal prosecution to show what defendant testified to when examined as a witness before that body, he not being a witness on the trial.

The fact that the testimony of accused before the grand jury was reduced to writing will not exclude parol evidence on the trial of his testimony before that body. Grimsinger *v.* State, 44 Tex. Crim. 1, 69 S. W. 583; Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157.

In Higgins *v.* State, 157 Ind. 57, 60 N. E. 685, a stenographer's evidence was admitted in a criminal trial to show what the defendant testified to before the grand jury, although the stenographer admitted that he had no recollection of the defendant's evidence aside from his notes.

In Thompson *v.* State, 19 Tex. App. 593, it was held that evidence of statements made before the grand jury by the defendant regarding inducements made to him to secure a confession was admissible only when in the judgment of the court it became material to the administration of justice that it should be allowed. In this case the court's refusal to permit grand jurors to testify to such statements was held proper.

See article, "Confessions."

69. Crocker *v.* State, Meigs (Tenn.) 127; State *v.* Logan, 1 Nev. 427.

But in Tindle *v.* Nichols, 20 Mo. 326, it was held in an action for

In Civil Actions. — So, in a civil action the admissions of a party before the grand jury may be shown.[70] While there can be but little doubt that in those instances in which evidence given before a grand jury constitutes in itself a cause of action, such action may be shown. The cases on the subject are not satisfactory.[71]

C. For Purposes of Impeachment. — A witness may be impeached by showing that he made statements before the grand jury in conflict with his testimony at the trial.[72]

slander in charging plaintiff's wife with false testimony before a grand jury, that grand jurors could not be used as witnesses to show, in defendant's behalf, the truth of the alleged slander. This holding was under statutes specifying the instances in which grand jurors might be required to disclose testimony given before them, and providing that they should not do so except when lawfully required.

70. Burnham *v.* Hatfield, 5 Blackf. (Ind.) 21; Kirk *v.* Garrett, 84 Md. 383, 35 Atl. 1089.

Contra. — Loveland *v.* Cooley, 59 Minn. 259, 61 N. W. 138.

In re Pinney's Will, 27 Minn. 280, 69 N. W. 791, 7 N. W. 144, on an issue as to the mental capacity of a testator, it was held that evidence of what he had testified to before the grand jury was properly excluded, the court saying that the only cases in which the testimony of a witness might be disclosed were those specified in the statute.

The testimony of a married woman, illegally elicited before the grand jury on a charge against her husband, is not admissible against her on a question of property. Wilson *v.* Hill, 13 N. J. Eq. 143.

71. In Sands *v.* Robison, 12 Smed. & M. (Miss.) 704, 51 Am. Dec. 132, the competency of grand jurors to testify to the utterance of slanderous words before them was held discretionary with the court, it being remarked that no oath of secrecy was required of them.

In Beam *v.* Link, 27 Mo. 261, which was an action for malicious prosecution in which plaintiff alleged that the defendant appeared before the grand jury without probable cause, causing plaintiff to be indicted for perjury, it was held that no grand juror could be permitted to testify and disclose the name of any witness who appeared before that body.

72. *Indiana.* — Burdick *v.* Hunt, 43 Ind. 381.

Iowa. — State *v.* McPherson, 114 Iowa 492, 87 N. W. 421.

Maine. — State *v.* Benner, 64 Me. 267.

Maryland. — Kirk *v.* Garrett, 84 Md. 383, 35 Atl. 1089.

Massachusetts. — Com. *v.* Mead, 12 Gray 167, 71 Am. Dec. 741.

Missouri. — State *v.* Ragsdale, 59 Mo. App. 590.

New Hampshire. — State *v.* Wood, 53 N. H. 484.

Pennsylvania. — Gordon *v.* Com., 92 Pa. St. 216, 37 Am. Rep. 672.

Tennessee. — Jones *v.* Turper, 6 Heisk. 18.

Texas. — Scott *v.* State, 23 Tex. App. 521, 5 S. W. 142.

Virginia. — Little's Case, 25 Gratt. 921.

And under a statute, Dean *v.* Com., 25 Ky. L. Rep. 1876, 78 S. W. 1112.

Contra. — Imlay *v.* Rogers, 7 N. J. L. 347.

In Ruby *v.* State, 9 Tex. App. 353, the proposition of the text was held to be the common law rule, but a statute prescribing the oath of grand jurors was held to change the rule and render the statements of witnesses before the grand jury inadmissible for purposes of impeachment. But the same statute was afterward construed in Clanton *v.* State, 13 Tex. App. 139, and a contrary conclusion arrived at, Ruby *v.* State being expressly overruled.

To render a witness' testimony before the grand jury competent for purposes of impeachment, his truthfulness on the particular matter must

D. To Refresh Witness' Recollection. — The testimony of a witness before the grand jury, which has been reduced to writing and signed by him, may be used to refresh his recollection on the trial.[73]

have become an issue in the case. Spangler *v.* State, 41 Tex. Crim. 424, 55 S. W. 326. And his contradictory statements before the grand jury must have related to the same matters as to which he is to be examined. Hines *v.* State, 37 Tex. Crim. 399, 39 S. W. 935.

A written statement of the witness' testimony is admissible to impeach him, although there is no law requiring testimony before the grand jury to be reduced to writing. Parker *v.* State (Tex. Crim.), 65 S. W. 1066.

Where an effort is made to impeach a witness by proving that he made contradictory statements before the grand jury, the practice is the same as that to be followed when it is sought to contradict him by statements made anywhere else. The witness must first be asked if he made the statement at the time and place, and if he does not admit doing so any person who heard the statement may be called to prove it. Looney *v.* People, 81 Ill. App. 370.

Where a witness has been impeached by showing contradictory statements made out of court, his testimony before the grand jury is admissible in corroboration of his evidence. Perkins *v.* State, 4 Ind. 222. See also Way *v.* Butterworth, 106 Mass. 75.

73. Billingslee *v.* State, 85 Ala. 323, 5 So. 137.

But the witness cannot be asked to recur in his own mind to his testimony before the grand jury. Com. *v.* Phelps, 11 Gray (Mass.) 72.

Howard's Annot. Stat., § 9502, provides that grand jurors may be required to testify as to whether the testimony of a witness before them was inconsistent with or different from his testimony in court, etc. In a prosecution for violating the local option law, unwilling witnesses, prejudiced against the prosecution, were asked by the prosecutor about their testimony before the grand jury. *Held*, that it was competent to call their attention to such previous testimony for the purpose of refreshing their memories and, if possible, eliciting the truth. People *v.* O'Neill, 107 Mich. 556, 65 N. W. 540.

GRAND LARCENY. — See Larceny.

GRANTS. — See Deeds.

GUARANTY.

By Clarence Meily.

CROSS-REFERENCES:

Bills and Notes;
Principal and Surety;
Statute of Frauds.

I. MODE OF PROOF.

1. In General. — Contracts of guaranty differ from other ordinary simple contracts only in the nature of the evidence required to establish their validity. And in other respects the same rules of evidence apply to contracts of this character as apply to other ordinary contracts.[1] The statute of frauds (29 Car. 2, ch. 3, § 4) provides that "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith." This statute has been substantially copied into the statute law of the several states,[2] and no parol evidence will be allowed as a substitute for the requirements of the statute.[3] The statute established a rule of evidence.[4]

2. Guaranties Not Within the Statute of Frauds. — There is, however, one important instance in which the statute of frauds is held not to apply to contracts of guaranty, which in such cases may be proved by parol. The rule may be thus stated: Where the holder of a contract of a third person transfers it to another upon a consideration moving to himself, his guaranty thereof, made simultaneously with the transfer and as a part of the transaction, is not within the statute of frauds, and need not be evidenced by a written memorandum.[5] The

1. Union Bank of Louisiana *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280.

2. See the statutes of the several states.

In Pennsylvania, the clause of the statute of frauds requiring a written memorandum to bind one to answer for the debt of another was not adopted until 1855, previous to which contracts of guaranty might be proved by parol. Jack *v.* Morrison, 48 Pa. St. 113. But as a precaution against fraud, the courts required that such parol evidence should be clear and explicit, so that there might be no room for suspicion, mistake, misapprehension, or any misrepresentation in the transaction. Petriken *v.* Baldy, 7 Watts & S. (Pa.) 429. And every ambiguity in the evidence was weighed in favor of the defendant. Kellogg *v.* Stockton, 29 Pa. St. 60.

The Iowa statute of frauds providing that no evidence of any contract to answer for the debt, default or miscarriage of another person shall be competent, unless such statute is in writing, means the same as the English statute which provides that no action shall be brought on such an agreement. Westheimer *v.* Peacock, 2 Iowa 527.

3. Union Bank of Louisiana *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280.

4. "It is too well established to justify referring to authorities that the statute of frauds relates only to the form of evidence." Sheehy *v.* Fulton, 38 Neb. 691, 57 N. W. 395, 41 Am. St. Rep. 767.

5. *Georgia.* — Mobile & G. R. Co. *v.* Jones, 57 Ga. 198.

Indiana. — Beaty *v.* Grim, 18 Ind. 131.

Michigan. — Thomas *v.* Dodge, 8 Mich. 50; Huntington *v.* Wellington, 12 Mich. 10.

Minnesota. — Wilson *v.* Hentges, 29 Minn. 102, 12 N. W. 151; Nichols *v.* Allen, 22 Minn. 283.

Missouri. — Barker *v.* Scudder, 56 Mo. 272.

New York. — Cardell *v.* McNiel, 21 N. Y. 336; Johnson *v.* Gilbert, 4 Hill 178; Bruce *v.* Burr, 67 N. Y. 237.

North Carolina. — Ashford *v.* Rob-

reason of this rule, as commonly given, is that the guarantor is in effect paying his own debt by the transfer of the contract, the guaranty, therefore, being of an original and not a collateral character.[6]

inson, 30 N. C. 114; Rowland *v.* Rorke, 49 N. C. 337.

Oregon. — Kiernan *v.* Kratz, 42 Or. 474, 69 Pac. 1027.

Pennsylvania. — Malone *v.* Keener, 44 Pa. St. 107.

Tennessee. — Hall *v.* Rodgers, 7 Humph. 536.

Vermont. — Fullam *v.* Adams, 37 Vt. 391.

Wisconsin. — Wyman *v.* Goodrich, 26 Wis. 21; Eagle Mowing & Reap. Mach. Co. *v.* Shattuck, 53 Wis. 455, 10 N. W. 690, 40 Am. Rep. 780. Hence, the guaranty need not express a consideration. Brown *v.* Curtiss, 2 N. Y. 225. And parol evidence may be resorted to to show a new and independent consideration, removing the guaranty from the operation of the statute. Tyler *v.* Stevens, 11 Barb. (N. Y.) 485. And see Burt *v.* Horner, 5 Barb. (N. Y.) 501.

But mere forbearance to the principal debtor is not sufficient to remove the guaranty from the statute of frauds. Caston *v.* Moss, 1 Bail. (S. C.) 14.

In Crenshaw *v.* Jackson, 6 Ga. 509, 50 Am. Dec. 361, evidence that on transferring notes payable to bearer, the transferrer said that they were good and the maker, though a poor man, was perfectly good, and if he were not, he (the transferrer) was good, was admitted to prove a guaranty of the notes. The court said that it was properly sent to the jury for what it was worth.

In Hopkins *v.* Richardson, 9 Gratt. (Va.) 485, it appeared that R. had assigned the bond of G. to K., guaranteeing the same, to enable K. to purchase goods on the credit of the assignment and guaranty. K. purchased goods of H., who instituted action on the guaranty. *Held,* that the guaranty was not within the statute of frauds.

But in Dows *v.* Swett, 120 Mass. 322, it was held, in contravention of the rule stated in the text, that an oral guaranty of the notes of a third person transferred by a guarantor in settlement of his own outstanding due-bill was within the statute. But see Jones *v.* Palmer, 1 Doug. (Mich.) 379, where the rule of the text was applied to such a case.

6. Barker *v.* Scudder, 56 Mo. 272; Cardell *v.* McNiel, 21 N. Y. 336; Johnson *v.* Gilbert, 4 Hill (N. Y.) 178; Kiernan *v.* Kratz, 42 Or. 474, 69 Pac. 1027; Leonard *v.* Vredenburgh, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317 (see *post,* note 28); Ashford *v.* Robinson, 30 N. C. 114; Wyman *v.* Goodrich, 26 Wis. 21.

In Wilson *v.* Hentges, 29 Minn. 102, 12 N. W. 151, the court said: "The reason assigned in some of the cases is that a promise is not within the statute where the leading or main object of the promisor is to subserve some purpose of his own and to benefit himself. This has been often, and we think very justly, criticised as being too indefinite and elastic to be adopted as a legal rule or test. Again, other authorities (following the classification of Chancellor Kent in Leonard *v.* Vredenburgh, 8 Johns. 29) hold that such a guaranty is not within the statute, because founded on a new and original consideration moving from the guarantee to the guarantor, the idea being that 'any new and independent consideration of benefit to the promisor moving between the newly-contracting parties,' takes the case out of the statute. Notwithstanding the eminent authority for this doctrine, yet, as thus broadly stated, it is now very generally criticised and disapproved, as not furnishing a correct criterion by which to determine whether or not a case comes within the statute. Some text-writers have suggested, as the reason why a guaranty made under such circumstances is not within the statute, that it is a mere extension of the terms of the warranty which the law implies upon the sale of any chattel or chose in action, and not a contract created *ab origine* for the

3. Admissibility of Parol Evidence. — A. In General. — The contract of guaranty being usually written, the common rule excluding parol evidence to vary or contradict a written instrument, or to expound it, except in cases of a latent ambiguity, applies,[7] rendered more strict in such phases of its application by the requirement of the statute of frauds.[8]

B. Matters Provable by Parol. — In cases of uncertainty or ambiguity, the identity and amount of the obligation guaranteed,[9]

purpose specified in the statute of frauds. Another reason often assigned is that such a guaranty is in substance a promise to pay the guarantor's own debt, and therefore not within the statute, though the debt of a third person be incidentally guaranteed. This provision of the statute of frauds was never designed to enable men to evade their own obligations entered into solely for their own benefit, but it was designed to accomplish just what it says — viz., to prevent persons from being held liable for the debts or defaults of others upon mere verbal promises. The reason for such a provision was the temptation, through fraud and perjury, to impose a bad debt upon some other person of substance. Hence a general principle running through all the cases is that whenever a person's promise is in effect to pay his own debt, it is not within the statute, although in form and incidentally it guarantees the debt of another. Such a case is not within either the spirit or the mischief of the statute."

7. Klein *v.* Kern, 94 Tenn. 34, 28 S. W. 295; Tyler *v.* Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; Monroe *v.* Matthews, 48 Me. 555; Smith *v.* Montgomery, 2 Wils. Civ. Cas. Ct. App. (Tex.) § 427; Union Bank of Louisiana *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280; Hutchinson *v.* Root, 2 App. Div. 584, 38 N. Y. Supp. 16.

8. Thus in Lazear *v.* Nat. Union Bank, 52 Md. 78, 36 Am. Rep. 358, the court said that the rule excluding parol evidence where there was an ambiguity in the language employed in the written memorandum, or uncertainty as to the subject-matter, should be more readily enforced in these cases falling within the purview of the statute of frauds.

"In cases not within the statute of frauds, the rule which excludes evidence to vary, etc., a written instrument, has been held with less stringency, especially with regard to the consideration." Brewster *v.* Silence, 8 N. Y. 207.

9. Lee *v.* Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466; Willis *v.* Ross, 77 Ind. 1, 40 Am. Rep. 279; Lynn Safe Deposit & Tr. Co. *v.* Andrews, 180 Mass. 527, 62 N. E. 1061; Sanders *v.* Barlow, 21 Fed. 836; McDonald *v.* Fernald, 68 N. H. 171, 38 Atl. 729.

In Haskell *v.* Tukesbury, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529, parol evidence was admitted to identify the subject-matter of a guaranty which read: "Friend Geo.: Pop Dyer has been up to see me about a bill that he owes your concern. If they will give him time, I will see that the bill is paid."

In Eckel *v.* Jones, 8 Pa. St. 501, parol evidence was admitted to show that a note drawn by A to the order of B and indorsed by him to C was the subject-matter of a written guaranty of a note by A "payable" to C.

Where the principal is intrusted with a general contract of guaranty to use at his discretion, parol evidence is admissible to show that he delivered it to the guarantee as security for particular debts. Commercial Bank of Albany *v.* Eddy, 7 Metc. (Mass.) 181.

In Maryland a Stricter Rule seems to obtain. Thus, in Deutsch *v.* Bond, 46 Md. 164, parol evidence was held inadmissible to show that the subject-matter of a guaranty reading, "We, the undersigned, take pleasure in recommending S. to D.

and whether it consists of a past or future indebtedness,[10] may be shown by parol evidence of the situation of the parties and the circumstances surrounding the transaction; so also, the parties,[11] the

We also severally agree to become responsible for $350 to said D. to be forthcoming in thirty days after the final delivery of the work," was a contract between S. and D. for the publication of a book; the purpose of the evidence being to show the consideration of the guaranty. So, in Frank *v.* Miller, 38 Md. 450, parol evidence was held inadmissible to show the subject-matter of a guaranty reading, "If you will make it 4 notes, 3, 6, 9, and 12, I will settle them; 2 notes due;" the court saying that the statute of frauds required the contract to be in writing, and it could not be partly in writing and partly in parol.

Where the written guaranty itself defines its subject-matter by a recital, parol evidence of the subject-matter is inadmissible. Hall *v.* Rand, 8 Conn. 560.

10. Standley *v.* Miles, 36 Miss. 434.

Thus, parol evidence is admissible to show whether the term "advance" relates to past or future advances. Haigh *v.* Brooks, 10 Ad. & E. 309, 37 E. C. L. 108; Goldshede *v.* Swan, 1 Ex. 154.

And to show whether the term "account" relates to an existing or future obligation. Waldheim *v.* Miller (Wis.), 72 N. W. 869; Walrath *v.* Thompson, 4 Hill (N. Y.) 200.

In Hall *v.* Soule, 11 Mich. 494, parol evidence was held inadmissible to show that a letter reading, "And now I hardly know what to say to you. I think, on the whole, that you will have to rely on my pledge already made, that as soon and fast as I can, I will see that five hundred dollars of the demand you hold against Harry is paid; beyond that, I do not think myself under obligation," was, in fact, a memorandum of a guaranty of future advances.

In an action on a guaranty of payment for goods "delivered from time to time" to the principal, providing that it should be a continuing guaranty, it is proper to reject evidence of an agreement between the principal and the guarantee, of which the guarantor was ignorant, that the guaranty should stand for past indebtedness. Pritchett *v.* Wilson, 39 Pa. St. 421.

11. **Identity of Guarantor.** — In Small *v.* Elliott, 12 S. D. 570, 82 N. W. 92, 76 Am. St. Rep. 630, parol evidence was admitted to show that the letters "Pt." following a signature to guaranty were intended to show that the signer affixed his signature in the capacity of a president of a bank.

In Aaronson *v.* David Mayer Brew. Co., 26 Misc. 655, 56 N. Y. Supp. 387, parol evidence seems to have been received to show that a written guaranty signed by the defendant corporation, but containing within the body of it the name of David Mayer as an individual, as guarantor, was in fact the contract of the corporation.

But in First Nat. Bank of Sturgis *v.* Bennett, 33 Mich. 520, parol evidence was held inadmissible to show that a contract of guaranty signed by the president of a bank, but on its face importing only his individual obligation, was, in fact, the contract of the bank, such proof being a violation of the statute of frauds.

Identity of Principal. — In Haskell *v.* Tukesbury, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529, parol evidence was admitted to identify the principal debtor, referred to in the written memorandum of guaranty as "Pop Dyer." See also Eichhold *v.* Tiffany, 21 Misc. 627, 48 N. Y. Supp. 70.

Identity of Guarantee. — Notwithstanding the statute of frauds, the surrounding circumstances may be looked to to ascertain who are the guarantees. McDonald *v.* Fernald, 68 N. H. 171, 38 Atl. 729; Thomas *v.* Dodge, 8 Mich. 50; Watson *v.* McLaren, 19 Wend. (N. Y.) 557; Haskell *v.* Tukesbury, 92 Me. 551,

time of execution[12] and the consideration.[13] But parol evidence cannot be resorted to, to incorporate conditions or limitations affect-

43 Atl. 500, 69 Am. St. Rep. 529. *Contra.* — Hoffman *v.* LaRue, 3 N. J. L. 259.

In Jones *v.* Dow, 142 Mass. 130, 7 N. E. 839, the action was upon a guaranty indorsed on a note by the directors of a corporation under whose authority the treasurer of the company had executed the note payable to his own order, the purpose being to raise funds for the company. It was objected that the guaranty was insufficient under the statute of frauds, because it did not contain the name of the plaintiff. The court held that the guaranty was made to the first holder for value, which, in this instance, was the plaintiff, and that the memorandum was sufficient, saying: "It is true that in order to satisfy the statute of frauds it is necessary that the memorandum should show who are the parties to the contract, but it is sufficient if this appears by description instead of by name; and if the promisor or promisee is described instead of named, parol evidence is admissible to apply the description and identify the person who is meant by it." It also held that evidence of the circumstances under which the plaintiff took the note was competent to identify him as the first holder for value and the promisee in the guaranty.

In Michigan State Bank *v.* Peck, 28 Vt. 200, 65 Am. Dec. 234, parol evidence was admitted to show that a guaranty addressed to "T., President," was in fact intended for the bank of which T. was president, as guarantee.

In Wadsworth *v.* Allen, 8 Gratt. (Va.) 174, 56 Am. Dec. 137, parol evidence was admitted to show that a guaranty addressed to W. & W. was really intended for W., W. & Co., W. & W. being partners in that firm and not engaged in business on their own account. See also Drummond *v.* Prestman, 12 Wheat. (U. S.) 516.

In Hedges *v.* Bowen, 83 Ill. 161, parol proof was admitted to show that a guaranty of the liabilities of an insurance company, not running to any person in particular, was intended merely to secure another company which assumed the business of the first, and was not intended to secure a policy-holder. In this case the court said that the instrument was manifestly intended to indemnify somebody, but it failed to state whom, and in such case it was, perhaps, admissible to resort to extrinsic evidence, even parol, to learn who the persons were who were to be indemnified; and that if the paper was to have any effect whatever it must be by the force of extrinsic evidence.

But in Marston *v.* French, 43 N. Y. St. 538, 17 N. Y. Supp. 509, a memorandum which failed to disclose the guarantee, but left it in doubt whether it was the obligation of the party of the first part or of the party of the second part to certain contracts, which were secured, was held sufficient evidence of a guaranty.

Burden of Proof, see *post*, "II. Presumptions and Burden of Proof. 4. Title of Guarantee," and note 53.

12. The date of a written memorandum of guaranty, where omitted or incorrectly given, may be proved by parol without contravening the statute of frauds. Hewes *v.* Taylor, 70 Pa. St. 387; Wilson Sewing Machine Co. *v.* Schnell, 20 Minn. 40; Draper *v.* Snow, 20 N. Y. 331, 75 Am. Dec. 408; Ordeman *v.* Lawson, 49 Md. 135.

Presumption as to time of execution of indorsed guaranty, see *post*, notes 48 and 49.

13. Jones *v.* Dow, 142 Mass. 130, 7 N. E. 839.

In Southard *v.* Bryant, 26 Neb. 253, 41 N. W. 1009, parol evidence was admitted to show that a written promise "to release and defend B. on a certain mortgage held by S. against said B.'s team of horses in case of said S. to ever collect said mortgage," was made as a part of an executory agreement of separation between B. and his wife and in consideration of B.'s ceasing to molest her, which he had refused to do, the court saying: "In an action between the original parties to an agreement, the consideration may be inquired into."

ing the guarantor's liability, and which do not appear in the written memorandum.[14] Whether oral evidence is receivable to fix the

In Taylor *v.* Wightman, 51 Iowa 411, the court held that parol evidence was admissible to show the consideration for a written guaranty other than the nominal consideration of one dollar mentioned therein.

Parol evidence is admissible to show the actual consideration for a written guaranty, not within the statute of frauds, though the guaranty recites, "for value received;" such evidence not varying the written contract. Jones *v.* Palmer, 1 Doug. (Mich.) 379.

In Burt *v.* Horner, 5 Barb. (N. Y.) 501, the court said, concerning a written guaranty, not within the statute of frauds, that it could be supported by parol evidence of a consideration consistent with the written agreement, though the writing itself disclosed no consideration.

In Tyler *v.* Stevens, 11 Barb. (N. Y.) 485, the court said that parol evidence was admissible to show a new and distinct consideration for the guaranty of an existing indebtedness whereby the contract was removed from the statute of frauds, following, in this instance, the case of Leonard *v.* Vredenburgh, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317, though it added that if the question was an open one, it would hesitate before submitting to the doctrine which it regarded as a violation of the rule excluding parol evidence to vary an unambiguous written contract.

For a discussion of the effect of the statute of frauds on parol proof of the consideration, see *post*, "4. Sufficiency of Memorandum Required by Statute of Frauds. C. Expression of Consideration," and notes 26-42.

14. Hakes *v.* Hotchkiss, 23 Vt. 231; Neil *v.* Board of Trustees, 31 Ohio St. 15; Jones *v.* Albee, 70 Ill. 34; Watson *v.* Hurt, 6 Gratt. (Va.) 633; Squier *v.* Evans, 127 Mo. 514, 30 S. W. 143.

Parol evidence that it was a condition of a written guaranty that the guarantee was to bring suit on the obligation secured is inadmissible. Nixon *v.* Long, 33 N. C. 428.

In McKee *v.* Needles (Iowa), 98 N. W. 618, parol evidence was held inadmissible to show that the guaranty of a board bill, to be paid on the publication of a special edition of the guarantor's newspaper, was intended to be satisfied out of the principal's share of the proceeds of such edition.

In Jones *v.* Hoyt, 25 Conn. 374, parol evidence was held inadmissible to show that a guaranty of freight indorsed on a bill of lading was intended to prevent a sale of the shipment for the transportation charges. The court said that the bill of lading in providing that the freight should be payable before delivery clearly implied that payment was a condition upon which the goods were to be delivered; and that the evidence offered was an attempt to vary this provision by parol, in violation of the rule excluding parol evidence when offered to vary a written contract.

In Allen *v.* Rundle, 50 Conn. 9, 47 Am. Rep. 599, parol evidence of an agreement contemporaneous with a written guaranty of the collectibility of a note, by which the guarantors were to become principal debtors and the maker of the note be relieved from liability, was held inadmissible as varying the terms of the guaranty, even though it was offered, not to affect the construction of the guaranty, but merely to excuse the guarantee's want of diligence in pursuing the maker of the note.

But in Clark *v.* Merriam, 25 Conn. 576, parol evidence was received to show that the blank indorsement of a note payable in one day from date, importing *prima facie* a guaranty of collectibility when due, was really intended to guarantee collectibility for a reasonable time. And in Swisher *v.* Deering, 204 Ill. 203, 68 N. E. 517, a letter of the guarantor's expressing his readiness to pay the debt was admitted in aid of the interpretation of a waiver in the guaranty of notice of its acceptance.

character of the guaranty as a limited or continuing one depends on whether or not its provisions are ambiguous in that particular.[15]

C. Limitations on the Introduction of Parol. — But this rule cannot, of course, be pressed to the extent of admitting parol evidence to transform into a guaranty a writing which on its face does not import such an obligation.[16]

15. *Arkansas.* — West-Winfree Tobacco Co. *v.* Waller, 66 Ark. 445, 51 S. W. 320.

Connecticut. — Indiana Bicycle Co. *v.* Tuttle, 74 Conn. 489, 51 Atl. 538; Hotchkiss *v.* Barnes, 34 Conn. 27, 91 Am. Dec. 713; Hall *v.* Rand, 8 Conn. 560.

Massachusetts. — Boston & Sandwich Glass Co. *v.* Moore, 119 Mass. 435.

New York. — McShane Co. *v.* Padian, 142 N. Y. 207, 36 N. E. 880; White's Bank *v.* Myles, 73 N. Y. 335, 29 Am. Rep. 157.

Texas. — Gardner *v.* Watson, 76 Tex. 25, 13 S. W. 39.

In Hamill *v.* Woods, 94 Iowa 246, 62 N. W. 735, it was held that a guarantor to be personally responsible for goods advanced to the principal, "and I will see the same is paid as if it was my own debt," might be shown by parol evidence not to have been a continuing guaranty, the court saying: "It is a generally recognized rule that, when the language of a guaranty is not so clear as to indicate its meaning conclusively, parol evidence is admissible to show the circumstances under which it was executed, that it may be construed in the light of all material facts, to the end that the intent of the parties to it may prevail."

In Schneider-Davis Co. *v.* Hart, 23 Tex. Civ. App. 529, 57 S. W. 903, parol evidence was held inadmissible to show that a guaranty for "a line of credit" was not intended by the parties to be a continuing one, the court saying, however, that evidence to explain the meaning of that expression might be received.

From expressions in a few cases it might be inferred that parol evidence to show whether a guaranty was limited or continuing might be received without much reference to the existence of an ambiguity in a written memorandum. Thus, in Crist *v.* Burlingame, 62 Barb. (N. Y.) 351, the court said: "There is another rule, partly of evidence and partly of construction, which applies to this class of contracts as well as to others, and that is, that in order to arrive at the intention of the parties, the circumstances under which, and the purposes for which, the contract was made may be proved and must be kept in view in its construction." The question at issue in this case was whether a guaranty was a continuing one.

So in Schwartz *v.* Hyman, 107 N. Y. 562, 14 N. E. 447, the court said that the construction of a guaranty claimed to be a continuing one must always be largely influenced by the precise language used, viewed in the light of the circumstances attending its execution.

And in Michigan State Bank *v.* Peck, 28 Vt. 200, 65 Am. Dec. 234, the subsequent conduct of the parties was admitted to show that a guaranty was a continuing one, though the court said that the terms of the guaranty would naturally incline it to regard it as a single guaranty for a particular sum.

16. Eckman *v.* Brash, 20 Fla. 763; Eaton *v.* Mayo, 118 Mass. 141; Clarke *v.* Russel, 3 Dall. (U. S.) 415.

In O'Harra *v.* Hall, 4 Dall. (U. S.) 340, parol evidence to show that a written assignment, general in its terms, was intended as a guaranty, was excluded, the objection being that it varied the written instrument. But see *contra*, Overton *v.* Tracey, 14 Serg. & R. (Pa.) 311.

To determine whether a transaction is a parol guaranty or an original promise, the language is to be construed in the light of the acts of the parties and the surrounding circumstances. Cowdin *v.* Gottgetren, 55 N. Y. 650.

So in Wichita University *v.* Schweiter, 50 Kan. 672, 32 Pac. 352,

Blank Indorsement of Principal Obligation. — The weight of authority is, however, that a blank indorsement of the principal obligation may sufficiently evidence a contract of guaranty within the statute of frauds, and be shown by parol to constitute such a contract.[17]

4. Sufficiency of Memorandum Required by Statute of Frauds. A. In General. — Closely connected with the question of the admissibility of parol evidence is that of the sufficiency of the written evidence which the statute of frauds demands; for where this may be supplemented by parol its sufficiency is assured.

While the memorandum must be in writing, a telegraphic dispatch

where certain persons had signed an instrument reciting that whereas divers individuals had undertaken to subscribe a certain sum to a building fund for a college, they, the undersigned, bound themselves that the full sum should be paid at the time and in the manner mentioned, it was held that it was competent for the signers, when sued on the writing, to show by parol that the instrument was a guaranty of the subscriptions mentioned therein.

Parol Evidence to Show That the Letters "O. K." indorsed on a principal obligation, and followed by a signature, were intended to constitute a guaranty, has been held inadmissible in Salomon *v.* McRae, 9 Colo. App. 23, 47 Pac. 409. To the same effect, Moore *v.* Eisaman, 201 Pa. St. 190, 50 Atl. 982, in which parol evidence that such letters were understood by the parties to constitute a contract of guaranty was likewise rejected as violating the statute of frauds, though in this case the court said that it had been shown that such was their significance in trade circles that evidence would have sustained the guaranty. *Contra.* — Penn Tobacco Co. *v.* Leman, 109 Ga. 428, 34 S. E. 679.

17. *Connecticut.* — Beckwith *v.* Angel, 6 Conn. 315.

Illinois. — Underwood *v.* Hossack, 38 Ill. 208; Featherstone *v.* Hendrick, 59 Ill. App. 497.

Kansas. — Fuller *v.* Scott, 8 Kan. 25.

Massachusetts. — Tenney *v.* Prince, 4 Pick. 385, 16 Am. Dec. 347; Ulen *v.* Kittredge, 7 Mass. 233.

Minnesota. — Peterson *v.* Russell, 62 Minn. 220, 64 N. W. 555, 54 Am. St. Rep. 634, 29 L. R. A. 612.

Virginia. — Hopkins *v.* Richardson, 9 Gratt. 485.

Contra. — Schafer *v.* Farmers & Mechanics Bank, 59 Pa. St. 144, 98 Am. Dec. 323; Jack *v.* Morrison, 48 Pa. St. 113; Wilson *v.* Martin, 74 Pa. St. 159; Hauer *v.* Patterson, 84 Pa. St. 274; Temple *v.* Baker, 125 Pa. St. 634, 17 Atl. 516, 11 Am. St. Rep. 926, 3 L. R. A. 709.

In Perkins *v.* Catlin, 11 Conn. 213, 29 Am. Dec. 282, parol evidence was held admissible to show that a blank indorsement on a note was intended to evidence a contract of guaranty, as against the objection that it amounted to receiving such evidence to vary a written contract. The further objection that the reception of such evidence infringed the statute of frauds requiring a contract of guaranty to be in writing was likewise held untenable, the court saying that the contention had no foundation in principle and was not supported by any precedent which it could find; that the indorsement being in writing and in blank, was of itself an authority to write over it the agreement it was designed to express, and that it constituted in itself a memorandum of the contract signed by the party to be charged. It also said that if the objection should be sustained the statute would be an insuperable bar in every case of blank indorsement, to the proof of a limited contract. See also on this latter point, Castle *v.* Candee, 16 Conn. 223.

But in Pennsylvania, evidence to show that an indorsement on a promissory note was a guaranty thereof must itself be sufficient to constitute a memorandum under the statute of frauds, in which case it may be admitted. Eilbert *v.* Fink-

is sufficient.[18] The memorandum must contain the promise;[19] but it need not be made contemporaneously with the guaranty since the writing is only required to make valid proof of the contract;[20] nor need it be delivered to the guarantee.[21]

B. Memorandum Consisting of Detached Papers. — It is the established rule that the memorandum need not consist of a single paper, but that the statute is satisfied by several papers having reference to each other, showing they were parts of the same transaction.[22] And parol evidence is not, in general, admissible to establish this connection,[23] though the rule excluding it is not absolute.[24]

beiner, 68 Pa. St. 243, 8 Am. Rep. 176.

In Hodgkins *v.* Bond, 1 N. H. 284, however, the blank indorsement on a note by a stranger thereto after its delivery was held insufficient as a memorandum of guaranty under the statute of frauds, and it was also held that the matter was not helped by the writing of a memorandum above such signature by the holder of the note, the court saying: "When an agent has been authorized to write over the signature of the principal a contract already made, it is not enough to prove the signature of the principal and the authority of the agent to write a contract over it. This does not make the writing evidence of the contract, unless the contract is to be presumed to be anything the agent pleases to write. It would still be necessary to show that the agent had pursued his authority; and this could be done only by showing what the contract was, and comparing it with the writing. And when it was proved that the writing contained the real contact, this would not make the writing itself evidence of the contract. The proof of the contract would still rest altogether upon the evidence introduced to show that the writing was true."

So also Culbertson *v.* Smith, 52 Md. 628, 36 Am. Rep. 384.

In Minnesota it is held that while a blank indorsement on a note by a stranger thereto is not a sufficient memorandum of a guaranty under the statute of frauds, yet, when the holder of the note writes above the signature a contract of guaranty, it thereupon becomes an adequate memorandum. Moor *v.* Folsom, 14 Minn. 340; Peterson *v.* Russell, 62 Minn. 220, 64 N. W. 555. Blank indorsement as expressing consideration, see *post*, "4. Sufficieny of Memorandum Required by Statute of Frauds. C. Expression of Consideration. e. Indorsed or Subjoined Guaranty," and notes 36-38.

18. Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355.

19. Marston *v.* French, 43 N. Y. St. 538, 17 N. Y. Supp. 509.

20. Ward *v.* Hasbrouck, 44 App. Div. 32, 60 N. Y. Supp. 391.

21. Ward *v.* Hasbrouck, 44 App. Div. 32, 60 N. Y. Supp. 391.

22. *Alabama.* — Strouse *v.* Elting, 110 Ala. 132, 20 So. 123.

Massachusetts. — Lee *v.* Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466.

Minnesota. — Highland *v.* Dresser, 35 Minn. 345, 29 N. W. 55.

New Hampshire. — Simons *v.* Steele, 36 N. H. 73.

New York. — Barney *v.* Forbes, 118 N. Y. 580, 23 N. E. 890; Marston *v.* French, 43 N. Y. St. 538, 17 N. Y. Supp. 509; Hanford *v.* Rogers, 11 Barb. 18; Ward *v.* Hasbrouck, 44 App. Div. 32, 60 N. Y. Supp. 391.

South Carolina. — Lecat *v.* Table, 3 McCord 158. As to resorting to principal obligation to ascertain consideration of guaranty, see *post* notes 36 to 38, inclusive.

23. Deutsch *v.* Bond, 46 Md. 164; Ordeman *v.* Lawson, 49 Md. 135; Frank *v.* Miller, 38 Md. 450; Eckman *v.* Brash, 20 Fla. 763.

When the relation between the papers is apparent by intrinsic reference, parol evidence is receivable to identify the paper referred to. Marston *v.* French, 43 N. Y. St. 538, 17 N. Y. Supp. 509.

24. In Strouse *v.* Elting, 110 Ala. 132, 20 S. W. 123, the court said:

In analogy to this rule, it has been also held that written evidence is not admissible to add to or interpret a guaranty, unless made a part thereof by intrinsic reference.[25]

C. Expression of Consideration. — a. *In General.* — Among the features of the contract, the necessity of the incorporation of which in the memorandum has been determined, the chief and most vexatious is the consideration.

It was early held in England that in view of the statute's requiring a note or memorandum of the "agreement" the consideration must appear;[26] and this has become the settled law

"The general rule is that it is not competent to connect several papers by parol, but the several instruments must be connected by references contained in the papers themselves. The rule is not absolute." It was accordingly held in this case that parol evidence might be received to connect correspondence between the parties with the memorandum of guaranty, so as to exhibit the consideration for the latter.

In Lee *v.* Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466, the court said that it was well settled that parol evidence might be introduced to show the connection of different writings, constituting a memorandum, with one another.

In Union Bank of Louisiana *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280, parol evidence was said to be admissible to connect a written contract of guaranty with the principal contract, also in writing.

In Barney *v.* Forbes, 118 N. Y. 580, 23 N. E. 890, parol evidence was held admissible to show that two letters, one from a principal debtor to his creditor promising to make payments out of his salary received from a certain firm, and the other a letter from a member of the firm guaranteeing such payments, were inclosed in one envelope and sent by the writers to the creditor; the purpose being to gather from the two instruments the consideration for the guaranty.

25. In Bell *v.* Bruen, 1 How. (U. S.) 169, it was said that under the statute of frauds a letter of guaranty could not be added to by written evidence, if not signed by the guarantor, unless the written evidence was by a reference in the letter adopted as part of it. It was held, however, that a guaranty reading "Our mutual friend, T., has informed me that he has a credit given by you in his favor with A.," sufficiently referred to letters of the friend to the guarantee, and to A., to permit of their being read in evidence.

In Looney *v.* Le Geirse, 2 Wils. Civ. Cas., Ct. of App., (Tex.) § 531, the court held parol evidence admissible to connect sheets of paper consecutively numbered, inclosed in a single envelope, and mailed to the alleged guarantee, so as to show that the fifth paper containing a guaranty in these words, "I will be responsible for the amount bought by my brother," had actual reference to an order for goods contained in the other papers, the court saying: "When an ambiguity arises which the contract itself does not explain, parol evidence is admissible to aid in its construction;" and that in the case at bar the guaranty by its terms would cover any purchase made of the guarantee by the principal at any time and to any amount, and that the subject-matter could only be ascertained by the evidence in question.

Where a letter of guaranty begins by saying that the guarantor has before him a letter addressed to the principal by the prospective guarantee, whatever letter or letters were so addressed on the subject and shown to the guarantor are competent in evidence as tending to prove the contract between the parties; and even if they were not shown to the guarantor, but their contents communicated to him, that would be sufficient. Nelson Mfg. Co. *v.* Shreve, 94 Mo. App. 518, 68 S. W. 376.

26. In the leading and famous case of Wain *v.* Warlters, 5 East (Eng.) 10, the syllabus reads: "No

of certain of the states by judicial adoption of the construction given the English statute,[27] and in others by express statutory

person can, by the statute of frauds, be charged upon any promise to pay the debt of another, unless the *agreement* upon which the action is brought, or some note or memorandum thereof, be *in writing;* by which word *agreement* must be understood the *consideration* for the promise as well as the *promise* itself. And therefore, where one promised in writing to pay the debt of a third person, without stating on what consideration, it was holden that *parol* evidence of the consideration was inadmissible by the statute of frauds; and consequently such promise appearing to be without consideration upon the face of the written engagement, it was *nudum pactum* and gave no cause of action."

"By the 4th section of the statute of frauds, an agreement to pay the debt of another must, in order to give a cause of action, be in writing, and must contain the consideration for the promise, as well as the promise itself, and parol evidence of the consideration is inadmissible." Saunders *v.* Wakefield, 4 B. & A. 595, 6 E. C. L. 531.

27. *Maryland.* — Sloan *v.* Wilson, 4 Harr. & J. 322, 7 Am. Dec. 672; Elliott *v.* Giese, 7 Har. & J. 457; Culbertson *v.* Smith, 52 Md. 628, 36 Am. Rep. 384; Nabb *v.* Koontz, 17 Md. 283; Ordeman *v.* Lawson, 49 Md. 135; Deutsch *v.* Bond, 46 Md. 164; Hutton *v.* Padgett, 26 Md. 228.

New Jersey. — Buckley *v.* Beardslee, 5 N. J. L. 570, 8 Am. Dec. 620; Ashcroft *v.* Clark, 5 N. J. L. 577.

In Georgia the English doctrine was early followed in the case of Henderson *v.* Johnson, 6 Ga. 390. But in Hargroves *v.* Cooke, 15 Ga. 321, the propriety of the former decision was doubted, though it was held that the consideration must not be left to mere conjecture from the instrument. The matter was finally settled by statute (Pamphlet Acts, 1851-2, § 243), providing that the consideration need not be expressed in writing. See Sorrell *v.* Jackson, 30 Ga. 901; Black *v.* McBain, 32 Ga. 128.

In New York the English rule was also followed, though in its more liberal aspect. In the leading case of Leonard *v.* Vredenburgh, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317, Chief Justice Kent said: "There are, then, three distinct classes of cases on this subject, which require to be discriminated: (1.) Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. Here, as we have already seen, is not, nor need be, any other consideration than that moving between the creditor and original debtor. (2.) Cases in which the collateral undertaking is subsequent to the creation of the debt and was not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. Here must be some further consideration shown, having an immediate respect to such liability, for the consideration for the original debt will not attach to this subsequent promise. The cases of Fish *v.* Hutchinson (2 Wils. 94), of Chater *v.* Beckett (7 Term Rep. 201), and of Wain *v.* Warlters (5 East 10), are samples of this class of cases. (3.) A third class of cases, and to which I have already alluded, is when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The first two classes of cases are within the statute of frauds, but the last is not. The case before us belongs to the first class; and if there was no consideration other than the original transaction, the plaintiff ought to have been permitted to show the fact, if necessary, by parol proof; and the decision in Wain *v.* Warlters did not stand in the way."

In 1830 a provision was incorporated in the New York statute requiring the consideration to be expressed, and this remained until 1863, when, in re-enacting the statute, it was omitted. But, notwithstanding this omission, it is settled that the

enactment.[28] But the holding gave rise to dissatisfaction,[29] and the more general and better rule is that in the absence of express statutory requirement, parol evidence of the consideration of the guaranty, not repugnant to the terms of the memorandum, may be received; and hence the consideration need not be disclosed in the writing in order to satisfy the statute of frauds.[30]

English rule is still in force, and the memorandum must disclose the consideration, either expressly or by implication. Union Nat. Bank *v.* Leary, 77 App. Div. 332, 79 N. Y. Supp. 217; Castle *v.* Beardsley, 10 Hun (N. Y.) 343; Marston *v.* French, 43 N. Y. St. 538, 17 N. Y. Supp. 509; Brumm *v.* Gilbert, 27 Misc. 421, 59 N. Y. Supp. 237. *Contra.* — Speyers *v.* Lambert, 37 How. Pr. (N. Y.) 315.

28. Such statutory provision exists in Alabama, California, Minnesota, Montana, Nevada and Wisconsin, and existed in New York between 1830 and 1863. Under this provision parol evidence of the consideration has been rigorously excluded. Brewster *v.* Silence, 8 N. Y. 207; Rigby *v.* Norwood, 34 Ala. 129; Taylor *v.* Pratt, 3 Wis. 674.

In White *v.* White, 107 Ala. 417, 18 So. 3, it was said that where the statute requires not only that guaranties shall be in writing, but that the writing shall express the consideration, the failure to express a valuable consideration is as fatal to the binding force of the contract as would be the failure to reduce it to writing.

But in O'Bannon *v.* Chumasero, 3 Mont. 419, parol evidence of the situation of the parties seems to have been considered in determining whether a memorandum of a guaranty sufficiently expressed the consideration as required by the Montana statute of frauds.

29. The law has now been changed in England, by the third section of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), providing that "no special promise to be made by any person after the passing of this act, to answer for the debt, default or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document." See Houghton *v.* Ely, 26 Wis. 181, 7 Am. Rep. 52.

30. *United States.* — Dunlap *v.* Hopkins, 95 Fed. 231.

Connecticut. — Sage *v.* Wilcox, 6 Conn. 81.

Maine. — Levy *v.* Merrill, 4 Me. 180; King *v.* Upton, 4 Me. 387, 16 Am. Dec. 266; Gilligan *v.* Boardman, 29 Me. 79.

Massachusetts. — Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119; Packard *v.* Richardson, 17 Mass. 122, 9 Am. Dec. 123.

New Hampshire. — Brown *v.* Fowler, 70 N. H. 634, 47 Atl. 412.

North Carolina. — Ashford *v.* Robinson, 30 N. C. 114; Nichols *v.* Bell, 46 N. C. 32; Green *v.* Thornton, 49 N. C. 230.

Ohio. — Reed *v.* Evans, 17 Ohio, 128.

Pennsylvania. — Shively *v.* Black, 45 Pa. St. 345; Moore *v.* Eisaman, 201 Pa. St. 190, 50 Atl. 982.

South Carolina. — Fyler *v.* Givens, 3 Hill L. 48.

Tennessee. — Gilman *v.* Kibler, 5 Humph. 19.

Vermont. — Smith *v.* Ide, 3 Vt. 290; Roberts *v.* Griswold, 35 Vt. 496, 84 Am. Dec. 641.

In Gregory *v.* Gleed, 33 Vt. 405, the court said that the rule excluding parol evidence of the consideration of a guaranty, founded on the statute of frauds, was independent of the common law rule of evidence that parol testimony was not admissible to supply the defects of, or add to, a written contract.

By the Indiana statute of frauds (1 G. & H., § 2, p. 351), the con-

b. *Memorandum of "Promise."* — Where the statute uses the word "promise" in connection with or as a substitute for the word "agreement," it is held that the consideration may be omitted.[31]

c. *Expression by Implication.* — The consideration need not appear in express language, but it is sufficient if it may be collected by necessary or reasonable implication from the writing, without the aid of parol.[32] Where a guaranty expressly refers to a previous agreement between the principal and a guarantee, executory in its character and embracing prospective dealings between the parties, it

sideration for the promise or agreement to answer for the debt, etc., of another, need not be set forth in the written evidence thereof, but may be proved. Hiatt *v.* Hiatt, 28 Ind. 53.

By the civil law as it exists in Louisiana, a guaranty is good without proof of a consideration, and hence the written memorandum thereof need not contain the consideration. Ringgold *v.* Newkirk, 3 Ark. 96.

Performance of the consideration for a written guaranty may be proved by parol, though the statute requires the consideration to be in writing; since the parol evidence is used to show not what the consideration is, but that it has been performed. Union Bank of Louisiana *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280.

31. Taylor *v.* Ross, 3 Yerg. (Tenn.) 330; Britton *v.* Angier, 48 N. H. 420; McDonald *v.* Fernald, 68 N. H. 171, 38 Atl. 729; Wren *v.* Pearce, 4 Smed. & M. (Miss.) 91; Colgin *v.* Henley, 6 Leigh (Va.) 85; Sanders *v.* Barlow, 21 Fed. 836. And see Patmor *v.* Haggard, 78 Ill. 607.

32. *England.* — James *v.* Williams, 1 Bing. (N. C.) 476, 27 E. C. L. 280; Hawes *v.* Armstrong, 1 Bing. (N. C.) 761, 27 E. C. L. 565.

Maryland. — Hutton *v.* Padgett, 26 Md. 228; Ordeman *v.* Lawson, 49 Md. 135; Deutsch *v.* Bond, 46 Md. 164; Roberts *v.* Woven Wire Mattress Co., 46 Md. 374.

Minnesota. — Straight *v.* Wight, 60 Minn. 515, 63 N. W. 105.

New Hampshire. — Simons *v.* Steele, 36 N. H. 73.

New Jersey. — Laing *v.* Lee, 20 N. J. L. 337.

New York. — Union Bank of Louisiana *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280; Douglass *v.* Howland, 24 Wend. 35.

Contra. — Bennett *v.* Pratt, 4 Denio (N. Y.) 275.

In Wilson Sewing Mach. Co. *v.* Schnell, 20 Minn. 40, the court said it would be sufficient if the memorandum was so framed that any person of ordinary capacity must infer from it that such and no other was the consideration; but that a mere conjecture, no matter how plausible, would be insufficient to satisfy the statute, the law requiring a well-grounded inference to be necessarily collected from the terms of the memorandum.

In Laing *v.* Lee, 20 N. J. L. 337, a recital that the principal debtor had transferred his stock of goods to the person sought to be charged as guarantor, which the latter intended to sell at the least possible expense, intending to make the most of it for the creditors, followed by a statement that the creditors might consider him as security, was held to sufficiently disclose a consideration in the transfer of the stock of goods to the guarantor.

A written guaranty to pay an execution if the execution plaintiff would delay service to a certain date and the defendant then failed to pay, sufficiently expresses the consideration thereof. Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119. See also Union Nat. Bank *v.* Leary, 77 App. Div. 332, 79 N. Y. Supp. 217.

A guaranty indorsed on a note assuring the payment thereof, "The one-half within six months and the other half within twelve months," sufficiently expresses a consideration of forbearance toward the principal debtor to satisfy the statute of frauds. Neelson *v.* Sanborne, 2 N. H. 413, 9 Am. Dec. 108.

In Oldershaw *v.* King, 2 H. & N. (Eng.) 399, a guaranty reciting as

imports on its face a sufficient consideration;[33] but an already existing indebtedness or obligation of the principal is insufficient.[34]

d. *Parol Proof of Consideration of Original Obligation.* — Where it is sought to show the consideration of the original obligation as

a consideration the creditor's forbearance to press for immediate payment was held not to express a consideration, the stipulation being too indefinite.

In Packer *v.* Wilson, 15 Wend. (N. Y.) 343, it was held under 2 Rev. Stat. 135, § 2, subd. 2, requiring the memorandum of a contract of guaranty to express the consideration, that a guaranty indorsed on a promissory note after it had become overdue, by which the payment thereof was guaranteed in six months, but which expressed no further consideration, was insufficient, the court saying that while under the former statute, which was the same as the English statute, it was permissible to infer a consideration, yet under the present act the argument that forbearance could be inferred from the guaranty as a consideration therefor so as to satisfy the statute, could not prevail.

33. Roberts *v.* Woven Wire Mattress Co., 46 Md. 374, and see Straight *v.* Wight, 60 Minn. 515, 63 N. W. 105.

In Stadt *v.* Lill, 9 East (Eng.) 348, it was held that a written guaranty to pay for goods which the vendor delivers to the principal, sufficiently expresses a consideration in the stipulation for such delivery. To the same effect, Dunning *v.* Roberts, 35 Barb. (N. Y.) 463; Hoad *v.* Grace, 7 H. & N. (Eng.) 494; Church *v.* Brown, 21 N. Y. 315; Eastman *v.* Bennett, 6 Wis. 232; Waldheim *v.* Miller, 97 Wis. 300, 72 N. W. 869; Coxe *v.* Milbrath, 110 Wis. 499, 86 N. W. 174.

In Marquand *v.* Hipper, 12 Wend. (N. Y.) 520, an undertaking to guarantee and become security for any amount in silver which B. might from time to time during two years put into the hands of C. for the purpose of manufacture, was held to sufficiently express the consideration therefor as required by the statute of frauds.

A guaranty reading: "I hold myself to P. for drafts he has accepted or may hereafter accept for L.," sufficiently expresses a consideration, the plain meaning of the draft being that in consideration of the plaintiff's acceptances for L., the defendant will be responsible for their payments. Hutton *v.* Padgett, 26 Md. 228.

But in Hutson *v.* Field, 6 Wis. 407, a guaranty incorporated in a lease and reading, "I, H., agree to become surety for the prompt payment of the lease," the lease being signed by H., who was not, however, otherwise a party to the transaction, was held not to express a consideration as required by the Wisconsin statute of frauds.

34. Elliott *v.* Giese, 7 Har. & J. (Md.) 457; James *v.* Williams, 1 Bing. (N. C.) 476, 27 E. C. L. 280; Walrath *v.* Thompson, 4 Hill (N. Y.) 200.

In Brumm *v.* Gilbert, 27 Misc. 421, 59 N. Y. Supp. 237, it was held that a written promise to guarantee an existing debt of another which did not disclose a consideration was insufficient under the statute of frauds requiring that every promise to answer for the debt of another shall be in writing, etc., the court saying that from the earliest times, with but few exceptions, the courts of New York, following the English decision of Wain *v.* Warlters, 5 East 10, have held that the written memorandum must contain the whole contract, including a recital of a consideration, which could not be shown by extrinsic evidence.

A guaranty reciting that whereas certain parties "have made and entered into various contracts," discloses only a past consideration and is, therefore, insufficient under the statute of frauds. Marston *v.* French, 43 N. Y. St. 538, 17 N. Y. Supp. 509.

In Oldershaw *v.* King, 2 H. & N. (Eng.) 399, a recital of possible future advances and a guaranty of the balance of account, including past and

sustaining also a contemporaneous guaranty, this may be done by parol.[35]

e. *Indorsed on Subjoined Guaranty.* — A memorandum indorsed on the contract guaranteed at the time of the execution of the latter, need not separately express a consideration in order to satisfy the statute of frauds;[36] and this is true even where the statute requires the consideration to be expressed in writing.[37] But the

future indebtedness, was held insufficient.

35. Leonard *v.* Vredenburgh, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317; Bailey *v.* Freeman, 11 Johns. (N. Y.) 221, 6 Am. Dec. 371; D'Wolf *v.* Rabaud, 1 Pet. (U. S.) 476; Wren *v.* Pearce, 4 Smed. & M. (Miss.) 91. But see *contra,* Brewster *v.* Silence, 8 N. Y. 207.

36. *Illinois.* — Underwood *v.* Hossack, 38 Ill. 208.

Maryland. — Nabb *v.* Koontz, 17 Md. 283; Ordeman *v.* Lawson, 49 Md. 135.

Mississippi. — Wren *v.* Pearce, 4 Smed. & M. 91.

New Hampshire. — Simons *v.* Steele, 36 N. H. 73.

New York. — Leonard *v.* Vredenburgh, 8 Johns. 29, 5 Am. Dec. 317; Bailey *v.* Freeman, 11 Johns. 221, 6 Am. Dec. 371; Marsh *v.* Chamberlain, 2 Lans. 287.

The consideration of a guaranty indorsed on a note at the time of its execution will be presumed to be the same as that of the note. Parkhurst *v.* Vail, 73 Ill. 343.

Parol evidence is admissible to show that an indorsed guaranty was concurrent with the making of the original obligation and a part of the same transaction, the purpose being to show the consideration for the guaranty. Leonard *v.* Vredenburg, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317.

But in Deutsch *v.* Bond, 46 Md. 164, parol evidence was held inadmissible to connect a written guaranty with a written contract between the principal and the guarantee, for the purpose of showing a consideration for the guaranty.

Sufficiency of indorsement as constituting memorandum in general, see *ante,* "3. Admissibility of Parol Evidence. — Blank Indorsement of Principal Obligation," and note 17.

37. Moses *v.* National Bank of Lawrence Co., 149 U. S. 298; Evoy *v.* Tewksbury, 5 Cal. 285; Riggs *v.* Waldo, 2 Cal. 485, 56 Am. Dec. 356; and see Ford *v.* Hendricks, 34 Cal. 673. *Contra.* — Van Doren *v.* Tjader, 1 Nev. 380, 90 Am. Dec. 498.

In Hazeltine *v.* Larco, 7 Cal. 32, and Otis *v.* Haseltine, 27 Cal. 81, the court noted the fact that the indorsed guaranty referred in terms to the principal contract.

But in Taylor *v.* Pratt, 3 Wis. 674, evidence for plaintiff, in an action on a guaranty indorsed on a promissory note but not separately expressing a consideration, of the actual consideration therefor, and that the guaranty was given at the same time with the making of a note, and that the principal credit was given to the guarantors, was held properly rejected, the court in effect thus repudiating the doctrine that the consideration of the principal obligation on which a contemporaneous guaranty is indorsed can be extended to the latter so as to satisfy the requirement of the statute of frauds that the consideration shall be expressed in the written memorandum. This case was severely criticised by Chief Justice Dixon in Houghton *v.* Ely, 26 Wis. 181, 7 Am. Rep. 52, in which the case of Sears *v.* Loy, 19 Wis. 96, was said to be directly in conflict therewith and to have overruled it. But in Parry *v.* Spikes, 49 Wis. 384, 35 Am. Rep. 782, the doctrine of Taylor *v.* Pratt was expressly adhered to, the criticism in Houghton *v.* Ely being said to be that of the chief justice alone, in which the majority of the court did not concur. In this last case the rule obtaining in Wisconsin was thus stated, in conformity to the previous statement made in Taylor *v.* Pratt: "A written guaranty, upon a negotiable promissory note, though

indorsement of the guaranty must be contemporaneous with the

referring to the note, and though made at the same time with the note, and constituting a ground of the credit given to the maker, is void within the statute of frauds because it does not express the consideration for the guaranty."

The Rule in New York. — During the period from 1830 to 1863, when the New York statute of frauds required the written memorandum of a guaranty to express the consideration, the decisions in that state as to the application of this requirement to an indorsed guaranty contemporaneous with the principal obligation, are in hopeless confusion. Two leading cases diametrically opposed to each other, that of Union Bank of Louisiana *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280, and Brewster *v.* Silence, 8 N. Y. 207, may be noted. In the first of these the consideration of a guaranty subjoined to a letter of credit was held sufficiently inferable to satisfy the statute of frauds, the two contracts being read together to the effect that in consideration of the guarantee's purchase of drafts drawn on the principal, the acceptance of such drafts was guaranteed. A decision of similar import was reached in Hanford *v.* Rogers, 11 Barb. (N. Y.) 18, in which a guaranty indorsed on a bond was construed with an assignment thereof, so as to show a consideration for the guaranty. In Church *v.* Brown, 21 N. Y. 315, a guaranty of the payment of goods indorsed on a contract for their purchase was construed therewith, in order to disclose the consideration. In this case the court distinguished between the case of Union Bank *v.* Coster, *supra,* and that of Brewster *v.* Silence, *supra,* saying that under the former decision a guaranty indorsed on the original obligation may be construed therewith where the original obligation is contracted on the credit of the guaranty and the consideration is a future one; while under the latter case, the two contracts cannot be read together, where the consideration for the principal obligation is an executed one, such as an existing indebtedness; since, in such case, even if they were construed together, the consideration disclosed would not be an adequate one for the guaranty. "In the one case, the guaranty was of an existing debt; in the other, of a debt to be contracted on the credit of the guaranty. One had a past consideration to support the promise, which was none at all; in the other, the promise was supported by an act to be done by the promisee at the implied request of the promisor. In the one there was no consideration moving between the promisor and the promisee; there was none, in fact, and none could be legally implied. . . . In the other, the act to be done by the promisee, at the request of the promisor, and which was the consideration of the promise of the latter, was expressed in writing." The court held, however, that if this attempt at reconcilement was unsuccessful, the case of Brewster *v.* Silence must be considered overruled by that of Union Bank *v.* Coster. How this could be in view of the fact that the former is the later case is not clear. Prior to this line of decisions and as early as 1833, it had been held in Stymets *v.* Brooks, 10 Wend. (N. Y.) 206, that a guaranty subjoined to a contract reciting the giving of a deed to the principal, showed the consideration, it being inferable that without the guaranty the deed would not have been made. In Manrow *v.* Durham, 3 Hill (N. Y.) 584, a guarantee of payment indorsed on a note was regarded in legal effect as itself a promissory note, and as such, importing a consideration. But, in Hunt *v.* Brown, 5 Hill (N. Y.) 145, this rule was held not to apply to a guaranty of collection so indorsed. And in Hall *v.* Farmer, 5 Denio (N. Y.) 484, and Tyler *v.* Stevens, 11 Barb. (N. Y.) 485, the idea that an indorsed guaranty was itself a promissory note was repudiated. Following the authority of Manrow *v.* Durham, *supra,* it was held in Curtis *v.* Brown, 2 Barb. (N. Y.) 51, that it was the settled law of New York that a guaranty of payment indorsed on a promissory note, but having no connection with the mak-

execution of the instrument guaranteed, and a part of the same transaction; and one subsequently indorsed and not in itself expressing a consideration is not sufficient.[38]

ing thereof, might be sustained by proof of its actual consideration and need not express a consideration. The conflicting cases of Manrow *v.* Durham, and Hall *v.* Farmer, *supra,* were both affirmed by the court of appeals in the same year, by a badly-divided court. Three years after Union Bank of Louisiana *v.* Coster, *supra,* was decided, the same court rendered the decision in Brewster *v.* Silence, *supra,* by which it was held that a guaranty of payment indorsed on a note contemporaneously with its execution must itself express its consideration. The court referred to the case of Leonard *v.* Vredenburgh, 8 Johns. (N. Y.) 828, 5 Am. Dec. 317, saying it was a fundamental error in that case to hold that in the case of a guaranty contemporaneous with the original transaction, parol proof might be received to show that it had no other consideration than that supporting the principal obligation. It also added: "But I know of no case where the statute of frauds requires the consideration to be expressed in a written agreement that, in an action at law founded upon it, the omission to state the consideration in the writing can be supplied by parol proof. When the case of Leonard *v.* Vredenburgh was decided, the statute did not require the consideration to be expressed in the writing. The remark of the chief justice that the omission to state the consideration in the writing might be supplied by parol proof conflicted with no statute. . . . Indeed, under the former statute, it was enough if the court could make out the consideration by inference. . . . But since the Revised Statutes, something more than mere argument or inference has been deemed necessary to make out a consideration." Previous to this it had been held in Hall *v.* Farmer, *supra,* that a guaranty contemporaneously indorsed on a note given for a pre-existing indebtedness and payable instanter, must separately express a consideration. Following Brewster *v.* Silence, it was held in Glen Cove Mut. Ins. Co. *v.* Harrold, 20 Barb. (N. Y.) 298, that a contemporaneous guaranty indorsed on a note must express a consideration, the court saying that prior to Brewster *v.* Silence it had held the opinion that if the principal contract and guaranty were both on the same piece of paper and written at the same time, they should be considered as one transaction and the signature of the guarantor be deemed a subscription by him, not only to the guaranty, but also to the acknowledgment of a consideration in effect expressed by the principal contract; but that all previous decisions had been overruled by that case. Brewster *v.* Silence was also followed in Gould *v.* Moring, 28 Barb. (N. Y.) 444; and in Draper *v.* Snow, 20 N. Y. 331, 75 Am. Dec. 408, the same doctrine was again reiterated by the court of appeals, which a little later was to repudiate it in Church *v.* Brown, *supra.* The matter was finally settled by the alteration of the statute in 1863, omitting the requirement that the consideration be expressed in writing, since which the doctrine of the text has obtained in New York. Marsh *v.* Chamberlain, 2 Lans. (N. Y.) 287.

The rule stated in the text has been extended to apply to a guaranty on a separate paper, but referring to the guaranteed obligation, which under such circumstances need not express a consideration, even though the statute so requires. Jones *v.* Post, 6 Cal. 102; Wilson Sewing Machine Co. *v.* Schnell, 20 Minn. 40; Highland *v* Dresser, 35 Minn. 345, 29 N. W. 55; Union Bank of Louisiana *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280.

38. Moses *v.* National Bank of Lawrence Co., 149 U. S. 298; Rigby *v.* Norwood, 34 Ala. 129; Crooks *v.* Tully, 50 Cal. 254; Nichols *v.* Allen, 23 Minn. 542.

A guaranty written on a promissory note in these words, "I hereby guarantee that the above note is not outlawed, according to the laws of the

f. *Recitals of Consideration.* — The words "for value received" are a sufficient recital of consideration in a written guaranty to satisfy the statute of frauds,[39] as is also the recital of a consideration of one dollar paid to the guarantor.[40]

state. Isaac Hampton," is invalid, no consideration being expressed in it. Clark *v.* Hampton, 1 Hun (N. Y.) 612.

In Manrow *v.* Durham, 3 Hill (N. Y.) 584, the court said that where a note and indorsed guaranty were contemporaneous the note might be resorted to to sustain the consideration of the guaranty. "The note contains aliment to support the guaranty." But when the guaranty was made at a different time, it must be sustained by showing an independent consideration.

But in Curtis *v.* Brown, 2 Barb. (N. Y.) 51, the court said that it must be taken as the settled law of New York that where a guaranty of payment was indorsed on a promissory note as a distinct and independent agreement having no connection with the making of the note, the validity of the guaranty might be sustained by proof of its actual consideration, and it need not express a consideration. This case was professedly decided on the authority of Manrow *v.* Durham, *supra.*

In Howland *v.* Aitch, 38 Cal. 133, the court said that the test as to whether the guaranty indorsed on the original contract rested upon the consideration of that contract, was not whether the indorsement was made contemporaneously with the execution of the original contract, but whether they constituted in fact a single transaction; and in this case an indorsement guaranteeing a note, but made three days after the delivery of the instrument, was held sufficient under the statute of frauds, though not reciting a consideration, it having been made pursuant to an oral understanding prior to the execution of the note.

In those states where the statute does not require the consideration to be expressed in a written memorandum, it seems that parol evidence of a new consideration for a subsequently indorsed guaranty will be received, the burden of adducing which will be on the guarantee. Dreyer *v.* Kadish, 70 Ill. App. 76; Parkhurst *v.* Vail, 73 Ill. 343.

In McCoskey *v.* Deming, 3 Blackf. (Ind.) 145, it was held that a guaranty indorsed on a promissory note after its delivery was admissible in evidence in an action against the guarantors, though it did not recite a consideration.

Where it appears that the guaranty was indorsed on a lease after its delivery and the occupation by the tenant under it, parol evidence should be received to show that there was no new consideration for the obligation. Lewin *v.* Barry, 15 Colo. App. 461, 63 Pac. 121.

Presumption as to time of indorsement, see *post,* "II. Presumptions and Burden of Proof. — 1. Blank Indorsement of Principal Obligations. — B. Time of Execution," and notes 48 and 49.

39. *United States.* — Moses *v.* National Bank of Lawrence Co., 149 U. S. 298.

Colorado. — Jain *v.* Giffin, 3 Colo. App. 90, 32 Pac. 80.

Maryland. — Emerson *v.* Aultman, 69 Md. 125, 14 Atl. 671.

Minnesota. — Osborne *v.* Baker, 34 Minn. 307, 25 N. W. 606, 57 Am. Rep. 55.

New York. — Watson *v.* McLaren, 19 Wend. 557; Douglass *v.* Howland, 24 Wend. 35; Miller *v.* Cook, 23 N. Y. 495; Mosher *v.* Hotchkiss, 3 Keyes, 161; Howard *v.* Holbrook, 9 Bosw. 237; Connecticut Mut. Life Ins. Co. *v.* Railway Co., 41 Barb. 9; Cooper *v.* Dedrick, 22 Barb. 516.

Wisconsin. — Day *v.* Elmore, 4 Wis. 190; Dahlman *v.* Hammel, 45 Wis. 466. And see Brewster *v.* Silence, 8 N. Y. 207.

40. Recitals in guaranty as making *prima facie* case of consideration, see *post,* "II. Presumptions and Burden of Proof. — 6. Consideration. — C. Effect of Recitals in Instrument," and note 57. Moses *v.* National Bank

And a seal attached to the memorandum of guaranty expresses a consideration as the statute of frauds requires.[41]

g. *Statutory Presumption of Consideration.* — The statutory presumption of consideration arising from the fact that a contract is in writing does not apply to a written guaranty so as to take it out of the statute of frauds where it fails to express the consideration.[42]

II. PRESUMPTIONS AND BURDEN OF PROOF.

1. Blank Indorsement of Principal Obligation. — A. Existence of Contract. — Where the blank indorsement of a stranger to the instrument appears on a note in the hands of the payee, the presumption obtains in certain states that he is a guarantor.[43] But the presumption is not conclusive and parol evidence is admissible[44] to show

of Lawrence Co., 149 U. S. 298; Childs *v.* Barnum, 11 Barb. (N. Y.) 14.

41. Rosenbaum *v.* Gunter, 2 E. D. Smith (N. Y.) 415; Douglass *v.* Howland, 24 Wend. (N. Y.) 35. As to effect of seal on burden of proving consideration, see *post*, "II. Presumptions and Burden of Proof. 6. Consideration. C. Effect of Recitals in Instrument," and note 58.

42. Rigby *v.* Norwood, 34 Ala, 129. But see Thompson *v.* Hall, 16 Ala. 204; Bolling *v.* Munchus, 65 Ala. 558. As to effect of statutory presumption on burden of proving consideration in general, see *post*, "II. Presumptions and Burden of Proof. 6. Consideration. B. Presumption from Writing," and note 56.

43. *Illinois.* — Klein *v.* Currier, 14 Ill. 237; Camden *v.* McKoy, 4 Ill. 437, 38 Am. Dec. 91; Cushman *v.* Dement, 4 Ill. 497; Carroll *v.* Weld, 13 Ill. 682, 56 Am. Dec. 481; Webster *v.* Cobb, 17 Ill. 459; Donovan *v.* Griswold, 37 Ill. App. 616; Glickauf *v.* Kaufmann, 73 Ill. 378; Boynton *v.* Pierce, 79 Ill. 145.

Kansas. — Firman *v.* Blood, 2 Kan. 491; Fuller *v.* Scott, 8 Kan. 25; Withers *v.* Berry, 25 Kan. 373.

Nevada. — Van Doren *v.* Tjader, 1 Nev. 380, 90 Am. Dec. 498.

Ohio. — Greenough *v.* Smead, 3 Ohio St. 416.

In Bogue *v.* Melick, 25 Ill. 80, it was held that where the payee of a note is also one of the makers, the rule that a blank indorsement by a stranger will be presumed to be a guaranty will not apply, but such indorser will be regarded as a second indorser, since before the note can have validity the payee must first indorse it. But in Griffiths *v.* Herzog, 100 Ill. App. 380, it was held that a name indorsed on a note drawn by the maker to his own order and indorsed by him, appearing there when the maker presented the note for discount, was presumptively that of a guarantor.

Sufficiency of blank indorsement as memorandum under statute of frauds, see *ante*, "I. Mode of Proof. 3. Extent of Admissibility of Parol Evidence. D. Blank Indorsement of Principal Obligation," and note 19.

Blank indorsement as expressing consideration within statute of frauds, see *ante*, "I. Mode of Proof. 4. Sufficiency of Memorandum Required by Statute of Frauds. C. Expressions of Consideration. e. Indorsed or Subjoined Guaranty," and notes 26-28.

44. Lincoln *v.* Hinzey, 51 Ill. 435; Eberhart *v.* Page, 89 Ill. 550; Wallace *v.* Goold, 91 Ill. 15; Kingsland *v.* Koeppe, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649.

The proof to rebut the presumption must, however, be clear and satisfactory. Stowell *v.* Raymond, 83 Ill. 120.

In Ewen *v.* Wilbor, 70 Ill. App. 153, extrinsic evidence was admitted to show that the note guaranteed represented only a conditional liability.

the true contract, the burden of adducing which is on the indorser.[45] The rule does not apply to the signature of the payee himself,[46] and the burden of showing that the payee has become liable as a guarantor by his blank indorsement is on the holder of the note.[47]

B. Time of Execution. — Where an undated guaranty is indorsed on the principal obligation, it is presumed that the two were executed at the same time,[48] and the burden is on the guarantor to show that the guaranty was made subsequently.[49]

2. Execution and Delivery. — Possession of the contract of guaranty raises a presumption of its due delivery sufficient to make a *prima facie* case.[50] Where the terms of the principal obligation have been modified, it devolves on the guarantee, in order to bind the guarantor, to prove the latter's consent to the new contract.[51]

45. Pfirshing *v.* Heitner, 91 Ill. App. 407; Donovan *v.* Griswold, 37 Ill. App. 616.

Where, in an action on a blank indorsement of a note by a stranger to the instrument, sued on as a contract of guaranty, the proof establishes the fact that the defendant was in fact an entire stranger to the note, the burden of proof is shifted to him, and to escape responsibility as guarantor he must show that his contract was one of assignment and not of guaranty. Arnold *v.* Bryant, 8 Bush (Ky.) 668.

Proof that the name of an indorser on a note was put there for the purpose of becoming liable as security that the makers should be responsible for the payment of the note, and that he refused to sign as maker, will not rebut the presumption that he indorsed as guarantor. Stowell *v.* Raymond, 83 Ill. 120.

46. Dietrich *v.* Mitchell, 43 Ill. 40, 92 Am. Dec. 99; Wallace *v.* Goold, 91 Ill. 15; Hinsey *v.* Studebaker Mfg. Co., 73 Ill. App. 278.

47. Boynton *v.* Pierce, 79 Ill. 145; Windheim *v.* Ohlendorf, 3 Ill. App. 436.

48. *Illinois.* — Webster *v.* Cobb, 17 Ill. 459; Boynton *v.* Pierce, 79 Ill. 145; Gridley *v.* Capen, 72 Ill. 11; Underwood *v.* Hossack, 38 Ill. 208.

Massachusetts. — Bickford *v.* Gibbs, 8 Cush. 154.

Michigan. — Higgins *v.* Watson, 1 Mich. 428.

New York. —Union Bank of Louisiana *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280.

Texas. — Cook *v.* Southwick, 9 Tex. 615, 60 Am. Dec. 181.

In Parkhurst *v.* Vail, 73 Ill. 343, it was held that the presumption was not overcome by testimony of one of the makers of the note guaranteed, that when he signed it the guarantor's name was not indorsed, but that the loan for which the note was given was not then consummated.

A guaranty of a promissory note, written above the indorsement of the payee, is presumed to have been made at the time of his signature and to be his genuine obligation. Gilman *v.* Lewis, 15 Me. 452.

49. The reason of the holding is that the fact is peculiarly within the guarantor's knowledge. Higgins *v.* Watson, 1 Mich. 428.

50. The production of a letter of credit by the plaintiff suing thereon raises a fair presumption of the delivery of the instrument and that the advances made by the plaintiff were made on the faith thereof. Union Bank of Tenn. *v.* Lockett, 18 La. Ann. 678.

51. Gardner *v.* Watson, 76 Tex. 25, 13 S. W. 39, in which it was held incumbent on a guarantee who had received valuable property from the debtor and the promise of an increased rate of interest, for which he had granted an extension of time, to show the guarantor's consent to the new agreement.

Where a contract of guaranty is signed by the guarantor and delivered to the guarantee's agent, and is in the possession of the guarantee at the time of suit thereon and is

3. Scope of Liability. — Where the guaranty is equivocal on its face, the parties will be presumed not to have intended a continuing guaranty.[52]

4. Title of Guarantee. — The burden of proof rests on him who seeks to recover on a guaranty which does not name the guarantee, to show himself a party thereto.[53]

5. Prima Facie Case From Possession of Guaranteed Instrument. The possession of an overdue note on which a guaranty is indorsed makes a *prima facie* case of liability against the guarantor, upon whom the burden then lies of defeating the action.[54]

6. Consideration. — A. Burden of Proof in General. — The burden lies on the guarantee to show the consideration for the contract of guaranty.[55]

produced by him, there is sufficient *prima facie* evidence of its delivery and acceptance. Roberts *v.* Woven Wire Mattress Co., 46 Md. 374.

Where a guaranty of a note covers renewals thereof, it will be presumed in the absence of evidence that a provision for interest and attorney's fees in the renewal was not at variance with the terms of the original note. Stanford *v.* Coram, 26 Mont. 285, 67 Pac. 1005.

52. Cremer *v.* Higginson, 1 Mason C. C. 323, 6 Fed. Cas. No. 3383; Carson *v.* Reid, 137 Cal. 253, 70 Pac. 89. But see Gates *v.* McKee, 13 N. Y. 232, 64 Am. Dec. 545.

In Gard *v.* Stevens, 12 Mich. 292, the court, in construing an ambiguous guaranty as limited to a single transaction, said: "Every person is supposed to have some regard to his own interest; and it is not reasonable to presume any man of ordinary prudence would become surety for another without limitation as to time or amount, unless he has done so in express terms, or by clear implication. If the guaranty was limited in express terms, either as to time or amount, but not as to both, it might be said it was the intention of the guarantor to leave it open as to the other, or that a further limitation could not be implied. But where it contains no express limitation as to either, and there is nothing in the instrument itself from which it can be inferred that it was the intention of the guarantor to leave it open as to both, we think it must be understood as referring to a single transaction."

53. M'Doal *v.* Yeomans, 8 Watts (Pa.) 361.

It is not incumbent on the first holder for value of a note to prove affirmatively that a contract of guaranty indorsed on the note was in fact made with him; the note having been indorsed by one shown to be merely an accommodation indorser. Northumberland Bank *v.* Eyer, 58 Pa. St. 97.

Where a guaranty is indorsed on a note and the note transferred, such sale furnishes *prima facie* evidence of the sale of the contract of guaranty; and possession of the note and guaranty is *prima facie* evidence of the holder's right to the guaranty and to sue thereon. Cooper *v.* Dedrick, 22 Barb. (N. Y.) 516.

Proof of parties by parol notwithstanding statute of frauds, see *ante*, "I. Mode of Proof. 3. Admissibility of Parol Evidence. B. Matters Provable by Parol," and note 11.

54. Ewen *v.* Wilbor, 208 Ill. 492, 70 N. E. 575, *affirming* 99 Ill. App. 132.

The production of a written guaranty of a note and the note itself without any credits indorsed thereon, both instruments being in possession of the guarantee, makes out a *prima facie* case against the guarantor. Burns *v.* Cole, 117 Iowa 262, 90 N. W. 731.

55. Richner *v.* Kreuter, 100 Ill. App. 548; Green *v.* Thornton, 49 N. C. 230.

In Klein *v.* Currier, 14 Ill. 237, it was held that proof of the consideration of a guaranty consisting in the blank indorsement on a note at the

B. Presumption From Fact of Writing. — In certain states it is held that the statutory presumption of consideration attaching to all written obligations will also be indulged in the case of written guaranties casting on the guarantor the burden of showing a want of consideration.[56]

C. Effect of Recitals in Instrument. — Recitals in the guaranty, as "for value received," may make a *prima facie* case of consideration, requiring proof on the part of the guarantor of lack thereof;[57] and the same significance has been attached to the fact of a seal.[58]

time of its execution is made in the first instance by proving the genuineness of defendant's signature, for when this is done, the presumption arises that the name was put there at the time the note was made and a part of the original transaction, in which case the consideration for the note is also that for the guaranty. But where it appears that a guarantor indorsed in blank a promissory note after its delivery and in pursuance of some subsequent arrangement, the original consideration for the note no longer supports the guaranty and the burden of proof is again thrown on the plaintiff guarantee to show a new and express consideration. In such case, the defendant is not bound to show the circumstances of the transaction and especially the absence of consideration, but is only required to prove the time of his signature, thus overcoming the presumption that it was contemporaneous with the execution of the note.

In Featherstone *v.* Hendrick, 59 Ill. App. 497, the court approved the doctrine of Klein *v.* Currier, *supra*, saying that it was the settled law of the state.

And in Dreyer *v.* Kadish, 70 Ill. App. 76, it was held that the burden was on a plaintiff suing on the guaranty of a note indorsed thereon after delivery, to show the consideration. It was also held that proof of the guarantor's admission of his liability on the note, and his assurance that he would pay it when due, were not sufficient proof of consideration.

56. Sabin *v.* Harris, 12 Iowa 87; Taylor *v.* Wightman, 51 Iowa 411; McKee *v.* Needles (Iowa), 98 N. W. 618; Fuller *v.* Scott, 8 Kan. 25.

As satisfying statute of frauds, see *ante*, "I. Mode of Proof. 4. Sufficiency of Memorandum Required by Statute of Frauds. C. Expression of Consideration. g. Statutory Presumption of Consideration," and note 42.

57. Quimby *v.* Morrill, 47 Me. 470; Rattelmiller *v.* Stone, 28 Wash. 104, 68 Pac. 168; Austin *v.* Heiser, 6 S. D. 429, 61 N. W. 445; Citizens Sav. Bank & Trust Co. *v.* Babbitt, 71 Vt. 182, 44 Atl. 71.

In this last case it was held that the admission of parol evidence to show a consideration consisting in the forbearance to sue the principal debtor, though unnecessary, was not error, as the evidence did not conflict with the writing.

In Sears *v.* Loy, 19 Wis. 107, it was held that it was incumbent on a guarantor in a written guaranty reciting the payment of one dollar as a consideration, who had offered evidence negativing the payment thereof, to show that there was no other adequate consideration for his undertaking before he could be released from liability.

As satisfying statute of frauds, see *ante*, "I. Mode of Proof. 4. Sufficiency of Memorandum Required by Statute of Frauds. C. Expression of Consideration. f. Recitals of Consideration," and notes 39 and 40.

58. Where a guaranty under seal expresses a consideration of $1.00 "to him [the guarantor] in hand paid," the seal imports a consideration, casting the burden on the guarantor to negative that fact; and this is not done merely by proof that the one dollar has not been paid, since this leaves a presumption that it was agreed to be paid, which agreement would also be a sufficient consideration. Childs *v.* Barnum, 11 Barb. (N. Y.) 14.

7. Conditions. — The burden is on the plaintiff guarantee to show the happening or performance of a condition on which the guarantor's liability depends.[59]

8. Default. — And he must also prove the principal's default.[60] Evidence that the principal has paid money or property to the guarantee, but without showing that it was understood that the payment should be applied on the obligation guaranteed, does not authorize a legal presumption of the satisfaction of that obligation.[61]

9. Notice of Default, and Injury From Failure to Give Notice. Where notice of the principal's default is properly addressed to the guarantor, postpaid and mailed, a presumption arises that it was received.[62] Failure to give notice and a resulting injury to the guarantor are matters of defense, the burden of showing which is

As satisfying statute of frauds, see *ante*, note 41.

59. Gillett *v.* McAllister, 1 Colo. App. 168, 27 Pac. 1013; Cereghino *v.* Hammer, 60 Cal. 235; Wieder *v.* Union Surety & Guaranty Co., 42 Misc. 499, 86 N. Y. Supp. 105.

In Smith *v.* Compton, 6 Cal. 24, it was held incumbent on the plaintiff to prove his performance of the consideration, which was a condition precedent to the guaranty's becoming the operative.

And this is true, though the condition was of no apparent benefit to the guarantor. Waldheim *v.* Sonnenstrahl, 8 Misc. 219, 28 N. Y. Supp. 582.

60. Craig *v.* Phipps, 23 Miss. 240. In this case, the fact that the rule required the plaintiff to prove a negative — *i. e.*, that the principal obligation had not been paid — was held to make no difference.

The presumption is that the guarantee's claims against the principal debtor have been settled, and the guarantee, to make a case, must adduce proof to the contrary. Peck *v.* Barney, 12 Vt. 72.

Where in addition to taking a guaranty for the payment of goods the creditor takes the negotiable note of the principal debtor, the burden is on him when suing on the guaranty to show that this note has never been negotiated or paid. Goodman *v.* Parish, 2 McCord (S. C.) 259.

But in Kimball *v.* Cockrell, 23 Wash. 529, 63 Pac. 228, the court held that it was not incumbent on a guarantee, in order to make out a case on the guaranty, to show what disposition had been made of certain notes mentioned in the contract guaranteed; since in the first place there was no evidence that the notes ever came into the guarantee's possession, and in the second place, the guaranty was absolute in terms and imposed no such obligation on the guarantee.

Where one guarantees the payment for goods purchased by the principal under an agreement that they are to be resold to a certain institution and the proceeds of the resale turned over to the guarantee in satisfaction of his claim, and it appears that drafts from the institution were turned over to the guarantee to an amount sufficient to satisfy the principal's indebtedness, but that the institution had made other purchases from the principal, the burden rests on the guarantor to show that these drafts were given on account of goods sold under the contract so guaranteed. Fulton Grain & Milling Co. *v.* Anglim, 34 App. Div. 164, 54 N. Y. Supp. 632.

61. Tyler *v.* Stevens, 11 Barb. (N. Y.) 485.

The mere fact that a payment was made to a creditor having several claims upon the same debtor, with the debtor's money, through one who was the debtor's guarantor for one of the debts, is not a circumstance from which any inference can arise that the debtor intended it should be applied to the debt guaranteed. Mitchell *v.* Dall, 4 Gill & J. (Md.) 361.

62. Aaronson *v.* David Mayer Br. Co., 26 Misc. 655, 56 N. Y. Supp. 387.

on him;[63] but in jurisdictions where the contrary is held, it is also held that the guarantee must assume the burden of showing the principal's insolvency as an excuse for failure to give notice of default.[64]

63. *Illinois.* — Voltz *v.* Harris, 40 Ill. 155; Mamerow *v.* National Lead Co., 206 Ill. 626, 69 N. E. 504, 99 Am. St. Rep. 196, *affirming* 98 Ill. 460.

Indiana. — Snyder *v.* Click, 112 Ind. 293, 13 N. E. 581; Closson *v.* Billman, 161 Ind. 610, 69 N. E. 449.

Iowa. — Sabin *v.* Harris, 12 Iowa 87; Martyn *v.* Lamar, 75 Iowa 235, 39 N. W. 285.

Kansas. — Fuller *v.* Scott, 8 Kan. 25.

Michigan. — Farmers & Mech. Bank *v.* Kercheval, 2 Mich. 505.

New Hampshire. — Simons *v.* Steele, 36 N. H. 73.

Pennsylvania. — Brown *v.* Brooks, 25 Pa. St. 210.

Contra. — Rankin *v.* Childs, 9 Mo. 673.

In Allen *v.* Rightmere, 20 Johns. (N. Y.) 365, it was held that the guarantee need not prove the principal's default and notice thereof to the guarantor, in order to charge the latter.

The guarantor must not only prove want of notice, but resulting injury. Brackett *v.* Rich, 23 Minn. 485, 23 Am. Rep. 703; Furst & Bradley Mfg. Co. *v.* Black, 111 Ind. 308, 12 N. E. 504. And in this latter case it was held that in order to show injury, the guarantor must prove that at the time of the default the principal was solvent, and afterward became insolvent, or that he was a non-resident of the state without property therein subject to execution.

An assignment for the benefit of creditors made by the principal is not evidence, without proof of the extent of his assets and liabilities, that the guarantee's failure to give notice of default to the guarantor resulted in loss to the latter. Hughes *v.* Heyman, 4 App. D. C. 444.

In Burns *v.* Cole, 117 Iowa 262, 90 N. W. 731, evidence that one guaranteeing that his principal would obtain a title to certain realty and convey it to the guarantee, or else he (the guarantor) would pay the principal's note, would, had he had notice of the principal's default, have obtained a conveyance from him, or could have enforced the collection of a note, was held insufficient to go to the jury on the question of injury from want of notice, it not appearing that the principal became insolvent, and title not having been obtained by him until eighteen months after the guarantee was under contract to accept the conveyance.

64. Nelson Mfg. Co. *v.* Shreve, 94 Mo. App. 518, 68 S. W. 376.

In Rankin *v.* Childs, 9 Mo. 673, the court said that to charge a guarantor, proof of notice of default to him was absolutely necessary, unless the guarantee could show that the principal was insolvent and that the guarantor was apprised of that fact, so that no injury resulted to him from failure to give such notice.

In an action against the guarantor of a promissory note, evidence that the maker, fourteen months after the guaranty was executed, took advantage of the insolvent laws does not warrant the presumption that he was insolvent when the guaranty was made, so as to relieve the guarantee from the effect of failure to give proper notice of default. Whiton *v.* Mears, 11 Metc. (Mass.) 563, 45 Am. Dec. 33.

By statute in Iowa (Code 1897, § 3049), it is provided that to charge a guarantor whose contract is evidenced by the blank indorsement of the principal obligation, notice of non-payment by the principal must be given within a reasonable time unless the holder shows affirmatively that the guarantor received no detriment from want thereof; and in Knight *v.* Dunsmore, 12 Iowa 35, it was held that this obligation on the part of the guarantee was met *prima facie* by showing the principal's insolvency at the time his obligation matured; and this proof was not necessarily rebutted by evidence that the principal was in the habit of re-

10. Proceedings Against Principal. — A. Guaranty of Collection. — Where the guaranty is one of collection merely, it is held in some jurisdictions that the guarantee, when he sues the guarantor, must show that he has exhausted his legal remedies against the principal.[65] But the weight of authority favors the view that he may also show either the principal's insolvency,[66] or a waiver

newing his paper, nor by showing that, through his friends or otherwise, he might have succeeded in making some arrangement for an extension of time.

65. Bosman *v.* Akeley, 39 Mich. 710, 33 Am. Rep. 447; Cumpston *v.* McNair, 1 Wend. (N. Y.) 457; Moakley *v.* Riggs, 19 Johns. (N. Y.) 69; Van Dereer *v.* Wright, 6 Barb. (N. Y.) 547; Newell *v.* Fowler, 23 Barb. (N. Y.) 628; Northern Ins. Co. *v.* Wright, 76 N. Y. 445; French *v.* Marsh, 29 Wis. 649.

In Getty *v.* Schantz, 100 Fed. 577, and McNall *v.* Burrow, 33 Kan. 495, 6 Pac. 897, the possibility of the principal's insolvency is not adverted to.

In McMurray *v.* Noyes, 72 N. Y. 523, 28 Am. Rep. 180, the court said: "The fundamental distinction between a guaranty of payment and one of collection is that in the first case the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor, without taking any steps to collect of the principal debtor, and the omission or neglect to proceed against him is not (except under special circumstances) any defense to the guarantor; while in the second case the undertaking is that if the demand cannot be collected by legal proceedings the guarantor will pay, and consequently legal proceedings against the principal debtor and a failure to collect of him by those means are conditions precedent to the liability of the guarantor; and to these the law, as established by numerous decisions, attaches the further condition that due diligence be exercised by the creditor in enforcing his legal remedies against the debtor."

Where the guaranty itself is conditioned on the guarantee being unable "by due course of law" to collect the principal obligation, suit against the principal, with execution returned *nulla bona,* is indispensable to charge the guarantor; and proof of the principal's insolvency is no excuse for the failure to pursue the principal. Dwight *v.* Williams, 4 McLean 581, 8 Fed. Cas. No. 4218.

A guaranty of the collection of the amount of a bond as "it becomes due" requires proof to charge the guarantor that the principal has been prosecuted with reasonable diligence to judgment and execution; and the fact that he is hopelessly insolvent does not excuse a failure to show such prosecution. Craig *v.* Parkis, 40 N. Y. 181, 100 Am. Dec. 469. Three of the eight judges dissented from this last decision.

Where a guarantee sues on a guaranty of collection, relying on the prosecution of the principal debtor to judgment and execution without result, he is bound to maintain this fact by proper proof; and evidence of seasonable suit against the principal, diligently and in good faith carried on to final judgment and execution without avail, is sufficient to establish his right to recover. Aldrich *v.* Chubb, 35 Mich. 530.

Where a guaranty is that mortgaged land will bring the money for which it is pledged, or otherwise the guarantor will pay it, it is incumbent on the guarantee to prove when he sues on the guaranty that he pursued the original debtor with all good faith, and that he failed not by his own negligence, but because the debtor was never in such a situation that he could probably recover from him. Overton *v.* Tracy, 14 Serg. & R. (Pa.) 311.

66. *United States.* — Osborne *v.* Smith, 18 Fed. 126.

Alabama. — Grannis *v.* Miller, 1 Ala. 471.

Connecticut. — Allen *v.* Rundle, 50 Conn. 9, 47 Am. Rep. 599.

Minnesota. — Brackett *v.* Rich, 23 Minn. 485, 23 Am. Rep. 703.

of diligence by the guarantor,[67] as an excuse for not pursuing the principal by litigation. In certain cases it has been intimated that the burden is on the guarantor to show injury from the creditor's want of diligence.[68]

B. GUARANTY OF PAYMENT. — Where, however, the guaranty is one of payment, it is settled that no showing of diligence need be made by the guarantee,[69] the burden being on

Nebraska. — Rice *v.* McCague, 61 Neb. 861, 86 N. W. 486.

New Hampshire. — Colby *v.* Farvell, 71 N. H. 83, 51 Atl. 254.

Ohio. — Stone *v.* Rockefeller, 29 Ohio St. 625.

Pennsylvania. — M'Doal *v.* Yeomans, 8 Watts 361.

Vermont. — Bull *v.* Bliss, 30 Vt. 127; Wheeler *v.* Lewis, 11 Vt. 265.

In default of legal proceedings the guarantee must show the principal's insolvency. Osborne *v.* Thompson, 36 Minn. 528, 33 N. W. 1. And see Gallagher *v.* White, 31 Barb. (N. Y.) 92; Shepard *v.* Phears, 1 White & W. Civ. Cas. Ct. of App. (Tex.) § 168.

Where the principal becomes insolvent before the debt becomes due and remains so, it is not necessary in order to charge the guarantor, to show that legal proceedings against the principal have been commenced and prosecuted to judgment. Dana *v.* Conant, 30 Vt. 246.

In Cady *v.* Sheldon, 38 Barb. (N. Y.) 103, the court held that ordinarily it was necessary, in order to charge a guarantor of the collectibility of a note or other evidence of debt, to prove a resort to legal proceedings against the principal; and that a return of an execution unsatisfied was *prima facie* evidence of the guarantor's liability; but that it was not absolutely indispensable that legal proceedings should be resorted to, if it otherwise satisfactorily appeared that a resort thereto would be entirely ineffectual; and hence that proof that the principal debtor, from the period of the maturity of the debt, had been uniformly insolvent, was likewise sufficient to charge the guarantor.

On the guaranty of "final payment" of a draft, evidence of the insolvency of the principals prior to the institution of suit on the guaranty is inadmissible to charge the guarantor; and proof of prior legal proceedings against the principals, or of their insolvency when the draft became payable, is not necessary. Huntress *v.* Patten, 20 Me. 28.

67. Allen *v.* Rundle, 50 Conn. 9, 47 Am. Rep. 599; Rice *v.* McCague, 61 Neb. 861, 86 N. W. 486; Goodwin *v.* Buckman, 11 Iowa 308; Day *v.* Elmore, 4 Wis. 190.

68. Thus, in Thomas *v.* Woods, 4 Cow. (N. Y.) 173, where the action was on a guaranty of collectibility by due process of law, it was said that if the guarantor had sustained damage through the failure of the guarantee to promptly sue the principal, it was proper evidence for the defense.

So in Ashford *v.* Robinson, 30 N. C. 114, where the guaranty was that the principal obligation should be "good," the court said that the guarantor was not discharged simply by the creditor's negligence in pursuing the principal, but he must also show a loss to himself thereby.

But in Burt *v.* Horner, 5 Barb. (N. Y.) 501, after remarking that it was contended that if the guarantors had been prejudiced by delay in pursuing the principal, the burden of showing it was on them, the court held inferentially that the rule was the other way and the burden on the guarantee to show diligence.

69. *United States.* — Memphis *v.* Brown, 87 U. S. 289; Getty *v.* Schantz, 100 Fed. 577.

Alabama. — Donley *v.* Camp, 22 Ala. 659, 58 Am. Dec. 274.

Colorado. — Jain *v.* Giffin, 3 Colo. App. 90, 32 Pac. 80.

Connecticut. — Garland *v.* Gaines, 73 Conn. 662, 49 Atl. 19.

Illinois. — Penny *v.* Crane Bros. Mfg. Co., 80 Ill. 244.

Iowa. — Peddicord *v.* Whittan, 9 Iowa 471.

Kansas. — Crissey *v.* Inter-State Loan & Trust Co., 59 Kan. 561, 53 Pac. 867.

Maine. — Read *v.* Cutts, 7 Me. 186, 22 Am. Dec. 184; Prentiss *v.* Garland, 64 Me. 155.

Michigan. — Roberts *v.* Hawkins, 70 Mich. 566, 38 N. W. 575.

Mississippi. — Wren *v.* Pearce, 4 Smed. & M. 91.

New York. — Bank of New York *v.* Livingston, 2 Johns. Cas. 409; Grant *v.* Hotchkiss, 26 Barb. 63.

Pennsylvania. — Campbell *v.* Baker, 46 Pa. St. 243; Janes *v.* Scott, 59 Pa. St. 178, 98 Am. Dec. 328.

Tennessee. — Klein *v.* Kern, 94 Tenn. 34, 28 S. W. 295.

Texas. — McCormick Harv. Mach. Co. *v.* Millett (Tex. Civ. App.), 29 S. W. 80.

West Virginia. — But see McNeel *v.* Auldridge, 25 W. Va. 113.

Wisconsin. — Day *v.* Elmore, 4 Wis. 190.

But in Johnson *v.* Mills, 25 Tex. 704, it was held that a guaranty of payment imposes on the guarantee the duty of using reasonable diligence in its collection by due process of law against the principal unless exempted therefrom by stipulation to the contrary. And where it appears that the guarantee has departed from the regular course of law by giving a stay of execution to the principal debtor, the burden is imposed on the guarantee to show that the failure to collect the debt was not caused in whole or in part thereby.

In the case of a general guaranty of a non-negotiable security which is assigned, all that the guarantee need show is that he first sought payment from the maker within a reasonable time by ordinary means, and where the maker has left the state or is insolvent he need not be pursued. Benton *v.* Gibson, 1 Hill L. (S. C.) 56.

In Pennsylvania, however, a stricter rule obtains, and it is held that the creditor, in order to recover against a technical guarantor, must prove due diligence against the principal debtor or excuse himself by showing insolvency so that such pursuit would be fruitless. But it is not necessary that he should prove both. Woods *v.* Sherman, 71 Pa. St. 100; Brown *v.* Brooks, 25 Pa. St. 210, in which it was said that a guaranty is an engagement to pay in default of solvency in the debtor, provided due diligence be used to obtain payment from him. So in Parker *v.* Culbertson, 1 Wall. Jr. (U. S.) 149, 18 Fed. Cas. No. 10,732, the court, applying the law of Pennsylvania to a contract of guaranty, held that the creditor must prove either fruitless legal proceedings against the principal or the latter's insolvency in order to charge the guarantor. It is sufficient to show that the principal debtor is utterly insolvent at the maturity of the guaranty. McClurg *v.* Fryer, 15 Pa. St. 293. In order to hold a guarantor of a corporate debt, it is sufficient for the guarantee to show that he has exhausted his remedy against the corporation, without also showing that he has sought to enforce the individual liability of the stockholders. National Loan & Bldg. Assn. *v.* Lichtenwalner, 100 Pa. St. 100, 45 Am. Rep. 359. In an action on a guaranty of a mortgage, it is essential that the plaintiff show that within a reasonable time after default on the mortgage he sought to collect the debt from the land or from the debtor, or that he produce evidence which would warrant a jury in finding that such course would have been idle. Dutton *v.* Pyle, 195 Pa. St. 8, 45 Atl. 429. Where a guarantee resorts to legal process against the principal debtor without unnecessary delay there is a legal presumption that he has been duly diligent, but this presumption is not conclusive, since there may be cases in which something more may be needed than simply suing out legal process and letting it run its course. Hoffman *v.* Bechtel, 52 Pa. St. 190. The return of execution *nulla bona* in an action against the principal debtor is *prima facie* evidence of his insolvency and of due diligence on the part of the creditor, when introduced in evidence in an action against the guarantor; but it is not conclusive evidence of these facts. National Loan & Bldg. Assn. *v.* Lichtenwalner, 100 Pa. St. 100, 45 Am. Rep. 359. And see Woods *v.* Sherman, 71 Pa. St. 100, where the fact that the execution was not re-

the defendant guarantor to prove injury to himself from a want thereof.[70]

11. Discharge of Guarantor. — The burden of proving the facts entitling him to a discharge from liability is on the guarantor.[71]

III. COMPETENCY AND RELEVANCY OF EVIDENCE.

1. Existence and Execution of Guaranty. — The existence of a guaranty may be proved by the admissions of the defendant guarantor.[72] Parol evidence of a conditional delivery by which the signature of another guarantor was to be obtained before the guaranty became operative is admissible in behalf of the guarantor.[73] An insufficiently executed written assent to an extension of

turned till after suit had been begun against the guarantor was held immaterial.

70. Peddicord *v.* Whittam, 9 Iowa 471; Farrow *v.* Respess, 33 N. C. 170; Heaton *v.* Hulbert, 4 Ill. 489; Sabin *v.* Harris, 12 Iowa 87.

In Curtis *v.* Brown, 2 Barb. (N. Y.) 51, evidence offered by the guarantor of a note that the maker thereof was solvent when it became due and remained so for several years, but that when the suit was begun he was insolvent, was held admissible provided the guaranty was a collateral agreement, but if it was to be regarded as amounting in fact to a promissory note, then such evidence was inadmissible. In this case, the language, "I guarantee the payment of the within," was held to import merely a collateral agreement.

The burden is on a guarantor when sued on his guaranty of a note made in another state, to show that the maker had property in such other state out of which the note might have been collected; and the guarantee is not required to prove the maker's insolvency in the state of his residence. Fall *v.* Youmans, 67 Minn. 83, 69 N. W. 697, 64 Am. St. Rep. 390.

71. The burden of proving the fact of an extension of credit to the principal, whereby the guarantor claims to have been discharged, is on the latter when sued on his guaranty. Eichhold *v.* Tiffany, 21 Misc. 627, 48 N. Y. Supp. 70.

The burden is on the defendant guarantor to show that an extension of time to the principal relied on as effecting the defendant's discharge, did not conform to the provisions of the contract of guaranty. Alger *v.* Alger, 83 App. Div. 168, 82 N. Y. Supp. 523.

In Meyer *v.* Blakemore, 54 Miss. 570, an instruction that it devolved upon a guarantor, when sued on his guaranty, to show by affirmative evidence, other than the mere execution and delivery by the principal of additional security, that the same was not taken as cumulative security merely, but that it was agreed that it should absolutely discharge the guarantor's liability, was approved.

In an action on a guaranty of freight, the burden is on the guarantor to show to what extent the plaintiff's claim was reduced by sale of the shipment to satisfy the transportation charges. Jones *v.* Hoyt, 25 Conn. 374.

In Kortlander *v.* Elston, 52 Fed. 180, a guarantor was required to prove that the guarantee had settled the loss on insurance policies held as collateral, for less than he was properly entitled to.

72. Eichhold *v.* Tiffany, 20 Misc. 680, 46 N. Y. Supp 534, in which the guarantor's admission at a former trial of the fact of his signature was held sufficient proof of the execution of the guaranty, in the absence of countervailing evidence.

73. New Home Sew. Mach. Co. *v.* Simon, 104 Wis. 120, 80 N. W. 71, in which it was held that such evidence must be supplemented by proof that before extending credit on the faith of the guaranty the creditor had notice of the stipulation.

a guaranty may be introduced as a circumstance tending to show actual assent by the guarantors.[74]

2. Proof of Notice of Acceptance. — Notice of the acceptance of a guaranty need not be shown by direct proof,[75] but the guarantor's conduct and remarks may justify an inference thereof.[76]

3. Understanding of the Parties. — Evidence of the interpretation placed on the contract by the parties is receivable for some purposes, but not as a rule to aid in its construction.[77]

In Price *v.* Oatman (Tex. Civ. App.), 77 S. W. 258, it was said that parol evidence of a guarantor that he signed and delivered the guaranty to the principal debtor on condition that another guarantor be obtained before its delivery to the guarantee, while inadmissible standing alone, may properly be received to explain the principal's subsequent return of the guaranty to the guarantor with the statement that the guarantee had refused to receive it until another signature was obtained, and the guarantor's redelivery of it to the principal on the condition that that be done.

74. Rutherford *v.* Brachman, 40 Ohio St. 604. In this case, a written assent to an extension of time to the principal was admitted in evidence to show an actual assent of the guarantors thereto, though one guarantor had not executed it.

75. Barnes Cycle Co. *v.* Reed, 91 Fed. 481.

"This notice need not be proved to have been given in writing, or in any particular form, but may be inferred by the jury from facts and circumstances which warrant such inference." Reynolds *v.* Douglass, 12 Pet. (U. S.) 497.

76. Rankin *v.* Childs, 9 Mo. 673; Barnes Cycle Co. *v.* Reed, 91 Fed. 481; Peck *v.* Barney, 13 Vt. 93; Oaks *v.* Weller, 16 Vt. 63; White *v.* Reed, 15 Conn. 457.

In this last case, conversations with the guarantor in which, on being shown the guarantee's account with the principal, he said he would see the principal about it, hoped he would pay it and that it was a just debt; and on being again shown the account, asked why it had not been presented to the principal's agent; said he knew it ought to be paid; took a copy, and said he would consult counsel and if not barred, he would pay it, were held admissible to prove notice to him of the acceptance of the guaranty.

A statement by a guarantor when called on to fulfill his obligation that he had surrendered to his principal, on the latter's assurance that the debt had been settled, certain papers which would have indemnified him, does not warrant the inference as a matter of law that he had received due notice of the acceptance of the guaranty, but at most the question is one for the jury. The Louisville Mfg. Co. *v.* Welch, 10 How. (U. S.) 461.

77. Douglass *v.* Reynolds, 7 Pet. (U. S.) 113, in which such evidence was admitted to show that the guarantee had regarded the contract as a continuing guaranty. In this case the court said: "We are of opinion that the evidence was rightly admitted. . . . It was not offered to explain or establish the construction of the letter of credit, whether it constituted a limited or continuing guaranty; and was not thus open to the objection which has been relied on at the bar, that it was an attempt by parol evidence to explain a written contract. It was admitted simply to establish that credit had been given to H. [the principal], . . . and that it was treated by the plaintiffs as a continuing guaranty; so that if, in point of law, it was entitled to that character, the plaintiff's claim might not be open to the suggestion that no such advances, acceptances or indorsements had in fact been made upon the credit of it; an objection which, of founded in fact, might have been fatal to their claim."

In Lombard *v.* Martin, 39 Miss. 147, it was said that the fact that

4. Condition Not Disclosed to Guarantee. — Proof of the existence of the condition agreed on between the principal and the guarantor, on which the guaranty is to become operative, but which is not communicated to the guarantee, cannot be received against him.[78]

5. Reliance on Guaranty. — The guarantee may testify directly that he extended credit on the faith of the guaranty,[79] and evidence of his understanding of the contract has also been received to show the same fact.[80] So the circumstances under which the guaranty was given, and the fact of the guarantee's previous refusal to extend credit to the principal alone, are admissible.[81] In order to charge the guarantor with the payment of goods, the delivery thereof may be shown by other evidence than the original order made by the principal.[82]

6. Declarations and Admissions of Parties. — A. In General. The declarations of the guarantor, constituting part of the *res gestae* of an assignment of a bond, have been admitted to show that the assignment was not made under such circumstances, or with such intent as would render him liable on the accompanying guaranty.[83]

the alleged guarantee considered from a conversation which he had with the guarantor that the latter was either originally or secondarily liable, could have no effect upon his actual liability.

In Glenn *v.* Lehnen, 54 Mo. 45, evidence of the understanding of one of the guarantees as to the contract of guaranty was held admissible, the court saying that it was certainly material to know what understanding he had with his co-plaintiff, at or near the time of the transaction.

In Lawrence *v.* McCalmont, 2 How. (U. S.) 426, the fact that the principal and the agents of the guarantee had agreed that the guaranty was a continuing one and need not be renewed on the making of further advances was said to be strong evidence to establish that such an interpretation of the guaranty was neither a forced nor an unnatural one, though the guarantor was not a party to the agreement.

78. Belloni *v.* Freeborn, 63 N. Y. 383; D'Wolf *v.* Rabaud, 1 Pet. (U. S.) 476; in which latter case the guarantor who had contracted to forward merchandise to the guarantee to meet advances to the principal, was not permitted to show that the shipment was only to be made, as arranged between him and the principal without the guarantee's knowledge, in case funds were furnished by the principal for the purchase of the goods.

79. Worcester Coal Co. *v.* Utley, 167 Mass. 558, 46 N. E. 114, in which the officers of the creditor corporation were permitted to testify that they sold goods on the faith of the guaranty.

80. Douglass *v.* Reynolds, 7 Pet. (U. S.) 113, in which the guarantee was permitted to show that he understood the contract to be a continuing guaranty, the evidence being received not to aid in the interpretation of the contract, but solely to show the guarantee's reliance on it.

81. Dunning *v.* Roberts, 35 Barb. (N. Y.) 463, in which, however, the written memorandum sufficiently expressed a consideration under the statute of frauds, and the evidence of the circumstances surrounding the guaranty and the guarantee's previous refusal of credit were allowed only as showing the execution of the consideration.

82. Feustmann *v.* Gott, 65 Mich. 592, 32 N. W. 869.

83. Hopkins *v.* Richardson, 9 Gratt. (Va.) 485.

A letter written by the guarantee to a friend at the time of receiving

B. Conclusiveness of Admissions in Guaranty. — A guaranty is evidence of all the facts therein stated, and in general the guarantor cannot impeach it by contradictory evidence; thus, where the guaranty recites that the principal was indebted to the guarantee, the guarantor cannot contest the validity of the principal obligation;[84] and a guaranty indorsed on the principal obligation is sufficient and conclusive evidence of the execution thereof;[85] yet proof of the principal obligation is admissible, and its rejection error.[86] So, where a guarantor undertakes that his principal actually is in possession of property which he professes to pledge to the guarantee, he cannot be heard to say that it was not in existence.[87] The same conclusiveness attaches in behalf of the guarantor to a stipulation in the contract by which the principal agrees that his liability to his guarantor shall be conclusively evidenced by the production of documentary evidence of payment made on the guaranty, and the principal cannot assail the justice of the claims against him which were thus settled.[88]

the guaranty has been held admissible in the writer's behalf as a memorandum made at the time of an occurrence and testified to as correct, to show the date of the guarantee. Dunlap *v.* Hopkins, 95 Fed. 231.

A guaranty previously tendered and rejected as insufficient is admissible against the guarantor when sued on a subsequent guaranty. Nelson Mfg. Co. *v.* Shreve (Mo. App.), 79 S. W. 488.

84. Di Iorio *v.* Di Borasio, 21 R. I. 208, 42 Atl. 1114.

Where a guarantee recites that the creditor has two notes and a judgment on which execution has issued against the principal debtor, these facts require no further proof in an action on a guaranty. Peck *v.* Barney, 12 Vt. 72.

85. Austin Co. *v.* Heiser, 6 S. D. 429, 61 N. W. 445; Cooper *v.* Dedrick, 22 Barb. (N. Y.) 516.

The confession of the execution of a guaranty indorsed on a note necessarily carries with it the admission of the existence and execution of the note as and for what it purports to be. Martin *v.* Butler, 111 Ala. 422, 20 So. 352.

In an action on a guaranty indorsed on a contract executed by the principal's agent, it is unnecessary to prove the authority of the agent in order to introduce the contract and the guaranty in evidence, the object of introducing the contract being merely to fix the extent of the guarantor's liability. Mallory *v.* Lyman, 3 Pinn. (Wis.) 443.

86. Ward *v.* Hasbrouck, 44 App. Div. 32, 60 N. Y. Supp. 391, in which it was said that the first step in fixing the creditors' liability was to show that there was a principal contract between the other parties, the performance of which he had guaranteed.

87. Farmers and Mech. Nat. Bank *v.* Lang, 29 N. Y. Super. Ct. 372. In this case the guarantor offered proof, not only that the property described in the warehouse receipts given to the guarantee was not in existence, but that he was ignorant of the guarantee taking such receipts; that he knew nothing of the dealings between the other parties; that the property described in the receipts was worth much less than they called for, and with the guarantee's consent, had not been separated from the principal's other property in the warehouse; and all this evidence was held properly rejected in view of the undertaking of the guaranty.

88. Guarantee Co. of North America *v.* Pitts, 78 Miss. 837, 30 So. 758. In this case, the court said: "There is nothing wrong or unreasonable or against public policy in this stipulation. Under such contract the company was authorized in ad-

C. Declarations of Principal Offered Against Guarantor. The admissions and declarations of the principal debtor are competent against the guarantor, when made in the transaction of the business for which the guarantor is bound, so as to be part of the *res gestae,* or when made in a transaction subsequent to the guaranty, but which it contemplated and authorized;[89] but other admissions and declarations, such as subsequent acknowledgments of

vance, as a condition of guaranteeing, to exercise discretion as to paying any demand made by the holder of the guaranty, and was bound only to act without fraud in settling a claim, and, thus paying, is entitled to hold the party guaranteed for reimbursement; and the voucher proves the claim, if not shown to have been infected with fraud."

89. Guarantee Co. of North America *v.* Mutual Building & Loan Assn., 57 Ill. App. 254; Hatch *v.* Elkins, 65 N. Y. 489.

In Eichhold *v.* Tiffany, 20 Misc. 680, 46 N. Y. Supp. 534, statements by a principal to the guarantee, prior to the time the guaranty was given and in the absence of the guarantor, but in the course of selection of the goods the payment for which was secured, and in contemplation of the furnishing of the guaranty and at no great interval from its execution, were held properly admitted as a part of the *res gestae;* and in this case it was also held that where a *prima facie* case against a guarantor is made out by proving the admissions of his principal, it then devolves upon him to introduce evidence negativing their truth. See also on this latter point, Eichhold *v.* Tiffany, 21 Misc. 627, 48 N. Y. Supp. 70.

A letter by the principal to the guarantee, announcing his intention to take an agency for the guarantee and offering his brother as his guarantor, pursuant to which a contract of agency was entered into and a bond of indemnity executed by the brother, is admissible in evidence in a suit against the latter, as constituting a part of the transaction. Roberts *v.* Woven Wire Mattress Co., 46 Md. 374.

In Glenn *v.* Lehnen, 54 Mo. 45, the admission of evidence of a conversation between the principal and the guarantee prior to the execution of the guaranty was held not ground for reversal, the court saying that while it was not competent to bind the guarantor or fix his responsibility, yet it seemed that the evidence was only detailed by the witness to show that the guarantee had refused to sell to the principal on the latter's own responsibility, and as preliminary to the conversation had with the guarantor in which the guaranty was made; and while not strictly legal evidence, its admission could not be regarded as an injurious error.

But in Taylor *v.* Shouse, 73 Mo. 361, a letter written by the principal to the guarantee stating that he supposed a guaranty from the guarantor would be sufficient, and which preceded the giving of the guaranty, was held properly excluded, it not appearing that the guarantor knew of the letter, or of any existing agreement between the other parties, to which the instrument sued on was intended or could be made to apply. The purpose of the letter seems to have been to show that the guaranty, which was prospective in its terms, was intended to cover existing indebtedness.

In Bushnell *v.* Church, 15 Conn. 406, the declaration of a principal to a contract of guaranty, that he had made a sale of certain goods which the guarantee was to produce for him, was held admissible against the guarantors to prove the fact of sale, over the objection that it was merely hearsay. The theory of its admission seems to have been that it was part of the *res gestae,* being made at the time the principal ordered the goods from the guarantee, for the payment of which the guarantors were bound.

R. assigned the bond of G. to K. to enable K. to purchase goods on the credit of R.'s assignment, and K. purchased goods of H. *Held,* that in an action by H. against R. upon the assignment, the statements

indebtedness, or the like, are not competent unless brought home to the guarantor.[90]

of K. to H. in relation thereto, pending the negotiation for the goods and the transfer of the bond, were competent evidence against R. Hopkins *v.* Richardson, 9 Gratt. (Va.) 485.

In Meade *v.* McDowell, 5 Binn. (Pa.) 195, letters of the principal debtor were admitted against the guarantor to prove the terms of the contract guaranteed, though written subsequently to the making of such contract; it appearing that by the terms of the guaranty the principal debtor was intrusted with the making of the contract to be secured thereby. Such declarations, however, were not conclusive.

In Waldheim *v.* Sonnestrahl, 8 Misc. 219, 28 N. Y. Supp. 582, receipts by the principal were said to be competent to show the delivery of the goods, payment for which was guaranteed.

90. In Wieder *v.* Union Surety and Guaranty Co., 42 Misc. 499, 86 N. Y. Supp. 105, an admission of the alleged defalcation by the principal, whose honesty was guaranteed, was held inadmissible against the guarantor as not being part of the *res gestae.*

So, in Hatch *v.* Elkins, 65 N. Y. 489, the admissions and acknowledgments of the principal as to the amount due from him to the creditor were held incompetent to establish the fact against the guarantor.

Statements made by the principal after the purchase of goods, the payment for which was guaranteed, has been concluded, are not admissible to bind the guarantor. Eichhold *v.* Tiffany, 21 Misc. 627, 48 N. Y. Supp. 70; Hopkins *v.* Richardson, 9 Gratt. (Va.) 485.

But in Swisher *v.* Deering, 204 Ill. 203, 68 N. E. 517, a statement of account between the guarantee and the defaulting principal was admitted against the guarantor, though the principal had gone into bankruptcy. This seems to have been on general principles, though the guaranty itself provided that the written acknowledgment of the principal should bind and be conclusive against the guarantor.

And in Drummond *v.* Prestman, 12 Wheat. (U. S.), 516, the principal's admission of liability contained in his confession of judgment to the guarantee was admitted against the guarantor after the principal's death.

In Horn *v.* Perry, 14 Hun (N. Y.) 409, the books of a firm which had been composed of the principal debtors and the guarantee, which did not fully show the liability of the former to the latter, together with a check and receipt evidencing a settlement made on the basis of the books, were held inadmissible against the guarantor, the court saying: "As against the principals, the proof would have been sufficient; but, as to the sureties, the contents of the books of the principals, the receipt given by them, their verbal admissions to the plaintiff, and his check, were but the declarations of third persons by which the sureties were in no manner affected."

Where suit is brought against the guarantor of the credit of the debtor, and the guarantor relies on a payment made by the debtor and alleged to have been applied to the account sued on, conversations between the debtor and the plaintiff's agent as to the state of the account, and letters written by the debtor to such agent requesting him to misrepresent to the guarantor the state of the account, are irrelevant and not admissible over the guarantor's objection. Coxe Bros. & Co. *v.* Milbrath, 110 Wis. 499, 86 N. W. 174.

In Deere Plough Co. *v.* McCullough 102 Mo. App. 458, 76 S. W. 716, declarations of a principal or his attorney relevant to having turned his assets over to his guarantor, were held inadmissible against the latter.

Evidence of a conversation between a guarantee and the principal occurring after the transaction and not in the guarantor's presence, in which the principal stated that the guarantor had promised to protect him, and that it was agreed when he signed the guaranteed note that he was not to pay it and should have no trouble with it, but that the guarantor would take care of it, is inadmissible against the guarantor to excuse the guaran-

7. Admissibility of Judgment Recovered Against Principal. — It seems that a judgment recovered against the principal debtor is, in general, admissible in the action against the guarantor,[91] and is evidence of its own existence,[92] but it cannot be received as proof of credit extended on the faith of the guaranty, nor as a ground of recovery.[93] Whether it may be used to show the amount of the debt is doubtful.[94]

tee's failure to proceed against the principal. Allen *v.* Rundle, 50 Conn. 9, 47 Am. Rep. 599.

91. In Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98, the rule was thus stated: "Where a suit is necessary to fix the liability of the guarantor, the first judgment is *prima facie* evidence of the default; but where the guarantor is liable without suit against the principal, the judgment against him is regarded as strictly matter *inter alios*."

A judgment against the principal, the record of which includes the declaration and account of the guarantee on which is was rendered, is admissible against the guarantor, its connection with the subject-matter of the guaranty being thereby shown. Roberts *v.* Woven Wire Mattress Co., 46 Md. 374.

92. In an action against the guarantor of a note, the record of a judgment against the makers is competent evidence of the fact of its rendition, especially where notice of the suit was given the guarantor. Robinson *v.* Lane, 14 Smed. & M. (Miss.) 161.

In Grommes *v.* St. Paul Trust Co., 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248, it was held that in the absence of a notice and opportunity to defend given to the guarantor, or of an assumed responsibility by him for the result of the suit against his principal, the judgment rendered therein was not conclusive against the guarantor, but could only be introduced against him as evidence of its own existence and not as evidence of any of the facts upon which its recovery rested. As to the latter, it was *res inter alios acta*.

93. Commercial Bank of Albany *v.* Eddy, 7 Metc. (Mass.) 181, and see Eaton *v.* Harth, 45 Ill. App. 355.

Where A. indorses a note to B. "to be liable only in second instance" and B. sues one of the makers, who pleads a release from A. while the holder of the note, and is discharged by the judgment of the justice, that judgment is only *prima facie* evidence, at best, in a subsequent suit against A., and to make it conclusive evidence of B.'s right to recover, notice to A. of the first action was indispensable. Brown *v.* Chaney, 1 Ga. 410.

In an action against the guarantor of the consideration of a note, the record of a suit against the maker exhibiting a judgment for the defendant, was read, and it was held competent to show by parol whether the judgment was on the merits of the case and was rendered because of a want or failure of consideration; but a bill of exceptions taken on the trial of the suit against the maker and embodying the proof would not be competent evidence, as the witnesses themselves would be required so they could be cross-examined. Robinson *v.* Lane, 14 Smed. & M. (Miss.) 161.

Judgment as evidence of principal's insolvency, see *post*, note 3.

94. In Ayres *v.* Findley, 1 Pa. St. 501, an award against the plaintiff in an action by the guarantee against the principal debtor was held to be *prima facie* evidence against the guarantor of the debt, who had assigned it with an accompanying guaranty that nothing was due thereon; but in the absence of notice of the litigation to the guarantor, it was said that the award was not conclusive.

In Brown *v.* Brooks, 25 Pa. St. 210, a judgment recovered against the principal debtor was held evidence in an action on the guaranty of the amount of the debt.

But in Giltinan *v.* Strong, 64 Pa. St. 242, it was held error to admit a judgment against the principal debtor as evidence against the guarantor of the sum due, the court saying that it would be a novelty if the principal could call on his surety to defend

It seems fairly well settled, however, that a judgment against the principal is admissible to show due diligence in pursuing him, by the guarantee.[95]

8. Proof of Insolvency. — In an action on a guaranty, the fact of the principal's insolvency, when in issue, should be proved in the same manner as any other fact in the case.[96]

9. Default and Notice. — The guarantor's promise to pay the debt is admissible as an admission of the principal's default;[97] and his statement that he does not deny liability is also proof, either of notice of default or of its waiver.[98] Written notice bearing the official certificate of the sheriff that he has served the same is competent evidence of such service.[99]

10. Proof of Damages. — It is proper to show, on the question of damages, that the principal debtor is insolvent, and that a judgment against him cannot be collected.[1]

11. Discharge of Guarantor. — Facts showing the discharge of the guarantor may be proved by parol, though the guaranty is in writing.[2] Evidence of negligence in enforcing an execution against

him, and that there was no legal privity between the parties.

95. Woodward *v.* Moore, 13 Ohio St. 136; Commercial Bank of Albany *v.* Eddy, 7 Metc. (Mass.) 181.

The *prima facie* evidence of diligence afforded by a judgment against the principal secured before a justice is rebutted by showing that had it been recorded in the district court it might have been made a lien upon the principal's real estate. Osborne *v.* Smith, 18 Fed. 126.

In Sterns *v.* Marks, 35 Barb. (N. Y.) 565, a judgment whereby the principal secured a release from his obligation on the ground of fraud was held admissible in an action against the guarantor who was cognizant of the circumstances on which the former case had been decided, to excuse the guarantee's failure to proceed against the principal, the court saying it had the same legal effect on the rights of the parties as if the guarantee had sued the principal, who had recovered a judgment discharging him from liability.

In the absence of notice to the guarantor of a suit begun by a guarantee against the principal, the judgment therein does not conclude the guarantor from showing that had proper diligence been used in the conduct of such action, the judgment would not have been recovered. Woodward *v.* Moore, 13 Ohio St. 136.

96. Consequently, record evidence is not indispensable, but insolvency may be shown by parol. McClurg *v.* Fryer, 15 Pa. St. 293; Reynolds *v.* Douglass, 12 Pet. (U. S.) 497. But record evidence, such as a duplicate of the bankrupt record in the matter of the principal's bankruptcy, is admissible. Fales & Jenks Mach. Co. *v.* Browning (S. C.), 46 S. E. 545.

In Nelson Mfg. Co. *v.* Shreve (Mo. App), 79 S. W. 488, the opinion of a witness as to the value of the contents of a principal's plumbing shop was held admissible on the issue of his insolvency, arising in a suit against the guarantor.

Judgment recovered against the principal debtor and execution returned thereon *nulla bona* are *prima facie* evidence of insolvency. Brown *v.* Brooks, 25 Pa. St. 210; Lawson *v.* Wright, 21 Ga. 242, and see Buttram *v.* Jackson, 32 Ga. 409.

97. Harbert *v.* Skinner, 37 Iowa 208.

98. First Nat. Bank *v.* Carpenter, 34 Iowa 433, in which such a statement by a member of a guarantor partnership was admitted as an admission of the firm.

99. Taylor *v.* Taylor, 64 Ind. 356.

1. Clark *v.* Hampton, 1 Hun (N. Y.) 612.

2. White *v.* Walker, 31 Ill. 422. The objection to the evidence in this case was grounded on the ancient

the principal debtor is admissible to show want of proper diligence on the part of the guarantee.[3] Evidence of what the guarantor has done with property of the principal in his possession is immaterial, except so far as it shows a payment thereof to the guarantee, and the *pro tanto* reduction of his claim.[4]

rule of the common law that an obligor could be released only by an instrument of as high dignity as that by which he was bound, but the court declined to follow this rule, holding that it was no longer practically enforced.

3. Hoffman *v.* Bechtel, 52 Pa. St. 190. In this case the guarantor was permitted to prove that the principal was the owner of real estate upon which the judgment recovered against him was a lien; that under an execution issued thereon the property was sold for an insignificant sum to the debtor's wife; that the guarantee paid no attention to the sale, absented himself from it and remarked that he did not care as he was secure for his claim; and that he made no effort to have the sale set aside, but privately offered the purchaser an advance on the bid, if it was transferred to him.

4. Farmers & Mech. Nat. Bank *v.* Lang, 29 Super. Ct. (N. Y.) 372.

GUARDIAN AND WARD.

By Clarence Meily.

CROSS-REFERENCES:

Admissions;
Infants;
Principal and Surety.

I. PRESUMPTIONS AND BURDEN OF PROOF.

1. Appointment and Qualification. — A. APPOINTMENT IN GENERAL. — The maxim, "*Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium,*" applies to the appointment and qualification of a guardian and the various steps in the proceedings connected therewith. Thus, the residence of the guardian at the time of appointment will be presumed, though it is shown that at the time of instituting a suit the guardian lived without the state;[1] and the formal removal of a testamentary guardian will be presumed to have preceded the appointment of a statutory one.[2]

Nevertheless, in suing his ward's debtor, the burden is on the guardian to show a legal appointment.[3]

Effect of Record. — The record of an appointment is so far satisfactory evidence thereof that the issuance of a certificate is unnecessary;[4] but, on the other hand, the fact that no record of appointment can be discovered is not conclusive against the fact of the appointment in view of the maxim above quoted;[5] and the

1. Martin *v.* Tally, 72 Ala. 23, in which the court said that it would presume a change of residence after appointment, if necessary.

2. Den *v.* Gaston, 25 N. J. L. 615.

3. Hutchins *v.* Johnson, 12 Conn. 376, 30 Am. Dec. 622.

4. Eyster's Appeal, 16 Pa. St. 372.

5. Fink's Appeal, 101 Pa. St. 74. In this case, after referring to the evidence adduced to show the appointment, consisting both of circumstantial proof and the direct testimony of one witness, the court said: "But the maxim '*Omnia praesumuntur esse rite acta*' is clearly applicable in such case, and when to this is added the positive testimony of a living witness, and strongly corroborative circumstances concurring with and happening in consequence of the principal fact in question, and that fact occurred more than thirty years ago, the

presumption of authority to act, notwithstanding the absence or silence of the record, has been extended to a foreign guardian.[6]

B. JURISDICTION. — Jurisdiction to appoint a guardian will be presumed in a court of record making the appointment;[7] and a foreign appointment will be presumed to have been made by a court having general jurisdiction and authority to act;[8] and both the fact of jurisdictional notice[9] and the residence of the minor[10] have likewise been presumed in favor of the validity of the proceedings.

C. EFFECT OF LETTERS OF GUARDIANSHIP. — Letters of guardianship regular on their face and issued by a court having jurisdiction

judicial mind may well rest satisfied with the sufficiency of the proof."

But in House *v.* Brent, 69 Tex. 27, 7 S. W. 65, it was held that the authority of one signing a deed to a minor's realty in the purported capacity of guardian, to act as such, would not be presumed, in the absence of all proof, even after a lapse of thirty years.

6. Cole *v.* Collett, 5 Litt. (Ky.) 47, in which it appeared that the personal estate of an infant had been delivered over with the approbation of a court of a neighboring state, having competent jurisdiction, to one who was not shown by the record to have been a guardian or otherwise vested with legal authority to receive it.

7. Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136, in which this presumption of jurisdiction was held to apply to probate courts in view of the constitutional provision making them courts of record, but in which the court said that even in the absence of this provision public policy and general utility would require the indulgence of the same presumption.

8. Halliburton *v.* Fletcher, 22 Ark. 453.

Record of domestic court as evidence of valid foreign appointment, see *post,* note 49.

9. On a collateral inquiry it will be presumed that the probate court of a territory gave proper notice of the application for appointment of a guardian to persons interested, though the record fails to disclose such notice. Kelley *v.* Morrell, 29 Fed. 736.

The fact that an order for the appointment of a guardian for a non-resident minor recites that on reading and filing the petition, and the bond having been duly filed and approved, it is ordered that the appointment be made, etc., does not constitute an affirmative showing on the face of the record that the jurisdictional notice of the appointment was not given; so that the general presumption of jurisdiction accorded to probate courts in Minnesota, as courts of record, is not overthrown thereby. Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136.

10. In Collins *v.* Powell, 14 Ky. L. Rep. 119, 19 S. W. 578, the court, in speaking of the appointment of a guardian which was assailed twenty years afterward on the ground of the non-residence of the minor in the county where the appointment was made, and the consequent lack of jurisdiction in the county court, said that when the jurisdiction was so questioned after the lapse of so many years, great weight should be attached to the proceeding for the appointment, although *ex parte* so far as the ward was concerned, and that in view of the rights of an innocent purchaser at the guardian's sale of realty, the chancellor should be reluctant to disturb the appointment so as to divest the purchaser of his title upon no other testimony than the recollection of witnesses, refreshed doubtless by the insolvency of the guardian. In this case it appeared that the judge making the appointment knew that his jurisdiction depended upon the infant's residence and that it was his usual custom to have proof on the subject. It also appeared that the judge in the county now claimed to have been the infant's residence had refused to make the appointment on the ground of want of jurisdiction.

are presumed to have been regularly issued,[11] and are *prima facie* evidence that all previous requisites necessary to a valid appointment have been complied with;[12] but they are not absolutely essential to a due proof of appointment.[13]

D. QUALIFICATION. — A presumption of due qualification is indulged where the guardian has acted as such.[14]

2. Reception of Assets. — A. IN GENERAL. — PRIMA FACIE EVIDENCE. — The fact of giving a bond and filing a settlement is *prima facie* evidence against a guardian that he took charge of the estate.[15]

11. Den *v.* Gaston, 25 N. J. L. 615, in which it was held, in consequence, that such letters could not be collaterally attacked.

Burden of impeaching appointment in attack on validity of sale. See *post,* note 49.

12. Hence, it is unnecessary to show an application for an appointment or a notice thereof to the persons interested. Prescott *v.* Cass, 9 N. H. 93.

In an action by the guardian of an insane person it is unnecessary for the plaintiff to prove the insanity of his ward or the regularity of the proceedings in the probate court appointing him as guardian, since in a collateral action the letters of guardianship themselves are conclusive of both these facts. Minnesota Loan & Trust Co. *v.* Beebe, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418.

Where letters of tutorship set forth that a tutor has complied with the requisites of the law to entitle him thereto, it is evidence that he has given a bond. Smith *v.* Porter, 16 La. Ann. 370.

13. Martin *v.* Martin (Tenn.), 52 S. W. 902, in which the guardian had testified without objection that he was in fact such.

14. In State *v.* Richardson, 29 Mo. App. 595, the giving of a bond by a guardian and the filing of a settlement showing a balance against himself were held to dispense with proof that his bond had been approved.

Where a will appoints the mother of testator's infant children as their guardian, excusing her from giving security, and she has answered as such guardian, she will be presumed, in the absence of evidence to the contrary, to have been regularly qualified. Brown *v.* Severson, 12 Heisk. (Tenn.) 381.

Hoover *v.* Sellers, 5 La. Ann. 180. In this case the court said: "But the plaintiff seeks to escape from the effect of these principles by questioning the legal capacity of her several tutors to act as such. Osburn, it is said, was not her tutor; because, although he was appointed, it does not appear that he had given or taken the oath of office. That he acted as tutor is proved. That he was recognized as such by the parish judge in subsequent proceedings is also inferable. Moreover, we find charges made in 1831 by the parish judge, 'for taking bonds,' and by the notary, for 'writing bonds for tutors.' Under the circumstances the defendant is fairly entitled to the benefit of the presumption, *omnita rite acta.* This presumption is peculiarly equitable in the present case, considering the state of confusion and dilapidation into which the records of the probate court have fallen."

The fact that a guardian's bond is not found on file is not sufficient to show that one was not given, and therefore to show that the guardian was not legally qualified, where the letter of guardianship which is on record recites the giving of a bond, and the court afterward recognizes the guardian as properly qualified by entertaining his petition for leave to sell real estate. As the letter of guardianship could not have been issued properly by the court until the bond had been filed, such filing is to be presumed. McGale *v.* McGale, 18 R. I. 675, 29 Atl. 967.

15. State *v.* Richardson, 29 Mo. App. 595. And see Richards *v.* Swan, 7 Gill (Md.) 366.

Effect of Joint Receipt. — A joint receipt by two guardians for money due the ward's estate is presumptive evidence that the money came equally into the possession and control of both.[16]

B. Loss of Assets. — The burden is on a guardian who has failed to reduce assets to possession to show that he could not do so,[17] or that he employed due diligence in the attempt to secure them.[18]

C. Release of Claim Due Estate. — The general rule is that a guardian's compromise and release of a claim existing in favor of the ward's estate is presumably valid, and the burden of impeaching it is upon the ward;[19] but this rule has been refused application in the case of the compromise of a pending action, made without obtaining authority from the court.[20] Nor does a receipt given by a guardian on compromising debts due his ward at a fraction of their nominal value create a presumption of negligence.[21]

3. Management of Estate. — A. Investments. — a. *Practicability.* — It will be presumed in the absence of evidence that a guardian

16. Monell *v.* Monell, 5 Johns. Ch. (N. Y.) 283, 9 Am. Dec. 298, in which it was said that the evidence to rebut this presumption must be direct and positive, but if such evidence is adduced, and it appears that the money did in fact go exclusively into the hands of one, then the presumption would arise that it was so paid under the direction of the other party and that he voluntarily agreed to such a disposition of it.

17. Stewart *v.* McMurray, 82 Ala. 269, 3 So. 47; Micou *v.* Lamar, 7 Fed. 180.

But in Brown *v.* Bessou, 30 La. Ann. 734, it was held that a tutor could not be charged with more than he collected of a debt due the minor, where it was not shown that the debt was worth more than the sum realized.

In Dakin *v.* Demming, 6 Paige Ch. (N. Y.) 95, the court said that the presumption that notes belonging to a ward's estate and inventoried as bad had been collected did not arise from the fact that they had been placed in judgment and the constable fees paid out of the estate; and if the judgment was actually collectible, the ward, who was attempting to charge the guardian with the amount of the notes after a lapse of sixteen years, was bound to establish the fact by proof less equivocal than the payment of the constable's fees. The court also said that it might be fairly presumed after such a lapse of time, in order to sustain a settlement by the guardian with an executor from whom the notes were received, that even notes inventoried as good had proven uncollectible.

18. Stewart *v.* McMurray, 82 Ala. 269, 3 So. 47.

19. Ordinary *v.* Dean, 44 N. J. L. 64.

A guardian's release of a claim existing in favor of a ward's estate, made under seal, is binding on the ward when he becomes of age if fairly made and free from fraud; and if a ward claims otherwise, the burden of impeaching the receipt is on him. Torrey *v.* Black, 58 N. Y. 185.

In Dakin *v.* Demming, 6 Paige Ch. (N. Y.) 95, the court held that a receipt given by a guardian to an executor for the ward's distributive share of the estate was evidence of the settlement between executor and guardian, and that such settlement was so far conclusive upon the ward when he became of age as to throw on him the burden of proving that there was error in the account upon which settlement was made.

20. Hogy *v.* Avery, 69 Iowa 434, 29 N. W. 409.

21. Luton *v.* Wilcox, 83 N. C. 20.

could loan his ward's funds as required by statute,[22] and the burden is on him to show the contrary.[23]

b. *Identity of Fund.* — It will be presumed that if a guardian has actually invested his ward's money in certain securities, they will appear payable to him as guardian, and not in his own name;[24] but the mere fact that he takes an evidence of indebtedness in a fiduciary capacity is not conclusive of the identity of the fund.[25]

c. *Loss of Investment.* — It is incumbent on a guardian to free himself from the suspicion of neglect attaching to a loss of funds invested by him.[26]

B. EXPENDITURES. — a. *In General.* — It will be presumed that a guardian has discharged the duties imposed on him of providing for the maintenance, protection and education of his infant ward;[27]

22. Steyer *v.* Morris, 39 Ill. App. 382. But in Ashley *v.* Martin, 50 Ala. 537, the supreme court of that state took judicial notice, as a part of the history of the community following the civil war, that its people were in a condition of very great pecuniary embarrassment, so that it might not have been practicable for a guardian to make a safe loan of $22,000 without delay, though a statute authorized and required such investment to be made.

23. Thompson *v.* Thompson, 92 Ala. 545, 9 So 465.

But the burden of proving that a guardian has received a higher interest than the legal rate upon his ward's money is on those who represent the ward's interests on an accounting; and they must identify the instances in which such interest has been received. Moyer *v.* Fletcher, 56 Mich. 508, 23 N. W. 198.

24. Ammon *v.* Wolfe, 26 Gratt. (Va.) 621, in which the presumption of the text was indulged against the executor of a deceased guardian and was said to obtain whether the investment was made pursuant to a chancery decree, or under a statute which expressly provided that, when practicable, the bonds therein authorized to be purchased should be taken in the name of the fiduciary in his fiduciary character.

25. The mere fact that a guardian on making a loan took a note and mortgage to himself as executor of the estate of his ward's father is not conclusive evidence that the funds used in making the loan belonged to the ward, the guardian not being in fact such executor of the estate. Railsback *v.* Williamson, 88 Ill. 494.

26. A conversion of funds of the wards' estate into Confederate bonds during the civil war bound the wards only if it were done in a legal way pursuant to the statutes then in force on the subject; and the burden of showing such legal conversion is on the guardian and his representatives. Munroe *v.* Phillips, 64 Ga. 32.

Where a guardian admits that he collected notes of his ward prior to the civil war, but claims that the money was lost to the ward's estate by reason of its being in Confederate currency, the burden is on him to show when and by what means the fund became commuted. Johnson *v.* McCullough, 59 Ga. 212.

Where a guardian accepts on a loan of the ward's funds a mortgage executed by a husband alone, the burden is on him to show that the husband's estate in the land was an adequate security for the money loaned, so that it was unnecessary that the wife should join in the incumbrance. Slanter *v.* Favorite, 107 Ind. 291, 4 N. E. 880, 57 Am. Rep. 106.

27. Nicholson *v.* Spencer, 11 Ga. 607, in which it was said that this presumption was but a special application of the general rule that when a person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be presumed that he had performed it unless the contrary is shown.

and that he has paid for services procured by him in his ward's behalf, and has charged and received credit therefor.[28]

b. *Gifts by Guardian to Ward.* — Where one not a parent is guardian, he will not be presumed to have made gifts of necessaries to his ward;[29] but where a parent is guardian and has the ability to supply his children with necessaries, such supplies will be presumed to be gifts, and no allowance will be made him therefor.[30]

c. *Burden of Proving Credits.* — The burden of proof is upon the guardian claiming a credit for money expended for, or necessaries supplied to, his ward, to establish his right by evidence.[31] And where the credit is claimed for cash paid the ward during minority, the proof must show that the ward ratified the payment after majority, and must be of a clear character.[32] Where proper and improper charges against the ward's estate are commingled,

28. Brown *v.* Eggleston, 53 Conn. 110, 2 Atl. 321.

29. *In re* Bushnell, 17 N. Y. St. 813, 4 N. Y. Supp. 472.

30. *In re* Bushnell, 17 N. Y. St. 813, 4 N. Y. Supp. 472, in which the presumption was said to obtain that unless the children's estate was so ample and the parent's means so insignificant it would be a hardship to compel the parent to support his children by his own exertions or from his own property.

The existence of the relation of stepfather and stepchild is not conclusive against the stepfather's right to compensation from the child's guardian for clothing and boarding the child. Glidewell *v.* Snyder, 72 Ind. 528.

While a stepfather may receive the children of his wife by a former marriage into his family under such circumstances as to create a presumption that he is to board and clothe them gratuitously, yet where he receives such children as their legally appointed guardian, and as such renders his account for expenditures from year to year, and such accounts are allowed by the county court, the presumption does not arise. Bond *v.* Lockwood, 33 Ill. 212.

31. Hutton *v.* Williams, 60 Ala. 133.

May *v.* Duke, 61 Ala. 53, in which it was also said that the credit could not be allowed unless the evidence was of a character which would support an action at law if the guardian was suing the ward in an action *ex contractu.*

It is incumbent on the curator of an interdicted person to sustain his account, particularly those items of it which are opposed, by satisfactory proof; but where the accounts are not contested they will be presumed to be correct. Interdiction of Rosette Rochon, 18 La. Ann. 272.

A guardian must affirmatively show that the ward's estate justified the expenditure of money for the ward's board and schooling, for which the guardian claims credit in his account. Peelle *v.* State *ex rel.* Hipes, 118 Ind. 512, 21 N. E. 288.

By making repairs and improvements on the ward's lands, without a preceding order on the county court, a guardian assumes the burden of showing, at the time of asking credit therefor, that they were necessary and proper to the interest of the ward, and paid for at reasonable rates. Cheney *v.* Roodhouse, 32 Ill. App. 49.

Where a guardian sues his ward for reimbursement for the expenses of litigation, one item of which is for bringing a witness one hundred miles to testify in a suit in another state, the court will presume that the attendance of the witness could have been secured by subpoena; and if there existed any peculiar circumstances rendering it necessary or expedient to send for the witness, or if the law of the sister state imposed such a duty on the guardian, he should prove the same. Taylor *v.* Kilgore, 33 Ala. 214.

32. Hescht *v.* Calvert, 32 W. Va. 215, 9 S. E. 87.

it is incumbent on the guardian to adduce evidence discriminating between the two.[33]

d. *Expenditures Beyond Income.* — Where a guardian makes expenditures beyond the income of the ward's estate, and without obtaining an order of the court therefor, he must show, on claiming a credit, such a case as would justify a court of equity in ordering the expenditures had application been made for the purpose.[34]

e. *Vouchers.* — Expenditures shown in a guardian's account should be supported by vouchers and by such further evidence as is requisite to show them necessary and reasonable;[35] but the produc-

33. Hudson *v.* Hawkins, 79 Ga. 274, 4 S. E. 682; Moore *v.* Bannerman (Tex. Civ. App.), 45 S. W. 825.

A guardian cannot have credit for counsel fees expended in partitioning lands belonging to his ward and his own wife, by showing that he paid the fee and that it was reasonable, but he must also show that it was a proper payment, made without injustice to the ward; since, as counsel may have represented both the ward and the wife, the guardian is in a position which forbids any presumption in favor of his acts. McGary *v.* Lamb, 3 Tex. 342.

34. Owens *v.* Pearce, 10 Lea (Tenn.) 45; Olsen *v.* Thompson, 77 Wis. 666, 47 N. W. 20; Holmes *v.* Logan, 3 Strob. Eq. (S. C.) 31; Davis *v.* Harkness, 6 Ill. 173. But see Moore *v.* Cason, 1 How. (Miss.) 53, where the direction of the court seems to have been regarded as an imperative requisite.

Where proper expenditures for a ward, other than for necessaries, have been allowed as items in a guardian's account, the presumption is that they were not so allowed without proof of their propriety and of a satisfactory excuse for not procuring an order for making them before they were made. Bond *v.* Lockwood, 33 Ill. 212.

It will not be presumed that a ward did not earn his living during the time for which a guardian seeks to charge the principal of his estate for his support. Clark *v.* Clark, 8 Paige Ch. (N. Y.) 152, 35 Am. Dec. 676. But in Brent *v.* Grace's Administrator, 30 Mo. 253, the court said: "There is nothing in the objection that no previous order was obtained from the probate court authorizing expenditures for education and maintenance. It is the duty of the court to order the proper education of minors according to their means, and for that purpose it may from time to time make the necessary appropriations of the money or personal estate of any minor. (1. R. C. 1855, p. 826, § 24.) The guardian may, if he chooses, apply in the first instance for an order and appropriations; but if he does not, and takes the risk of having his accounts disallowed when he makes his settlements, that is his own concern, and his omission to do so is no fraud upon his ward. The court, in either case, determines whether the expenditures are necessary and proper, and allowing accounts for expenditures already incurred is, in effect, the same as making a formal order for appropriations beforehand, and equally satisfies the statute."

35. Newman *v.* Reed, 50 Ala. 297. Credits claimed by a guardian for expenditures on behalf of his ward should be supported by evidence that the expenditures were necessary and reasonable, and this, notwithstanding the statute (Code, § 1401) makes vouchers presumptive evidence of disbursements actually made, since the statute does not make them evidence of the nature, purpose or necessity of the disbursements, when the same are not expressed in the vouchers; and to make the vouchers presumptive evidence on those points, they should state with reasonable particularity the purpose of them, on what particular account made, the time when made, etc., so as to make it appear that the disbursement was a proper one. McLean *v.* Breese, 109 N. C. 564, 13 S. E. 910.

Where a guardian who has grossly

tion of vouchers does not seem indispensable to an allowance of the expenditures.[36]

It has been held that receipts taken by a guardian are insufficient as vouchers to support his account.[37]

A guardian's omission to take a receipt, however, is not a fatal objection to an allowance of the expenditure.[38]

f. *Burden of Establishing Ward's Set-off for Services.* — Where a ward claims a set-off against his guardian's account for services rendered by him to the guardian, the burden is on the ward to establish the same.[39]

C. PAYMENT OF CLAIMS. — The burden is on the guardian to establish an alleged payment made in the ward's behalf, and with which the guardian seeks to charge him,[40] and to show at

abused his trust claims a credit for expenditures for his ward, but files no exhibits for the items and does not make it appear that they were proper, the credit will not be allowed. Boyett *v.* Hurst, 54 N. C. 166.

Vouchers sustaining a guardian's charge for clothing, schooling, tuition and board ought not to be rejected on account of their generalness, though they show great carelessness and negligence in his mode of keeping his accounts; but the accounts thus kept should be strictly proven by testimony, to support the charges made, that the clothing, etc., were actually furnished, and the charges reasonable and suitable to the ward's circumstances. Hendry *v.* Hurst, 22 Ga. 312,

36. Foteaux *v.* Lepage, 6 Iowa 123.

The fact that an executor of a deceased tutor is deprived, by the destruction of the papers connected with the tutor's account, of written evidence concerning the same, does not excuse him from supplying its place as far as possible by secondary evidence, and a fragmentary account unsupported by such secondary evidence is insufficient. Succession of Peniston, 19 La. Ann. 277.

37. Alexander *v.* Alexander, 8 Ala. 796.

A guardian's own receipt to himself is no evidence to support a charge in his own favor against his ward. Hendry *v.* Hurst, 22 Ga. 312.

But in Richard *v.* Blanchard, 12 Rob. (La.) 524, it was held that as a tutor is bound to procure medical assistance, when necessary, for the minor, the receipt of a physician for the amount of his fees for such services paid by the tutor, being admitted without opposition, was a sufficient voucher to entitle the latter to credit for the amount, the tutor not being bound to procure evidence of the necessity for such services where the amount paid was not large and nothing authorized the presumption that the payment was improper.

38. Albert's Appeal, 128 Pa. St. 613, 18 Atl. 347.

39. Thompson *v.* Hartline, 84 Ala. 65, 4 So. 18, in which it was said that the burden of proving his case rested on the ward precisely as if he were suing to recover for his services.

So he must show the value of his services. Calhoun *v.* Calhoun, 41 Ala. 369.

In Jennings *v.* Kee, 5 Ind. 257, which was a bill by a ward to charge her guardian with the proceeds of the sale of land, in speaking of the guardian's claim for credit for the board of the ward, who was a minor sister-in-law, and of her counterclaim for her services, the court said that the strong presumption was that neither of them ever thought of making charges of this character against each other until after the institution of the suit.

40. Eberhardt *v.* Schuster, 10 Abb. N. C. (N. Y.) 374, in which the burden seems also to have been placed on the guardian to negative the possibility of his having reimbursed himself from the ward's estate.

And in Sanders *v.* Forgasson, 3 Baxt. (Tenn.) 249, where it appeared that the guardian had made several settlements since the date of a re-

least a *prima facie* case of liability on the part of the ward's estate.[41]

D. Misappropriation and Conversion of Assets. — The law presumes that in his final settlement a guardian has properly accounted for all the property of his ward which came into his possession;[42] but where the guardian has failed to properly account, or has grossly neglected and abused his trust, every presumption will be made against him.[43]

Where a guardian assigns to his co-guardian assets of the ward's estate, the presumption arises that he did so to accommodate his co-guardian with the use of the money for the latter's own private purposes.[44]

Resulting Trust in Realty.— In order to establish a resulting trust in realty standing in the name of the guardian individually, while the proof may be by parol, the evidence must be full clear and conclusive.[45]

ceipt from a third person, the presumption was held to obtain that he had had credit therefor.

41. Stewart *v.* McMurray, 82 Ala. 269, 3 So. 47.

A receipt purporting to be received by one as administrator imposes the burden on him of explaining and proving that the sum referred to was properly chargeable against the heirs, so as to convert the receipt into a voucher for himself as their guardian. Greenlee *v.* McDowell, 56 N. C. 325.

In order to obtain credit for the payment of the ward's funds made to the ward's mother for support and education prior to the commencement of the guardianship, the guardian should require as full proof of the justness of the account as of claims of any other character. Hescht *v.* Calvert, 32 W. Va. 215, 9 S. E. 87.

42. Smith *v.* Denny, 34 Mo. 219.

Where an heir who opposes the account filed by his former tutor admits that he received a certain sum of money from the tutor, but alleges that it was derived from a source different from the one set forth by the latter, he must prove his allegation, or otherwise his admission will relieve the tutor from any further proof. Brown *v.* Bessou, 30 La. Ann. 734.

43. In Jennings *v.* Kee, 5 Ind. 257, in referring to the guardian's failure to settle his guardianship, the court said: "The whole case looks inexcusably negligent on the part of J. [the guardian]. Why did he not settle with the proper court as guardian and produce the record of that court as evidence of the correctness of his course in discharging the duties of the trust he had accepted? In all cases of delinquency and neglect the courts will presume in favor of the ward and against the guardian as strongly as the facts will warrant."

Where a guardian has grossly neglected and abused his trust, every inference on an accounting by him is to be made against him. Boyett *v.* Hurst, 54 N. C. 166.

In Poullain *v.* Poullain, 76 Ga. 420, it was said that it was scarcely necessary to observe that the omission of much the larger part of the estate from the final account of a guardian, the incorrectness of other items, and the failure to furnish any vouchers whatever, raised a presumption against the good faith of the settlement.

44. Monell *v.* Monell, 5 Johns. Ch. (N. Y.) 283, 9 Am. Dec. 298.

45. Shelton *v.* Lewis, 27 Ark. 190.

In order to declare a resulting trust in realty of a deceased guardian, on the ground of its purchase with funds of the ward, the evidence relied on being all matter of record and accessible at all times, but a delay of thirty years having taken place before instituting the suit, the proof of the justness of the complainant's claim must be of the clearest character. Spring *v.* Kane, 86 Ill. 580.

But in Louisiana, where the minor

E. Actions by Third Persons Against Guardian. — Where a tutor has created an indebtedness without authority of law, the burden is on the creditor to show that it was absolutely necessary either for the support of the minor or the preservation of his property, and that the supplies furnished by him actually inured to the minor's benefit.[46]

4. Sale of Realty. — A. Proof of Necessity of Sale. — Proof of the necessity of a proposed sale of a ward's realty by the guardian is essential, and it is error to order a sale on the guardian's application as a matter of course;[47] but the introduction of adequate evidence will be presumed on a collateral inquiry, after a decree for the sale has been made.[48]

B. Presumption of Regularity. — The usual presumption of the regularity of judicial action where jurisdiction exists applies in the case of a guardian's sales, and is extended to various matters of procedure, instances of which will be found in the note.[49]

seeks to enforce his tacit mortgage against real estate held by a third person under a title derived from the tutor, a proceeding which, like the attempt to declare a resulting trust at common law, involves a pursuit of the guardian's realty, it is held that the burden of proving that there is other property first liable for the plaintiff's claim is upon the tutor's grantee. Alva *v.* Jamet, 4 La. Ann. 353.

46. Urquhart *v.* Scott, 12 La. Ann. 674; Sanford *v.* Waggaman, 14 La. Ann. 852.

47. Lloyd *v.* Malone, 23 Ill. 41.

But in Adkins *v.* Sidener, 5 Ind. 228, in speaking of proceedings by a guardian for the sale of his ward's realty, the court said: "It is objected that the record does not show that any evidence was offered to sustain the matters set out in the petition. It does not seem to be required. If the court is satisfied with the propriety of selling such real estate, it is sufficient. (*Citing* Rev. Stat. 1843, ch. 35, § 111.) The statute is silent as to the means to be resorted to to satisfy the court, and when the record shows that the result has been produced we will presume, in favor of judicial action, that the end was attained by proper and adequate means."

48. Williams *v.* Pollard (Tex. Civ. App.), 28 S. W. 1020; Adkins *v.* Sidener, 5 Ind. 228.

49. In Schaale *v.* Wasey, 70 Mich. 414, 38 N. W. 317, a file-mark on a bond given by a guardian in proceedings for the sale of the ward's realty, reciting its filing and approval as occurring November 25, 1869, was regarded as a clerical error in view of the fact that the bond was dated November 25, 1868, the license issued and bond ordered on November 24, 1868, and in the report of the sale and the confirmation thereof on April 14, 1869, the giving and approving of the bond were recited. In this same case the presumption was held to obtain that the oath before sale was taken and subscribed before the occurrence of the sale, though it bore date of the same day as the sale; both the guardian's report of the sale and the confirmation thereof reciting that the oath preceded the sale.

Where it appears that a notice of the sale of realty by the guardian was directed by the court, and the guardian's report recites that the property was advertised "according to law," and the sale is confirmed, there is sufficient *prima facie* evidence of notice, though no notice is returned among the papers and there is no further proof of its having been given. Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52, and see Larimer *v.* Wallace, 36 Neb. 444, 54 N. W. 835.

Where it sufficiently appears that the probate court had jurisdiction of the proceedings for the sale, it must be presumed, in the absence of a con-

So the existence of a license to sell raises the presumption of the regularity of all prior proceedings.[50] And the deed to the minor's

trary showing, that a continuance of the hearing on the guardian's petition was authorized. Schlee *v.* Darrow's Estate, 65 Mich. 362, 32 N. W. 717.

Where a guardian's report of a sale of his ward's realty was approved by the court and ordered entered, it will be presumed that the clerk of the court recorded the report as it was his duty to do, though by reason of the destruction of all evidence of what was in fact done, there is no direct proof that the report was recorded; and so where it appears that the court approving the sale had power to call special terms, and that the proceedings purport to have been had at such special term, it will be presumed that the term was regularly called in accordance with the requirements of the statute. Spring *v.* Kane, 86 Ill. 580.

In Farrington *v.* Wilson, 29 Wis. 383, it was held, in view of Laws 1861, ch. 127, creating the same presumption in favor of the jurisdiction of the county court and the validity of its proceedings when acting in probate as prevails in favor of the jurisdiction and proceedings of courts of general jurisdiction, that the record of proceedings in the county court for the sale of a ward's realty, regular on its face, created a presumption of jurisdiction sufficient to sustain the sale until the contrary was shown, and was *prima facie* evidence of such matters as the court was necessarily required to adjudicate as a foundation for its decree, such as the validity of the foreign appointment of the guardian and the identity of the ward. In this same case, the burden of showing that foreign letters were void was held to rest upon the parties attacking the validity of the sale on that account.

But in Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136, in which a ward sued the purchaser at his guardian's sale to recover the land sold, the burden was held to be on the defendant to maintain his title by proof of a valid guardian's sale as the law requires, as a part of which he must show a valid appointment of the guardian, notwithstanding Gen. Stat. 1878, ch. 57, § 51, enacting that a guardian's sale shall not be avoided in an action by the ward against the purchaser on account of any irregularity in the proceedings, provided it appears that the guardian was licensed to make the sale by a probate court having jurisdiction, since the rule of proof prescribed by the statute concerns only the proceedings for the sale itself and not the prior appointment of the guardian.

And in Reid *v.* Hart, 45 Ark. 41, in speaking of the validity of a guardian's sale of real estate, the court said: "The burden was on the defendant [the purchaser] to show that it had been duly confirmed, as without confirmation the sale would not be effective to pass any title. This confirmation will not be presumed under the rule that applies when probate courts have jurisdiction, that all things were done rightly unless the contrary is affirmatively shown. The meaning of that rule is that when a substantial order or judgment is shown to have been made, it will be presumed that all the proper preliminary steps have been taken which were necessary to make such order or judgment correct, that is, after jurisdiction has been acquired — that is to say, it will be presumed that the court proceeded orderly from the time jurisdiction attached to the effective judgment. But the presumption will not extend to show that the final order, consummating the proceedings, has been itself made as a matter of course, for, perchance, the court may not have seen fit to make it out at all. There must be proof."

50. Schaale *v.* Wasey, 70 Mich. 414, 38 N. W. 317. Seward *v.* Didier, 16 Neb. 58, 20 N. W. 12, in which this presumption, held in this case to arise after a lapse of twenty-two years, was said to be an application of the rule that the law will presume official acts of public officers to have been rightly done, and of the further rule that acts done which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter. In this case the court also said that the doctrine

realty is likewise presumptive evidence of the regularity of the prior proceedings.[51]

C. Actions to Set Aside Sale. — The burden is on the ward suing the purchaser at his guardian's sale to set the same aside, to show the seasonableness of the commencement of his action as prescribed by statute;[52] but the burden in such an action is on the defendant who invokes the bar of a statute of limitations to show the conditions which make it applicable.[53]

5. Transactions Between Guardian and Ward. — A. General

was peculiarly applicable to a new state where, from lack of proper conveniences and from the ease with which access to them may be had, papers cannot be, or at least are not, as carefully preserved as in older communities.

In Pursley *v.* Hays, 17 Iowa 310, the court held that in the absence of anything on the face of the record showing that a license to a guardian to sell his ward's realty, or the sale itself, was void, the proceedings would, under Rev. Stat., § 4120, be presumed regular.

Under the act of 1813, Stat. Law 806, conferring on the circuit courts a special and limited jurisdiction to order the sale of real estate descended to infants on the application of the guardian, the record of the proceedings for such sale must exhibit every fact prescribed by the statute, or the order for sale will be deemed *prima facie* erroneous; and hence, where the record fails to certainly disclose that the lands came to the infant by descent, it is insufficient. Singleton *v.* Cogar, 7 Dana (Ky.) 479.

51. Edwards *v.* Powell, 74 Ind. 294.

So in Reid *v.* Hart, 45 Ark. 41, the court said: "The recitals of the guardian's deed would afford *prima facie* proof of the confirmation if properly acknowledged and recorded. . . . The object in making any recitals of a court's proceedings in a deed *prima facie* evidence is to make them better assurance of a title, and to relieve the grantee and those claiming under him from the burden of preserving certified copies of the proceedings, and to furnish ready proof at all times, and the only proof in case of the loss of the records by fire or other accidents. It would to a considerable extent defeat this policy if, after the loss of the records, with no chance left to verify the recitals, they should be overturned by any oral testimony except of the most convincing nature. It would afford sometimes the strongest temptation to perjury in cases where it might be committed with almost absolute impunity, and would make titles depend upon the strength or weakness of human memory after a lapse of years."

But in Gatton *v.* Tolley, 22 Kan. 678, the court said that there was no statute making a guardian's deed *prima facie* evidence that the law had been observed in its execution, and the proceedings and order under which it was executed should be shown before the deed was offered in evidence, in the absence of which it was not error to reject it.

52. Stewart *v.* Ashley, 34 Mich. 183, in which the court said: "The seasonableness of his commencement of suit was an essential condition of his right to claim recovery of the land against his guardian's sale. It was part of his own case and not separate and independent matter of defense."

53. Jeffries *v.* Dowdle, 61 Miss. 504, in which the defendant, claiming the benefit of Code 1871, § 2173, providing that no action shall be brought to recover property sold by a guardian under order of the probate court, on the ground of the invalidity of such sale, unless the action be commenced within one year — if such sale were made in good faith and the purchase-money paid — was required to show that the sale was in fact made in good faith, to execute an order made by the probate court, and that the purchase-money was paid.

PRESUMPTION OF INVALIDITY. — Transactions between guardian and ward during the continuance or shortly after the termination of the relation are presumptively fraudulent when assailed by the ward; and the burden is on the guardian to justify them by proof of their fairness and proper conservation of the ward's interests.[54]

Applications of Rule. — This rule has been applied in the case of gifts by wards to guardians,[55] purchases by the guardian from the ward for an inadequate consideration,[56] purchases by the guardian at a judicial sale,[57] and to the ward's indorsement of his guardian's

54. *Alabama.* — Malone *v.* Kelley, 54 Ala. 532; Jackson *v.* Harris, 66 Ala. 565; Voltz *v.* Voltz, 75 Ala. 555.

Georgia. — Gaither *v.* Gaither, 20 Ga. 709.

Indiana. — Wainwright *v.* Smith, 106 Ind. 239, 6 N. E. 333.

Michigan. — Jacox *v.* Jacox, 40 Mich. 473, 29 Am. Rep. 547.

Missouri. — Goodrick *v.* Harrison, 130 Mo. 263, 32 S. W. 661.

New Jersey. — Davis *v.* Davis, 55 N. J. Eq. 37, 36 Atl. 475.

North Carolina. — Williams *v.* Powell, 36 N. C. 460; Whedbee *v.* Whedbee, 58 N. C. 392.

And see Wickiser *v.* Cook, 85 Ill. 68.

As illustrative of the attitude of courts to such transactions, the language of Willey *v.* Tindal, 5 Del. Ch. 194, may be quoted. In this case the court said: "The relation of guardian and ward is fiduciary in its character; the principle upon which that duty is based is no less extensive than that of doing to others as you would have others do unto you. The relation is so intimate, the dependence so complete, the influence so great, that any transactions between the two parties, or by the guardian alone, through which the guardian obtains a benefit, entered into while the relation exists, are in the highest degree suspicious; the presumption against them is so strong that it is hardly possible for them to be sustained. This general doctrine of equity applies to the parties after the legal condition of guardianship has ended, and as long as the dependence on one side and influence on the other presumptively in fact continued."

So in Gillett *v.* Wiley, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587, the court said: "Courts will watch settlements of guardians with their wards, or any act or transaction between them affecting the estate of the ward, with great jealousy."

In McParland *v.* Larkin, 155 Ill. 84, 39 N. E. 609, the court declared that it was not necessary that actual and intentional fraud be established, but that it was sufficient when the parties sustained the relation of guardian and ward that the former had gained some advantage by the transaction with his ward to throw on him the burden of proving good faith and absence of influence and of the ward's knowledge and free consent. To the same effect, Wade *v.* Pulsifer, 54 Vt. 45, and Ferguson *v.* Lowery, 54 Ala. 510, 25 Am. Rep. 718.

55. Wade *v* Pulsifer, 54 Vt. 45.

And in Gaither *v.* Gaither, 20 Ga. 709, it was said that the fact that the ward's gift might happen to be to the children of the guardian instead of to the guardian himself did not take it out of the suspicion with which it would be viewed by the courts.

56. McParland *v.* Larkin, 155 Ill. 84, 39 N. E. 609; Wright *v.* Arnold, 14 B. Mon. (Ky.) 638.

The purchase by a ward from his guardian, on arriving at majority, will be closely scrutinized by a court of equity, but if fairly made, will stand. Sherry *v.* Sansberry, 3 Ind. 320.

57. In Scott *v.* Freeland, 7 Smed. & M. (Miss.) 409, the court, in speaking of a purchase by a guardian of a ward's realty, sold under order of the probate court, said that an inclination had been manifested by some of the English judges, and perhaps by some of the courts in this country, to look into the transaction when a trustee has purchased the trust property, and to make its valid-

note for his own antecedent debt given before any accounting had been had.[58]

Duration of Presumption. — The duration of the presumption of invalidity is uncertain, depending on the circumstances of the particular case. In general, it may be said that it lasts while the guardian's functions are to any extent still unperformed, while the property is still at all under his control, and until his accounts have been finally settled;[59] and it would seem to also continue as long as the influence arising from the relationship persists.[60] The duration of this presumption must be distinguished from *laches* on the part of the ward in enforcing his rights, which is not here treated.

B. SETTLEMENTS AND RELEASES. — Settlements made by a guardian with his ward out of court are regarded with distrust, and

ity rest upon its fairness, but that the decided weight of authority was the other way, and the sale might be set aside at the option of the *cestui que trust* as a matter of course.

In Chorpenning's Appeal, 32 Pa. St. 315, 72 Am. Dec. 789, the court, in sustaining a purchase by a guardian of realty belonging to his ward and sold by the sheriff under judgment against the administrator, the guardian having no assets in his hand with which to prevent the sale, said that the guardian's control over the sale was not to be presumed, but the contrary would be presumed as the sale was to be made by a public officer.

58. Gale *v.* Wells, 12 Barb. (N. Y.) 84, in which the guardian's note was given for the payment of his own antecedent debt, and the indorsement of the ward procured within eighteen months after his majority, while he was still at school, and before any accounting had been had of the guardianship.

59. Willey *v.* Tindal, 5 Del. Ch. 194.

60. Ferguson *v.* Lowery, 54 Ala. 510, 25 Am. Rep. 718.

In McParland *v.* Larkin, 155 Ill. 84, 39 N. E. 609, it was said that where the guardianship had terminated, and the influence of the guardian upon the ward had ceased so that they could be said to stand upon an equality, transactions between them would be regarded as binding.

See also Wickiser *v.* Cook, 85 Ill. 68.

Undue influence will not be supposed to exist on the part of a guardian over his former ward in a settlement had more than three years after the ward attained his majority, and the burden of proof in such case is on the ward or his representative to impeach the settlement. Kittridge *v.* Betton, 14 N. H. 401.

In Rhodes *v.* Robie, 9 App. D. C. 305, a receipt executed by a ward and her husband upon a settlement with her guardian, when she had attained the age of twenty-six years, was held sufficiently conclusive to preclude an additional charge in her behalf against the guardian.

Under acts of 1829, ch. 216, § 7, providing that the release of females of the age of eighteen years, to their guardians, duly executed before the orphans' court, etc., shall have the same effect and operation as if such females were of full age, a release executed by a female ward on reaching eighteen years of age, to one who had been her guardian nine years before, was held not subject to the presumption of fraud commonly indulged in the case of settlements between guardians and wards during the guardianship or immediately after the ward's majority. McClellan *v.* Kennedy, 3 Md. Ch. 234.

In Smith *v.* Davis, 49 Md. 470, the court held that the circumstance that a ward had been partially emancipated from the government and control of his guardian when he was about nineteen, and that he was nearly twenty-two when the settlement in question was made and his release executed, the guardian's account being perfectly simple and understandable by him, relieved the guardian from the burden of sustaining the fairness of the settlement.

should be subjected to the closest scrutiny,[61] and the burden of proof is on the guardian to show everything requisite to make the settlement valid and binding.[62]

The early doctrine that a release differed from other transactions between guardian and ward and was *prima facie* valid, has long since been overthrown.[63]

61. Ela *v.* Ela, 84 Me. 423, 24 Atl. 893; Wade *v.* Lobdell, 4 Cush. (Mass.) 510; Sullivan *v.* Blackwell, 28 Miss. 737; Hall *v.* Cone, 5 Day (Conn.) 543; Carter *v.* Tice, 120 Ill. 277, 11 N. E. 529.

Fish *v.* Miller, 1 Hoff. Ch. (N. Y.) 266. "I take it to be settled that where a release is obtained upon a ward's freshly arriving at age, the whole burden is cast upon the guardian of proving everything essential to make the release a valid discharge; and nothing is more essential than a full, entire and minute account. . . . This court . . . requires that a discharge to the guardian shall not be precipitated; that ample time shall be allowed for consultation and inquiry; that there shall be a full exhibition of the estate and of its administration; and it requires that a guardian who settles his account in secret be prepared to prove that he has fully complied with these requisites unless he can shelter himself under a positive ratification — a deliberate, intelligent, voluntary acquiescence; or such a flow of time as will induce the court to refuse its interposition."

62. McConkey *v.* Cockey, 69 Md. 286, 14 Atl. 465.

But in Pennsylvania a laxer rule seems to prevail. Thus, in Luken's Appeal, 7 Watts & S. (Pa.) 48, after remarking that it was the practice of guardians to settle with their wards out of court, a proceeding which ought to be avoided, and that the ward had the right by the statute to require a settlement in court, the court said: "But if he chooses, after he has arrived at full age, to make a settlement with his guardian without the intervention of the court, and, after having received the amount agreed to be coming to him, to give an acquittance or release to his guardian, he ought not to trouble the court or his guardian either, afterward, without pointing out some mistake or error in the settlement, or showing that a fraud has been practiced on him by his guardian, whereby he is prejudiced. But more especially should he not be allowed to call his guardian to account before the court after a lapse of nearly four years, as in this case, without pointing out or designating some mistake, or specifying a fraud alleged to have been committed, and undertaking to prove the same in some way." In *Ex parte* Cress, 2 Whart. (Pa.) 494, it was said that where a settlement was made between guardian and ward, out of court, to save the expense of an accounting in court, it was at least ungracious for the ward to bring it into court after the lapse of several years; though if at the time of settlement the ward had not had the assistance and advice of friends, or had not been in possession of the account and of the vouchers, or if, having them, he had pointed out to the court any error of charge or credit, an account might properly be ordered even after the period of delay in this case, amounting to four years. In this case, it appeared that the settlement had been had about nine months after the ward came of age, the guardian stating his account and producing his vouchers, which were examined by a third person in the presence of both parties and submitted to a fourth by the ward some time after settlement, who also found them to be correct. See also Roth's Estate, 150 Pa. St. 261, 24 Atl. 685, and Alexander's Estate, 156 Pa. St. 368, 27 Atl. 18.

63. In Kirby *v.* Taylor, 6 Johns. Ch. (N. Y.) 242, Chancellor Kent said: "A simple release of a guardian by the ward, when arriving at maturity, is *prima facie* good; and it is not necessarily to have been presumed to have been obtained by undue influence, like bonds from young heirs, or gifts and conveyances and lucrative bargains from wards, or marriage brokerage bonds."

So in Steadham *v.* Sims, 68 Ga.

It has, however, been held that where the final settlement involves no transaction between the guardian and ward, the presumption against its validity does not apply.[64]

Among the circumstances casting suspicion upon the settlement, a prominent one is the absence of the ward's advisers and friends.[65]

Modifications of Rule.— Where it appears that, owing to the lapse of time, the vouchers and papers showing the elements entering into the settlement have been lost or mislaid, the guardian may be

741, which was a suit by a ward to recover assets of her estate after a settlement with her guardian on attaining majority, the burden was held to be upon her to overcome her receipt by proof that it was fraudulently obtained.

But in Waller *v.* Armistead, 2 Leigh (Va.) 11, 21 Am. Dec. 594, the court referred to the doctrine of Chancellor Kent and said: "We cannot perceive the justness of this distinction. A simple release, by which the guardian is exonerated from accounting, and consequently from paying a just balance which may be in his hands, is as much a gratuity as a direct gift by formal conveyance. It may be as gainful to the guardian, and as disadvantageous to the ward, as a direct gift would be. And if such a practice were tolerated, it would lead to greater mischiefs than would result from sanctioning direct gifts or gratuities; for wards might be much more easily induced to grant releases for unascertained balances of unsettled accounts than to make direct gifts of what they have in possession and know to be their own. Besides, if we say that every acquittance executed by a ward is *prima facie* good, we exempt the guardian from the obligation of showing that it was given in consequence of a just settlement or that if a settlement had been made nothing would have been due to the ward; and we throw upon the ward the burden of proving that the settlement, if one were made, was not fair, or that if a fair one were made, the guardian would be brought in debt. This shifting the burden of proof, in such cases, is entirely contrary to our ideas of propriety." To the same effect, Ferguson *v.* Lowery, 54 Ala. 510, 25 Am. Rep. 718.

Finally, in Fish *v.* Miller, 1 Hoff. Ch. (N. Y.) 266, after referring to the grounds on which the presumption of invalidity rests, the court said: "In my opinion, such reasons apply with greater force to a release precipitately obtained by a guardian than to a direct gift. In the latter case the ward knows precisely what he bestows. The bounty is open. In the former, the benefit covertly given is unknown and uncertain. The temptations to the exercise of undue influence are the same; the liability to be influenced is greater where the fact itself of advantage may be concealed, and that concealment may be effected by fictitious or plausible, yet eroneous, accounts."

64. Wainwright *v.* Smith, 106 Ind. 239, 6 N. E. 333, where it was accordingly held, in an action to set aside a final settlement and recover damages for the guardian's neglect in the discharge of his trust, that it was error to instruct that in suits by wards for the neglect of the guardian the jury should presume in favor of the plaintiffs and against the defendant as strongly as the facts would warrant.

65. Johnston *v.* Haynes, 68 N. C. 509; Harris *v.* Carstarphen, 69 N. C. 416.

On the other hand, in Smith *v.* Davis, 49 Md. 470, the court referred to the fact that in making the settlement in question the parties had the assistance of an able attorney and that three witnesses were present, including the justice of the peace, two of whom, the third being dead, testified to the deliberation and care with which the settlement was made. It then added: "Under these circumstances, it would be inequitable to hold the appellee [guardian] bound to recast the account, or to impose on him the burden of proving that the settlement was in all respects free from error, especially after the lapse

exempted from the *onus* of sustaining its fairness.[66] And a disposition has been shown in the south to refuse to reopen settlements the propriety of which turned on the results of the civil war.[67]

C. Wills. — The unfavorable presumption attaching generally to transactions between guardian and ward during or shortly after the close of the relationship has been extended to the case of wills made by the ward in the guardian's favor.[68]

D. Ratification and Acquiescence. — But notwithstanding the unfavorable presumption which attaches to them, transactions between guardian and ward may be ratified by the subsequent acts or conduct of the latter;[69] but where ratification is sought to be proved by the guardian, he must show that the ward, at the time thereof, was fully acquainted with his rights, and knew the transactions to be impeachable, and that with this knowledge he freely and spontaneously performed the act of ratification.[70] While an express ratification is a matter of fact to be proved, an entire acquiescence may be inferred from lapse of time, omission to complain, and other circumstances; but acquiescence, like ratification, depends for its efficacy on the ward's full and perfect knowledge

of more than six years after the settlement was made."

66. Smith *v.* Davis, 49 Md. 470.

67. Ferguson *v.* Lowery, 54 Ala. 510, 25 Am. Rep. 718.

68. Morris *v.* Stokes, 21 Ga. 552.

In Garvin *v.* Williams, 44 Mo. 465, the court said: "It would be indeed strange and remarkable if any distinction were made, and the doctrine did not apply to wills; that the law should watch with such extreme jealousy and throw every safeguard around the living, and deny it to those who were just ready to sink into the grave on account of disease; that, on grounds of public utility, men of health should be protected because by reason of certain confidences they were placed in a situation where they were liable to be imposed on, yet when they were placed in the same relation, emaciated by sickness, and bereft to a great extent of their intellectual capacity, they should fall a prey to cupidity and avarice. . . . It is true, that while the testator is living his will is ambulatory, and may be altered or revoked; but this principle is of no consequence when he is induced to make and publish it in view of impending death, when no opportunity of reconsideration is open to him." This ruling was reaffirmed in Garvin *v.* Williams, 50 Mo. 206.

Almost the same language was indulged in Meek *v.* Perry, 36 Miss. 190, in which the court also remarked that an indefatigable research by counsel had failed to disclose any authority, ancient or modern, either from reported cases or text-books, warranting any distinction between wills and other transactions. In this case, however, Judge Hendy dissented, urging the difficulty under which a guardian who was entirely ignorant of the will's execution would labor in endeavoring to show his innocence, and saying that the presumption could not apply because a will was the *ex parte* act of the testator and not a deed, transaction, or contract between him and the guardian, in which the latter could be presumed to have had any agency.

69. Wade *v.* Pulsifer, 54 Vt. 45, in which the court said that some of its members were inclined to hold that a gift by wards to their guardian shortly after majority was absolutely void, but that the better rule deducible from the cases was that, though *prima facie* void, it might be confirmed by the subsequent acts or conduct of the donors.

70. Voltz *v.* Voltz, 75 Ala. 555. See also Trader *v.* Lowe, 45 Md. 1.

of all his rights, the burden of showing which is on the guardian.[71]

Closely analagous to the doctrine of acquiescence is the principle that lapse of time, without any claim by the ward, or admission by the guardian of an existing right in the former, coupled with circumstances tending to show the guardian's performances of his trust, raises a presumption of its due execution.[72]

6. Effect of Settlements and Allowances of Guardian's Account. A. Annual or Partial Settlements. — a. *When Relied on by Guardian.* — Annual or partial settlements, made by the guardian during the continuance of his trust, and regularly approved, are *prima facie* correct, and the burden is on the ward to impeach them.[73] But in order to have a *prima facie* efficacy in the guard-

71. Fish *v.* Miller, 1 Hoffm. Ch. (N. Y.) 266.

In Wade *v.* Pulsifer, 54 Vt. 45, in referring to a claim of acquiescence by wards for a period of ten years, in gifts made by them to their guardian shortly before their majority, the court said: "Acquiescence is matter of defense. It is not a line of conduct that, by relation back, makes a gift valid *ab initio;* but is a state of facts arising *ex post facto* that enables the defendant to say that no remedy is available to the claimant to set aside the gift. Hence the burden of proof to show acquiescence is upon the person claiming to hold the gift. And this burden is discharged not by guesswork, but substantial facts must be proved, or the defense fails. To make out the defense it must be shown, 1st, that the wards knew that the gifts were invalid, and that they have the right to set them aside; 2d, that knowing these facts they have consented for unreasonable time that the gifts might stand unquestioned; and 3rd, that this consent is the result of their free and intelligent choice and not the product of the pressure and influence of the confidential relations existing between the parties."

In Southall *v.* Clark, 3 Stew. & P. (Ala.) 338, which was a bill by a former ward to set aside a settlement with his guardian, made ten years before, the court said: "If the settlement made was a fraud on the complainant, and the receipt given by him procured by fraud, it was competent for him to waive all charges, and confirm the settlement, although it was originally effected by the fraudulent practice of the defendant; and this confirmation must necessarily be presumed from so long an acquiescence on the part of the complainant."

72. Gregg *v.* Gregg, 15 N. H. 190, in which it appeared that a father had been appointed guardian of his minor children in 1795 and received certain property belonging to them; that in 1811 his daughter arrived at age, continuing to reside with him the greater portion of his life; that he made some payments for her during minority, and that she made no claim against him or his estate until thirty years after her majority, and after the guardian's death, when she began proceedings for an accounting; and that there was no evidence of any admissions of indebtedness on the part of the guardian after the ward's infancy. It was held that it would be presumed that the money received by the guardian had been paid out and accounted for to the ward, and that the guardian's executor could not be required to render a specific account of items of expenditure, but a general credit, to balance the sums which it was admitted came into the guardian's hands, was sufficient.

73. *Alabama.* — Bentley *v.* Dailey, 87 Ala. 406, 6 So. 274; Radford *v.* Morris, 66 Ala. 283; Voltz *v.* Voltz, 75 Ala. 555.

California. — Guardianship of Cardwell, 55 Cal. 137.

Georgia. — Lewis *v.* Allen, 68 Ga. 398; Dowling *v.* Feeley, 72 Ga. 399.

Illinois. — Wilcox *v.* Parker, 23 Ill. App. 429.

Indiana. — Sherry *v.* Sansberry, 3 Ind. 320.

Iowa. — Warfield *v.* Warfield, 74

ian's behalf, annual or partial settlements must have been allowed and approved by the court, as it is this judicial sanction which makes them evidence for him.[74] Such settlements and allowances are *prima facie* evidence only and are not conclusive.[75]

Iowa 184, 37 N. W. 144; Brewer *v.* Stoddard, 49 Iowa 279; Latham *v.* Myers, 57 Iowa 519, 10 N. W. 924.

Louisiana. — Succession of Tucker, 13 La. Ann. 464.

Maryland. — Owens *v.* Collinson, 3 Gill & J. 25; State *v.* Baker, 8 Md. 44; Magruder *v.* Darnell, 6 Gill 204; Spedden *v.* State, 3 Har. & J. 251.

Mississippi. — Roach *v.* Jelks, 40 Miss. 754; Austin *v.* Lamar, 23 Miss. 189; Heard *v.* Daniel, 26 Miss. 451.

Tennessee. — Matlock *v.* Rice, 6 Heisk. 33.

Wisconsin. — Willis *v.* Fox, 25 Wis. 646.

In Thompson *v.* Thompson, 92 Ala. 545, 9 So. 465, partial settlements regularly made were held *prima facie* evidence that the guardian had satisfactorily accounted for a failure to loan his ward's money.

While only *prima facie* accurate, partial reports and *ex parte* orders in relation to the duties of guardians are not subject to collateral attack, except in actions on the guardian's bond, and even this apparent exception is not a real one, but is only a negation of their enforcement against third persons. Candy *v.* Hanmore, 76 Ind. 125.

The inaccuracy of partial accounts may be shown in opposition to the final account, by the accounts themselves or other testimony. Curatorship of Sarah Beecroft, 28 La. Ann. 824.

Where an account, approved and passed by the court, has been standing for several years unquestioned, there must be clear proof of its incorrectness to justify its vacation and restatement. Rhodes *v.* Robie, 9 App. D. C. 305.

In Davis *v.* Combs, 38 N. J. Eq. 473, annual accountings of a guardian were held to be *prima facie* evidence in his behalf, even though the statute did not require them to be made on notice to the ward.

But in State *v.* Roeper, 82 Mo. 57, the court held that the annual settlement of a guardian did not constitute *prima facie* evidence in his and his sureties' behalf in an action on his bond.

This was an affirmance of State *v.* Roeper, 9 Mo. App. 21, in which such annual settlements had been excluded as merely *ex parte* "and not in any sense judicial in their character." But see State *v.* Jones, 89 Mo. 470, 1 S. W. 355, in which annual settlements and orders of approval seem to have been admitted in a guardian's behalf.

74. Bond *v.* Lockwood, 33 Ill. 212; Glidewell *v.* Snyder, 72 Ind. 528.

Redford *v.* Morris, 66 Ala. 283, in which it was said that to raise such settlements to the dignity of *prima facie* proof they must be made in conformity to law, and *ex parte* settlements or allowances were of no effect, since they were mere nullities. It was accordingly held that an account sworn to, filed and ordered recorded was without effect as *prima facie* proof, there being no decree ascertaining a balance, and no order exhibited by the record further than that directing the account to be recorded.

So in Dowling *v.* Feeley, 72 Ga. 557, returns made out with a view to presentation, but which were never received by the ordinary, and some of which were not even verified, were declared not to be evidence in favor of the guardian or his sureties, unless satisfactorily proved by other testimony.

In Austin *v.* Lamar, 23 Miss. 189, the court, in speaking of annual settlements of a guardian, said that as they were made under oath and regularly allowed by the court, they were *prima facie* evidence, and must be sustained unless the ward could show their incorrectness.

75. *Alabama.* — Cunningham *v.* Pool, 9 Ala. 615.

California. — Guardianship of Cardwell, 55 Cal. 137.

District of Columbia. — Rhodes *v.* Robie, 9 App. Cas. 305.

Georgia. — Lewis *v.* Allen, 68 Ga. 398; Dowling *v.* Feeley, 72 Ga. 399.

b. *When Relied on by Ward.* — The annual or partial settlement of a guardian during the course of his guardianship is not conclusive against him or his sureties, but is *prima facie* evidence only.[76] The theory on which such settlements are admitted against the guardian is that of admissions prejudicial to his interest, from which it follows that their probative force is not dependent on their approval by the court.[77]

Illinois. — Wilcox *v.* Parker, 23 Ill. App. 429.

Indiana. — Candy *v.* Hanmore, 76 Ind. 125.

Louisiana. — Curatorship of Sarah Beecroft, 28 La. Ann. 824.

Maryland. — Spedden *v.* State, 3 Har. & J. 251.

Mississippi. — Heard *v.* Daniel, 26 Miss. 451.

Missouri. — Folger *v.* Heidel, 60 Mo. 284; West *v.* West's Adm'r, 75 Mo. 204; State *v.* Jones, 89 Mo. 470, 1 S. W. 355; State *v.* Booth, 9 Mo. App. 583.

Wisconsin. — Willis *v.* Fox, 25 Wis. 646.

In Succession of Tucker, 13 La. Ann. 464, it was said that annual or provisional accounts filed by a tutor, though sanctioned by law, were not conclusive on the minor unless rendered to him after his majority or emancipation.

76. State *v.* Booth, 9 Mo. App. 583; Lewis *v.* Allen, 68 Ga. 398; Napier *v.* Jones, 45 Ga. 520; State *ex rel.* Rutledge *v.* Holman, 93 Mo. App. 611, 67 S. W. 747; May *v.* May, 19 Fla. 373.

In Olsen *v.* Thompson, 77 Wis. 566, 47 N. W. 20, the holding that orders of a county court disallowing items in the guardian's annual account were not conclusive against the guardian on a final account, though properly received in evidence to show the character of his claims, was made in view of a rule of the court providing that no order in reference to the annual account of the guardian should be conclusive on final settlement, but that it should be competent to examine and pass, in such proceedings, on all the guardian's accounts subsequent to his appointment.

In McClellan *v.* Kennedy, 3 Md. Ch. 234, the rule that accounts of a guardian, passed by the orphans' court and admitting an indebtedness to the ward, were *prima facie* evidence thereof, was applied against the grantees of the guardian claiming under a deed subsequently executed by him. See also Richards *v.* Swan, 7 Gill (Md.) 366.

In Johnson *v.* McCullough, 59 Ga. 212, in holding that a guardian might explain his returns by parol evidence and show the actual truth of his accounts, the court remarked that this rule might be treating too lightly the guardian's solemn admissions, made under oath, approved and recorded, but said that such seemed to be the latest adjudication on the subject. See also State *v.* Paul, 21 Mo. 51.

But in Coffin *v.* Bramlitt, 42 Miss. 194, the court held that an annual account by which a guardian charged himself with a certain sum in par funds could not be impeached or contradicted by proof that the balance stated was money collected in the depreciated issues of broken or suspended banks or in Confederate money, or that the same was at the time invested in Confederate bonds. It said: "Annual accounts of guardians are final and conclusive against them in the court where rendered, and can only be set aside by due course of procedure. Inaccuracies in such accounts, arising from sheer inadvertence or oversight, or from palpable mistake or miscalculation, may, in proper cases, be corrected. Where a guardian, in his annual accounts, has repeatedly stated the balance due his ward in dollars and cents, it will be regarded as constitutional currency, and he will not be permitted to show by parol testimony that such balances were in Confederate notes or in Confederate bonds."

77. In State *v.* Richardson, 29 Mo. App. 595, in referring to the proposed introduction of a certified copy of a guardian's annual settlement in an action on his bond, the court said: "But it is said that the settlement

B. Final Accounts. — a. *When Relied on by Guardian.* — The general rule, sustained by an overwhelming weight of authority, is that the final settlement of a guardian, duly approved by the court, is as conclusive against the ward as any other judgment.[78] But in some instances such accounts are held only *prima facie* evidence against the ward, casting on him the burden of impeaching them.[79]

should not have been received in evidence for the reason that it did not appear to have been passed upon by the court. These settlements are *prima facie* evidence against the guardian and his sureties, and the objection made involves the question whether they are evidence from the fact of their being approved by the court, or from the fact that they are solemn admissions made by the guardian over his signature and under oath. I think it is undoubtedly upon the latter ground that they receive their probative force and upon which they are allowed in evidence. . . . If I am correct in this, the settlement or exhibit became *prima facie* evidence against the guardian and his sureties from the time he filed it in court. It might happen that a guardian would make out and file his settlement, and before its approval, or before offering or exhibiting evidence in support of it, he would abscond. It might never be approved. In such instances the sworn exhibit which he has filed in open court would be evidence against him and his bondsmen."

So if annual settlements are irregular or void, they are, nevertheless, admissions of record that the guardian was on that day indebted to the ward in the sum therein disclosed. Hutton *v.* Williams, 60 Ala. 107.

And returns of the guardian made out with a view to presentation, but which were never received or approved by the ordinary, and some of which were not even verified, may still be used as admissions of the guardian. Dowling *v.* Feeley, 72 Ga. 399.

See also State *v.* Roeper, 82 Mo. 57, in which the court said that when annual settlements were offered by the ward or other person interested in the estate as *prima facie* evidence only of the facts therein contained, there was no good reason for excluding them any more than any other admissions or statements made by an accounting party in the discharge of his duty.

78. *Alabama.* — Crumpler *v.* Deens, 85 Ala. 149, 4 So. 826; Lewis *v.* Allred, 57 Ala. 628; Foust *v.* Chamblee, 51 Ala. 75.

Arkansas. — Reed *v.* Ryburn, 23 Ark. 47.

California. — Lataillade *v.* Orena, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219.

Indiana. — Briscoe *v.* Johnson, 73 Ind. 573; Candy *v.* Hanmore, 76 Ind. 125; State *ex rel.* Coleman *v.* Peckham, 136 Ind. 198, 36 N. E. 28; Holland *v.* State, 48 Ind. 391.

Missouri. — State *ex rel.* Smith *v.* Leslie, 83 Mo. 60; Garton *v.* Botts, 73 Mo. 274; Brent *v.* Grace's Adm'r, 30 Mo. 253.

Mississippi. — Hooker *v.* Hooker, 31 Miss. 448.

79. Rolfe *v.* Rolfe, 15 Ga. 451. Williams Estate (Tex. Civ. App), 45 S. W. 412; Campbell *v.* Silent, 3 Mon. (Ky.) 122; Crooks *v.* Turpen, 1 B. Mon. (Ky.) 183.

Where a ward seeks to open a guardian's final account after his death, on the ground of fraud or mistake, the burden is on her to clearly prove the same. And where a ward appeals from a decree of the probate court, finding certain mistakes in the final accounting of her guardian and accordingly charging him with a certain amount, the burden is on the ward to prove that her guardian should be charged with a larger sum. Durell *v.* Gibson (Me.), 9 Atl. 353.

In Hyer *v.* Morehouse, 20 N. J. L. 125, which was a proceeding to open the final settlement of a guardian, the court held that the party seeking to open the account ought primarily, and before any rule calling on the opposite party to show cause was made, to point out specifically wherein the fraud or mistake complained of consists, and to lay such evidence

Here, again, the probative effect of the settlement, when offered by the guardian, is conditioned on its having received a judicial sanction.[80] But a *prima facie* effect has been given to final settlements though of an *ex parte* character.[81]

b. *When Relied on by Ward.* — The judgment of a probate court on the final settlement of a guardian, asserting the balance due the ward, is also conclusive on the guardian and his sureties.[82] Though

of it before the court as to make out at least a *prima facie* case; and if the court think proper, upon such complaint, to give the parties a hearing, the burden of proof must lie entirely on the complaining party and the account and decree must stand until overthrown by evidence of fraud or mistake.

80. Beedle *v.* State *ex rel.* Small, 62 Ind. 26.

In Moore *v.* Cason, 1 How. (Miss.) 53, an account purporting to be between a guardian and ward, with an indorsement thereon, made in vacation by the probate judge, stating that it had been "examined, audited and allowed," was held not to be evidence against the ward of a balance disclosed therein in the guardian's favor, the indorsement being only a discharge by the judge of the duties required of him by law preparatory to the final settlement; and an order of the probate court in term time, reciting that the guardian "had presented his final settlement," and ordering it to be recorded, at the same time making the guardian an allowance upon the amount expended by him, was also denied effect as evidence against the ward of the existence of any such balance, on the ground that it was not a decree.

81. State *v.* Strange, 1 Ind. 538; Turner *v.* Turner, 104 N. C. 566, 10 S. E. 606.

In Murphy *v.* Murphy, 2 Mo. App. 156, a guardian's settlement of his accounts after a ward's death, but made without the advertisement required by law, was denied any binding or conclusive effect, but was said to have merely the effect of an annual settlement, open to revision and amendment at any time.

But in Burnham *v.* Dalling, 16 N. J. Eq. 144, a final settlement of a guardian's account made without notice by public advertisement, as required by statute, was denied effect even as *prima facie* evidence of the truth of the charges therein made, the ward being thus relieved from the burden of impeaching any of the items.

And in McNutt *v.* Roberts (Tenn.), 84 S. W. 300, a contention that a settlement by a guardian in the county court was *prima facie* correct in an action on his bond and would not be disturbed except on clear proof, was held untenable, it appearing that the complainant ward had arrived at age before the settlement was made, but had no notice thereof, and the settlement itself not purporting to be a final one.

82. *Alabama.* — Waldrom *v.* Waldrom, 76 Ala. 285.

Arkansas. — Norton *v.* Miller, 25 Ark. 108.

California. — Brodrib *v.* Brodrib, 56 Cal. 563.

Illinois. — Gillett *v.* Wiley, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587; Ryan *v.* People, 165 Ill. 143, 46 N. E. 206; Kattleman *v.* Guthrie, 142 Ill. 357, 31 N. E. 589.

Iowa. — Knox *v.* Kearns, 73 Iowa 286, 34 N. W. 861; McWilliams *v.* Kalbach, 55 Iowa 110, 7 N. W. 463; Knepper *v.* Glenn, 73 Iowa 730, 36 N. W. 763.

Ohio. — Braiden *v.* Mercer, 44 Ohio St. 339, 7 N. E. 155.

Pennsylvania. — Com. *v.* Gracey, 96 Pa. St. 70; Com. *v.* Julius, 173 Pa. St. 322, 34 Atl. 21.

Texas. — Hornung *v.* Schramm, 22 Tex. Civ. App. 327, 54 S. W. 615; Bopp *v.* Hansford, 18 Tex. Civ. App. 340, 45 S. W. 744.

Wisconsin. — Shepard *v.* Pebbles, 38 Wis. 373.

A final settlement made by a guardian, in which a balance is found to be due from him to his ward, is evidence against him of a debt of that amount due to his ward, although as a judgment the settlement would be considered void because not

in some jurisdictions such a judgment is given only a *prima facie* effect against the sureties.[83]

7. Actions on Guardian's Bonds. — A. In General. — In an action against the sureties of a guardian to charge them with assets converted by him, the evidence necessary to recover is the same as that required in any ordinary suit for wrongful conversion.[84]

The bond of a guardian on file as part of the records of the probate court is presumed to be genuine;[85] and the identity of the plaintiff with the ward for whom the guardian was appointed has also been in effect presumed.[86] The guardian's admissions in an answer in equity are *prima facie* but not conclusive evidence against his sureties.[87]

Where a ward sues the sureties on the guardian's first bond for assets for which he settled during the life of a second bond, the ward must assume the burden of proving a misappropriation of the assets while the first bond was in force.[88]

B. Burden of Proving Disposition of Assets. — In an action

rendered in favor of any one, and no execution could issue upon it. Hughes *v.* Mitchell, 19 Ala. 268.

83. Kenner *v.* Caldwell, 1 Bail. Eq. (S. C.) 149; Weaver *v.* Thornton, 63 Ga. 655; State *v.* Grace's Adm'r, 26 Mo. 87.

In State *v.* Hoster, 61 Mo. 544, the court held that a guardian's settlement, purporting to be a final one, but not made upon notice, was properly excluded when offered as evidence against the sureties on his bond.

84. McDonald *v.* People, 12 Colo. App. 98, 54 Pac. 863, in which this was said to be the rule in the absence of any order of the court made in the guardianship proceedings by which the plaintiff's claim might be supported.

85. Gravett *v.* Malone, 54 Ala. 19.

86. Where it appears in an action on a guardian's bond that the guardian was appointed for "Robert W. B.," it will be presumed that the father of Robert had but one child of that name, for the purpose of identifying the plaintiff Robert W. with the ward of the defendant. Naugle *v.* State *ex rel.* Burton, 101 Ind. 284.

87. Myers *v.* Wade, 6 Rand. (Va.) 444, in which the admission was that the guardian had received the estate of the infant.

88. State *v.* Paul's Ex'r, 21 Mo. 51. In this case the court said: "From the face of the papers, the surety in the last bond is chargeable with the money sought to be recovered in this suit. Now, as the plaintiff has waived her action on the last bond, and the settlement under it, there is no hardship in imposing on her the burden of the proof that would have exculpated the surety in that bond. She must show that her money was wasted by her curator, whilst Paul was the security. As the law will not presume a default or wrong in the curator, nothing more appearing, the presumption is that the money was in his hands at the time the last bond was entered into, and, consequently, that Paul, the surety in the first bond, was discharged. . . . The surety in the last bond, nothing more appearing, would be liable for the balance found in the hands of the curator at the last settlement. But the plaintiff, waiving the benefit of this presumption against the last surety, as she had a right to do, has assumed that there was no money in the hands of her curator at the time of the last bond and settlement. Then she must make good her assumption and show that her curator spent her money whilst Paul was her surety. This is the legal effect of the record as presented, and its force cannot be broken by reading only parts of it."

See also State *ex rel.* Rutledge *v.* Holman, 93 Mo. App. 611, 67 S. W. 747.

on the guardian's bond, a *prima facie* case for the plaintiff is made by proving that assets came into the guardian's hands by virtue of his trust; whereupon the burden devolves upon the defendants to show that a lawful disposition was made of the property.[89]

II. COMPETENCY AND RELEVANCY OF EVIDENCE.

1. Appointment, Qualification, and Removal. — A. PROCEEDINGS FOR APPOINTMENT. — On an application for the appointment of a guardian for an incompetent person, evidence of the prospective ward's age and infirmity, and the prejudicial situation in which the custody of those in charge of her has placed her, is admissible.[90]

89. Freeman *v.* Brewster, 93 Ga. 648, 21 S. E. 165; State *v.* Richardson, 29 Mo. App. 595, in which a rehearing was granted on the ground that the ruling conflicted with Renfro *v.* Price, 17 Mo. 431, but the holding was reaffirmed on the authority of State *v.* Weaver, *post.*

The earlier Georgia cases (Justices of the Inferior Court *v.* Woods, 1 Ga. 84, and Ray *v.* Justices of the Inferior Court, 6 Ga. 303), in which a doctrine contrary to the text was announced, would seem to have been overruled by Freeman *v.* Brewster, *supra,* and by Weaver *v.* Thornton, 63 Ga. 655, in which it was held that where one, as guardian, receipts to himself as administrator for a certain sum as constituting the ward's estate, the legal effect was to transfer that amount from his hands as administrator into his hands as guardian, whether any property passed into his hands at that time or not; and hence, such receipt made a *prima facie* case of liability against the sureties on his guardianship bond.

In State *ex rel.* Weaver *v.* Weaver, 92 Mo. 673, 4 S. W. 697, which was an action on a guardian's bond given in proceedings for the sale of the ward's realty, the court, in speaking of the burden of showing what disposition had been made of the proceeds of the sale which came into the guardian's hands, said: "The obligation of the defendants was to pay a certain sum of money, to be void upon the condition that the guardian should account for the proceeds of the sale of the ward's real estate; the plaintiff made out a *prima facie* case when he showed that a sale had been made and that the proceeds of the ward's real estate had come into the hands of the guardian. It then devolved upon the defendants to show that those proceeds had been accounted for."

In Howell *v.* Williamson, 14 Ala. 419, it was held that in an action on a guardian's bond, the mere introduction of the bond in evidence did not make a complete case for the plaintiff, casting the burden of proving performance of the condition on the defendant; but that when the plaintiff showed that the defendant had received property as guardian to which the plaintiff was entitled, the burden of proof was then shifted in respect of such property to the defendant, who must show that he made a proper disposition of it. To require the plaintiff to prove that the property had been disposed of according to law would require him to prove a negative, the truth of which was peculiarly within the defendant's knowledge. It was further said that, property having come into the guardian's possession, the law presumed a continuation of such possession and thus fixed a *prima facie* liability on the guardian to account therefor.

90. *In re* Streiff, 119 Wis. 566, 97 N. W. 189, in which the court held that evidence of the prospective ward's mental weakness resulting from old age and infirmity and requiring tender care at all times, and that those with whom she resided, because of her broken-down condition, were able to keep her and did keep her in a state of subjection to their will; that they kept her relatives away from her and ill-treated her, and that she was too weak and infirm to protect herself; that they obtained

The footing on which an applicant for appointment as guardian stood with the parents of the child or either of them while they were living, is important, and any declaration or act which throws light thereon is relevant.[91]

B. Proof of Appointment. — Record evidence of the appointment of a guardian is not indispensable, and where the record cannot be found the appointment may be shown by other proof.[92] But the record of an appointment made by a domestic court of record cannot be impeached by parol evidence showing a want of jurisdiction, where the defect does not appear on the face of the record itself.[93] Nor can the record be aided by extraneous evidence.[94] It need hardly be added that record evidence of the appointment is admissible.[95]

Recitals in Guardian's Bond. — The recital in a guardian's bond of

from her all her property without consideration and then increased the severity of their treatment; that she was mentally and physically powerless to resist or escape — this evidence bore very strongly upon the ultimate issue of fact to be solved whether she was mentally competent to have the charge and management of her property, and was consequently properly admitted.

91. Janes *v.* Cleghorn, 63 Ga. 335, in which it was consequently held that on application for appointment as guardian, a contestant, who urged and supported his own right to the appointment on the ground of a contract with the child's deceased father by which the latter relinquished to him the parental right, might testify to such contract as a part of the child's history in order to advise the court in the selection of a guardian, even though he could not testify to it to establish his strict legal right, the other party to the contract being dead.

92. Fink's Appeal, 101 Pa. St. 74. But such proof as, for instance, the admissions of the guardian himself, cannot be introduced until a foundation has been first laid by proof of the loss or destruction of the record of the court by which the letters of guardianship were alleged to have been granted. Halliburton *v.* Fletcher, 22 Ark. 453.

Contra. — The appointment of a guardian for a free person of color is necessarily a matter of record, and it is error to allow parol proof thereof. Bryan *v.* Walton, 14 Ga. 185.

93. Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136, the holding being made in view of a constitutional provision in Minnesota making probate courts courts of record, by which is extended to them the presumption of jurisdiction in particular cases, which belongs to proceedings in courts of record.

94. Hutchins *v.* Johnson, 12 Conn. 376, 30 Am. Dec. 622, in which it was held that the failure of the record of a conservator's appointment, to show that notice of the application therefor was ever given, could not be aided by the fact that the files of the court showed a summons and an officer's return.

95. The recording of letters of guardianship is proper and the record is competent evidence of them, without producing the original letters or accounting for their absence; nor does the fact that the transcript of the original letters and order of appointment was made by the clerk of the probate judge, instead of by the judge himself, affect the case; and the fact that the transcription was some years after they were originally made out does not deprive the records of their evidentiary value. Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136.

It is no objection to the admission as evidence of a copy of the record appointing a guardian, that the certificate to such record embraces a copy of the records of the accounts of such guardian and other proceedings of the court, as well as the record of the appointment itself. Halliburton *v.* Fletcher, 22 Ark. 453.

his appointment is evidence thereof, and is generally held to be sufficient proof.[96]

C. Subsequent Contest Over Appointment. — The admission of matter *res inter alios acta,* offered by a guardian to show his good faith in securing the appointment of his successor, is not ground for reversal.[97]

A guardian's personal representative has been held precluded from contesting the propriety of his appointment.[98]

D. Qualification. — The fact of qualification must be proved by record evidence where that is attainable.[99]

E. Proceedings for Removal. — In proceedings for the removal of a guardian on the ground of unsuitableness, evidence of his conduct and position adverse to his ward's interest is admissible, though occurring after the commencement of the proceedings.[1]

2. Reception of Assets. — A. In General. — A tutor's receipt, formal and authentic, for the minor's share of the purchase price of

96. Ryan *v.* People, 165 Ill. 143, 46 N. E. 206.

Hayden *v.* Smith, 49 Conn. 83, in which the guardian and his sureties were held to be precluded from contesting a recital of his appointment.

The recital of the guardian's appointment in his bond is an admission thereof when suit is brought thereon. State *v.* Richardson, 29 Mo. App. 595.

97. Where, in a suit by wards against their former guardian, who, the plaintiffs allege, fraudulently procured the appointment of his successor, to whom he turned over, as property of the estate, indebtednesses due to himself from such successor, the admission of evidence to show the good faith of the defendant, that he consulted the mother of the wards and that the selection of the succeeding guardian was made in accordance with her wishes, is not ground for reversal, notwithstanding such matters are *res inter alios acta.* Manning *v.* Manning, 61 Ga. 137.

98. In Munroe *v.* Phillips, 64 Ga. 32, which was a suit against the administratrix of a guardian by wards who were under guardianship prior to the civil war as free persons of color, the court refused to permit the defendant to contest the freedom *de jure* of the plaintiffs during the period of guardianship, saying that the defendant's intestate could not have been a guardian of slaves, as there was no law for it, and that if he acted as plaintiff's guardian and the plaintiffs were *de facto* free and all of age, as the evidence showed, it was material whether they were free *de jure,* or not; and other evidence showing that funds came to the wards whose title thereto the guardian recognized by his accounts. The guardian stood committed to the theory that his wards had acquired their freedom by some lawful means, and was also committed to their ownership of the funds; and that his administratrix must abide the consequence.

99. Clarke *v.* State, 8 Gill & J. (Md.) 111.

1. Gray *v.* Parke, 155 Mass. 433, 29 N. E. 641, in which the court said: "His acts, after the filing of the petition and down to the time of the hearing, tended to show his real position with reference to the interests of his ward at the time when she brought the petition for his removal, and could properly be considered upon that question [that of suitableness]. We do not intend to intimate that, if the petition had alleged misconduct instead of unsuitableness, acts of alleged misconduct occurring after the filing of the petition could have been given in evidence, or have justified a decree of removal; but the suitableness or unsuitableness of a person for a particular trust is something upon which his subsequent acts and conduct often throw the strongest and clearest light."

realty makes proof of itself and cannot be contradicted by parol evidence.[2]

So a guardian's receipt to himself, as administrator, for cash belonging to the ward, is admissible to negative the claim that the property was received otherwise than in cash, and is conclusive against him on that question.[3]

In proceedings for the final settlement of the accounts of a curator who has also been administrator of the estate of the minor's father, evidence is admissible that, as administrator, he received money with which he has not charged himself in the settlement of either fiduciary account.[4]

An appraisement or inventory of the ward's property is not conclusive against the guardian as to the amount thereof.[5]

Where a guardian, suing for his ward, has established a right in the latter to the property in suit, he cannot afterward introduce evidence of a prior right in himself.[6]

B. Loss of Assets. — Vouchers showing that expenditures by the

2. Mather *v.* Knox, 34 La. Ann. 410.

3. State *ex rel.* Koch *v.* Roeper, 9 Mo. App. 21, in which such receipt was also said to make a *prima facie* case against the guardian's sureties.

Crawford *v.* Brewster, 57 Ga. 226, in which, in view or such receipt, it was also held proper to exclude the testimony of a witness that if the notes alleged to have been taken by the guardian had not been collected in negroes or Confederate money they could not have been collected at all.

4. *In re* Final Settlement of Wood, 71 Mo. 623. In this case the court said: "The evidence was offered to show not only that it could have been, but that it was, collected; that he actually had in his hands, as administrator, an amount of money to which his ward, as one of the distributees, was entitled. If a stranger had been administrator of that estate, and this curator had known that he had money in his hands to which his ward was entitled, and permitted a final settlement of that estate to be made, without making a proper effort to collect it for his ward, would it have been any answer to a suit against him as curator for such neglect of duty that there had been a final settlement of such estate? The lying by and permitting such final settlement to be made, without collecting the money due his ward, is the very ground of complaint. The curator having also been such administrator, so far from being in a better, is in a worse position than if another had been the administrator of that estate; for, in the latter case, he would only have had an action to recover the money for the ward, whereas in the former the money was in his possession, and he had but to credit his ward with the amount to which he was entitled."

5. Magruder *v.* Darnell, 6 Gill (Md.) 204.

Abstracts of inventories recorded as required by statute to preserve the mortgage of minors are not evidence of the validity of the minor's claim, much less are they conclusive against the tutor as to the amount appearing on them to be due the minor; and as the general mortgage created by recording these abstracts is not fixed in amount by such recording merely, so a special mortgage on a particular piece of property executed under permission of the court to replace that general mortgage does not irrevocably fix the sum stated therein as that due the minor. Succession of Theurer, 38 La. Ann. 510.

6. Edwards *v.* Ford, 2 Bail. (S. C.) 461.

guardian's predecessor were proper, are admissible to show that he was without fault in failing to sue the predecessor's bond.[7]

Where it is claimed that a guardian has permitted a loss of assets by failing to resist an administrator's sale of realty, the record of the sale proceedings is admissible to show the amount of damages claimed.[8]

3. Management of Estate. — A. In General. — Where a statute disqualifies a guardian to testify to any transaction with his ward unless called by the opposite party or the court, he is precluded from testifying against the ward in a proceeding involving the management of his estate.[9]

The account book of a deceased guardian containing his account with his ward is not admissible as a trader's book of accounts.[10]

B. Investments and Income. — Identity of Funds. — A guardian's declaration at the time of making a loan has been held competent evidence that the money loaned belonged to the estate of the ward;[11] and the identity of the fund deposited by him is provable by parol, notwithstanding a certificate of deposit taken in his own name.[12]

Interest on Investments. — The administratrix of a guardian cannot give in evidence his self-serving declarations as to the rate of interest at which he had loaned the ward's money, and as to his care and diligence in doing so.[13]

Evidence in a guardian's behalf of the general insolvency of the people of his own and adjacent counties is competent on the question of his negligence in failing to promptly loan funds of the estate.[14]

Evidence of a creditor that he received payment from the guardian is admissible to support a credit claimed by the latter.[15]

7. And this, though they were not sworn or approved by the court. Young *v.* Gray, 65 Tex. 99.

8. This is because it tends to show the extent of the real interest of the heirs in the land. Anthony *v.* Estes, 101 N. C. 541, 8 S. E. 347.

9. Garwood *v.* Cooper, 12 Heisk. (Tenn.) 101. The statute in question (Acts 1869-70, ch. 78, § 2) provided that in actions or proceedings by guardians in which judgment might be rendered for or against them, neither party should be allowed to testify against the other as to any transaction with or settlement by the ward, unless called to testify by the opposite party or requested to do so by the court.

10. Fowler *v.* Hebbard, 40 App. Div. 108, 57 N. Y. Supp. 531, in which, however, the fact that the ward had access to the book at all times, and knew of all of the entries and agreed thereto, was held to render it admissible.

11. Beasley *v.* Watson, 41 Ala. 234, in which such declaration was admitted in the guardian's own behalf as part of the *res gestae*.

The recital in a guardian's return, made eight years after taking a note payable to himself individually, that it represented the ward's funds, is insufficient to identify the note so as to permit its introduction in evidence. Crawford *v.* Brewster, 57 Ga. 226.

12. Beasley *v.* Watson, 41 Ala. 234, in which such parol evidence seems to have been received to show the pertinency of the certificate.

13. Royston *v.* Royston, 29 Ga. 82.

14. Ashley's Adm'x *v.* Martin, 50 Ala. 537.

15. Fowler *v.* Hebbard, 40 App. Div. 108, 57 N. Y. Supp. 531.

The ward, in contesting credits claimed by the guardian for board, etc., may show that the guardian furnished nothing,[16] or that the obligations have been paid for, or discharged in some other way;[17] and on an issue as to whether the guardian intended, at the time of furnishing supplies, to charge therefor, evidence of all the equities of the case is admissible.[18]

Vouchers. — It is not absolutely essential that a credit be supported by a voucher, and the absence thereof will not warrant the exclusion of oral testimony to sustain it.[19]

A receipt given by a ward upon receiving a payment from his tutor after his majority is admissible as a voucher.[20]

On appeal from a decision of the ordinary on a guardian's return, vouchers presented before him should not be permitted to go to the jury[21] as part of the case for trial, since the vouchers form no part of the issues.

C. COMMISSIONS. — Where a guardian's commissions are fixed by statute and no special or extraordinary services appear to have been rendered by him, it is error to examine witnesses as to the value of his services.[22]

Where it is claimed that a guardian has duplicated his commissions, an inquiry into the circumstances surrounding the former and the present allowances is proper.[23]

16. Evidence that a minor was an admitted member of the family of his grandmother, with whom his uncle, who was afterward made his guardian, also resided, and was provided for as a member of the grandmother's family during a period for which the guardian afterward sought to charge him for board and clothing, is admissible in the ward's behalf in a proceeding for the settlement of the guardian's accounts. Bondie *v.* Bourassa, 46 Mich. 321, 9 N. W. 433.

17. Jennings *v.* Kee, 5 Ind. 257.

18. In Ela *v.* Brand, 63 N. H. 14, which was a proceeding for the settlement of a guardian's final account, he being also the ward's stepfather, and the issue being as to his right to an allowance for the support of the wards, the court admitted evidence of the understanding of the wards and their mother relative to the question of their support, and also the testimony of one of the wards that he would not have lived with his stepfather if he had supposed that he was to pay for his board; and the court further remarked that if the wards had requested the guardian to take payment out of their property, this request, though not legal authority for the payment, would have been admissible in evidence on the general question of the equitable application of the trust fund.

Proof of the parol declarations of a guardian that she did not intend to charge her ward for board is admissible to repel a charge for board in her lifetime, exhibited by her representatives after her death. Hooper *v.* Royster, 1 Munf. (Va.) 119.

19. Hutton *v.* Williams, 60 Ala. 107, the decision, however, being made under a statute providing that if any person interested except to the guardian's account, the court "shall proceed to hear the proof and correct errors," etc.

20. Succession of Kidd, 51 La. Ann. 1157, 26 So. 74.

21. Hendry *v.* Hurst, 22 Ga. 312. But it seems that the vouchers would have the same effect as evidence which they had before the ordinary, though they would give no additional force from the fact of the ordinary's judgment sustaining the guardian's account.

22. Neilson *v.* Cook, 40 Ala. 498.

23. Thus, it is proper to ask the

D. Payment of Claims. — Verbal directions by a probate judge to a guardian to pay a claim against the ward's estate and take a receipt for it are not admissible in the guardian's behalf.[24]

Proof may be received to show that evidence of indebtedness given by a tutor in his own name in fact represented the obligation of the estate.[25]

E. Misappropriation and Conversion of Assets. — The fact that a guardian conceals the existence of assets is a strong circumstance to show an intent to appropriate them.[26]

An order allowing a claim against the estate of an insane party is not evidence against her sureties of her conversion of property of the ward.[27]

On the question whether a guardian has paid over the estate to the ward, evidence is admissible that certain property received by the ward from the guardian was transferred in discharge of the guardian's liability;[28] and after a long period of time, and the death of both guardian and ward, the circumstances surrounding them and the transactions between them also become relevant.[29]

F. Actions by Third Persons. — In an action against the guardian for necessaries furnished the ward, evidence of the guardian's voluntary promise to pay the similar claim of another person is competent.[30]

Where, in an action against a ward on his contract, it is urged

guardian whether he did not draft the decree allowing such commissions, whether there was any contest by the special guardian appointed on the former accounting in respect to the amount of commissions; whether there was, in fact, any argument or taking of evidence in regard to that matter, and whether the fact of duplication was made known to the surrogate when the second allowance was made. Matter of Hawley, 104 N. Y. 250, 10 N. E. 352.

24. This is because whatever is done by a court of record must appear by the record. Folger *v.* Heidel, 60 Mo. 284.

25. Leonard *v.* Hudson, 12 La. Ann. 840, in which it was said that such testimony did not contradict any part of the note given by the tutor, and would authorize a judgment thereon against a tutor subsequently appointed.

26. Eberhardt *v.* Schuster, 10 Abb. N. C. (N. Y.) 374.

27. McDonald *v.* People, 12 Colo. App. 98, 54 Pac. 863, in which it was said that the terms of the sureties' bond bound them that the guardian should render accounts as required by the court, and comply with the lawful orders of the court, in view of which only orders made in the guardianship proceedings would be of any effect against them.

28. Chapman *v.* Chapman, 13 La. Ann. 228.

29. *In re* Pierce's Estate, 68 Vt. 639, 35 Atl. 546, in which, after a lapse of thirty years and the death of both the parties, evidence was received to show that the financial condition of the ward and the transactions between him and the guardian about the time the former obtained his majority were such as to render it probable that he would demand and receive, and that he did in fact receive, the amount due him.

30. Cook *v.* Bennett, 51 N. H. 85, in which such evidence was said to be admissible both as tending to show the guardian had in his possession and control property of the ward, and also upon the question of the probability whether the guardian, recognizing his liability in the one instance, did not also consider himself liable in the other.

that the guardian assented thereto, his assent to other contracts made by the ward is irrelevant.[31]

4. Sale of Realty. — A. In General. — A deed conveying the land of minors and signed by one purporting to be their guardian is inadmissible against them without proof of the pretended guardian's authority to act.[32]

A deed purporting to convey the realty of a ward may be shown to have been, in fact, a transaction to secure by mortgage a personal debt of the guardian.[33]

B. Record Evidence. — The steps in proceedings by a guardian to sell realty should be shown by record evidence, where that exists, but where the record has been lost or destroyed, secondary evidence may be given.[34]

31. Prescott *v.* Cass, 9 N. H. 93.

32. House *v.* Brent, 69 Tex. 27, 7 S. W. 65.

A guardian who has sold his ward's realty cannot afterward testify in derogation of the title he has thus made. Williams *v.* Pollard (Tex. Civ. App.), 28 S. W. 1020, in which it was sought to introduce the guardian's testimony as to his reasons for wanting to make the sale.

33. *In re* Pierce's Estate, 68 Vt. 639, 35 Atl. 546.

34. In Blanchard *v.* DeGraff, 60 Mich. 107, 26 N. W. 849, which was an action by one claiming under a ward against a purchaser at the guardian's sale of the ward's realty, the court, in speaking of the statute providing that in such cases the sale is not to be avoided on account of any irregularity in the proceedings provided certain essentials appear, and of the claim that the sale was invalid by the failure to file and record the proceedings, a requirement not made essential by the statute, said: "The questions are, was the sale licensed, the bond given, the oaths taken, the notice of sale given, and the premises sold at public auction and now held by one who purchased them in good faith? Of course these things must be established by the best evidence, and by the record, when the record exists and can be obtained; if not, then the next best evidence may be resorted to. If the record or the original papers have been lost or destroyed, without fault or fraud on the part of the defendant, their contents may be given in evidence as in other cases. . . . It is suggested, however, by the learned counsel for the plaintiff, that while it may be proper to show the contents of lost files or records, such proof can only be made after it has first been made clearly to appear that such files or records once existed, and that the evidence upon this point was not only very unsatisfactory, but entirely insufficient to be submitted to the jury. It is true the testimony in regard to some of the things required to be reduced to writing and signed and sworn to by the guardian is somewhat vague and uncertain; but, when it appears that in making the papers the judge of probate adopted the ordinary blanks in use for that purpose, the testimony is greatly aided, and is about as definite and satisfactory as could well be expected after a lapse of eighteen years, and we do not feel at liberty to say it should not have been submitted to the jury. To hold otherwise, we think, would not be in harmony with the liberal view heretofore taken by this court in such cases, and might prove destructive of hundreds of titles long since obtained, and regarded by all the parties interested as well settled, derived through the early proceedings in our probate courts."

The original affidavit of appraisers in proceedings by a guardian for the sale of the ward's realty, and their written appraisement, and the deed of the guardian, though never reported to the court, are admissible in evidence to show the proceedings of the guardian under the court's order. Robert *v.* Casey, 25 Mo. 584. In this case the court said that the

C. Proof of Notice. — A mode of proving the service of a notice of a guardian's sale, pointed out by statute, is not exclusive, but other evidence may be received.[35]

Slight irregularities in the affidavit of proof of notice are immaterial.[36]

5. Transactions Between Guardian and Ward. — A. Settlements in General. — The judge of probate may receive a settlement between a guardian and his former ward, made out of court, as evidence that the guardian ought not to be required to settle a further account.[37]

Where a ward sues to set aside the settlement of a guardianship negotiated with the guardian by the ward's husband, evidence is admissible to show that the settlement was made with her knowledge and authority.[38]

A guardian is not concluded by the considerations named in deeds from a third person to himself and from himself to the ward, where the transaction is attacked by the ward as fraudulent.[39]

affidavit and appraisement were not matters of record but proceedings *in pais*, and the principle that a court speaks only by its records was not applicable.

35. Larimer *v.* Wallace, 36 Neb. 444, 54 N. W. 835.

How. Stat., § 7498, provides that proof of the publication of notice of a sale of realty by a guardian may be made by the affidavit of the printer of the newspaper, or of his foreman or principal clerk; while § 6047 (equally applicable to guardians' sales) provides that an affidavit of a personal representative, or of some other person having knowledge of the fact, that notice of the sale by a personal representative was given, shall be admitted as evidence of the giving of such notice. *Held*, that an affidavit of publication made by one who described himself as bookkeeper of the paper, while not a compliance with § 7498, was sufficient proof under § 6047, being couched in positive affirmative language, and therefore presumably made on his own knowledge. The mode of proof prescribed by § 7498 is not exclusive of every other. Schlee *v.* Darrow's Estate, 65 Mich. 362, 32 N. W. 717.

36. Dexter *v.* Cranston, 41 Mich. 448, 2 N. W. 674, in which it was said that the objection that the affidavit was made by one describing himself as foreman of the paper in which the notice was published, instead of as foreman of the printer of the paper, as specified in the statute, was untenable and more nice than wise.

But an affidavit to prove the publication of notice must be made by the proper person. Schlee *v.* Darrow's Estate, 65 Mich. 362, 32 N. W. 717, in which an affidavit of the publication of an order for the hearing of a guardian's petition to sell real estate, made by the bookkeeper of the newspaper in which the publication was made, was held not to be evidence of the publication of the order.

37. Kittridge *v.* Betton, 14 N. H. 401.

38. Trader *v.* Lowe, 45 Md. 1, in which evidence that a few weeks after the ward's marriage, her guardian, who was also her father, proposed to her and her husband a settlement of the guardianship, whereupon the ward said that she did not wish to go to town, and if the matter could be attended to by her husband without her going she would rather not go and would assent to what they did, was held admissible for the purpose stated in the text.

39. Smith *v.* Davis, 49 Md. 470, in which the court said: "The deeds are altogether collateral to the subject-matter of inquiry. They are introduced as evidence only, and the parties are not estopped to show the real truth of the transaction by other

B. Receipt and Release. — A ward's receipt, given to the guardian, does not conclude the former, but may be explained or impeached by extraneous evidence,[40] and even where under seal, is not available to the guardian as against a mistake which he admits.[41]

But a release to the guardian is evidence of a receipt of assets by the ward.[42]

C. Ratification. — A ward may explain the acceptance of a bill and the execution of a release by her relied on by her guardian as constituting a ratification of a prior settlement.[43]

6. Accountings and Settlements. — A. Proceedings for Accounting. — Jurisdiction of the person of the ward in proceedings for an accounting and settlement with the guardian cannot be shown by parol evidence.[44]

evidence outside of the deeds. But especially is this so in the present case. Here the ground of the suit is the alleged fraud of the appellee [the guardian]. To sustain the charge of fraud, the deeds are offered in evidence, and the statement therein of the amount of consideration is relied on to establish the charge. In such case, it is clear that to repel the charge of fraud the appellee is equitably entitled to prove the actual cost of the land to him, and the real consideration paid therefor by the appellant."

40. Trader *v.* Lowe, 45 Md. 1; Gillett *v.* Wiley, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587; Beedle *v.* State *ex rel.* Small, 62 Ind. 26.

On proceedings for the final settlement of guardianship accounts, evidence on behalf of the ward that a receipt given by him on a private settlement between the two was obtained by false and fraudulent pretenses is admissible. Wade *v.* Lobdell, 4 Cush. (Mass.) 510.

41. Felton *v.* Long, 43 N. C. 224.

42. Trader *v.* Lowe, 45 Md. 1.

A release of all claims against a guardian concerning specific personal property is evidence of the delivery of such property to the releasor, his ward. Magruder *v.* Darnell, 6 Gill (Md.) 204.

But a receipt given by a ward to his tutor for a certain amount paid on the ward's reaching majority, but without, at the time, a final adjustment and settlement of the tutorship, while it shows the fact of an indebtedness to the extent of the sum therein mentioned, and of the payment thereof, does not acknowledge the existence of a further indebtedness, or disclose, fix, or recognize the ultimate balance due. Succession of Kidd, 51 La. Ann. 1157, 26 So. 74.

43. In a suit by a ward to set aside a settlement of the guardianship negotiated between the guardian, who was also her father, on the one hand, and her husband on the other, the ward's evidence was admissible that the nature of a release then made by her husband to the guardian was not known to her until she consulted counsel and was advised that its effect was to discharge the guardianship absolutely, and that so believing, and with the full knowledge of all the facts, she accepted a bill of sale and afterward indorsed thereon a release; such acts being relied on by the guardian as constituting a ratification of the settlement. Trader *v.* Lowe, 45 Md. 1.

44. In a proceeding to compel an accounting by a guardian and to set aside what purports to be a final account, it is not competent to permit the probate judge and clerk to testify that the ward was present in the court when the guardian's account was presented, the only proper evidence that the ward had notice of the proceeding or waived notice by his personal appearance being the record of the court. Sullivan *v.* Blackwell, 28 Miss. 737.

Where it appears by the record of the guardian's final settlement that the ward was not represented therein by a guardian *ad litem*, the defect in the jurisdiction of the court cannot be cured by parol evidence. Hutton *v.* Williams, 60 Ala. 107.

On a final settlement, the guardian is bound to answer specifically under oath all questions concerning his account.[45]

The account of the tutor cannot be amplified by verbal testimony[46] on a final settlement; but the records of previous annual settlements, made by the guardian, may and should be looked to as evidence.[47]

B. Admissibility of Settlements and Allowances of Guardian's Accounts. — The guardian's settlements and the allowances thereof are admissible in evidence for various purposes, instances of which will be found in the note.[48]

Where a ward reads in evidence a portion of the guardian's

45. Wade *v.* Lobdell, 4 Cush. (Mass.) 510.

46. The account of a tutor must be in writing and be a full and complete account of all moneys received or paid by him and of all property of the estate, and it cannot be amplified by verbal testimony, for the heir is not cited to answer a verbal account to be developed by oral testimony during the trial. Tutorship of Minor Heirs, 45 La. Ann. 134, 12 So. 12.

47. Bentley *v.* Dailey, 87 Ala. 406, 6 So. 274.

48. A settlement of a guardian's account by the county court is the best evidence of matters contained therein, as the vouchers on which it was made may have been lost. Tabb *v.* Boyd, 4 Call (Va.) 453.

Guardian's returns referred to in the testimony of a competent witness and testified by him to be correct, are admissible as a part of such testimony and as a sworn statement in corroboration thereof. Coggins *v.* Flythe, 113 N. C. 102, 18 S. E. 96.

In Richards *v.* Swan, 7 Gill (Md.) 366, which was an appeal by wards to set aside their guardian's conveyance to a third person as fraudulent toward themselves, the court held that a duly authenticated copy of an account proved by the guardian and passed by the orphans' court was *prima facie* evidence to show that on the date of its allowance the guardian admitted that the wards were minors and that he was their guardian, and that as such he was indebted to them in the amount stated in the account. It also held that these admissions were competent against the guardian's grantee, having been made prior to the conveyance attacked as fraudulent. See to the same effect McClellan *v.* Kennedy, 3 Md. Ch. 234.

Orders of the probate court approving payments by a guardian to the ward's mother for the ward's support, together with the accounts and claims upon which the court acted in making the orders, are competent evidence for the defense in an action on the guardian's bond. Brewer *v.* Stoddard, 49 Iowa 279.

In an action on a guardian's bond, the reports of the guardian, current and final, are admissible in evidence for the purpose of identifying certain notes of insolvent persons which the guardian had taken, without security, for the rents of his ward's real estate. French *v.* State *ex rel.* Manifold, 81 Ind. 151.

In State *v.* Jones, 89 Mo. 470, 1 S. W. 355, which was an action on the bond of a guardian of an insane person, the guardian was denied in the court below any compensation on the volume of business done in carrying on the business of his ward, on the theory that he had no right to do this. After sustaining the guardian's power in the premises the court said: "The annual settlements and the orders of approval made thereon, in this case, were competent evidence to show, and they do show, that the business was carried on under the eye and supervision of the court, and that is sufficient, though no previous order therefor was procured."

Orders of a county court, disallowing items in a guardian's annual account for the support of his ward, were properly received in evidence for the purpose of showing the character of the claims made by him in regard to the matter. Olsen *v.* Thompson, 77 Wis. 666, 47 N. W. 20.

An annual settlement is competent

return, the defense may introduce the rest,[49] and must do so if it desires to have the whole admitted in evidence.[50] But the record of a final settlement, though reciting the approval of the guardian's report and his discharge, does not preclude evidence that the balance ascertained to be due the ward has never been paid.[51]

7. Actions on Guardian's Bonds. — Evidence impeaching the jurisdiction or authority of the court originally requiring the bond cannot be introduced by the defendant.[52]

Recitals in the bond of the names of the sureties are sufficient evidence thereof.[53]

Admissions of a guardian, in order to be admitted against his sureties, must have been made during the period of his trust.[54]

Judgments and unsatisfied executions against the guardian, for his misconduct as such, have been held admissible against his sureties.[55]

against the guardian's sureties as tending to show a liability for the amount therein stated. State *v.* Booth, 9 Mo. App. 583.

Annual settlements, when offered by the ward or other person interested in the estate as *prima facie* evidence of the facts therein contained, are admissible as admissions or statements made by an accounting party in the discharge of his duty. State *v.* Roeper, 82 Mo. 57.

But in Royston *v.* Royston, 29 Ga. 82, the administratrix of a deceased guardian was not allowed to put in evidence, in a suit by the ward to compel an accounting, returns made by her of moneys which she had paid out after the guardian's death, and of moneys paid out by the guardian in his lifetime but not returned by him to the court of ordinary.

Effect of settlements as evidence, see *ante*, "I. Presumptions and Burden of Proof, 6. Effect of Settlements and Allowances of Guardian's Accounts," and notes 73-83, inclusive.

49. Munroe *v.* Phillips, 64 Ga. 32, in which a ward, suing the personal representative of her guardian, read in evidence two out of a number of the intestate's returns, which had all been made at the same time and sworn to in the same affidavit, and it was held competent for the defendant to introduce the rest, and for the jury to consider the whole as one entire document, giving more or less credit to the several parts as they deserved.

50. Dowling *v.* Feeley, 72 Ga. 399, in which the ward, on introducing an incomplete return, was held not bound to introduce also the accompanying receipts, etc., referred to therein as vouchers, but it was incumbent on the defendant, if he desired to have the whole admitted in evidence, to introduce them.

51. Naugle *v.* State *ex rel.* Burton, 101 Ind. 284, in which such evidence was said not to contradict the record.

52. United States *v.* Bender, 5 Cranch C. C. 620, 24 Fed. Cas. No. 14,567.

53. Ryan *v.* People, 165 Ill. 143, 46 N. E. 206.

54. Admissions made by a guardian before he became such are not binding on the sureties on his bond, and are inadmissible in a suit on the bond, though he also is a defendant thereto. Johnson *v.* McCullough, 59 Ga. 212.

Admissions of a guardian, made after his letters of guardianship have been revoked, ought not to be received in evidence to charge his co-guardian, or the sureties on their bond; nor would the fact that the guardian making the admission was dead at the time of the trial alter the case, it appearing that the admission was not particularly against his interest. Freeman *v.* Brewster, 93 Ga. 648, 21 S. E. 165.

55. Where a guardian pays a balance shown by his final account to be due the ward, by transferring a worthless note and mortgage, taking

from the ward a discharge and an authority to enter a decree with the surrogate judicially settling his account and discharging him and his bond, and this discharge and decree are afterward set aside for the guardian's fraud, and judgment entered for the ward for the balance of account, such judgment is evidence against the sureties on the guardian's bond and is *prima facie* binding on them; and in the absence of evidence rebutting inferences deducible from the judgment roll, it is proof of the fact of the guardian's liability to the ward, and is competent evidence of his fraud. Douglass *v.* Ferris, 44 N. Y. St. 710, 18 N. Y. Supp. 685.

A dormant judgment in favor of a ward against her guardian, with the entry of *nulla bona* on the execution issued thereon, made before dormancy supervened, is admissible to prove a *devastavit* in an action by the ward against the guardian's sureties. Carter *v.* Colcby, 8 Ga. 351.

An execution returned *nulla bona*, issued on a decree of a court of equity against a guardian on a bill filed against him charging him with waste and seeking to render him individually liable and not in his representative capacity, is admissible in a suit on the guardian's bond against the sureties. Bryant *v.* Owen, 1 Ga. 355. But in this case the court held that the decree was only *prima facie* evidence of a *devastavit* as against the security, and not conclusive; but the surety would be permitted to inquire, *ab origine*, into the justice of the decree.

HABEAS CORPUS.

By Clarence Meily.

CROSS-REFERENCES:

Contempt;

Extradition.

I. RECEPTION OF EVIDENCE IN GENERAL.

1. On Application for the Writ. — It is not necessary that the application for the writ of *habeas corpus* be supported by testimony where the judge is familiar with the circumstances from his own personal knowledge.[1]

2. After Return. — At common law, the return to the writ seems to have been regarded as conclusive, and no evidence was admissible to controvert it, the suggested remedy of the relator being an action for a false return.[2] In a modified form this rule still persists in the holding that no evidence is necessary to support the return, but it will be regarded as true until impeached.[3] But the rule has been almost universally altered by statute, both in England and America,[4]

1. State *v.* Lyon, 1 N. J. L. 403.

2. Street *v.* State, 43 Miss. 1; State *v.* Asselin, Charlt. (Ga.) 184; People *v.* Chegaray, 18 Wend. (N. Y.) 637; Com. *v.* Chandler, 11 Mass. 83; People *v.* McLeod, 25 Wend. (N. Y.) 483, 1 Hill 377, 37 Am. Dec. 328. In *In re* Kaine, 14 Fed. Cas. No. 7598, the court, while holding the return not traversible, said that evidence *aliunde* was admissible to impeach the action of the committing magistrate.

In Renney *v.* Mayfield, 4 Hayw. (Tenn.) 165, the court said that the law seemed on principle and authority to be that if the return was legally sufficient the court could not try the facts stated therein by affidavits or other proof contradicting the return, but for the time must take it to be true; nor could the court allow of pleading to the return nor make an issue upon it; but after judgment for the plaintiff in an action for false return, then the court would issue an *alias* or *pluries* writ.

3. Crowley *v.* Christensen, 137 U. S. 86; Speer *v.* Davis, 38 Ind. 271.

4. See the statutes of the various states, and the English statute of 56 G. 3, c. 100, § 4. Also consult:

England. — *Ex parte* Beeching, 4 B. & C. 136, 10 E. C. L. 293.

Florida. — *Ex parte* Pitts, 35 Fla. 149, 17 So. 76.

Mississippi. — Street *v.* State, 43 Miss. 1.

New York. — People *v.* Chegaray, 18 Wend. 637; People *ex rel.* Clark *v.* Grant, 111 N. Y. 584, 19 N. E. 281.

Vermont. — *In re* Hardigan, 57 Vt. 100.

West Virginia. — State *v.* Reuff, 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676.

The statutory provision commonly held to change the rule regarding the conclusiveness of the return is, in effect, that the prisoner may deny any of the facts set forth therein, and may allege any material facts, whereupon the court shall in a summary manner hear the proofs, and

and even in the absence of statute the rule has been disregarded and evidence received to controvert the return.[5] A peculiar phase of the conclusiveness of the return appears in the holding that the return of a United States officer, in *habeas corpus* in a state court, showing that the petitioner was held by him under federal authority, is conclusive, and the state court can proceed no further.[6]

II. PRESUMPTION AND BURDEN OF PROOF.

1. Presumption as to Correctness of Official Acts. — In few varieties of litigation is the burden of proof more responsive to particular presumptions than in *habeas corpus*. Among the chief of these is the common presumption of the regularity of official acts, instances of which will be found in the note.[7] A special and not uncommon

make such order regarding the custody of the prisoner as justice shall require.

5. Thus, in Eggington's Case, 2 El. & Bl. 717, 75 E. C. L. 717, the court permitted the introduction of affidavits in contravention of a return good on its face, to show that the arrest under the process therein set out was actually made on Sunday.

So in *In re* Stepen, 1 Wheel. Crim. Cas. 323, the court discusses the conclusiveness of the return, and declares it is of the opinion that the return is not conclusive, as otherwise a man might be restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice, and the object of the *Habeas Corpus* Act would be defeated.

And in State *v.* Scott, 30 N. H. 274, the court said: "But we do not consider the return of the writ as conclusive of all the particular facts contained in it. The object of the writ is inquiry whether the party be, in fact, under restraint, and if so, the reasons and warrant for the same; an object which might often fail to be secured if the court had no power to look beyond the return and inquire into the truth as well as the sufficiency of the averments."

6. Ableman *v.* Booth, 21 How. (U. S.) 506.

But in *In re* Reynolds, 20 Fed. Cas. No 11,721, it was held that the return of a United States officer in *habeas corpus* in a state court, that he held the prisoner under authority of the United States, was not conclusive on the court, but that it might entertain an inquiry as to the truth of the allegation. In this case the court referred to the case of Ableman *v.* Booth, 21 How. (U. S.) 506, and said that if any doubt could be entertained that the opinion therein required not only an allegation but proof that the prisoner was legally held under federal authority, there certainly could be no doubt that there must be not merely the allegation of facts showing such authority, but also their actual existence, and not the mere formal but false assertion of a state of facts that did not exist; and that the state court should order the discharge of the petitioner unless the facts alleged in the return were proved or admitted, leaving the respondent to refuse to obey its judgment at his peril.

7. On *habeas corpus* to secure release from arrest on the commitment of a magistrate, where the record fails to show that the magistrate made any examination of the charge against the relator, it will be presumed, in the absence of evidence, that such an examination was waived by the accused. *Ex parte* Jefferson, 62 Miss. 223.

On *habeas corpus* to secure release from re-arrest after an escape from the hirer of county convicts, it not appearing from the pleadings or evidence when the re-arrest was effected, it will be presumed that it was within so short a time prior to the issuance of the writ that the sheriff had not had a reasonable time

instance of this presumption occurs where a prisoner is held for the infraction of a statute, certain clauses of which he assails as unconstitutional; in which case the presumption will be indulged, in order to sustain the action of the committing court, that his offense really consists in the violation of those portions not so attacked.[8]

2. Conclusiveness of Indictment or Information. — Again, where a prisoner has been indicted, that fact will raise a presumption of his guilt on *habeas corpus,* though at his trial before the petit jury the

within which to return the prisoner to the proper custody. McQueen *v.* State, 130 Ala. 136, 30 So. 414.

On *habeas corpus* to secure release from arrest for contempt of court in disobeying its order for the payment of a judgment for separate maintenance, the court will presume that the tribunal whose process is questioned found from the evidence adduced on the contempt hearing that the petitioner had property with which to satisfy the wife's judgment. This is on the ground that the order of commitment is conclusively presumed to be right on a collateral attack. *In re* Popejoy (Cal.), 55 Pac. 1083.

On *habeas corpus* to secure the release of a prisoner committed to the reform school, it will be conclusively presumed that the recorder, in certifying the age of the relator, did his duty, and was not influenced by any other than legal evidence. Matter of Mason, 8 Mich. 70.

In State *ex rel.* Rhodes, 48 La. Ann. 1363, 20 So. 894, the court, after saying that the sheriff, when authorized, may place a prisoner for safekeeping in the jail of another parish than that in which the arrest was ordered, said that it must presume, until the contrary was alleged and proven, that the relator was brought to the jail of such other parish under proper order and authority.

In State *v.* Brearley, 5 N. J. L. 639, which was on *habeas corpus* to secure the discharge of a minor from enlistment in the United States army, it was held, in view of a statute authorizing the enlistment of musicians under the age of eighteen without the consent of parent, guardian, etc., that the burden was upon the relator to show that the minor was not enlisted as a musician, the court saying that it could not presume or infer this, but that it must be proven.

In Mississippi, where one who is imprisoned on the commitment of a magistrate seeks release by *habeas corpus* on the ground that since his commitment a regular term of the court having jurisdiction of his case has been held, and no indictment found against him, he must show, in addition, that the charge against him was fully investigated by the grand jury. *Ex parte* Jefferson, 62 Miss. 223.

Where the process on which the relator is detained is valid on its face, it will be deemed *prima facie* legal, and the relator must assume the burden of impeaching its validity by showing want of jurisdiction. People *ex rel.* Tweed *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211.

But in *Ex parte* Croom, 19 Ala. 561, which was *habeas corpus* to secure bail after arrest on the ground that the court prematurely adjourned without hearing the petitioner's case, it was held that if the petitioner showed that he was in custody before the adjournment and actually in jail in time to be tried, unfinished business being also shown, the prisoner had made out a *prima facie* case, and was not required to go further to show that there was not sufficient cause for the adjournment, but that it was incumbent upon those opposing his discharge to prove affirmatively that the court was justified in adjourning. The court said: "We know of no rule of law which would justify us in going beyond the record to intend the existence of a state of facts which would deprive a party of a trial, and at the same time deny to him his liberty upon bail."

8. *Ex parte* Bizzell, 112 Ala. 210, 21 So. 371; State *v.* Rosencrans, 65 Iowa 382, 21 N. W. 688.

usual presumption of innocence will once more attach.[9] This presumption is frequently held, however, not to be conclusive,[10] though at common law, and in a number of the states, it seems to have been given that character.[11]

9. State *v.* Herndon, 107 N. C. 934, 12 S. E. 268; People *v.* Ruloff, 5 Park. Crim. (N. Y.) 77; *Ex parte* Ryan, 44 Cal. 555; *Ex parte* Duncan, 53 Cal. 410.

10. State *v.* Herndon, 107 N. C. 934, 12 S. E. 268. In this case the court said: "The grand jury, it must be remembered, hear the state's witnesses only, and only such of them as may be sent before them by the solicitor or by order of the court. It may happen, and often does, that, upon hearing the state's evidence only, the conviction produced is ample to justify the grand jury in finding a true bill for murder; yet upon an examination of the witnesses for both sides by a judge upon a writ of *habeas corpus*, it may appear that there was no proper case as to the charge of murder, and that it is a case of manslaughter, and therefore bailable or excusable homicide; or it may be there is no proper case upon the whole evidence that the defendant was the guilty party." It was held, however, that after indictment the judge could not absolutely discharge the prisoner in any case, however clear a case of innocence might be made out.

It is the settled practice in Mississippi, on *habeas corpus* to secure bail after indictment, to receive evidence *aliunde* the indictment. Street *v.* State, 43 Miss. 1.

Where the prisoner is indicted for murder or other offense, he is entitled upon *habeas corpus* to produce such evidence as may operate to convince the court that he is guilty, if at all, of an offense of such a grade that he is entitled to bail, or that there are such strong doubts that, upon the case as presented, the jury should not convict of a capital offense. Finch *v.* State, 15 Fla. 633. See also Holley *v.* State, 15 Fla. 688.

An indictment in a capital case does not raise such a presumption of defendant's guilt as absolutely to preclude the power of the court, on *habeas corpus*, to go behind the indictment and investigate the merits of the charge with a view of ascertaining whether the prisoner is entitled to bail. *Ex parte* White, 9 Ark. 222.

The rule of the common law that on *habeas corpus* to secure release from custody after indictment the court will not go behind the indictment to pass on the evidence on which it was found, is changed in Indiana by statutory provisions authorizing the court to summon witnesses and fully investigate the case; as under these provisions, though the evidence given to the grand jury is not attainable, yet the witnesses who there testified can be summoned afresh. Lumm *v.* State, 3 Ind. 293.

Where imprisonment is had on the warrant of a committing magistrate, the court, on *habeas corpus*, has the right to inquire into the question of reasonable or probable cause, and receive evidence bearing on that issue, notwithstanding an information has been filed against the prisoner. *Ex parte* Sternes, 82 Cal. 245, 23 Pac. 38. In this case the court distinguished between the effect of an information and that of an indictment.

11. As to the common-law rule, see Lumm *v.* State, 3 Ind. 293; Street *v.* State, 43 Miss. 1.

As to the rule in California, see *Ex parte* Ryan, 44 Cal. 555, and *Ex parte* Duncan, 53 Cal. 410, in which the presumption of guilt seems to have been regarded as conclusive; and also *Ex parte* Finley (Cal.), 4 Pac. 881. But *compare Ex parte* Sternes, 82 Cal. 245, 23 Pac. 38.

In Hight *v.* United States, Morris (Iowa) 407, 43 Am. Dec. 111, it was held that the presumption of guilt furnished by the indictment was conclusive on *habeas corpus* to secure bail after indictment for a capital offense, and that evidence of the facts could not be introduced by the petitioner. It was also held that the Iowa *Habeas Corpus* Act, providing that the officer before whom the writ is returned shall proceed to examine

3. Burden of Impeaching Indictment. — The consequence of this presumption is, where evidence is received at all, to throw the burden on the petitioner of showing that the proof of his guilt is not evident, nor the presumption thereof great.[12] But the *quantum* of evidence and the number of witnesses to be examined are within the discretion of the judge who hears the writ, and his action in that regard cannot be reviewed.[13]

4. Conclusiveness of Magistrate's Commitment. — Where, however, the prisoner is in custody upon a warrant of commitment issued by a magistrate, but has not yet been indicted, he is entitled on *habeas corpus* to require the judge to hear and pass on the evidence in regard to his guilt, and discharge him if it appears that no offense has been committed, or there is no probable cause of charging him therewith.[14] Yet it is held that on such hearing the court must

into the facts contained in the return, and allowing the return to be controverted, did not affect the conclusiveness of the presumption raised by the indictment.

On *habeas corpus* to secure release from arrest after indictment, the indictment is conclusive on the merits of the charge, and evidence tending to show the innocence of the prisoner is not admissible; and this rule is not changed by a statutory provision that on a return of the writ the relator may deny any of the material facts set forth in the return, or allege any facts showing that his imprisonment was unlawful, and thereupon the court shall, in a summary way, hear such allegations and proof as may be adduced, and dispose of the relator as justice may require. People *v.* McLeod, 25 Wend. (N. Y.) 483, 1 Hill 377, 37 Am. Dec. 328.

In Missouri the conclusiveness of the indictment seems to be established by statute. See *In re* Spradlend, 38 Mo. 547.

12. *Ex parte* Jones, 55 Ind. 176; *Ex parte* Kendell, 100 Ind. 599; Street *v.* State, 43 Miss. 1; in *Ex parte* Heffren, 27 Ind. 87, after announcing the rule stated in the text, the court remarked that, so far as it was aware, the books were barren on the subject. It also held that though the rule required the defendant to exhibit the proof on the part of the State, he did not thereby lose his right to cross-examine the witnesses.

13. State *v.* Herndon, 107 N. C. 934, 12 S. E. 268.

14. *Ex parte* Champion, 52 Ala. 311; *Ex parte* Mahone, 30 Ala. 49, 68 Am. Dec. 111; Benjamin *v.* State, 25 Fla. 675, 6 So. 433; *Ex parte* Jenkins, 2 Wall. Jr. (U. S.), 521. In this last case the court said it was an everyday practice to inquire into the regularity of a warrant, and whether it had been issued on sufficient grounds.

So, on *habeas corpus* to secure a preliminary examination after arrest on the warrant of a justice, it is within the power of the court under the statutes to hear the evidence. *Ex parte* Eagan, 18 Fla. 194.

Notwithstanding Code, § 671, providing that the court or judge shall not inquire into the legality of any judgment or process whereby a party is in custody, when the time of commitment has not expired and when such custody has been on process issued upon any final judgment, etc., the court may hear evidence in *habeas corpus* to secure release from arrest on a commitment issued by a magistrate after the preliminary examination; authority therefor being conferred by § 672, which provides that in cases of commitment issued by a magistrate for want of bail the court on *habeas corpus* shall summon the prosecuting witness, investigate the criminal charge, and admit to bail, discharge or recommit the prisoner, as may be just, etc. *In re* Snyder, 17 Kan. 542.

In a commitment by an alderman or justice of the peace to the house of refuge, the adjudication is in no respect conclusive of the truth of its

determine the case upon the testimony taken before the magistrate, and evidence to controvert the magistrate's finding cannot be received, the proceeding being in the nature of a writ of review.[15] But all of the evidence introduced before the magistrate should at least be produced.[16]

5. Burden of Impeaching Commitment. — While not conclusive, a magistrate's commitment makes a *prima facie* case, which it is incumbent on the petitioner to rebut.[17]

contents, and the whole subject is open on the hearing of a writ of *habeas corpus*, when it is incumbent on the managers to show affirmatively and from evidence that the child detained in their custody is a proper subject for the house of refuge within the true intent and meaning of their charter. Com. *ex rel.* M'Keagy *v.* Superintendent of the House of Refuge, 1 Ashm. (Pa.) 248.

In *Ex parte* Harfourd, 16 Fla. 283, which was an appeal in *habeas corpus* to secure release from imprisonment on failure to give security to keep the peace, the court said that the statutes relating to *habeas corpus* gave ample power to examine into the cause of imprisonment, and to discharge, admit to bail, or remand to custody, as the law and evidence should require. It was accordingly held error in the circuit court to refuse to inquire into the merits of the charge against the prisoner.

15. People *v.* Stanley, 18 How. Pr. (N. Y.) 179. Nor can he impeach the witnesses who testified against him before the magistrate. *Ex parte* Allen, 12 Nev. 87.

In State *v.* Asselin, Charlt. (Ga.) 184, the court held that evidence extraneous to the depositions and evidence taken by the committing magistrate could not be admitted on *habeas corpus* to controvert the facts contained in such depositions, or the charge exhibited in the commitment; assigning for this holding the reasons that otherwise the court would be compelled to go into a plenary hearing of the merits of the case, and decide on the issue of the guilt of the accused, and also that it would be compelled to determine the credibility of the witnesses, which is peculiarly a matter for the jury.

In People *v.* McLeod, 25 Wend. (N. Y.) 483, 1 Hill 377, 37 Am. Dec. 328, the court said that nothing was better settled on English authority than that on *habeas corpus* the examination as to guilt or innocence could not under any circumstances extend beyond the depositions or proofs upon which the prisoner was committed, and that this would be so even before indictment found, however loosely the charge might be expressed in the warrant of commitment.

Contra. — The *Habeas Corpus* Act, § 58, providing that if the prisoner appears by the testimony offered with the return or "on the hearing" to be guilty the court shall remand him, contemplates an examination not only of the evidence returned by the committing magistrate, but also of original evidence offered at the hearing, which may therefore be received. People *v.* Richardson, 4 Park. Crim. (N. Y.) 656, 18 How. Pr. 92, 9 Abb. Pr. 393.

16. On *habeas corpus* to secure release from arrest upon the commitment of a magistrate after a preliminary examination, the court should not discharge the prisoner unless all the witnesses previously examined against him, if still living and attainable, are produced and examined; and in the absence of any material witness previously testifying, the question considered should relate only to the amount of bail, if the case be bailable. *Ex parte* Champion, 52 Ala. 311.

17. Matter of Heyward, 1 N. Y. Super. Ct. 701; State *v.* Jones, 113 N. C. 669, 18 S. E. 249, 22 L. R. A. 678; *Ex parte* Richards, 102 Ind. 260, 1 N. E. 369; *Ex parte* McGlaun, 75 Ala. 38; State *ex rel.* Edwards *v.* Sheriff, 37 La. Ann. 617; *Ex parte* Howe, 26 Or. 181, 37 Pac. 536.

6. Conclusiveness of Final Judgment of Conviction. — A final judgment of conviction, whether pronounced by a superior or inferior tribunal, is conclusively presumed on *habeas corpus* to be just, and the merits of a case cannot be retried.[18] But the respondent is required to establish the existence of such judgment.[19]

7. Conclusiveness of Process for Civil Arrest. — A process for arrest, in a civil action, is not conclusive of the legality of the detention.[20]

8. Conclusiveness of Governor's Warrant in Extradition Proceedings. — Where *habeas corpus* is brought to secure release from

In this last case the question was whether five separate commitments were issued for one offense, and the court, after remarking that the petitioner under the statute was at liberty to have shown this fact, said that, not having done so, the court could not indulge any presumption to that effect.

Where the petitioner, in his traverse of the return, alleges that there was no evidence whatever before the magistrate that he committed the crime, the burden is upon him to show that to be the case. *In re* Henry, 13 Misc. 734, 35 N. Y. Supp. 210. But see *In re* Simon, 37 N. Y. St. 48, 13 N. Y. Supp. 399.

So the findings of the committing court are *prima facie* correct. *Ex parte* Nicholas, 91 Cal. 640, 28 Pac. 47.

18. *Ex parte* Pate, 21 Tex. App. 190, 17 S. W. 460; Matter of Wright, 29 Hun (N. Y.) 357, 65 How. Pr. 119; *Ex parte* Fisher, 6 Neb. 309; *Ex parte* Bushnell, 9 Ohio St. 77. In this last case a conviction by the United States District Court was held conclusive of the prisoner's guilt on *habeas corpus* in a state court, the court saying that a judge would be guilty of high-handed usurpation and would deserve impeachment if he undertook in such a proceeding as this to discharge the relators on any assumed ground that they were not in fact guilty.

So in Passmore Williamson's Case, 26 Pa. St. 9, 67 Am. Dec. 374, the court treated the judgment of a United States District Court, sentencing the prisoner to confinement for contempt, as conclusive on the merits, saying that even the judgment of an inferior state court would, in such a proceeding, be conclusively presumed to be right.

In Brenan's Case, 10 Ad. & E. (N. S.) 492, 59 E. C. L. 492, the court said that it was bound to assume *prima facie* that the court pronouncing the sentence from which release was sought by *habeas corpus* had jurisdiction to decree the particular sentence imposed, its jurisdiction to try the offense not being controverted. It was accordingly held that the validity of the sentence was not open to inquiry.

In People *ex rel.* Danziger *v.* Protestant Episcopal House of Mercy, 128 N. Y. 180, 28 N. E. 473, which was on *habeas corpus* to secure release from a reformatory after a sentence thereto by a magistrate, the court seems to have contented itself with holding that the burden of impeaching the validity of the process, valid on its face, under which the relator was held, must be assumed by him; receiving, however, evidence to controvert the propriety of the detention.

19. People *ex rel.* Snyder *v.* Whitney, 22 Misc. 226, 49 N. Y. Supp. 591.

20. On *habeas corpus* to secure release from civil arrest on the process of a state court, brought by a United States marshal in a federal court, the court said that to affirm that a tribunal called on to inquire whether an imprisonment was tortious, must listen to no evidence but that of the tort feasor himself and his accomplices, was to invert the first principles of common sense as well as justice. It held consequently that the process was not conclusive of the legality of the arrest. *Ex parte* Jenkins, 2 Wall. Jr. (U. S.) 531.

arrest on an executive warrant issued in extradition proceedings, the presumption of the prisoner's guilt arising therefrom is conclusive, and no examination to determine his actual guilt or innocence will be allowed.[21] The warrant is also conclusive evidence that the defendant stands charged with crime in the demanding state.[22] But while making a *prima facie* case on the issue of the prisoner's being a fugitive from justice, it is not conclusive of that fact, and parol evidence is admissible in his behalf to disprove his presence in the demanding state at the time of his offense.[23] So the question of the identity of the person arrested with the one described as the alleged fugitive is always open to inquiry.[24]

9. Scope of Inquiry After Provisional Arrest. — But where a prisoner is held under a provisional arrest to await the issuance of the executive warrant, the question of his probable guilt is open.[25]

21. State *v.* Buzine, 4 Har. (Del.) 572; *In re* Clark, 9 Wend. (N. Y.) 212; Leavy's Case, 6 Abb. N. C. (N. Y.) 43; *In re* Roberts, 24 Fed. 132; *In re* White, 55 Fed. 54; *In re* Bloch, 87 Fed. 981; *In re* Mohr, 73 Ala. 503, 49 Am. Rep. 63. And see *Ex parte* Pearce, 32 Tex. Crim. 301, 23 S. W. 15; and People *v.* Donohue, 84 N. Y. 438.

In Massachusetts the governor's warrant is held conclusive unless there is some defect apparent on the record. Kingsbury's Case, 106 Mass. 223; Davis' Case, 122 Mass. 324; though in this latter case it is said to be *prima facie* evidence, at least, that all legal prerequisites have been complied with.

In People *ex rel.* Draper *v.* Pinkerton, 77 N. Y. 245, it was held in *habeas corpus* to secure release from arrest in extradition proceedings that the governor's warrant was at least *prima facie* evidence of the facts therein recited.

But in *Ex parte* Powell, 20 Fla. 806, which was on *habeas corpus* to secure release from arrest in extradition proceedings, the court said that the judgment of the executive of the demanding state, and of the state of the forum, though entitled to great deference, is by no means conclusive as to the sufficiency of the cause shown for extradition; that the books were thronged with cases in which the court had made inquiries and decided upon the sufficiency of the cause; and that a contrary view would make the executive power omnipotent, and impair to a great extent the writ of *habeas corpus*.

22. *In re* Leary, 10 Ben. 197, 15 Fed Cas. No. 8162. But in Indiana the cases seem to go only to the extent of holding the warrant *prima facie* evidence of the existence of an indictment in the demanding state. Nichols *v.* Cornelius, 7 Ind. 611.

In Katyuga *v.* Cosgrove, 67 N. J. L. 213, 50 Atl. 679, it was held that the certificate of the executive of the demanding state that the indictment certified presents a crime makes a *prima facie* case of the charge of such a crime.

23. *In re* Bloch, 87 Fed. 981; Wilcox *v.* Nolze, 34 Ohio St. 520; *In re* Mohr, 73 Ala. 503, 49 Am. Rep. 63. But in Katyuga *v.* Cosgrove, 67 N. J. L. 213, 50 Atl. 679, it was doubted whether the governor's determination that the prisoner is a fugitive from justice can be controverted. At all events, it makes a *prima facie* case.

24. *In re* Leary, 10 Ben. 197, 15 Fed. Cas. No. 8162.

A governor's warrant in requisition proceedings for the arrest of O. A. N. does not conclusively authorize the arrest of Otto A. N., and the burden is upon the respondents to show the identity of the relator when the same is put in issue by his denial thereof. People *ex rel.* Nubell *v.* Byrnes, 33 Hun (N. Y.) 98, 2 N. Y. Crim. 398.

25. State *v.* Buzine, 4 Har. (Del.) 572; *In re* Roberts, 24 Fed. 132.

Where the provisional arrest in extradition proceedings is had upon

10. Presumptions and Burden of Proof Where Prisoner Is Held in Extradition Proceedings. — Where release is sought from arrest in extradition proceedings it will be presumed that the governor's warrant was rightfully and not improperly issued, and the burden is upon the relator to show the contrary.[26]

And where the attack is made on the indictment as failing to state facts constituting the crime against the laws of the demanding state, the prisoner must assume the burden of showing that fact, to which end it is incumbent on him to produce the statutes of the demanding state if necessary.[27] This is because the fact that the indictment has been found raises a *prima facie* presumption that the acts charged constitute such a crime.[28]

Where the affidavits charging the commission of the crime in the demanding state, and referred to in the executive warrant, are not shown to have been made before a magistrate or judicial officer, it cannot be presumed that they were made in the course of judicial proceedings for the prosecution of the person demanded.[29]

III. COMPETENCY AND RELEVANCY OF EVIDENCE.

1. In General. — While the conventional rules governing the admission of evidence are applicable in *habeas corpus*, they are to be liberally applied, and varied as necessity requires to meet the exigencies of individual cases.[30]

On *habeas corpus* in the Supreme Court, after the denial of the writ by another tribunal competent to act, facts not in evidence on

mere suspicion without a warrant, proof must be given in *habeas corpus* to secure release therefrom that the suspicion is well founded; and mere telegrams from the demanding state asserting the guilt of the prisoner are not legal proof authorizing the court to remand him. Matter of Henry, 29 How. Pr. (N. Y.) 185.

U. S. Rev. Stat., § 760, authorizing amendments to the return in *habeas corpus* "so that thereby the material facts may be ascertained," and § 761 providing for a summary hearing by testimony, do not authorize an examination into the merits of a commitment by a United States Commissioner to await a warrant from the president for the prisoner's surrender to the authorities of a foreign state. *In re* Stupp, 12 Blatchf. C. C. 501, 23 Fed. Cas. No. 13,563.

On *habeas corpus* to secure release from a provisional arrest pending an application to an United States District Court for a warrant of removal to the jurisdiction in which an alleged crime has been committed, the prisoner may show by evidence *aliunde* the indictment that the alleged offense was committed and completed outside of the demanding jurisdiction. United States *v.* Fowkes, 53 Fed. 13.

26. *Ex parte* White, 39 Tex. Crim. 497, 46 S. W. 639.

27. *In re* Renshaw (S. D.), 99 N. W. 83; Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113.

28. Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113; *In re* Van Sceiver, 42 Neb. 772, 60 N. W. 1037, 47 Am. St. Rep. 730. In this last case it was said that the same effect would be accorded on information.

29. *Ex parte* Powell, 20 Fla. 806.

30. *In re* Hardigan, 57 Vt. 100; Matter of Heyward, 1 N. Y. Super. Ct. 701, and see Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113.

the original application cannot be introduced, the jurisdiction being appellate.[31]

Where *habeas corpus* is brought to secure release from arrest in a civil action in which defendant was charged with fraud, and in which he submitted to examination as a poor debtor, such examination, and also the evidence offered on the charge of fraud, is properly admitted.[32]

Where *habeas corpus* is brought after confinement on final sentence imposed alternatively to the payment of a fine, the official receipt of the clerk, showing payment of the fine and costs, is admissible for the petitioner, and is *prima facie* evidence.[33]

The contents of the record before the committing magistrate may be shown by evidence of the magistrate and his clerk, and the clerk, having the original complaint with him, may produce it in evidence.[34] So the magistrate may be required to produce his minutes, and if they have been lost or destroyed, may be examined under oath touching the evidence on which his commitment was founded.[35]

Release from Military Arrest. — It has been held that statutes enabling a party to become a witness in his own behalf in civil proceedings applied to *habeas corpus* by a captured deserter from the United States army, to obtain his release, and he was, in consequence, admitted to testify.[36] The descriptive roll made out at the time of enlistment, and showing the recruit to be an adult, is admissible.[37]

Practice Governing Presentation of Testimony.— It is improper for the petitioner and respondent to agree as to what testimony was introduced before the magistrate, and refrain in consequence from the introduction of testimony.[38]

New evidence for the detention of the prisoner cannot be presented the day after the hearing has been closed.[39]

31. *Ex parte* Brown, 63 Ala. 187.

32. Stevens *v.* Fuller, 136 U. S. 468.

33. Broomhead *v.* Chisholm, 47 Ga. 390, *holding* also that after the introduction of the receipt the contract between the ordinary of the county and the respondents, under which the prisoner is held, is not admissible.

34. Matter of Heyward, 1 N. Y. Super. Ct. 701.

35. *In re* Martin, 5 Blatchf. C. C. 303, 16 Fed. Cas. No. 9151.

36. *In re* Reynolds, 20 Fed. Cas. No. 11,721.

But in Absence of a Statute, the court said that it was doubtless error to hold the relator to be a competent witness. United States *v.* Wyngall, 5 Hill (N. Y.) 16, which was *certiorari* to review *habeas corpus* by an enlisted soldier to secure his release.

37. Green *v.* Ewell, 1 N. M. 166. In this case the descriptive roll was said to be important evidence of the recruit's age, and, in connection with proof that he received pay, subsistence, etc., as a properly enlisted soldier, without objection, to raise a presumption in favor of the regularity of the enlistment, requiring the petitioner to establish the contrary by proof of an evident and decided character.

But in *In re* Reynolds, 20 Fed. Cas. No. 11,721, the court said that it greatly doubted the admissibility of a descriptive list of recruits offered in evidence, though the same was, in fact, considered.

38. State *v.* Rosencrans, 65 Iowa 382, 21 N. W. 688.

39. Matter of Heyward, 1 N. Y. Super. Ct. 701.

2. Parol Evidence to Vary Records. — The general rule that parol evidence is inadmissible to contradict a record obtains in *habeas corpus,* and has been applied in a variety of ways.[40] But parol evi-

40. In *Ex parte* Hollwedell, 74 Mo. 395, the record of a hearing before a police justice, incorporated in the return to a writ of *habeas corpus,* showing that the chief of police had signed the report upon which the justice acted, was held conclusive and not subject to collateral attack.

On *habeas corpus* to secure release from imprisonment on final sentence, on the ground that the prisoner has been pardoned, the court cannot inquire whether the pardon, fair on its face, was obtained by false and fraudulent pretenses. *In re* Edymoin, 8 How. Pr. (N. Y.) 478.

On *habeas corpus* to secure release from a sentence of conviction of violating a city ordinance, parol evidence is not admissible to show errors in the proceedings not affecting the jurisdiction of the court. *Ex parte* Bizzell, 112 Ala. 210, 21 So. 371.

Oral evidence is inadmissible on *habeas corpus* to secure a discharge from state's prison, to impeach the record of the court below, and to show error in its proceedings. *Ex parte* Smith, 2 Nev. 338.

On *habeas corpus* by a convict to secure his release on the ground that the record shows a verdict of guilty rendered by only eleven jurors, supplementary oral proofs to show a verdict rendered in fact by twelve cannot be allowed, nor can the effect of the error be avoided by the indulgence of any presumption. Scott *v.* State, 70 Miss. 247, 11 So. 657, 35 Am. St. Rep. 649.

On *habeas corpus* to secure release from arrest on an indictment, parol evidence is inadmissible to vary the record by showing that the foreman of the grand jury, by mistake, indorsed the indictment a true bill, when in fact it had been found to be not a true bill. Whitten *v.* Spiegel, 67 Conn. 551, 35 Atl. 508.

In *habeas corpus* to secure release from an arrest on a commitment issued by a justice, on the ground that it erroneously recited the offense, the petitioner's evidence that the charge against him before the justice was not that named in the commitment is properly excluded, the charge itself being in evidence, and the witness' testimony being, at best, but a legal conclusion. Davis *v.* Bible, 134 Ind. 108, 33 N. E. 910.

But in Matter of Divine, 5 Park. Crim. (N. Y.) 62, 21 How. Pr. 80, 11 Abb. Pr. 90, on *habeas corpus* to secure release from imprisonment on a conviction of a misdemeanor, evidence was held receivable *aliunde* the commitment to show that the court trying the prisoner was not legally constituted.

And in *In re* Alsberg, 16 Nat. Bk. Reg. 116, on *habeas corpus* by a bankrupt to secure his release from a civil arrest upon the ground that the debt was discharged by the bankrupty proceedings, the court said that it had come to the conclusion, upon reflection, that it was its duty to examine diligently all legal evidence brought before it, from any quarter whatever, tending to show that the debt was not dischargeable, the allegations in the state court not being conclusive.

In Seavey *v.* Seymour, 3 Cliff. 439, 21 Fed. Cas. No. 12,596, which was *habeas corpus* to secure the release of a minor enlisted in the United States army, the court said that where the recruit was less than eighteen years of age, and was mustered into the military service without his parents' consent, proof to show that fact had always been admissible in evidence, and was so still, unless the provision of 12 Stat. at L. 339, providing that the oath of enlistment should be conclusive as to the recruit's age, had established a different rule; but after considerable discussion the court decided that it did not.

On *habeas corpus* to secure the release of a minor enlisted in the United States army, evidence that he stated on his enlistment that his age was only eighteen years, and had not understood that he was swearing that he was of age as his enlistment papers showed, is admissible. *In re* Stokes, 1 Ben. 341, 23 Fed. Cas. No. 13,474.

dence is admissible to corroborate and sustain a record,[41] and has been held receivable to supply an omitted recital.[42] The rule excluding parol evidence has even been carried so far as to result in the rejection of evidence impeaching the jurisdiction of the court.[43]

3. Affidavits. — While affidavits are admissible,[44] at least where not *ex parte*,[45] they are not essential, and oral evidence may be intro-

41. State *v.* McClellan, 87 Tenn. 52, 9 S. W. 233.

42. Matter of Baker, 11 How. Pr. (N. Y.) 418; but see *contra*, State *v* McClellan, 87 Tenn. 52, 9 S. W. 233.

In People *ex rel.* Trainor *v.* Baker, 89 N. Y. 460, the court said it had no doubt that if the minutes of the sentencing tribunal, furnished to the keeper of the penitentiary, imperfectly described the crime of which the relator was convicted, the keeper could show by the records of the court what the crime was, and thus justify the detention; but that the judgment must be proved by the records and could not be shown by parol evidence. In this case, however, an affidavit of the district attorney as to the identity of a crime for which the relator was sentenced was held sufficient, in the absence of objection, for the court to act on.

43. *In re* Sproule, 12 Can. Sup. Ct. 140. So parol evidence is inadmissible to impeach a record regular on its face by showing that the judicial acts therein recited occurred outside of the territorial limits of the judge's jurisdiction. *In re* Watson, 30 Kan. 753, 1 Pac. 775; *Ex parte* Davis, 95 Ala. 9, 11 So. 308.

In *In re* Clarke, 2 Q. B. 619, 42 E. C. L. 835, the court refused to receive affidavits in *habeas corpus* to show that the master of the rolls issued a commitment in his private room and not in court, saying that the statement in the order that the prisoner was brought to the bar of the court was conclusive of the locality where the adjudication was made.

44. *Ex parte* Pitts, 35 Fla. 149, 17 So. 76.

In *Ex parte* Jenkins, 2 Wall. Jr. (U. S.) 531, which was *habeas corpus* to secure release from civil arrest, the court regretted that it did not have the affidavit of the plaintiff in the civil case, on account of his familiarity with the facts.

But in *Ex parte* Stanley, 25 Tex. App. 372, 8 S. W. 645, which was *habeas corpus* to secure release from arrest in extradition proceedings, the court held that an affidavit, made in the demanding state and charging the applicant with a crime, but which was not made a part of the respondent's return, nor attached to the governor's warrant, nor authenticated as evidence, and which was not shown or claimed to be the evidence upon which the warrant was issued, was erroneously admitted.

So in *In re* Reynolds, 20 Fed. Cas. No. 11,721, which was *habeas corpus* by a captured deserter from the United States army to obtain his release, the court, in speaking of the affidavit of a witness, said that it was entirely extrajudicial, and no indictment for perjury could be sustained upon it, and therefore it was of itself inadmissible against the petitioner; but that as the witness was placed on the stand and referred to the affidavit, it would be considered in the review of his testimony.

45. In State *v.* Lyon, 1 N. J. L. 403, *ex parte* affidavits offered on the hearing in *habeas corpus* were rejected, the court saying that the party adducing evidence is bound to show that the testimony is legal and taken in a mode conformable to law; that the *ex parte* character of the affidavits had not been denied; and as there existed no reason to take the case out of the general rule, the evidence must be rejected.

Ex parte affidavits filed with the submission of a case in the supreme court in *habeas corpus* proceedings, and undertaking to set forth matters of record in the office of the supervisor of registration and clerk of the circuit court of the county, which can be shown by duly certified copies, are not proper or competent evidence of the facts therein stated. *Ex parte* Pitts, 35 Fla. 149, 17 So. 76.

duced where it is relevant and competent.[46]

4. Where Prisoner Is Held in Extradition Proceedings. — On *habeas corpus* to secure release from arrest in extradition proceedings, it is improper for the court to inquire into the motives or purposes of the prosecution,[47] or of the proceedings themselves.[48]

In *habeas corpus* for such purpose, the court, in the inquiry as to the laws of the demanding state, will not be restricted to the rigid rule of considering only such testimony as may be formally tendered in evidence by the parties, but may seek the best sources of information at its command.[49]

IV. USE IN SUBSEQUENT PROCEEDINGS.

It has been held that testimony taken on the hearing of a writ of *habeas corpus*, though reduced to writing and properly authenticated, is not admissible in evidence against the defendant on his final trial.[50]

But in Joab *v.* Sheets, 99 Ind. 328, it was said: "At the hearing in a *habeas corpus* case the court acts summarily upon the facts before it, whether admitted by the pleadings or established by the evidence, and even *ex parte* affidavits are sometimes treated as, or received in, evidence in such a case on account of the summary nature of the proceedings."

46. In State *v.* Lyon, 1 N. J. L. 403, the admission of oral testimony on *habeas corpus* was objected to on the ground that affidavits alone were proper, as the court could not afford the time to listen to a tedious examination of witnesses, it being said that the universal practice in England was for courts to proceed on written evidence; but the court held that parol evidence was admissible, saying that it had been the constant practice in cases of this kind to hear oral testimony when offered; that the general principle in the admission of evidence was not that courts were restricted by narrower rules than were juries, but that they, being able to discriminate between that which ought to be listened to and that which could be disregarded, were not prohibited from hearing any evidence which they might think calculated to illustrate the subject before them; that the objections urged applied wholly to the convenience of the judges; and that when it was necessary to adopt another course than that decided on they would give previous notice, but that no such necessity then existed for departing from the custom of receiving oral evidence.

47. Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113.

48. *In re* Sultan, 115 N. C. 57, 20 S. E. 375, 44 Am. St. Rep. 433, 28 L. R. A. 294; *In re* Bloch, 87 Fed. 981.

49. Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113.

50. Childers *v.* State, 30 Tex. App. 160. The reason of this ruling was that such testimony is not taken before an examining court, and the statutory provisions relating to testimony so taken are not applicable; but White, J., *dissenting*, held that the testimony was admissible both under such statutes and also by the rules of the common law.

In Cobbett *v.* Grey, 4 Ex. 729, which was an action for false imprisonment, the return made by one defendant in a previous *habeas corpus* case was received both as making a case against him and as supporting a plea of justification.

HALLUCINATION. —See Insanity.

HANDWRITING.

By Clark Ross Mahan.

CROSS-REFERENCES:

Alteration of Instruments;
Deeds; Demonstrative Evidence;
Forgery.

I. INTRODUCTORY.

1. Proof of Execution of Written Instrument by Subscribing Witnesses. — This article does not include the rules as to proving the execution of an instrument by subscribing witnesses.[1]

II. NON-OPINION EVIDENCE.

1. Testimony of Eye-witnesses. — The genuineness of a disputed handwriting or signature may be established by the testimony of a witness who was present and saw it written or signed,[2] and indeed such testimony has been declared to be the most satisfactory proof on such an issue, especially where the purported author is not competent to testify as a witness.[3]

2. Admissions of Purported Author. — The genuineness may be established by the admissions of the purported author.[4]

3. Testimony of Purported Author. — A. In General. — The purported author of a disputed signature is a competent witness to testify whether the signature is his, or whether he authorized any one to execute it on his behalf.[5]

1. See the article "Subscribing Witnesses."

2. Arthur *v.* Arthur, 38 Kan. 691, 17 Pac. 187; Archer *v.* United States, 9 Okla. 569, 60 Pac. 268; Cothran *v.* Knight, 45 S. C. 1, 22 S. E. 596. See also Riordan *v.* Guggerty, 74 Iowa 688, 39 N. W. 107, an action on a note, the execution of which the defendant denied, claiming it to be a forgery, wherein the plaintiff was permitted on his direct examination to testify that the defendant signed the note in his presence; that he saw the defendant sign it; that the signature was the defendant's, and that he was positive of it.

Johnston Harv. Co. *v.* Miller, 72 Mich. 265, 40 N. W. 429, wherein it was held that the agent of the payee of a note, who states that he saw the maker sign it, may be cross-examined fully, as to all that took place at the time of the alleged signing.

Witness' Best Recollection. — In Patton *v.* Lund, 114 Iowa 201, 86 N. W. 296, the witness who took the acknowledgment to the instrument in question testified that he thought the signature thereto, as well as that to another instrument which was a part of the same transaction, was made in his presence; that that was his best recollection.

3. Hanley *v.* Gandy, 28 Tex. 213, 91 Am. Dec. 315. See also Benedict *v.* Flanigan, 18 S. C. 506, 44 Am. Rep. 583.

4. Bardin *v.* Stevenson, 75 N. Y. 164.

Recognition of Liability. — In Hammond *v.* Varian, 54 N. Y. 398, an action against a father and son upon a promissory note purporting to have been executed by them as joint makers, which had been given in the business of the latter and was unquestioned by him, and which was disputed by the former as a forgery, it was held that evidence tending to prove that the father had recognized the validity of, and his liability upon, other similar notes which he himself had not signed after full knowledge that the signature was not in his handwriting, was proper, in connection with other evidence that the signature was in fact made by the son as tending to show authority in the latter so to sign.

Declarations of a Testator whose will is before the court for probate are admissible to prove that the document is in his handwriting. Succession of Morvaunt, 45 La. Ann. 207, 12 So. 349; Taylor's Will, 10 Abb. Pr. (N. S.) (N. Y.) 300. See further, the article "Wills."

5. Wentz *v.* Black, 75 N. C. 491; Com. *v.* Kepper, 114 Mass. 278. See

Prosecution for Forgery. — But on a prosecution for forgery it is error to permit him to state that the signature in question is a forgery.[6]

B. Transactions With Deceased Persons. — The testimony of the purported author of a disputed handwriting or signature as to the genuineness thereof does not come within the rule prohibiting a party from testifying to transactions with deceased persons merely because the other party to the instrument is deceased;[7] although he should not be permitted to testify to the genuineness of his own signature and that of the decedent where his testimony also involves evidence of conversations which took place at the time of signing.[8]

C. Cross-Examination. — a. *In General.* — It has been held that where the defense to an action on a note is that it was forged by the plaintiff, the court should permit great latitude in the cross-examination of the plaintiff as a witness.[9]

b. *Exhibiting Only Part of Writing.* — The ability of the purported author of a disputed signature to recognize his own handwriting cannot be tested on cross-examination by exhibiting to him

also Avery *v.* Starbuck, 127 N. Y. 675, 27 N. E. 1080.

Rogers *v.* Tyley, 144 Ill. 652, 32 N. E. 393, wherein the person whose handwriting was in dispute was permitted to testify that the signature in question was not in his handwriting, although he did not deny that the writing was similar to his; the reason for his belief that he did not write the letter being that the given name in the signature was abbreviated, while he claimed that he never signed in that way.

In White *v.* Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537, it was held that the statement of the purported author that "the signature resembles mine. I wish to have the contract identified before answering further," coupled with the absence of any later denial, was sufficient proof of genuineness.

Even Before the Enabling Statutes it was held proper to permit the person whose name appeared upon forged paper, and who was interested in setting the instrument aside, to testify that the signature appearing upon the instrument claimed to be forged was not his genuine signature. Hess *v.* State, 5 Ohio St. 5, 22 Am. Dec. 767; State *v.* Nettleton, 1 Root (Conn.) 308, so ruling notwithstanding that he would be entitled to an action for his damage. *Compare* State *v.* Brunson, 1 Root (Conn.) 307.

6. In Wiggins *v.* State, 1 Lea (Tenn.) 738: "The very point for which the jury were impaneled was to try whether the instrument was a forgery. To constitute forgery there must be the fraudulent making or alteration of the writing to the prejudice of another's rights. In other words, there must be an act with a fraudulent intent. The witness might testify as to the act by proving that the name was not signed, nor authorized to be signed, by him, but it was for the jury to say with what intent the writing was made. Perhaps nothing more was intended than a statement from the witness that the signature was not his, but the mode of putting the question was improper, and naturally produced an improper answer."

7. Evans *v.* Ellis, 22 Hun (N. Y.) 460.

8. Garvey *v.* Owens, 37 Hun (N. Y.) 498.

9. Gitchell *v.* Ryan, 24 Ill. App. 372.

Other Writings in Evidence. Where the defendant in a prosecution for forgery has testified in chief that the instrument was not in his handwriting and that he had every reason to believe that it was in the

a written instrument, all of which except the signature is concealed, and asking him if the signature is his.[10]

c. *Collateral Matters.* — It has been held that where the purported author is examined in chief only with respect to the genuineness of the disputed signature, he should not, on cross-examination, be required to state his opinion as to the points of difference between that and others admitted to be genuine.[11]

4. Circumstantial Evidence. — Resort may be had to circumstantial evidence;[12] and there is authority to support the proposition

handwriting of the person purporting to have executed it, it has been held proper to cross-examine him with reference to a genuine handwriting already in evidence as a standard. Grooms *v.* State, 40 Tex. Crim. 319, 50 S. W. 370. See also Neal *v.* Neal, 58 Cal. 287.

10. North American Fire Ins. Co. *v.* Throop, 22 Mich. 146, 7 Am. Rep. 638. *Compare* Hardy *v.* Norton, 66 Barb. (N. Y.) 527, wherein several papers were shown to the witness in such a manner that he could see only the signatures, and he was asked if the signatures were his, whereupon the whole of the papers were shown to him and he was asked the same question; and it was held that it was discretionary with the trial judge to permit such a mode of cross-examination, especially in view of the fact that the witness had stated that he could distinguish his signature whenever he saw it.

11. Norfolk Nat. Bank *v.* Job, 48 Neb. 774, 67 N. W. 781, so ruling because of the rule requiring the cross-examination to be restricted to matters pertaining to the direct examination. The court did say that possibly the trial judge might, without prejudice, have permitted the examination demanded, but that certainly its refusal was not an abuse of discretion calling for a reversal of the judgment. *Compare* People *v.* Bird, 124 Cal. 32, 56 Pac. 639, wherein it was held to be a matter within the discretion of the trial judge whether or not to require the purported author to point out upon certain enlarged photographs the difference between the signatures charged to be forgeries and those admitted to be genuine.

Nor can the purported author of a disputed signature be shown disputed signatures of his name on cross-examination, and asked whether he would not have considered them genuine if he had not been told they were counterfeit; *In re* Barney's Will, 71 Vt. 217, 44 Atl. 75, so ruling because such signatures presented a collateral issue.

12. Condition of Writer as to Sobriety. — People *v.* Parker, 67 Mich. 222, 34 N. W. 720.

Pecuniary Condition. —In Costello *v.* Crowell, 133 Mass. 352, it was held competent for the defendant to prove that the plaintiff did not have the means to advance the money for which he contended that the notes in suit were given.

In Thomas *v.* Miller, 151 Pa. St. 482, 25 Atl. 127, where the issue was as to the genuineness of the signature of a note bearing date of February, 1887, and entered up in September, 1890, it was held error to exclude evidence offered by the defendant to show that the plaintiff had in her possession a few days before the entry of judgment on the note in question, other notes bearing the signature of the same maker, but in blank as to dates and amounts; that "The possession of such blanks was a highly suspicious circumstance, calling for clear explanation, and none the less so whether plaintiff then had this note or not. The lapse of time was not important. If this note was a forgery as defendant claimed, then its having been antedated was not only consistent with defendant's theory, but was highly probable, and even if it was not antedated the possession of blanks with the maker's signature, when the plaintiff already had this note representing the value of a large part of

that in all such inquiries great latitude in the admission of testimony is neither unreasonable nor improper.[13]

Capacity to Imitate.— Where a writing claimed to be forged is traced to a third person, it has been held competent to prove that such person had the capacity to imitate the signature of the supposed maker.[14]

Coincidence of Identity. — The fact that two writings, one of which is disputed, are found to be facsimiles when held up to the light, superimposed one upon the other, is strong evidence of simulation.[15] But the mere fact that a signature is capable of being traced through thin paper has a very remote tendency to prove that a particular signature was thus made.[16]

Characteristics. — On an issue as to the authorship of certain writings, which, when produced, display certain characteristics, it is

his estate, called equally for explanation."

13. Brant *v.* Dennison (Pa.), 5 Atl. 869, where the issue was as to the genuineness of a signature to an assignment claimed to be a forgery, or a genuine signature obtained fraudulently, and there was testimony to the effect that the instrument had the appearance of having been extremely crowded to get the writing into a limited space; it was held proper to permit proof that the purported author was in the habit of writing his name on pieces of paper and carelessly leaving them where they could be readily obtained and improperly used.

14. First Nat. Bank *v.* Wisdom, 111 Ky. 135, 63 S. W. 461. But see State *v.* Hopkins, 50 Vt. 316; Dow *v.* Spenney, 29 Mo. 386.

15. Hunt *v.* Lawless, 7 Abb. N. C. 113, *affirmed* 47 N. Y. Super. Ct. 540, where the court said: "It is a fact well known, and may be readily verified, that no two signatures, actually written in the ordinary course of writing them, are precisely alike. The character of a person's signature is generally of uniform appearance, and the resemblance between one and another signature of the same person is thus apparent. But the coincidence is seldom, if ever, known where a genuine signature of a person, when held up to the window-pane, superposed over another genuine signature of the same person, is such a facsimile that the one is a perfect match to the other in every respect. It may be possible for an expert penman, intentionally, to make two signatures so much alike that one will be a counterpart of the other; but the signatures made in ordinary transactions, written without such studied and careful intention, are never counterparts one of another. There is a diversity in the marks of the pen, the size of the letter, the level of the signature, and the space it occupies, that stands as a guard over the genuine signature, and characterizes it as a true signature. But where two or more supposed signatures are found to be counterparts, I think the simulation is detected by that circumstance. Genuine signatures will not lap with perfect similarity one over another."

16. Doud *v.* Reid, 53 Mo. App. 553, where the court in so ruling said: "The witness was not asked if the signatures on the note bore evidence of tracing. Suppose the witness had been permitted to answer and had said that signatures could be traced by laying over them a thin piece similar to the paper upon which the note in suit was written, would such answer have tended to prove that these signatures were traced? All that it could have amounted to would have been to show that the act which defendants thought had been done in this case was one which could be performed or was possible of performance. And this the jury knew without proof."

competent to introduce other writings by the person claimed to be such author containing the same characteristics.[17]

III. OPINION EVIDENCE.

1. Scope of Section. — In discussing the rules of evidence in respect to opinion evidence in proof of disputed handwriting, especially so far as concerns the testimony of expert witnesses, this section deals only with such evidence when it is not based on comparison of handwritings. The question of comparison of handwritings is discussed in a subsequent portion of the article.

2. Non-Expert Witnesses. — A. STATEMENTS OF RULES AS TO ADMISSIBILITY. — a. *In General.* — The genuineness or falsity of a disputed handwriting may be shown by the testimony of a witness who, although not an expert, shows himself to be qualified within the rules stated in this section.[18]

17. United States *v.* Chamberlain, 12 Blatchf. 390, 25 Fed. Cas. No. 14,778, which was a prosecution for depositing scurrilous postal cards in the mail, the cards in question displaying characteristic instances of misspelling, and it was held competent to prove other writings of the defendant containing identical errors in spelling for the purpose of connecting the defendant with the cards which formed the subject of the case.

18. *United States.* — Rogers *v.* Ritter, 12 Wall. 317; Hopkins *v.* Simmons, 1 Cranch C. C. 250, 12 Fed. Cas. No. 6691.

Alabama. — Griffin *v.* State, 90 Ala. 596, 8 So. 670; Karr *v.* State, 106 Ala. 1, 17 So. 328; Moon *v.* Crowders, 72 Ala. 79.

Colorado. — Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369.

Florida. — Thalheim *v.* State, 38 Fla. 169, 20 So. 938.

Illinois. — Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474; Long *v.* Little, 119 Ill. 600, 8 N. E. 194.

Indiana. — Talbott *v.* Hedge, 5 Ind. App. 555, 32 N. E. 788.

Iowa. — State *v.* Farrington, 90 Iowa 673, 57 N. W. 606.

Kansas. — Arthur *v.* Arthur, 38 Kan. 691, 17 Pac. 187; Macomber *v.* Scott, 10 Kan. 335.

Louisiana. — Succession of Morvaunt, 45 La. Ann. 207, 12 So. 349.

Maine. — Page *v.* Homans, 14 Me. 478; Hammond's Case, 2 Me. 34.

Maryland. — Smith *v.* Walton, 8 Gill 77.

Massachusetts. — Hall *v.* Huse, 10 Mass. 39; Com. *v.* Hall, 164 Mass. 152, 41 N. E. 133.

Michigan. — Empire Mfg. Co. *v.* Stuart, 46 Mich. 482, 9 N. W. 527.

Missouri. — State *v.* Harvey, 131 Mo. 339, 32 S. W. 1110; State *v.* Minton, 116 Mo. 605, 22 S. W. 808.

Nebraska. — First Nat. Bank *v.* Lierman, 5 Neb. 247; Burgess *v.* Burgess, 44 Neb. 16, 62 N. W. 242; Mosher *v.* Farmers & Merchants Nat. Bank, 51 Neb. 55, 70 N. W. 540; Schmuck *v.* Hill, 96 N. W. 158.

New Hampshire. — State *v.* Carr, 5 N. H. 364, 22 Am. Dec. 466.

New Jersey. — West *v.* State, 22 N. J. L. 212.

New York. — Magee *v.* Osborn, 32 N. Y. 669; Hammond *v.* Varian, 54 N. Y. 398; Johnson *v.* Daverne, 19 Johns. 134, 10 Am. Dec. 198; Jacob *v.* Watkins, 10 App. Div. 475, 42 N. Y. Supp. 6; Green *v.* Benham, 57 App. Div. 9, 68 N. Y. Supp. 248.

North Carolina. — State *v.* Cheek, 35 N. C. 114.

Oklahoma. — Archer *v.* United States, 9 Okla. 569, 60 Pac. 268.

South Carolina. — Benedict *v.* Flanigan, 18 S. C. 506, 44 Am. Rep. 583.

South Dakota. — State *v.* Hall, 91 N. W. 325.

Tennessee. — Renshaw *v.* First Nat. Bank, 63 S. W. 194.

Texas. — Hanley *v.* Gandy, 28 Tex. 213, 91 Am. Dec. 315; Rector *v.* Erath Cattle Co., 18 Tex. Civ. App. 412, 45 S. W. 427; Timmony *v.*

Identity of Ink Used. — Whether certain parts of a writing were written in the same ink as the remaining parts is a question properly submitted to a witness, although not an expert in handwriting or in ink, who testifies to a long experience in a business necessitating the handling and examination of a great mass of papers.[19]

b. *Distinction Between Civil and Criminal Cases.* — Regarding the admissibility of the testimony of a non-expert based on acquaintance, there is no distinction between civil and criminal cases in the application of the rule.[20]

The Youth of the Witness is not ground for excluding his testimony where the witness duly qualifies as a non-expert, and his testimony is otherwise unobjectionable.[21]

c. *Identity of Writer.* — Where a non-expert testifying to the

Burns (Tex. Civ. App.), 42 S. W. 133.

Vermont. — Redding *v.* Redding, 69 Vt. 500, 38 Atl. 230.

Washington. — Poncin *v.* Furth, 15 Wash. 201, 46 Pac. 241.

A Manager of a Telegraph and Messenger Company who states that he knows the signature of a person by means of correspondence and by having seen his signature upon telegrams and upon tickets of the company returned to the office by messenger boys is duly qualified to testify as a non-expert, although he admits that he has never seen the person write. Tyler *v.* Mutual Dist. Messenger Co., 17 App. D. C. 85.

Near Relatives. — On an issue as to the genuineness of the signatures of the testator and of deceased witnesses to the will, a near relative of the testator and neighbor of the witnesses, who had seen him write, had received letters from the testator and was acquainted with the handwriting of each is shown to have sufficient qualifications to entitle him to give his opinion as to the signatures of all. Morell *v.* Morell, 157 Ind. 179, 60 N. E. 1092.

Change in Handwriting. — In State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225, it was held proper to ask a witness to state whether, during the time he had been acquainted with the handwriting of the person whose name was alleged to have been forged, it has always been the same, or whether there has been any change in it.

Peculiar Formation of Letters. In Murphy *v.* Hagerman, Wright (Ohio) 293, a witness testified to his acquaintance with the defendant's handwriting, and to the opinion that the signature to the note in question was not his; that one of the letters was different from his, and the writing generally not so good as the defendant wrote. The court said that the particular formation of any one letter did not appear to be a very sure test of handwriting. "Accident, haste, the position of the paper, the presence of a hair in the nib of the pen, or its more or less free discharge of ink, might essentially vary the turn of the letters."

19. Glover *v.* Gentry, 104 Ala. 222, 16 So. 38.

20. Reg. *v.* Murphy, 8 Car. & P. (Eng.) 297; Hammond's Case, 2 Me. 34. And see other cases cited *passim*.

21. Reyburn *v.* Belotti, 10 Mo. 597, where it was contended that the witness was too young at the time he professed to have acquired a knowledge of the handwriting to have done so, and hence his testimony should have been excluded; but the court said that while the facts disclosed by the witness showed that he could not reasonably have obtained a knowledge of the handwriting at the time stated, still the court would not have been warranted in withholding the evidence from the jury, and that how far his statements were within the range of probability and entitled to credence was a question entirely

genuineness of a disputed signature, bases his opinion on his acquaintance with the writer's handwriting, when he is not personally acquainted with the writer, the identity of the latter must be shown by other evidence.[22]

d. *Application of Best Evidence Rule.* — The testimony of the person whose handwriting is in dispute is not superior evidence to that of a witness testifying from knowledge.[23]

e. *Presence of Purported Author at Trial.* — The fact that the person whose signature is in dispute is himself present at the trial[24] and denies that the signature was in his handwriting is not ground for excluding other competent evidence, the effect of which will be to prove the genuineness of the signature in question.[25]

f. *Acquaintance With Handwriting of Purported Author of Forged Signature.* — It is proper to permit a non-expert witness familiar with the handwriting of a person to testify that certain

for the jury. See also Wyche *v.* Wyche, 10 Mart. (O. S.) (La.) 408.

22. Harington *v.* Fry, 1 Car. & P. (Eng.) 289; Snyder *v.* McKeever, 10 Ill. App. 18; Sartor *v.* Bolinger, 59 Tex. 411.

Compare Sewell *v.* Evans, 4 Ad. & El. (N. S.) 626, 45 E. C. L. 626, an action against the defendant as acceptor of a bill of exchange. It appeared that the defendant had kept cash at the bank where it was made payable, and had drawn checks thereupon which the cashier had paid. The cashier knew the defendant's handwriting by the checks, and swore that the acceptance was in the same handwriting, though he had not paid any checks for some time; did not know the defendant personally and could not identify the depositor with the defendant. It was held that a sufficient *prima facie* case was made out.

23. McCaskle *v.* Amarine, 12 Ala. 17; Royce *v.* Gazan, 76 Ga. 79; Smith *v.* Prescott, 17 Me. 277; Lefferts *v.* State, 49 N. J. L. 26, 6 Atl. 521; McCully *v.* Malcolm, 9 Humph. (Tenn.) 187; Foulkes *v.* Com., 2 Rob. (Va.) 836. *Compare* Cheritree *v.* Roggen, 67 Barb. (N. Y.) 124; Haun *v.* State, 13 Tex. App. 383, 44 Am. Rep. 706, wherein it was held that the testimony of the purported writer of the signature in dispute was certainly the best evidence that could be adduced to disprove the genuineness of such signature, and that in the absence of a satisfactory excuse for not producing him it was error to permit another witness to give his opinion in relation thereto, even though otherwise he was a qualified witness.

In Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767, the court said: "The objection that secondary evidence is substituted for the best does not apply in the case, since there is not such a distinction between one whose knowledge is of his own handwriting, and the knowledge of another's on the same subject as constitutes the former evidence of a superior degree to the latter. 2 Stark. Ev. 586."

24. Williams *v.* Deen, 5 Tex. Civ. App. 375, 24 S. W. 536, where the court said: "If the party whose handwriting is sought to be proven should be present and deny its genuineness, it could never be established under the ruling of the trial judge in this case." See also Com. *v.* Pratt, 137 Mass. 98.

25. Burgess *v.* Burgess, 44 Neb. 16, 62 N. W. 242, where the court in so holding said that "it would afford a dangerous precedent to hold that where the alleged writer of a letter denied that the signature thereto was in his handwriting, no other evidence was competent as to the genuineness of such signature, yet this is in effect the condition of the plaintiffs in error, for it is shown by the bill of exceptions that at least three witnesses well acquainted with the handwriting of W. J. Burgess testified that from

signatures are his, although the witness is not acquainted with the handwriting of the person whose signatures are supposed to be imitated or forged.[26]

g. *Transactions With Deceased Persons.* — A non-expert witness, duly qualified within the rules as to such witnesses, offering to prove the handwriting of a decedent, is properly permitted to give his testimony as against the objection that being a party his testimony concerns a personal[27] transaction or communication between

such knowledge they were able to say and did say that he signed the initials in question."

26. Stone *v.* Moore (Tex. Civ. App.), 48 S. W. 1097.

Rule Stated and Applied. — In Brown *v.* Hall, 85 Va. 146, 7. S. E. 182, wherein it was claimed that a will was forged by the propounder of it, it was held error to refuse to permit a witness acquainted with the writing of the propounder to testify that the will was in the latter's handwriting merely because the witness was not acquainted also with the handwriting of the testator. The court said: "A witness may, as in this case, be unacquainted with the handwriting of the decedent, and may yet be perfectly acquainted with the handwriting of the propounder of an alleged will, and may be able to testify positively that it is in his handwriting; or a witness may have positive knowledge, independently of his knowledge of the handwriting, that the alleged will is a forgery, and was forged by the propounder, or by some other person named. Can it be doubted for a moment that, in either case, the evidence is clearly admissible? We think not; for it is but another and more conclusive mode of showing that the paper was not written by the person whose will it purports to be. It is, too, the most direct and positive way of proving the invalidity of the paper propounded. In many cases it might be extremely difficult, if not impossible, to prove the handwriting of a dead person; for the handwriting of a person may not be sufficiently known to enable any one to testify with any degree of confidence in respect thereof, just as, in questions of veracity, it not infrequently occurs that persons have formed no character or general reputation in respect of which witnesses can be found to testify."

But knowledge possessed by a non-expert of the handwriting of a person does not of itself qualify him to testify whether the forged signature made in imitation of the handwriting of another was or was not written by such person. Neal *v.* United States, 118 Fed. 699.

27. Stillwell *v.* Patton, 108 Mo. 352, 18 S. W. 1075; Sankey *v.* Cook, 82 Iowa 125, 47 N. W. 1077; Simmons *v.* Havens, 101 N. Y. 427, 5 N. E. 73; Rush *v.* Steed, 91 N. C. 226; Hussey *v.* Kirkman, 95 N. C. 63; Hoag *v.* Wright, 69 App. Div. 381, 74 N. Y. Supp. 1069; Monumental Bronze Co. *v.* Doty, 99 Mo. App. 195, 73 S. W. 234. See also People *v.* Maxwell, 64 N. C. 313, an action upon the official bond of the defendant's intestate, wherein it was held that the plaintiff was not competent to testify that the intestate signed the paper in question, although the court said that he might have proved the handwriting of the deceased from his general knowledge of it; that to prove that the deceased signed the particular paper was to prove a "transaction" between the witness and the deceased.

Testimony of Husband After Decease of Wife. — In Ferebee *v.* Pritchard, 112 N. C. 83, 16 S. E. 903, which was a case involving the validity of a conveyance by a woman claimed to have been executed in fraud of the rights of her contemplated husband; it was held that the testimony of the husband after her death to the genuineness of a letter purporting to have been written by her in which she promised to marry him was not objectionable within the rule prohibiting the testimony as to transactions with deceased persons.

the witness and the deceased person, although there is apparent authority to the contrary.[28]

h. *Privileged Communications.* — The testimony of an attorney as to the genuineness of a signature purporting to be that of his client, with whose handwriting he is acquainted, is not open to the objection that he is testifying to a privileged communication,[29] unless the attorney's knowledge of the handwriting has been acquired from a communication which was itself privileged.[30]

i. *Inability of Witness to Read or Write.* — The mere fact that a non-expert witness, testifying to the genuineness of a signature from his knowledge of the handwriting of the purported author, cannot himself read or write, does not affect his competency, but goes merely to the weight of his testimony.[31]

j. *Belief of Witness.* — The competency of the testimony of a non-expert testifying as to the genuineness of a signature from acquaintance with the handwriting of the purported author is not affected by the fact that he merely states his belief and refuses to

In Hobart *v.* Verrault, 74 App. Div. 444. 77 N. Y. Supp. 483, an action upon a promissory note claimed to have been executed by the defendant's intestate, after the testimony of witnesses acquainted with the handwriting of the deceased to the effect that the signature on the note was not genuine had been received, the plaintiff called the payee named in the note, who testified that he had seen the deceased write, and that she had signed the note and delivered it to him. "The admission of the testimony of the payee was sought to be justified on the ground that the examination of the defendant had opened the door so as to permit such testimony to be given, but it was held that no such claim could be sustained, and that accordingly the testimony of the payee was not admissible."

28. Distributee. — In Kirksey *v.* Kirksey, 41 Ala. 626, in which the issue was as to the genuineness of the signature to a note purporting to have been made by the intestate payable to the administrator of his estate, and claimed by the administrator as a credit on the asserted right of retainer, it was held that the distributee of the estate being a party to the proceeding, although otherwise competent as a non-expert, was not competent to testify to the genuineness of the intestate's signature. The court said: "To allow the administrator to testify 'as to the signature to the note in *controversy,*' would be allowing him to testify 'as to a transaction with the intestate' within the meaning of the statute, and he would therefore be an incompetent witness under the act *for that purpose;* and hence, the other parties must be held to be incompetent."

29. Brown *v.* Jewett, 120 Mass. 215. See also Holthausen *v.* Pondir, 23 Jones & S. (N. Y.) 73; Johnson *v.* Patterson, 13 Lea (Tenn.) 626.

30. Johnson *v.* Daverne, 19 Johns. (N. Y.) 134, 10 Am. Dec. 198, where the court said: "If he knew nothing but what his client had communicated to him he could not be compelled to disclose that, but if he became acquainted with his client's signature in any other manner, though it was subsequent to his retainer, he was bound to answer; for an attorney and counsel may be questioned as to a collateral fact within his knowledge, or as to a fact which he may know without being entrusted with it as an attorney in the cause."

31. Foye *v.* Patch, 132 Mass. 105. See also Goodhue *v.* Bartlett, 5 McLean 186, 10 Fed. Cas. No. 5538, where the witness admitted that he did not well read writing. *Compare* People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066, wherein it was held

swear positively.[32] But a witness called to speak to handwriting cannot be asked whether to the best of his impression the handwriting is that of the person in question.[33]

that a witness who was practically unable to write or to read writing, or to distinguish words written, and had only seen the person whose signature was in question print his name, was not competent.

32. Succession of Morvaunt, 45 La. Ann. 207, 12 So. 349; State *v.* Stair, 87 Mo. 268, 56 Am. Rep. 449; State *v.* Harvey, 131 Mo. 339, 32 S. W. 1110; Com. *v.* Andrews, 143 Mass. 23, 8 N. E. 643; People *v.* Bidleman, 104 Cal. 608, 38 Pac. 502. See also Thalheim *v.* State, 38 Fla. 169, 20 So. 938; Reyburn *v.* Belotti, 10 Mo. 597; State *v.* Mahoney, 24 Mont. 281, 61 Pac. 647; Pepper *v.* Barnett, 22 Gratt. (Va.) 405.

Belief Amounting to Opinion. Gross *v.* State, 62 Md. 179, where it was held that although the witness stated that he would not swear to the handwriting of the person in question unless he saw him write, it did not by any means follow that he did not know that the instrument in question was written by such person. Watson *v.* Brewster, 1 Pa. St. 381, where the court said: "It is not required to give positive evidence of handwriting. The jurors are the judges of the genuineness of signatures; and it is usual to submit instruments to them upon an expression of belief, although qualified as here, that they are in the handwriting of the person whose name is signed to them." Chahoon *v.* Com., 20 Gratt. (Va.) 733.

Haynes *v.* Thomas, 7 Ind. 38, where the witness stated that he thought the signature was genuine, but would not be positive, and the court, sustaining this testimony, said: "No one can testify positively to a writing unless he saw it written. Proof of handwriting by inspection is not susceptible of greater certainty than was attained in this instance."

Witness Unwilling to Swear Positively. — In Mosher *v.* Farmers & Merchants Nat. Bank, 51 Neb. 55, 70 N. W. 540, where the sole issue was as to the genuineness of the defendants' signatures to the note in controversy, it was held that the testimony of a witness shown to be well acquainted with the handwriting of defendants to the effect that the signatures were genuine, although he was unwilling to swear positively to one of the signatures because of a variation from the general manner in which the purported writer usually signed his name, was sufficient proof of the genuineness of the signatures.

Reasonable Certainty. — In Gross *v.* Sormani, 50 App. Div. 531, 64 N. Y. Supp. 300, where the witness had duly qualified as a non-expert, it was held error for the court to refuse to permit him to state whether he could "with reasonable certainty" state from his acquaintance with the handwriting of the person in question whether or not the disputed handwriting was that of such person.

33. Carter *v.* Connell, 1 Whart. (Pa.) 392, where the court said that it was proper to ask a witness as to his belief, but that to inquire of a witness as to his impression is descending to a test too vague to form a judgment upon; that "it is like asking a witness what was his understanding of a conversation, instead of inquiring what the parties said." See also Wiggin *v.* Plumer, 31 N. H. 251, where the court held that nothing but the belief or opinion of the witness was competent, and that his testimony that he could not swear positively to the genuineness of the signature, or that it had a close resemblance, or that he saw nothing differing from the character of the writing, was nothing to the purpose.

In Burnham *v.* Ayer, 36 N. H. 182, where the witness appears to have had the means or knowledge sufficient to have formed an opinion, but those means had made very little, if any, impression upon his mind, and when brought to the point to give an opinion he failed to do it, the court held that the fact that he had seen the person write and had also seen his handwriting was immaterial unless it had fixed such an impression

Lost Instruments. — Stricter proof is required of handwriting in the case of lost instruments than where the instrument is produced and under the inspection of the witness.[34]

k. *Reasons for Opinion.* — A non-expert who expresses an opinion as to the genuineness of handwriting of another should be allowed to give his reasons for his opinion.[35]

B. The Qualifications of the Witness. — a. *Sources of Knowledge.* — **(1.) Seeing Purported Author Write.** — Any person who has seen the purported author write and has thus acquired a standard in his own mind of the general character of his handwriting is competent to testify as to the genuineness of the signature in question.[36]

upon his mind and recollection as to enable him to express an opinion as to the genuineness of the signature in question, and that nothing but his belief or opinion was competent; that a vague, indistinct impression in regard to the matter was insufficient.

34. "It is not necessary to rule that after-acquired knowledge in no case will enable a witness to prove a signature to a *lost* instrument. But this we do say, that evidence in a case of that description must be of the most unequivocal and positive kind. That nothing short of actually seeing the party write, or an acknowledgment distinctly and clearly made by the party himself, will suffice. We wish not to be misunderstood on this point. We take the distinction which is a clear and marked one between the proof of a *lost* instrument, and proof of a paper produced and under the inspection of the witness. It is the first class of cases which calls for the stringent proof alluded to and not the last." Porter *v.* Wilson, 13 Pa. St. 641.

35. Kendall *v.* Collier, 97 Ky. 446, 30 S. W. 1002. See also Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Collier *v.* Simpson, 5 Car. & P. (Eng.) 73; Keith *v.* Lothrop, 10 Cush. (Mass.) 453.

Where a non-expert witness has given as his reason for his belief that a signature is not genuine, that certain peculiarities were not often found in the genuine signature of the purported author, it is proper to introduce another witness acquainted with the handwriting of the purported author and permit him to testify that such peculiarities were not an unusual feature in such signature. Throckmorton *v.* Holt, 180 U. S. 552. And there is authority to the effect that the mere statement of the belief of the witness when unaccompanied by grounds for that belief raises only a slight presumption, "which moveth not at all." Watson *v.* McAllister, 7 Mart. O. S. (La.) 368.

36. *Colorado.* — Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369.

Connecticut. — Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884.

Florida. — Thalheim *v.* State, 38 Fla. 169, 20 So. 938.

Illinois. — Riggs *v.* Powell, 142 Ill. 453, 32 N. E. 482; Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474; Greenebaum *v.* Bornhofen, 167 Ill. 640, 47 N. E. 857; Snyder *v.* McKeever, 10 Ill. App. 188.

Iowa. — State *v.* Farrington, 90 Iowa 673, 57 N. W. 606.

Kentucky. — Kendall *v.* Collier, 97 Ky. 444, 30 S. W. 1022; Fee *v.* Taylor, 83 Ky. 259.

Louisiana. — Succession of Morvaunt, 45 La. Ann. 207, 12 So. 349.

Maine. — Hammond's Case, 2 Me. 34.

Massachusetts. — Brigham *v.* Peters, 1 Gray 139.

Missouri. — State *v.* Harvey, 131 Mo. 339, 32 S. W. 1110; State *v.* Stair, 87 Mo. 268, 56 Am. Rep. 449.

New Jersey. — West *v.* State, 22 N. J. L. 212.

New York. — Hammond *v.* Varian, 54 N. Y. 398; Jacob *v.* Watkins, 10 App. Div. 475, 42 N. Y. Supp. 6; Titford *v.* Knott, 2 Johns. Cas. 211.

Ohio. — Burnham *v.* Ayer, 3 Ohio Dec. 327.

Pennsylvania. — Swope *v.* Donnelly, 7 Pa. Dist. 448; Reese *v.*

(2.) Inspection of Genuine Writings. — (A.) GENERALLY. — In showing familiarity with handwriting the witness is not restricted to the single means of having seen the person write.[37] It is sufficient that the witness may have acquired knowledge of the handwriting by having seen writings admitted by the purported author to be his, or with his knowledge acted upon as his, or so adopted in the ordinary business of life as to create a reasonable presumption of genuineness.[38]

Reese, 90 Pa. St. 89, 35 Am. Rep. 634.

Rhode Island. — State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

South Dakota. — State *v.* Hall, 91 N. W. 325.

Texas. — Williams *v.* Deen, 5 Tex. Civ. App. 375, 24 S. W. 536.

Vermont. — Redding *v.* Redding, 69 Vt. 500, 38 Atl. 230.

Washington. — Poncin *v.* Furth, 15 Wash. 201, 46 Pac. 241.

In Renshaw *v.* First Nat. Bank (Tenn.), 63 S. W. 194, the witness testified that he was acquainted with the handwriting of the person in question; that he still had some recollection of it; that he did not know his handwriting very well, but had seen him write and sign his name, and had papers with his signature to them which he had seen made; and it was held that the witness was shown to have been sufficiently acquainted with the handwriting, notwithstanding its probative force might be very weak.

37. Stone *v.* Moore (Tex. Civ. App.), 48 S. W. 1097; Thomas *v.* Horlocker, 1 Dall. (Pa.) 14; Board of Trustees *v.* Misenheimer, 78 Ill. 22.

In Reid *v.* Hodgson, 1 Cranch C. C. 491, 20 Fed. Cas. No. 11,667, where the court in holding that a witness acquainted with the handwriting of a person may testify as to the genuineness of a purported signature of such person, although he has never seen the latter write, said: "To say that the handwriting must be proved by a person who had seen him write is only to say that a fact known to one person cannot be proved by him because there may be a person who has a more correct knowledge of the same fact, or whose judgment may be more mature, or may have had a better opportunity of getting information. It may happen that a witness may have seen the party once write his name, but his testimony would not be so satisfactory as that offered in this case," where the witness testified from his acquaintance based on correspondence.

38. *California.* — Burdell *v.* Taylor, 89 Cal. 613, 26 Pac. 1094; Sill *v.* Reese, 47 Cal. 334.

Illinois. — Ennor *v.* Hodson, 28 Ill. App. 445; Riggs *v.* Powell, 142 Ill. 453, 32 N. E. 482.

Kentucky. — Fee *v.* Taylor, 83 Ky. 259.

Massachusetts. — Com. *v.* Carey, 2 Pick. 47.

Minnesota. — Berg *v.* Peterson, 49 Minn. 420, 52 N. W. 37.

New York. — Stevens *v.* Seibold, 5 N. Y. St. 259; Gross *v.* Sormani, 50 App. Div. 531, 64 N. Y. Supp. 300; Sprague *v.* Sprague, 80 Hun 285, 30 N. Y. Supp. 162.

North Carolina. — United States *v.* Holtsclaw, 3 N. C. 577.

Ohio. — Burnham *v.* Ayer, 3 Ohio Dec. 327.

Rhode Island. — State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

Tennessee — Allen *v.* State, 3 Humph. 367.

Texas. — Stone *v.* Moore (Tex. Civ. App.), 48 S. W. 1097.

Vermont. — Redding *v.* Redding, 69 Vt 500, 38 Atl. 230.

"When one testifies as to handwriting from knowledge acquired by seeing the author write, he but testifies from impressions made at the time of the writing, and if that time be remote, as in the case of one long deceased, like Bryan, his memory may fail or deceive him; but where it is refreshed and kept alive through long years by constant or even occasional handling and reading of the written memorials of undoubted authenticity, it seems to us that a witness thus

made familiar with handwriting, though never having seen the author write, would be even more capable of giving reliable testimony than one testifying alone from memory after the lapse of many years — in this instance more than thirty." Stone *v.* Moore (Tex. Civ. App.), 48 S. W. 1097.

"The witness must either have seen the party write, or have obtained a knowledge of the character of his writing from a correspondence with him upon matters of business, or from *transactions* between them, such as having paid bills of exchange for the party for which he has afterward accounted. 2 Star. on Evid. 372. These *prima facie* have been held to be sure means of acquiring knowledge; but means short of these have been deemed inadequate to afford the opportunity of knowing a man's handwriting. It may be asked why this precise distinction? What difference is there between the knowledge of handwriting acquired from observing writings proved to be those of a party, and observing those which the witness has himself seen written? Do not they all, if really written by him, furnish precisely the same means of judging to the witness? Waiving other answers, we say, in the first place, that it is indispensable to the uniform administration of justice that there should be some *definite* rule for ascertaining when the witness' belief — for it is but belief — has been formed under such circumstances as entitle it to confidence; and whenever the rule has been once fixed, it is dangerous to depart from it because of speculative notions. But we further answer that, if it be admitted that all instruments written by a man furnish the same means of acquiring a knowledge of the character of his writing (an admission which is not to be made without many qualifications), yet it is first necessary that it shall be *known* that they were so written, before any opinion founded on them can be entitled to the least confidence. In the cases put by the rule, the law supposes, *prima facie* at least, that this preliminary matter of fact is known — but in all other cases it is to be proved. How is this to be done? By testimony — direct or indirect — met, opposed, weakened, strengthened, repelled or established by other testimony — and this upon a number of collateral issues, of which no previous intimation had been given — embarrassing the jury, surprising the parties, and unfitted to the simplicity and distinctness which should characterize the trial of facts by the country." Pope *v.* Askew, 23 N. C. 16, 35 Am. Dec. 729.

A Clerk of the Court who has frequently seen what he believed to be the official signature of a justice of the peace, and has certified to its genuineness on frequent occasions, is competent to prove the handwriting of such justice although he has never seen him write. Amherst Bank *v.* Root, 2 Metc. (Mass.) 522.

An Administrator of an Estate who has seen numerous notes and checks found among the papers of his intestate which he has examined and states that from all this information he could say he was acquainted with the signature of his intestate, is a competent witness to testify as to the genuineness of a purported signature of the intestate. Tucker *v.* Kellogg, 8 Utah 11, 28 Pac. 870.

Witness to Will. — In Cabarga *v.* Seeger, 17 Pa. St. 514, the witness called to prove the execution of the instrument in question stated that he knew the handwriting of the purported author from having witnessed his will; that he did not know that he had ever seen him write at all, but that he either wrote the will or acknowledged it in the witness' presence, and that in relation to the instrument in question to the best of his knowledge the signature was in the handwriting of such person.

A Bank Teller who has paid checks purporting to be drawn by a depositor, although he has not seen him write, is not competent to testify to the handwriting of such depositor where some of the checks so paid were forgeries. Brigham *v.* Peters, 1 Gray (Mass.) 139.

Checks. — In Cunningham *v.* Hudson River Bank, 21 Wend. (N. Y.) 557, it was held that the mere fact that checks upon one bank had been passed to the credit of another which had discounted and transmitted them

It is held that the trial judge should not arbitrarily restrict the witness in his testimony to knowledge acquired from particular writings.[39]

Casual Inspection. — A witness is not competent to testify to the genuineness of a disputed signature where he has seen, for a few moments only, papers acknowledged to be in the handwriting of the purported author.[40]

Inspection of Writings Not Properly Authenticated as Genuine. A witness who has no other acquaintance with a person's handwriting than that acquired from the examination of his signature to papers which he has heard other persons state, even though under oath, to be genuine, is not competent to testify to the genuineness of the signature in question.[41]

(B.) CORRESPONDENCE. — One who has written letters to the purported author of the disputed signature and received replies thereto, on which both have acted, is a competent witness to testify as to the genuineness of the disputed signature.[42]

to a correspondent for collection was not sufficient to qualify the cashier of the discounting bank to testify to the genuineness of signatures on other checks purporting to have been drawn by the same person, of which he had no knowledge other than that derived from their similarity to the signatures of the checks paid.

Custodian of Public Records. — In Burdell *v.* Taylor, 89 Cal. 613, 26 Pac. 1094, it was held that a public officer who had charge of the official documents of his office and had given frequent examination to numerous documents therein purported to be in the handwriting of his predecessor, which the latter had also testified as being in his handwriting, was competent to testify as to whether or not certain handwriting was that of his predecessor.

39. *In re* Allemann's Will, 22 N. Y. St. 885, 5 N. Y. Supp. 196, a proceeding to probate a will wherein a witness called by the contestant stated that he had seen the testator sign, elsewhere than at the lodge where he belonged, a certain check, and that he had also seen the testator write in the lodge, and that its records were signed by the members; it was held error for the court to confine the witness in his testimony to the knowledge he had acquired from seeing the signatures mentioned, and not permit him to testify as well from knowledge acquired from seeing the testator write in the lodge, and from his signature in the lodge records.

40. United States *v.* Johnson, 1 Cranch C. C. 371, 26 Fed. Cas. No. 15,484.

41. Goldsmith *v.* Bane, 8 N. J. L. 87; First Nat. Bank *v.* Hovell, 24 Ill. App. 594; Snyder *v.* McKeever, 10 Ill. App. 188; Pierce *v.* De Long, 45 Ill. App. 462. See also White *v.* Tolliver, 110 Ala. 300, 20 So. 97; Gibson *v.* Trowbridge Furn. Co., 96 Ala. 357, 11 So. 365; National Union Bank *v.* Marsh, 46 Vt. 443.

See also Putnam *v.* Wadley, 40 Ill. 346, where the witness was asked if he had seen the signature of the defendant to a certain other note or to official returns made by the latter as an officer, but no proof was offered that the defendant had recognized the returns as signed by him or as to the genuineness of the other note referred to.

42. *Alabama*. — Campbell *v.* Woodstock Iron Co., 83 Ala. 351, 3 So. 369.

Colorado. — Atlantic Ins. Co. *v.* Manning, 3 Colo. 224.

Georgia. — Swicard *v.* Hooks, 85 Ga. 580, 11 S. E. 863.

Indiana. — Thomas *v.* State, 103 Ind. 419, 2 N. E. 808.

Maine. — Hammond's Case, 2 Me. 34.

Massachusetts. — Chaffee *v.* Taylor, 3 Allen 598.

There Must Be Some Admission or Acquiescence, however, equivalent to an acknowledgment that the purported writer was in fact the writer of the letters, independent of their receipt and contents,[43] and hence the mere receipt of letters purporting to be from a person never seen and with whom no subsequent relations existed based on the genuineness of the letters is not enough.[44] Nor

Michigan. — Empire Mfg. Co. *v.* Stuart, 46 Mich. 482, 9 N. W. 527.

Mississippi. — Southern Express Co. *v.* Thornton, 41 Miss. 216.

Missouri. — State *v.* Harvey, 131 Mo. 339, 32 S. W. 1110.

Nebraska. — Violet *v.* Rose, 39 Neb. 660, 58 N. W. 216.

Tennessee. — Allen *v.* State, 3 Humph. 367.

Wisconsin. — Parker *v.* Amazon Ins. Co., 34 Wis. 363.

In Violet *v.* Rose, 39 Neb. 660, 58 N. W. 216, the court, *quoting* from Mudd *v.* Suckermore, 5 Ad. & El. 703, 31 E. C. L. 406, said: "The knowledge [rendering a witness competent to give his opinion as to the genuineness of a writing] may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterward communicated personally with the parties upon the contents of those letters or documents, or, having otherwise acted upon them by written answers, producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the witness and the party which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party."

Correspondence With Firm. Where the signature to an assignment of an account by a partnership is disputed, one who has corresponded with the firm and knew its signature only as it had been communicated to him in that way may testify that the signature to such correspondence was the same as that affixed to the assignment; and it is immaterial that he never saw the signature written, and knows it only through his business transactions and correspondence. Murray *v.* Walker, 83 Iowa 202, 48 N. W. 1075.

43. Cunningham *v.* Hudson River Bank, 21 Wend. (N. Y.) 557.

Flowers *v.* Fletcher, 40 W. Va. 103, 20 S. E. 870, where the court said: "But he must have some knowledge, and the mere fact that he has received letters purporting to be from the person whose signature is in controversy is not sufficient, unless there has been some admission or acquiescence equivalent to an acknowledgment on the part of the supposed writer, other than the letters themselves, that said letters are genuine, and in the handwriting of the person from whom they purport to come. A person who has had business correspondence with another acted on by both parties is competent to testify to the handwriting of his correspondent, although he may never have seen him write. But where the letters have no relation to business transactions, but are letters of mere friendly or polite intercourse, some acknowledgment of handwriting, in some way other than letters themselves, on the part of the supposed writer must be shown. The knowledge of the witness must be founded in some other means than the receipt and contents of the letters."

Confidential Clerk. — In Titford *v.* Knott, 2 Johns. Cas. (N. Y.) 211, the confidential clerk of the plaintiff was permitted to prove a correspondence the defendant, and to testify that from the knowledge he had thus acquired of the defendant's handwriting he believed the signature in dispute to be in the handwriting of the by letters between the plaintiff and defendant, although the witness had never seen the defendant write.

44. Pinkham *v.* Cockell, 77 Mich. 265, 43 N. W. 921, where the court said: "Where there is no direct knowledge of handwriting there must

does the mere fact that the witness alone has acted on the letters have any tendency to prove their genuineness.[45]

Answering Letter Coming From Another Postoffice. — In an otherwise proper case a witness who bases his knowledge of the handwriting in question upon a letter received by him from the purported author, the fact that the answering letter came from another postoffice than the one to which his letter was addressed is not ground for holding him incompetent, especially where further correspondence had ensued and acts had been performed showing that the purported writer had acted upon the letters as genuine.[46]

Letters Not Written to Witness. — It is not essential that the writings should have been sent to the witness:[47] as where the witness was a clerk of the person with whom the correspondence was had.[48]

be something which assures the recipient of letters in a responsible way of their genuineness before he can swear to their writer, or use them as standards of handwriting." See also Flowers *v.* Fletcher, 40 W. Va. 103, 20 S. E. 870; Talbot *v.* Hedge, 5 Ind. App. 555, 32 N. E. 788.

45. Cunningham *v.* Hudson River Bank, 21 Wend. (N. Y.) 557, where the court said: "Although the fact that the witness has acted on the letters when standing alone is of no importance, it may be of great value in a chain of circumstantial evidence. The acts done in pursuance of the letters may be followed by such acts of approval or acknowledgment on the part of the supposed author as can only be accounted for on the supposition that he was in truth the writer of the letters; and there can be no doubt that in this way, as well as by direct admission, the fact of authenticity may be satisfactorily established."

46. Violet *v.* Rose, 39 Neb. 660, 58 N. W. 216.

47. Tuttle *v.* Rainey, 98 N. C. 513, 4 S. E. 475; Murray *v.* Walker, 83 Iowa 202, 48 N. W. 1075. *Compare* Nunes *v.* Perry, 113 Mass. 274; Redd *v.* State, 65 Ark. 475, 47 S. W. 110; Sutton *v.* Hayden, 62 Mo. 101.

In Gordon *v.* Price, 32 N. C. 385, an action upon a bill of exchange, the evidence of a witness, who could not swear to the handwriting of either member of the firm in whose name the bill was drawn, but who testified that, in his opinion, the handwriting was the same as that of many notes he had presented to the firm, and which had been paid by them, was held to be competent. The court said: "The case seems to be one of that class in which the proof has been allowed to come from a witness whose knowledge of the writing was derived from papers purporting to be made by the party, which were established in the mind of the witness to be genuine, by the fact they were so treated by the party from time to time by paying them;" and that it was of no consequence that the witness had no such knowledge of the writing of one of the partners, derived in any manner, as would enable him to say with precision that he believed that such partner had personally signed the firm name to the bill.

48. Reyburn *v.* Belotti, 10 Mo. 597; Titford *v.* Knott, 2 Johns. Cas. (N. Y.) 211.

"Handwriting is proven by one who has seen the asserted author of the writing write, or who has in any reliable way become acquainted with the hand. By our code, § 3786, if one testify that he knows the hand, he is competent. How he acquired the knowledge may be inquired into, and the result of the inquiry is for the jury. The witness is competent, his credibility, the character of his knowledge, is a thing of degree. But if the witness does not testify affirmatively, but says that from the knowledge so and so acquired, I am of opinion, etc., then the nature of that knowledge may or may not render him incompetent. In this case the witness does not state that

(3.) **Ancient Writing.** — Where writing in dispute is so old that no living witnesses can be produced who have knowledge thereof, witnesses who have become familiar with the signatures of the purported author from having seen other ancient writings bearing such signatures, and which have been treated as genuine, are competent.[49]

(4.) **Writings Specially Prepared.** — A witness who has merely seen a person write for the express purpose of becoming acquainted with his handwriting is not competent to testify as to the genuineness of a disputed signature of such person.[50]

he knew the hand, but says that, from having read letters, etc., he thought, etc. Clearly, in order to be able to know a handwriting so as to testify on the subject, the witness must have seen the party write, or have read papers expressly or by implication acknowledged by the writer to be genuine." Bruce *v.* Crews, 39 Ga. 544, 99 Am. Dec. 467. In this case the witness merely professed to have read certain letters which came to a business house where he was a clerk purporting to have been written by the party whose writing was in question, and which were not in reply to any letters the witness had written or had seen written. The witness knew they were defendant's letters merely because they bore his name, and because the house at which he was clerk recognized them as his. It was held that this was not sufficient, that there must be some recognition by the assumed writer, and of this the witness must testify of his own knowledge.

49. Jackson *v.* Brooks, 8 Wend. (N. Y.) 426; Jones *v.* Huggins, 12 N. C. 223, 17 Am. Dec. 567.

Ancient Plats and Maps. — In Jones *v.* Huggins, 12 N. C. 223, 17 Am. Dec. 567, for the purpose of proving the handwriting of a deputy surveyor, made some forty years previously, an aged witness was introduced who stated that he, the witness, had seen many plats of surveys purporting to have been made by such surveyor, and that from his knowledge thus acquired he believed that the map produced, together with the annexed explanations, were wholly in such person's handwriting.

Family Records, etc. — In Sweigart *v.* Richards, 8 Pa. St. 436, it was held that for the purpose of proving the handwriting of a person who had been dead for over forty years, witnesses whose acquaintance with his handwriting was derived from signatures and writings in family records admitted by the family to be in such person's handwriting, from letters in the possession of his family purporting to be signed by him, and from official documents received in the proper office and acted upon as genuine, were duly qualified.

50. Shorb *v.* Kinzie, 100 Ind. 429; Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538; Reese *v.* Reese, 90 Pa. St. 89, 35 Am. Rep. 634. See also Stranger *v.* Searle, 1 Esp. Cas. 14, where the witness had seen the defendant write his name several times previous to the trial for the purpose of showing to the witness his true manner of writing, and Lord Kenyon, rejecting the testimony, said: "The defendant might write differently from his common mode of writing his name, through design."

In Whitmore *v.* Corey, 16 N. J. L. 267, the witness in question stated that he saw a person who said he was the writer of the indorsement in question write his name for the purpose of enabling the witness to prove his handwriting, and a new trial was granted.

As Corroborative Evidence. There is authority in support of the proposition, however, that proof of disputed signatures by a witness who called upon the writers and saw them severally write their names, although since the beginning of the action, may be given in evidence to corroborate admissions made by the writers, acknowledging the genuineness of the signatures. Philadelphia & W. C. R. Co. *v.* Hickman, 28 Pa. St. 318, where the court said, in so holding, that in a case of that kind, which was an action upon stock

(5.) Printed Descriptions and Facsimiles. — A witness is not qualified to testify to the genuineness of handwritings as a non-expert where his acquaintance therewith is derived solely from having seen printed descriptions and facsimiles.[51]

(6.) Composition and Style of Writing. — Non-experts should not be allowed to give their opinions as to the genuineness of a disputed handwriting where they base their opinions wholly or partially upon the composition or style of the document, or the legal and literary attainments of the purported author.[52]

b. *Proof of Knowledge.* — **(1.) Necessity.** — A witness is not competent to testify as to the genuineness of a signature without proof of having seen the person write, or of other circumstances to show the witness' knowledge of the handwriting respecting which he is called to testify,[53] and it is sufficient ground for excluding the testimony of a witness that his lack of qualifications is made to appear upon his cross-examination.[54]

Presumption From Relationship. — The mere fact that the witness is a son of the purported author does not of itself raise a presumption that he is better acquainted with his father's signature than a stranger would be; and, as in the case of a stranger, in order to entitle him to testify, a knowledge of the handwriting of his father must be proved.[55]

subscriptions, a more stringent rule of evidence would put the parties to great and unnecessary inconvenience.

51. State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168, where the court, in so holding, said: "It is evident that he who is acquainted with the genuine handwriting only from printed descriptions and facsimiles is qualified to swear with regard to it in none of the accustomed modes."

52. Throckmorton *v.* Holt, 180 U. S. 552.

53. *United States.* — Strother *v.* Lucas, 6 Pet. 763.

Alabama. — Nelms *v.* State, 91 Ala. 97, 9 So. 193.

Colorado. — Hinchman *v.* Keener, 5 Colo. App. 300, 38 Pac. 611.

Indiana. — Thomas *v.* State, 103 Ind. 419, 2 N. E. 808.

Missouri. — State *v.* Minton, 116 Mo. 605, 22 S. W. 808.

New York. — Boyle *v.* Colman, 13 Barb. 42.

North Carolina. — Jarvis *v.* Vanderford, 116 N. C. 147, 21 S. E. 302.

Pennsylvania. — Slaymaher *v.* Wilson, 1 Pen. & W. 216; Brant *v.* Dennison, 5 Atl. 869.

South Carolina. — Weaver *v.* Whilden, 33 S. C. 190, 11 S. E. 686.

Texas. — Haun *v.* State, 13 Tex. App. 383, 44 Am. Rep. 706.

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

See also Porter *v.* Wilson, 13 Pa. St. 641, to the effect that before a witness is permitted to state his belief as to the genuineness of the handwriting of another he must state facts and circumstances to show that he has knowledge sufficient to speak with reasonable certainty.

Character of Contents. — In Philadelphia & W. C. R. Co. *v.* Hickman, 28 Pa. St. 318, the witness had never seen the person write and had no knowledge of his handwriting except that which he derived from letters written to other persons which purported to have been written by the person in question. It was held that he was not qualified, and that his want of knowledge was not supplied by the statement of the witness that the contents of the documents were of such a character as to enable him to "judge certainly" that they were written by the person in question.

54. Mapes *v.* Leal, 27 Tex. 345; Sartor *v.* Bolinger, 59 Tex. 411.

55. Farrell *v.* Manhattan R. Co., 83 App. Div. 393, 82 N. Y. Supp. 334.

(2.) **Mode.** — Unless the witness is able to say that he has such knowledge as enables him to detect the handwriting of the person in question, and to distinguish it from others, he is not competent,[56] but where a witness swears positively to a signature without being interrogated as to the sources of his knowledge it is sufficient.[57]

Proof of Correspondence. — For the purpose of proving the qualification of the witness to testify to handwriting it is proper to show that the witness had carried on a correspondence with the party, and to show the extent of that correspondence.[58]

(3.) **Sufficiency.** — A witness who states that he is well acquainted with the handwriting of the purported author of the disputed signature is *prima facie* qualified to testify as to the genuineness thereof.[59] And the mere fact that the witness does not also state how he acquired his knowledge is immaterial.[60] And on such *prima facie*

56. Kinney *v.* Flynn, 2 R. I. 319.

57. Dwight *v.* Scates, 14 La. 495, holding that if the witness had been interrogated as to those means and had failed to give a satisfactory answer, his testimony must have had no weight, but that the manner in which he testified may be made obnoxious to the penalty of perjury if in reality he had no knowledge of the handwriting in question. See also Whittier *v.* Gould, 8 Watts (Pa.) 485; Goodhue *v.* Bartlett, 5 McLean (U. S.) 186, 10 Fed. Cas. No. 5538.

58. Thomas *v.* State, 103 Ind. 419, 2 N. E. 808, *holding* also that the letters received by the witness in the course of the correspondence may be produced and identified.

59. Davis *v.* Higgins, 91 N. C. 382; Anderson *v.* Logan, 99 N. C. 474, 6 S. E. 704; Barwick *v.* Wood, 48 N. C. 306; Pateate *v.* People, 8 Ill. 644; Pradiers *v.* Combe, 3 Brev. (S. C.) 481; Hinchman *v.* Keener, 5 Colo. App. 300, 38 Pac. 611; State *v.* Minton, 116 Mo. 605, 22 S. W. 808.

See also Com. *v.* Meehan, 170 Mass. 362, 49 N. E. 648, where the witness stated that he thought he knew the handwriting in question.

Although it is usual to begin the examination of a witness who is expected to testify to the handwriting of a particular person with the question, "Have you ever seen the party write?" it is not improper to ask a witness if he knows the handwriting of the person in question, because such a question involves an answer to the former question. Stoddard *v.* Hill, 38 S. C. 385, 17 S. E. 138.

The opinion of a non-expert as to the genuineness of a disputed signature is not affected by the fact that he does not expressly state that he is familiar with the party's handwriting; it is sufficient that his familiarity therewith appears from his testimony showing much knowledge as to the details, forms of letters, etc. Riggs *v.* Powell, 142 Ill. 453, 32 N. E. 482.

In Egan *v.* Murray, 80 Iowa 180, 45 N. W. 563, where the witness in answer to a question whether he was acquainted with the defendant's handwriting said: "Yes, I have seen it," it was held that in the absence of cross-examination he was competent to testify in relation thereto.

In First Nat. Bank *v.* Lierman, 5 Neb. 247, the witness testified that he was acquainted with the handwriting in question "to a considerable extent;" that he had "been more particularly acquainted with this handwriting about a year;" and it was held that in the absence of cross-examination as to his means of knowledge the witness was duly qualified.

Where a witness has not been interrogated as to his means of knowing a signature to which he has testified, no objection to a want of disclosure of such means is available. Berryman *v.* Dahlgren, 6 Rob. (La.) 188.

60. Davis *v.* Higgins, 91 N. C. 382.

proof being made the burden of showing the insufficiency of the witness' source of information is upon the opposite party.[61]

c. *Extent of Knowledge.* — (1.) **Generally.** — No precise standard fixing the qualifications of a witness to testify as to the genuineness of handwriting can be stated. The source of knowledge rather than its extent is the determining factor in this respect;[62] and the extent of the knowledge or familiarity is a matter affecting the weight of his testimony merely.[63] Accordingly, a witness who has any knowledge of the signature in controversy, however slight, may give his opinion as to its genuineness.[64]

61. Stone *v.* Moore (Tex. Civ. App.), 48 S. W. 1097.

62. Poncin *v.* Furth, 15 Wash. 201, 46 Pac. 241; Hartung *v.* People, 4 Park. Crim. (N. Y.) 319.

"All that the rule of law contended for requires is that a witness who is called to prove handwriting shall be able to show that he has had such means of knowledge as to furnish a reasonable presumption that he is qualified to form an opinion on the subject. And the opportunity of acquiring such knowledge, mentioned in the books on evidence, such as having seen the party write, having corresponded with him, or seen writings acknowledged by him to be genuine, are only illustrations of the principle, and are not to be understood as the only means whereby such knowledge may be acquired. If other means of knowledge, in the view of reason and common sense, will equally afford it, there can be no reason why the statement of such means of information shall not be held to be sufficient, preliminary to an examination in chief in relation to the writing." Allen *v.* State, 3 Humph. (Tenn.) 367.

"The question, so far as it relates to the competency of the witness, must depend not upon the quantity of his information, but the source from whence it is derived. This evidence, like all evidence founded on probability, varies in every conceivable degree from the highest to the lowest order of presumptive proof." Smith *v.* Walton, 8 Gill (Md.) 77.

"The law, from the inherent difficulty, will not undertake to define the extent of this knowledge which a witness must possess, or inquire into the ability of the witness. It will only inquire if he had any means of acquiring the requisite knowledge and impression of the character of the party's hand. There are two modes of doing this which the law permits; first, by having seen the party write; second, by familiarity with and examination of writings admitted to be his. If he has these means in any degree, the court will not undertake to measure the knowledge derived from them. It will be left to the jury to determine whether his knowledge be sufficient to be reliable." Kinney *v.* Flynn, 2 R. I. 319.

A witness is competent to testify to the genuineness of a purported signature of a person, although he is in fact familiar with her signature only. *In re* Marchall's Estate, 126 Cal. 95, 58 Pac. 449.

63. Moon *v.* Crowder, 72 Ala. 79; Nelms *v.* State, 91 Ala. 97, 9 So. 193; Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369; Flowers *v.* Fletcher, 40 W. Va. 103, 20 S. E. 870; Long *v.* Little, 119 Ill. 600, 8 N. E. 194; State *v.* Hopkins, 50 Vt. 316.

The Frequency or Infrequency of the opportunities of the witness to acquire knowledge rendering him capable of expressing an opinion, or the nearness or remoteness of such opportunities in point of time to the time of his examination, are matters addressed to the credibility or weight and not to the admissibility of the evidence, and are for the consideration of the jury. Karr *v.* State, 106 Ala. 1, 17 So. 328.

That a witness examined as to handwriting had seen the alleged writer write his name twice only does not render the evidence incompetent, but goes only to the question of credibility. Lachance *v.* Loeblein, 15 Mo. App. 460.

64. Flowers *v.* Fletcher, 40 W. Va. 103, 20 S. E. 870.

Nearness of Witness to Writer. — And it has been held that the fact that the witness was, at the time of seeing the person write, at some distance from him is not of itself sufficient ground for excluding the witness where he qualifies in other respects.[65]

(2.) How Often Witness Must Have Seen Person Write. — Accordingly a witness who has seen a person write but once, and then only his signature, is duly qualified to testify as to the genuineness of a disputed signature of such person.[66]

65. Hoitt *v.* Moulton, 21 N. H. 586, where the court said that the evidence was *prima facie* competent, although not of the most satisfactory kind.

66. *Illinois.* — Woodford *v.* McClenahan, 9 Ill. 85.

Maryland. — Edelen *v.* Gough, 8 Gill 87.

Missouri. — State *v.* Stair, 87 Mo. 268, 56 Am. Rep. 449.

New Hampshire. — Cochran *v.* Butterfield, 18 N. H. 115, 45 Am. Dec. 363.

New York. — Hammond *v.* Varian, 54 N. Y. 398; Magee *v.* Osborn, 32 N. Y. 669.

Pennsylvania — Swope *v.* Donnelly, 7 Pa. Dist. 448.

Vermont. — *In re* Diggin's Estate, 68 Vt. 198, 34 Atl. 696.

West Virginia. — Flowers *v.* Fletcher, 40 W. Va. 103, 20 S. E. 870.

Compare McNair *v.* Com., 26 Pa. St. 388, where the court said: "To admit a witness to testify to his belief of the handwriting of a party from having seen him write his signature only once is to go quite far enough in support of that description of evidence." Hopper *v.* Ashley, 15 Ala. 457; United States *v.* Crow, 1 Bond (U. S.) 51, 25 Fed. Cas. No. 14,895.

In Pepper *v.* Barnett, 22 Gratt. (Va.) 405, the court, *quoting* from Burr *v.* Harper, 3 E. C. L. 147, said: "The mere fact of having seen a man once write his name may have made a very faint impression on the witness' mind; but some impression, however slight in degree, it will make."

Rule Stated in Rideout *v.* Newton, 17 N. H. 71, as follows: "There is no rule of law that requires that a witness, called to prove the handwriting of a party, should have seen the party write a large number of times. Handwriting, like the countenance, form, gait and gesture of a party, is recognized by some more readily than by other witnesses, and is in some persons marked by more decisive and obvious peculiarities than in others. All that is requisite is to ascertain whether the witness has seen handwriting which, by an infallible test, he knows to be that of the party; and then he must upon his oath declare if the writing exhibited appears to him to be that of the same party. The weight to be attached to such testimony must depend upon the ordinary tests of knowledge, the capacity of the witness, and his disposition to tell the truth, and the means that have been afforded him, whether from the intrinsic nature of the subject itself or the familiarity of the witness with it, to acquire the information he assumes to have."

"The impression made upon the mind of a witness who has seen [a person] write his name only in a single instance, may be exceedingly faint and imperfect, but it is, nevertheless, testimony, provided the witness can declare . . . that from his knowledge of the character of the handwriting of [such person], thus acquired, he believes it to be genuine. . . . It is therefore a proper subject for the consideration of a jury who must determine what influence and weight is to be given, under the circumstances of the case, to the opinion of a witness who places his belief upon a single instance." Smith *v.* Walton, 8 Gill (Md.) 77.

Witness and Purported Author Parties to Written Contract. — In Pope *v.* Askew, 23 N. C. 16, 35 Am. Dec. 729, the witness stated that he had seen the defendant write on but one occasion, when he wrote a con-

(3.) Number of Writings Inspected. — So also a witness has been held to be duly qualified, even though he has seen but one specimen of the handwriting of the purported author of the disputed signature.[67]

(4.) Time of Having Acquired Knowledge. — Nor can any arbitrary limit of time be fixed within which a witness must have seen the person write, or have seen his writing, in order to render him competent to testify as a non-expert.[68] And a witness who has testified that the disputed signature is not genuine may be asked on cross-examination as to whether or not there had been a change in the

tract between himself and the witness; that witness had then noticed the manner in which the defendant handled his pen; that on another occasion he had received a note from the defendant and observed the handwriting, and that he had thus acquired a knowledge of the general character of the defendant's handwriting; and he was accordingly held to be duly qualified to testify as to whether or not the handwriting in question was that of the defendant.

67. Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538; *In re* Diggin's Estate, 68 Vt. 198, 34 Atl. 696.

68. Wilson *v.* VanLeer, 127 Pa. St. 371, 17 Atl. 1097, 14 Am. St. Rep. 854.

In Willson *v.* Betts, 4 Denio (N. Y.) 201, an illiterate witness who had seen the person in question write, some sixty odd years previously, was permitted to testify, although he had never after that seen the handwriting or had it called to his attention until he was called to testify.

In re Diggin's Estate, 68 Vt. 198, 34 Atl. 696, where the witness had seen the purported writer sign his name some twenty years previously, the court said: "After the lapse of such a period, unless the signature of the intestate had marked peculiarities or the witness had an exceptional recollection, all of which was addressed to the judgment of the trier, his opinion, if given, would have slight probative force."

In Karr *v.* State, 106 Ala. 1, 12 So. 328, the testimony of the witness showed that on two or three occasions, considerable lapse of time intervening, and the last of these occasions being several years before the trial, he had seen the party write the names of persons and places casually. It was held that the testimony, though not perhaps of the highest and most satisfactory kind, was competent and authorized the disputed writing in evidence so far as its admissibility depended upon proof of the handwriting.

In Lowe *v.* Dorsett, 125 N. C. 301, 34 S. E. 442, it was admitted that the body of the instrument in suit was in the plaintiff's handwriting. A witness was introduced by the defendant, not as an expert, to disprove the genuineness of the signature. Upon cross-examination the plaintiff asked the witness as to the difference between a certain letter in the body of the instrument and the same letter in the signature. The court, in holding that this was not proper, said: "Suppose the witness, without objection, had answered, 'Yes;' that would go to show that the plaintiff wrote the alleged signature — a result not intended or desired by the plaintiff. Again, suppose the witness had answered, 'No;' that would tend only to show that the plaintiff did not write the signature, but it would no more show that John Arnold wrote it than John Smith or any other person wrote it. So, in either event, the question and answer could not aid the jury on the issue before them. The alleged signature without doubt could be compared with any genuine writing of John Arnold, and the similarity pointed out by expert or opinion witnesses, subject finally to the finding of the jury; but the comparison can go no further, for otherwise it might lead to an endless inquiry."

handwriting of the purported author since the signature in question was written.[69]

Whether or Not Witness Would Act Upon Signatures. — A non-expert witness testifying to the genuineness of disputed signatures may be asked on cross-examination whether he would act upon the signatures if they came to him in an ordinary business transaction.[70] But his knowledge must not have been acquired under such circumstances as would tend to bias his mind, imperceptible though it may have been to the witness himself.[71]

The Interval between the time when the witness acquired his knowledge of the handwriting in question and the time of his testimony is a fact which does not affect the competency of his testimony.[72]

Knowledge Acquired Subject to Signature in Dispute. — The mere fact that the witness' knowledge of the handwriting was not acquired until after the making of the signature in dispute is not ground for excluding his testimony.[73]

69. Armstrong *v.* Thruston, 11 Md. 148.

70. Holmes *v.* Goldsmith, 147 U. S. 150, holding such cross-examination to be proper as a means of showing the strength and value of the witness' opinion. *Compare* Bank of the Com. *v.* Mudgett, 44 N. Y. 514, wherein it was held that a witness testifying from acquaintance who has testified to the genuineness of the signature in dispute cannot be asked on cross-examination whether he would accept it against the denial by the purported author of its genuineness.

71. Board of Trustees *v.* Misenheimer, 78 Ill. 22, which was an action of debt on an official bond where the witness in question did not profess to have had any acquaintance with the defendant's handwriting until he was informed that the defendant denied the signature to the bond, when, as he said, to satisfy himself, he went to the county clerk's office and examined the defendant's signature to certain reports made by him, and that from comparison of those he had formed an opinion that the signature to the bond was genuine. The court said: "It is scarcely probable that he did not have some impression as to the genuineness of the signature before he examined the guardian's reports. That he felt an interest in the question is shown by the fact that he put himself to the trouble to make the examination. When, therefore, he investigated, however honest he may have believed himself to be, the natural tendency of his mind would most likely find something to confirm his preconceived opinion. In this way important differences may have been overlooked, and slight resemblances greatly magnified. Knowledge thus acquired is vastly different from that acquired by repeatedly seeing a handwriting and scrutinizing it, when no unfavorable circumstances exist to arouse suspicion and excite the imagination. The evidence was properly excluded."

72. Wyche *v.* Wyche, 10 Mart. (O. S.) (L. A.) 408.

The fact that the personal acquaintance of a non-expert witness with the purported writer of a disputed signature did not antedate all of the letters received by the witness from such writer is imaterial. Thomas *v.* State, 103 Ind. 419, 2 N. E. 808.

73. Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963, where the court said: "There was no presumption that the handwriting had so changed from 1869 to 1873 as to be unrecognizable. The lapse of time and the possibility of change were matters for the consideration of the jury, but did not make the testimony incompetent. In like manner, it has been held that the greater or less remoteness of time

Knowledge Acquired During Trial. — And there is authority to the effect that the mere fact that the witness has seen the person write only since the beginning of the trial is not enough to render his evidence incompetent.[74]

d. *Refreshing Recollection.* — A witness duly qualified as a non-expert may before or at the trial refer to papers which he knows to be in the handwriting of the purported author of the disputed signature for the purpose of refreshing his memory before testifying.[75] But if such inspection entirely fails to refresh his memory — if, after all, he can only speak from comparison of the two signatures and he has no recollection independent of the signature itself — he is not competent to prove handwriting.[76]

e. *Cross-Examination.* — **(1.) As to Qualifications.** — Whether or not the adverse party has the right to cross-examine a witness as to his qualifications before he is admitted to testify to the merits would seem to be a question within the discretion of the trial judge.[77]

as to which the witness was acquainted with the character of one impeached was a matter for the jury, not for the court. The genuineness of the agreement is a vital point for the defense, and the exclusion of this evidence is a material error, which entitles the defendants to a new trial."

A witness who has done business with the defendant and seen him write, but only since the date of a disputed note, may nevertheless give his opinion that the note is not genuine. The objection is to the weight and not to the competency of the evidence. Keith *v.* Lothrop, 10 Cush. (Mass.) 453.

74. Tucker *v.* Hyatt, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872.

75. Cross *v.* People, 47 Ill. 152; 95 Am. Dec. 474; Thomas *v.* State, 103 Ind. 419, 2 N. E. 808; White Sew. Mach. Co. *v.* Gordon, 124 Ind. 495, 24 N. E. 1053; Redford *v.* Peggy, 6 Rand. (Va.) 316.

See also Pepper *v.* Barnett, 22 Gratt. (Va.) 405, where the court, *quoting* from Burr *v.* Harper, 3 E. C. L. 168, said: "And surely as the standard exists and the witness possesses the genuine paper he may recur to it to revive his memory on the subject. . . . He uses it to retouch and strengthen his recollection, and not merely for the purpose of comparison."

In Smith *v.* Walton, 8 Gill (Md.) 77, the court, in holding this practice proper, said: "This course of examination was perfectly legitimate, and if the witness, after having thus retouched and strengthened his recollection of the defendant's handwriting by inspecting the draft, had stated that he believed the disputed signature to be genuine, as the result of a comparison between that signature and the impression he had formed in his mind as to the general character of the defendant's writing, derived from antecedent knowledge, no legal exception could have been taken to the testimony."

76. McNair *v.* Com., 26 Pa. St. 388.

77. Com. *v.* Hall, 164 Mass. 152, 41 N. E. 133, where the court said: "The presiding judge may conduct the examination himself, or he may permit it to be made by counsel. Ordinarily no harm can result if the adverse party is given an opportunity at some stage of the case to test the qualifications of the witness, though perhaps the more general and better practice is to permit it to be done as a part of the preliminary examination. Without meaning to say that the court would have the right to refuse any cross-examination on the question of qualifications, we think that in the present case the course pursued was within the discretion of the court as to the order of the trial." See further on this question the article "EXPERT AND OPINION EVIDENCE."

(2.) **Testing Knowledge.** — It has been held proper for the purpose of testing the witness' knowledge to ask him on cross-examination as to the general character and importance of other writings he saw signed.[78] So also a non-expert may be asked on cross-examination whether in the course of his duties he is called upon and how often to pass and act upon the signatures of the purported author of the disputed signature.[79] And where a witness as to the genuineness of a disputed signature predicates his judgment in whole or in part upon signatures to other instruments which he saw the party sign, the fact that the signatures to the latter instruments differ from the disputed signature may be shown on cross-examination of the witness for the purpose of enabling the jury to determine what weight they should give to the testimony of the witness.[80]

C. CORROBORATION. — For the purpose of corroborating the testimony of a non-expert witness to the genuineness of a handwriting based upon his acquaintance with the handwriting of a purported writer, the genuineness of the signature to a letter received by such witness in his correspondence with the writer may be testified to by another.[81]

3. Expert Witnesses. — A. MATTERS APPARENT ON FACE OF WRITING. — Expert witnesses as to handwriting may testify to the difference[82] in the letters or words of the writing or signature in

78. Bardin *v.* Stevenson, 75 N. Y. 164.

79. Bank of Com. *v.* Mudgett, 44 N. Y. 514, where such a cross-examination was held to be "material to show the means and extent of the knowledge of the witness upon which his opinion was based." It was urged that such a cross-examination called for a comparison, and the court said that although that was remotely probable, yet it was no more so than every opinion on that subject, and that it showed "the opportunity which the witness has had to form an opinion."

80. Bevan *v.* Atlanta Nat. Bank, 142 Ill. 302, 31 N. E. 679; Winnie *v.* Tousley, 36 Hun (N. Y.) 190.

81. Thomas *v.* State, 103 Ind. 419, 2 N. E. 808. It was objected in this case that such testimony would raise a collateral issue and that the purpose was to get the benefit of a comparison of handwritings, but the court, in overruling the contention, said that proving the signature to the letter in this manner tended to prove that the party wrote the letter and thus in some degree corroborate the statement of the previous witness that he had received the letter in a correspondence with the party. That this no more raised a collateral issue than did the testimony in relation to the correspondence.

82. Iron City Nat. Bank *v.* Peyton, 15 Tex. Civ. App. 184, 39 S. W. 223; Roy *v.* First Nat. Bank (Miss.), 33 So. 494, *s. c.* 33 So. 411; Hawkins *v.* Grimes, 13 B. Mon. (Ky.) 257. See also Bridgman *v.* Corey, 62 Vt. 1, 20 Atl. 273.

"Where the question is upon the genuineness or the forgery of the signature of an individual as a subscribing witness to an instrument, an expert may be allowed to show the dissimilarity between such signature and the signature of the same person as a subscribing witness to another instrument, by testifying that the one is a natural and the other an unnatural hand; that there is a difference in the color of the ink, and the writing and slant of the letters; and that if one is genuine he should reject the other; provided such expert has been acquainted with the handwriting claimed to be a forgery, or the other instrument is properly in evidence for other purposes." Goodyear *v.* Vosburgh, 63 Barb. (N. Y.) 154.

dispute, similar characteristics,[83] or other matters as they may appear to him on the face of the writing,[84] as for example, simulation, naturalness and the like.[85] And expert witnesses may, in a proper case, give their opinion whether a given writing is a genuine or a feigned or forged signature.[86]

Unfair Selection of Specimens. — The fact that a specimen of genuine handwriting to be used as a standard of comparison may be an unfair selection is no reason for excluding the opinions of expert witnesses, based on comparison of such standard with the disputed handwriting.[87]

B. Simultaneous Execution of Writings. — An expert may be permitted to give his opinion as to whether or not two papers were written at the same time.[88]

An expert witness may be permitted to testify as to whether or not the different parts of a written instrument were written at different times as they purported to be, or whether they were all written at the same time with the same pen and ink.[89]

C. Effect of Acids and Gas on Writings. — It is no objection to experts in handwriting, who are otherwise qualified, that they are

83. United States *v.* Chamberlain, 12 Blatchf. 390, 25 Fed. Cas. No. 14,778.

84. See Storey *v.* First Nat. Bank, 24 Ky. L. Rep. 1709, 72 S. W. 318; *following* Fee *v.* Taylor, 83 Ky. 259.

"Persons of experience and skill, though previously unacquainted with the handwriting in question, may be safely allowed to depose as to appearances perceived by them upon the paper, and as to their ordinary causes, or as to the resemblance or difference in the formation and appearance of different letters or words, or even in the general appearance of different portions of the writing." Hawkins *v.* Grimes, 13 B. Mon. (Ky.) 257.

One who is an expert in the use of the microscope, although not in the matter of handwriting, may tell the jury what he sees upon the examination of a written instrument with a microscope, but cannot give his opinion as to whether a certain figure had been altered, and how. Stevenson *v.* Gunning, 64 Vt. 601, 25 Atl. 697.

85. People *v.* Hewit, 2 Park. Crim. (N. Y.) 20; Moody *v.* Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317; Sudlow *v.* Warshing, 108 N. Y. 520, 15 N. E. 532; Travis *v.* Brown, 43 Pa. St. 9, 82 Am. Dec. 540.

86. Moon *v.* Crowder, 72 Ala. 79.

87. Calkins *v.* State, 14 Ohio St. 222.

88. Tally *v.* Cross, 124 Ala. 567, 26 So. 912.

89. Ellingwood *v.* Bragg, 52 N. H. 488, recognizing that this question was properly one for expert testimony, but holding that the witness, who was a lawyer of some forty years' practice and had had about the same experience as lawyers in general in the examination and comparison of handwritings, did not possess the qualifications requisite to enable him to testify as an expert upon that question.

Difference in Inks. — In Porell *v.* Cavanaugh, 69 N. H. 364, 41 Atl. 860, where the issue was as to whether or not the maker of an instrument had signed his name at the same time and place as did the attesting witness, it was held proper to permit experts to testify that the ink used by the maker in signing his name was different from that used by the witness. The court said: "If both the parties had signed the paper at the same desk at the same time it is probable that both would have used the same ink. The fact that they used different inks was competent for the jury to consider in determining who was right in regard to this question."

not shown to be experts as to the effect of acids and gas upon writings, where it does not appear that the disputed writing had been subjected to acids or gas.[90]

D. Efforts to Disguise. — An expert cannot testify that a forger, in disguising and imitating handwriting, was more particular at the beginning than at the close of the attempt.[91]

E. Improvement of Handwriting. — Whether or not a person could within a short time improve his handwriting to a certain extent is not a subject for the testimony of experts.[92]

F. Cross-Examination. — A witness who is being examined as to his qualifications as an expert cannot be cross-examined by questions which go merely to his credibility.[93]

IV. COMPARISON OF HANDWRITINGS.

1. Definition. — It has been declared that in reality all testimony as to handwriting is in fact a comparison, except where the witness testifies that he saw the person sign or heard him admit that he did sign.[94] But in the case of the testimony of non-expert witnesses, although there is in one sense of the word a comparison, that is to say, a comparison by the witness of the disputed handwriting or signature with the mental picture which the witness has of the genuine handwriting — a *pseudo* comparison, as it is sometimes called — his testimony is in reality based on his knowledge of the handwriting of the person in question. Accordingly, comparison in the true meaning of that term, or at least in the sense in which the term is used in this article, is the actual juxtaposition of two writings, in order by such comparison to ascertain whether both were written by the same person, etc.[95]

90. Birmingham Nat. Bank *v.* Bradley, 108 Ala. 205, 19 So. 791.

91. Miller *v.* Dill, 149 Ind. 326, 49 N. E. 272, where the court said: "The question seems not to have been within the domain of expert testimony. It presented no question of science, and involved no rule not subject to as many variations as there might be efforts at forging. The care of one man is not evidence of the care which may be exercised by another in an effort to commit a forgery, any more than is the skill of one man in executing the imitation or disguise evidence of the skill of another."

92. McKeone *v.* Barnes, 108 Mass. 344.

93. Smyth *v.* Caswell, 67 Tex. 567, 4 S. W. 848.

94. See Graham *v.* Nesmith, 24 S. C. 285; People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, where this statement is made. Many other cases could be referred to where similar language was used, but their citation is deemed useless for the purposes of this article.

"This comparison was made in two ways: *first*, by witnesses who had acquired personal knowledge of the handwriting of those several persons by having seen them write or by having received writings from them, and who had thus formed in their minds an exemplar of the genuine handwriting with which they compared the several disputed signatures, and thus reached their opinions." Gordon's Case, 50 N. J. Eq. 397, 26 Atl. 268.

95. Travis *v.* Brown, 43 Pa. St. 9, 82 Am. Dec. 540, where the court said: "Comparison of handwriting is . . . where other witnesses have proved a paper to be the handwriting of a party, and then the wit-

2. Comparison by Jury or Court. — A. Rule in England. Prior to 1854 the question whether or not it was proper to permit the jury to compare writings was one on which the courts did not entirely agree.[96] But in 1854 the question was apparently settled by a statute which provided that the writings and the evidence of witnesses respecting the same were to be submitted to the court or jury as evidence of the genuineness or otherwise of the writing in dispute.[97]

B. Rule in the United States. — a. *In General.* — Comparison of a disputed handwriting or signature with standards or specimens, the genuineness of which has been established, and which are proper to be used for such purpose within the rules subsequently discussed in this article, is very generally permitted to be made by the jury in nearly all of the jurisdictions.[98]

ness on the stand is desired to take the two papers in his hand, compare them, and say whether they are or are not in the same handwriting. There the witness collects all his knowledge from comparison only; he knows nothing himself; he has not seen the party write nor held any correspondence with him." See also McCorkle *v.* Binns, 5 Binn. (Pa.) 340, 6 Am. Dec. 420.

By comparison "is meant the collation of two papers in juxtaposition for the purpose of ascertaining by inspection if they were written by the same person." Smith *v.* Walton, 8 Gill (Md.) 77.

96. See Mudd *v.* Suckermore, 5 Ad. & El. 703, 31 E. C. L. 406; Perry *v.* Newton, 5 Ad. & El. 514, 31 E. C. L. 382.

97. Creswell *v.* Jackson, 2 Fost. & F. 24.

98. *United States.* — Williams *v.* Conger, 125 U. S. 397.

Kentucky. — Eve *v.* Saylor, 19 Ky. L. Rep. 1697, 44 S. W. 355.

Massachusetts. — Com. *v.* Andrews, 143 Mass. 23, 8 N. E. 643.

Missouri. — State *v.* Clinton, 67 Mo. 380, 29 Am. Rep. 506; Rose *v.* First Nat. Bank, 91 Mo. 399, 3 S. W. 876.

New York. — Van Wyck *v.* McIntosh, 14 N. Y. 439.

North Carolina. — Otey *v.* Hoyt, 48 N. C. 407.

Pennsylvania. — Berryhill *v.* Kirchner, 96 Pa. St. 489; Travis *v.* Brown, 43 Pa. St. 9, 82 Am. Dec. 540; Aumick *v.* Mitchell, 82 Pa. St. 211.

Texas. — Kennedy *v.* Upshaw, 64 Tex. 411.

Vermont. — Rowell *v.* Fuller, 59 Vt. 688.

Davis *v.* Fredericks, 3 Mont. 262, decision by the territorial Supreme Court following the rule in the United States Supreme Court to the effect that comparison of handwritings as original evidence is not admissible.

In Chester *v.* State, 23 Tex. App. 577, 5 S. W. 125, it was held error to permit the writings used as standards of comparison by experts to go into the hands of the jury to be compared by them with and prove the handwriting in dispute. *Citing* Code Crim. Proc., art. 754.

In Richardson *v.* Newcomb, 21 Pick. (Mass.) 315, it became important to determine whether a certain paper not signed, being a paper having words and figures upon it, was in the actual handwriting of the plaintiff. To prove this, other papers, testified to have been in fact written by the plaintiff, were offered in evidence to enable the jury to judge of the genuineness of the paper in question by comparison, and the proof was admitted.

In Hall *v.* Huse, 10 Mass. 39, an action on a promissory note, the defendant, to prove that the signature to the note was not genuine, was permitted to introduce signatures proved to be his, apparently for the purpose of comparison by the jury with the disputed signature.

Huff *v.* Nims, 11 Neb. 363, 9 N. W. 548, to the effect that the jury are

b. *Statutes.* — In some jurisdictions comparison of handwritings by the jury is expressly permitted by statute.[99]

c. *Comparison by Court or Referee.* — So, also, it is proper for the court sitting without a jury or a referee to compare the handwriting in question with proper standards,[1] and where the court is trying the case without a jury he is not precluded from himself making a comparison of the handwritings merely because experts have already testified. He is not compelled to adopt their opinions.[2]

d. *Comparison by Jury During Deliberations.* — Although there is authority to the contrary,[3] it has been held proper for the judge to permit the jury to take with them, upon retiring to deliberate upon their verdict, papers proper to be used as standards of comparison, for the purpose of inspecting and making comparisons of signatures.[4]

e. *Use of Magnifying Glasses.* — It is not error to permit the jury to use magnifying glasses in examining papers submitted in evidence, and to carry the glasses with them in their retirement.[5]

3. Comparison by Witnesses. — A. Competency of the Proof.

competent to make comparison between the handwriting in dispute and a genuine specimen made in their presence, either with or without the aid of expert witnesses.

Tower *v.* Whip, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937, to the effect that it is proper for the jury to compare the disputed signature with the signature of the purported author affixed to pleas signed by him and sworn to and filed as part of the case.

Where the jury in a prosecution for forgery have the alleged forgery before them for inspection, together with genuine writings, they are not to rely solely on the testimony of experts, but must use their own judgment in deciding upon the effect of a comparison of the papers as evidence in the case. People *v.* Gale, 50 Mich. 237, 15 N. W. 99.

In Kentucky it was formerly the rule that comparison by the jury with or without the aid of expert witnesses was not permitted, the reason doubtless being that no necessity existed for it when witnesses were at hand who knew the writing. Fee *v.* Taylor, 83 Ky. 259. But the rule now is as stated in the text.

In North Carolina, however, comparison by the jury is not permitted. Outlaw *v.* Hurdle, 46 N. C. 150; Fuller *v.* Fox, 101 N. C. 119, 7 S. E. 589; Forbes *v.* Wiggins, 112 N. C. 122, 16 S. E. 905; Tunstall *v.* Cobb, 109 N. C. 316, 14 S. E. 28.

99. Browning *v.* Gosnell, 91 Iowa 448, 59 N. W. 340; First Nat. Bank *v.* Carson, 48 Neb. 763, 67 S. W. 779; Grand Island Banking Co. *v.* Shoemaker, 31 Neb. 124, 47 N. W. 696; Osmun *v.* Winters, 30 Or. 177, 46 Pac. 780.

1. Greenebaum *v.* Bornhofen, 167 Ill. 640, 47 N. E. 857; Hunt *v.* Lawless, 7 Abb. N. C. (N. Y.) 113, 15 Jones & S. 540.

The Court of Claims, like a court of equity or admiralty, may determine the genuineness of a signature by comparing it with other genuine handwritings of the party. Moore *v.* United States, 91 U. S. 270.

2 Millington *v.* Millington (Tex. Civ. App.), 25 S. W. 320.

3. *In re* Foster's Will, 34 Mich. 21; Howell *v.* Hartford Fire Ins. Co., 6 Biss. 163, 12 Fed. Cas. No. 6779; Chance *v.* Indianapolis, 32 Ind. 472. See also Cox *v.* Straisser, 62 Ill. 383.

4. Hardy *v.* Norton, 66 Barb. (N. Y.) 527; State *v.* Scott, 45 Mo. 302; Means *v.* Means, 7 Rich. L. (S. C.) 533; Com. *v.* Andrews, 143 Mass. 23, 8 N. E. 643; Johnson *v.* Com., 102 Va. 927, 46 S. E. 789.

5. Hatch *v.* State, 6 Tex. App. 384.

a. *Rules in England.* — Prior to 1854 the general rule in the English courts of law, both criminal and civil, was that the proof of handwriting by comparison by witnesses was not permissible, but in the ecclesiastical courts of England proof of handwriting by comparison was always permitted.[6]

The English Common-Law Procedure Act of 1854, however, provides that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.[7] And this statute was by subsequent amendment made to expressly apply to criminal cases.[8]

b. *Rule in the United States.* — **(1.) As Original Evidence.** — (A.) GENERALLY. — Formerly, in the absence of a statute authorizing it to be done, the question whether or not it was proper to permit proof of the handwriting by comparison by a witness with other genuine writings was one as to which there was great contrariety of opinion. Some courts held that the witness called upon to testify to the handwriting must testify thereto from his knowledge within the rules previously discussed, and that the genuineness *vel non* could not be proved by comparison with other handwritings.[9] Other courts, however, even without any statutory authority therefor, recognized a proof of handwriting by comparison as a rational method of investigation.[10] If evidence by comparison is proper to be admitted for

6. Riley *v.* Rivett, 1 Phill. Eccl. 78; Saph *v.* Atkinson, 1 Addams Eccl. 162; Locke *v.* Denner, 1 Addams Eccl. 353; Young *v.* Brown, 1 Hagg. Eccl. 556. See also Mudd *v.* Suckermore, 5 Ad. & El. 703, 31 E. C. L. 406, where this question is discussed at great length.

7. 17 and 18 Vict. ch. 125; 19 and 20 Vict. ch. 102, § 30; Wilson *v.* Thornburg, L. R. 17 Eq. 517; Reg. *v.* Silverlock (1894), 2 Q. B. 766.

8. 28 and 29 Vict. ch. 18, § 8; Reg. *v.* Silverlock (1894), 2 Q. B. 766.

9. Jackson *v.* Phillips, 9 Cow. (N. Y.) 94; Moore *v.* United States, 91 U. S. 270; Strother *v.* Lucas, 6 Pet. (U. S.) 763; Pope *v.* Askew, 23 N. C. 16, 35 Am. Dec. 729; Turner *v.* Foxall, 2 Cranch C. C. 324, 24 Fed. Cas. No. 14,255; Brooke *v.* Peyton, 1 Cranch C. C. 96, 4 Fed. Cas. No. 1933. See also Smith *v.* Walton, 8 Gill (Md.) 77.

In United States *v.* Prout, 1 Cranch C. C. 301, 27 Fed. Cas. No. 16,094, a prosecution for forgery, an offer on the part of the prosecution to submit the prisoner's signature, written in the presence of the marshal, and the alleged forged instrument to an expert witness and have his opinion as to whether the paper was forged by the prisoner, was rejected.

10. Forgey *v.* First Nat. Bank, 66 Ind. 123.

"It may be safely stated as a fundamental proposition that, on the question whether a given signature is in the handwriting of a particular person, comparison of the disputed signature with other writings of that person known to be genuine is a rational method of investigation, and that similarities and dissimilarities disclosed are probative, and as satisfactory in the instinctive search for truth as opinion formed by the unquestioned method of comparing the signature with an exemplar of the person's handwriting, existing in the mind, and derived from direct acquaintance, however little, with the party's handwriting. The objections

the purpose of proving the genuineness of the signature, the same kind of evidence must also be admitted to prove that the signature is not genuine.[11]

Inability of Jurors to Read or Write. — The fact that members of the jury may not be able to read or write has been held to be no ground for excluding the opinions of expert witnesses to handwriting based on comparison.[12]

Collateral Issues. — The fact that the opinions of expert witnesses to handwriting might embarrass the trial with numerous collateral issues and open the door to much collateral evidence is no ground for excluding such opinions in an otherwise proper case.[13]

upon which the common-law rule of exclusion is founded are threefold: (1) Ignorance of jurors, and their inability to make intelligent comparison; (2) danger of unfairness and fraud in the selection of specimens, with no sufficient opportunity for the opposing party to investigate and expose; (3) collateral issues as to the genuineness of the specimens presented. (1) The first objection, however justified by the state of English society when it was originally announced, has no weight at the present time in a jurisdiction where intelligence and education are general, and needs no further comment. (2) Since the right to produce specimens under a rule allowing comparison is equally open to both parties, and the specimens are all subject to examination and cross-examination, the opportunity for advantage from unfair selections is too slight to furnish reason for closing the door against this important avenue of investigation. (3) The third objection — that to permit comparison with specimens not otherwise in evidence, and admitted for the mere purpose of comparison, would introduce collateral issues, and confuse and distract the jury — is, when applied to specimens neither admitted by the parties nor found by the court to be genuine, firmly grounded in reason and authority." University of Illinois *v.* Spalding, 71 N. H. 163, 51 Atl. 731.

"If it is true, as I suppose it is, that every witness who testifies to the handwriting of another does it by comparing in his mind the signature to be proved, with the knowledge he has previously acquired of the character of the handwriting of the individual, either by seeing him write, or by the examination of letters or documents admitted to be his, I cannot see any danger in extending the rule so far as to permit *experts* to testify upon actual comparison. Certainly there is more probability of arriving at truth in this manner than there is in relying upon the opinion of a witness who has, but in a single instance, seen the person write whose signature is to be proven." Hicks *v.* Person, 19 Ohio 426.

In Pennsylvania prior to 1895 it was held that an expert witness as to handwriting must testify from an inspection of the alleged signature itself and not from a comparison thereof with genuine signatures. Travis *v.* Brown, 43 Pa. St. 9, 82 Am. Dec. 540; Berryhill *v.* Kirchner, 96 Pa. St. 489; Rockey's Estate, 155 Pa. St. 453, 26 Atl. 656. But in 1895 the rule in that state was changed by an express statutory provision authorizing comparison of handwritings by expert witnesses. Hagan *v.* Carr, 198 Pa. St. 606, 48 Atl. 688.

11. West *v.* State, 22 N. J. L. 212.

12. Calkins *v.* State, 14 Ohio St. 222, 45 Am. Dec. 536.

Some of the old books give as a reason for not submitting the comparison of hands, that perhaps some of the jury cannot write. But where they can all write, that reason has no weight. McCorkle *v.* Binns, 5 Binn. (Pa.) 340, 6 Am. Dec. 420.

13. Calkins *v.* State, 14 Ohio St. 222, 45 Am. Dec. 536, where the court said: "All those questions which are to be decided by the opinions of witnesses are subject to the same objection."

(B.) STATUTES. — In most of the jurisdictions, however, there are now express statutes authorizing comparison to be made by witnesses of disputed writings with other genuine writings.[14]

Strict Construction of Statute. — A statute authorizing the comparison of disputed handwriting with genuine specimens is in derogation of common law and should be strictly construed.[15]

14. Froman *v.* Com., 19 Ky. L. Rep. 948, 42 S. W. 728.

The New York Statute provides as follows: "Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." Section 2 of the act provides: "Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine handwriting of any person claimed on the trial to have made or executed the disputed instrument, or writing, shall be permitted and submitted to the court and jury in like manner." Farrell *v.* Manhattan R. Co., 83 App. Div. 393, 82 N. Y. Supp. 334. But prior to the passage of the New York statute as at present in force, "comparison was permitted only with writings in evidence which were material upon some of the issues of the case. The expert was, therefore, limited in his investigation to an examination, in many instances, of but one or two specimens. The purpose of these statutes was to give him a broader field for his investigation by permitting other writings, which were not material upon the issues of the case, to be introduced in evidence solely for the purpose of comparison." See *In re* Hopkins Will, 172 N. Y. 360, 65 N. E. 173, 92 Am. St. Rep. 746.

An Iowa Statute authorizes comparison between the handwriting, the genuineness of which is in controversy, and writings of the same person which are proved to be genuine. Coppock *v.* Lampkin, 114 Iowa 664, 87 N. W. 665.

A Texas Statute provides that it is competent in every case to give evidence of handwriting by comparison made by experts or by the jury, but proof by comparison only shall not be sufficient to establish the handwriting of a witness who denies his signature under oath. McGlasson *v.* State, 37 Tex. Crim. 620, 40 S. W. 503, 66 Am. St. Rep. 842.

A Tennessee Statute provides "That hereafter in all the courts of this state comparison of disputed writings or signatures with any writings or signatures proved to the satisfaction of the judge to be genuine shall be permitted to be made by expert witnesses; and such writings or signatures, and the evidence of expert witnesses respecting the same, shall be submitted to the court or jury as evidence of the genuineness or otherwise of the writing or signature in dispute." Franklin *v.* Franklin, 90 Tenn. 44, 16 S. W. 557.

In State *v.* Henderson, 29 W. Va. 147, 1 S. E. 222, a prosecution for forgery, the defendant proposed to prove by a witness that sometime previous to the trial the witness was in the office of the prosecuting attorney, and in the presence of the latter and the prosecuting witness was shown the alleged forged instrument, and another writing with the prosecuting witness' signature thereto, which the latter then and there admitted to be genuine, and that the witness was then asked to compare the two signatures, which he did, and that they were almost alike or so nearly alike that one could not be distinguished from the other; but it was held that the evidence was clearly incompetent; that "certainly a witness could not be permitted to testify that he had at any time made the comparison, and to detail such comparison to the jury."

15. Franklin *v.* Franklin, 90 Tenn. 44, 16 S. W. 557.

(C.) Disputed Writing Need Not Be Subject-matter of Controversy. A statute providing for proof of handwriting by comparison does not restrict such proof to those cases alone where the disputed writing is the subject-matter of the controversy.[16]

(2.) Comparison in Aid of Doubtful Proof. — (A.) Generally. — While comparison of handwritings as an original means of ascertaining the genuineness of the signature or other writing was not permitted at common law, yet it was and still is permitted in some states in aid of doubtful proof.[17]

16. "We think it too clear for extended argument that the 'disputed writing' referred to by the statutes is any writing which one party upon a trial seeks to prove as the genuine handwriting of any person, and which is not admitted to be such, provided that the writing is not inadmissible under other rules of evidence. The statutes were clearly intended to remove the restriction which at common law limited the comparison of a disputed writing, either with other writings put in evidence for other purposes than comparison, or with standards existing in the minds of witnesses familiar with the handwriting of the person sought to be charged with the disputed writing. The class of disputed writings which may be proved upon the trial of an issue has neither been enlarged nor restricted. The admissibility of such disputed writings depends upon other rules than either the common law or the statutory rules respecting comparison of handwriting. If a disputed handwriting is itself either a fact in issue or a fact relevant to the issue, it may be proved by the means pointed out by the statutes. If it is neither in issue nor relevant to the issue, it must be excluded, not because the statutes of 1880 and 1888 have anything to do with the question, but because, according to fundamental rules, it can have no bearing upon the controversy." People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286. *Compare* People *v.* Kennedy, 34 Misc. 101, 69 N. Y. Supp. 470, which was a prosecution for murder, and it was held that experts could not give their opinions, based on comparison, to the effect that a check found on the body of the deceased and a pad in the room where the homicide took place were in the handwriting of the defendant. The court said: "My judgment is that in this case comparison cannot be made by an expert in handwriting placing two pieces of evidence, not being the subject of the action, in juxtaposition, and comparing one with the other, and declaring in his opinion whether one was written by the accused, or both by one person, because, as I have stated, these are mere evidential writings, and not the writings which constitute the controversy in the action. I therefore sustain this objection."

17. State *v.* Ezekiel, 33 S. C. 115, 11 S. E. 635; Graham *v.* Nesmith, 24 S. C. 285; Benedict *v.* Flanigan, 18 S. C. 506, 44 Am. Rep. 583; Desbrow *v.* Farrow, 3 Rich. L. (S. C.) 382.

This Was the Rule in Pennsylvania Previous to 1895. — Rockey's Estate, 155 Pa. St. 453, 26 Atl. 656; Aumick *v.* Mitchell, 82 Pa. St. 211; Berryhill *v.* Kirchner, 96 Pa. St. 489. And in Baker *v.* Haines, 6 Whart. (Pa.) 284, 36 Am. Dec. 224, the court said that on the principle that evidence from comparison of handwriting supported by other circumstances is admissible, from a comparison of the types, devices, etc., of two newspapers, one of which is clearly proved and the other imperfectly, the jury may be authorized to infer that both were printed by the same person.

In United States *v.* McMillan, 29 Fed. 247, it was ruled that an expert should not be allowed to compare disputed signatures with letters not belonging to the witness nor in his custody, nor parts of the record, nor admitted to be genuine, and as to which the witness only swore to his belief of genuineness, following the South Carolina rule to the effect that

Federal Courts. — And it is held that the decision of a state court in which this rule is recognized is binding upon a federal court sitting in that state, at least in the absence of a decision of the supreme court of the United States on the question.[18]

(B.) Qualifications of Witness. — Where comparison of handwritings is permitted in aid of doubtful proof, the witness need not be a technical expert.[19]

(C.) Determination of Fact of Doubtful Proof. — Where comparison of handwritings in aid of doubtful proof is desired, it is the duty of the trial judge to determine in the first instance whether or not sufficient doubt has been raised to authorize comparison.[20]

B. Necessity of Comparison by Witnesses. — Sometimes it is held that the statute authorizing comparison of handwritings by witnesses does not warrant the submission to the jury of the genuine writings, unless comparison with the disputed writing has been first made by witnesses.[21]

"comparison of handwriting, as an original means of ascertaining the genuineness of handwriting, will not be permitted, but, when introduced in aid of doubtful proof already offered, it may be allowed (Benedict *v.* Flanigan, 18 S. C. 508), and the question whether or not the evidence is so doubtful or conflicting as to admit this supplemental testimony must be determined by the court (*Ib.* 509)."

In Rose *v.* Winnsboro Nat. Bank, 41 S. C. 191, 19 S. E. 487, it was claimed that the trial judge erred in allowing a book of stock-certificates used by the defendant's attorney during the examination of the plaintiff to be sent to the jury-room after the jury had retired, the purpose being to compare handwriting on one of the certificates of stock with the handwriting of certain letters offered by the defendant against the objection of the plaintiff. The plaintiff had admitted the handwriting on a certificate of stock to be genuine, but had at least made it doubtful whether the letters in question were in her handwriting, and it was held that the judge only conformed to the general rule in such cases of permitting comparison by the jury in aid of doubtful proof already offered.

In Kentucky prior to 1886 proof of handwriting by comparison was not permitted, but by virtue of a statute passed in that year such proof is now proper with certain restrictions. Andrews *v.* Hayden, 88 Ky. 455, 11 S. W. 428.

18. United States *v.* Mathias, 36 Fed. 892, *following* the South Carolina practice.

19. State *v.* Ezekiel, 33 S. C. 115, 11 S. E. 635; Benedict *v.* Flanigan, 18 S. C. 506, 44 Am. Rep. 583. *Compare* Weaver *v.* Whilden, 33 S. C. 190, 11 S. E. 686; United States *v.* Mathias, 36 Fed. 892, where the court said: "The value of the testimony depends upon the character, experience and skill of the experts. Non-experts can afford little or no aid to a jury of intelligence. The testimony upon this point will be confined to experts."

20. State *v.* Ezekiel, 33 S. C. 115, 11 S. E. 635; Graham *v.* Nesmith, 24 S. C. 285.

21. People *v.* Pinckney, 67 Hun 428, 22 N. Y. Supp. 118; Glenn *v.* Roosevelt, 62 Fed. 550, where the court said: "Certainly the 'evidence' respecting the genuine writings which is to be submitted to the jury cannot be the evidence of their genuineness, for that is addressed solely to the court, who is to determine that question to his satisfaction without interference by the jury. And no other 'evidence' respecting these genuine signatures is competent, except such as the statute provides for — viz., a 'comparison . . . by witnesses.' It is such evidence, therefore, which the statute couples with 'such writings' as proof proper

C. Witnesses Competent to Make Comparison. — a. *Non-Experts.* — A non-expert is not competent to testify as to the genuineness of handwriting where his opinion is founded wholly upon a comparison of the handwriting in question with other genuine writings.[22] And it makes no difference that he saw the genuine

to submit to the jury. The diligence of counsel has presented upon their briefs the entire body of state authorities construing this statute, and in them there is found nothing which requires a different construction."

22. *California.* — Spottiswood *v.* Weir, 80 Cal. 448, 22 Pac. 289.

Indiana. — Clark *v.* Wyatt, 15 Ind. 271, 77 Am. Dec. 90.

Iowa. — Mixer *v.* Bennett, 70 Iowa 329, 30 N. W. 587.

Kentucky. — Hawkins *v.* Grimes, 13 B. Mon. 257.

Maine. — Page *v.* Homans, 14 Me. 478.

Maryland. — Smith *v.* Walton, 8 Gill 77.

Missouri. — Heacock *v.* State, 13 Tex. App. 97.

Nebraska. — First Nat. Bank *v.* Lierman, 5 Neb. 247.

New York. — Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474; People *v.* Severance, 67 Hun 182, 22 N. Y. Supp. 91.

North Carolina. — Jarvis *v.* Vanderford, 116 N. C. 147, 21 S. E. 302.

Pennsylvania. — Philadelphia & W. C. R. Co. *v.* Hickman, 28 Pa. St. 318.

Texas. — Mugge *v.* Adams, 76 Tex. 448, 13 S. W. 330.

West Virginia. — Clay *v.* Robinson, 7 W. Va. 348.

Compare. — Bell *v.* Brewster, 44 Ohio St. 650, 10 N. E. 679; Arthur *v.* Arthur, 38 Kan. 691, 17 Pac. 187; United States *v.* Larned, 4 Cranch C. C. 312, 26 Fed. Cas. No. 15,565.

In United States *v.* Craig, 4 Wash. C. C. 729, 25 Fed. Cas. No. 14,883, a prosecution for counterfeiting, the district attorney having proved the handwriting of the prisoner, by his acknowledgment that a certain paper exhibited in court was written by him, asked the witness if he believed that another paper, purporting to be an order signed by the prisoner, was in the handwriting of the prisoner. The witness answered that he had never seen the prisoner write, nor had he ever received a letter from him or corresponded with him; and it was held that his testimony to the effect that he believed the order to be in the handwriting of the prisoner, having compared it with the acknowledged genuine writing, was not admissible.

Testimony Partially Based on Comparison. — In Bruyn *v.* Russell, 52 Hun 17, 4 N. Y. Supp. 784, where the witness in question had frequently seen the purported author write, and had admitted that he had examined other signatures purporting to be those of the writer, which the witness, however, had not seen him write and which were not produced at the trial. He testified that he based his opinion principally upon the comparison. It was held that as his testimony was only partially based on such comparison it was properly received.

In Bruce *v.* Crews, 39 Ga. 544, 99 Am. Dec. 467, the plaintiff proposed to show the witness on the stand several papers which had been proven before the court to be in the handwriting of the defendant, and then ask the witness if the paper he had copied was not, from its resemblance to those writings, also in the defendant's handwriting. It was held that this was not proper, that "this is not the case of permitting a witness, an expert, to testify from a comparison of papers, all present before the jury. This is a simple case of educating the witness in the presence of the court up to the point of competency;" that it was proposed to make the witness competent from knowledge acquired by seeing writings which third persons have stated under oath were genuine.

In Mugge *v.* Adams, 76 Tex. 448, 13 S. W. 330, a witness testified to having seen a letter once, but that he was not familiar with the handwriting or signature of the writer of the letter. The witness was then shown a bond which had been filed

writing executed unless he also testifies that by that means or some other he knows or would recognize the handwriting of the person who executed it.[23]

b. *Experts.* — **(1.) Generally.** — The rule that when the matters in issue do not so far partake of the nature of a science as to require a previous course of study in order to obtain a knowledge of them, the opinions of experts are not admissible has no application where the genuineness of writings and signatures is in issue. Whether or not two instruments were written by the same person, whether signatures are the same, and the like, is clearly the subject of expert testimony, even though the witness has no previous knowledge of the handwriting of the purported author.[24] And in many of the

in the case by the defendants who were the purported writers of the letter in question and which contained their names, and he stated that the signature to the letter was the same as that signed to the bond. It was held that this was error "because the witness, instead of qualifying himself to testify to the signature of the letter otherwise, was permitted to express an opinion that the unproduced signature was similar to the signature of the bond" shown to the witness.

23. Wimbish *v.* State, 89 Ga. 294, 15 S. E. 325. See also Clark *v.* Wyatt, 15 Ind. 271, 77 Am. Dec. 90, wherein the court held that if a witness have previous knowledge of the handwriting he may, in corroboration of his testimony, compare the writing in question with other signatures known to be genuine.

24. *Alabama.* — Moon *v.* Crowder, 72 Ala. 79.

Illinois. — Rogers *v.* Tyley, 144 Ill. 652, 32 N. E. 393.

Indiana. — Walker *v.* Steele, 121 Ind. 436, 22 N. E. 142; McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336; Wines *v.* State Bank, 22 Ind. App. 114, 53 N. E. 389; Tucker *v.* Hyatt, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872.

Kansas. — Arthur *v.* Arthur, 38 Kan. 691, 17 Pac. 187.

Massachusetts. — Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711; Demerritt *v.* Randall, 116 Mass. 331; Homer *v.* Wallis, 11 Mass. 309, 6 Am. Dec. 169.

Nebraska. — Grand Island Banking Co. *v.* Shoemaker, 31 Neb. 124, 47 N. W. 696.

New Jersey. — Wheeler & Wilson Mfg. Co. *v.* Buckhout, 60 N. J. L. 102, 36 Atl. 772; Gordon's Case, 50 N. J. Eq. 397, 26 Atl. 268.

New York. — Miles *v.* Loomis, 75 N. Y. 288, 31 Am. Rep. 470; Sudlow *v.* Warshing, 108 N. Y. 520, 15 N. E. 532.

North Carolina. — Kornegay *v.* Kornegay, 117 N. C. 242, 23 S. E. 257; Tunstall *v.* Cobb, 109 N. C. 316, 14 S. E. 28; State *v.* Noe, 119 N. C. 849, 25 S. E. 812.

Ohio. — Murphy *v.* Hagerman, Wright 293; Calkins *v.* State, 14 Ohio St. 222, 45 Am. Dec. 536; Koons *v.* State, 36 Ohio St. 195.

Oklahoma. — Archer *v.* United States, 9 Okla. 569, 60 Pac. 268.

Texas. — Grooms *v.* State, 40 Tex. Crim. 319, 50 S. W. 370; Wagoner *v.* Ruply, 69 Tex. 700, 7 S. W. 80; Williams *v.* Deen, 5 Tex. Civ. App. 575, 24 S. W. 536.

Utah. — Durnell *v.* Sowden, 5 Utah 216, 14 Pac. 334.

Vermont. — Bridgman *v.* Corey, 62 Vt. 1, 20 Atl. 273.

Virginia. — Hanriot *v.* Sherwood, 82 Va. 1.

In Green *v.* Terwilliger, 56 Fed. 384, the court, in speaking of the competency of the testimony of experts in handwriting, said: "Experts, in determining the genuineness of handwriting, or its falsity, seldom confine themselves solely to the appearance of similitude or dissimilitude of the individual letters. An analysis of the signature as a whole is, or should be, always made. Experiments, observations and experience have disclosed the fact that there are certain general principles which

states this rule is expressly recognized by statute.[25] And the rule governing expert testimony as to handwriting is the same in a criminal as in a civil action.[26]

Similar Characteristics. — Expert witnesses may be permitted to explain similar characteristics found in the signature in dispute and on other signatures admitted to be genuine.[27]

Differences. — Testimony of experts as to the characteristics of different signatures is not open to objection where it is confined to the signature in controversy and to others admitted to be genuine.[28]

can often be satisfactorily relied upon in determining the genuineness of handwriting. In nearly every person's manner and style of writing there is a prevailing and distinct character, which is more or less independent of the writer's will, and unconsciously forces the writer to stamp the writing as his own. By nature, custom, and habit, individuals, as a general rule, acquire a system of forming letters which gives to their writing a fixed character, as distinct as the features of the human face, which distinguishes their own handwriting from the handwriting of every other person."

In State *v.* Hastings, 53 N. H. 452, the court, in commenting upon the authorities in that state as to the competency of expert testimony based on comparison, said: "In Myers *v.* Toscan, 3 N. H. 47, it is held that it cannot be left to the jury to determine the genuineness of a signature to a paper, merely by comparing it with other signatures proved to be genuine, but that after witnesses acquainted with the handwriting in question have testified, other signatures *proved* to be genuine may be submitted to the jury to corroborate or weaken their testimony. In Bowman *v.* Sanborn, 25 N. H. 110, it is said, where there are other signatures of the person already in evidence in the case, a comparison may be made between the signatures *admitted* to be genuine, and the one in question, without any previous proof as to handwriting. Reed *v.* Spaulding, 42 N. H. 111, 121, 122, *follows* Bowman *v.* Sanborn, that it is only between signatures admitted to be *genuine*, and which are already in evidence in the case, and the one in question, that a comparison can be made by experts or the jury, and that this may be done without any other preliminary evidence, thus contradicting Myers *v.* Toscan; while the second case of Reed *v.* Spaulding, decided in Sullivan Co., Dec. Law Term, 1862, and not reported, held that the standards of comparison might be *proved* to be genuine as well as to be *admitted* to be so; and that they might be introduced anew for the purposes of the comparison, as well as to use those already in the case for other purposes. State *v.* Shinborn, 46 N. H. 497, follows Bowman *v.* Sanborn, that the comparison may be made without waiting for any other evidence derived from a knowledge of the handwriting."

25. Hagan *v.* Carr, 198 Pa. St. 606, 48 Atl. 688; State *v.* Tice, 30 Or. 457, 48 Pac. 367; Munkers *v.* Farmers & M. Ins. Co., 30 Or. 211, 46 Pac. 850; Grand Island Banking Co. *v.* Shoemaker, 31 Neb. 124, 47 N. W. 696; First Nat. Bank *v.* Carson, 48 Neb. 763, 67 N. W. 779.

26. State *v.* Webb, 18 Utah 441, 56 Pac. 159; Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767.

27. Patton *v.* Lund, 114 Iowa 201, 86 N. W. 296.

United States *v.* Chamberlain, 12 Blatchf. 390, 25 Fed. Cas. No. 14,778, to the effect that an expert might point out to the jury features in the writing of the standards identical with those displayed by the writings in question.

28. Riordan *v.* Guggerty, 74 Iowa 688, 39 N. W. 107, where it was insisted that the error consisted in permitting testimony to matters which do not require the testimony of an expert, but the court held as stated.

In Pope *v.* Anthony, 29 Tex. Civ. App. 298, 68 S. W. 521, it was held

Identity of Authorship. — So, also, it is competent for an expert to testify that signatures to documents purporting on their face to be those of different persons are or are not in fact in the same handwriting.[29]

(2.) Actions Pending in Federal Court. — It has been held that in an action pending in a federal court where the question is as to the genuineness of a signature, the admissibility of expert testimony in respect thereto is governed by the statute of the state where the court is sitting.[30]

(3.) Facts Forming Basis of Reason for Opinion. —To render opinions of experts as to handwriting admissible, all the facts upon which the expert forms his opinion should be before the court and jury to the

that a witness duly qualified as an expert and who had shown his familiarity with the records of the land office, and especially with a certain land certificate, was competent to testify that a transfer of the certificate in question to a third person, written on its back, was in the same handwriting as letters received at the land office, purporting to come from such person, and also that the body of the transfer was written by the same person, because he had fully given all facts on which he based his opinion, and the letters referred to were over sixty years old, and related to official business in the land office, and had been acted on as the letters of the purported writer.

In Demerritt *v.* Randall, 116 Mass. 331, an expert was asked upon comparing the signatures to the standards, "Which exhibits the greater ease and facility of writing?" to which it was held he was properly permitted to answer, "The signature to the will [which was in dispute] shows the most ease, most skill and cultivation of the art of penmanship."

Alterations. — In Hawkins *v.* Grimes, 13 B. Mon. (Ky.) 257, where the issue was whether or not certain alterations in a will, the body of which was admitted to be in the handwriting of the testator, were also in his handwriting, and it was held competent for witnesses, although not acquainted with the handwriting of the testator, to give their opinions whether the alterations were or were not in the same handwriting as that of the body of the will, and to point out variations in the form of words, letters, etc., leaving the jury to decide upon their own inspection as well as such aids.

Testimony of an expert to the effect that the defendant in an action on a promissory note did not sign the note in controversy is proper. Roy *v.* First Nat. Bank (Miss.), 33 So. 494; *s. c.* 33 So. 411.

Upon a standard of genuineness thus established, it is competent to introduce opinions of persons proven to be experts in handwriting, to the effect that the signature which appears upon the instrument the genuineness of which is in issue was not made by the same person who signed the deed so proven to be genuine. Goza *v.* Browning, 96 Ga. 421, 23 S. E. 842.

29. People *v.* Coombs, 36 App. Div. 284, 55 N. Y. Supp. 276, *affirmed* 158 N. Y. 532, 53 N. E. 527; Costello *v.* Crowell, 133 Mass. 352; Baldwin *v.* Threlkeld, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841. *Compare* People *v.* Severance, 67 Hun 182, 22 N. Y. Supp. 91, *holding* that the testimony of an expert in such case should not be to the effect that the disputed writing is in the handwriting of the purported author and that his testimony should be confined to a comparison of the handwriting of the genuine paper with the handwriting of the paper in dispute, and to his opinion that they were or were not written by the same person. See also Bell *v.* Hutchings (Tex. Civ. App.), 41 S. W. 200; Wines *v.* Hamilton State Bank, 22 Ind. App. 114, 53 N. E. 389.

30. Holmes *v.* Goldsmith, 147 U. S. 150; Richardson *v.* Green, 61 Fed. 423; Green *v.* Terwilliger, 56

end that they should determine whether the opinion given is well founded and also that the opposing counsel may have an opportunity to cross-examine as to such facts.[31]

(4.) **Use of Diagrams.** — An expert witness in handwriting may be permitted to use a diagram for the purpose of illustrating and explaining the meaning of his testimony where it appears that without such document he could not make his meaning clear.[32]

(5.) Proof of Correctness by Ocular Demonstration. — It has been held that the correctness of an opinion of an expert in handwriting is usually susceptible of ocular demonstration, and that it should be accorded little evidential weight when it is not accompanied by such demonstration.[33] And an expert testifying as to the genuineness of

Fed. 384. *Compare* United States *v.* Jones, 10 Fed. 469.

31. Kendall *v.* Collier, 97 Ky. 446, 30 S. W. 1002; Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; People *v.* Mooney, 132 Cal. 13, 63 Pac. 1070; Demerritt *v.* Randall, 116 Mass. 331; McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336; *In re* Koch, 33 Misc. 153, 68 N. Y. Supp. 375.

Koons *v.* State, 36 Ohio St. 195, where it was held error upon the part of the court to exclude from the consideration of the jury the facts upon which the opinion was founded, but not the opinion itself.

32. Hagan *v.* Carr, 198 Pa. St. 606, 48 Atl. 688, *holding,* however, that the diagram is not to be regarded as a piece of evidence in itself, but merely as an aid to the witness and counsel in intelligently presenting to the jury the theory upon which the opinion of the witness is based.

33. "The theory upon which these expert witnesses are permitted to testify is that handwriting is always in some degree the reflex of the nervous organization of the writer, which, independently of his will and unconsciously, causes him to stamp his individuality in his writing. I am convinced that this theory is sound. But, at the same time, I realize that in many cases it is unreliable when put to practical test. It must contend not only with disguise, but also with the influence of possible abnormal mental and physical conditions existing when the writing was made, such, for instance, as the position of the body, whether reclining, sitting or standing; the height and stability of that upon which the writing rests, and the character of its surface; the character of the paper written upon, the ink, the pen and holder of the pen, the health of the writer's body and member with which the writing is made, not only generally, but also with reference to the accidents and influences of the moment. It follows that unreliability is greater when the disputed writing is short or the standards for comparison are meagre or are all written at one time, and also that uncertainty lessens when the disputed writing is long and the standards are numerous and the products of different dates. Handwriting is an art concerning which correctness of opinion is susceptible of demonstration, and I am fully convinced that the value of the opinion of every handwriting expert as evidence must depend upon the clearness with which the expert demonstrates its correctness. That demonstration will naturally consist in the indication of similar characteristics, or lack of similar characteristics, between the disputed writing and the standards, and the value of the expert's conclusion will largely depend upon the number of those characteristics which appear or are wanting. The appearance or lack of one characteristic may be accounted to coincidence or accident, but, as the number increases, the probability of coincidence or accident will disappear, until conviction will become irresistible. Thus comparison is rated after the fashion of circumstantial evidence, depending for strength upon the number and prom-

handwriting may make illustrations on the blackboard for the purpose of rendering his testimony more intelligible.[34]

D. Qualifications of Witnesses. — a. *Necessity.* — As has been previously stated, only those persons who are accustomed to and skilled in that respect may institute comparisons of handwritings of unquestioned genuineness with the writing in dispute, and give opinion as to the genuineness of the latter, and accordingly the witness must have some skill as an expert before his testimony should be received.[35]

b. *Requisite Skill, Knowledge and Experience.* — (1.) **Generally.** There is no distinct legal rule defining the precise qualifications of expert witnesses to handwriting. Whether one is qualified depends upon his knowledge of the subject, his experience in connection with it, and his capacity to form an opinion.[36]

inence of the links in the chain. Without such demonstration the opinion of an expert in handwriting is a low order of testimony, for, as the correctness of his opinion is susceptible of ocular demonstration, and it is a matter of common observation that an expert's conclusion is apt to be influenced by his employer's interest, the absence of demonstration must be attributed either to deficiency in the expert or lack of merit in his conclusion. It follows that the expert who can most clearly point out will be most highly regarded and most successful." Gordon's Case, 50 N. J. Eq. 397, 26 Atl. 268.

34. McKay *v.* Lasher, 121 N. Y. 477, 24 N. E. 711; Dryer *v.* Brown, 52 Hun 321, 5 N. Y. Supp. 486.

35. Moon *v.* Crowder, 72 Ala. 79; Griffin *v.* State, 90 Ala. 596, 8 So. 670; Bratt *v.* State, 38 Tex. Crim. 121, 41 S. W. 622; Jarvis *v.* Vanderford, 116 N. C. 147, 21 S. E. 302; Mugge *v.* Adams, 76 Tex. 448, 13 S. W. 330; People *v.* Dorthy, 50 App. Div. 44, 63 N. Y. Supp. 592; Kendall *v.* Collier, 97 Ky. 446, 30 S. W. 1002; First Nat. Bank *v.* Lierman, 5 Neb. 247.

In Koons *v.* State, 36 Ohio St. 195, a prosecution for uttering a forged check, an expert who had seen the check several months previously, but had never seen the accused write and was not acquainted with his handwriting, was called as a witness, and a genuine signature of the accused was exhibited to the witness, which furnished the only knowledge he had of the handwriting of the accused. It was held that the witness had not qualified himself to express an opinion as an expert; that it must appear before such an opinion is called for that the witness has formed, or is at least able to form, an opinion proper to be stated.

In Curtis *v.* State, 118 Ala. 125, 24 So. 111, it was held that a bookkeeper, although he had said that he had seen many different kinds of writing, but had never knowingly seen a forged instrument, and had had no skill or experience in comparing forged with genuine handwritings, was not qualified to make comparisons as an expert.

"Large Acquaintance With Handwriting." — It cannot be inferred from the mere fact that the witness had been a clerk of court for many years, and has had "a large acquaintance with handwriting," that he has acquired skill in the comparison of signatures. Buchanan *v.* Buckler, 8 Ky. L. Rep. 617.

Ability to Recognize Signature. Evidence by the alleged maker of a note that he could read and write and would know his signature does not constitute a proper foundation to permit him to testify as an expert that the signature was not in his handwriting. Pillard *v.* Dunn, 108 Mich. 301, 66 N. W. 45.

36. People *v.* Flechter, 44 App. Div. 199, 60 N. Y. Supp. 777; Marcy *v.* Barnes, 16 Gray (Mass.) 161, 77 Am. Dec. 405; Com. *v.* Williams 105

It is not necessary in order to qualify a witness as an expert to testify as to the genuineness of handwriting from a comparison that he should have made such comparisons a specialty,[37] although he must have had an opportunity to study and acquire skill in the matter of making comparisons, and must have done so.[38] And accordingly

Mass. 62; Forgey *v.* First Nat. Bank, 66 Ind. 123.

Attorney-at-Law. — In State *v.* Phair, 48 Vt. 366, an attorney-at-law who stated that he had had occasion to examine handwriting with a view to comparison of handwritings, had been called to the witness stand as a witness on the subject many times; that he thought he could detect handwriting pretty well; that he had never made a business of criticising handwriting, but, after all, had been accustomed to it and always supposed he could identify handwriting, was held to be qualified as an expert.

Instructor in Penmanship. — In Heffernan *v.* O'Neill (Neb.), 96 N. W. 244, it was held that one who had been a student of penmanship for many years; had given special attention to the study and comparison of signatures; had taught penmanship; was familiar with all the different systems of penmanship, and had been frequently called upon to compare signatures, was duly qualified as an expert in handwriting.

In People *v.* Spooner, 1 Denio (N. Y.) 343, 43 Am. Dec. 672, it was stated that a clerk in chancery was not competent as an expert in handwriting merely on the ground that he had been accustomed to examine signatures as to their genuineness, because there was nothing either in the official employment or the profession of the witness which proved that he had a higher degree of skill in judging of handwriting than was common to several classes of individuals.

37. Wheeler & Wilson Mfg. Co. *v.* Buckhout, 60 N. J. L. 102, 36 Atl. 772.

"It is not always necessary that one whose opinion as to the genuineness of a signature is received in evidence should have special experience and skill in the examination of handwriting in general. It is enough if he can show special experience and skill in the examination of the handwriting of the person whose signature is to be proved, and of whose handwriting an undisputed standard is before the court." Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884.

In Reg. *v.* Silverlock (1894), 2 Q. B. 766, wherein it was held that a witness giving evidence under the English statute in proof of handwriting need not be a professional expert or a person whose skill in the comparison of handwritings has been gained in the way of his profession or business. The court said: "It is true that the witness who is called upon to give evidence founded on a comparison of handwritings must be *peritus;* he must be skilled in doing so; but we cannot say that he must have become *peritus* in the way of his business or in any definite way. The question is, is he *peritus?* Is he skilled? Has he an adequate knowledge? Looking at the matter practically, if a witness is not skilled the judge will tell the jury to disregard his evidence. There is no decision which requires that the evidence of a man who is skilled in comparing handwriting, and who has formed a reliable opinion from past experience, should be excluded because his experience has not been gained in the way of his business."

38. Buchanan *v.* Buckler, 8 Ky. L. Rep. 617; Kendall *v.* Collier, 97 Ky. 446, 30 S. W. 1002.

A witness who states that he has testified on the subject of disputed handwriting in many of the courts of the United States and in Canada is qualified as an expert. People *v.* Flechter, 44 App. Div. 199, 60 N. Y. Supp. 777.

A county clerk who previous to becoming clerk had been employed in the clerk's office, and whose service in that office extended over a period of nearly twenty-five years, and whose duty it was during that time to compare the signatures of various

it is ordinarily sufficient that the witness has been engaged in some business which calls for frequent comparisons, and that he has in fact been in the habit for some time of making such comparisons.[39]

officials upon instruments brought to the clerk for his certification with the genuine signatures of such officials on file in the office, for the purpose of determining whether the signatures produced could be properly certified to be genuine, is entitled to rank as an expert witness on handwriting. Wheeler & Wilson Mfg. Co. *v.* Buckhout, 60 N. J. L. 102, 36 Atl. 772.

"An expert witness is one possessed of special knowledge or skill in respect of the subject upon which he is called to testify. Mr. Lawson lays down the rule that one may be qualified as an expert witness by study without practice or practice without study. Laws. Ex. & Sp. Ev. 210. He justly adds that mere observation, without either study or practice, will not be sufficient. But in the case in hand, Mr. Fisher was offered as an expert not because of his familiarity with handwriting or signatures generally, but because the evidence established a long course of practice in comparing signatures and determining their genuineness. It is impossible to conceive that he did not thereby acquire a special skill upon that subject not possessed by others. It is precisely upon this ground that rests the admission to testify as experts of tellers and cashiers of banks who have acquired their experience and skill by the practice of comparing the signatures to checks, drafts and notes passing through the banks with signatures known to be genuine." Wheeler & Wilson Mfg. Co. *v.* Buckhout, 60 N. J. L. 102, 36 Atl. 772.

39. *Kansas.* — Ort *v.* Fowler, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501.

Massachusetts. — Bacon *v.* Williams, 13 Gray 525; Com. *v.* Nefus, 135 Mass. 533; Edmonston *v.* Henry, 45 Mo. App. 346.

Missouri. — State *v.* David, 131 Mo. 380, 33 S. W. 28.

New Jersey. — Wheeler & Wilson Mfg. Co. *v.* Buckhout, 60 N. J. L. 102, 36 Atl. 772.

New York. — People *v.* Flechter, 44 App. Div. 199, 60 N. Y. Supp. 777; Hadcock *v.* O'Rourke, 25 N. Y. St. 55, 6 N. Y. Supp. 549.

North Carolina. — Kornegay *v.* Kornegay, 117 N. C. 242, 23 S. E. 257; State *v.* De Graff, 113 N. C. 688, 18 S. E. 507.

Texas. — Bratt *v.* State, 38 Tex. Crim. 121, 41 S. W. 622; Riley *v.* State (Tex. Crim.), 44 S. W. 498.

In Heacock *v.* State, 13 Tex. App. 97, the witness offered as an expert testified that he had been engaged in the banking business several years, and was more or less experienced in handwriting; that his clerk did most of his corresponding, that he had little occasion to make comparisons of handwriting, did not consider himself an expert, and had never before been called to testify as an expert. It was held that he was not qualified to testify as an expert.

One Who Has Been a Student of or Taught Penmanship for a great many years, who is familiar with all the different systems of penmanship, and who has given special attention to the study and comparison of signatures is sufficiently qualified to give his opinion as an expert. Heffernan *v.* O'Neill (Neb.), 96 N. W. 214.

A County Auditor, a teacher of penmanship of long experience, and attorneys, all of whom stated that they were familiar with old papers and writings, and thought they were capable of giving an opinion upon the age of the writing in question are properly allowed to testify as experts in relation thereto. It is not necessary, in order to qualify a witness to testify upon such a question, that he should be a chemist and have knowledge of the chemical composition of ink. Eisfield *v.* Dill, 71 Iowa 442, 32 N. W. 420.

A Clerk of the Court who has also been county recorder for a number of years, and who states that in copying he has seen a number of handwritings and has become familiar with the handwriting of different people in copying documents, etc., has been held to be an expert. State *v.* Webb, 18 Utah 441, 56 Pac. 159. But

Mere Opportunity Afforded for Observation, however, will not constitute a person an expert in handwriting; he must have been educated in that business or he must have acquired actual skill and scientific knowledge upon the subject.[40]

Bank Officers. — Within this rule it is ordinarily held that bank officers, bank tellers and other persons following similar avocations, whose daily business and duties have for a long time compelled them to scrutinize and examine writings, are sufficiently qualified as experts to compare handwritings.[41] But a cashier of a bank is entitled to no more credit in judging of handwriting than any other person of equal skill.[42]

a witness does not show himself to be qualified to testify as an expert in handwriting by stating merely that he is a clerk of the courts without stating also how long he has served in that office. Winch *v.* Norman, 65 Iowa 186, 21 N. W. 511. In this case it seemed to have been questioned whether the witness could have become qualified to testify as an expert from comparison of writings by such service, but the court did not rule on the question, merely ruling that he could certainly not become an expert without showing how long he had served.

An Attorney whose business for fifteen years has required him to examine handwriting a great deal, and of a great many people, who states that he has frequently made comparisons, and often made discriminations between handwritings to find out whether the handwriting was that of a certain person is competent as an expert, although he states that he is not an expert in the sense of making it his business. Christman *v.* Pearson, 100 Iowa 634, 69 N. W. 1055.

A Merchant of many years' experience who states that he has had occasion to examine signatures and handwritings of various people, most of which were checks and bills of exchange, is a competent witness to testify as an expert on handwriting. State *v.* Webb, 18 Utah 441, 56 Pac. 159. See also Edmonston *v.* Henry, 45 Mo. App. 346.

40. Goldstein *v.* Black, 50 Cal. 462, where the witness stated that he had never been called upon to testify as an expert in handwriting; had never been employed in making comparisons, although he had sometimes compared signatures when disagreements arose in the course of business as to their genuineness.

41. Riley *v.* State (Tex. Crim.), 44 S. W. 498; People *v.* Flechter, 44 App. Div. 199, 60 N. Y. Supp. 777; Hendrix *v.* Gillett, 6 Colo. App. 127, 39 Pac. 896; Speiden *v.* State, 3 Tex. App. 156, 30 Am. Rep. 126; Forgey *v.* First Nat. Bank, 66 Ind. 123; Green *v.* Terwilliger, 56 Fed. 384; Clay *v.* Alderson, 10 W. Va. 49. See also Clay *v.* Robinson, 7 W. Va. 348.

A Cashier of a Bank whose business it has been to examine signatures to checks to test their genuineness, and who is acquainted with the handwriting of the purported author of a disputed signature, is entitled to rank as an expert witness on handwriting. Tower *v.* Whip, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937.

In Servis *v.* Nelson, 14 N. J. Eq. 94, five witnesses experienced in the examination of handwriting and conversant with the subject as bank officers, or otherwise, were examined as experts and all testified that the signature of a purported attesting witness to the instrument in question was not genuine.

Authorship of Anonymous Letter. In Com. *v.* Williams, 105 Mass. 62, where the question was as to the authorship of an anonymous letter, it was held that bank officers duly qualified in other respects as experts were not incompetent to compare the letter with another letter written by the defendant merely because their experience in making comparisons as such bank officers was largely confined to the examination of the bodies of notes and checks for the purpose of enabling them to judge of the genuineness of the signatures.

42. Murphy *v.* Hagerman, Wright (Ohio) 293.

Acquaintance With Official Records. — One who during a long course of official action has acquired great familiarity with official records and signatures has been held to be qualified as an expert to testify as to the genuineness of such signatures.[43]

(2.) Extent of Skill. — The mere fact that the qualifications of a witness offered as an expert in handwriting are not extensive is a matter which does not affect his competency, but merely goes to the weight of his testimony.[44]

(3.) Bias of Witness. — It has been held that a person duly qualified as an expert in handwriting should not be permitted to testify as such where he was detailed by the government to examine into and collect the facts of the particular case, and has hunted up testimony and busied himself in the inspection and prosecution of the case on trial.[45]

c. *Proof of Qualifications.* — The mere fact that a witness does not in express terms state that he is an expert is not ground for holding him not to be an expert, where he does state that he has had experience in examining signatures on papers.[46]

43. United States *v.* Ortiz, 176 U. S. 422. See also Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884.

44. Schmuck *v.* Hill (Neb.), 96 N. W. 158. See also Com. *v.* Williams, 105 Mass. 62.

"As there is no exact test by which it can be determined with certainty how much skill or experience a witness must possess to qualify him to testify as an expert, the peculiar circumstances of each case must, from necessity, have much influence upon the trial judge in the exercise of his discretion. Among these circumstances are the bearing of the witness upon the stand, his mental capacity, etc. A personal examination by the trial judge, therefore, gives him a better opportunity to decide than the appellate court can enjoy. An experience and opportunities which would be sufficient to qualify a sharp, intelligent witness as an expert might be wholly inadequate to qualify a dull and ignorant one." State *v.* Webb, 18 Utah 441, 56 Pac. 159.

In order to render a witness competent as an expert to testify to handwriting by comparison it is not necessary that he should possess the highest skill or information on the subject. Hyde *v.* Woolfolk, 1 Iowa 159.

45. United States *v.* Mathias, 36 Fed. 892, which was a prosecution for violating the federal statutes prohibiting the sending of obscene matter through the mails, and the witness in question was a postoffice inspector. The court said: "This testimony is only to aid the jury, showing them the opinion of experienced and skillful men. It can in no sense control them. Where the person called to testify as an expert is one occupying the relation to the case which this witness does — saturated with bias against the defendant, honestly convinced of his guilt, and, in the conscientious discharge of his duty, seeking to bring him to punishment — he can afford the jury no efficient aid in coming to a fair and impartial conclusion."

46. Riley *v.* State (Tex. Crim.), 44 S. W. 498.

A witness offered as an expert in handwriting may be asked by the party calling him as to his residence, his occupation, the length of time he has been engaged in business that would qualify him to judge of signatures, and also as to his actual experience in such matters as a witness in court. Tyler *v.* Todd, 36 Conn. 218.

The competency of a witness as an expert in handwriting is not affected by the fact that the witness does not claim to be an expert nor to be superior to others in judgment. Hyde *v.* Woolfolk, 4 Iowa 159.

d. *Determination of Fact.* — Whether or not a witness offered as an expert in handwriting is duly qualified as such is a question for the determination of the trial judge, and a reversal of the judgment for an alleged error in determining that a witness is or is not such an expert is not warranted, unless it can be clearly seen that the judge was in error, and that his error was injurious.[47] And the question whether or not one offered as an expert is qualified to speak as such cannot be left to the jury.[48]

E. Limiting Number of Witnesses. — Limiting the number of expert witnesses testifying for or against the genuineness of disputed handwriting is a matter within the discretion of the trial judge, and his ruling in this respect cannot be ground for reversal unless he has abused that discretion and it can be seen that this abuse resulted in injury.[49]

F. Weight of Expert Testimony. — Although the weight and value to be given to the testimony of expert witnesses as to the genuineness of disputed handwriting is a question for the jury,[50] such testimony is received with caution, and there is a very general disposition upon the part of the courts to regard it as of a weak and unsatisfactory character.[51]

47. Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559; Forgey *v.* First Nat. Bank, 66 Ind. 123; Bratt *v.* State, 38 Tex. Crim. 121, 41 S. W. 622; Schmuck *v.* Hill (Neb.), 96 N. W. 158; People *v.* Flechter, 44 App. Div. 199, 60 N. Y. Supp. 777; Hoag *v.* Wright, 174 N. Y. 36, 66 N. E. 579.

"From the very nature of the subject, no absolute rules can be laid down by which to determine whether a witness is qualified to testify as an expert. Therefore the question must be left to the discretion of the court, whose duty it is to decide. This being so, many courts of the highest authority have held 'that the question whether a witness possesses the necessary qualifications of an expert is a question of fact purely within the province and discretion of the trial judge, and that his decision concerning the matter is not subject to revision in the appellate court.' Rog. Exp. Test (2d Ed.) § 22, and cases cited in note 1. Many other courts of equally high authority as those above referred to hold that, where there is palpable abuse of discretion, the ruling of the trial court is subject to review. This is the better rule, and the one best sustained by the authorities." State *v.* Webb, 18 Utah 441, 56 Pac. 159.

48. Fairbank *v.* Hughson, 58 Cal. 314.

49. Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559.

50. Christman *v.* Pearson, 100 Iowa 634, 69 N. W. 1055.

51. *California.* — Spottiswood *v.* Weir, 66 Cal. 525, 6 Pac. 381.

District of Columbia. — Cowan *v.* Beall, 1 McArthur 270.

Iowa. — State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497; Winch *v.* Norman, 65 Iowa 186, 21 N. W. 511.

Ohio. — Koons *v.* State, 36 Ohio St. 195.

"The opinions of experts upon handwriting, who testify from comparison only, are regarded by the courts as of uncertain value, because in so many cases where such evidence is received witnesses of equal honesty, intelligence and experience reach conclusions not only diametrically opposite, but always in favor of the party who called them." Hoag *v.* Wright, 174 N. Y. 36, 66 N. E. 579.

Expert testimony as to handwriting is of the lowest order of evidence or of the most unsatisfastory character. It cannot be claimed that it ought to overthrow positive and direct evidence of creditable witnesses who testified from their personal knowledge. It is most used and is most useful

4. The Standards of Comparison. — A. In General. — Certainly if comparison of handwritings is to be permitted as a proper method of investigation, either by witnesses, jury or court, for the purpose of determining the genuineness of a disputed signature or handwriting, the writings sought to be used as furnishing an exemplar

in cases of conflict between witnesses in corroborating testimony. Borland *v.* Walrath, 33 Iowa 130.

"Testimony of that kind is not entitled to the same weight as the testimony of persons who speak concerning matters within their personal observation, because these witnesses simply express opinions which they entertain, founded on the comparison made, and you should regard their statements in this matter as *opinions merely*, and give them such weight only as you think they deserve, considering the experience which the experts have had in making such comparisons." United States *v.* Pendergast, 32 Fed. 198.

In Patton *v.* Lund, 114 Iowa 201, 86 N. W. 296, the court charged the jury as follows: "Our statute provides that evidence respecting handwriting may be given by experts by comparison, or by comparison by the jury with writings of the same person which are proved to be genuine. Evidence of this character has been introduced upon this trial, and it is for you to say how much weight shall be given to such testimony, taking into consideration the amount of skill possessed by the witness. But while it is proper to consider such evidence, and to give it such weight as you think it justly entitled to, yet it is proper to remark that it is of the lowest order of evidence, or evidence of the most unsatisfactory character, but it is most useful in cases of conflict between witnesses as corroborating testimony."

In Land Mort. Inv. & A. Co. *v.* Preston, 119 Ala. 290, 24 So. 707, on an issue as to whether a borrower executed an alleged paper authorizing his agent to receive the money, the borrower testified that he did not execute the paper; nine witnesses, not experts, but more or less familiar with the borrower's handwriting, testified that in their opinion the signature was not genuine, and eight witnesses, some of whom were experts, testified by comparison that it was, in their opinion, not genuine, and some of them that the signature was the same handwriting as the other parts of the paper, which was written by the alleged agent. Opposed to this the lender introduced eight witnesses who were experts, who testified by comparison that in their opinion the signature was genuine. It was held that the burden on the lender to show the genuineness was not discharged by a preponderance of the evidence.

In Green *v.* Benham, 57 App. Div. 9, 68 N. Y. Supp. 248, the defendants called a professional expert, who expressed an opinion that the disputed signature was not genuine, based upon a comparison of a few genuine signatures with an enlarged photograph of the disputed signature. In the course of his study and measurements and minute criticisms of the signatures under his observation, he discovered several variations in the disputed signature from the genuine signatures which had been submitted to him; and those which he considered departures from the genuine signatures, and therefore indicative of forgery in the disputed signature, he detailed. But upon his cross-examination many other signatures confessedly genuine were presented to him, and it was found that the various characteristics which had been pointed out by him as evidences of forgery existed in one or more of the genuine signatures, and he frankly and with great candor admitted that these facts weakened, if they did not destroy, the effect of his previous observations. And, besides, the rule is that "an opinion as to handwriting should depend not so much upon mathematical measurements and minute criticisms of lines, nor their exact correspondence in detail when placed in juxtaposition with other specimens, as upon its general character and features, as in the recognition of the human face."

The statement of an expert to the effect merely that there is a similarity in some of the small letters of the

or standard for the purpose of making the comparison must be such as are proper, within the rules subsequently discussed, to be used for that purpose, and it will be regarded as fatal error if an improper standard is permitted to be used.[52]

B. Writings Already in Evidence for Other Purposes. — a. *In General.* — Irrespective of liberalizing statutes as to what writings may be used for purposes of comparison, it is very generally held, and, indeed, was recognized as one of the exceptions to the former strict rule at common law, that genuine writings which are already properly in evidence for other purposes may be used as exemplars or standards of comparison.[53]

disputed writing to those in the handwriting conceded to be genuine, but that he does not state that it is his opinion that the same person was the author of the two handwritings, is not sufficient to establish the genuineness of the disputed handwriting. Crow *v.* State, 37 Tex. Crim. 295, 39 S. W. 574.

The testimony of an expert witness to the effect that signatures to certain notes were forgeries was held sufficient to establish that fact in *In re* Koch, 33 Misc. 153, 68 N. Y. Supp. 375, because the expert based his reasons for his opinion on the fact that when the two notes were placed one over the other the sides and ends coincided, and when the two were held to the light it could be discovered that the signatures on each were entirely and exactly alike; that each line of each of the letters in the signatures is precisely similar in size, shape and position on the paper with the corresponding line in the other note; that there was not the slightest deviation, except such as might and naturally would occur if both signatures were tracings from the same standard, especially in view of the fact that the purported author of the two signatures was an illiterate man, barely capable of writing his name.

The testimony of an expert witness, however eminent, as to the genuineness of an instrument and the date of its execution, based upon the appearance of the paper, which is of some age, when that appearance might be due to some other causes than those inferred from visual examination and microscopic scrutiny, should not prevail against positive testimony of witnesses to the execution of the paper, one of whom was the typewriter who prepared it. Card *v.* Moore, 68 App. Div. 327, 74 N. Y. Supp. 18; *affirming* 173 N. Y. 598, 66 N. E. 1105.

The opinions of experts in writing are weaker in degree of certainty than the direct evidence of the subscribing witness to an instrument where there is no proof to impugn the veracity of the latter, or to show that he had any interest or motive to swear falsely. Brown *v.* Mutual Ben. Life Ins. Co., 32 N. J. Eq. 809.

52. State *v.* Ezekiel, 33 S. C. 115, 11 S. E. 635, wherein it is held that erroneously permitting to be used as standards in prosecution for forgery, papers which are not proper for that purpose, cannot be regarded as harmless because the conviction was on a count for uttering and publishing the instrument as forged, where the comparison was the only proof of the forgery.

In Shannon *v.* Fox, 1 Cranch C. C. 133, 21 Fed. Cas. No. 12,706, an offer to prove the handwriting of the defendant by comparing it with his signature to the power of attorney filed in the cause was refused on the ground that no proof was given of the signature of the power of attorney; that the power itself was not considered as a matter of record.

In Macubbin *v.* Lovell, 1 Cranch C. C. 184, 16 Fed. Cas. No. 8928, the plaintiff having proved that on a note filed in another case the plaintiff had confessed judgment, an offer to permit the jury to compare a receipt purported to be signed by the plaintiff with such note, and therefrom to infer that the signature was in his handwriting, was refused.

53. *United States.* — United States *v.* Chamberlain, 12 Blatchf. 390, 25

b. *Writings Admitted Without Objection.* — Writings admitted without objection, and admitted or treated by both parties as being genuine, may be used as standards of comparison, although they would be inadmissible as irrelevant upon a proper objection being made.[54]

Fed. Cas. No. 14,778; Green *v.* Terwilliger, 56 Fed. 384; Moore *v.* United States, 91 U. S. 270; Stokes *v.* United States, 157 U. S. 187; Williams *v.* Conger, 125 U. S. 397.

Illinois. — Rogers *v.* Tylev, 144 Ill. 652, 32 N. E. 393; Himrod *v.* Gilman, 147 Ill. 293, 35 N. E. 373; Frank *v.* Taubman, 31 Ill. App. 592.

Indiana. — Bowen *v.* Jones, 13 Ind. App. 193, 41 N. E. 400; Swales *v.* Grubbs, 126 Ind. 106, 25 N. E. 877; Shorb *v.* Kinzie, 100 Ind. 429.

Kansas. — Macomber *v.* Scott, 10 Kan. 335; Gaunt *v.* Harkness, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 297.

Maine. — State *v.* Thompson, 80 Me. 194, 13 Atl. 892, 6 Am. St. Rep. 172.

Michigan. — First Nat. Bank *v.* Robert, 41 Mich. 709, 3 N. W. 199; People *v.* Parker, 67 Mich. 222, 34 N. W. 720; Vinton *v.* Peck, 14 Mich. 287; *In re* Foster's Will, 34 Mich. 21.

Missouri. — State *v.* David, 131 Mo. 380, 33 S. W. 28; Springer *v.* Hall, 83 Mo. 693, 53 Am. Rep. 598.

New York. — Hardy *v.* Norton, 66 Barb. 527; People *v.* Flechter, 44 App. Div. 199, 60 N. Y. Supp. 777; Miles *v.* Loomis, 75 N. Y. 288, 31 Am. Rep. 470; Pontius *v.* State, 21 Hun 328, 82 N. Y. 338; Dubois *v.* Baker, 40 Barb. 355; Shaw *v.* Bryant, 90 Hun 374, 70 N. Y. St. 612, 35 N. Y. Supp. 909; Ellis *v.* People, 21 How. Pr. 356.

Texas. — Mardes *v.* Meyers, 8 Tex. Civ. App. 542, 28 S. W. 693; Cook *v.* First Nat. Bank (Tex. Civ. App.), 33 S. W. 998; Smyth *v.* Caswell, 67 Tex. 567, 4 S. W. 848; Kennedy *v.* Upshaw, 64 Tex. 411.

Utah. — Durnell *v.* Sowden, 5 Utah 216, 14 Pac. 334.

Vermont. — Rowell *v.* Fuller, 59 Vt. 688, 10 Atl. 853.

West Virginia. — State *v.* Koontz, 31 W. Va. 127, 5 S. E. 328.

The only recognized exception to the rule that proved specimens of handwriting cannot be received for the purpose of comparison, "is when other papers pertinent to the issue on trial are properly in evidence, the jury may under the instructions of the court institute a comparison. Little *v.* Beasley, 2 Ala. 703; State *v.* Givens, 5 Ala. 747; Bishop *v.* State, 30 Ala. 34; Kirksey *v.* Kirksey, 41 Ala. 626. The rule proceeds not only on the ground that if it were otherwise the issues before the jury could be indefinitely multiplied, and their attention distracted from the real matter in controversy, involving unreasonable embarrassment and delay in the administration of justice, but upon the broader ground of preventing fraud, which could be easily perpetrated in the selection of spurious or prepared instruments for the purposes of comparison." Williams *v.* State, 61 Ala. 33.

In State *v.* Zimmerman, 47 Kan. 242, 27 Pac. 999, a prosecution for forging a note and mortgage, wherein both the prosecution and the defendant had proved that a former mortgage offered in evidence was signed by the person whose signature was charged to have been forged, it was held that such former mortgage was competent evidence to be examined by the jury for the purpose of comparing the signature thereupon with those disputed.

54. Wagoner *v.* Ruply, 69 Tex. 700, 7 S. W. 80; Smyth *v.* Caswell, 67 Tex. 567, 4 S. W. 848; Miles *v.* Loomis, 75 N. Y. 288, 31 Am. Rep. 470; Shaw *v.* Bryant, 90 Hun 374, 35 N. Y. Supp. 909. See also Mallory *v.* Ohio Farmers Ins. Co., 90 Mich. 112, 51 N. W. 188.

In State *v.* David, 131 Mo. 380, 33 S. W. 28, a prosecution for murder charged to have been committed by poisoning, it was held that the signature of the defendant to the records of poisons sold kept by the druggist might be compared with his signature to a deposition taken at the coroner's inquest, because such deposition was admitted without objection.

Compare Bank of the Com. *v.* Mudgett, 44 N. Y. 514, wherein the

c. *Cross-Examination of Non-Experts.* — For the purpose of testing the extent of a non-expert witness' familiarity with the handwriting of the purported author, and his ability to distinguish between the disputed signature and one which has been used upon the trial and is acknowledged to be genuine, it is proper on cross-examination to show him the latter writing and ask him to point out the difference between the two writings.[55]

d. *Cross-Examination of Experts.* — And it is held that where other writings or signatures purporting to be made by the author of the disputed signature are otherwise properly in evidence in the case, they may be used on the cross-examination of experts.[56]

C. WRITINGS ALREADY PART OF RECORD. — a. *In General.* Again, writings which constitute a part of the record of the cause on trial bearing the handwriting or signature of the purported author of the signature in dispute, may be used as standards[57]

issue was as to the genuineness of an indorsement by the defendant on a note, and a number of bank checks drawn by the defendant were sought to be used on the cross-examination of the plaintiff's witnesses, not for the purpose of comparison, but for the purpose of testing the knowledge and accuracy of the witnesses, but the court refused to permit such a cross-examination.

55. First Nat. Bank *v.* Hyland, 25 N. Y. St. 446, 6 N. Y. Supp. 87; State *v.* Hopkins, 50 Vt. 316. See also Neal *v.* Neal, 58 Cal. 287.

56. Johnston Harvester Co. *v.* Miller, 72 Mich. 265, 40 N. W. 429, wherein such signatures were used for the purpose of having witnesses make comparisons and show that they differed radically in their views of the similarity of letters, and that they might easily be mistaken in their assumptions from such a comparison, the court holding also that the fact that the witnesses do not know whether the signatures so used were made by one person or two but added to the value of the test. The court said: "The object evidently was to show the fallibility and unreliable character of the testimony. . . . The sequel showed that the opinions of the experts were of but little worth, and we are not disposed to limit or confine the opportunities for testing and determining the accuracy and value of expert evidence."

In Riordan *v.* Guggerty, 74 Iowa 688, 39 N. W. 107, certain witnesses, examined with reference to the genuineness of the signature to the note in suit, were permitted to testify to the characteristics of different signatures in evidence, including that attached to the note, the comparative size and length of these signatures, whether written on or above or below the lines designed for them, the differences in certain letters, and other facts of like character. It was insisted that the court erred in permitting this testimony for the reason that the facts to which it was directed did not require the testimony of an expert, but could have been determined by the jury. It was held that there were two answers to this claim: (1) That it was caused to be given by the cross-examination of the witnesses. (2) It was confined to the signature in controversy, and to others admitted to be genuine, and was accordingly authorized by the Iowa statute.

57. *United States.* — Stokes *v.* United States, 157 U. S. 187.

Colorado. — Wilber *v.* Eicholtz, 5 Colo. 240.

Delaware. — McCafferty *v.* Heritage, 5 Houst. 220.

New York. — Mortimer *v.* Chambers, 63 Hun 335, 17 N. Y. Supp. 874.

Evidence Taken at Coroner's Inquest. — In State *v.* David, 131 Mo. 380, 33 S. W. 28, a prosecution for murder, it was held that the evidence

of comparison. As for example, a pleading,[58] an affidavit,[59] or a bond.[60]

of the defendant, which under a statute of Missouri must be reduced to writing and subscribed to by the witness, was a paper in the case proper to be used as a standard of comparison.

A Party's Signature to an Application for a Continuance and attachment, the genuineness of which has been proved, may be used for the purpose of comparison where the applications themselves are not read in evidence, and the use of the instruments is confined to the signature only. Williams *v.* State, 27 Tex. App. 466, 11 S. W. 481.

Application for Attachment. The signature of a defendant in a criminal prosecution to an application for an attachment in the cause may be used as a standard of comparison, and the fact that the defendant was in custody when he signed the application would not affect the signature in any manner for use as such a standard. Hunt *v.* State, 33 Tex. Crim. 252, 26 S. W. 206.

Bill of Review. — In Grooms *v.* State, 40 Tex. Crim. 319, 50 S. W. 370, a bill of review in a previous case executed by one of the parties to the present action was permitted to be used as a standard of comparison.

In Froman *v.* Com., 19 Ky. L. Rep. 948, 42 S. W. 728, affidavits, an answer and a deposition signed by the defendants were permitted to be used for purposes of comparison. The court said: "It would seem that the court did not require any evidence of the genuineness of such writings, other than that which they furnished. The writings offered were sworn to in the presence of persons who were authorized to administer oaths and make a certification thereof. Smith's signature appeared upon official records which the court believed was sufficient evidence that they were genuine, and that no fraud had been practiced in their selection. It is upon the ground that these signatures were on such official papers that we hold that the judge, by an inspection of them, could determine whether or not they should be introduced for the purpose contemplated by the statute. We therefore are of the opinion that the court did not err in allowing the writings to be introduced."

58. Medway *v.* United States, 6 Ct. Cl. 421; Doud *v.* Reid, 53 Mo. App. 553.

Pleas. — In Tower *v.* Whip, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937, an action upon a promissory note the genuineness of which the defendant denied, it was held that an expert on handwriting should have been permitted to compare the signature to the note with the defendant's signature to pleas signed and sworn to by him and filed by him, and state his opinion as to whether the same person made the signature to both the note and the pleas.

59. State *v.* DeGraff, 113 N. C. 688, 18 S. E. 507.

Affidavit of Claim Against Estate. In Elsenrath *v.* Kallmeyer, 61 Mo. App. 430, it was held that the signature to an affidavit filed by a client in the probate court in support of a demand presented for allowance against the estate of a decedent is to be considered a paper in the case, and that on an appeal to the circuit court such signature might be used as a standard of comparison with the purported signature of the decedent to the note forming the basis of the claim, the genuineness of which was denied.

Affidavit for Change of Venue. In Tucker *v.* Hyatt, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872, it was held that the signature to an affidavit for a change of venue, made by the party whose signature was in question, and before the disputed writing was brought into question, was a paper in the case proper to be used for purposes of comparison.

A Signature to an Affidavit for a Continuance was held proper to be used as a standard of comparison in People *v.* Parker, 67 Mich. 222, 34 N. W. 720.

60. A Signature to a Bail-Bond constituting a part of the record in a criminal action for the appearance of the defendant to answer the charge upon which he is being tried may be used as a standard of comparison.

But the party whose signature is in dispute cannot introduce a pleading filed by him bearing his signature for the purpose of being used as a standard of comparison on his own behalf.[61]

b. *Cross-Examination of Non-Experts.* — And where the writing offered is already properly a part of the record it may be used upon the cross-examination of a non-expert witness.[62]

D. Extraneous Writings. — a. *Non-Statutory Rule.* (1.) **Generally.** — Whether in the absence of any statute on the subject, writings not already in evidence in the case and which are not admissible in evidence for other purposes, although they may be genuine, can be received in evidence for the sole purpose of furnishing an exemplar or standard of comparison, there is much conflict in the authorities. Many of the courts hold that such writings cannot be received for that purpose.[63] Other courts, however, hold that

State *v.* Noe, 119 N. C. 849, 25 S. E. 812; People *v.* Parker, 67 Mich. 222, 34 N. W. 720. See also Cannon *v.* Sweet (Tex. Civ. App.), 28 S. W. 718, 29 S. W. 947.

In Dunlop *v.* Silver, 1 Cranch C. C. 27, 8 Fed. Cas. No. 4169, an action on a promissory note, the plaintiff offered to prove the handwriting of one of the indorsers by comparing it with the signature of the bail-bond filed in the case, and contended that as it was a bond taken by a sworn officer and filed in court it could not be denied, and the evidence was admitted.

61. Springer *v.* Hall, 83 Mo. 693, 53 Am. Rep. 598. *Compare* Thomas *v.* State, 103 Ind. 419, 2 N. E. 808.

62. Tucker *v.* Hyatt, 144 Ind. 635, 41 N. E. 1047; Melvin *v.* Hodges, 71 Ill. 422, where the court said: "The signature to the plea was not in controversy, nor was its genuineness questioned. The object in having the witness examine this signature was not to prove a signature by comparison, but to test the accuracy of the witness' memory. Had there been any question as to the genuineness of the signature to the plea, it would certainly not have been competent to have asked the witness whether it was Melvin's signature or not, with a view of contradicting him, as that would have raised a collateral issue entirely irrelevant to the case. But the signature being admitted, no such issue could be raised; and the only effect the examination could have would be to enable the witness to determine how accurate and reliable was the impression of Melvin's signature, as fixed in his memory, with the view of confirming or modifying his previously expressed opinion in regard to the signature in controversy. It is essential to justice that a considerable degree of latitude be allowed in the cross-examination of witnesses for the purpose of testing the accuracy and fairness of their evidence."

63. *United States.* — Williams *v.* Conger, 125 U. S. 397.

Alabama. — Griffin *v.* State, 90 Ala. 596, 8 So. 670; Little *v.* Beazley, 2 Ala. 703, 36 Am. Dec. 431; Snider *v.* Burks, 84 Ala. 53, 4 So. 225.

Illinois. — Riggs *v.* Powell, 142 Ill. 453, 32 N. E. 482; Gitchell *v.* Ryan, 24 Ill. App. 372; Frank *v.* Taubman, 31 Ill. App. 592; Snow *v.* Wiggin, 19 Ill. App. 542; Insurance Co. *v.* Sweet, 46 Ill. App. 598.

Indiana. — Bowen *v.* Jones, 13 Ind. App. 193, 41 N. E. 400; White S. M. Co. *v.* Gordon, 124 Ind. 495, 24 N. E. 1053.

Michigan. — Weidman *v.* Symes, 116 Mich. 619, 74 N. W. 1008; People *v.* Parker, 67 Mich. 222, 34 N. W. 720.

North Dakota. — Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003. See also Malloy *v.* Ohio Farmers Ins. Co., 90 Mich. 112, 51 N. W. 188. *Compare* Davis *v.* Fredericks, 3 Mont. 262, *following* the rule in the federal supreme court excluding comparison of handwritings with extraneous documents.

Statement of Rule by Illinois Court. — "It seems to be well settled in this state that the genuineness of

even in the absence of any statute where the genuineness of handwriting is involved, well-tested standards of the writing of the persons whose writing is in question may be introduced for the sole purpose of comparison with that which is disputed, although they are otherwise irrelevant.[64]

a signature cannot be proved by comparing it with an admittedly genuine signature to papers or documents not in evidence in the cause and which are collateral to the issue, and therefore not admissible in evidence for other purposes. (Pate *v.* The People, 3 Gilm. 644; Jumpertz *v.* The People, 21 Ill. 408; Kernin *v.* Hill, 37 *id.* 209; Melvin *et al. v.* Hodges, 71 *id.* 425; Massey *v.* Bank, 104 *id.* 327.) In Brobston *v.* Cahill, 64 Ill. 356, the distinction between that class of cases and where the comparison is to be made between the disputed signature and the signature to some paper or instrument admitted or proved to be genuine, and which has been legally admitted in evidence, is clearly drawn, and it was held that the genuineness, or otherwise, of the disputed signature to a paper otherwise admissible in evidence may be proved by comparison with a signature, admitted or proved to be genuine, to a paper which has been admitted in evidence under the issues; and such we understand to be the recognized rule and practice in this state." Himrod *v.* Gilman, 147 Ill. 293, 35 N. E. 373.

In Texas the rule stated in the text seems to be the rule adopted by most of the cases.

Matlock *v.* Glover, 63 Tex. 231; Cook *v.* First Nat. Bank (Tex. Civ. App.), 33 S. W. 998; Sheppard *v.* Love (Tex. Civ. App.), 71 S. W. 67. *Compare* Cannon *v.* Sweet (Tex. Civ. App.), 28 S. W. 718, 29 S. W. 947, wherein it was held competent to use any signature shown to be genuine as a standard of comparison, and that it was not necessary that the paper containing such signature should have come from any particular custody nor that it should have been previously filed in the case; Hatch *v.* State, 6 Tex. App. 384.

Reasons for Rule. — The grounds upon which such writings are excluded are said to be, first, that such a practice is calculated to raise collateral issues as to the genuineness of the signatures offered, and second, that it affords an opportunity to the party offering them to obtain an advantage by an unfair selection. Smyth *v.* Caswell, 67 Tex. 567, 4 S. W. 848; Hickory *v.* United States, 151 U. S. 303, where the court said: "The danger of fraud or surprise and the multiplication of collateral issues were deemed insuperable objections, although not applicable to papers already in the cause, in respect of which, also, comparison by the jury could not be avoided."

In Alabama extraneous irrelevant papers, although admitted to be genuine, cannot be used as a standard of comparison with the writing in controversy. Moon *v.* Crowder, 72 Ala. 79.

In Idaho, on an issue as to the genuineness of a signature, only such papers as are already in evidence in the case for other purposes and are admitted to be genuine should be permitted for use as standards, except in very exceptional cases. Bane *v.* Gwinn, 7 Idaho 439, 63 Pac. 634.

64. *Connecticut.* — Tyler *v.* Todd, 36 Conn. 218.

Indiana. — Burdick *v.* Hunt, 43 Ind. 381.

Kansas. — Macomber *v.* Scott, 10 Kan. 335.

Maine. — State *v.* Thompson, 80 Me. 194, 13 Atl. 892, 6 Am. St. Rep. 172.

Massachusetts. — Com. *v.* Pettes, 114 Mass. 307; Com. *v.* Andrews, 143 Mass. 23, 8 N. E. 643.

Minnesota. — Morrison *v.* Porter, 35 Minn. 425, 29 N. W. 54, 59 Am. Rep. 331.

Mississippi. — Wilson *v.* Beauchamp, 50 Miss. 24.

New Hampshire. — State *v.* Hastings, 53 N. H. 452.

Ohio. — Bell *v.* Brewster, 44 Ohio St. 60, 10 N. E. 679.

Pennsylvania. — Travis *v.* Brown, 43 Pa. St. 9, 82 Am. Dec. 540.

(2.) Cross-Examination of Non-Experts. — (A.) GENERALLY. — Whether or not it is proper for the purpose of testing the knowledge of a non-expert witness testifying to handwriting to submit to him other genuine writings not in evidence of the purported author of the disputed handwriting, upon cross-examination, is a question as to which the authorities are in conflict. On the one hand it is held that such a mode of cross-examination is not proper;[65] while on the other hand it is held that a witness testifying from acquaintance may

Tennessee. — Clark *v.* Rhodes, 2 Heisk. 206.

Texas. — Kennedy *v.* Upshaw, 64 Tex. 411.

Utah. — Tucker *v.* Kellogg, 8 Utah 11, 28 Pac. 870; Durnell *v.* Sowden, 5 Utah 216, 14 Pac. 334.

Vermont. — Adams *v.* Field, 21 Vt. 256; Rowell *v.* Fuller, 59 Vt. 688, 10 Atl. 853; Bridgman *v.* Corey, 62 Vt. 1, 20 Atl. 273.

Virginia. — Johnson *v.* Com., 102 Va. 927, 46 S. E. 789.

Washington. — Moore *v.* Palmer, 14 Wash. 134, 44 Pac. 142.

The Inherent Value of Comparison as a Method of Proof, and the inconsistency of permitting it with papers happening to be in the case, and denying it with genuine specimens admitted for the purpose, was recognized by parliament. While the refinements, distinctions and exceptions which had confused the subject and embarrassed the administration of justice were thus wiped away, and the door opened wide for comparison with genuine specimens, it is to be noted that the essential principle of the common law forbidding disputed signatures and collateral issues was distinctly preserved by the provision limiting comparison to writings "proved to the satisfaction of the judge to be genuine." University of Illinois *v.* Spalding, 71 N. H. 163, 51 Atl. 731.

In Wilson *v.* Thornbury, L. R. 17 Eq. 517, an action involving the genuineness of the signature of a testator to a certain document, the defendant was ordered to produce on affidavit any checks in his possession signed by the testator between certain specified dates, and the defendant produced a great many checks, stating in his affidavit that they were all the checks in his possession signed by the testator, although he had other checks which he did not produce because they were forgeries; and it was held that the plaintiffs were not entitled to the production of the forged checks.

65. Griffits *v.* Ivery, 11 Ad. & El. 322, 39 E. C. L. 101; United States *v.* Chamberlain, 12 Blatchf. 390, 25 Fed. Cas. No. 14,778; Tyler *v.* Todd, 36 Conn. 218; Rose *v.* First. Nat. Bank, 91 Mo. 399, 3 S. W. 876; Bank of Com. *v.* Mudgett, 44 N. Y. 514; VanWyck *v.* McIntosh, 14 N. Y. 439; Howard *v.* Patrick, 43 Mich. 121, 5 N. W. 84; Hoyt *v.* Stuart, 3 Bosw. (N. Y.) 447; Armstrong *v.* Thruston, 11 Md. 148.

In Fogg *v.* Dennis, 3 Humph. (Tenn.) 47, the court said that to permit this to be done "would lead in practice to much inconvenience and confusion, not to say trickery and imposition — and after all could not attain the end proposed, that is, show to the jury the ignorance or falsehood of the witness as to the handwriting, without submitting to the jury the inspection and comparison of those other writings. This is an answer to the whole case. But if the writings in question had been proved to be genuine previously to the offer to examine the witness with regard to them, we are of opinion that it would not be proper. If the witness had been of opinion that such genuine signatures were not those of the testator, the inference of ignorance and inaccuracy to be drawn from such circumstances could have been fairly repelled by the introduction of other genuine signatures which the witness might adopt. This would lead to innumerable examinations; and after all, the degree of credit the jury should yield to the witness is entirely uncertain, unless they could inspect and compare the several documents produced."

A witness who has testified, from his knowledge of having seen the tes-

be cross-examined by showing him a signature whose genuineness is unquestioned, and examining him with respect to its genuineness.[66]

tator write, that his signature to a will was not genuine, cannot be asked on cross-examination, after having been shown purported signatures of the testator to several checks, whether, from his "present knowledge," the testator wrote his name in a designated manner. McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336.

66. Gitchell *v.* Ryan, 24 Ill. App. 372.

In Page *v.* Homans, 14 Me. 478, where a witness had testified in relation to the genuineness of a signature on cross-examination, a slip of paper was put into his hands having the name of a person written upon it three times with a request to say whether the writing was by the same or different hands, and he answered by the same hands, whereupon a witness was then called and permitted to testify that the writing was by different hands; it was held that although the judge might have rejected the testimony, yet that its admission did not furnish sufficient ground for granting a new trial.

In Wentz *v.* Black, 75 N. C. 491, where a witness had testified on direct examination that he did not think the defendant's signature was genuine on account of a difference in the making of the letter "k," and the defendant's counsel had also exhibited to the witness two genuine signatures on other instruments and asked him if they did not correspond; it was held proper on cross-examination to exhibit to the witness the defendant's signature to his answer and on other instruments and ask the witness if they did not correspond with the signature to the note in controversy.

In Royal Canadian Bank *v.* Brown, 27 U. C. Q. B. 41, an action by an indorsee upon a promissory note, a non-expert witness for the defense testified that he thought the signature of the indorser was not genuine. On cross-examination he was asked whether two signatures on a paper shown to him were the indorser's. He stated he thought not. In reply the plaintiff proved that they were, the defendant objecting to such proof as being in support of the plaintiff's original case. It was received at the trial for the purpose of impeaching the witness, but withheld from the jury as evidence to sustain the plaintiff's case. It was held that being admissible for one purpose the evidence was in the case generally and should have been so left to the jury. The court said: "The jury had to form their conclusion as to the value of [the non-expert's] evidence, and, as appears to us, the paper which he said did not contain the defendant's signature, but which was satisfactorily proved to contain it, should have been submitted to their inspection to enable them to put a right estimate upon his evidence as to the indorsement." *Compare* Hughes *v.* Rogers, 8 Mees. & W. (Eng.) 123, where a witness called to prove the signature of the attesting witness to a bond had sworn that the signature was not in the supposed attesting witness' handwriting, and another paper not in evidence was put into his hand which he also stated was not that person's writing, and it was held that the plaintiff could not prove, for the purpose of contradicting the witness, that this paper was actually written by the attesting witness.

In Gleeson *v.* Wallace, 4 U. C. Q. B. 245, the witness called for the purpose of proving the plaintiff's signature to the instrument in question swore that he had seen the plaintiff write, whereupon the defendant's counsel exhibited to the witness another paper purporting to be signed by the plaintiff, but which was in no way connected with the issues, and also proposed to hand the witness other papers genuine but not relevant. The court in holding refusal to permit this practice proper, said: "If the witness had been called on the other side to discredit the receipt, and had assigned as his reason for not believing it to be genuine, that it differed in some particular point from the plaintiff's ordinary mode of signing his name, then we conceive it would have been competent for the defendant to endeavor to convince him that he was mistaken in the ground of his opinion, by exhibiting

(B.) Concealing Part of Signature. — On an issue as to the genuineness of a signature, a witness in an otherwise proper case may be shown a part of signature to another instrument purporting to have been made by the author of the signature in dispute, and be asked in whose handwriting is the part shown him.[67]

(C.) Selecting Genuine Specimens. — Upon the cross-examination of a non-expert witness testifying to handwriting it is not proper to submit to him various papers having the purported author's name written thereon, and ask him to designate the genuine signatures.[68]

(D.) Refreshing Recollection on Cross-Examination. — Notwithstanding the foregoing rule as to the use of irrelevant documents on cross-examination, a non-expert witness may use genuine writings

to him other proved or admitted signatures of the plaintiff, which by containing or wanting the peculiarity on which he laid stress, might convince him or satisfy the jury that he was in error. But under the circumstances reported by the judge who tried the cause, we think the other papers were properly rejected."

67. Kirksey *v.* Kirksey, 41 Ala. 626, where the court said: "Such a mode of cross-examination may be allowable to test the capacity of the witness to testify to the handwriting of the supposed maker of the instrument, or for other purposes."

Compare West *v.* State, 22 N. J. L. 212, where, upon the cross-examination of a non-expert witness, the witness was shown a writing a part of which was covered and concealed, and was asked if the portion of the writing that was visible was that of the defendant. The court, in holding that it was not error to refuse to permit such cross-examination, said: "It does not clearly appear for what purpose the evidence was offered. It may have been to prove the instrument shown, for the purpose of offering it in evidence, or it may have been, as was probably the case, for the purpose of testing the value of the witness' opinion in respect to the handwriting of West, and discrediting him before the jury. If the former were the object, the witness could form and express his opinion only upon the whole writing. If the latter, the better opinion seems to be that the party was entitled to lay the paper before the jury, to form their opinion as to the testimony of the witness, and therefore the whole paper should be shown. For the jury should not judge, from the inspection of the entire instrument, of the value of the opinion of a witness who has only seen a part of it. But admitting that the witness is not, as a general rule, entitled to see the entire instrument, it is clearly the duty of the court to see that the paper is so exhibited as to enable the witness to judge of its general character, and that the cross-examination is so conducted as fairly to test the value of his opinion. This must be left, in some measure, to the discretion of the judge, and if he err in a matter of discretion, his opinion is not subject to review. 1 Greenl. Ev. § 431. The propriety of the decision must necessarily depend upon circumstances of which the court can have no knowledge. What was the extent of the writing? What part of it was shown? Was it sufficient to enable the witness fairly to judge of the character of the writing?"

68. Massey *v.* Farmers Nat. Bank, 104 Ill. 327, where the court, in commenting upon this question, said: "Without stopping to inquire as to the general correctness of this observation, and especially where the rule obtains, as in this state, that evidence of the genuineness of handwriting, based on comparison of hands, is not admissible, we think that at least with reference to test papers got up for the occasion, as in the present case, there was no error in not allowing the course of cross-examination proposed."

of the purported author of the disputed signature on cross-examination for the purpose of refreshing his recollection.[69]

(3.) Cross-Examination of Experts. — (A.) Courts Permitting Liberal Cross-Examination. — Witnesses who have testified as experts in handwriting may be cross-examined in any appropriate way to test their skill.[70]

69. National Bank of Chester Co. *v.* Armstrong, 66 Md. 113, 6 Atl. 584, 59 Am. Rep. 156, where the court said: "To have allowed these witnesses to examine this letter for the purpose of refreshing their memories as to the defendant's handwriting, and then say whether they were still of opinion the disputed signature was not genuine, would in no wise have infringed the rule which is well settled in this state against proof of handwriting by comparison of hands. It is not the case of placing the disputed signature and a genuine writing before a witness who had no antecedent knowledge on the subject, and allowing him from the mere inspection of the two to say whether in his opinion they were both written by the same person. These witnesses both testified that they had frequently seen the defendant write and were familiar with his signature, and by reason of their knowledge of his handwriting thus acquired were competent and qualified to testify as to the genuineness *vel non* of this indorsement. Speaking from that knowledge they said in their examination-in-chief that in their opinion it was not genuine. Then on cross-examination, after having given as a reason for their opinion that the defendant wrote a heavier and larger hand, the cross-examining counsel, for the purpose of refreshing their memories as to the character of his handwriting exhibited to the witnesses a letter and a signature which the defendant himself admitted he had written, asked them to examine it and then to say whether they were still of the same opinion. We see no objection whatever to this course of cross-examination, and are clearly of opinion it should have been allowed."

Compare McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336. In this case it was held that a non-expert witness who had testified in regard to the disputed signature of an attesting witness to a will could not be cross-examined as to the same signature upon a cash-book which the witness had in his possession, on the ground that he might look at the pages thereof to refresh his memory.

70. In Birmingham Nat. Bank *v.* Bradley, 108 Ala. 205, 19 So. 791, the court, in holding that it is right and in fact necessary that expert testimony as to handwriting be subjected to every legitimate test on cross-examination in order that the jury may properly weigh it, said: "We are of opinion the court erred in refusing to allow the plaintiffs to cross-examine the expert witnesses of the defendant, as to the effect of acids on writing, and whether in their opinion the writing could be altered or removed by the use of such means so as to escape detection. The objection was sustained on the ground that these witnesses were not experts in the use and effect of acids on ink, and therefore incompetent to express an opinion. If the purpose had been to establish by these witnesses the effect of acids on ink, the objection would have been well taken. The purpose of the question was to affect their testimony as to the genuineness of the check. These witnesses had testified as experts, that in their opinion the check had not been raised, that it was as originally drawn, and the defendant had the benefit of this testimony with the jury. The plaintiff had introduced expert evidence to show the effect of eureka acid No. 1 and 2 on commercial ink when used for writing, and that it could be easily obtained. If the witnesses for the defendant had stated that they knew nothing of the effect of acids on ink, their testimony as to the genuineness of the check, and that it had not been altered, would have been considered in connection with the admission on their part that they had no knowledge or experience of the effect of acids on writings. It is right and in fact necessary that expert testimony be subjected to every legitimate test on cross-examination in order to properly weigh it."

Spurious Signatures. — Thus it has been held that an expert witness who has testified to the genuineness of a signature may, on cross-examination, be shown spurious signatures and asked if upon a former trial after comparing such signatures with the standards in evidence he had pronounced them genuine and had sworn that all were written by the same hand.[71]

(B.) CONTRARY VIEW. — Other courts, however, in those jurisdictions where extraneous writings are held to be inadmissible for purposes of comparison, hold that the reason of the rule applies to the cross-examination with as much force as to the direct examination, and that writings which are not admissible for other purposes, although they may be genuine, should not be received, whether used to test the witness as an expert or to test his knowledge of the handwriting of the purported author of the disputed signature.[72]

And it is also held that experts testifying from comparison cannot be cross-examined as to other writings of unknown author-

Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18. In this case the witnesses were examined upon certain incomplete and mutilated writings which were partial copies by another hand of documents which the purported author had written, although proof as to who wrote these copies was not avowed or made until after the cross-examination. The court said that the purpose of the experiment was to show that the experts were not reliable; that they would mistake writing not done by the purported author for writing which he had done. "The whole object of the test would have been defeated had other proof been required that the documents were genuine before they could be used. By what colour of right could the defendant claim to see or know anything of them before the trial commenced? And why should not scraps and fragments be used to test experts on the mere question of manual or mechanical execution?"

71. Hoag *v.* Wright, 174 N. Y. 36, 66 N. E. 579, *reversing* 69 App. Div. 381, 74 N. Y. Supp. 1069, on this point, where the court, in holding that it was error to refuse to permit such an examination, said the evidence "tended to cast doubt upon the credibility of the witness and his skill as an expert. It suggested the question whether, if the witness was at fault as to the spurious signatures, he was not at fault as to the signatures in question. It made a direct attack upon the value of his opinion, and tended to show that it was unreliable. The defendants were deprived of the right to test, in an effective and practical manner, the accuracy and worth of the opinions of the three experts relied upon by the plaintiff."

72. United States *v.* Chamberlain, 12 Blatchf. 390, 25 Fed. Cas. No. 14,778; Gaunt *v.* Harkness, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 207. See also Van Wyck *v.* McIntosh, 14 N. Y. 439; First Nat. Bank *v.* Hyland, 53 Hun 108, 6 N. Y. Supp. 87; Rose *v.* First Nat. Bank, 91 Mo. 399, 3 S. W. 876, where the court said: "The rule which excludes extrinsic papers and signatures is substantially the same in the direct and cross-examination, as will be seen from the foregoing authorities. Papers not a part of the case and not relevant, as evidence, to the other issues, are excluded mainly on the ground that to admit such documents would lead to an indefinite number of collateral issues, and would operate as a surprise upon the other party, who would not know what documents were to be produced, and, hence, could not be prepared to meet them. The reason of the rule applies to the cross-examination with as much force as to the direct examination. The signatures should have been excluded, whether used to test the witness as an expert, or to test his knowledge of the handwriting of the plaintiff."

ship and not pertinent to the case, merely to test their ability as experts.[73]

(C.) Selecting Genuine from Spurious Signatures. — It has been held proper upon the cross-examination of an expert witness testifying to handwriting for the purpose of testing the value of his testimony, to submit to him genuine and spurious signatures, and ask him to select the genuine from the spurious.[74]

b. *Statutory Rule.* — In many of the states, however, statutes have been enacted expressly authorizing any writing, properly authenticated as genuine, to be used for the purpose of comparison, although it may not be admissible in evidence for any other purpose.[75]

73. State *v.* Griswold, 67 Conn. 290, 34 Atl. 1046. See also Bacon *v.* Williams, 13 Gray (Mass.) 525, *holding* that a disputed signature cannot be used in cross-examination of a witness to test his accuracy as to another signature. *Compare* Thomas *v.* State, 103 Ind. 419, 2 N. E. 808.

74. Browning *v.* Gosnell, 91 Iowa 448, 59 N. W. 340, where the court in so ruling said: "We think it is proper, when a witness testifies to the genuineness of a handwriting or signature, to test the value of his evidence thoroughly, and for that purpose he may be asked to give his opinion as to the genuineness of signatures which are prepared for that purpose, and in the handwriting of any person. Opinions as to the genuineness of handwriting are, at best, weak and unsatisfactory evidence, and every reasonable opportunity should be afforded, on cross-examination, to test the value of the opinion of the witness, and we know of no better way than was resorted to in this case. Generally, testimony as to the genuineness of handwriting is the merest guesswork. Of necessity, it is admitted, because, often, no other evidence is attainable. But it should be open always to full investigation on cross-examination, for thus only can its utter unreliability, in many cases, be established." *Compare* Andrews *v.* Hayden, 88 Ky. 453, 11 S. W. 428, wherein it was held that the use of spurious signatures prepared by an experienced expert for the purpose of being presented to the witness was error.

Compare People *v.* Murphy, 135 N. Y. 450, 32 N. E. 138, where certain letters were introduced in evidence by the prosecution, and, for the purpose of showing that they were written by the defendant, a number of genuine specimens of his handwriting were put in evidence, and experts were called, who, after comparison of the letters with such specimens, testified that they were written by the same hand. The defendant, for the purpose of testing the accuracy of the witnesses' judgment, submitted different specimens of handwriting to said witnesses, who, after comparing them with the letters put in evidence by the people, testified that some of them were written by the same person who wrote the letters. Defendant then offered to prove that the specimens so submitted were spurious, and the evidence was excluded. The court held that there was no error; that it was collateral matter, and defendant was bound by the answers of the witness.

75. *California.* — People *v.* Bibby, 91 Cal. 470, 27 Pac. 781.

Georgia. — Kelly *v.* Keese, 102 Ga. 700, 29 N. E. 591.

Iowa. — State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497; Coppock *v.* Lampkin, 114 Iowa 664, 87 N. W. 665; State *v.* Farrington, 90 Iowa 673, 57 N. W. 606; State *v.* Calkins, 73 Iowa 128, 34 N. W. 777.

Missouri. — St. Louis Nat. Bank *v.* Hoffman, 74 Mo. App. 203; Cook *v.* Strother, 100 Mo. App. 622, 75 S. W. 175; Bank *v.* Hoffman, 74 Mo. App. 203; Edmonston *v.* Henry, 45 Mo. App. 346; State *v.* Minton, 116 Mo. 605, 23 S. W. 808; State *v.* Thompson, 132 Mo. 301, 34 S. W. 31; Elsenrath *v.* Kallmeyer, 61 Mo. App. 430.

Montana. — Baxter *v.* Hamilton, 20 Mont. 327, 51 Pac. 265.

Nebraska. — First Nat. Bank *v.* Carson, 48 Neb. 763, 67 S. W. 779.

New Jersey. — Yeomans *v.* Petty, 40 N. J. Eq. 495.

E. Ancient Writings. — Where a writing was offered in evidence so antiquated as to render it difficult, if not impossible, to produce a witness who had ever seen the person write whose signature was attached to the writing, and yet not so old as to prove

New York. — Mutual L. Ins. Co. *v.* Suiter, 131 N. Y. 557, 29 N. E. 822; People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286.

Oregon. — Osmun *v.* Winters, 30 Or. 177, 46 Pac. 780; Munkers *v.* Farmers & M. Ins. Co., 30 Or. 211, 46 Pac. 850.

Tennessee. — Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559.

In New York Prior to 1880 the rule excluding irrelevant documents which were not already in evidence in the case for other purposes was followed. Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Dec. 538; Goodyear *v.* Vosburgh, 63 Barb. (N. Y.) 154; Randolph *v.* Laughlin, 48 N. Y. 456; VanWyck *v.* McIntosh, 14 N. Y. 439; Hardy *v.* Norton, 66 Barb. (N. Y.) 527. But in 1880 a statute was passed which was amended in 1886 and 1888, wherein it was expressly provided that other writings properly authenticated as genuine as therein provided, may be used for the purpose of comparison; and a denial of the right is error requiring a reversal. For cases in which this statute has been construed and applied, see: Farrell *v.* Manhattan R. Co., 83 App. Div. 393, 82 N. Y. Supp. 434; Mutual L. Ins. Co. *v.* Suiter, 131 N. Y. 557, 29 N. E. 822; Peck *v.* Callaghan, 95 N. Y. 73; *In re* Koch, 33 Misc. 153, 68 N. Y. Supp. 675; People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286.

Under the Oregon Statute testimony of expert witnesses as to handwriting based on a comparison with other writings admitted or treated as genuine by the party against whom the evidence is offered may be received irrespective of whether the papers so used as standards are otherwise competent or not. Holmes *v.* Goldsmith, 147 U. S. 150.

In Wisconsin it was formerly a rule that comparison of handwritings might be instituted where the writings used for that purpose were already admitted in evidence on other grounds, but that writings could not be introduced for the mere purpose of making a comparison. State *v.* Miller, 47 Wis. 530, 3 N. W. 31.

Orders Drawn by the Treasurer of a School District on a school fund during certain years and shown to be genuine are admissible in evidence to enable the jury to make a comparison of the handwriting with the signature to a note purporting to have been executed during those years by such treasurer, but which he denies having executed. Grand Island Banking Co. *v.* Shoemaker, 31 Neb. 124, 47 N. W. 696.

The Signature of One in a Hotel Register made about the time of the writing in controversy and shown to be genuine may be used as a standard of comparison. State *v.* Calkins, 73 Iowa 128, 34 N. W. 777; State *v.* Farrington, 90 Iowa 673, 57 N. W. 606, where the court said: "Counsel's claim is that the hotel register could not be used as a standard of comparison, because it was not relevant or material to any other issue in the case. Whatever may be the rule elsewhere, this court has recognized the right to use, for the purposes of comparison, the defendant's genuine signature, wherever found, if made about the time of the alleged forgery." But the genuineness of the signature must be established, State *v.* VanTassel, 103 Iowa, 6, 2 N. W. 497.

In People *v.* Truck, 170 N. Y. 203, 63 N. E. 281, a prosecution for murder, it was held that the signatures of the defendant attached to papers executed in the transaction of ordinary business, although not relating to the case but proved by persons who saw the signature written by him and whose genuineness was not attacked, were competent to be used as standards by handwriting experts to compare with letters purporting to be written by a third person confessing to the murder in question and declaring the defendant innocent, for the purpose of showing that such letters were in the handwriting of the defendant.

itself, the common law recognized an exception to the rule excluding proof of handwriting by comparison, and permitted such comparison to be made.[76] And the rule permitting proof of the handwriting of an ancient document by comparison by expert witnesses applies in criminal as well as civil cases.[77]

F. Official Documents. — There have been cases where signatures of officials on documents produced from official archives, the genuineness of which has never been challenged, and which have officially been treated as authentic, have been received in evidence as standards of comparison without further proof.[78]

"Genuine writings of a person on trial for murder by poisoning are not inadmissible as standards of comparison with the handwriting upon a package containing poison which he is alleged to have sent feloniously through the mail because they were produced at the request of a handwriting expert retained by the police authorities at a time when the inquest into the circumstances of the death was in progress, and while the defendant was suspected, as he knew, of being the murderer, and was under subpoena to testify at the inquest, since he was not in custody and no formal charge had been made against him." People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286.

76. Strother *v.* Lucas, 6 Pet. (U. S.) 763; Cantey *v.* Platt, 2 McCord (S. C.) 260; Macomber *v.* Scott, 10 Kan. 335; McNair *v.* Com., 26 Pa. St. 388, *citing* Rowt *v.* Kile, 1 Leigh (Va.) 216. Jackson *v.* Brooks, 8 Wend. (N. Y.) 426.

In Rogers *v.* State, 11 Tex. App. 608, a prosecution for forging a deed in the name of one Edward Gritten, it was held proper to permit certain signatures purporting to be Gritten's on documents shown to be archives of the general land office to be used for purposes of comparison.

"Where a document is of such date that we cannot reasonably be expected to find living persons acquainted with the handwriting of the supposed writer, either by having seen him write, or by having held correspondence with him, other ancient documents, which are proved to have been treated and regularly preserved as authentic, may be compared with the disputed one." Cook *v.* First Nat. Bank (Tex. Civ. App.), 33 S. W. 998.

"A Deed Proven to be Thirty Years of age, purporting to be signed by the alleged grantor and under which he surrendered possession to the person purporting to be the grantee who by himself and his privies in estate remained in possession, was so far proven to be the genuine deed of the alleged grantor, and so far established the genuineness of his signature thereto, as to authorize its admission in evidence, for the purpose of a comparison of handwriting, upon the trial of a cause involving the question of the genuineness of the signature of such grantor to another instrument." Goza *v.* Browning, 96 Ga. 421, 23 S. E. 842.

77. West *v.* State, 22 N. J. L. 212.

78. United States *v.* Ortiz, 176 U. S. 422. *Compare* Marshall *v.* Hancock, 80 Cal. 82, 22 Pac. 61. In this case the objection was that the record in question had not been sufficiently authenticated or proved to be the public record claimed. The court, however, in ruling against this contention, said: "But this was entirely unnecessary. The evidence was not offered to prove the contents of the record or to establish any fact. The name appearing therein was the only material thing. It could make no difference whether the name offered appeared in a public record, a private writing, or on a blank piece of paper. If it was admitted or proved to the satisfaction of the judge to be genuine, it could properly be compared with the handwriting in controversy for the purpose of showing that the latter was genuine. (Code Civ. Proc., §§ 1943, 1944.) Of course the record introduced did not prove that the name of White appearing therein was his genuine signature; but there was positive evi-

G. Writings of Third Persons. — It is not proper to permit comparison of the disputed writing with writings introduced for that purpose as the genuine writings of any person other than the purported writer, or the person charged with having written the disputed paper.[79]

H. Writings Prejudicial to Party. — The selection of a writing for comparison with no other purpose than to prejudice the writer with the jury should not be permitted, especially where there are other writings available which are not open to that objection.[80]

dence to that effect which we must presume was proof to the satisfaction of the judge that it was genuine."

In Rogers *v.* State, 11 Tex. App. 608, a prosecution for forging a deed, it was held proper to permit the prosecution to introduce, for the purpose of comparison with the signature charged to be a forgery, signatures purporting to be those of the apparent maker of the deed to documents shown to be archives of the general land office.

79. Franklin *v.* Franklin, 90 Tenn. 44, 16 S. W. 557; Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559; Cook *v.* Strother, 100 Mo. App. 622, 75 S. W. 175; Coppock *v.* Lampkin, 114 Iowa 664, 87 N. W. 665; Bruyn *v.* Russell, 52 Hun 17, 4 N. Y. Supp. 784; Peck *v.* Callaghan, 95 N. Y. 73; State *v.* Henderson, 29 W. Va. 147, 1 S. E. 222.

In Keith *v.* Lothrop, 10 Cush. (Mass.) 453, an action on a promissory note alleged to have been forged, wherein the defendant had proved the plaintiff's declarations that she could successfully imitate his handwriting, it was held that the plaintiff could not in reply introduce specimens of her own handwriting for the purpose of proving that the note was not forged by her.

In Williams *v.* State, 61 Ala. 33, a prosecution for forgery, it was held improper to permit a witness, who confessed having written the forged instrument at the request and under the direction of the defendant, to write in the presence of the court and jury a similar instrument for the purpose of furnishing a standard of comparison. The court said: "It would open too wide a door for fraud if a witness was allowed to corroborate his own testimony by a preparation of specimens of his handwriting for the purposes of comparison. By design a correspondence with or a departure from the disputed writing could be fabricated; and whether there was such a design is an inquiry with which the jury should not be embarrassed."

80. In Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500, the court said: "It is true that § 6, art. 35, of the code permits the comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine; but it cannot be supposed it was designed thereby to deprive the court of all discretion in determining what character of genuine writing should be used for this purpose, or to permit the introduction before the jury of extraneous matter calculated, if not intended, to prejudice the party against whom it is used. In the present case there were already in evidence several letters written by the defendant, which would have gratified the most liberal requirement of the law as to comparison of writings, without prejudice to the defendant; and the selection of a letter confined to the subject of exciting political questions in an approaching presidential election must have been made with no other purpose than to prejudice the defendant with such members of the jury as might not share the views he expressed, and constitutes a perversion of the machinery of justice which we cannot sanction under the circumstances of this case. If there were no other writing available at the time for the purposes of comparison, we might be forced to accept the situation."

Compare People *v.* Bibby, 91 Cal. 470, 27 Pac. 781, a prosecution for forgery wherein other orders of the

I. Writings Must Have Been Made Ante Litem Motam. — a. *In General.* — Specimens of handwriting, although genuine, which are offered by the defendant himself as furnishing a standard of comparison, must have been written before any controversy arose as to the genuineness of the writing in dispute.[81] Although there is

same general character as the one set out in the information, the genuineness of which was established, were permitted to be used as comparative evidence against the defendant, the court saying: "While those orders may have, unfortunately to the defendant, demonstrated his ample capabilities in the line of the creation of spurious paper, still that fact afforded no legal objection to their admissibility as evidence of his handwriting, and it was upon this ground alone, as stated by the district attorney at the time, that they were offered and received in evidence."

81. Phoenix Nat. Bank *v.* Taylor, 113 Ky. 61, 67 S. W. 27; Renner *v.* Thornburg, 111 Iowa 515, 82 N. W. 950 (where the signatures to the documents offered were appended before the one in question was executed, and it was held that there was no room for the contention that the standards were manufactured); Weidman *v.* Symes, 116 Mich. 619, 74 N. W. 1108. See also Tucker *v.* Hyatt, 144 Ind. 635, 41 N. E. 1047, wherein it was held that an objection to the writings offered that the signatures were made after the disputed signature became a matter of controversy did not suggest the objection that they may have been made in a disguised hand for the purpose of manufacturing evidence, and that hence the question as to the admissibility of the writings was not presented.

And so in State *v.* Hopkins, 50 Vt. 316, a prosecution for forgery, it was held that certain bank checks drawn by the prosecuting witness were admissible for purposes of comparison unless they or some of them were made at a time when he had an interest in establishing the fact that his signature upon the draft in question was a forgery, and that as it did not appear from the case as it was made up that he had such interest there was accordingly no error in admitting them.

Statement of the Rule. — "As we understand the rule, the claimed author of disputed writings cannot make testimony in his favor by bringing in for comparison a writing manufactured by him for that very purpose after the controversy has arisen. He is confined to the production of papers written by him before the controversy commenced, or those subsequently made by him in the usual course of business and under such circumstances as to negative all idea that they were made for the purpose of being used as evidence in his own favor. A party cannot be allowed to manufacture this class of testimony more than any other in his favor." Sanderson *v.* Osgood, 52 Vt. 309, wherein it was held, however, that although the writing was not proper for comparative purposes because it was made for that purpose after the beginning of the controversy, yet its use in that case was not error because the party against whom it was used had failed to object at the proper time.

In Williams *v.* State, 61 Ala. 33, the court, *quoting* from Mudd *v.* Suckermore, 5 Ad. & El. 703, 31 E. C. L. 406, said: "The test of genuineness ought to be the resemblance, not to the formation of letters in some other specimen or specimens, but to the general character of writing which is impressed on it as the involuntary and unconscious result of constitution, habit or other permanent cause, and is therefore of itself permanent. And we best acquire a knowledge of this character by seeing the individual write at times when his manner of writing is not in question, or by engaging with him in correspondence; either supposition giving reason to believe that he writes at the time, not constrainedly, but in his natural manner."

In Com. *v.* Allen, 128 Mass. 46, 35 Am. Rep. 356, it was held proper for the court to exclude a writing

authority apparently to the effect that the fact that the writings offered were not so written is not of itself ground for excluding them.[82]

Writing Made Subsequent to Signature. — The fact that the signatures offered as furnishing standards of comparison were made subsequent to the time of the signature in dispute is not ground for denying their use as standards in an otherwise proper case, where there is no pretense that they were made after the controversy arose, or that they were manufactured for the purpose of comparison.[83]

b. *Writing on Direct Examination.* — Accordingly it is held improper to permit the purported author of the signature in dispute to write his name on his direct examination in the presence of the court and jury, and give it in evidence on his own behalf for the purpose of furnishing a standard of comparison;[84] and this rule

offered by the defendant containing certain words written by him during the trial for the purpose of being compared with the same words alleged to have been written by him at another time, the genuineness of which is in controversy.

In United States *v.* Prout, 4 Cranch C. C. 301, 27 Fed. Cas. No. 16,094, a prosecution for forgery, an offer on the part of the prosecution to show to the jury the prisoner's signature, written in the presence of the marshal, and permitting them to compare it with the handwriting of the alleged forged instrument, was rejected.

82. Singer Mfg. Co. *v.* McFarland, 53 Iowa 540, 5 N. W. 739, where the court said: "The statute does not prescribe the time when the offered writing shall be made, and we do not think the court was authorized to exclude the evidence. It was proper to allow it to go to the jury for what it was worth. It would doubtless have been in better taste for the defendant to have introduced his writings made at a time and upon an occasion when the motive to disguise was not apparent. This was a matter for the consideration of the jury, but we can find no warrant for excluding the evidence."

83. University of Illinois *v.* Spalding, 71 N. H. 163, 51 Atl. 731, where the court said: "The claimed author of disputed writings cannot make testimony in his favor by bringing in for comparison a writing manufactured by him for that very purpose after the controversy has arisen. He is confined to the production of papers written by him before the controversy commenced, or those subsequently made by him in the usual course of business, and under such circumstances as to negative all idea that they were made for the purpose of being used as evidence in his own favor. A party cannot be allowed to manufacture this class of testimony, more than any other, in his favor. The utmost limit to which the cases and practice go in this respect is to allow the opposing party, when the upholding party takes the stand as a witness, in cross-examination, to call upon him to write in the presence of the jury, that he may use such specimens of his writing for comparison with the disputed writing by the jury and experts against him. Sanderson *v.* Osgood, 52 Vt. 309; King *v.* Donahue, 110 Mass. 155, 14 Am. Rep. 589; Hickory *v.* United States, 151 U. S. 303."

84. King *v.* Donahue, 110 Mass. 155; Bronner *v.* Loomis, 14 Hun (N. Y.) 341. See also United States *v.* Jones, 10 Fed. 469; Griffin *v.* State, 90 Ala. 596, 8 So. 670; Whittle *v.* State, 43 Tex. Crim. 468, 66 S. W. 771. This was an action for forgery, and the state had the prosecuting witness write her name on a blank piece of paper three times in the presence of the court and jury, and "offered her signature, in connection with the signature upon the note, in evidence before the jury, thereby securing a comparison of the signature as written upon the note

and as written upon the blank piece of paper, which was offered as evidence in this case. To which defendant excepted upon the ground that the same had been written long after the signature was written upon the back of the note, and under different circumstances, and was written with a stub pen, when the signature on the back of the note appeared to have been with a sharp-pointed pen, and that the manner of proving the handwriting of Dollie Trimble, in the way it was done, was illegal; and for the further reason that the signature made by her in the court room in the way and manner aforesaid should not have been introduced, for, she being the main witness and the alleged injured party, she could, therefore, on account of her hostility to defendant, disguise her handwriting and dissemble the same, if she saw proper to do so, and in that way show the dissimilarity in her signature on the back of said note and as written upon the blank piece of paper." The action of the court in permitting these specimens to be used as standards was held to be error.

In McGlasson *v.* State, 37 Tex. Crim. 620, 40 S. W. 503, 66 Am. St. Rep. 842, the court said: "The question presented in the above bill of exceptions is whether it is permissible to allow a witness — a private prosecutor — in a case of forgery, where his signature is alleged to be forged, and he denies such signature, to make his signature before the jury for the purpose of being used as evidence in the case bearing on the issue as to whether or not the signature to the instrument alleged to be forged is his genuine signature. We believe it is the general rule, supported by all the authorities, and gainsaid by no well-considered case which we have been able to find, that such testimony is not admissible; the principle upon which the exclusion of this character of evidence is founded being its liability to fabrication, the witness, at the time he makes said signature for the purpose of comparison, having a motive to fabricate, and having the means furnished him at the time to aid him in such fabrication. . . . Of course, it was to the interest of the prosecuting witness to write his signature differently from the copy before him, and it is not the intention of the law to thus present temptations to human infirmity. It is insisted, however, that the witness could only write his own name, and that consequently he was incapable of changing the form of his signature. If the evidence established the fact that he could not write his name except in one form — that is, without a change in any letter — the position would be sound; but we have no such evidence in this case. The inducement to fabricate is too great, under such conditions, and in such cases the courts do not authorize such testimony."

In Hickory *v.* United States, 151 U. S. 303, the defendant, being called as a witness on his own behalf, denied that a certain letter was in his handwriting, and it was held proper to refuse to permit him to write at the trial for the purpose of preparing and furnishing a standard of comparison. The court said: "It is only when the paper is written, not by design but unconstrainedly and in the natural manner, so as to bear the impress of the general character of the party's writing, as the involuntary and conscious result of constitution, habit, or other permanent cause, and therefore of itself permanent, that it furnishes, if otherwise admissible, any satisfactory test of genuineness." The court also said, in quoting from King *v.* Donahue, 110 Mass. 155: "A signature made for the occasion *post litem motam* and for use at the trial ought not to be taken as a standard of genuineness;" and from Williams *v.* State, 61 Ala. 33, "It would open too wide a door for fraud if a witness was allowed to corroborate his own testimony by a preparation of specimens of his writing for the purpose of comparison."

In State *v.* Koontz, 31 W. Va. 127, 5 S. E. 328, where it was held inadmissible to give in evidence to the jury the genuine signature of such party written in the presence of the jury, the court said: "The modern English decisions are clearly opposed to admitting such evidence upon an examination in chief for the mere purpose of enabling the jury to judge of the handwriting. . . . One of the strongest reasons against the

holds whether the writer has or has not before him the disputed writing.[85]

c. *Writing on Cross-Examination.* — Where a witness has denied writing a document which is alleged to be a forgery, or has denied his signature thereto, he may be asked and required on cross-examination to write in open court in order that a comparison may be made between such writing and the writing controverted.[86]

establishment of such a rule of evidence is 'fraud in the selection of the writings offered as specimens for the occasion.' How much greater would be the danger of this fraud if the prosecuting witness, instead of being required to produce such specimens written before the controversy had arisen, were permitted to manufacture them at the moment they are to be given in evidence to the jury. If such a proceeding were allowed, the party whose name is alleged to have been forged would in all cases be strongly tempted to make the 'specimen' resemble the forgery as little as possible. In any such case there would be added the 'danger of surprise upon the other party,' who would have no means of knowing what kind of a specimen was to be produced, nor could he be prepared to meet the inferences drawn from them."

Compare State *v.* Henderson, 29 W. Va. 147, 1 S. E. 222, a prosecution for uttering a forged receipt, wherein witnesses had testified to the handwriting of the alleged forged receipt, and being acquainted with the signature of the person whose name was signed thereto they were permitted in the presence of the jury to write the letters of his name as they thought he wrote them that the jury might compare the letters so written with the letters in the alleged forged signature. The court said: "The witnesses were only asked to write an 'L' as they thought Leonard wrote it, so that the jury could the better understand the testimony. If a jury do not have a clear idea of the location of a place where an act is alleged to have been done, no one doubts the right of a party to have a witness describe the place and by a word painting of it and its surroundings make its location clear to the minds of the jury. What objection then can there be to the permitting of the witness to make in the presence of the jury a diagram of the place to enable the jury the better to understand the witness? There can then be no valid objection to the permitting of the witnesses in their attempt to describe how Ebenezer Leonard wrote the letter 'L' to illustrate their meaning by writing the letter themselves, so that the jury could see whether or not it was in fact different from the alleged simulated 'L.'"

85. Whittle *v.* State, 43 Tex. Crim. 468, 66 S. W. 771.

86. Williams *v.* State, 61 Ala. 33; Bridgman *v.* Corey, 62 Vt. 1, 20 Atl. 273; Allen *v.* Gardner, 47 Kan. 337, 27 Pac. 982; People *v.* DeKroyft, 49 Hun 71, 1 N. Y. Supp. 692; Bronner *v.* Loomis, 14 Hun (N. Y.) 341; Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013; Chandler *v.* LeBarron, 45 Me. 534.

Compare First Nat. Bank *v.* Roberts, 41 Mich. 709, 3 N. W. 199; Williams *v.* Riches, 77 Wis. 569, 46 N. W. 817, where the witness was a young girl, and testified that her handwriting had greatly improved since making the writing in dispute, and it was held proper to refuse to compel her to write on cross-examination.

In Sanderson *v.* Osgood, 52 Vt. 309, the court said: "The utmost limit to which the cases and practice go in this respect is to allow the opposing party, when the upholding party takes the stand as a witness, in cross-examination, to call upon him to write in the presence of the jury, that he may use such specimens of his writing for comparison with the disputed writing by the jury and experts against him."

In Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013, it was declared that the benefit of this kind of cross-examination is well illustrated in this case. The check alleged to have been

J. Authentication of Genuineness. — a. *Necessity.* — Whenever proof of a disputed handwriting or signature is sought to be made by comparison, either by witness, court or jury, the writing offered as an exemplar or standard must be one of which the

forged was for the sum of $24.60. The word "four" in the check having been written "foure," and in the writing executed by the defendant upon the witness stand the same orthography was used.

In Huff *v.* Nims, 11 Neb. 363, 9 N. W. 548, an action on a promissory note the genuineness of which the defendant denied, the defendant had called his son as a witness, who testified in chief that certain words in the note which his father actually gave were written by himself, while those in the one in suit were not. It was held proper to require him on cross-examination to write the same words in the presence of the jury for their inspection and comparison with the note in controversy.

In Wheeler & Wilson Mfg. Co *v.* Buckhout, 60 N. J. L. 102, 36 Atl. 772, it became important for the defendant to establish the genuineness of a writing offered to be used as an exemplar, the genuineness of the signature to which the plaintiff denied, and the defendant asked the plaintiff on cross-examination to write her name, which she did three times, and these signatures, together with other signatures which she admitted had been made by her, were used as standards.

It is proper to require the purported author of a disputed signature on cross-examination to reproduce the writing in question in his handwriting by sentences, and use the same as a standard of comparison. Rogers *v.* Tyley, 144 Ill. 652, 32 N. E. 393.

Printing Signature. — In Smith *v.* King, 62 Conn. 515, 26 Atl. 1059, the court said: "The authority and duty of a court, under proper circumstances, to direct a person denying, in testimony, his signature to a document, to write his name in open court, in order that the jury may compare such writing with the disputed signature, is a somewhat controverted question. . . . We are inclined to think it to be the better opinion, supported by the weight of authority, that the court does possess such power, and that its exercise is best committed to the sound discretion of the trial court, to be asserted or withheld, as the circumstances may seem to such court to warrant. . . . The facts, as found, indicate that no foundation was laid upon which to demand such an experiment. No reason for it existed. The defendant had testified to the finding of an old handkerchief with the name 'T. L. Smith,' presumably in printed letters, upon it. That name, very plain and distinct at one time, had become so obliterated and nearly faded out that even its location could be found only with great difficulty. It seems fair, therefore, to assume that any inference that it was the plaintiff's handkerchief, growing out of his name being upon it, would arise from testimony as to what had appeared, plain and distinct, at a former time, rather than from an inspection of what had now so nearly faded as to leave so little trace that with difficulty its former location could be shown. Such being the evidence on the part of the defendant, the plaintiff merely testified that the handkerchief did not belong to him, and that he had no knowledge of it. No one appears to have claimed that the name, once distinct, was written or printed by him, or that it resembled his writing. Nor does it appear that such a name was shown to him, or even that it was sufficiently legible so that it could have been. Nor did he testify anything in regard to it, except inferentially from the above statement. What possible reason was there for requiring a signature, to be used by the jury, in comparison with another signature not before them, which no longer existed, which no one had ever identified as bearing the plaintiff's characteristics, and not in writing but in print?"

genuineness is sufficiently established within the rules subsequently discussed.[87]

87. *United States.* — Green *v.* Terwilliger, 56 Fed. 384.

Connecticut. — Tyler *v.* Todd, 36 Conn. 218.

Georgia. — McCombs *v.* State, 109 Ga. 496, 34 S. E. 1021; McVicker *v.* Conkle, 96 Ga. 584, 24 S. E. 23.

Indiana. — White S. M. Co. *v.* Gordon, 124 Ind. 495, 24 N. E. 1053.

Iowa. — Bruner *v.* Wade, 84 Iowa 698, 51 N. W. 251; Hyde *v.* Woolfolk, 1 Iowa 159.

Kansas. — Macomber *v.* Scott, 10 Kan. 335.

Kentucky. — Andrews *v.* Hayden, 88 Ky. 455, 11 S. W. 428; Storey *v.* First Nat. Bank, 24 Ky. L. Rep. 1799, 72 S. W. 318.

Maine. — State *v.* Thompson, 80 Me. 194, 13 Atl. 892, 6 Am. St. Rep. 172.

Massachusetts. — Com. *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596; Martin *v.* Maguire, 7 Gray 177.

Michigan. — Van Sickle *v.* People, 29 Mich. 61; People *v.* Cline, 44 Mich. 290, 6. N. W. 671.

Montana. — Davis *v.* Fredericks, 3 Mont. 262.

Missouri. — State *v.* Soper, 148 Mo. 217, 49 S. W. 1007; Doud *v.* Reid, 53 Mo. App. 553.

New York. — People *v.* Flechter, 44 App. Div. 199, 60 N. Y. Supp. 777; People *v.* Dorthy, 50 App. Div. 44, 63 N. Y. Supp. 592; Bruyn *v.* Russell, 52 Hun 17, 4 N. Y. Supp. 784; Hall *v.* Van Vranken, 28 Hun 403.

North Carolina. — Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963; Tunstall *v.* Cobb, 109 N. C. 316, 14 S. E. 28.

North Dakota. — Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003.

Texas. — Sartor *v.* Bolinger, 59 Tex. 411; McGlasson *v.* State, 37 Tex. Crim. 620, 40 S. W. 503, 66 Am. St. Rep. 842; Heard *v.* State, 9 Tex. App. 1; Whittle *v.* State, 43 Tex. Crim. 468, 66 S. W. 771.

Vermont. — State *v.* Horn, 43 Vt. 20; Wilmington Sav. Bank *v.* Waste, 57 Atl. 241.

"Comparison of handwritings is a mode of proof by which, if it be not carefully guarded, judicial tribunals are liable to great imposition. The relaxation of the rules concerning this class of evidence should never be so far extended as to permit the use of uncertain standards of comparison." Shorb *v.* Kinzie, 100 Ind. 429.

Undated Writing. — In Redding *v.* Redding, 69 Vt. 500, 38 Atl. 230, it was held that the fact that the writing offered as a standard bears no date does not affect its admissibility if it appears extrinsically when it was written. It was also held that the fact that the handwriting of the person whose signature is in dispute materially changed between the date he signed the papers offered for the purpose of comparison and the date of the instrument in question does not affect the competency of such papers, but goes only to their weight as such standards.

In Hobart *v.* Verrault, 74 App. Div. 444, 77 N. Y. Supp. 483, an action upon a promissory note claimed to have been executed by the defendant's intestate, the plaintiff, for the purpose of proving the signature of the intestate to the note, produced a declaration of an application for citizenship signed with the same name; but it was held, in the absence of proof that the person signing the application was the intestate, other than the fact that the two names were the same, the declaration was not admissible as a standard.

"By the civil and ecclesiastical law, where a more liberal rule of comparison prevailed than at common law, the genuineness of the standard was an indispensable prerequisite to its admission. By the ecclesiastical law, 'the instruments of comparison were required to be proved by witnesses who saw them written, and it was for the judge to decide whether they were sufficiently proved.' By the civil law it was provided that 'the writing must either be of a public nature, such as signatures made before a notary, or judge, etc., or papers written or signed in some public capacity; or, if private papers, they must be admitted in the case by the party to whom they are attrib-

It is not generally sufficient that the paper offered is attested by a public officer.[88] And the rule that writings to be used as standards for comparison of handwritings must be admitted to be genuine by the party against whom they are sought to be used, or at least clearly proved to be so, applies as well to writings used on the cross-examination of witnesses as on the direct.[89]

b. *Mode of Authentication.* — **(1.) Admissions.** — Certainly writings may be used as standards where their genuineness is admitted by the person against whom they are to be used for such purposes;[90] and there is authority apparently to the effect that it is only when he does admit the genuineness of such writings that they can be used for comparison.[91]

(2.) Failure to Deny Genuineness. — It has been held that writings are not admissible for purposes of comparison where their genuineness is not established by any evidence other than the mere fact

uted, to be of his own handwriting. A previous admission of them or previous proof will not make them admissible.'" University of Illinois *v.* Spalding, 71 N. H. 163, 51 Atl. 731.

88. McVicker *v.* Conkle, 96 Ga. 584, 24 S. E. 23, where it was held that the fact that the paper offered was attested by a public officer might afford such inferential evidence of its execution as to authorize its admission, but it was insufficient to authorize the admission of the paper for purposes of comparison. "Where a paper is offered for the purposes of comparison, its execution by the maker must be either proved or acknowledged by him. Before it could be set up as a standard by which to judge of the genuineness of another paper, the handwriting must be established as being that of the alleged maker of the collateral paper. Its force as evidence cannot be made dependent upon inference; because, in order to determine by comparison the identity of makers by similarity of handwriting it is of prime consequence that we first establish a genuine standard; otherwise it would be impossible to reach even an approximately correct conclusion."

89. Gaunt *v.* Harkness, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 297. In this case it was held error to permit the defendant to present to plaintiff's witnesses, testifying as experts, false signatures prepared for the purpose of testing the ability of witnesses to detect a forgery, and to cross-examine such witnesses as to such false signatures, and thereafter to introduce such signatures in evidence and prove by another witness the fact that he wrote them himself. See also Tyler *v.* Todd, 36 Conn, 218.

90. Cannon *v.* Sweet (Tex. Civ. App.), 28 S. W. 718; Com. *v.* Nefus, 135 Mass. 533; Walker *v.* Steele, 121 Ind. 436, 22 N. E. 142; People *v.* Flechter, 44 App. Div. 199, 60 N. Y. Supp. 777; Hyde *v.* Woolfolk, 1 Iowa 159.

In Moore *v.* United States, 91 U. S. 270, where the paper offered to be used as a standard was a power of attorney given by the claimant to his attorney in fact, by virtue of which the latter appeared and presented the claim to the court of claims; it was held that an admission by counsel that the paper was the document it purported to be amounted to a declaration that the document was in the claimant's handwriting; that to pretend the contrary would operate as a fraud on the court of claims.

Admission on Cross-Examination. In Dietz *v.* Fourth Nat. Bank, 69 Mich. 287, 37 N. W. 220, where the plaintiff was a witness and denied the execution of an instrument which bore his signature, it was held that a paper which on cross-examination he admitted did bear his signature might be used for comparison.

91. Merritt *v.* Straw, 6 Ind. App. 360, 33 N. E. 657; DeArman *v.* Tag-

that the party against whom they are to be used does not deny their genuineness.[92]

(3.) Estoppel to Deny Genuineness. — Some of the courts hold that writings may be used for purposes of comparison where they are of such a character that the party against whom they are to be used is estopped to deny their genuineness.[93]

(4.) Testimony of Writer. — The genuineness of a writing offered for purposes of comparison may be established by the testimony of the person who wrote it;[94] and indeed it has been declared that such testimony is the very best that can be offered, since nothing is then left to presumption.[95]

(5.) Testimony of Eye-witnesses. — The genuineness of the writing when not admitted or proved by the testimony of the writer may, and some courts hold that it must, be proved by the testimony of witnesses who saw it written.[96] It is error, however, to permit a

gart, 65 Mo. App. 82; State *v.* Minton, 116 Mo. 605, 22 S. W. 808.

92. State *v.* Ezekiel, 33 S. C. 115, 11 S. E. 635. *Compare* Hall *v.* Van Vranken, 28 Hun (N. Y.) 403; People *v.* Flechter, 44 App. Div. 199, 60 N. Y. Supp. 777; Storey *v.* First Nat. Bank, 24 Ky. L. Rep. 1799, 72 S. W. 318.

93. *Missouri.* — DeArman *v.* Taggart, 65 Mo. App. 82; Lechance *v.* Lobelein, 15 Mo. App. 460; Singer Mfg. Co. *v.* Clay, 53 Mo. App. 412; McCombs *v.* Foster, 62 Mo. App. 303.

North Carolina. — State *v.* Noe, 119 N. C. 849, 25 S. E. 812; Jarvis *v.* Vanderford, 116 N. C. 147, 21 S. E. 302; Tunstall *v.* Cobb, 109 N. C. 316, 14 S. E. 28.

Texas. — Kennedy *v.* Upshaw, 64 Tex. 411; Mardes *v.* Meyers, 8 Tex. Civ. App. 542, 28 S. W. 693.

Claim Against Estate of Decedent. In Croom *v.* Sugg, 110 N. C. 259, 14 S. E. 748, an action against executors of a decedent to charge the latter's estate with the liability, it was held that the plaintiff was estopped to deny the execution of the will under which the defendant was appointed and qualified, and that the original will taken from the records of the court was competent, without further proof of its execution, to be used for purposes of comparison.

In Williams *v.* Conger, 125 U. S. 397, the plaintiff himself claimed title under and by virtue of the document which was offered as a standard of comparison, and it was held that he was estopped to deny the genuineness of the signature thereto, and accordingly the paper was used as such standard.

94. Renner v. Thornburg, 111 Iowa 515, 82 N. W. 950; State *v.* Stegman (Kan.), 63 Pac. 476. And in Mallory *v.* State, 37 Tex. Crim. 482, 36 S. W. 751, the trial court seemed to have excluded the writing offered because it was not authenticated by any other testimony than that of the writer himself. The court, in holding such exclusion error, said: "This did not go to the relevancy of the testimony, but to its weight before the jury. While the court may have believed the defendant was testifying falsely in regard to writing the letter, yet the jury may have thought differently, and he was entitled to whatever weight might be attached to it in comparing the handwriting of the letter with the indorsement on the check."

95. Renner *v.* Thornburg, 111 Iowa 515, 82 N. W. 950.

96. Koons *v.* State, 36 Ohio St. 195; Sperry *v.* Stebbs, 10 Ohio Dec. 318; Homer *v.* Wallis, 11 Mass. 309, 6 Am. Dec. 169.

With respect to the genuineness of a paper offered as a standard of comparison no reasonable doubt should exist; and nothing short of evidence of a person who saw the paper written or an admission of its genuineness, or evidence of an equal certainty, should be received for that purpose. Baker *v.* Haines, 6 Whart.

witness who was present at the execution of the writing offered as comparative evidence to detail the circumstances under which it was written, especially where the effect of such testimony is to authorize an inference that he and the writer had been engaged in attempts to perpetrate other offenses similar to the one with which the writer stood charged.[97]

(6.) Opinion Evidence. — The genuineness of a writing offered for purposes of comparison cannot be proven by the opinions of non-expert witnesses testifying from acquaintance with the handwriting of the purported author. The standard must be established by evidence of a higher and more certain grade.[98] There is authority,

(Pa.) 284, 36 Am. Dec. 224, where the court said: "It is very plain that without the restrictions which have been indicated, evidence of comparison of hands would very often be used for very oppressive and pernicious purposes. As the party who offered them would have the selection of the criterion or test specimen, it would very frequently happen that it would be out of the power of the adverse party to disprove the allegation that the writing was his."

97. People *v.* Creegan, 121 Cal. 554, 53 Pac. 1082.

98. *Indiana.* — Merritt *v.* Straw, 6 Ind. App. 360, 33 N. E. 657; Shorb *v.* Kinzie, 100 Ind. 429.

Iowa. — Sankey *v.* Cook, 82 Iowa 125, 47 N. W. 1077; Hyde *v.* Woolfolk, 1 Iowa 159; Renner *v.* Thornburg, 111 Iowa 515, 82 N. W. 950.

Kentucky. — Phoenix Nat. Bank *v.* Taylor, 113 Ky. 61, 67 S. W. 27.

Oklahoma. — Archer *v.* United States, 9 Okla. 569, 60 Pac. 268.

Texas. — Phillips *v.* State, 6 Tex. App. 364; Hatch *v.* State, 6 Tex. App. 384; Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315; Jester *v.* Steiner, 86 Tex. 415, 25 S. W. 411.

Winch *v.* Norman, 65 Iowa 186, 21 N. W. 511, where the court, *quoting* from Hyde *v.* Woolfolk, 1 Iowa 159, said: "Two obvious methods of proving the standard writing are — First, by the testimony of a witness who saw the person write it; and secondly, by the party's admission, when not offered by himself. We do not mean to say that these are the only methods, but only that the proof must be positive. . . . The very idea of proving handwriting by comparison implies, of necessity, the establishment of the genuineness of the standard. The court is not prepared to adopt the suggestion that the standard writing may be proved by witnesses who have only seen the party write, for this is in effect fixing the standard by comparison; it is supporting a probability by a probability."

Pavey *v.* Pavey, 30 Ohio St. 600, where the standard was a receipt, and a witness testified that the defendant had given him a receipt that looked very similar to the one offered, but that he could not say positively that it was the identical one, and it was held that the evidence was too uncertain to warrant its admission as a standard of comparison. See also Bragg *v.* Colwell, 19 Ohio St. 407; Calkins *v.* State, 14 Ohio St. 222, 45 Am. Dec. 536; Gilmore *v.* Swisher, 59 Kan. 172, 52 Pac. 426. In this case the letters offered as standards were not admitted to be genuine, and most of the proof with reference to their genuineness was that they were letters received by mail in due course of business, and the opinions of witnesses that they were genuine.

A mere statement by a witness that the signature to a check looked like that of the person alleged to have drawn the check is wholly insufficient to justify the admission of the check in evidence for the purpose of being used as a standard of comparison. Fullam *v.* Rose, 181 Pa. St. 138, 37 Atl. 197.

In an action upon a lost contract the plaintiff, for the purpose of proving the genuineness of the signature thereto, testified that he was acquainted with the handwriting of defendant's testator, and offered in evi-

however, to the effect that the manner of proving the genuineness of the standard depends upon the general rules of evidence applicable to the proof of a person's handwriting, and accordingly that the genuineness of such writings may be established by the testimony of witnesses acquainted with the handwriting of the purported author.[99]

dence a letter which he claimed was in the testator's handwriting; he then called an expert who had seen the original contract sued on, by whom it was attempted to prove that the signature to the contract and that to the letter offered were in the same hand. It was held that the proof as to the genuineness of the handwriting of the letter was insufficient to warrant its use as a standard for proof of the signature by comparison. Sankey *v.* Cook, 82 Iowa 125, 47 N. W. 1077. The court said: "Before the comparison can be made by the expert or jury the genuineness of the standard writing must be proved, established, and no longer a question of fact in the case. It should be so that the court can say to the jury that the standard, as a matter of law, is genuine, and leave to the jury the inquiry whether the disputed signature was written by the same hand;" and that in this case the genuineness is established alone upon the plaintiff's opinion thereof, based on his knowledge of the testator's handwriting; that the most that could be said of the testimony was that the expert was of the opinion that the two writings were executed by the same hand, based on the opinion of the plaintiff that the letter was genuine. *Quoting* from Winch *v.* Norman, 65 Iowa 186, 21 N. W. 511, they say that "the genuineness of the writing made the basis of comparison, called sometimes the 'standard writing,' should be proved by direct and positive evidence."

99. McKay *v.* Lasher, 121 N. Y. 477, 24 N. E. 711, so ruling by virtue of the New York statute which makes writings admissible for purposes of comparison when "proved to the satisfaction of the court to be the genuine handwriting" of the person who it is claimed executed the disputed instrument. And in Sprague *v.* Sprague, 80 Hun 285, 30 N. Y. Supp. 162, it was held that if the testimony of a witness who was testifying from acquaintance was to be believed no reasonable doubt existed as to the genuineness of the papers admitted.

"Any competent evidence tending to prove that the paper offered as a standard of comparison is genuine is to be received, no matter whether that evidence be in the nature of an admission of the proper party or the opinion of a witness who knows his handwriting, or of any other kind whatever. It is to be received, and then the jury are to be instructed that they are first to find, upon all the evidence bearing upon that point, the fact whether the writing introduced for the purpose of comparison, or sought to be used for that purpose, is genuine. If they find it is not so, then they are to lay this writing and all the evidence based upon it entirely out of the case; but if they find it genuine, they are to receive the writing and all the evidence founded upon it, and may then institute comparisons themselves between the paper thus used and the one in dispute, and settle the final and main question whether the signature in dispute is or is not genuine. We think this is the true rule that is, or ought to be, adopted in this state. It is no longer the criterion to exclude everything that raises a collateral issue. If the testimony is competent, that is sufficient; and it is for the court to decide when the evidence becomes so distant and shallow on collateral issues that it should be excluded." State *v.* Hastings, 53 N. H. 452.

In Manning *v.* State, 37 Tex. Crim. 180, 39 S. W. 118, it was held that a paper identified by a witness who had qualified himself to testify to the handwriting of the purported writer should have been admitted in evidence as a specimen of the handwriting of such author for comparison with other letters alleged to have been written by him.

There is authority, also, to the effect that the genuineness of the writing to be used as a standard of comparison may be established upon the cross-examination of witnesses for the party against whom it is to be used, who are shown to be acquainted therewith.[1]

(7.) **Comparison.** — Nor can the genuineness of a writing offered for purposes of comparison be established merely by a comparison with another writing.[2]

c. *Order of Proving Genuineness.* — The fact that the exemplars submitted to experts had not at the time been proven by direct evidence to be genuine is immaterial, where the fact of their genuineness is subsequently established by uncontradicted evidence.[3]

d. *Requisite Authentication.* — (1.) **Generally.** — The general rule is that the genuineness of the signature or handwriting offered for the purpose of furnishing a standard of comparison should be established by clear and undoubted proof.[4] And where the evidence of

1. Kornegay *v.* Kornegay, 117 N. C. 242, 23 S. E. 257. This was an action to set aside a deed held by one of the defendants from her father conveying land to her which the plaintiffs claimed under the will of the father; and it was held that the defendant and her husband, who testified as witnesses for themselves to the execution of the deed, and who were acquainted with the handwriting and signature of the testator, were properly required to state if the signature to the will was not that of their grantor. See also McCombs *v.* Foster, 62 Mo. App. 303.

2. Archer *v.* United States, 9 Okla. 569, 60 Pac. 268; Winch *v.* Norman, 65 Iowa 186, 21 N. W. 511, wherein the court said: "Evidence of experts based upon comparisons is, at best, not very reliable, and we do not think we should be justified in holding that writing can be used as standard writing the evidence of whose genuineness rests only in opinion."

3. *In re* Marchall's Estate, 126 Cal. 95, 58 Pac. 449.

4. *United States.* — Green *v.* Terwilliger, 56 Fed. 384.

Iowa. — Hyde *v.* Woolfolk, 1 Iowa 159.

Kansas. — Gilmore *v.* Swisher, 59 Kan. 172, 52 Pac. 426; Gaunt *v.* Harkness, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 297.

Massachusetts. — Com. *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596; Martin *v.* Maguire, 7 Gray 177.

Ohio. — Bragg *v.* Colwell, 19 Ohio St. 407.

Pennsylvania. — Farmers' Bank *v.* Whitchell, 10 Serg. & R. 110.

Texas. — Mallory *v.* State, 37 Tex. Crim. 482, 36 S. W. 751; Cook *v.* First Nat. Bank (Tex. Civ. App.), 33 S. W. 908.

Utah. — State *v.* Webb, 18 Utah 441, 56 Pac. 159.

In Rowell *v.* Fuller, 59 Vt. 688, 10 Atl. 853, the court, in speaking of the quantity of evidence necessary to prove the genuineness of a writing offered as a standard, said: "While great care should be taken that the standard of comparison should be genuine and found so, as Bennett, J., says in 21st Vt. 256, by 'clear, direct and positive testimony,' we are not aware of any different rule to guide the court from that which obtains in the disposition of any other question which the court or jury are called to pass upon, either in the admission of testimony or in the amount of testimony required. The court should be satisfied, by a fair balance of testimony, the usual rule in civil causes, that the signature is a genuine one, before it permits it to be used as such."

The signature to a motion for a continuance purporting to be that of the defendant, and to which is attached the certificate of the clerk of the court that the same was subscribed by the defendant in his presence, may be used as a standard of comparison without further proof of the genuineness of the signature.

the genuineness of the writing offered for purposes of comparison is meager and unsatisfactory, it is error to permit the use of the writing for that purpose.[5]

(2.) Distinction Between Civil and Criminal Cases. — Sometimes, however, distinction is made between civil and criminal cases, requiring in the former case proof of the genuineness of the standard by a preponderance of the evidence, and in the latter case proof beyond a reasonable doubt.[6]

State *v.* Farrington, 90 Iowa 673, 57 N. W. 606, where the court said: "The statute is absolute in its requirement that the genuineness of the standard writing must be established, but makes no provision as to how it shall be done. Here the defendant, for a legitimate purpose, attaches his signature to a paper which he finds necessary or desirable to file in the case. It is filed, and becomes a part of the record in the case. The defendant's name purports to be signed to the paper. The clerk certifies officially that that signature was put there by the defendant, before him, and in his presence. On the faith of such a showing, and the genuineness of the defendant's signature thereto, and in reliance thereon, the court is asked to grant him a continuance. He has thereby most solemnly said to the court, in the very case on trial, that his signature to that paper is genuine."

Letters purporting to be from the purported author of the signature in dispute in reply to letters addressed to him are not, without further proof, admissible as standards of comparison within the rule that such standards must be established by clear and undoubted proof. McKeone *v.* Barnes, 108 Mass. 344.

The mere fact that two letters were found in the possession of a person accused of forgery, one not signed at all and the other signed "Unhappy Nan," the accused being known as "Nannie," is not of itself sufficient to show that she wrote them, and thus establish the handwriting thereof as a standard with which to compare the handwriting of the alleged forged instrument. McCombs *v.* State, 109 Ga. 496, 34 S. E. 1021, where the court, *quoting* from McVicker *v.* Conkle, 96 Ga. 584, 24 S. E. 23, said: "Where a paper is offered for the purpose of comparison, its execution by the maker must be either proved or acknowledged by him. Before it could be set up as a standard by which to judge of the genuineness of another paper, the handwriting must be established as being that of the alleged maker of the collateral paper. Its force as evidence cannot be made dependent upon inference, because, in order to determine by comparison the identity of makers by similarity of handwriting, it is of prime consequence that we first establish a genuine standard; otherwise it would be impossible to reach even an approximately correct conclusion." Also in quoting from Van Sickle *v.* People, 29 Mich. 61, in the same case, it was held that the mere finding of a diary on a person, with an admission by him that it was his, is not a sufficient authentication of the writing to justify its use as a standard. "The circumstance, if such was the truth, that the plaintiff in error owned the book and claimed it as his, might have helped to show, and, with other evidence, might have sufficed to show, that the writing in it was actually made by him; but standing alone, and by itself, it was inadequate to show that fact. It is certainly possible that he wrote the matter contained in the diary, but the probability that he did so is not sufficiently assured by evidence of his ownership to warrant the assumption which was made. It would, I think, be a very unsafe rule to hold that the possession and ownership of a book or document may authorize an inference that the owner can write, that he did write the matter contained in it, and then, on the foot of these inferences, charge him as the author of other and wholly disconnected writings."

5. Wilson *v.* Irish, 62 Iowa 260, 17 N. W. 511.

6. "Since common-law evidence is competent to establish the genuine-

(3.) Sufficient Proof to Sustain Verdict. — It has been said that the proof of the genuineness of the standard must be so clear that if such genuineness were one of the issues in the case a verdict should be directed by the court in favor of its genuineness, and accordingly hold that where there is as much doubt about the genuineness of the standard as there is about the writing in dispute the standard should not be received.[7]

(4.) Proof to Satisfaction of Trial Judge. — Sometimes the statutes regulating the proof or disputed handwriting by comparison, notably those of Kentucky and New York, require the genuineness of the writing to be used as a standard to be proved to the satisfaction of the judge.[8] And a statute so providing is not unconstitutional as

ness of a writing sought to be used as a standard of comparison, it is apparent, in the absence of a statutory rule as to the degree of proof to be made, that the general rule of the common law as to the sufficiency of evidence must prevail. In civil cases the genuineness of such a paper must be established by a fair preponderance of the evidence, and in criminal cases beyond a reasonable doubt." People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286.

7. Clark *v.* Douglass, 5 App. Div. 547, 40 N. Y. Supp. 769.

8. Andrews *v.* Hayden, 88 Ky. 455, 11 S. W. 428; People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066.

In Farrell *v.* Manhattan R. Co., 83 App. Div. 393, 82 N. Y. Supp. 334, the court said: "To justify the court in allowing evidence of a comparison between two signatures, the standard must be proved to the satisfaction of the court to have been the genuine writing of the person who it was claimed executed the disputed instrument. The court who heard the testimony was not satisfied that the signature to this contract was the genuine signature of the person whose consent it was sought to prove. It is true that it was found among the papers of the witness' father after his death, and purported to be a contract for the conveyance of the property which had been conveyed to the father, and which purported to be executed by the grantor, who had subsequently conveyed the property, but this was not sufficient to show that the signature was genuine. The son — the only witness called to testify to the handwriting — could not testify that he had ever seen his father write. He expressly disclaimed knowledge of his father's handwriting, and, although apparently disinterested, he refused to testify that the signature to the consent or the contract was genuine."

"The words 'proved to the satisfaction of the court' are to be construed in the light of the obvious purpose for which these statutes were enacted. At common law a paper properly in evidence for general purposes can be compared with a disputed writing, but only when the genuineness of the handwriting of the former is admitted or proved beyond a reasonable doubt. (Chamberlayne's Best on Ev., 239; Doe *v.* Newton, 5 Ad. & El. 514; 1 Greenleaf on Ev. [14th ed.] 578; Miles *v.* Loomis, 75 N. Y. 288; State *v.* Scott, 45 Mo. 302; Moore *v.* U. S., 91 U. S. 270.) Since these statutes were designed to amplify and broaden the common-law rule by permitting the use of genuine writings as standards of comparison, even when they are not competent or relevant for other purposes, it must be assumed that the language prescribing the manner in which the genuineness of such writings is to be established was carefully and deliberately chosen by the legislature. While it is obvious that the words 'proved to the satisfaction of the court' do not invest the trial court with a mere personal discretion which is to be exercised without reference to rules of evidence, it is equally plain that the failure of these statutes to prescribe the precise method or degree of proof necessary to establish the genuineness of a writing for purposes of comparison with a disputed

violating the provision that trial by jury in all cases in which it has been heretofore used shall remain forever inviolate.[9] Sometimes it is expressly provided by statute that the genuineness of writings to be used as standards of comparison shall be proved to the satisfaction of the judge by other than opinion evidence; where they are sworn papers which are part of the official records in the case it is held that the genuineness of such writings may be determined by the judge from a mere inspection.[10]

e. *Determination of Fact.* — Whether or not the genuineness of a writing offered for the purpose of comparison with a disputed writing has been sufficiently established within the rules just stated is a question for the determination of the trial judge.[11] And although in one case it has been held error for the judge to submit that question to the jury for their determination,[12] the prevailing rule is that the judge decides in the first instance, and the jury are final judges as to the genuineness of the paper offered as a standard.[13]

K. Notice of Intended Use of Standards. — Sometimes the statutes regulating the proof of handwriting by comparison, notably those of Kentucky and Georgia, provide that notice of the intended use of the genuine specimens as standards for comparison must be given to the party against whom they are to be used with a reasonable opportunity to examine them before trial,[14] and the

writing renders it necessary to resort to the general rules of the common law for that purpose." People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286.

The California Code of Civil Procedure (§ 1944) provides that the judge is required to be satisfied that the writing is genuine before he is authorized to admit it for purposes of comparison. People *v.* Creegan, 121 Cal. 554, 53 Pac. 1082.

9. People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, where the court said: "The sufficiency of the proof given of the genuineness of the papers offered as standards is a preliminary point to be determined in the first instance by the court before permitting the papers to go to the jury. If the court, having regard to the rules adverted to, adjudge the papers genuine, it then becomes the duty of the jury in its turn, at the proper time, before making comparison of a disputed writing with the standards, to examine the testimony respecting the genuineness of the latter, and to decide for itself, under proper legal instructions from the court, whether their genuineness has been established."

10. Froman *v.* Com., 19 Ky. L. Rep. 948, 42 S. W. 728, so holding under the Kentucky statute.

11. Bragg *v.* Colwell, 19 Ohio St. 407; Rowell *v.* Fuller, 59 Vt. 688, 10 Atl. 853; Hall *v.* Van Vranken, 28 Hun (N. Y.) 403; State *v.* Thomas, 80 Me. 194, 13 Atl. 892, 6 Am. St. Rep. 172; Costello *v.* Crowell, 133 Mass. 352; Com. *v.* Coe, 115 Mass. 504; People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286.

12. Rowell *v.* Fuller, 59 Vt. 688, 10 Atl. 853.

13. State *v.* Hastings, 53 N. H. 452; People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286.

14. Phoenix Nat. Bank *v.* Taylor, 113 Ky. 61, 67 S. W. 27; Storey *v.* First Nat. Bank, 24 Ky. L. Rep. 1799, 72 S. W. 318; Axson *v.* Belt, 103 Ga. 578, 30 S. E. 26.

Notice Need Not Specify Particular Specimens. — In Birchett *v.* Shelbyville, 113 Ky. 135, 67 S. W. 371, a notice had been given to take the depositions some time prior to the

effect of failure to give such notice and opportunity for inspection is to render such writings inadmissible for purposes of comparison.[15]

L. Limiting Number of Writings. — Sometimes the statutes regulating the proof of disputed handwriting by comparison give the trial judge the power of limiting the number of writings to be used as standards.[16] In the absence of a statute, however, it is error for the trial judge to arbitrarily limit the comparison to but one genuine signature.[17]

5. Production of Genuine and Disputed Writings. — A. In General. — The general rule is that proof by comparison of handwritings must be made at the trial,[18] and that it is not proper to permit such proof unless the writings used as standards for comparison as well as the disputed writings are before the court and jury.[19]

trial, stating that certain writings and signatures of the purported author of the signature in dispute would be submitted for inspection and comparison. It was objected that this notice did not state what the writings were which were to be submitted. The court, in sustaining the notice as sufficient, said: "Upon the trial of a common-law cause it would, no doubt, be necessary, under this section, to submit the writings for examination a reasonable time before the commencement of the trial. But in the taking of depositions to be used in an equity cause, we think the notice given was sufficient, as it gave notice of the intention to introduce writings for comparison; and the depositions were taken a sufficient length of time before the hearing to afford the opposing party and her counsel a reasonable opportunity to examine them before the commencement of the trial."

15. Axson *v.* Belt, 103 Ga. 578, 30 S. E. 26; Bogard *v.* Johnstone, 21 Ky. L. Rep. 965, 53 S. W. 651.

16. As in Kentucky. See Phoenix Nat. Bank *v.* Taylor, 113 Ky. 61, 67 S. W. 27.

17. Mutual Ben. Life Ins. Co. *v.* Suiter, 131 N. Y. 557, 29 N. E. 822, where the court arbitrarily excluded three other genuine signatures which would have given the expert witnesses a much wider range for comparison, and the reviewing court said that "whatever the views of the trial judge may have been as to its value or safety, he should have received it." See also Barfield *v.* Hewlett, 6 Mart. (N. S.) (La.) 78, where the court reversed the judgment and instructed the trial judge to require the production of more than one standard in accordance with the provisions of the code.

18. Kendall *v.* Collier, 97 Ky. 446, 30 S. W. 1002, where it was held error to permit a witness, in addition to his testimony as to the genuineness of the signature in dispute, based on his acquaintance with the handwriting, to testify that he had examined the instrument in question sometime previously, and that he had then compared the signature thereto with the signature of the purported author to other papers which he knew to be genuine, but which he had lost and was unable to produce, and that he had sent the instrument in question with such other papers to an expert for the purpose of having the latter make a comparison. See also Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315.

19. People *v.* Dorthy, 50 App. Div. 44, 63 N. Y. Supp. 592; Spottiswood *v.* Weir, 66 Cal. 525, 6 Pac. 381; Tyler *v.* Todd, 36 Conn. 218.

In Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538, it was held that photographs could not be used for comparison when the originals were not before the jury, and could not be shown to the witness on cross-examination.

Collins *v.* Ball, 82 Tex. 259, 17 S. W. 614, 27 Am. St. Rep. 877, to the effect that a letter written by the pur-

B. Use of Copies, Photographs, Etc. — Press Copies. Within this general rule it has been held improper to permit an expert to compare genuine writings with a press copy of the writing in dispute, and give his opinion as to the genuineness of the original writing.[20] And it is also held that press copies of letters are not admissible as standards of comparison.[21]

Traced Copies of various signatures of the person in question, although supported by the testimony of the person who made them as to the manner in which the tracing was done, have been held to be inadmissible, especially where photographic copies of the same signatures are already in evidence.[22]

Photographic Copies. — Again, in a number of instances photographic copies of other writings claimed to be genuine have been held to be inadmissible as standards of comparison.[23] Although

ported author of the disputed writing was not admissible for purposes of comparison, because the original instrument containing the disputed writing was not produced.

20. Spottiswood *v.* Weir, 66 Cal. 525, 6 Pac. 381, where the court said: "It would add vastly to the danger of such evidence to permit evidence to be given from a comparison of genuine writings with press copies of the writing whose genuineness is disputed. Indeed, in this very case the expert on cross-examination testified that 'it would be very dangerous to decide on a press copy for sure.'"

21. "Ordinarily the original itself is used, and it has been held that copies, either by tracing, or produced by a press or machine, however correct they may be, cannot be used as standards." Geer *v.* Missouri Lumb. & M. Co., 134 Mo. 85, 34 S. W. 1099.

"Impressions of writings produced by means of a press, or duplicate copies made by a machine, are not admissible for this purpose. Nothing but original signatures can be used as standards of comparison by which to prove other signatures to be genuine or not." Phillips *v.* State, 6 Tex. App. 364, *quoting* from Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

"Here there was merely a copy — a press copy, it is true — of the nature of a facsimile, but not necessarily exact, as the spreading of the ink in such copies often obliterates the fine lines of a handwriting, though substantially preserving its original form. It is manifest such copies would be an unsafe standard. I know of no authority for their introduction, and upon principle they are inadmissible. It is difficult to see why this evidence was introduced, as a reliable standard had previously been given in evidence." Cohen *v.* Teller, 93 Pa. St. 123.

22. Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525.

23. Maclean *v.* Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209; Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538; Howard *v.* Illinois Trust & Sav. Bank, 189 Ill. 568, 59 N. E. 1106; Taylor's Will, 10 Abb. Pr. (N. S.) (N. Y.) 300. See also Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315.

Duffin *v.* People, 107 Ill. 113, where a photographed copy of the instrument charged to have been forged, the original of which had so faded that it had practically become illegible, and the court, in holding this reception to be proper under the circumstances, said that if the purpose of introducing the copy had been to prove the forgery by a comparison of handwritings, the objection would probably have been good, but the purpose of the copy was simply to prove the words of the original and not the peculiarity of the handwriting.

In Tome *v.* Parkersburg Branch R. Co., 39 Md. 36, a photographer, an expert in handwriting, produced photographic copies taken by the witness, of certain genuine signatures, some of which were the size of the original and some enlarged, and was

there are other cases in which magnified photographic copies of genuine signatures, of writings and of the disputed signature, properly authenticated as to correctness, have been received in evidence, the originals being also produced.[24]

permitted to give his opinion derived from a comparison of those copies with the disputed signatures. It was held error both to permit the witness to give his opinion so derived, and also to permit the photographed copies to go to the jury as evidence.

24. Green *v.* Terwilliger, 56 Fed. 384; Vanderslice *v.* Snyder, 4 Pa. Dist. 424; Johnson *v.* Com., 102 Va. 927, 46 S. E. 789; People *v.* Mooney, 132 Cal. 13, 63 Pac. 1070; United States *v.* Ortiz, 176 U. S. 422; Rowell *v.* Fuller, 59 Vt. 688, 10 Atl. 853.

Marcy *v.* Barnes, 16 Gray (Mass.) 161, 77 Am. Dec. 405, where the court said: "Assuming it to be true, as he testified, which yet was a fact first to be considered and determined by the jury, that the copies were accurate in all respects, excepting only in relation to size and color, they were capable of affording some aid in comparing and examining the different specimens of handwriting which were exhibited on the trial. It is not dissimilar to the examination with a magnifying glass. Proportions are so enlarged thereby to the vision that faint lines and marks, as well as the genuine characteristics of handwriting which perhaps could not otherwise be clearly discerned and appreciated, are thus disclosed to observation, and afford additional and useful means of making comparisons between admitted signatures and one which is alleged to be only an imitation. Under proper precautions in relation to the preliminary proof as to the exactness and accuracy of the copies produced by the art of the photographer, we are unable to perceive any valid objection to the use of such prepared representations of original and genuine signatures as evidence competent to be considered and weighed by the jury."

Compare Frank *v.* Chemical Nat. Bank, 5 Jones & S. (N. Y.) 26, where the objection was to the presentation and use on the trial of photographic copies and photographic magnified copies of the disputed documents; and the court, in holding that the use of such documents was proper, said: "The administration of justice profits by the progress of science, and its history shows it to have been almost the earliest in antagonism to popular delusions and superstitions. The revelations of the microscope are constantly resorted to, in protection of individual and public interests. It is difficult to conceive of any reason why, in a court of justice, a different rule of evidence should exist, in respect to the magnified image, presented to the eye by the lens in the microscopist's instrument, from that which applies to the same image, presented in the lens in the photographer's camera, and permanently delineated upon sensitive paper. Either may be distorted or erroneous through imperfect instruments or manipulation, but that would be apparent or easily proved. If they are relied upon as agencies, for accurate mathematical results in mensuration and astronomy, there is no reason why they should be deemed unreliable in matters of evidence. Wherever what they disclose can aid or elucidate the just determination of legal controversies, there can be no well-founded objection to resorting to them."

Crane *v.* Dexter-Horton & Co., 5 Wash. 479, 32 Pac. 223, wherein it was held proper for the court to reject photographs of the disputed signature and certain genuine signatures taken side by side which were offered in evidence because there were several hundred genuine signatures before the court, and especially as the photographs were not shown to be perfect copies.

In First Nat. Bank *v.* Wisdom, 111 Ky. 135, 63 S. W. 461, the signature in dispute and two other signatures of the purported author, both clearly genuine, had been enlarged and reproduced by photographers, and these photographs were exhibited to the jury after the proof by the photographers of their accuracy. It was held that they were properly admitted in evidence because "they were a

But in any event before a photographic copy of either the disputed signature or other genuine writings should be received in evidence it should be properly authenticated as an exact reproduction of the original.[25]

Where Originals Cannot Be Produced. — Where the genuine signatures to be compared are so situated that they cannot be brought into court, the photograph becomes an almost perfect substitute for the original, and if taken with proper care may be received.[26]

C. Disputed Signature Lost. — Where a signature is lost, an expert who has previously examined it may testify as to its genuine-

more enduring form of exhibiting the signatures to the jury as under a magnifying glass."

Compare White S. M. Co. *v.* Gordon, 124 Ind. 405, 24 N. E. 1053, where the court said: "Had it been desirable that the jury should examine the signature in question with the aid of a microscope, we know of no reason why they should not have been permitted to do so; but the admission of what purported to be an enlarged copy of such signature opened the door to innumerable collateral questions. We do not think the court erred in refusing to submit to the inspection of the jury this enlarged copy of the signature in question, as it was not proposed to compare it with enlarged copies of signatures admitted to be genuine."

25. Buzard *v.* McAnulty, 77 Tex. 438, 14 S. W. 138.

In Houston *v.* Blythe, 60 Tex. 506, it was held that a photographic copy smaller in size than the original from which it was taken, and not shown to be an exact reproduction of the original, although in evidence, could not be used as a standard of comparison.

In Geer *v.* Missouri L. & M. Co., 134 Mo. 85, 34 S. W. 1099, it was claimed that as the original was on file in the interior department at Washington City and could not be produced at the trial, and the art of photography and lithographing is so perfect that a photo-lithographic copy of the writing is an exact copy of the original, and should be admitted, from the necessity of the case. But the court, without determining whether such a copy, the original of which would be admissible, but could not be produced, could be substituted, were certain that could not be done unless preliminary proof was first made that the copy was exact and accurate in all respects. The specific point ruled was that the mere certificate of the officer that the copy was of the same size and was a true and literal exemplification of the original was insufficient. "The perfection of a photograph depends upon many circumstances and conditions, such as skill of the operator, the correctness of the lenses, 'the purity of the chemicals, the accuracy of the focusing, the angle at which the original to be copied was inclined to the sensitive plate,' etc. Taylor Will Case, 10 Abb. Pr. (N. S.) 300. The slightest defect or imperfection in the photography or lithographing would destroy the sufficiency of the copy as a standard for the comparison. Opinions are often formed on the slightest strokes of the pen, or the most delicate shading of the letters."

26. Com. *v.* Jeffries, 7 Allen (Mass.) 548, 83 Am. Dec. 712; Luco *v.* United States, 23 How. (U. S.) 515; Leathers *v.* Salver Wrecking & Transp. Co., 2 Woods 680, 15 Fed. Cas. No. 8164, where the original documents were public documents on file in one of the executive departments in Washington City, and which public policy required should not be removed. See also Crane *v.* Dexter-Horton & Co., 5 Wash. 479, 32 Pac. 223.

In Grooms *v.* State, 40 Tex. Crim. 319, 50 S. W. 370, a prosecution for forging a deed, expert witnesses were permitted to compare a photographic copy of the deed, which the defendant refused to produce, with genuine standards of comparison.

ness by comparison with other genuine signatures admitted in evidence.[27]

V. SIGNATURE BY MARK.

1. Testimony of Maker. — Although by statute a mark may not be *prima facie* a signature unless the instrument is also signed by the person writing the name of the maker of the mark, yet it is proper to permit a person so signing to testify that the mark is genuine, and that the person writing his name had authority so to do.[28]

2. Testimony of Non-Expert Witnesses. — Whether or not the genuineness and identity of a mark as a substitute for a signature may be established by the testimony of witnesses acquainted therewith is a question as to which the authorities are somewhat at variance. Some of the courts hold that the genuineness of a mark may be so established where it contains some peculiarity which the witnesses have observed, thus enabling them to distinguish it from other marks.[29] And it is permissible to allow a witness to testify

27. Abbott *v.* Coleman, 22 Kan. 250, 31 Am. Rep. 186. *Compare* Collins *v.* Ball, 82 Tex. 259, 17 S. W. 614, 27 Am. St. Rep. 877, where the original document in question had been lost, and it was held that as there could accordingly be no comparison of handwritings, it was proper upon the part of the court to exclude certain letters written by the man who it was claimed wrote the original document for purposes of comparison.

28. *Ex parte* Miller, 49 Ark. 18, 3 S. W. 883, 4 Am. St. Rep. 17; Thompson *v.* Davitte, 59 Ga. 472, *cited* in Phoenix Nat. Bank *v.* Taylor, 113 Ky. 61, 67 S. W. 27, where the court said: "The question arose whether he was competent to identify the paper as the one attested by him. The court instructed the jury 'that the mark made by a witness in attesting a will need not have any peculiarity about it, but any mark is sufficient if the witness, when called to testify, can swear to the mark.' The court said: 'The code pronounces a mark sufficient on the sole condition that the witness shall be able to swear to it. This is all the heraldry of the matter. Nothing like a system of crests or bearings is contemplated, not even any special hook or claw on which the mind can hang recognition. As best it can, the memory may lay hold, and hold on, and the conscience may swear to it. A court cannot declare any peculiarity necessary where the witness needs none. It is not improbable that those who make marks for default of skill in making letters have an aptitude of their own in distinguishing marks that to ordinary eyes look alike.'"

29. Paisley *v.* Snipes, 2 Brev. (S. C.) 200; Fogg *v.* Dennis, 3 Humph. (Tenn.) 47.

In Strong *v.* Brewer, 17 Ala. 706, to prove the execution of a written instrument which had been signed by mark, a witness was introduced who testified that he knew the mark of such person, and that the mark attached to the foot of the instrument in question he believed to be genuine. The court said: "The degree of weight to be attached to it depends not only upon the character of the witness, but also upon the opportunity he has had of acquiring a knowledge of the party's handwriting. It may be more difficult to acquire a knowledge of a simple mark, by which an illiterate man executes a deed, than the knowledge of the handwriting of one who can write his name in full, but we cannot perceive why it may not be done. In some instances the peculiarity may be as strong as that which marks the

that he could see a similarity between the marks used by the signer of the respective papers which are signed by mark only, and that such similarity is strong enough to support the opinion of the witness that they were made by the same person.[30] But it has been held that where a mark on inspection appears to have nothing in its construction to distinguish it from the ordinary marks used by illiterate persons to authenticate their contracts, its genuineness or identity cannot be established by the opinions of witnesses.[31]

A Statute providing that the handwriting of a person may be shown by any one who believes it to be his and who has seen him write, or has seen writing purported to be his upon which he has acted or been charged, and who has thus acquired knowledge of his handwriting, extends to signatures by mark.[32]

3. Comparison of Marks. — So, also, whether or not the genuineness or identity of a mark as a substitute for a signature may be established by the testimony of experts based on comparison with other marks is a question which the courts have apparently not settled.[33]

characters of one who can write, and in other instances not, perhaps, so great; yet in all, we apprehend, would be found something distinct and peculiar, which would enable one who had frequently seen the party make his mark to know it."

30. Phoenix Nat. Bank *v.* Taylor, 113 Ky. 61, 67 S. W. 27.

31. Shinkle *v.* Crock, 17 Pa. St. 159; Carrier *v.* Hampton, 33 N. C. 307. See also Engles *v.* Bruington, 4 Yeates (Pa.) 345, 2 Am. Dec. 411, where it was said that "to attempt to prove a mark to a will would be idle and ludicrous."

32. State *v.* Tice, 30 Or. 457, 48 Pac. 367, where the court said: "Considering the manner in which marks of persons incapable of writing their own signatures are usually made, by merely touching the pen while the scrivener forms the character, it is a matter of doubtful propriety whether any person ought to be allowed, as a matter of evidence, to identify such a mark as a handwriting; but the mark of some persons, by reason of methods of their own adoption in its formation, and its inherent peculiarities, might be capable of identification, and we are of the opinion that such evidence ought to be permitted to go to the jury, but the attending circumstances touching the habits of the person whose mark is in the balance, his accustomed manner of making the same, and the peculiarities attending it which render it capable of identification, should be carefully considered and scrutinized in determining the weight to be ascribed thereto."

33. Thus, in *In re* Hopkins Will, 172 N. Y. 360, 65 N. E. 173, 92 Am. St. Rep. 746, it is held that proof by comparison is not proper; although experts may doubtless be able to determine whether one mark is made over another; whether a mark is made by a trembling or steady hand, and if familiar with inks they may be able to determine nearly the age or the time when the writing was made. *Compare* Lansing *v.* Russell, 3 Barb. Ch. (N. Y.) 325; Jackson *v.* Van Dusen, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330.

"Promissory notes found among the papers of an illiterate deceased person, purporting to have been signed by him with his mark, and which he had paid, are, on the trial of an action against his administrator upon another promissory note also purporting to have been signed by the intestate with his mark, admissible in evidence for the purpose of comparing the marks on these notes with that affixed to the note in suit, the defense to the action being that this latter note was a forgery.

The genuineness of the marks upon the notes offered for this purpose might be inferred from the facts above recited, and it was not absolutely essential to show by direct proof that they were actually made by the deceased. In other words, the execution of the notes by making marks to the same could be proved by circumstantial as well as by direct evidence." Little *v.* Rogers, 99 Ga. 95, 24 S. E. 856.

Travers *v.* Snyder, 38 Ill. App. 379. In this case the court said: "How can simply a mark be recognized as that of any particular person, without any proof of any particular characteristic by which it can be distinguished? And it seems to us that it proves nothing that one cross or mark is like another. It seems to us that it would be very unsafe, and lead to dangerous results, to allow such comparisons to be made and taken as evidence, unless at least some proof were made that the defendant's mark had some established characteristics, like a handwriting, that would enable it to be recognized. A mere cross or mark cannot be identified, and it therefore stands for itself alone."

HEARSAY.

By A. I. McCormick.

CROSS-REFERENCES:

Declarations; Dying Declarations;

Former Testimony;

Pedigree;

Res Gestae.

I. SCOPE OF ARTICLE.

The rules of evidence relating to hearsay, so far as their practical application is concerned, have to do chiefly, if not wholly, with the exceptions to the hearsay rule rather than to the rule itself. These exceptions are fully treated elsewhere in this work under their respective titles.[1] This article is designed to treat only of the general principles underlying and governing the application of the hearsay rule itself.

II. DEFINITION.

Hearsay may be defined to be any statement, verbal or written, the persuasiveness or probative value of which depends partly or wholly upon something other than the credit to be given to the witness who utters the statement or the instrument which contains it, and renders necessary a resort to and belief in the veracity and competency of some other person.[2]

III. THE RULE.

No rule of evidence is more firmly settled or more universally recognized than that in all cases save those in which from necessity or other justifiable reason the law has been compelled to make an exception to the rule, hearsay is incompetent and inadmissible as evidence.[3]

1. See *infra,* V. 2.

2. Hopt *v.* Utah, 110 U. S. 574; Morell *v.* Morell, 157 Ind. 179, 60 N. E. 1092.

3. *England.* — Dysart Peerage Case, H. L. 6 App. Cas. 489.
United States. — Hopt *v.* Utah, 110 U. S. 574; Ellicott *v.* Pearl, 10 Pet. 436.

Rigor of the Rule. — So strictly have the courts guarded and applied the rule, that hearsay has been held incompetent even in aid of human freedom.[4]

IV. REASONS FOR THE RULE.

The chief reasons which induce the courts to look with distrust upon hearsay and to enforce the rule with such strictness are the fact that hearsay, in its nature, supposes that better evidence exists,[5] and that it is given without the sanction of an oath and without the opportunity of cross-examination, "those tests of truth which the law, in general, so wisely requires."[6] To these may be added its

California. — Amann *v.* Lowell, 66 Cal. 306, 5 Pac. 363.

Massachusetts. — Warren *v.* Nichols, 6 Metc. 261.

New Jersey. — Overseers of Westfield *v.* Overseers of Warren, 8 N. J. L. 249.

New York. — Coleman *v.* Southwick, 9 Johns. 45, 6 Am. Dec. 253; Lent *v.* Shear, 160 N. Y. 462, 55 N. E. 2.

Pennsylvania. — Farmers Bank of L. *v.* Whitehill, 16 Serg. & R. 89.

Wisconsin. — Harter Med. Co. *v.* Hopkins, 83 Wis. 309, 53 N. W. 501. This rule is so well settled that a further citation of authorities would be useless.

4. Queen *v.* Hepburn, 7 Cranch (U. S.) 290.

5. Gould *v.* Smith, 35 Me. 513; Jackson *v.* Etz, 5 Cow. (N. Y.) 314; State Bank *v.* Wooddy, 10 Ark. 638; Queen *v.* Hepburn, 7 Cranch (U. S.) 290; McEwen *v.* City of Portland, 1 Or. 300; Stouvenel *v.* Stephens, 26 How. Pr. (N. Y.) 244.

Better Evidence Obtainable. "The established doctrine is that you must go if you can to the source of testimony, and not introduce a copy when the original is to be had, nor undertake to prove what another person has been heard to say, when that person is a good witness, and can be produced." Coleman *v.* Southwick, 9 Johns. (N. Y.) 45, 6 Am. Dec. 253.

6. Patterson *v.* Maryland Ins. Co., 3 Har. & J. (Md.) 71, 5 Am. Dec. 419; Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; Damon *v.* Carrol, 163 Mass. 404, 40 N. E. 185; Morell *v.* Morell, 157 Ind. 179, 60 N. E. 1092; State *v.* Medlicott, 9 Kan. 176; Marshall *v.* Railroad Co., 48 Ill. 475, 95 Am. Dec. 561.

Lack of Oath and Cross-Examination. — "To admit hearsay 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 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." Lund *v.* Inhabitants of Tyngsborough, 9 Cush. (Mass.) 36.

No Guarantee of Truth. — "It was only hearsay, at the best; and for the purpose of proof in a court of justice, the controlling reason operates to its rejection, that it cannot be subjected to the ordinary tests which the law has provided for the ascertainment of truth — the obligation of an oath, and the opportunity afforded for cross-examination; for these, or equivalent ones, are the

intrinsic weakness and incompetency to satisfy the human mind,[7] and the fact that fraud would be encouraged and supported by its admission.[8]

V. EXCEPTIONS TO THE RULE.

1. In General. — The difficulty, in many cases, of obtaining other proof and the consequent necessity of resorting to hearsay,[9] coupled

guarantees of truth, which the law, in ordinary cases, invariably requires. Where a witness to facts might be produced and examined on oath, little doubt can be entertained that hearsay evidence of his mere declarations, heard and detailed by another, ought to be excluded; so infinitely inferior in degree must such hearsay evidence be, when compared with direct testimony delivered in open court. 1 Stark. Ev., 38-39. If admissions of another person were receivable in evidence, in default of better evidence, the uncertainty which would result from its general reception would far outweigh the benefit which might possibly be derived from its admission in particular instances." Ibbitson *v.* Brown, 5 Iowa 532.

Witnesses Absent From Jury. "The law does not regard as sufficiently authentic to influence a jury any statement which is not made under the sanction of an oath; and, in general, it further requires that the witness making the statement should be present at the trial, to the end that he may be examined by the adverse party, and that the jury may draw their own conclusions as to his sincerity and accuracy by his appearance and bearing upon the witness stand." Stephens *v.* Vroman, 16 N. Y. 381.

7. Hopt *v.* Utah, 110 U. S. 574; Ellicott *v.* Pearl, 10 Pet. (U. S.) 436; State Bank *v.* Wooddy, 10 Ark. 638; McEwen *v.* City of Portland, 1 Or. 300; Stouvenel *v.* Stephens, 26 How. Pr. (N. Y.) 244.

Attended With Doubts and Difficulties. — "Hearsay testimony is, from the very nature of it, attended with all such doubts and difficulties, and it cannot clear them up. 'A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he intrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.' It is against sound principle, and would at once awaken distrust, for a party to resort to a secondary species of evidence, so long as the original and primary evidence exists and can be produced. The plaintiff, by means of this species of evidence, would be taken by surpise, and be precluded from the benefit of a cross-examination of Stanley, as to all these material points which have been suggested as necessary to throw full light on his information." Coleman *v.* Southwick, 9 Johns. (N. Y.) 45, 6 Am. Dec. 253.

Vague and Unsubstantial. — "The reason is, that it is too vague and unsubstantial to afford any reasonable presumption as to the recited fact. It affords too great latitude for deception, mistake or miscomprehension; and with all, it is not given under the solemn obligation of an oath." Wells *v.* Shipp, 1 Walk. (Miss.) 353.

8. Stouvenel *v.* Stephens, 26 How. Pr. (N. Y.) 244.

C. J. Marshall, in Queen *v.* Hepburn, 7 Cranch (U. S.) 290, says: "One of these rules is, that 'hearsay' evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible."

9. Necessity for Resorting to Hearsay. — Higham *v.* Ridgway, 10 East (Eng.) 109; Ruch *v.* Rock Is-

with the fact that the hearsay in such cases is subjected to some sanction and test other than, but deemed equivalent to, the ordinary ones, thereby insuring its trustworthiness and rendering extremely improbable its falsity,[10] has induced the law to recognize many exceptions to the rule and to allow the admission of hearsay as competent evidence thereunder.

But hearsay is not admissible merely because, in the particular case, no better evidence can be had.[11]

2. Apparent and Real Exceptions. — Of these exceptions some are only apparent, while others are real exceptions to the rule. To the former class belongs that species of evidence which is offered merely for the purpose of proving the fact of the making or utterance of the declaration of a third person (not a witness) and not its truth.[12] This principle is likewise applicable to the statements of a third person (not a witness) offered for the purpose of proving the information possessed by the person to whom the statements were made, and thereby bearing upon his belief or motive in relying and acting upon such statements.[13] This rule also renders competent in certain cases the *ex parte* declarations of a person as to his physical[14] and mental[15] condition, or intent.[16] Declarations of a third person which

land, 97 U. S. 693; Costigan *v.* Lunt, 127 Mass. 354.

10. Presumption of the Truth From Circumstances. — Southwest School District *v.* Williams, 48 Conn. 504; Bird *v.* Hueston, 10 Ohio St. 418; Ruch *v.* Rock Island, 97 U. S. 693.

11. State *v.* Dart, 29 Conn. 153, 76 Am. Dec. 593. And see *infra*, VI. 1.

12. In Smith *v.* Whittier, 95 Cal. 279, 30 Pac. 529, the court, in speaking of this class of evidence, said: "Such evidence is admitted for the purpose of establishing merely the utterance of the words, and not their truth, but the admission in evidence of the words spoken is not to be used in determining the issue of their truth. Necessarily, the words so spoken are brought before the jury, but the jury can readily be instructed by the court that they are not to regard them as proof of the facts that are stated."

13. Thus where the reason or motive of a particular act is in issue, the statement of a third person made to the actor and constituting the information on which he acted is original and material evidence. People *v.* Shea, 8 Cal. 538.

Malice in Malicious Prosecution and Libel. — Thus, in malicious prosecution, the defendant may show what information he possessed when he caused plaintiff's arrest, and if this information consisted in statements of third persons, not witnesses, they are admissible "not for the purpose of proving that the plaintiff was, in fact, guilty of the offense imputed to him, but that the defendant . . . had good reason to believe that he was guilty." Lamb *v.* Galland, 44 Cal. 609. Rule is applicable to declarations made to a person charged with libel, when they were of such a character as to reasonably lead him to believe that he published the truth. Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676.

14. Natural Evidence. — "The declarations of a decedent as to the condition of his body and health at the time when the declarations were made, fall under the head of *natural evidence*. Such declarations are admissible in the very nature of things." State *v.* Harris, 63 N. C. 1.

15. Jacobs *v.* Whitcomb, 10 Cush. (Mass.) 255.

16. In Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235, in speaking of the admissibility of the declarations of a person, since

called the attention of the witness to the fact or fixed it in his recollection are admitted under this principle.[17]

The real exceptions may be classed as follows: (1) Dying declarations;[18] (2) declarations as to matters of general and public interest (including declarations as to public and private boundaries);[19] (3) declarations against interest;[20] (4) declarations concerning matters of pedigree;[21] (5) certain public documents;[22] (6) ancient documents and possessions;[23] (7) books of account of the litigant parties;[24] (8) entries of third persons in the regular course of business;[25] (9) oral declarations in the discharge of defendant's duty;[26] (10) former testimony given under oath;[27] and (11) declarations which are so intimately connected with the principal fact or transaction as to constitute a part of it and to characterize or explain it — *i. e., res gestae.*[28]

3. Admissions and Confessions. — The question as to what extent, if any, admissions and confessions are exceptions to the hearsay rule is one upon which the authorities and text-writers do not thoroughly agree. These are generally treated as evidence having a probative value of itself, and as the equivalent of affirmative testimony.[29] Under this theory, these constitute exceptions to the hearsay rule.[30] On the other hand, it is maintained that the effect

deceased, made to a trance-medium, to the effect that she (declarant) was going to drown herself, the court said: "Although evidence of the conscious declarations of a person as indications of his state of mind has in it some of the elements of hearsay, yet it closely resembles evidence of the natural expressions of feeling which has always been regarded in the law, not as hearsay, but as original evidence." But *compare* Com. *v.* Felch, 132 Mass. 22. See article "INTENT."

17. State *v.* Fox, 25 N. J. L. 566; Harris *v.* Central Railroad, 78 Ga. 525, 3 S. E. 355.

18. See article "DYING DECLARATIONS," Vol IV, p. 910.

19. See article "DECLARATIONS," Vol. IV, p. 77.

20. See article "DECLARATIONS," Vol. IV, p. 87.

21. See article "PEDIGREE."

22. See article "PUBLIC DOCUMENTS."

23. In Baeder *v.* Jennings, 40 Fed. 199, Thay. Cas. on Ev., p. 462, it is held that ancient documents and acts of possession (some of them 200 years old) are competent and sufficient proof of the truth of the facts therein recited, or thereby indicated. The opinion is by Justice Bradley, and the decision is based upon the great lapse of time which had intervened since the acts, and the great age of the documents, coupled with the fact that the acts of possession, affirmatively proven, were consistent with and in conformity to the truth of the facts as stated in the documents and as indicated by the acts of possession. See also article "ANCIENT DOCUMENTS," Vol. I, p. 857, and article "PRIVATE WRITINGS."

24. See article "BOOKS OF ACCOUNT," Vol. II.

25. See article "ENTRIES IN THE REGULAR COURSE OF BUSINESS," Vol. V.

26. See article "DECLARATIONS," Vol. IV, p. 103.

27. See article "FORMER TESTIMONY," Vol. V.

28. See article "RES GESTAE."

29. Hall *v.* The Emily Banning, 33 Cal. 522; Bartlett *v.* Wilbur, 53 Md. 485; Warder *v.* Fisher, 48 Wis. 338, 4 N. W. 470.

30. Truby *v.* Seybert, 12 Pa. St. 101; Terry *v.* Rodahan, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420.

of admissions and confessions as evidence is in the nature of an impeachment or prior contradiction of a present claim, and they are not of probative value as affirmative evidence. Under this theory, the hearsay rule is not applicable to them.[31]

VI. IMMATERIAL ATTRIBUTES AND CHARACTERISTICS.

1. Declarant Deceased. — The fact that the author of the hearsay statement is dead[32] or cannot be found[33] does not affect the rule.

2. Form. — The hearsay rule applies as forcibly to statements in writing as it does to those verbally made.[34] Nor is it at all material that the hearsay statement was made under oath or as part of a sworn deposition.[35] The certificate of a ministerial officer which merely affirms the existence or non-existence of a fact is mere hearsay.[36] The assessment-roll of a county showing property assessed

31. State *v.* Willis, 71 Conn. 293, 41 Atl. 820.

32. Ibbitson *v.* Brown, 5 Iowa 532; Lund *v.* Inhabitants of Tyngsborough, 9 Cush. (Mass.) 36; Davis *v.* Green, 102 Mo. 170, 14 S. W. 876, 11 L. R. A. 90.

Deceased Clerk of Court. — The statements of a clerk of a court, since deceased, that a certain legal paper had not been filed in his office is hearsay and incompetent. Baker *v.* Goldsmith, 91 Ga. 173, 16 S. E. 988.

33. Spokane & V. G. & C. Co. *v.* Colfelt, 24 Wash. 568, 64 Pac. 847.

34. Tobin *v.* Young, 124 Ind. 507, 24 N. E. 121; Silverstein *v.* O'Brien, 165 Mass. 512, 43 N. E. 496; Hunter *v.* Randall, 69 Me. 183.

35. Inhabitants of Braintree *v.* Inhabitants of Hingham, 1 Pick. (Mass.) 244; Pautz *v.* Jones, 21 La. Ann. 726; Traber *v.* Hicks, 131 Mo. 180, 32 S. W. 1145; Rooker *v.* Rooker, 83 Ind. 226; Early *v.* Oliver, 63 Ga. 11; Manny *v.* Stockton, 34 Ill. 306. But see article "Former Testimony," Vol. V.

In Lent *v.* Shear, 160 N. Y. 462, 55 N. E. 2, the court said: "Declarations made under oath do not differ in principle from declarations made without that sanction, and both come within the rule which excludes all hearsay evidence."

"A voluntary affidavit [marine protest before notary public] ranks in equal grade with hearsay testimony in the scale of evidence." Patterson *v.* Maryland Ins. Co., 3 Har. & J. (Md.) 71, 5 Am. Dec. 419.

Depositions as Corroborating Evidence. — The fact that the hearsay statements were part of a deposition and material as corroborative of other evidence does not alter the rule. Clopper *v.* Poland, 12 Neb. 69, 10 N. W. 538.

Not Aided by Judicial Sanction. The fact that a judicial officer has concluded that an *ex parte* affidavit, in the action in which used, furnished sufficient evidence to prove an indebtedness from one party to another, or fraud in contracting such indebtedness, does not render such affidavit competent in another action between third parties. Bookman *v.* Stegman, 105 N. Y. 621, 11 N. E. 376.

36. Certificate of Court Clerk. The certificate of a clerk of a court which consists merely in his statement as to the existence or non-existence of a fact, or that an act had or had not been performed in connection with his office, is inadmissible as hearsay. Thus a certificate which merely states that a cause has been dismissed (Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92), or that a person named therein was duly naturalized (Miller *v.* Reinhart, 18 Ga. 239), are inadmissible, being merely a clerk's opinion of the legal effect of the court record, and not a copy or abstract thereof.

Certificate of Consul. — The certificate of an American consul, stationed in a foreign country, as to the

to a person other than him against whom offered is hearsay and inadmissible in the absence of proof that the person against whom offered gave in the assessment or had knowledge thereof.[37]

A Newspaper Paragraph stating a purported fact is merely hearsay upon hearsay.[38]

Public Rumor. — The fact that the statement is of such common notoriety in the community as to be a matter of public rumor does not free it from its hearsay character.[39]

3. Against Interest. — The fact that the hearsay statement of a person is against his interest[40] or tends to cast upon the declarant the guilt of an act or crime[41] with which one of the parties is charged, does not render such statement admissible.

4. Testimony Founded Wholly or Partially on the Knowledge of Others. — Where the testimony offered is based in whole or in part upon the knowledge of some other person than the witness it is inadmissible as hearsay.[42]

death of an American in said country is hearsay and inadmissible. Morton *v.* Barrett, 19 Me. 109.

Certificate of Corporate Capacity. A certificate of the secretary of state, certifying that certain parties were legally organized and established as, and were thereby made, a corporation under the laws of such state, is mere hearsay in another state, where the corporate capacity of such persons is in issue in an action. Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711.

Record of Municipal Board. — The record of the proceedings of a meeting or a common council, which meeting was either illegally called or without jurisdiction of the matters evidenced by the record, is mere hearsay and inadmissible. Harris *v.* City of Ansonia, 73 Conn. 359, 47 Atl. 672. See article "CERTIFICATES."

37. Shumway *v.* Leakey, 67 Cal. 458, 8 Pac. 12.

38. Gould *v.* Smith, 35 Me. 513.

39. Ashcraft *v.* De Armond, 44 Iowa 229.

40. See article "DECLARATIONS," Vol. IV.

41. *United States.* — United States *v.* Mulholland, 50 Fed. 413.

Alabama. — Owensby *v.* State, 82 Ala. 63, 2 So. 764.

Georgia. — Kelly *v.* State, 82 Ga. 441, 9 S. E. 171.

Iowa. — Ibbitson *v.* Brown, 5 Iowa 532.

Kansas. — State *v.* Smith, 35 Kan. 618, 11 Pac. 908.

Kentucky. — Davis *v.* Com., 95 Ky. 19, 23 S. W. 585, 44 Am. St. Rep. 201.

Massachusetts. — Com. *v.* Chabbock, 1 Mass. 144; Farrell *v.* Weitz, 160 Mass. 288, 35 N. E. 783.

Missouri. — State *v.* Hack, 118 Mo. 92, 23 S. W. 1089.

North Carolina. — State *v.* Haynes, 71 N. C. 79; State *v.* Duncan, 28 N. C. 236.

Oregon. — State *v.* Fletcher, 24 Or. 295, 33 Pac. 575.

Admission of Crime by Third Person. — Statement of a third person, stranger, made to witness that he, third person, was guilty of the crime for which defendant was being prosecuted, is hearsay. Com. *v.* Chabbock, 1 Mass. 144.

Admission of Forgery by Maker of Note. — In an action on a note by the holder against the alleged indorser, the declaration of the maker, after the indorsement, acknowledging that he had forged the indorsement, such declaration being *ex parte* and not by the maker as a witness, is incompetent. Wheeler *v.* Ahlers, 189 Pa. St. 138, 42 Atl. 40.

42. Where two experts had made an estimate of the cost of repairing certain premises, and before the trial one of them had died, the testimony of the survivor as a witness, based not only on his own computation but also upon the opinion of his de-

5. Hearsay Blended with Admissible Evidence. — Although the hearsay may be blended with other admissible evidence, it must, if possible, be severed therefrom and excluded.[43]

6. Hearsay as Part of a Conversation. — The hearsay statements of a third person are not admissible under the rule entitling the adverse party to the whole of the conversation where part has been given, although part of the conversation in which such hearsay was given has been admitted. The exception to the rule applies only where the conversation was with one of the parties to the action.[44]

7. Source or Channel. — The means by which or the channel in which hearsay evidence is brought to the notice of the court or jury is immaterial.[45]

ceased companion, is hearsay and inadmissible. Collins *v.* Langan, 58 N. J. L. 6, 32 Atl. 258.

The testimony of a secretary of a corporation founded solely on the statements made by the president, and not on the witness' knowledge, is inadmissible. Persse *v.* Atlantic-Pacific R. T. Co., 5 Colo. App. 117, 37 Pac. 951.

Employer Testifying From Employe's Knowledge. — Thus, the testimony of an employer founded solely or partially upon the knowledge possessed by his employe, although relating to matters in connection with the employment, is incompetent. Tennessee & C. R. Co. *v.* Danforth, 112 Ala. 80, 20 So. 502; Olive *v.* Hester, 63 Tex. 190; Protection Life Ins. Co. *v.* Foote, 79 Ill. 361.

The estimate of a quantity of lumber, made partly from the witness' own notes and partly from those of his employe, is hearsay and inadmissible because not based upon matters wholly within the knowledge of the witness. Tingley *v.* Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098.

43. In Preston *v.* Bowers, 13 Ohio St. 1, 82 Am. Dec. 430, the court uses the following language: "The plaintiff had a right to give the declaration of his wife in evidence, to show the state of her affections toward him recently before the alleged seduction. But the exercise of a right, and the abuse of a right, are two very different things. The words and acts of the defendant Griffin, reported by the wife to the husband, and detailed by him in evidence to the jury, were nothing but hearsay, and in themselves clearly inadmisible. It is said in argument, however, that the declarations of the wife in regard to the state of her affections toward the plaintiff were so blended with her report of the acts and declarations of Griffin as to render the separation of them impracticable. We do not think so. It seems to use there would have been no practical difficulty in a statement of those declarations of his wife which tended to express attachment to him, and at the same time withholding her report of the words and acts of Griffin. And we cannot avoid the conviction that while the plaintiff was claiming to give in evidence the declarations of his wife for a legitimate purpose, his real and primary object was to bring before the jury her statement of the words and acts of Griffin. In permitting this to be done, we are of opinion that the court below erred."

44. Davis *v.* Sanders, 11 N. H. 259.

But it seems that if that part of the conversation admitted was admitted because competent under an exception to the hearsay rule, the adverse party has a right to bring out all that was said by the parties at the time. See McLurd *v.* Clark, 92 N. C. 312.

45. The testimony of a witness to the effect that the adverse party had stated to him that he (adverse party) had heard certain statements from others which were inconsistent with the testimony given by such adverse party on the trial, was purely hear-

8. Character of Proceeding in Which Offered. — The hearsay rule applies as much to evidence offered on applications for interlocutory remedies as on the trial of a cause.[46]

9. Object of Offered Hearsay. — A. To Contradict Witness or Declarant. — Hearsay is incompetent to contradict or discredit the testimony of the witness who made the hearsay statement.[47]

B. To Prove Admission. — The admission of a party cannot be proved by the testimony of a witness who merely states that the person to whom the alleged admission was made told the witness that it had been so made.[48]

C. To Refresh Memory. — Nor is hearsay admissible to refresh the memory of the witness as to other competent facts.[49]

VII. TEST OF COMPETENCY.

1. Determination of Hearsay Character. — A. In General. — It is often difficult to determine whether offered evidence is or is not hearsay. In most cases this can be determined from the form of the question or answer itself.[50] Thus, where a witness is asked or states if he "ever heard,"[51] or "believed,"[52] or "was told,"[53]

say and was not admissible as an admission. The admission of the party that he heard them is immaterial. Stephens *v.* Vroman, 16 N. Y. 381.

46. Early *v* Oliver, 63 Ga. 11.

47. Reynolds *v.* Copeland, 71 Ind. 422.

Nor can the testimony of a witness that a third person did or did not do an act be contradicted by the hearsay statement of such third person that he did or did not do the act. McElroy *v.* Meredith (Pa.), 12 Atl. 170.

48. Young *v.* Godbe, 82 U. S. 562. And see Stephens *v.* Vroman, 16 N. Y. 381, and Hard *v.* Ashley, 44 N. Y. St. 792, 18 N. Y. Supp. 413, *affirmed* 136 N. Y. 645, 32 N. E. 1015.

49. To Refresh Memory. — Testimony of a party to the suit as to a conversation had between him and his attorney, not in the presence of the adverse party, is inadmissible, even to refresh the witness' recollection as to other competent facts. Radley *v.* Seider, 99 Mich. 431, 58 N. W. 366.

50. In an action involving a breach of warranty of a machine, a question asked of a witness as to whether "the defendant or his boys" made any objection against a machine was held inadmissible for the reason that that part of the question relating to the boys was pure hearsay, and that relating to the defendant was inadmissible, because it did not appear from the question that any conversation was had with him. McCormick Mach. Co. *v.* Cochran, 64 Mich. 636, 31 N. W. 561.

51. Boyden *v.* Fitchburg R. Co., 72 Vt. 89, 47 Atl. 409; Greenwood *v.* Spiller, 3 Ill. 502; Adams *v.* Brown, 16 Ohio St. 75; Johns *v.* Northcut, 49 Tex. 444.

Where the witness testifies that "all he knew about the matter was in the way of correspondence," the testimony is hearsay. Coker *v.* First Nat. Bank, 112 Ga. 71, 37 S. E. 122.

52. Johns *v.* Northcut, 49 Tex. 444.

53. Where a witness testifies that on a certain occasion he saw D. talking to K. and afterward states, "I just happened to be there at the depot. I asked who was talking to K., and was told that it was D," the testimony shows on its face that the statement of the witness that he saw D. and heard him talk to K. was mere hearsay. In determining whether or not the testimony was

or "so far as he knew or understood,"[54] or that he "found out,"[55] or where he adds to a positive statement the clause "which I can prove,"[56] or where he testifies as to the motives of several persons, including himself, using the plural number,[57] the hearsay character of such testimony is apparent on its face and it is inadmissible. On the other hand, where the testimony purports to be of the positive knowledge of the witness and there is no apparent indication of its hearsay character it is competent.[58]

B. Determined from Context. — Likewise, the fact that the particular evidence is hearsay, although not apparent on its face, may sufficiently appear from the context to render it incompetent.[59]

C. Cross-Examination. — Although the witness may have testified positively of his own knowledge on direct examination, the fact that such testimony was based on hearsay and thereby rendered incompetent may be made to appear from the cross-examination.[60]

D. Burden of Showing Competency. — If the offered evidence

hearsay, the entire record should be looked into. Wells-Fargo & Co.'s Express *v.* Waites (Tex. Civ. App.), 60 S. W. 582, *distinguishing* Missouri Pac. R. Co. *v.* Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643.

54. The phrase "so far as he knew, or understood," implies that the testimony is hearsay. Wells *v.* Shipp, 1 Walk. (Miss.) 353.

55. Where a witness in response to a question states, "I afterward found out" that a letter had been written by another, the language of the answer implies that the fact stated was founded on hearsay, and not on the personal knowledge of the witness, and it not appearing that the knowledge was derived from a source which would make it an exception to the rule, it is inadmissible. Rosenthal *v.* Middlebrook, 63 Tex. 333.

56. Snodgrass *v.* Caldwell, 90 Ala. 319, 7 So. 834.

57. Where witness testifies as to the reason why several parties, including the witness, who were jointly interested in a matter, did or failed to do a certain thing, and uses the plural number, that portion of the testimony involving the knowledge or opinions of others than the witness is hearsay and inadmissible. Patrick *v.* Howard, 47 Mich. 40, 10 N. W. 71.

58. Anniston City L. Co. *v.* Edmondson, 127 Ala. 445, 30 So. 61.

59. See Wells-Fargo & Co.'s Express *v.* Waites (Tex. Civ. App.) 60 S. W. 582; Bridgman *v.* Corey's Estate, 62 Vt. 1, 20 Atl. 273.

Where a witness has already testified that he could neither read nor write, his statement as to what a written notice contained is hearsay and therefore inadmissible, because it necessarily implies that any information he may have is not his own knowledge, but must have been acquired from others. Russell *v.* Brosseau, 65 Cal. 605, 4 Pac. 643.

Where a witness testifies that a deed was signed by the grantor only on certain conditions, and then states that his only knowledge on the subject was obtained from statements of the grantor before and since the signing, the evidence shows on its face that it was mere hearsay. Rooker *v.* Rooker, 83 Ind. 226.

Where a witness had testified that he had received statements including duplicate statements of the amounts of ore sold from a certain mine and was asked how much was sold, it was held that the testimony asked was hearsay, because it did not appear that the witness personally knew anything about the amount of ore sold. Patrick *v.* Graham, 132 U. S. 627. But see *infra*, "Hearsay Character Doubtful, VI. 2."

60. Traber *v.* Hicks, 131 Mo. 180, 32 S. W. 1145; McCornick *v.* Sadler, 10 Utah 216, 37 Pac. 332.

appears on its face to be hearsay, it is inadmissible, although, by reason of some extraneous fact or circumstance, unexplained, it may be competent.[61] It is incumbent upon the party offering the evidence to show by other competent evidence that, by reason of such extraneous fact or circumstance, it is not hearsay or is an exception to the rule; otherwise an objection to its admission on the grounds that it is hearsay is well taken.[62]

2. Hearsay Character Doubtful. — Where the hearsay or non-hearsay character of the offered evidence is not apparent on the face thereof, or is in doubt, the decisions seem to vary as to the rules which should govern its competency as evidence.

A. Liberal Rule. — The majority of the courts seem to adopt a liberal rule, and if, from a consideration of the whole of the witness' testimony, the fact that the offered evidence is competent appears equally as consistent as that it is incompetent, the evidence is admissible.[63] Some of the cases hold that the evidence should

61. Cook *v.* Thornton, 109 Ala. 523, 20 So. 14; Thompson *v.* Wright, 22 Ga. 607; Stein *v.* Bowman, 13 Pet. (U. S.) 209; Greenwood *v.* Spiller, 3 Ill. 502; Kenyon *v.* Woodruff, 33 Mich. 310.

Where a question asked of a witness refers to knowledge acquired from some other source, but not stating the source and being general, which testimony would be admissible if derived from a certain definite source as an admission of one of the parties, the evidence is incompetent as being hearsay. The fact that the question was not confined to such admission and was in general terms rendered it inadmissible. Peck *v.* Parchen, 52 Iowa 46, 2 N. W. 597.

Where a witness was asked as to whether a statement was made by "the party," there being nothing to show who the party was or to indicate that the statements of such party were binding on the party against whom the evidence was offered, the evidence is properly excluded as hearsay. Minster *v.* Holbert, 32 Minn. 533, 21 N. W. 718.

62. Snodgrass *v.* Caldwell, 90 Ala. 319, 7 So. 834; Johns *v.* Northcut, 49 Tex. 444; Cook *v.* Thornton, 109 Ala. 523, 20 So. 14.

Testimony that the witness with two other persons went through the woods, three abreast, each carrying a book and marking therein each tree cut as they came to it, and that "from these, placed together, I found that there had been cut" a certain number of ties, is hearsay and inadmissible on account of the uncertainty as to whether the witness made the calculation entirely from the measurements obtained from his own book or from information partly derived from the books of the other two persons. "It was for the plaintiff . . . to show that the witness referred only to his own entries or to those concerning the correctness of which he had a personal knowledge. He did not do this and the language is nowhere explained, and we think the court should have excluded it." Central Coal & Coke Co. *v.* John Henry Shoe Co., 69 Ark. 302, 63 S. W. 49.

Where the whole of the answers to written interrogatories appear to have been based on hearsay, they are inadmissible and the interrogatories themselves not appearing, the court cannot assume that they were of such character as to make the answers admissible. Harrison Wire Co. *v.* Moore, 55 Mich. 610, 22 N. W. 62.

Declarations of Agent. — Where the declarations of a third person would be admissible if he were an agent of plaintiff, such testimony is inadmissible unless such fact of agency is proven. Gilbert *v.* Woodbury, 22 Me. 246.

63. Field *v.* Tenney, 47 N. H. 513. In Missouri Pac. R. Co. *v.* Sherwood, 84 Tex. 125, 19 S. W. 455, 17

be admitted and the question of its competency and weight left to the jury,[64] but the general rule requires the court to determine the

L. R. A. 643, a witness testified that he was located at Paris, Tex., at the time of the loss of certain cotton, by reason of the alleged fire, and he knew this cotton was destroyed by fire at Greenville, Tex., during the time that he was located at Paris, "of his own knowledge, so far as it is possible for him to know it without actually seeing it burn." The court held the testimony admissible, saying: "We are unable to say that the knowledge of the witness, to the existence of which he swears, was founded on pure hearsay. There are conditions in which one can acquire knowledge without seeing. We cannot adjudge that the action of the court in admitting the evidence was erroneous. While it appears that the witness was at the time stated located in business at Paris, it does not appear that he was not at Greenville on November 14, 1887; and, while he did not see the fire which consumed the cotton, his statement may have been based on information derived from a source which would bind defendant. The cross-examiner did not sufficiently prove the sources of the witness' knowledge to justify us in holding that it was founded entirely on hearsay, rendering his testimony inadmissible."

"It is doubtful whether the witness was testifying from hearsay or from his own knowledge when he said Weyer received orders from Pinson and delivered orders with Pinson's assent, for material, etc. He may have been testifying from his own knowledge of the facts. He may have been present when Weyer received orders from Pinson, and may have heard Pinson assent to them. Taking the whole of the witness' testimony together, as it appears in this record, it would seem that he was testifying of his own knowledge. However that may be, it does not appear to us affirmatively that he was testifying from hearsay; and unless it should so appear, we could not hold that the court erred in allowing the testimony." Atlanta Glass Co. *v.* Noizet, 88 Ga. 43, 13 S. E. 833.

Possibly Founded on Hearsay. Where a witness states positively, as of his personal knowledge, that a certain amount of merchandise was consigned to him and sold by him for another person, the fact that his further testimony shows that such sales and consignments were evidenced by book accounts, receipts of shipments, and freight bills, made by others, and the whole testimony tends to show that probably the positive statements of the witness were founded upon information derived from such statements of others, does not render such direct and positive statement incompetent as hearsay. "The objections are to the effect that said answers are mere hearsay, and the exhibits mere copies of account books, etc. It is not improbable that a cross-examination of the witness might have discovered the fact that these answers were grounded upon the witness' confidence in the statements of others, and in the verity of papers coming to him in the ordinary course of business. But his answers are positive and direct, and are made as upon his own personal knowledge. The court below, as here, was asked to exclude them solely on what the answers themselves upon their face discovered. As they purported to be upon the personal knowledge of the witness the court could not say they were not so in fact; although the circumstances of the case casting a doubt thereon were properly subjects of comment and criticism to the jury to aid them in determining the measure of credibility due them." Overman *v.* Hibbard, 30 Iowa 115.

64. In Thompson *v.* Wright, 22 Ga. 607, the court said: "We think that it does not appear with certainty, from the answers of Bemis, whether those answers were founded on hearsay or not. We think that those answers leave this question in some doubt, and therefore we think that they should have been submitted to the jury, that the jury might determine the question, and, according to that determination, regard or disregard the answer. The question was one of fact, and as much

hearsay or non-hearsay character of the evidence before it is submitted to the jury.[65]

B. STRICT RULE. — On the other hand, some decisions seem to require that the non-hearsay character of the testimony appear affirmatively in order to render it competent and admissible.[66]

VIII. ADMISSIBLE FOR ONE BUT FOR NO OTHER PURPOSE.

Where hearsay which has been admitted was competent for a certain purpose, but was incompetent for other purposes, it will be presumed that it was admitted for the purpose for which competent, and the ruling will be sustained.[67]

IX. WEIGHT OF HEARSAY ADMITTED WITHOUT OBJECTION.

The courts seem to differ as to the weight to which hearsay evidence is entitled when it has been admitted without objection. Thus it has been held that under such circumstances it is entitled to no more consideration than if it had been excluded, and that the jury should not at all consider it;[68] but, on the contrary, other authorities hold that when the hearsay has been admitted without objection the jury may consider it as they would any other properly admitted testimony.[69]

one for the jury as it would have been had the answers been given by the witness under an examination in the presence of the jury."

Prima Facie Not Hearsay. — Left to Jury. — Where the statements of a witness are made as of positive knowledge, and the circumstances show that he might have possessed that knowledge sufficiently to authorize him to testify, the court cannot say that the testimony is hearsay, although the information of the witness may have been derived from hearsay. It was held proper to leave the question to the jury, in the absence of a showing by the cross-examination of the witness that the statements were merely hearsay. Field *v.* Tenney, 47 N. H. 513.

65. In Harter Med. Co. *v.* Hopkins, 83 Wis. 309, 53 N. W. 501, the court said: "The jury were allowed to determine what was hearsay and what was not. The court ought to have determined on the objections, at the time, what was hearsay testimony, and excluded it from the consideration of the jury."

66. See Patrick *v.* Graham, 132 U. S. 627. In L'Herbette *v.* Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354, the question asked of a witness, who was a bookkeeper for a bank, "whether or not to his knowledge the plaintiff had any account with the bank," was held inadmissible as hearsay, his knowledge being apparently only that derived from the books of the bank, there being no suggestion that he was anything more than a bookkeeper.

67. Harris *v.* Central Railroad, 78 Ga. 525, 3 S. E. 355.

68. State Bank *v.* Wooddy, 10 Ark. 638.

69. Damon *v.* Carrol, 163 Mass. 404, 40 N. E. 185.

In State *v.* Croney, 31 Wash. 122, 71 Pac. 783, the court uses this language: "This, it is true, is hearsay testimony, but it was received without objection, and we know of no rule of law which would prevent the court from considering it."

HEIRS. — See Descent and Distribution.

HIGHWAYS.

CROSS-REFERENCES:

Dedication;
Eminent Domain.

I. PROCEEDINGS TO LAY OUT HIGHWAY.

1. Necessity, Utility and Convenience. — A. Burden of Proof. On a proceeding to lay out a highway, the necessity, utility and convenience of the proposed highway must be shown.[1]

B. Mode of Proof. — a. *In General.* — The public utility of a proposed highway need not be shown by direct evidence, but may be inferred from facts and circumstances;[2] but the evidence must refer to the proposed line and its utility, otherwise it should not be received.[3]

Cost of New Highways at Remote Times and Places. — Evidence of the cost of new highways, at remote times and places, is not admissible upon a proceeding before commissioners relative to a new highway.[4]

Town's Indebtedness. — Evidence of the town's indebtedness cannot be inquired into in an action to reject the report of the county commissioners denying an application for a public highway.[5]

b. *Testimony of Witnesses Acquainted With Neighborhood.* The public utility of a proposed highway may be shown by the testimony of witnesses acquainted with the neighborhood.[6]

C. Question of Fact. — The public utility of a proposed highway is always a question of fact for the determination of the jury from all the evidence.[7]

1. Hagaman *v.* Moore, 84 Ind. 496. See also People *ex rel.* Ottoman *v.* Seward Co., 27 Barb. (N. Y.) 94. See further on this question the article "Eminent Domain," Vol. V, p. 171, *et seq.*

2. Hagaman *v.* Moore, 84 Ind. 496.

Cost of Highway. — "In determining the question of public utility, the cost of the highway to the public is a proper element for the consideration of the jury. This does not merely include the damages that may be assessed to those whose property may be taken in the location, establishment and opening of the road. It includes also such expense, incidental to the opening of the road, as might be caused by the removal of a brick schoolhouse occupying a portion of the highway. It is proper that the jury should consider every necessary expense, so that they may determine whether the road will cost more than it is worth." Rominger *v.* Simmons, 88 Ind. 453. See also Watson *v.* Crowsore, 93 Ind. 220; Hunter *v.* Mayor and Aldermen of Newport, 5 R. I. 325; Bristol *v.* Branford, 42 Conn. 321.

Private Ways. — On an issue as to the public utility of a proposed highway, it is competent to show that there were private ways opened and used by the public, and that although they had been opened and used, the owners of them, or of the land over which they passed, had closed them. King *v.* Blackwell, 96 N. C. 322, 1 S. E. 485.

3. Kyle *v.* Miller, 108 Ind. 90, 8 N. E. 721.

4. Hayward *v.* Bath, 38 N. H. 179.

5. Hayward *v.* Bath, 38 N. H. 179.

6. McKeen *v.* Porter, 134 Ind. 483, 34 N. E. 223; Hire *v.* Kniseley, 130 Ind. 295, 29 N. E. 1132.

7. Kyle *v.* Miller, 108 Ind. 90, 8 N. E. 721. See also Watson *v.* Crowsore, 93 Ind. 220; People *ex rel.* Ottoman *v.* Seward Co., 27 Barb. (N. Y.) 94, wherein it was held that a recital in the original order of the highway commissioners laying out a highway, to the effect that twelve freeholders had certified to its necessity, was not conclusive evidence of that fact.

2. Regularity of Proceedings. — A. Jurisdiction of Commissioners. — When laying out highways, commissioners of highways act under a special and statutory authority, and it must appear upon the face of their proceedings, or by proof *aliunde*, that they acquired jurisdiction of the principal case. Their jurisdiction must be shown affirmatively.[8]

B. Petition for Laying Out. — a. *In General.* — Where a statute requires the presentation by certain freeholders of a petition to lay out a proposed highway it must be shown that such a petition was signed[9] and presented by the number required by the statute; and the burden of proof is upon the party seeking to avail himself of such a petition.[10]

b. *Parol Evidence as to Freeholders.* — And the fact that the signers of a petition for the laying out of a highway are freeholders may be shown by parol evidence where the question comes collaterally in issue, as documentary evidence is not absolutely indispensable in such cases.[11]

c. *Testimony of Petitioner to Impeach.* — The record of the relocation of a public highway cannot, on a collateral proceeding be impeached by the testimony of one of the petitioners.[12]

C. Notice of Proceedings. — In order to bind the landowner by proceedings to lay out a highway, as provided by statute, it must be proved that he was served with the required notice.[13]

The Usual Mode of Proving Service of Notice in such case is by an affidavit by the person making the service;[14] but where such service has been made and accidentally omitted from the affidavit, or the affidavit itself is absent from the records, his testimony to the fact of the service may be received.[15]

8. Miller *v.* Brown, 56 N. Y. 383; French-Glenn Live Stock Co. *v.* Harney Co., 55 Or. 138, 58 Pac. 35. See also Harrington *v.* People, 6 Barb. (N. Y.) 607, wherein it was held that an order directing the laying out of a highway made by a county judge upon an appeal from the decision of the commissioners was not conclusive evidence of the regularity of the proceedings, unless it recited the making of the application for the road by those liable to be assessed, and that the order was not evidence for any purpose unless the facts necessary to give jurisdiction to the commissioners appeared by other evidence.

9. In Anderson *v.* Hamilton Co. Com'rs, 12 Ohio St. 635, it was held that as between the landowner and the county commissioners, upon the question of their authority to enter his land to lay out the road, it was competent for the landowner to prove that the petition required by the Ohio statute was not signed by the requisite number of freeholders.

10. Williams *v.* Holmes, 2 Wis. 129, *holding* that a petition which merely stated that the "undersigned are freeholders" was not competent evidence in an action relating to a public highway.

11. Austin *v.* Allen, 6 Wis. 134.

12. Taft *v.* Com., 158 Mass. 526, 33 N. E. 1046; Lincoln *v.* Com., 164 Mass. 1, 41 N. E. 112.

13. *In re* Isaacs, 1 Penn. (Del.) 61, 39 Atl. 588.

14. *In re* Isaacs, 1 Penn. (Del.) 61, 39 Atl. 588.

15. *In re* Isaacs, 1 Penn. (Del.) 61, 39 Atl. 588; Carron *v.* Clark, 14 Mont. 301, 36 Pac. 178, where it was held proper to permit a witness to testify that he actually posted the notice required by statute.

Notification Published in Newspaper. — The fact that a landowner had due notice of proceedings to lay out a highway may be shown by a notification inserted in a newspaper published in the neighborhood.[16]

II. EXISTENCE OF HIGHWAY.

1. Presumptions and Burden of Proof. — A. In General. — As a general rule where land is claimed to be a street or other public highway, as, for example, where public authorities who are sued for the possession of property to quiet title thereto, or to recover damages for trespass thereon, assert that fact, the burden of proving it is upon them.[17]

B. Obstructing Highways. — a. *In General.* — So also upon a prosecution for obstructing a highway the legal existence of the highway as such is an element of the crime charged which must be proved by the prosecution as any other fact necessary to constitute the offense.[18] And that fact must be established beyond a

16. State *v.* Beeman, 35 Me. 242. For a further discussion as to matters of evidence pertaining to the right to condemn private property for public purposes, see the article "Eminent Domain," Vol. V.

17. *Colorado.* — Dingwall *v.* County Com'rs of Weld County, 19 Colo. 415, 36 Pac. 148.

Illinois. — Hudson *v.* Miller, 97 Ill. App. 74; McIntyre *v.* Story, 80 Ill. 127; Campbell *v.* Karr, 26 Ill. App. 305; Owens *v.* Crossett, 105 Ill. 354.

Iowa. — Goodfellow *v.* Riggs, 88 Iowa 540, 55 N. W. 319.

Kansas. — City of Kansas *v.* Banks, 9 Kan. App. 885, 61 Pac. 333.

Nebraska. — Rube *v.* Sullivan, 23 Neb. 779, 37 N. W. 666; Oyler *v.* Ross, 48 Neb. 211, 66 N. W. 1099.

Virginia. — Bare *v.* Williams, 101 Va. 800, 45 S. E. 331.

To Justify Entry on Land on the ground that the *locus in quo* is a public highway, all the essential facts required by statute to give the commissioners jurisdiction must be shown, and unless the consent of the landowners to the alleged alteration of a highway is proved the entry will not be justified. Miller *v.* Brown, 56 N. Y. 383.

Adverse Possession. — Burden of Proof. — Where the public claims title to the easement in an alleged highway by user, the burden rests upon the state or its agencies to show title by adverse possession. State *v.* Fisher, 117 N. C. 733, 23 S. E. 158.

Prescription. — Presumption. Where the original owners of the land made no objection and the road is shown to have been used and traveled by the public for more than ten years, the legal presumption is that the owners abandoned possession of the land for the road and that therefore the road is a public highway. Patterson *v.* Munyan, 93 Cal. 128, 29 Pac. 250.

Burden of Proof. — In a prosecution against an overseer of a road for neglect of duty, the state has the burden of proving that the road is a public road as defined by the statute, and in the absence of proof thereof the defendant must be acquitted. State *v.* Moore, 23 Ark. 550.

18. State *v.* Eisele, 37 Minn. 256, 33 N. W. 785. See also Meers *v.* State (Tex. App.), 16 S. W. 653; Baker *v.* State, 21 Tex. App. 264, 17 S. W. 144.

Evidence which merely shows that the road through the land of the defendant was never formally opened by the public authorities and only used at times by travelers, and was to all intents and purposes abandoned before obstructed by defendant, will not, under the Texas statutes, support a conviction for willfully obstructing a public road. Myers *v.* State (Tex. Crim.), 36 S. W. 255.

reasonable doubt.[19] And sometimes the statutes themselves contain express provisions as to the nature of the evidence to be adduced in such prosecutions, and in such case it is necessary for the prosecution to comply with the statute in order to obtain a conviction.[20]

b. *Point of Obstruction.* — The public authorities must in such case prove not only that the highway was established, but also that it was a highway at the precise location of the obstruction.[21]

c. *Traveled and Uniform Route.* — It must be shown that there is a definitely settled traveled road, and if the evidence fails in this there is no proof of highway.[22]

d. *Variance Between Allegation and Proof.* — In indictments for nuisances in public highways it has been held unnecessary to set out the termini, but if they are set out they must be proved as laid, and any material variance will be fatal to the conviction.[23]

C. Actions for Injuries Suffered Through Defective Highways. — Whenever, in an action to recover damages for injuries suffered through an alleged defective highway, the existence of the *locus in quo* as a highway is controverted, that fact must be proved by the plaintiff.[24]

19. State *v.* Dubuque & S. C. R. Co., 88 Iowa 508, 55 N. W. 727.

20. Thus in Missouri (Rev. Stat. 1889, §§ 7796-7800, Laws of 1893, p. 222) the state must show that a public road was established at the point in question and that the county court had ordered the establishment and opening of it (State *v.* Gilbert, 73 Mo. 20); and where the only documentary evidence contained in the record is a petition for the public road and a survey and record of the road commissioners, a conviction will not be sustained. State *v.* Cunningham, 61 Mo. App. 188. See also State *v.* Parsons, 53 Mo. App. 135; State *v.* Pullen, 43 Mo. App. 620.

21. Owens *v.* Crossett, 105 Ill. 354.

22. People *v.* Livingston, 27 Hun (N. Y.) 105, 63 How. Pr. 242. See also Murphy *v.* State, 23 Tex. App. 333, 4 S. W. 906, where the evidence disclosed that the road in question had been located several years before that action was brought; that it traversed an open, unfenced prairie country; that the roadbed, as the country became populated and fenced, shifted according to the fancy of the traveling public, and that when the defendant built his fence the road divided his land into nearly equal parts, having at different times traversed it at different angles. It was held that the defendant could not be convicted under the Texas statute of willfully obstructing the highway, because it was not shown that there was any definite, settled route.

23. State *v.* Rhodes, 35 Mo. App. 360.

Identity of Roads. — The fact that in the record establishing the road a particular name is given to it and in an indictment the road is given another name is not a material variance; parol evidence is admissible to show that the two roads are the same. State *v.* Hagood, 23 Ark. 553.

24. *Indiana.* — City of Huntington *v.* McClurg, 22 Ind. App. 261, 53 N. E. 658.

Iowa. — Kircher *v.* Town of Larchwood, 120 Iowa 578, 95 N. W. 184.

Kentucky. — Louisville *v.* Snow, 107 Ky. 536, 54 S. W. 860.

Massachusetts. — Snow *v.* Adams, 1 Cush. 443.

Missouri. — Arnold *v.* St. Louis, 152 Mo. 173, 53 S. W. 900.

New Hampshire. — Spaulding *v.* Town of Groton, 68 N. H. 77, 44 Atl. 88; Willey *v.* Portsmouth, 35 N. H. 303.

2. Mode of Proof. — A. Record Evidence. — a. *Admissibility.* **(1.) Generally.** — Where the establishment of a highway as such by a competent tribunal, under and pursuant to statutes providing therefor, is a matter of record, such record may, in order to show the existence of the highway in a subsequent proceeding, be received in evidence.[25] Otherwise, however, where the proceedings of the authorities are not authorized by statute,[26] the original minutes of the proceedings of the commissioners in laying out a road, and the original report of the viewers and plat of survey, although neither is recorded, may be received in evidence.[27]

New York. — Schafer *v.* Mayor of New York, 154 N. Y. 466, 48 N. E. 749.

Rhode Island. — Stone *v.* Langworthy, 20 R. I. 602, 40 Atl. 832.

Where the accident complained of occurred while driving through a public park in a city, under the Rhode Island Gen. Laws, ch. 36, 15-17, ch. 72, 12, the fact that the road is not merely a parkway, but a public highway, must be proven. Blair *v.* Granger, 24 R. I. 17, 51 Atl. 1042.

25. Epler *v.* Niman, 5 Ind. 459; Tyson *v.* Com'rs of Baltimore Co., 28 Md. 510; Seidschlag *v.* Town of Antioch, 207 Ill. 280, 69 N. E. 949; Jessup *v.* Osceola Co., 92 Iowa 178, 60 N. W. 485; Geer *v.* Fleming, 110 Mass. 39. *Compare* Louk *v.* Woods, 15 Ill. 256; State *v.* Berry, 21 Me. 169, where it was held that the records of a town which were not admissible to prove the existence of a legal townway could not be admitted to show the limits or outside lines of the road, although it might have been proved that a road had been actually traveled somewhere within those limits for more than twenty years.

In Hardy *v.* Houston, 2 N. H. 309, where the selectmen of a town had laid out a highway and drawn up and signed an account of their proceedings and filed it with the town clerk, it was held that such a record found on the files of the town, although not otherwise recorded, was sufficient evidence of the laying out of the highway.

Irregular and Ineffectual Proceedings of a county court in the matter of the establishment of a highway are admissible in evidence when it is proved or undisputed that the road as attempted to be located was afterward opened and in continuous use by the public as a highway for more than ten years. Nosler *v.* Coos Bay R. Co., 39 Or. 331, 64 Pac. 644.

The fact that the petition for the road in question is not produced is no valid objection to the admission of the road record, where it appears therefrom that such petition was presented, filed and acted upon. State *v.* Lane, 26 Iowa 223.

26. Unauthorized Proceedings Incompetent. — The proceedings of a town in laying out of a road not being authorized by any statute are inadmissible to show the location or limits of the road, notwithstanding they may have been in accordance with a long usage of the town. Young *v.* Inhabitants of Garland, 18 Me. 409. See also Fowler *v.* Savage, 3 Conn. 90.

27. King *v.* Kenny, 4 Ohio 79, where the court said: "When all the requisites have been performed which authorize a recording officer to record any instrument whatever, it is in law considered as recorded, although the manual labor of writing it in a book kept for that purpose has not been performed. Marbury *v.* Madison, 1 Cran. 161, 10 East 350. The commissioners holding a public office, and entitled to the custody of their own records, cannot be compelled to produce the originals in court; but when presented they are as good evidence as copies can be, authenticated in the most ample forms of law. Courts, for a most obvious reason, will not compel the production of their own original records, as evidence for parties, or those of any other public officer, but have never refused to admit them

The Record of the Relocation of a Highway, which, although referring to a plan, is in itself complete and clear, may be received in evidence without the production of the plan referred to.[28]

A Surveyor's Map and Field Notes of the survey for a highway may be evidence of when the survey was made and the road located, but they are not conclusive.[29]

Judgments Between Other Persons. — Verdicts and judgments between other persons have sometimes been held admissible to prove the existence of a public highway, but only where the party offering them claims by prescription, and then merely to corroborate the presumption of a grant. But a user of sufficient length to create this presumption must first be proved.[30]

(2.) Proof of Preliminary Proceedings. — Where proof of the existence of a highway is sought to be made by the introduction of record evidence thereof, it is held by some courts that it is unnecessary, in the first instance, to go further and show that all the preliminary steps required by law, which do not appear in the record itself, have been taken; that the presumption in such case is that the preliminary proceedings were regular and such as justified the tribunal in establishing the highway.[31] Thus, it is held that an order of the proper tribunals declaring a road to be a highway may be received in evidence, notwithstanding it contains no provision for compensation or mention of assessment of damages to owners of the fee.[32]

Compliance With Statutory Provisions Required. — In other jurisdictions, however, where the existence of a highway is sought to be established by record evidence, it is held that it must be shown that the authorities or tribunal fully complied with the provision of the statute, as, for example, that the persons whose action as a committee in laying out the highway is offered in evidence were in fact appointed and authorized to act as such committee;[33] that the

on the grounds that they were not of as high a nature as copies."

28. Lincoln *v.* Com., 164 Mass. 1, 41 N. E. 112.

29. Shaffer *v.* Weech, 34 Kan. 595, 9 Pac. 202.

30. Fowler *v.* Savage, 3 Conn. 90. See also Avery *v.* Stewart, 1 Cush. (Mass.) 496; State *v.* Ramsey, 76 Mo. 398.

31. Dumoss *v.* Francis, 15 Ill. 543; Ferris *v.* County Com'rs of Knox Co., 9 Ill. 409; Sage *v.* Barnes, 9 Johns. (N. Y.) 365; McClelland *v.* Miller, 28 Ohio St. 488; Anderson *v.* Com'rs of Hamilton Co., 12 Ohio St. 635; Beebe *v.* Scheidt, 13 Ohio St. 406. See also Nealy *v.* Brown, 6 Ill. 10; Galbraith *v.* Littiech, 73 Ill. 209; Chapman *v.* Gates, 46 Barb. (N. Y.) 313; Arnold *v.* Flattery, 5 Ohio 271; Tomlinson *v.* Wallace, 16 Wis. 224.

32. Howard *v.* State, 47 Ark. 431, 2 S. W. 331; Thompson *v.* Major, 58 N. H. 242; Lowe *v.* Aroma, 21 Ill. App. 598. *Compare* Dunning *v.* Matthews, 16 Ill. 307, wherein it was held that certified copies from the town clerk showing that the highway in question was legally laid out and opened were not admissible, because there was not a further showing that an assessment of damages was duly made.

33. Fowler *v.* Savage, 3 Conn. 90, where the court said: "No such committee may ever have been appointed; or if they were, their powers may have been particularly limited,

requisite notice of the proceedings for the establishment of the highway was duly served or given;[34] that the requisite number of commissioners were present at the meeting,[35] and the like.

Appointment of Viewers. — The mere fact that viewers have been appointed pursuant to statute to establish a highway is not of itself sufficient to prove the existence of the highway;[36] but it must also be shown that the proper court has acted upon the report of the viewers.[37]

Ancient Record. — It has been held that the record of the laying out of a highway may, after a lapse of nearly forty years, be submitted to the jury, although it does not show a compliance with some of the legal conditions.[38]

b. *As Best Evidence.* — Where the existence of a highway established pursuant to statute is sought to be proved by the record of the proceedings of the proper tribunal, the best evidence thereof is such record, and until the absence of such record evidence has been satisfactorily accounted for, secondary evidence should not be resorted to.[39]

and they may have exceeded them, or, lastly, the town may have refused to accept of such laying out; and the non-production of the record of their appointment, and the acceptance by the town, creates a strong presumption that, were it produced, it would operate against the defendants." See also Watrous *v.* Southworth, 5 Conn. 305.

34. State *v.* Weimer, 64 Iowa 243, 20 N. W. 171.

35. Stewart *v.* Wallis, 30 Barb. (N. Y.) 344, which was an action for trespass against highway commissioners in which they justified their actions upon the ground that the way was a public one, and sought to prove the same by producing the order to lay out the highway, but it did not appear that the commissioners were all present, as required by the state statute, and the court therefore refused the testimony.

36. Whitesides *v.* Earles (Tenn.), 61 S. W. 1038. See also Mankin *v.* State, 2 Swan (Tenn.) 206, a prosecution for obstructing a highway, wherein it was held that the record of the county court must not only show the order appointing viewers and the order establishing the road, but that the record itself must show that there was a competent court for that purpose.

37. Schuylkill County's Appeal, 38 Pa. St. 459, wherein it was held that the report of viewers was not of itself evidence that a public road was not opened on the precise ground on which it was located, as such evidence might have been found in the original survey or draft.

38. State *v.* Alstead, 18 N. H. 59, where the court said: "In transactions so ancient that the means of proving the exact state of the facts may fairly be presumed to have been lost, through the death of those who participated in them, and whose duties required them to know the whole truth; or, through the loss of the memory of them, on the part of such persons, if living, so that the ordinary remedy of the defect, by an amendment of the record, has become impracticable, a presumption is established in favor of the correctness of the proceedings, so imperfectly recorded; and the record, defective as it is, may be submitted to the jury, with instructions that enable them to find from it all the particular facts which it does not specifically attest, that are requisite for the validity of the principal one, which is sought to be established in evidence."

39. Hoffman *v.* Rodman, 39 N. J. L. 252. See also Beaudean *v.* Cape Girardeau, 71 Mo. 392; Naylor *v.*

c. *Conclusiveness as Against Collateral Attack.* — The record of the proceedings of the proper tribunal establishing a highway is not open to collateral attack,[40] unless it is made to appear that the

Beeks, 1 Or. 216. In Brander *v.* Justices, 5 Call (Va.) 548, 2 Am. Dec. 606, mandamus to compel the county court to erect a bridge across the county road, it was held that roads, bridges, etc., being established by matter of record, matter of record only could be admitted to prove whether the bridge was a public or private bridge.

40. *Indiana.* — Helms *v.* Bell, 155 Ind. 502, 58 N. E. 707; Gold *v.* Pittsburgh, C. C. & St. L. R. Co., 153 Ind. 232, 53 N. E. 285.

Maine. — Bradbury *v.* Benton, 69 Me. 194.

Missouri. — Baubie *v.* Ossman, 142 Mo. 499, 44 S. W. 338.

New Hampshire. — Spaulding *v.* Groton, 68 N. H. 77, 44 Atl. 88; Dudley *v.* Butler, 10 N. H. 281; State *v.* Rye, 35 N. H. 368.

Ohio. — Beebe *v.* Schmidt, 12 Ohio St. 402.

Oregon. — Sweek *v.* Jorgensen, 33 Or. 270, 54 Pac. 156.

South Carolina. — State *v.* Kendall, 54 S. C. 192, 32 S. E. 300.

Tennessee. — Mankin *v.* State, 2 Swan 206.

See also Anderson *v.* Commissioners of Hamilton Co., 12 Ohio St. 635, wherein it was held that the record of the county commissioners was *prima facie* evidence of the establishment of the road, but that on a question between the owner of the fee and the county commissioners, as to whether they might enter the land to construct the road, such owner might show that in fact the petition for the road was not signed by the requisite number of freeholders, and that no notice had been given as required by law.

In Blaisdell *v.* Briggs, 23 Me. 123, where it appeared by the town records that the location of a town road was subsequent to the issuing of the warrant to call the meeting of the town for its acceptance, it was held incompetent to show by parol evidence that the location in fact preceded the issuing of the warrant. The court said: "The records are on their face perfect and nothing can be supplied that is now wanting."

Rule Stated. — "The jurisdiction to establish and open public roads in their respective counties is conferred upon the county courts of the state, and when, in any given case, one of said courts acquires jurisdiction of an application to establish a road by the filing of a sufficient petition for that purpose, and the proof of the notice required by law, its judgment in such case is not open to collateral attack in any other court. All persons interested are bound to take notice of its orders, and, if dissatisfied with its action, may appeal therefrom. It is immaterial that in the course of the proceedings some error or irregularity occurs. Its judgment is none the less conclusive as to its findings in all collateral proceedings in which they may be drawn in question." Mitchell *v.* Kansas City & I. R. T. R., 138 Mo. 326, 39 S. W. 790.

Want of Notice. — The action of the commissioners' court establishing a road, predicated on the report of the jury of review, cannot be collaterally attacked by evidence of a want of proper notice, notwithstanding their judgment does not contain any recitation of notice. Kelly *v.* State (Tex. Crim.), 80 S. W. 382. See also Howard *v.* State, 47 Ark. 431, 2 S. W. 331.

The Testimony of Viewers upon whose report the road was ordered to be opened cannot subsequently be received to vary the legal import of their report. Butler *v.* Barr, 18 Mo. 357, *holding*, however, that they might be examined to show that the road opened was on the line designated in their report.

In Illinois, the commissioners of highways are required by law to keep a record of their proceedings at all meetings, and such records are the only legal evidence of the action to which they refer and cannot be contradicted, aided or supplemented by parol evidence. O'Connell *v.* Chicago T. T. R. Co., 184 Ill. 308, 56 N. E. 355.

order or judgment is void for want of jurisdiction.[41] Where the statute governing the establishment of highways by the public authorities expressly makes their order that proper notice of the proceedings was served or given *prima facie* evidence of that fact, a party denying such service may show by competent evidence that the notices were not in fact served or given.[42]

d. *Omissions.* — Where the record of the proceedings establishing a highway fails to show compliance with some of the provisions of the statute, the fact of compliance may be shown by evidence *aliunde*,[43] as, for example, where the record fails to show notice of the proceedings,[44] or that the petitioners were householders and resided in the vicinity of the road.[45]

B. Parol Evidence. — a. *In General.* — A highway may become such by public user,[46] and in such case parol evidence may be

In California, the question whether or not a public highway is demanded in any particular locality, as well as its location and extent, are matters of political or legislative character for the determination of which the legislature has established a tribunal, and where this tribunal proceeds in accordance with the provisions of the statute it acquires jurisdiction to determine these questions, and its determination is not subject to collateral attack. San Mateo Co. *v.* Coburn, 130 Cal. 631, 63 Pac. 78. See also Humboldt Co. *v.* Dinsmore, 75 Cal. 604, 17 Pac. 710, to the effect that an order of the supervisors, recognizing the petition and bond as sufficient, and ordering the viewers to be appointed, is conclusive upon those matters, unless the contrary appears by the record.

41. A recital in the order of the commissioners of highways, laying out a road, that the requisite number of freeholders have certified to its necessity is not conclusive evidence of that fact; that being a jurisdictional fact, is open to contradiction. People *ex rel.* Ottoman *v.* Seward Co., 27 Barb. (N. Y.) 94.

42. As for example in Wisconsin. State *v.* Logue, 73 Wis. 598, 41 N. W. 1061.

43. Smith *v.* Com'rs of Cumberland Co., 42 Me. 395. See also Keyes *v.* Tait, 19 Iowa 123.

Parol Evidence of the Action of Commissioners, appointed under and pursuant to a statute providing for the construction and alteration of a highway, in relation to the alteration of the highway at a particular place, at a meeting of all the commissioners on that subject, may be received, where it does not appear that any record of the proceedings at that time was kept, and the statute does not in terms require a record of the proceedings of the commissioners to be kept. Smith *v.* Helmer, 7 Barb. (N. Y.) 416.

Sufficiency of Petition As to Signers. — Oral evidence is competent in aid of a petition and order for the laying out of a highway to show that the petition was signed by the necessary number of qualified petitioners. Banse *v.* Clark, 69 Minn. 53, 71 N. W. 819.

44. Larson *v.* Fitzgerald, 87 Iowa 402, 54 N. W. 441; State *v.* Anderson, 39 Iowa 274; Keyes *v.* Tait, 19 Iowa 123; Carron *v.* Clark, 14 Mont. 301, 36 Pac. 178, where it was held proper to permit the fact that notices were posted to be testified to by the person who actually posted them.

45. Oliphant *v.* Com'rs of Atchison Co., 18 Kan. 386.

46. *Alabama.* — Harper *v.* State, 109 Ala. 66, 19 So. 901.

California. — Bequette *v.* Patterson, 104 Cal. 282, 37 Pac. 917.

Illinois. — Township of Madison *v.* Gallagher, 159 Ill. 105, 42 N. E. 316; Shugart *v.* Halliday, 2 Ill. App. 45.

Indiana. — Bidinger *v.* Bishop, 76 Ind. 244; Hays *v.* State, 8 Ind. 425; Hart *v.* Trustees, etc., 15 Ind. 226.

Iowa. — State *v.* Welpton, 34 Iowa 144; Casey *v.* Tama Co., 75 Iowa 655,

resorted to to establish that fact without first showing whether or not there is record evidence of the existence of the highway as such.[47]

37 N. W. 138; Duncombe *v.* Powers, 75 Iowa 185, 39 N. W. 261.

Maine. — Hinks *v.* Hinks, 46 Me. 423.

Maryland. — Day *v.* Allender, 22 Md. 511-528.

Massachusetts. — See also Folger *v.* Worth, 19 Pick. 108; Stetson *v.* Faxon, 19 Pick. 147.

Michigan. — Adams *v.* Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270, 18 Am. St. Rep. 441.

Missouri. — Zimmerman *v.* Snowden, 88 Mo. 218; State *v.* Proctor, 90 Mo. 334, 2 S. W. 472; Moore *v.* Hawk, 57 Mo. App. 495.

New Hampshire. — Barker *v.* Clark, 4 N. H. 380, 17 Am. Dec. 428.

New York. — Little *v.* Denn, 34 How. Pr. 68.

North Carolina. — State *v.* Fisher, 117 N. C. 733, 23 S. E. 158; *citing* Kennedy *v.* Williams, 87 N. C. 6; Frink *v.* Stewart, 94 N. C. 484; State *v.* Purify, 86 N. C. 681; State *v.* McDaniel, 53 N. C. 284.

South Carolina. — Hayward *v.* Chisolm, 11 Rich. L. 253.

Texas. — Click *v.* Lamar Co., 79 Tex. 121, 14 S. W. 1048.

Utah. — Whitesides *v.* Green, 13 Utah 341, 44 Pac. 1032, 57 Am. St. Rep. 740.

Vermont. — State *v.* Trask, 6 Vt. 355, 27 Am. Dec. 554.

Wisconsin. — Tomlinson *v.* Wallace, 16 Wis. 224; Lennon *v.* Hayden, 13 Wis. 160.

Contra. — Boyd *v.* Woolwine, 40 W. Va. 282, 21 S. E. 1020.

47. *Arkansas.* — Howard *v.* State, 47 Ark. 431, 2 S. W. 331.

Illinois. — Nealy *v.* Brown, 6 Ill. 10; Louk *v.* Woods, 15 Ill. 256.

Indiana. — Zimmerman *v.* State, 4 Ind. App. 583, 31 N. E. 550.

Kansas. — Madison Twp. *v.* Scott, 9 Kan. App. 871, 61 Pac. 967.

Maine. — Young *v.* Inhabitants of Garland, 18 Me. 408.

Massachusetts. — Bagley *v.* New York, N. H. & H. R. Co., 165 Mass. 160, 42 N. E. 571; Woburn *v.* Henshaw, 101 Mass. 193.

Pennsylvania. — Morrow *v.* Com., 48 Pa. St. 305.

Washington. — State *v.* Robinson, 12 Wash. 491, 41 Pac. 884.

That a road is used and traveled by the public as a highway, and recognized by the public authorities as an established road; that bridges have been built thereon and treated as part of a highway, and that the public authorities have done other work to make the highway passable and invited and induced the public to travel thereon is, so to speak, "a public fact," and as such may be testified to by any one having sufficient knowledge to speak upon the subject. Brown *v.* Jefferson Co., 16 Iowa 339.

In Miles *v.* Postal Tel. Cable Co., 55 S. C. 403, 33 S. E. 493, evidence of the road supervisors was held competent to show that a road was not a public highway, especially in view of the further facts that the public did not work the road in question, and that it had been used only for a few years, having been opened by private persons for their own convenience.

"A road may be shown to be a public road by other evidence than by the production of the order of the county court establishing it as such. Long-continued usage, with assignment of hands to work the same by the commissioners' court, regardless of whether all of the steps necessary were taken to a statutory condemnation of the same as a public road, would make the same a public road." Race *v.* State, 43 Tex. Crim. 438, 66 S. W. 560.

The actual physical opening of the highway by the public authorities to the use of the public is a fact which undoubtedly can be as well established by the testimony of witnesses who testified of their own knowledge as by secondary evidence of the contents of the lost proceedings before the public authorities touching the laying out of the highway. State *v.* Kendall, 54 S. C. 192, 32 S. E. 300.

In State *v.* Snyder, 25 Ohio 208, an indictment for obstructing a county road, it was held that parol evidence of user was not admissible, although it was said that if the charge had been a highway simply, the evidence would have been admissible.

Parol evidence in such case is primary evidence,[48] and is admissible although it is not shown that the land was taken under condemnation proceedings, or that the owner of the fee had ever received damages or compensation.[49] But where a particular place claimed to be a public highway has never been opened or worked or used as a highway, parol evidence that it is such is not admissible.[50]

Records of Public Authorities. — And where the evidence is sufficient to prove a highway by user, the record of the public authorities showing an ineffectual attempt to establish the road in question in pursuance of the statute is immaterial.[51]

Invitation to Use. — If the public authorities continue to hold out the way as a public thoroughfare they thereby admit the existence of the road and cannot escape liability.[52]

Condition of Road. — The condition of the road in question is not evidence upon the question whether or not it is a highway.[53]

Acts of Dominion. — Acts of dominion have been held admissible in actions against the public authorities to establish possession, and such evidence is neither irrelevant nor incompetent.[54]

b. *Knowledge of Owner.* — The user must be shown to be of such a kind as to convey to the owner knowledge of its extent and adverse nature.[55]

48. Mosier *v.* Vincent, 34 Iowa 478; State *v.* Fisher, 117 N. C. 733, 23 S. E. 158, where it was held that the best evidence of user by the public is the fact that the proper authorities have appointed overseers and designated hands to work, and assumed the responsibility of keeping the way in repair.

Best Evidence. — Where it is sought to show that the road is a public highway by proof of adverse public user for the statutory period, proof of the recognition of and the working of the road by the public authorities is not essential, and hence an instruction that the best evidence that a road is a public highway is that the same has been recognized by the authorities and worked as other roads of the district are worked is erroneous. "Where the statute expressly says that use of the road as a highway, by the public, for a certain number of years, makes it a public highway, we can not see why such use is not evidence of as high a character as are acts of recognition by the town authorities." Township of Madison *v.* Gallagher, 159 Ill. 105, 42 N. E. 316.

49. Race *v.* State, 43 Tex. Crim. 438, 66 S. W. 560.

50. Harrington *v.* People, 6 Barb. (N. Y.) 607. See also State *v.* Berry, 21 Me. 169, a prosecution for obstructing a highway, wherein the court said: "A town or private way cannot be proved by parol to sustain an indictment against an individual for obstructing it."

51. Patterson *v.* Munyan, 93 Cal. 128, 29 Pac. 250. See also Com. *v.* Petitcler, 110 Mass. 62.

52. Kircher *v.* Larchwood, 120 Iowa 578, 95 N. W. 184; Shannon *v.* Tama City, 74 Iowa 22, 36 N. W. 776; D'Amico *v.* Boston, 176 Mass. 599, 58 N. E. 158.

An invitation to use is shown by the fact of widening the traveled path, as a showing that all parts are equally suitable for the public use. Willey *v.* Portsmouth, 35 N. H. 303; Cobb *v.* Standish, 14 Me. 198.

53. Zimmerman *v.* State, 4 Ind. App. 583, 31 N. E. 550.

54. Barry *v.* The County of Sonoma, 43 Cal. 217.

55. Chicago *v.* Stinson, 124 Ill. 510, 17 N. E. 43. See also State *v.* Teeters, 97 Iowa 458, 66 N. W. 754, where it was held under the Iowa statute that the fact of the owner having lived on the land for some thirteen years while it was being used

c. *Intention to Dedicate.* — Where the existence of a highway is sought to be shown by user it is not necessary to show the original intention of the owners of the soil,[56] or that there had been any dedication;[57] although it is held that evidence tending to establish his intention to dedicate is competent as strong evidence in corroboration of the user.[58] And evidence tending to show that there was no intention to dedicate the way to the public is admissible.[59]

d. *Road Not a Necessity.* — Evidence showing that the laying out a highway was not a public necessity and that the road was not laid out on the section line, or in accordance with the government mounds and pits, has been held admissible.[60]

e. *Peaceful Possession.* — Peaceful possession under a claim of title is *prima facie* evidence of seisin in fee in an action *quare clausum fregit* in which the defendant, as town supervisor, justifies his actions in removing an obstruction from a highway upon the ground that the place in question was a highway.[61]

f. *Payment of Taxes.* — So evidence as to the payment of taxes is admissible in suits for the possession of land for the purpose of showing a possession adverse to the claim of the public.[62]

by the public and occasionally by himself, was sufficient evidence of knowledge on his part of the public user of the same as a highway.

Under statute providing that when an easement is claimed by prescription, the fact of adverse possession must be established by evidence distinct and independent of the use, and by evidence that the party against whom claim is made had express notice of such user and claim of possession. And hence, evidence showing mere use of land as a highway, even though the owner had actual knowledge of such use, is insufficient. "He must have express notice that the claim made was based thereon independent of or additional to the mere use." Gray *v.* Haas, 98 Iowa 502, 67 N. W. 394; State *v.* Mitchell, 58 Iowa 567, 12 N. W. 598.

56. Twp. of Madison *v.* Gallagher, 159 Ill. 105, 42 N. E. 316; Strong *v.* Makeever, 102 Ind. 578, 1 N. E. 502, 4 N. E. 11.

57. McKeer *v.* Porter, 134 Ind. 483, 34 N. E. 223.

58. McKeen *v.* Porter, 134 Ind. 483, 34 N. E. 223; Goelet *v.* Newport, 14 R. I. 295.

59. Bidlinger *v.* Bishop, 76 Ind. 244, *holding* that it was proper to permit the owner of the fee to show the purpose of the alleged obstruction, which in that case was a fence, and that it was erected for the purpose of advising the public that the right to appropriate the ground for a highway was disputed. *Compare* City of Columbus *v.* Dahn, 36 Ind. 330, where the secret intention of the owner contradicted his acts manifesting a dedication.

60. Williams *v.* Turner Twp., 15 S. D. 182, 87 N. W. 968. In this case such evidence was admissible upon the ground that it was competent for the plaintiff to show that the board had, by an order making a certain survey part thereof, established a highway not upon a section line in accordance with the original government plat and field notes, but had established a new section line through his premises, and that a highway already existed upon the section line some rods off the proposed highway.

61. Austin *v.* Allen, 6 Wis. 134.

62. St. Louis Public Schools *v.* Risley, 40 Mo. 356.

Evidence is admissible to show that such land has been taxed by the city ever since its organization, and that it has been sold for county taxes and a tax deed given; that it has never been used by the public, but only by the adjoining landowners. Trerice *v.* Barteau, 54 Wis. 99, 11

C. Declarations. — Public user of a road cannot be shown by the declarations of third persons;[63] but evidence of declarations by deceased persons with knowledge thereof may be received in relation to the original location of a highway.[64]

D. Hearsay, Reputation, etc. — Hearsay evidence is not admissible to prove user.[65] But in the case of ancient highways, their location being a matter of public or general interest, it may be established by that species of hearsay evidence called traditionary evidence.[66]

III. OBSTRUCTING HIGHWAYS.

1. The Offense. — A. Burden of Proof. — The rule of reasonable doubt does not apply to a statutory prosecution to recover a penalty for obstructing a highway; the rule in such case is that the jury may find the defendant guilty of the offense charged upon a clear preponderance of the evidence, although it may not be free from reasonable doubt.[67]

B. Mode of Proof. — Other Obstructions. — Evidence of

N. W. 244. In this case, the plaintiff's evidence further showed that when he took possession he fenced in the *locus in quo* from the adjoining property, cultivated and improved it and paid taxes thereon.

Assessment for Taxation. — In Huntington *v.* Townsend, 29 Ind. App. 269, 63 N. E. 36, it was held that on an issue as to whether or not the *locus in quo* was part of a public highway, evidence that it had been on the tax duplicate during a certain period was relevant as a circumstance tending to show whether or not the city had during that period claimed it as part of a street.

63. Sheperd *v.* Turner, 129 Cal. 530, 62 Pac. 106.

64. Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543. See also Noyes *v.* Ward, 19 Conn. 250.

65. Sheperd *v.* Turner, 129 Cal. 530, 62 Pac. 106, *holding* that a public highway cannot be proved by showing that it was generally reputed to be a highway.

66. Wooster *v.* Butler, 13 Conn. 309; St. Louis Public Schools *v.* Risley, 40 Mo. 356; State *v.* Vale Mills, 63 N. H. 4; Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331. See also State *v.* Cumberland, 6 R. I. 496.

Reputation, Such as Recitals in Ancient Records and Grants, is competent evidence of the laying out of ancient highways. Webster *v.* Boscawen, 67 N. H. 111, 29 Atl. 670. See also Willey *v.* Portsmouth, 35 N. H. 303; State *v.* Vale Mills, 63 N. H. 4.

67. Chicago & E. I. R. Co. *v.* People, 44 Ill. App. 632; Town of Havana *v.* Biggs, 58 Ill. 483; Fairbanks *v.* Town of Antrim, 2 N. H. 105; Spencer *v.* Peterson, 41 Or. 257, 68 Pac. 519. See also Town of Lewiston *v.* Proctor, 27 Ill. 414, *overruling* Ferris *v.* Commissioners, 9 Ill. 499, in so far as the latter case held that the evidence must show that the defendant was guilty beyond a reasonable doubt. The court, in drawing a distinction between cases of a clearly criminal and those of a *quasi* criminal character, said: "When the judgment necessarily involves the life or liberty of the citizen, the benign rule that the crime must be proved beyond a reasonable doubt should prevail unimpaired, and the same doctrine is too firmly established to be shaken, by authority, if not on principle, in all proceedings by indictment. But when only a pecuniary forfeiture is involved, and the proceeding is on the civil side of the docket, the same reasons do not apply."

other obstructions at other places and times is not admissible, as each obstruction is a separate offense.[68]

C. Variance Between Allegation and Proof. — a. *In General.* — Where the indictment for obstructing a public road or highway describes the offense charged with unnecessary particularity, it is incumbent upon the prosecution to prove the offense as described in the indictment, at least substantially.[69] And in some cases it is held that the existence of the road charged to have been obstructed must be proved as a matter of essential description.[70]

b. *Exact Location of Obstruction.* — It is not necessary for the prosecution to prove the location of the obstruction exactly as laid.[71]

c. *Obstructions at Other Times.* — Where the act is charged to have been done on a certain date, an objection to evidence showing obstructions on different dates cannot be sustained; the remedy of the defendant is by motion to compel the prosecution to elect upon which act or offense it will claim a verdict.[72]

68. Louisville & N. R. Co. *v.* Com., 25 Ky. L. Rep. 1452, 78 S. W. 124; Dyerle *v.* State (Tex. Crim.), 68 S. W. 174. *Compare* State *v* Chicago, M. & St. P. R. Co., 77 Iowa 442, 42 N. W. 365, 4 L. R. A. 298, wherein it was held that evidence of acts done on other dates than those specified in the indictment may be allowed to go to the jury in the same manner as if the offense had been laid with a continuance. Plummer *v.* Ossipee, 59 N. H. 55, *holding* that evidence of an obstruction on a highway at one point is evidence that a similar object may be an obstruction at another point.

The Record of an Indictment and a Judgment against one person for obstructing a highway is not admissible in evidence upon the trial of a subsequent indictment against such person and another for obstructing the same highway, Clark *v.* Com., 77 Ky. 166.

Contra. — The former conviction of a charge of obstructing a highway may be given in evidence in a prosecution for willfully obstructing a highway, as showing the willfulness of the defendant's action. Dodson *v.* State (Tex. Crim.), 49 S. W. 78, decided under the Texas statutes.

69. Meuley *v.* State, 3 Tex. App. 382; Hill *v.* Supervisors of Road District No. 6, 10 Ohio St. 621.

Prescription or Dedication. — Under an indictment for obstructing a public highway which avers the obstruction generally without showing whether the road was established by dedication or prescription, proof of the obstruction of a highway established by either is sufficient to support a conviction. State *v.* Teeters, 97 Iowa 458, 66 N. W. 754.

Townway. — Evidence proving an obstruction of a townway is sufficient to support an indictment charging the defendant with obstructing a public street. State *v.* Beeman, 35 Me. 242.

70. Houston *v.* People, 63 Ill. 185; Martin *v.* People, 23 Ill. 342; Town of Lewiston *v.* Proctor, 27 Ill. 414.

71. Dodson *v.* State (Tex. Crim.), 49 S. W. 78; Seidschlag *v.* Town of Antioch, 207 Ill. 280, 69 N. E. 949, *affirming* 109 Ill. App. 291; State *v.* Lord, 16 N. H. 357, an indictment charging the defendant with erecting a dam at a certain place and thus overflowing a highway so as to make it impassable, the gravamen of the complaint being that the defendant caused injury to the highway by means of the dam.

72. State *v.* Chicago, M. & St. P. R. Co., 77 Iowa, 442, 42 N. W. 365, 4 L. R. A. 298. In this case the court stated that the rule appeared to be as above stated in all cases where the evidence tended to show that more than one offense of the kind charged

2. Intent. — A. In General. — Under some of the statutes it is held to be incumbent upon the prosecution to show that the defendant's act in obstructing the highway was willful in its character; otherwise he will not be called upon to justify his acts.[73]

B. Admission of Act. — An admission by the defendant that he placed the obstruction across the road has in some cases been held an admission of the intentional or willful obstruction.[74]

3. Order to Remove. — It has been held unnecessary for the prosecution on an indictment for obstructing a highway to prove the making of the order to remove the obstruction.[75] Nor is such an order conclusive evidence of the existence of a public highway.[76]

4. Justification. — A. In General. — On a prosecution for willfully obstructing a highway the burden of proof does not devolve upon the defendant to show excuse or justification on his part.[77]

B. Information Does Not Excuse. — A person charged with obstructing a public highway cannot prove good faith or negative the imputation of willfulness by evidence of what other persons may have told him with reference to his right to maintain the obstruction at the *locus in quo*, especially where he is bound by the judgment of the tribunal under which the public way in question was established.[78]

was committed, *citing* State *v.* Crimmins, 31 Kan. 376, 2 Pac. 574. The court also further held that such evidence could be considered as if the offense had been charged with a *continuendo*.

73. The Iowa Code (§ 3979) uses the words "willfully obstructing or injuring any public road or highway;" and these words have been construed to mean that if any person "intentionally" obstructs or injures a highway he shall be liable to punishment, so proof of the intentional placing of the obstruction in the highway satisfies the statutes. State *v.* Teeters, 97 Iowa 458, 66 N. W. 754.

Under the Texas Statute it must be shown that the act was done willfully, the word "willful" meaning with evil intent or legal malice, or without reasonable ground for believing the act to be lawful. Baker *v.* State, 21 Tex. App. 264, 17 S. W. 144; Laroe *v.* State, 30 Tex. App. 374, 17 S. W. 934. See also Watson *v.* State, 25 Tex. App. 651, 8 S. W. 817. And unless this proof is made there is no case against the defendant calling for any testimony on his part in excuse or justification. Brinkoeter *v.* State, 14 Tex. App. 67.

74. State *v.* Teeters, 97 Iowa 458, 66 N. W. 754, decided under § 3979 of the Iowa Code.

75. Township of Madison *v.* Gallagher, 159 Ill. 105, 42 N. E. 316, so holding under the Illinois Road Law.

Nor is the order to remove admissible in evidence against the dedendant. Richardson *v.* State (Tex. Crim.), 79 S. W. 536, where the court intimated, however, that the order might be admissible to prove that the defendant had protested against the removal of the obstruction before the commissioners' court, in order to bring home to him knowledge of the fact that he had caused the obstruction.

76. State *v.* Doane, 14 Wis. 483, so holding in an action against the landowner to recover the penalty prescribed by the Wisconsin statute then in force.

77. Brinkoeter *v.* State, 14 Tex. App. 67.

78. Kelly *v.* State (Tex. Crim.), 80 S. W. 382. *Compare* Laroe *v.* State, 30 Tex. App. 374, 17 S. W. 934; Sneed *v.* State, 28 Tex. App. 56, 11 S. W. 834, wherein it was held that evidence that the adjoining land-

IV. DEFECTS IN HIGHWAYS RESULTING IN INJURY TO PERSON OR PROPERTY.

1. Presumptions and Burden of Proof. — A. The Fact of the Defect. — a. *In General.* — One who seeks to recover damages for injuries either to person or property, alleged to have been the result of defective construction or maintenance of a highway, has the burden of proving the defect alleged.[79]

Customary Use of the Streets. — And where the public authorities are sought to be charged for injuries occasioned by the use of the street for purposes other than public travel, it would seem that it is only necessary for the plaintiff to prove that such use has been continued in such a manner as to render the same unsafe for public travel.[80]

b. *Defect Within the Highway.* — The evidence must be such as to prove that the defect or obstruction complained of was within the limits of the highway.[81]

B. Status of Injured Person as Traveler. — It must be proved that the injured person was in the use of the road or highway as a traveler.[82]

C. Rightful Use of Highway. — A traveler must show that he was using the street or highway in the usual and ordinary way

owner told the defendant to go ahead and build his pasture fence, and that he, the adjoining landowner, would move his pasture fence back so as to have a road of the proper width; that upon this agreement the defendant built the fence, was held admissible as tending to rebut the willful intent and also as part of the *res gestae*.

79. May *v.* Inhabitants of Princeton, 11 Metc. (Mass.) 442; Walsh *v.* City of Buffalo, 17 App. Div. 112, 44 N. Y. Supp. 942. For other cases in support of this rule see those cited in the succeeding notes of this subdivision.

Insufficiency Constituting Actual Obstruction. — In Byington *v.* Merrill, 112 Wis. 211, 88 N. W. 26, it was held that evidence tending to establish an insufficiency in the sidewalk or street which constituted an actual obstruction was sufficient to take the plaintiff's case to the jury upon the question whether the sidewalk or street was reasonably safe.

80. In Radichel *v.* Village of Kendall (Wis.), 99 N. W. 348, an action to recover damages for injuries sustained by reason of a fall occasioned by the thills of a buggy obstructing the sidewalk, the court held: "It was not essential to show that any particular buggy had been customarily left in the particular way and at the particular place as at the time of the accident. It was sufficient to show that appellant had allowed the street to be customarily used as a storage place for vehicles when they were temporarily out of use to such an extent as to render it unsafe for public use, and that the leaving of the buggy which caused the accident was a mere continuance of such custom."

81. Murphy *v.* City of Worcester, 159 Mass. 546, 34 N. E. 1080; Potts *v.* Allen, 19 R. I. 489, 34 Atl. 993; Stone *v.* Langworthy, 20 R. I. 602, 40 Atl. 832; Lester *v.* Town of Pittsford, 7 Vt. 158.

Evidence of wheel tracks is relevant on the question of where the usual travel on a highway is, and is competent to show the limits of a highway, as established by use. Plummer *v.* Ossipee, 59 N. H. 55.

82. Leslie *v.* City of Lewiston, 62 Me. 468, *holding* thus under the provisions of the Maine statute relating to the keeping of ways safe and convenient for travelers.

in which such street or highway was generally used, and if the evidence adduced by him shows that he was not so doing, he will be deemed guilty of contributory negligence.[83]

D. Necessity for Traveling on Sunday. — When traveling on Sunday is forbidden by statute except for certain reasons, one who has been injured while so traveling has the burden of proving the existence of the reason recognized as such an exception.[84]

E. Exact Place of Accident. — A person injured from an alleged defect in a highway is not held to proof of the exact place at which the accident occurred, where the defective condition is proved and shown to have come to the knowledge of the public authorities.[85]

83. Holding *v.* City of St. Joseph, 92 Mo. App. 143.

Evidence which merely shows that the plaintiff was traveling on the wrong side of a road, in violation of the city statute, does not, as a matter of law, defeat his action against the public authorities where his own fault or negligence does not contribute to the injury, but it is competent evidence of negligence on his part, which may be submitted to the jury upon the question whether he was exercising ordinary care. Damon *v.* Inhabitants of Scituate, 119 Mass. 66, 20 Am. Rep. 315. To the same effect, Smith *v.* Gardner, 11 Gray (Mass.) 418; Spofford *v.* Harlow, 3 Allen (Mass.) 176; Jones *v.* Andover, 10 Allen (Mass.) 18; Steele *v.* Burkhardt, 104 Mass. 59, 6 Am. Rep. 191.

Proof that the party using the highway did so in an unusual and extraordinary manner; that animals, vehicles, or freight not suitable or adapted to the way opened and prepared for the public use in the common intercourse of society, and in the transaction of usual and ordinary affairs of business, will relieve the town from liability, although the injuries may be the direct result of defects and imperfections which the town would be responsible for to individuals in the lawful and proper use of it. Wilson *v.* Granby, 47 Conn. 59, 36 Am. Rep. 51.

Evidence showing that the load on which the plaintiff was riding at the time of the accident was so unusual and extraordinary, both in weight and bulk, as to lead to the injury, has been held sufficient to relieve the town from liability. Wilson *v.* Granby, 47 Conn. 59, 36 Am. Rep. 51.

84. Johnson *v.* Irasburgh, 47 Vt. 28, 19 Am. Rep. 111; Hinchley *v.* Inhabitants of Penobscot, 42 Me. 89; Gregg *v.* Wyman, 4 Cush. (Mass.) 322; Bosworth *v.* Swansey, 10 Metc. (Mass.) 363, 43 Am. Dec. 441.

Testimony showing that the plaintiff was traveling on the Lord's day on a matter of his own business and not from pressure of any "necessity" upon himself, or "charity" toward any other person, was held to bar his recovery by reason of the Mass. Gen. Stats., ch. 84, § 2. Connolly *v.* City of Boston, 117 Mass. 64; Bosworth *v.* Swansey, 10 Metc. (Mass.) 363, 43 Am. Dec. 441.

Evidence showing that the plaintiff was traveling with his brother for the sole purpose of visiting a common friend whom they knew to be sick, and thought might be in need of assistance, and of rendering such assistance as they might find necessary, is sufficient to let the case go to the jury upon the question whether he was traveling lawfully or not, even though there is no evidence showing the ground of their knowledge or belief. Doyle *v.* Lynn, 118 Mass. 195, 19 Am. Rep. 431.

85. See also City of Omaha *v.* Kranz (Neb.), 97 N. W. 1059, where it was not disputed that the walk in question had been out of repair for a long time prior to the injury, and the defendant urged that the plaintiff was picked up several feet south of where the loose board was and that therefore he did not receive the injury until he reached the place where he was found, but the plaintiff's evi-

F. Defect as Proximate Cause of Injury. — a. *In General.* The question of proximate cause is necessarily present in every case of injury where damages are claimed to have resulted from a defective highway, whether at common law or under the statutes;[86] and one claiming to have been so injured has the burden of proving that the injury was the result of the defect alleged.[87] And it is held that his evidence in this respect must not leave the cause of the accident open to mere conjecture.[88]

b. *Neglect of Duty by Public Authorities.* — The injured person must in such case prove that there has been a neglect of duty on the part of the public authorities.[89]

dence was supported by that of a witness who saw him stumble and fall and the court refused to disturb the verdict for the plaintiff.

In Ghenn *v.* Inhabitants of Provincetown, 105 Mass. 313, the evidence of a husband was admitted to prove the condition of the highway and defects therein, in order to show that they were the defects which caused the injury to his wife and that she was mistaken in her location thereof.

86. Fehrman *v.* Town of Pine River (Wis.), 95 N. W. 105; Cunningham *v.* City of Thief River Falls, 84 Minn. 21, 86 N. W. 763.

Proximate Cause as a Matter of Law. — If it be found by the jury that a dangerous declivity has been negligently permitted to exist in a highway and that a traveler has fallen therefrom while exercising ordinary care, and no other cause for his fall is disclosed by the evidence, proximate cause may be rightly said to be shown as a matter of law. Fehrman *v.* Town of Pine River (Wis.), 95 N. W. 105.

87. *Maine.* — Moore *v.* Inhabitants of Abbot, 32 Me. 46; Mosher *v.* Inhabitants of Smithville, 84 Me. 334, 24 Atl. 876.

Massachusetts. — Adams *v.* Inhabitants of Carlisle, 21 Pick. 146; May *v.* Inhabitants of Princeton, 11 Metc. 442; Murphy *v.* City of Worcester, 159 Mass. 546, 34 N. E. 1080.

Michigan. — Jackson *v.* City of Lansing, 121 Mich. 279, 80 N. W. 8; Beall *v.* Township of Athens, 81 Mich. 536, 45 N. W. 1014.

Missouri. — Haller *v.* City of St. Louis, 176 Mo. 606, 75 S. W. 613.

New Hampshire. — Owen *v.* Town of Derry, 71 N. H. 405, 52 Atl. 926.

New York. — Hume *v.* Mayor of N. Y., 9 Hun 674; Smith *v.* Clarktown, 69 Hun 155, 23 N. Y. Supp. 245; Raschen *v.* Norton, 26 Misc. 842, 56 N. Y. Supp. 800; Walsh *v.* City of Buffalo, 17 App. Div. 112, 44 N. Y. Supp. 942.

Oklahoma. — City of Guthrie *v.* Thistle, 5 Okla. 517, 49 Pac. 1003.

Wisconsin. — Hein *v.* Village of Fairchild, 87 Wis. 258, 58 N. W. 413.

88. Dapper *v.* City of Milwaukee, 107 Wis. 88, 82 N. W. 725, where it was claimed that the injury was caused by icy or slippery pavements. See also Hyer *v.* Janesville, 101 Wis. 371, 77 N. W. 729.

89. Mosher *v.* Inhabitants of Smithville, 84 Me. 334, 24 Atl. 876; Moore *v.* Inhabitants of Abbot, 32 Me. 46; Murphy *v.* City of Worcester, 159 Mass. 546, 34 N. E. 1080; Cunningham *v.* City of Thief River Falls, 84 Minn. 21, 86 N. W. 763.

It is not sufficient for the plaintiff to prove a mere defect, as, in order to establish even a *prima facie* case, the plaintiff must show affirmatively, not only the defective condition of the road, but notice of such defect by the proper authorities, or that the condition of the road was obvious to any one, without any particular examination. Garrison *v.* Mayor of New York, 5 Bosw. (N. Y.) 497.

Usually it is not necessary to prove negligence or fault on the part of public officials by direct evidence, as ordinarily it may be a matter of legitimate inference from the existence of the defect for a considerable length of time, but the burden of

c. *Accumulations of Ice and Snow.* — In order to render the public authorities liable for accumulations of snow and ice on the streets and sidewalks it must be shown by direct evidence that such accumulations were the sole or proximate cause of the accident and caused obstructions of such a nature as to be dangerous *per se,* and constitute defects which a person using ordinary care and prudence could not avoid.[90]

Under the statutes of some states, before a plaintiff can recover for injuries sustained by reason of snow and ice on sidewalks, he must prove that the sidewalk when bare was defective, and that the accident was due in part at least to such defect.[91]

d. *Defect Frightening Horses.* — (1.) **Generally.** — In order to recover damages for injuries to a horse by reason of a defect in a public highway, the burden of proof is upon the plaintiff to show that the cause of his horse taking fright or running away was an obstruction or defect in the highway which the public authorities had negligently allowed to remain there.[92]

proof is on the plaintiff to establish it in some way as one of the facts mentioned in the statute on which the right to recover depends. Murphy *v.* City of Worcester, 159 Mass. 546, 34 N. E. 1080.

90. Aurora *v.* Parks, 21 Ill. App. 459; Aurora *v.* Pulfer, 56 Ill. 270; Rogers *v.* Newport, 62 Me. 101; Todd *v.* City of Troy, 61 N. Y. 506; Smith *v.* City of Brooklyn, 107 N. Y. 655, 14 N. E. 606; Hyer *v.* Town of Janesville, 101 Wis. 371, 77 N. W. 729.

There must be direct evidence or circumstances from which it can reasonably be inferred that the accident happened by reason of such accumulations or ridges, and not through mere slipperiness. Salzar *v.* Milwaukee, 97 Wis. 471, 73 N. W. 20; Gagan *v.* Janesville, 106 Wis. 662, 82 N. W. 558.

Under the West Virginia Statutes (Code of 1887, ch. 43, § 53), proof of the defect and the injury caused thereby is sufficient evidence to establish liability. Chapman *v.* Milton, 31 W. Va. 384, 7 S. E. 22.

Rough Ridges. — Evidence of a defect in a sidewalk caused by an accumulation of snow and ice allowed to remain there and form into rough ridges, rounded and slanting, so as to make it difficult and dangerous for persons to pass over it, is sufficient to render a city or town liable. Huston *v.* Council Bluffs, 33 Iowa 39, 36 L. R. A. 211.

91. Newton *v.* City of Worcester, 174 Mass. 181, 54 N. E. 521; Bailey *v.* City of Cambridge, 174 Mass. 188, 54 N. E. 523; decided under Mass. Stat. 1896, ch. 540.

The effect of this statute is to change the law as to liability for defects arising from snow and ice so far as to create an exemption from such liability in cases where the ice or snow is proved to be the sole proximate cause of the accident, but if there is any other operative defect, then the city may be liable, although the evidence may show that the accident was in part due to ice or snow. Newton *v.* City of Worcester, 174 Mass. 181, 54 N. E. 521.

92. Johnson *v.* City of Superior, 103 Wis. 66, 78 N. W. 1100; Jackson *v.* Town of Bellevieu, 30 Wis. 250; Ritger *v.* City of Milwaukee, 99 Wis. 190, 74 N. W. 815; Reid *v.* Town of Ripley, 59 Hun 628, 14 N. Y. Supp. 124; Houfe *v.* Town of Fulton, 29 Wis. 296; Cushing *v.* Bedford, 125 Mass. 526.

The injury must be shown to result from the unsafe condition of the way. Bailey *v.* Inhabitants of Belfast (Me.), 10 Atl. 452.

In Rebuttal. — If the defendants offer to prove that the accident occurred through the horses shying at

(2.) Knowledge of Character of Horse. — If the character of the horse is in question, the plaintiff must prove not only that he did not know and had no reason to believe or suppose that the horse was vicious, but he must also prove that he was not in fault in not discovering such viciousness. He must prove the use of ordinary care.[93]

Evidence of the Character and Habits of the Horse, both before and after the accident, may be received where the evidence is conflicting upon the question of the cause of the accident and the general character of the horse.[94]

G. KNOWLEDGE OF THE DEFECT. — a. *On Part of Injured Person.* A person using a sidewalk or street has the right to expect that it is open for use by the public, and may assume that it is free from obstruction and in a reasonably safe condition; hence in order to charge him with contributory negligence the evidence must show that he knew of the danger or defect, and that he was not exercising ordinary caution at the time of the accident.[95]

some other material or obstacle in the way after they had passed the obstruction complained of, the plaintiff may show that the horses shied at the same stones the day after the accident, as showing that such stones were likely to frighten horses. Wilson *v.* Town of Spafford, 57 Hun 589, 10 N. Y. Supp. 649.

93. Town of Winship *v.* Enfield, 42 N. H. 197.

Evidence that prior to the accident the horse had exhibited no signs of fright is properly admitted as proving that the plaintiff had no knowledge of any viciousness, and was therefore not guilty of contributory negligence. Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643.

Plaintiff may show that the gentleness of his horse had been subject to certain tests, and also the circumstances under which it had been so tested. Clinton *v.* Howard, 42 Conn. 294.

Where the viciousness of the horse contributed to the accident, but the plaintiff had never driven him before, and had no knowledge of his viciousness, and was using ordinary care, the plaintiff is not, as a matter of law, guilty of negligence in not knowing the horse's character, and the defendants were charged with the burden of proof. Daniels *v.* Saybrook, 34 Conn. 377.

94. Maggi *v.* Cutts, 123 Mass. 535.

Previously Driven Over Road. Evidence is admissible to show that the horse had been previously driven over one of two cross roads, at the junction of which the accident occurred, as tending to show why he left the traveled track in which the plaintiff intended to drive. Johnson *v.* City of Sioux City, 114 Iowa 137, 86 N. W. 212.

95. Davis *v.* City of Austin, 22 Tex. Civ. App. 460, 54 S. W. 927; Snow *v.* Inhabitants of Provincetown, 120 Mass. 580.

"In the absence of any knowledge upon the subject, or anything apparent to observation that should lead to a contradictory opinion, it may be presumed that a township has repaired a weak and shaky bridge, after the lapse of a year from the time that it was known to be in that condition; but it was eminently proper to submit to the jury the question of the plaintiff's knowledge and opportunities for knowing that it had not been repaired." Moore *v.* Twp. of Hazleton, 118 Mich. 425, 76 N. W. 977.

If a traveler does not know of a defect in a traveled track he is only bound to prove that he used such care as the great mass of ordinarily prudent men would exercise under like circumstances, as he has a right to assume that the walk is reasonably safe. Wall *v.* Town of Highland, 72 Wis. 435, 39 N. W. 560.

No Presumption Against Knowledge. — There is no presumption that a walk is in good condition for public travel in favor of a person who knows it to be defective, and if an injury results to him while traveling upon such road it will be presumed to have been caused by his want of due care, in the absence of evidence showing a reasonable excuse.[96]

Failure to Adopt Traveled Road. — If the traveler deviates from the traveled track, he must show that he had a sufficient reason for taking such course and the exercise of due care therein, otherwise he will be deemed guilty of contributory negligence.[97]

b. *On Part of Public Authorities.* — **(1.) Generally.** — In order to charge the public authorities with responsibility for injuries alleged to have resulted from a defect in a highway, the fact that they had either actual or constructive notice of the defect complained of is a substantive fact to be established by the evidence.[98]

96. Collins *v.* City of Janesville, 111 Wis. 348, 87 N. W. 241.

97. Briggs *v.* Guilford, 8 Vt. 264; Ramsey *v.* Rushville & M. G. R. Co., 81 Ind. 394.

Evidence which shows that the plaintiff has deviated from the traveled track on a road proves want of due care on his part, unless it is shown that the traveled track or way was obstructed or otherwise unsafe or dangerous, and that he exercised due care in so turning out of the usual path. Kelley *v.* Town of Fond du Lac, 31 Wis. 179.

Evidence showing that the traveler left the street with the intention of taking the path, but by mistake turned off the street too soon proves want of due care on his part in the use of the street, and bars his claim for damages. City of Scranton *v.* Hill, 102 Pa. St. 378, 48 Am. Rep. 211.

98. *United States.* — Mayor of New York *v.* Sheffield, 4 Wall. 181.

Alabama. — Mayor of Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424.

Colorado. — City of Boulder *v.* Niles, 9 Colo. 415, 12 Pac. 632.

Connecticut. — Manchester *v.* City of Hartford, 30 Conn. 118.

Illinois. — City of Belvidere *v.* Crichton, 81 Ill. App. 595; Sterling *v.* Merrill, 124 Ill. 522, 17 N. E. 6; Streator *v.* Chrisman, 82 Ill. App. 24; City of Chicago *v.* Langlass, 66 Ill. 361.

Indiana. — City of Madison *v.* Baker, 103 Ind. 31, 2 N. E. 236; Town of Lewisville *v.* Batson, 29 Ind. App. 21, 63 N. E. 861; City of Aurora *v.* Bitner, 100 Ind. 396.

Iowa. — Yeager *v.* Town of Spirit Lake, 115 Iowa 593, 88 N. W. 1095.

Kentucky. — City of Carlisle *v.* Secrest, 25 Ky. L. Rep. 336, 75 S. W. 268.

Maryland. — Kranz *v.* Baltimore, 64 Md. 491.

Massachusetts. — Crocker *v.* Springfield, 110 Mass. 134; Brummett *v.* City of Boston, 179 Mass. 26, 60 N. E. 388; Hinckley *v.* Town of Somerset, 145 Mass. 326, 14 N. E. 166.

Michigan — Hayes *v.* City of West Bay, 91 Mich. 418, 51 N. W. 1067; Dundas *v.* City of Lansing, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143.

Minnesota. — Peterson *v.* Village of Cokato, 84 Minn. 205, 87 N. W. 615.

Missouri. — Milledge *v.* Kansas City, 100 Mo. App. 490, 74 S. W. 892; Baustian *v.* Young, 152 Mo. 317, 52 S. W. 921; Carrington *v.* City of St. Louis, 89 Mo. 208; Young *v.* City of Webb City, 150 Mo. 333, 51 S. W. 709.

Nebraska. — Northdruft *v.* City of Lincoln, 96 N. W. 163.

New York. — Lloyd *v.* Village of Walton, 57 App. Div. 288, 67 N. Y. Supp. 929; Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 11 N. E. 43.

Texas. — Sherman *v.* Greening (Tex. Civ. App.), 73 S. W. 424.

Upon the question as to the necessity of proving actual notice to the public authorities in order to charge them in actions for injuries sustained from defects in streets, the court, in

Notice of Accumulations. — In order to render the public authorities liable for damages occasioned by accumulations of snow and ice, it is sufficient to prove notice of the defect, or to establish the existence of facts from which notice can be inferred, or circumstances from which it is apparent that the defective condition ought to have been known.[99]

Mere Slipperiness. — Evidence of mere slipperiness or smooth condition of the sidewalk is not of itself sufficient to hold the public authorities liable, without further proof of notice of a particularly slippery condition in a given place.[1]

City of Dallas *v.* Moore (Tex. Civ. App.), 74 S. W. 95, said: "Actual notice of the defect and the dangerous condition of the street upon the part of the city was not necessary to be shown in order to hold it liable. If those agents of the city who are charged with supervision, control and superintendence of the streets could, by the exercise of reasonable care and diligence, have known of the defective condition, the city will be charged. If there are apparent and obvious defects so near and closely related to a condition which is apparently safe, but in fact defective, that an investigation of the former would lead to a knowledge of the latter, then it may be said that the city should take notice of such latter defect. Whether such conditions do or do not exist, and what effect they would have in determining that knowledge of one defect would necessarily lead to knowledge of another, are ordinarily questions of fact to be submitted to the jury."

Defects Must Be Known. — In an action for personal injuries caused by a defective highway, brought under the Massachusetts Pub. Stat., ch. 52, § 18, the municipality cannot be made liable where there is no evidence that the defects were known, or as to how long they had continued, as in such a case it cannot be said that they were not using reasonable diligence to remove the obstruction or defects. Parker *v.* City of Boston, 175 Mass. 501, 56 N. E. 569; to the same effect, Martin *v.* City of Chelsea, 175 Mass. 516, 56 N. E. 703.

Telephone Message. — Evidence showing that a telephone message was sent to the city authorities prior to the accident to the effect that the street at the place where the injury occurred was in a defective condition is admissible as showing publicity or notoriety of the existence of the defect. City of Dallas *v.* Moore (Tex. Civ. App.), 74 S. W. 95.

99. Jansen *v.* Atchison, 16 Kan. 358; Riggs *v.* Florence, 27 Kan. 194; Salina *v.* Trosper, 27 Kan. 544; Emporia *v.* Schmidling, 33 Kan. 485, 6 Pac. 893; Blakeley *v.* Troy, 18 Hun (N. Y.) 167; City of Lincoln *v.* Smith, 28 Neb. 762, 45 N. W. 41; York *v.* Spellman, 19 Neb. 357, 27 N. W. 213.

Constructive notice of accumulation is proved by evidence showing a long continuance of an observably dangerous condition. McLaughlin *v.* Corry, 77 Pa. St. 109, 18 Am. Rep. 432.

Constructive notice is proved by evidence showing a continuous flow of water from a hydrant for some time prior to the accident. Corbett *v.* City of Troy, 53 Hun 228, 6 N. Y. Supp. 381; Reich *v.* New York, 12 Daly (N. Y.) 72.

Notice of the accumulations causing the obstruction or defect may be proven by showing the custom for the police patrolman to report the non-removal of the same to the inspector, whose duty it was to report the defect at police headquarters. Twogood *v.* New York, 102 N. Y. 216, 6 N. E. 275.

1. *Colorado.* — Boulder *v.* Niles, 9 Colo. 415, 12 Pac. 632.

Illinois. — Chicago *v.* McGiven, 78 Ill. 347.

Iowa. — Broburg *v.* City of Des Moines, 63 Iowa 523, 19 N. W. 340, 50 Am. Rep. 756.

Maine. — Smyth *v.* Bangor, 72 Me. 249.

In order to render the public authorities liable for injuries sustained through snow and ice on sidewalks, the general rule is that the plaintiff must prove a substantial structural defect in the street or highway combined with the action of the elements, or the accumulations must be of such a nature as to constitute a dangerous condition and actionable defect and thus prove notice.[2]

Smooth, Dangerous Ice. — It has, however, been held that if the sidewalk is found to be in a dangerous condition by reason of smooth ice, of which the city has notice and which it could by reasonable expenditure remove, evidence of these facts is sufficient to render the public authorities liable.[3]

Low Temperature. — But evidence which merely shows the existence of ice by reason of the low temperature is not sufficient to hold the public authorities chargeable with negligence.[4]

(2.) Existence for Requisite Time. — It must be shown that the defects existed for such a length of time as to enable the jury to say

Massachusetts. — Pinkham *v.* Topsfield, 104 Mass. 78; McKean *v.* Town of Salem, 148 Mass. 109, 19 N. E. 21.

Michigan. — McKellar *v.* Detroit, 57 Mich. 158, 23 N. W. 621, 58 Am. Rep. 357.

Minnesota. — Henkes *v.* City of Minnesota, 42 Minn. 530, 44 N. W. 1026.

Nebraska. — Bell *v.* York, 31 Neb. 842, 48 N. W. 878; Nebraska City *v.* Rathbone, 20 Neb. 288, 29 N. W. 920.

New York. — Urquhard *v.* Ogdensburg, 91 N. Y. 67, 43 Am. Rep. 655.

Ohio. — Chase *v.* Cleveland, 44 Ohio St. 504, 58 Am. Rep. 843.

Pennsylvania. — Mauch Chunk *v.* Kline, 100 Pa. St. 119, 45 Am. Rep. 364.

Wisconsin. — Cook *v.* City of Milwaukee, 24 Wis. 270, 1 Am. Rep. 183; Grossenbach *v.* City of Milwaukee, 65 Wis. 31, 26 N. W. 182, 56 Am. Rep. 614.

2. *Kansas.* — Atchison *v.* King, 9 Kan. 375.

Massachusetts. — Adams *v.* Chicopee, 147 Mass. 440, 18 N. E. 231.

Michigan. — McKellar *v.* Detroit, 57 Mich. 158, 23 N. W. 621, 58 Am. Rep. 357.

Nebraska. — Lincoln *v.* Smith, 28 Neb. 762, 45 N. W. 41.

New York. — Harrington *v.* Buffalo, 121 N. Y. 147, 24 N. E. 186; McNally *v.* Cohoes, 127 N. Y. 350, 27 N. E. 1043; Lichtenstein *v.* New York, 159 N. Y. 500, 54 N. E. 67.

Pennsylvania. — Decker *v.* Scranton, 151 Pa. St. 241, 25 Atl. 36.

Rhode Island. — Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331.

Wisconsin. — Cook *v.* City of Milwaukee, 24 Wis. 270, 1 Am. Dec. 183; Grossenbach *v.* City of Milwaukee, 65 Wis. 31, 26 N. W. 182, 56 Am. Rep. 614; Kleimer *v.* Madison, 104 Wis. 339, 80 N. W. 453; DePere *v.* Hibbard, 104 Wis. 666, 80 N. W. 933; Dapper *v.* City of Milwaukee, 107 Wis. 88, 82 N. W. 725.

Ice on Sidewalks. — Evidence that ice formed on the sidewalk at a place where the accident occurred through surface water being allowed to flow thereon through a defective drain-pipe shows a defective condition outside of the icy condition. Brown *v.* White, 202 Pa. St. 97, 51 Atl. 962. So does evidence showing a rounded roadway only eleven feet wide, covered in part with smooth, hard ice, and a structural defect of a steep slope at the side of a gutter or brook, incumbered with snow, and unguarded. Carville *v.* Inhabitants of Westford, 163 Mass. 644, 163 N. E. 544.

3. City of Hartford *v.* Talcott, 48 Conn. 525, 40 Am. Rep. 189; Cloughessey *v.* Town of Waterbury, 51 Conn. 405, 50 Am. Rep. 38.

4. Kaveny *v.* Troy, 108 N. Y. 571, 15 N. E. 726.

that the city, in the actual discharge of its duties toward the citizens, ought to have discovered and remedied the defect.[5]

Sufficient Time to Make Repairs. — It is also necessary for the plaintiff to prove the lapse of a sufficient length of time after the public authorities have received notice of the defect to allow them to make the necessary repairs.[6]

(3.) Sufficiency and Presumption of Notice. — (A.) GENERALLY. — Upon the question of the sufficiency of notice to be proved in order to charge public authorities with notice of defects and obstructions in highways, the question as to what facts will be sufficient to put them upon inquiry depends upon a variety of conditions; such as the length of time the defect has existed, its notoriety, the frequency of travel, the character of the defect itself, and the like.[7]

5. Walsh *v.* City of Buffalo, 17 App. Div. 112, 44 N. Y. Supp. 942.

Evidence which shows the existence of the defect long enough for the commissioners of highways to have knowledge of its presence is sufficient to charge the municipality with notice of its presence. Hoffart *v.* Town of West Turin, 90 App. Div. 348, 85 N. Y. Supp. 471.

Knowledge of a defective condition of a highway may be imputed where it has existed for over two months. Davis *v.* Town of Guilford, 55 Conn. 351, 11 Atl. 350.

Evidence showing that the limb of a tree which fell upon the plaintiff was in a rotten condition and that other branches of the tree overhanging a sidewalk had fallen the month before, and so rendered the use of the sidewalk dangerous for the public, is sufficient to charge the public authorities with notice of the dangerous character of the walk, as the corporation should have made tests in order to find out the condition of the overhanging branches, and thus avoid the danger which might arise therefrom. McGarey *v.* City of N. Y., 89 App. Div. 500, 85 N. Y. Supp. 861.

6. City of Chicago *v.* Langlass, 66 Ill. 361, wherein the sidewalk was originally constructed in a proper manner, and subsequently became unsafe by reason of use and natural decay. Crawford *v.* City of New York, 174 N. Y. 518, 66 N. E. 1106, in which case evidence showing the number of miles of sidewalk in the city was held admissible as bearing upon the question of time to repair.

Opportunity to Remove. — If it is shown that the city had an opportunity to remove a rough surface of snow and ice, it will be held liable although the condition was made more dangerous by a subsequent fall of snow, where evidence shows that the injury would not have been sustained but for such uneven and rough condition, occasioned by the old snow and ice being left upon the sidewalk. Hodges *v.* City of Waterloo, 109 Iowa 444, 80 N. W. 523. To the same effect: Kinney *v.* Troy, 108 N. Y. 567, 15 N. E. 728; Kaveny *v.* Troy, 108 N. Y. 571, 15 N. E. 726; Foxworthy *v.* Hastings, 25 Neb. 133, 41 N. W. 132; Hayes *v.* Cambridge, 136 Mass. 402.

Knowledge of a defective condition of a walk will be presumed from the fact that it is out of repair and unsafe to travel upon, and is allowed to remain in such condition for such a length of time that the public authorities by the exercise of reasonable care might have acquainted themselves of the fact, and in such a case proof of actual notice need not be given. City of Chicago *v.* Dalle, 115 Ill. 386, 5 N. E. 578; City of Springfield *v.* Doyle, 76 Ill. 202.

If the defect complained of was palpable, dangerous, and had existed for a long time, the jury may infer either negligent supervision and ignorance consequent upon and chargeable to such neglect, or notice of the defect and a disregard of the duty to repair it. Manchester *v.* City of Hartford, 30 Conn. 118.

7. Klein *v.* City of Dallas, 71 Tex. 280, 8 S. W. 90.

(B.) Knowledge of Members of Corporate Bodies. — The public authorities will be chargeable with notice of the defective condition where the evidence shows that notice thereof has been communicated to a member of their body, provided such notice is communicated to him in his line of duty.[8]

But notice to the council of defects which had been repaired before the accident occurred will not charge the authorities with notice of those which caused the injury, although they existed at the place where the repairs were made.[9]

(C.) Officials Frequently Passing. — And evidence showing that the city officials reside in close proximity to the place of the accident and pass by it daily, has been held sufficient to charge the public authorities with notice of the defective condition of the highway.[10]

Notice will be inferred from the fact that the defect ought to have been found out by the exercise of ordinary diligence. City of Madison *v.* Baker, 103 Ind. 31, 2 N. E. 236.

The existence of an obstruction in a street for more than thirty days is sufficient to warrant the inference of knowledge on the part of the city. City of Logansport *v.* Justice, 74 Ind. 378.

The Position of a Defect when taken into consideration with the condition of the road is a fact from which the public authorities might have inferred such defective condition and is sufficient to charge them with notice thereof. Tilton *v.* Inhabitants of Wenham, 172 Mass. 407, 52 N. E. 514.

8. Carter *v.* Town of Monticello, 68 Iowa 178, 26 N. W. 129; City of Denver *v.* Dean, 10 Colo. 375, 16 Pac. 30.

Alderman. — Proof of notice given to an alderman of the district in which the accident occurs is sufficient to charge the city authorities with notice of the defective condition of the walk; especially, where such alderman is a member of the committee having charge of the streets, although a notice which is general in its terms will not be sufficient to prove their knowledge of any particular defect in the sidewalk. Dundas *v.* City of Lansing, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143.

Police Officer's Knowledge. — Proof that a member of the police force has knowledge of the obstruction or defect in a sidewalk is sufficient to charge the city with notice. Carrington *v.* City of St. Louis, 89 Mo. 208; Palestine *v.* Hassell (Tex. Civ. App.), 40 S. W. 147.

Notice is shown by evidence that the walk in question is patrolled by a policeman, and has been in a visibly defective state for nine days. Fortin *v.* Easthampton, 145 Mass. 196, 13 N. E. 599.

Police Notifying City Attorney. Evidence showing that the existence of an unauthorized ditch, about two feet in depth, across a public street, for about three weeks, attracted the attention of the policeman who notified the city attorney, is sufficient to charge the city with notice. City of Fort Worth *v.* Johnson, 84 Tex. 137, 19 S. W. 361.

Road Commissioner. — The fact that a witness describes the defect and testifies that he told the road commissioner of the town thereof is evidence from which the jury may rightly infer that the road commissioner had notice of the defect. Cowan *v.* Bricksport, 98 Me. 305, 56 Atl. 901.

Knowledge of Trustee. — Actual knowledge on the part of a township trustee of a patent defect in a public highway, located in his township, is sufficient to satisfy the requirement of § 48, p. 42, of the Kan. Gen. Stat., 1897, relating to notice. Madison Twp. *v.* Scott, 9 Kan. App. 871, 61 Pac. 967.

9. Carter *v.* Town of Monticello, 68 Iowa 178, 26 N. W. 129.

10. Malloy *v.* Twp. of Walker, 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695.

(D.) General Bad Condition.— Although the municipality had no notice of the particular defect which occasioned the injury, it will be liable for the consequences of the defect where there is sufficient proof of notice of the bad condition of the sidewalk in general at the place where the accident occurred.[11] There is authority, however, that notice of the defect which caused the injury will not be chargeable from the fact of knowledge of the general defective condition.[12]

Defect Open and Visible. — It has been held that the identical defect must be shown to have been open and visible in order to charge the public authorities with constructive notice thereof; and that no question with respect to other and different defects in the locality near by can be admitted.[13]

Defect Not Visible. — Where the defect or obstruction complained of is not usually visible, knowledge on the part of the public authorities of the defect in question will not be inferred.[14]

(E.) Time Necessary to Raise Presumption. — How long the defect must have been visible in order to give rise to a presumption of

Selectman Passing Over. — Evidence showing that the defective walk in question was passed over daily by one of the selectmen of the town, and was in a very bad condition for some time, is sufficient to charge the authorities with notice of its condition as showing that they had, or with reasonable diligence might have had, knowledge of its condition, although such evidence does not show that any one had previous notice of the rottenness of the individual plank in question, as proper care and diligence would have revealed such fact. Noyes *v.* Inhabitants of Gardner, 147 Mass. 505, 18 N. E. 423, 1 L. R. A. 354. Fortin *v.* Easthampton, 145 Mass. 196, 13 N. E. 599, to the same effect.

11. City of Platsmouth *v.* Mitchell, 20 Neb. 228, 29 N. W. 593.

Evidence showing that the village authorities had knowledge of the defective condition of the walk for its entire length is sufficient to support the plaintiff's claim without evidence showing notice of the particular defect. Grattan *v.* Village of Williamson, 116 Mich, 462, 74 N. W. 668.

The fact that the city officers knew that the general condition of a walk was such that from mere decay an accident was liable to happen upon it at any moment is sufficient to charge the city with negligence if it neglects to repair, without bringing home to the authorities actual knowledge of the looseness of the particular plank which happened to occasion the injury. Weisenberg *v.* Appleton, 26 Wis. 56.

12. Shelby *v.* Clagett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606, *holding* that in order to charge, as a matter of law, the public authorities with notice of a particular defect from their knowledge of the existence of a general defect, the former should be of the same character as the latter, or at least so related to it that the particular defect is a usual concomitant of the general one.

13. Ruggles *v.* Town of Nevada, 63 Iowa 185, 18 N. W. 866.

The mere fact that a barrier erected by the public authorities upon a highway along the edge of a pond was in a rotten condition and was broken down, is not sufficient to charge the public authorities with notice of its condition where there is no proof as to how the barrier was broken, or how the plaintiff fell into the pond, other evidence showing that he was in the habit of frequenting the pond and leaning against the barrier, and was very venturesome. Eckert *v.* Town of Shawangunk, 77 App. Div. 645, 78 N. Y. Supp. 904.

14. Lewisville *v.* Batson, 29 Ind. App. 21, 63 N. E. 861; Matthews *v.* New York, 78 App. Div. 422, 80 N.

notice to the municipality must be determined from the circumstances of the particular case.[15]

(F.) Failure to Repair. — Negligence will be inferred from the fact that the public authorities have failed to remove the obstruction or remedy the defect for such a length of time as to afford a presumption of the knowledge of the existence thereof.[16]

H. Matters of Defense. — a. *Reasonable Care and Diligence.* (1.) Generally. — The public authorities may meet a *prima facie* case by showing that they have exercised all reasonable means and efforts to clear the highway from such obstructions as that complained of.[17]

(2.) Defect Frightening Horses. — In an action to recover damages for an injury to a horse through a defect in a highway, it may be shown in defense that the fright or uncontrollableness of the horse was not produced by the defect in the highway itself or by the presence of any object in it which the public authorities in the exercise of reasonable care and prudence were bound to remove on account of its nature and tendency to frighten horses.[18]

b. *Want of Funds.* — In actions to recover damages for injuries sustained through defective highways where the defense sets up the

Y. Supp. 360, where the accident was occasioned by a coal hole in the sidewalk, the defective condition of which was on the inside, and therefore not visible.

15. Seven Years Enough. — Lane *v.* Town of Hancock, 67 Hun 623, 22 N. Y. Supp. 470.

Evidence showing a condition existing for a long time before the accident and the result a natural one, is sufficient to charge constructive notice. Kitchen *v.* Union Twp., 171 Pa. St. 145, 33 Atl. 76.

Evidence of dangerous condition for five or six weeks prior to the accident is sufficient to charge the public authorities with notice. Philadelphia *v.* Smith (Pa.), 16 Atl. 493.

Evidence which shows that the surface of a sidewalk was rendered irregular and had been in an unsafe condition for a week prior to the accident, is sufficient to go to the jury, upon the question of the city's having constructive notice of such defect. Hodges *v.* City of Waterloo, 109 Iowa 444, 80 N. W. 523.

Rotten, Worn Out Considerable Time. — Where the rotten and worn-out condition of the sidewalk, as testified to by witnesses, was such that, in the nature of things, must have continued for a considerable length of time, the public authorities were charged with constructive notice of such defects. Peterson *v.* Village of Cokato, 84 Minn. 205, 87 N. W. 615.

16. Foley *v.* City of Troy, 45 Hun (N. Y.) 396; Requa *v.* City of Rochester, 45 N. Y. 129; Harrington *v.* Buffalo, 121 N. Y. 147, 24 N. E. 186; Maus *v.* City of Springfield, 101 Mo. 613, 14 S. W. 630, 20 Am. St. Rep. 634.

17. Hayes *v.* Cambridge, 136 Mass. 402; Landlot *v.* Norwich, 37 Conn. 615; Bly *v.* Whitehall, 120 N. Y. 506, 24 N. E. 943; Battersby *v.* New York, 7 Daly (N. Y.) 16. See also Milledge *v.* Kansas City, 100 Mo. App. 490, 74 S. W. 892.

Snow and Ice. — Witnesses for the defendant can be examined as to the presence of ice in the middle of the street and upon such streets and as to when such ice formed, in order to prove that there was an ice storm on the day in question as claimed by the defendant and as showing want of time to remove. Driscoll *v.* City of Ansonia, 73 Conn. 743, 47 Atl. 718.

18. Kelley *v.* Town of Fond du Lac, 31 Wis. 179; Foshay *v.* Glen Haven, 25 Wis. 288; Morse *v.* Richmond, 41 Vt. 435.

want of funds wherewith to make the necessary repairs of the streets or sidewalks, the burden of proof is upon the defendant to show the lack of such funds.[19]

At Time of Accident. — But in order to constitute a good defense in such actions such evidence must show a want of funds at the time of the accident.[20]

Expenditure of Funds. — But the mere proof of the fact that the public authorities have expended all the money is not sufficient to excuse them from liability in all cases.[21]

2. Substance and Mode of Proof. — A. DIRECT EVIDENCE. — a. *In General.* — Where the facts relating to the safety or unsafety of the *locus in quo* are such that they can be understood by men of ordinary experience without the aid of the opinions of others, such opinions are not admissible.[22]

19. Bullock *v.* Town of Durham, 64 Hun 380, 19 N. Y. Supp. 635; Hover *v.* Barkhoof, 44 N. Y. 113; Adsit *v.* Brady, 4 Hill 630; Clapper *v.* Town of Waterford, 131 N. Y. 382, 30 N. E. 240; Lane *v.* Town of Hancock, 67 Hun 623, 22 N. Y. Supp. 470; Bidwell *v.* Town of Murray, 40 Hun (N. Y.) 190.

But the defense of want of funds with which to make repairs will not be sustained where the evidence shows that one of the commissioners had procured materials to make the necessary repairs just before the accident and that on the morning after the accident the towns made the needed repairs, showing that the commissioners had the requisite funds or means to repair. Getty *v.* Towns of Hamlin and Kendall, 46 Hun (N. Y.) 1.

20. Bryant *v.* Town of Randolph, 53 Hun 631, 6 N. Y. Supp. 438. In this case evidence that the public authorities had not had sufficient funds with which to make repairs upon highways for eighteen months prior to the accident was held properly excluded, as it relates to a period prior to that accident.

21. Proof that the authorities had expended all the money at their disposal in repairing the streets of a city will not excuse it from liability, where the streets are proved to be insufficiently repaired, as every municipality is bound at its peril to keep its highways in sufficient repair or to take precautionary means to protect the public against danger. Prideaux *v.* City of Mineral Point, 43 Wis. 513.

22. *United States.* — Town of Watertown *v.* Greaves, 50 C. C. A. 172, 112 Fed. 183, 56 L. R. A. 865.

Connecticut. — Clinton *v.* Howard, 42 Conn. 294; Dunham's App., 27 Conn. 192; Ryan *v.* Town of Bristol, 63 Conn. 26, 27 Atl. 309.

Illinois. — Centralia *v.* Baker, 36 Ill. App. 46; Village of Fairbury *v.* Rogers, 98 Ill. 554.

Iowa. — Spears *v.* Town of Mt. Ayr, 66 Iowa 721, 24 N. W. 504; Hollenbeck *v.* City of Marshalltown, 62 Iowa 21, 17 N. W. 155.

Kansas. — City of Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933.

Massachusetts. — Redford *v.* City of Woburn, 176 Mass. 520, 57 N. E. 1008; Lamb *v.* City of Worcester, 177 Mass. 82, 58 N. E. 474.

Michigan. — Evans *v.* People, 12 Mich. 27; Smead *v.* Lake Shore & M. S. R. Co., 58 Mich. 200, 24 N. W. 761; Smith *v.* Township of Sherwood, 62 Mich. 159, 28 N. W. 806; Harris *v.* Township of Clinton, 64 Mich. 447, 31 N. W. 425; Langworthy *v.* Township of Green, 88 Mich. 207, 50 N. W. 130; Girard *v.* City of Kalamazoo, 92 Mich. 610, 52 N. W. 1021.

Minnesota. — Tabor *v.* St. Paul, 36 Minn. 188, 30 N. W. 765.

Missouri. — Eubank *v.* City of Edina, 88 Mo. 650.

Montana. — Leonard *v.* City of Butte, 25 Mont. 410, 65 Pac. 425; Metz *v.* City of Butte, 27 Mont. 506, 71 Pac. 761.

b. *Matters of Professional Skill.* — Where, however, the question of the sufficiency or insufficiency of a highway is one requiring technical knowledge, the testimony of a witness properly qualified[23] may be received.[24]

c. *Matters of Knowledge and Observation.* — Opinions have been held admissible in connection with the facts testified to on which they are founded; as, for example, where the witness testifies from his personal knowledge derived from observation.[25] Thus the testi-

Ohio. — Stillwater Tpk. Co. *v.* Coover, 26 Ohio St. 520.

Pennsylvania. — Siegler *v.* Mellinger, 203 Pa. St. 256, 52 Atl. 175.

Rhode Island. — Stone *v.* Langworthy, 20 R. I. 602, 40 Atl. 832.

Texas. — Shelley *v.* City of Austin, 74 Tex. 608, 12 S. W. 753.

Vermont. — Lester *v.* Town of Pittsford, 7 Vt. 158; Crane *v.* Northfield, 33 Vt. 124; Weeks *v.* Town of Lyndon, 54 Vt. 638.

Wisconsin. — Strong *v.* Stevens Point, 62 Wis. 255, 22 N. W. 425; Kelley *v.* Town of Fond du Lac, 31 Wis. 179; Wiltse *v.* Town of Tilden, 77 Wis. 152, 46 N. W. 234.

In passing upon the admissibility of the opinion of witnesses upon the question of the safety of highways, the court, in Griffin *v.* Town of Willow, 43 Wis. 509, said: "It was for the jury to determine the weight to be given to the testimony of the several witnesses. . . . And it is dangerous in practice, as it is wrong in principle, to admit witnesses to testify to the very conclusions of fact which the jury is impaneled to find."

Founded on Appearance and Inspection. — Evidence of a witness touching the condition of the bridge and stating that from its appearance and his inspection he should think it needed repairs, is properly excluded. The Balbridge & Courtney Bridge Co. *v.* Cartrett, 75 Tex. 628, 13 S. W. 8.

In an action to recover damages for injuries sustained through a defective bridge, the evidence of a witness that he knew nothing about a bridge of that kind, but it seemed to be good except the sidings, which were shabby, is inadmissible. The Balbridge & Courtney Bridge Co. *v.* Cartrett, 75 Tex. 628, 13 S. W. 8.

23. McDonald *v.* State, 127 N. Y.

24. Taylor *v.* Town of Monroe, 43 Conn. 36, *holding* that testimony of professional road-builders who had examined the road, as to the necessity of protection at the place in question, is admissible where the necessity of such protection is the real test in the case. See also Brown *v.* Town of Swanton, 69 Vt. 53, 37 Atl. 280, wherein it was held that testimony of the person who built the structure that he had found it had narrowed in places so that it would not perform the functions for which it was originally intended was admissible as showing that fact; Lester *v.* Town of Pittsford, 7 Vt. 158; Clinton *v.* Howard, 42 Conn. 294.

The testimony of a civil engineer and bridge-builder, as a witness for the state in an action for damages for injuries sustained through a defect in the highway, that, in his judgment, stones of the nature, size and weight of those claimants were moving were an excessive load for the bridge as originally constructed, was held to be error, as the opinion of the witness as to whether the original should have been stronger is not competent, and the question as to whether such stones were negligently moved was one for the board of claims to determine. McDonald *v.* State, 127 N. Y. 18, 27 N. E. 358; Eastman *v.* State, 127 N. Y. 18, 27 N. E. 358.

25. *Connecticut.* — Clinton *v.* Howard, 42 Conn. 294; Taylor *v.* Town of Monroe, 43 Conn. 36; Sydlemar *v.* Beckwith, 43 Conn. 9; Dunham's Appeal, 27 Conn. 197; Ryan *v.* Town of Bristol, 63 Conn. 26, 27 Atl. 309.

Kansas. — Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677.

mony of persons whose business and observation give them accurate information on the question of the kind or durability of materials used in bridges or walks may be of great value to the jury, and is properly received in evidence.[26] And testimony as to the relative condition of the walk at different times by witnesses who state that it was of the same condition at one time as another is competent as proving a fact and not a conclusion.[27]

The Nature and Extent of the Defect may be proved by witnesses who testify from their own knowledge to the condition of the highway at the time and place of the accident.[28]

As to Repairs. — Where a witness has stated facts within his knowledge as to the condition of the road at the time of the accident and has given testimony in answer to questions calling for comparison at the time of the accident and subsequent thereto, he may be asked whether it has been rectified since the accident.[29]

B. INDIRECT EVIDENCE. — a. *In General.* — Necessarily resort is frequently had to circumstantial evidence to prove what was the condition of a highway at a particular time and place.[30] As for

Maryland. — Baltimore & Limited Tpk. Co. *v.* Cassell, 66 Md. 419, 7 Atl. 805.

Michigan. — Laughlin *v.* Street R. Co. of Grand Rapids, 62 Mich. 220, 28 N. W. 873; Brown *v.* City of Owosso, 130 Mich. 107, 89 N. W. 568.

Pennsylvania. — Kitchen *v.* Union Twp., 171 Pa. St. 145, 33 Atl. 76; McNerney *v.* City of Reading, 150 Pa. St. 611, 25 Atl. 57.

Vermont. — Clifford *v.* Richardson, 18 Vt. 620.

Upon the question as to allowing a witness to give his opinion concerning the safety of a road or crossing, the court, in Laughlin *v.* Street Railroad Co. of Grand Rapids, 62 Mich. 220, 28 N. W. 873, said: "No amount of description can enable a jury to see the place as the witness saw it, and while witnesses must describe the place as well as they can, it is always competent for those who are familiar with the highways and their use to give their impressions received at the time concerning safety or convenience of passage, and other conditions of an analogous nature, as they are not strictly scientific questions, but come within familiar principles."

26. McConnell *v.* Osage, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778. To the same effect, Ferguson *v.* Davis Co., 57 Iowa 601, 10 N. W. 906; Muldowney *v.* Railroad Co., 36 Iowa 462.

27. Yeager *v.* Town of Spirit Lake, 115 Iowa 593, 88 N. W. 1095.

28. Young *v.* Webb City, 150 Mo. 333, 51 S. W. 709; Merkle *v.* Town of Bennington, 68 Mich. 133, 35 N. W. 846; Fuller *v.* City of Jackson, 92 Mich. 197, 52 N. W. 1075. See also Brown *v.* Town of Swanton, 69 Vt. 53, 37 Atl. 280. *Compare* Tyson *v.* Baltimore Co., 28 Md. 510.

29. Baker *v.* City of Madison, 62 Wis. 137, 22 N. W. 141.

30. McLeod *v.* Spokane, 26 Wash. 346, 67 Pac. 74, where the defect complained of was an open cellarway in a sidewalk, evidence that the cellar was not used as a place of business was held pertinent in showing the use and purpose of the way.

Changed Condition. — Evidence showing a changed condition of the highway since the accident is admissible where such changed condition only incidentally appears in the evidence by which the plaintiff sought to establish the condition of the *locus in quo* at the time of the occurrence of the accident, and it is shown that such evidence was received in that view and for that purpose alone, and where the witness has testified that the condition was just the same, except in one particu-

example, the construction of the way in question and the nature of the materials used;[31] the character of the way and its frequent use for travel at the place in question,[32] and the like.

Manner of Lighting. — The manner in which the public authorities light the streets has also been held admissible in evidence in such actions.[33]

b. *Measurements.* — And evidence of measurements of the place of the injury made at the time and subsequent thereto has been held admissible in some cases,[34] but not where subsequent changes have so affected the highway as to leave no reasonable basis therefor.[35]

c. *General Bad Condition of Highway.* — **(1.) As Showing Existence of Defect.** — Evidence of the general bad condition of the highway in question is not admissible for the purpose of showing that the defect in question actually existed.[36]

lar, the surface of the approach being the same as it then was. Stone *v.* Town of Poland, 81 Hun 132, 30 N. Y. Supp. 748.

Nature and Character of Defect. So evidence showing the nature, position and character of the defect complained of has been admitted upon the ground that it may tend to prove that the object or defect was or was not naturally calculated to frighten horses. Darling *v.* Westmoreland, 52 N. H. 401, 13 Am. Rep. 55; House *v.* Metcalf, 27 Conn. 632.

31. McConnell *v.* City of Osage, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778. See also Kenworthy *v.* Town of Ironton, 41 Wis. 647.

32. Porter Co. *v.* Dombke, 94 Ind. 72. See also Clark *v.* Town of Corinth, 41 Vt. 449.

33. McLeod *v.* City of Spokane, 26 Wash. 346, 67 Pac. 74.

34. Cheney *v.* Ryegate, 55 Vt. 499; Nesbet *v.* Town of Garner, 75 Iowa 314, 39 N. W. 516, 1 L. R. A. 152. See also Baker *v.* Madison, 62 Wis. 137, 22 N. W. 141. *Compare* Brooks *v.* Acton, 117 Mass. 204.

The evidence of a witness that he had, subsequent to the injury, measured the sidewalk in order to get the exact location of the defect, is admissible where he shows that he was able to locate the place. Duncan *v.* City of Grand Rapids (Wis.), 99 N. W. 317.

Where evidence as to the height of stakes above the sidewalk is contradicted by defendants proving the height at which they appeared after the accident by measurement to be much less, evidence showing that such stakes had been driven down before the taking of such measurement by the defendant is admissible. City of Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624.

35. Prahl *v.* Town of Waupaca, 109 Wis. 299, 85 N. W. 350. See also Langworthy *v.* Township of Green, 88 Mich. 207, 50 N. W. 130.

36. Trerice *v.* Barteau, 54 Wis. 99, 11 N. W. 244. See also Lyon *v.* Grand Rapids (Wis.), 99 N. W. 311.

In Dundas *v.* City of Lansing, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143, the court refused to allow testimony showing the general bad and defective condition of the sidewalks a block or more each way from the *locus in quo*, saying: "It is going far enough to hold that it may be shown that accidents have happened to other people who were exercising ordinary care, on account of the particular defect complained of; but such testimony is admissible mainly as tending to show the dangerous character of the defect — in other words, that on account thereof the street or sidewalk or cross-walk was not reasonably safe and fit for travel. Very remotely, and in connection with other testimony showing the length of time the defect had existed, it might have a bearing upon the question of notice to the municipality.

(2.) As Showing Notice. — Evidence of the general bad condition of the way in question is very generally received as showing notice thereof on the part of the public authorities.[37]

(3.) As Showing Negligence. — Such evidence has also been held admissible as proving negligence on the part of the public authorities.[38]

d. *Condition of Highway at Other Places.* — **(1.) As Showing Defect in Question.** — There is a conflict in the authorities upon the question as to how far evidence of defects in other places in the vicinity is admissible as showing the condition of the *locus in quo*. Some of the courts have held such evidence admissible upon the ground that it is not collateral to the issue, but is pertinent evidence bearing upon it, as it is a fact illustrating, as by way of experiment, the condition of the *locus in quo*.[39] The weight of authority, how-

Smith *v.* Township of Sherwood, 62 Mich. 159, 28 N. W. 806; Tomlinson *v.* Derby, 43 Conn. 562."

37. *Iowa.* — McConnell *v.* City of Osage, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778; Armstrong *v.* City of Ackley, 71 Iowa 76, 32 N. W. 80.

Michigan. — Haynes *v.* City of Hillsdale, 113 Mich. 44, 71 N. W. 466; Girard *v.* City of Kalamazoo, 92 Mich. 610, 52 N. W. 1021; Grattan *v.* Village of Williamson, 116 Mich. 462, 74 N. W. 668; Rodda *v.* City of Detroit, 117 Mich. 412, 75 N. W. 939; Butts *v.* City of Eaton Rapids, 116 Mich. 539, 74 N. W. 872; Strudgeon *v.* Village of Sand Beach, 107 Mich. 496, 65 N. W. 616; Styles *v.* Village of Decatur, 131 Mich. 443, 91 N. W. 622.

Minnesota. — Gude *v.* City of Mankato, 30 Minn. 256, 15 N. W. 175; Lyons *v.* City of Red Wing, 76 Minn. 20, 78 N. W. 868.

Missouri. — Kuntsch *v.* City of New Haven, 83 Mo. App. 174.

Texas. — City of Belton *v.* Turner (Tex. Civ. App.), 27 S. W. 831.

Wisconsin. — Barrett *v.* Village of Hammond, 87 Wis. 654, 58 N. W. 1053; Duncan *v.* City of Grand Rapids, 99 N. W. 317; McHugh *v.* Minocqua, 102 Wis. 291, 78 N. W. 478.

Condition at Certain Distances. Evidence of the condition of the walk at certain distances on either side of the point of the accident has bearing upon the question of knowledge of the condition of the walk at the point of the accident, although it is competent for no other purpose. Shannon *v.* Tama City, 74 Iowa, 22, 36 N. W. 776; Kircher *v.* Larchwood, 120 Iowa 578, 95 N. W. 184.

Long Standing. — Where a particular piece of sidewalk is generally defective or in disrepair, evidence that it had remained so for a considerable length of time previous to an accident caused by a defect at a particular place therein may be received as bearing upon the question of the negligence of the corporation in failing to ascertain and repair the defect therein which caused the accident. Kellogg *v.* Village of Janesville, 34 Minn. 132, 24 N. W. 359.

38. Harris *v.* Township of Clinton, 64 Mich. 447, 31 N. W. 425, 8 Am. St. Rep. 442; McLeod *v.* Spokane, 26 Wash. 346, 67 Pac. 74; City of Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624; Trerice *v.* Barteau, 54 Wis. 99, 11 N. W. 244.

Loose Planks Entire Length. Evidence showing that the planks in different portions of the sidewalk were loose for its entire length and were in generally bad condition, and had been for some months, was held admissible as showing that the sidewalk in question should have been inspected and repaired, and as showing that its defects could have been remedied by the authorities if they had taken proper means to do so. Kuntsch *v.* City of New Haven, 83 Mo. App. 174.

39. Kellogg *v.* Village of Janesville, 34 Minn. 132, 24 N. W. 359;

ever, is to the effect that such evidence is not admissible for this purpose.[40]

Caused by Third Persons Under Custom. — Evidence showing the prior existence of other obstructions placed upon a street or sidewalk by third persons under a custom has been held inadmissible where there is no evidence showing that the public authorities have notice of their unsafe character, especially where they are not of the same nature as the obstruction in question and have been allowed for trade purposes only.[41]

(2.) As Showing Notice. — Evidence of other defects, however, is very generally admitted as showing notice or knowledge on the part of the public authorities of the unsafe condition of the highway, or as showing circumstances from which the public authorities must be held to have constructive notice.[42]

Walker *v.* Town of Westfield, 39 Vt. 246.

A piece of wood offered in evidence upon the ground that it was a part of the stringer of the walk on which the accident happened may properly be admitted as showing the character and condition of the walk, although it is not claimed that it came from the exact spot where the accident occurred, but was a part of the stringer in the immediate proximity. Styles *v.* Village of Decatur, 131 Mich. 443, 91 N. W. 622. In this case it was claimed that the stringers were rotten and would not hold nails well.

Evidence is admissible to show that a plank adjoining the one which caused the injury looked old and rotten, although there was no evidence tending to show that its bad condition contributed to the accident, especially where the court has directed the jury to consider it with other evidence showing when the planks were put on the bridge, as evidence tending to show that the plank in question was defective. Knox *v.* Town of Wheelock, 56 Vt. 191.

40. *Iowa.* — Ruggles *v.* Town of Nevada, 63 Iowa 185, 18 N. W. 866; McConnell *v.* Town of Osage, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 78.

Michigan. — Dundas *v.* Lansing, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143.

Vermont. — Coates *v.* Town of Canaan, 51 Vt. 131.

Wisconsin. — Radichel *v.* Village of Kendall, 99 N. W. 348; Hoffman *v.* Village of North Milwaukee, 118 Wis. 278, 95 N. W. 274; Olson *v.* Luck, 103 Wis. 33, 79 N. W. 29.

Evidence offered in order to show that other sidewalks were defective and were all unsafe is properly stricken out, and if received by the court is ground for reversing the verdict on error, unless the jurors are told that such evidence is improper and they are warned not to be influenced by it. Jones *v.* Village of Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437.

41. Town of Lewisville *v.* Batson, 29 Ind. App. 21, 63 N. E. 861.

In Radichel *v.* Village of Kendall (Wis.), 99 N. W. 348, the court rejected evidence showing that the public authorities had allowed other places in their sidewalks to be obstructed in a similar manner under a customary use thereof by business houses.

42. *Colorado.* — Colorado City *v.* Smith, 17 Colo. App. 172, 67 Pac. 909.

Illinois. — City of Shelbyville *v.* Brant, 61 Ill. App. 153; City of McLeansbow *v.* Lay, 29 Ill. App. 478; Town of Wheaton *v.* Hadley, 30 Ill. App. 564; Brownlee *v.* Village of Alexis, 39 Ill. App. 135; City of Elgin *v.* Nofs, 200 Ill. 252, 65 N. E. 679; *reversing* 96 Ill. App. 291; City of Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624.

Iowa. — Bailey *v.* City of Centerville, 108 Iowa 20, 78 N. W. 831; Munger *v.* City of Waterloo, 83 Iowa 559, 49 N. W. 1028; McConnell *v.* City of Osage, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778.

Expectation of Uniform Decay. — It has also been admitted upon the ground that uniform decay may be looked for and expected in sidewalks similarly constructed throughout and built about the same time.[43]

Discovery. — It has also been held proper as bearing upon the question of discovery on the part of the public authorities.[44]

Extent of Rule. — The rule which admits evidence of other defects in a highway for the purpose of proving constructive notice to the municipal authorities ceases when the question of notice is not material by reason of the length of time the defect has existed.[45]

Structural Defect. — Evidence of defects in the highways in other places, however, is not admissible as showing negligence, where the defect in question is one in the original construction of the highway.[46]

e. *Prior Condition of Highway.* — **(1.) As Showing Existence of Defect.** — Evidence of the condition of the highway prior to the time in question has been held admissible for the purpose of proving the condition of the highway at the time of the accident.[47]

(2.) As Showing Notice. — Evidence of the condition of the highway prior to the time of the accident is admissible to prove notice to the public authorities of the condition of the way, or to show circumstances from which they should be charged with constructive

Michigan. — Canfield *v.* City of Jackson, 112 Mich. 120, 70 N. W. 444; Boyle *v.* City of Saginaw, 124 Mich. 348, 82 N. W. 1057; Moore *v.* City of Kalamazoo, 109 Mich. 176, 66 N. W. 1089.

Texas. — City of Belton *v.* Turner (Tex. Civ. App.), 27 S. W. 831.

Washington. — Shearer *v.* Town of Buckley, 31 Wash. 370, 72 Pac. 76; Laurie *v.* Ballard, 25 Wash. 127, 64 Pac. 906; Randall *v.* City of Hoquiam, 30 Wash. 435, 70 Pac. 1111.

Wisconsin. — Shaw *v.* Village of Sun Prairie, 74 Wis. 105, 42 N. W. 271; Weisenberg *v.* Appleton, 26 Wis. 56; Ripon *v.* Bittel, 30 Wis. 614; Sullivan *v.* Oshkosh, 55 Wis. 508, 13 N. W. 468; Barrett *v.* Hammond, 87 Wis. 654, 58 N. W. 1053; Trerice *v.* Barteau, 54 Wis. 99, 11 N. W. 244.

Upon the question of the competency of evidence of other defects as pertinent to the question of notice to the town authorities of the particular defect which caused the injury, the court, in Spearbracker *v.* Larrabee, 64 Wis. 573, 25 N. W. 555, said: "We think the testimony was proper with that view, because if the authorities had done their duty in repairing other places or defects of which they might be presumed from the number and character to have had notice, they would have probably discovered the defect in question."

43. Knox *v.* Town of Wheelock, 56 Vt. 191; Styles *v.* Village of Decatur, 131 Mich. 443, 91 N. W. 622.

Uniformity of Decay. — The evidence of the condition of the walk need not be limited to the particular defect, and it is competent to prove the condition of the walk in other places where it is of uniform material and put down at the same time, as it is not unreasonable to suppose that it will wear out and go to decay with some degree of uniformity. Brown *v.* City of Owosso, 130 Mich. 107, 89 N. W. 568.

44. Osborne *v.* City of Detroit, 32 Fed. 36; Brown *v.* City of Owosso, 130 Mich. 107, 89 N. W. 568, in which case the exact board which caused the accident was unknown, and the walk was old and several boards were loose.

45. Trerice *v.* Barteau, 54 Wis. 99, 11 N. W. 244.

46. Olson *v.* Town of Luck, 103 Wis. 33, 79 N. W. 29.

47. Norton *v.* Kramer, 180 Mo. 536, 79 S. W. 699; Reed *v.* Spokane, 21 Wash. 218, 57 Pac. 803. See also

notice thereof,[48] other evidence showing that there was no substantial alteration;[49] provided, of course, the time of such prior condition is not too remote.[50]

f. *Subsequent Condition of Highway.* — (1.) **Generally.** — Evidence of the subsequent condition of the highway has been held admissible in so far as it tends to prove the actual condition of the highway at the time in question, there being evidence of no substantial change in the conditions during the intervening period.[51]

Rodda *v.* City of Detroit, 117 Mich. 412, 75 N. W. 939, so holding even though it is shown that repairs were made a short time before the accident, the testimony showing that the general condition of the highway was not improved thereby. *Compare* Coates *v.* Town of Canaan, 51 Vt. 131; Will *v.* Village of Mendon, 108 Mich. 251, 66 N. W. 58.

Admitted by Way of Comparison and as aiding the jury to determine the exact condition at the time in question. Cook *v.* Town of Barton, 66 Vt. 65, 28 Atl. 631.

48. *Illinois.* — City of Belvidere *v.* Crichton, 81 Ill. App. 595; City of Chicago *v.* Dalle, 115 Ill. 386, 5 N. E. 578; City of Chicago *v.* Gillett, 91 Ill. App. 287.

Indiana. — Town of Lewisville *v.* Batson, 29 Ind. App. 21, 63 N. E. 861.

Iowa. — Parker *v.* City of Ottumwa, 113 Iowa 649, 85 N. W. 805; Finnegan *v.* Sioux City, 112 Iowa 232, 83 N. W. 907.

Maine. — Holt *v.* Inhabitants of Penobscot, 56 Me. 15.

Michigan. — Canfield *v.* City of Jackson, 112 Mich. 120, 70 N. W. 444; Butts *v.* City of Eaton Rapids, 116 Mich. 539, 74 N. W. 872; Will *v.* Village of Mendon, 108 Mich. 251, 66 N. W. 58.

Missouri. — Young *v.* City of Webb City, 150 Mo. 333, 51 S. W. 709.

New Hampshire. — Willey *v.* Portsmouth, 35 N. H. 303.

New York. — Walsh *v.* City of Buffalo, 17 App. Div. 112, 44 N. Y. Supp. 942.

Utah. — Burt *v.* Utah Light & Power Co., 26 Utah 157, 72 Pac. 497.

Washington. — Shearer *v.* Town of Buckley, 31 Wash. 370, 72 Pac. 76.

Wisconsin. — Mauch *v.* City of Hartford, 112 Wis. 40, 87 N. W. 816.

49. Hunt *v.* Dubuque, 96 Iowa 314, 65 N. W. 319.

50. In Sellick *v.* City of Janesville, 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691, such evidence was admitted as to the condition of the sidewalk at times extending two years pior to the injury, but most of it was connected with the time of the accident by some showing of continuance of conditions, and the court seems to have been induced to admit some of the evidence as relevant on the issue of notice to the city, the court saying: "While it might be unnecessary to decide whether the admission of any such evidence constituted reversible error, we deem it proper, in view of a new trial, to point out that where notice of the condition of the sidewalk is admitted, so that no proof thereof is necessary, no evidence should be received which is too remote to bear on the question whether the walk was defective at the very time of the accident."

51. *Alabama.* — Birmingham U. R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525.

Arkansas. — Little Rock F. S. R. Co. *v.* Eubanks, 48 Ark. 460, 3 S. W. 808.

Illinois. — City of Chicago *v.* Dalle, 115 Ill. 386, 5 N. E. 578.

Iowa. — Jessup *v.* Osceola Co., 92 Iowa 178, 60 N. W. 485; Bailey *v.* City of Centerville, 108 Iowa 20, 78 N. W. 831; Munger *v.* City of Waterloo, 83 Iowa 559, 49 N. W. 1028; Harrison *v.* Town of Ayrshire, 99 N. W. 132.

Kansas. — City of Abilene *v.* Hendricks, 36 Kan. 196, 13 Pac. 121.

Michigan. — Brown *v.* City of Owosso, 130 Mich. 107, 89 N. W. 568.

Minnesota. — Hall *v.* City of Austin, 73 Minn. 134, 75 N. W. 1121;

(2.) As Matter of Defense. — The courts have, however, refused to allow the defendant to introduce evidence of the condition of the street or public highway at a time subsequent to the injury as tending to show its condition at the time of the injury, upon the ground that such testimony would open the door for the perpetration of fraud, as the place may be secretly repaired in the night-time.[52]

g. *Repairs.*— **(1.) As Showing Existence of Defect.** — Evidence of subsequent repairs to a highway is not competent to prove the existence of a defect at the time of the injury.[53]

(2.) As Showing Notice. — Evidence of subsequent repairs has been admitted, however, to show notice that the highway was out of repair at the time of the injury, or circumstances from which notice

Johnson *v.* City of St. Paul, 52 Minn. 364, 54 N. W. 735.

Missouri. — Stoher *v.* St. Louis I. M. & S. R. Co., 91 Mo. 509, 4 S. W. 389; Norton *v.* Kramer, 180 Mo. 536, 79 S. W. 699.

New York. — Clapper *v.* Town of Waterford, 62 Hun 170, 16 N. Y. Supp. 640.

Wisconsin. — Salladay *v.* Town of Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541; Schuenke *v.* Town of Pine River, 84 Wis. 669, 54 N. W. 1007.

In Rebuttal, Not Collateral. When the defense introduce the testimony of the selectmen of the town showing that they passed over the highway in question about twelve days after the injury was received and that there were no such defects therein as the plaintiff claimed, it is competent for the plaintiff, in order to rebut such testimony given by the selectmen, to introduce testimony as to its condition by one who passed over the road two days after the injury, even though such evidence in rebuttal might be regarded as not competent in the opening upon the main issue, and such evidence would not tend to open a collateral issue, but would be direct to the material issue in the case, and even if offered in the opening should be admitted. Walker *v.* Town of Westfield, 39 Vt. 246.

Not Ground for Reversal. — Evidence which shows that the sidewalk was afterward taken up and a new one laid in its place, and as to how it came that witnesses knew the condition of the stringers on which the boards were laid, is not ground for reversal where it is incidentally admitted, and the court makes a statement limiting its scope. Frohs *v.* City of Dubuque, 109 Iowa 219, 80 N. W. 341.

52. In City of Chicago *v.* Early, 104 Ill. App. 398, in holding such evidence inadmissible on behalf of the defendant, the court said: "There is no rule of evidence that conditions shown to exist at a certain time are presumed to have been the same at a previous time."

53. Jennings *v.* Albion, 90 Wis. 22, 62 N. W. 926. See also Cramer *v.* Burlington, 45 Iowa 627.

Cross-Examination. — Where a witness has testified that the alleged defect is only a slight depression, he cannot be cross-examined as to how much work was done in repairing it after the accident, in order to prove that it was a defect. Jennings *v.* Town of Albion, 90 Wis. 22, 62 N. W. 926.

Town Vote or Ratification. — Evidence to prove an admission by the town of the defect by showing that two weeks after the accident the road commissioner repaired the defect, without showing that the town had either voted to make the repairs or ratified the commissioner's act, is inadmissible. Spooner *v.* Inhabitants of Freetown, 139 Mass. 235, 29 N. E. 662.

Repairs by Commissioner of Highways. — It is error to permit the plaintiff to prove that after the accident guards to the approaches of a bridge and a new abutment and retaining wall were erected by the commissioner of highways, and that he deemed them necessary. Getty *v.*

could be inferred;[54] although there are cases holding to the contrary.[55]

(3.) As Showing Negligence. — Evidence of subsequent repairs has very generally been held inadmissible for the purpose of showing negligence on the part of the public authorities.[56]

(4.) As Showing Funds. — Evidence of subsequent repairs has been held admissible as showing sufficient funds with which to make repairs.[57]

h. *Other Similar Injuries.* — **(1.) Generally.** — Whether or not evidence that other persons have suffered injury within a reasonable time before or after the accident at the place where the injury complained of is charged to have occurred is admissible, is a question upon which the courts do not at all agree.[58]

(2.) Inadmissible as Involving Collateral Issues. — Many of the courts hold that such evidence introduces a collateral issue,[59] and hence

Town of Hamlin, 127 N. Y. 636, 27 N. E. 399.

54. Shelbyville *v.* Brant, 61 Ill. App. 153; Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Frohs *v.* Dubuque, 109 Iowa 219, 80 N. W. 341; Osborne *v.* City of Detroit, 32 Fed. 36.

55. Dallas *v.* Meyers (Tex. Civ. App.), 55 S. W. 742.

The action of a village board in building a wider sidewalk than the one then in existence is not receivable in evidence as proving notice to the authorities of defects existing in the old sidewalk. Barrett *v.* Village of Hammond, 87 Wis. 654, 58 N. W. 1053.

56. Village of Mount Morris *v.* Kanode, 98 Ill. App. 373; Cramer *v.* City of Burlington, 45 Iowa 627; Sylvester *v.* Town of Casey, 110 Iowa 256, 81 N. W. 455; Hudson *v.* Chicago & N. W. R. Co., 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692; Corcoran *v.* Village of Peekskill, 108 N. Y. 151, 15 N. E. 309.

57. Stone *v.* Town of Poland, 58 Hun 21, 11 N. Y. Supp. 498. In this case the court drew a distinction between it and the case of Corcoran *v.* Village of Peekskill, 108 N. Y. 151, 15 N. E. 309, saying: "We do not understand that case to lay down any rule which prevents a witness from describing the condition of the place where an accident has happened, even though it does incidentally and argumentatively involve the fact that the party charged with maintaining it has, by making repairs thereon, by so much confessed to his dereliction, provided the evidence is material for some purpose which is legitimate. If we understand the rulings of the learned trial justice aright, he recognized the rule laid down in the case cited above, and admitted the evidence of the condition of the highway from the witnesses inspecting it after the accident, to show the presence of funds in the hands of the highway commissioner at the time of the accident."

58. Goble *v.* Kansas City, 148 Mo. 470, 50 S. W. 84.

59. *Indiana.* — Ramsey *v.* Rushville & M. G. R. Co., 81 Ind. 394.

Iowa. — Hudson *v.* Chicago & N. W. R. Co., 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692.

Maine. — Branch *v.* Libbey, 78 Me. 321, 5 Atl. 71, 57 Am. Rep. 810; Parker *v.* Portland Pub Co., 69 Me. 173.

Massachusetts. — Collins *v.* Inhabitants of Dorchester, 6 Cush. 396; Kidder *v.* Inhabitants of Dunstable, 11 Gray 342; Standish *v.* Washburn, 21 Pick. 237; Hinckley *v.* Inhabitants of Barnstable, 109 Mass. 126; Blair *v.* Inhabitants of Pelham, 118 Mass 420.

Missouri. — Goble *v.* City of Kansas City, 148 Mo. 470, 50 S. W. 84.

New Hampshire. — Hubbard *v.* City of Concord, 35 N. H. 52, 69 Am. Dec. 520.

New York. — Sherman *v.* Kortright, 52 Barb. 267.

should not be received;[60] although this contention is denied by some of the courts.[61]

(3.) Admissible as Showing Condition of Highway, etc. — On the other hand many of the courts hold that such evidence is admissible as showing the condition of the highway, as describing it, pointing out a common cause of accident, and also as bearing upon the question of reasonable safety.[62]

Wisconsin. — Phillips *v.* Town of Willow, 71 Wis. 6, 34 N. W. 731, 5 Am. St. Rep. 114; Barrett *v.* Village of Hammond, 87 Wis. 654, 58 N. W. 1053; Richards *v.* Oshkosh, 81 Wis. 226, 51 N. W. 256; Bloor *v.* Delafield, 69 Wis. 273, 34 N. W. 115.

60. *Maine.* — Bremner *v.* Inhabitants of New Castle, 83 Me. 415, 22 Atl. 382, 23 Am. St. Rep. 782; Branch *v.* Libbey, 78 Me. 321, 5 Atl. 71, 57 Am. Rep. 810; Hubbard *v.* A. & K. R. Co., 39 Me. 506.

Massachusetts. — Collins *v.* Inhabitants of Dorchester, 6 Cush. 396; Standish *v.* Washburn, 21 Pick. 237; Kidder *v.* Dunstable, 11 Gray 342; Schoonmaker *v.* Wilbraham, 110 Mass. 134; Aldrich *v.* Inhabitants of Pelham, 1 Gray 510.

New York. — Sherman *v.* Kortright, 52 Barb. 267.

The case of Frohs *v.* City of Dubuque, 109 Iowa 219, 80 N. W. 341, is distinguishable from the case of Cramer *v.* City of Burlington, 45 Iowa 627, wherein the court held that the fact of a subsequent change made in a sidewalk could not be received and considered as evidence of an admission of a previous defect.

61. In Osborne *v.* City of Detroit, 32 Fed. 36, the court commented upon the holding in the Massachusetts case, which was that such evidence is not admissible, upon the ground that it raises a collateral issue which the defendant is not called upon to try, and he may therefore claim a surprise, and stated that the weight of authority was decidedly the other way; and that so far as the federal courts were concerned, "the question had been put at rest by the case of the District of Columbia *v.* Armes, 107 U. S. 519, in which case a policeman, who saw deceased fall and went to his assistance, after testifying to the accident was allowed to state that he had seen persons stumble there before, and remembered sending home in a hack a man who had fallen there, and that he had seen as many as five persons fall there."

See also Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674, where it was held that evidence that others had been injured by the alleged defect is not objectionable on the ground of surprise, for the reason that the defendant is presumed to know the real character of the streets, and should be in a position to prove the same.

62. *United States.* — Osborne *v.* City of Detroit, 32 Fed. 36.

Alabama. — Birmingham U. R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525.

Georgia. — City of Augusta *v.* Hafers, 61 Ga. 48, 34 Am. Rep. 95.

Illinois. — Strehmann *v.* City of Chicago, 93 Ill. App. 206; City of Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624.

Iowa. — Frohs *v.* City of Dubuque, 109 Iowa 219, 80 N. W. 341.

Kansas. — City of Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933; Madison Township *v.* Scott, 9 Kan. App. 871, 61 Pac. 967.

Minnesota. — Phelps *v.* Winona & St. P. R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867.

New Hampshire. — Cook *v.* New Durham, 64 N. H. 419, 13 Atl. 650.

New York. — Masters *v.* City of Troy, 20 N. Y. St. 273, 3 N. Y. Supp. 450; Pomfrey *v.* Saratoga Springs, 104 N. Y. 469, 11 N. E. 43; Eggleston *v.* Columbia Tpk. Road, 18 Hun 146.

Vermont. — Cheney *v.* Town of Ryegate, 55 Vt. 499; Kent *v.* Lincoln, 32 Vt. 591.

Washington. — Smith *v.* City of Seattle, 33 Wash. 481, 74 Pac. 674.

In Quinlan *v.* City of Utica, 11 Hun (N. Y.) 217, the court distinguished the case from that of Sherman *v.* Kortright, 52 Barb. (N. Y.)

The frequency of accidents at a particular place would seem to be at least some evidence of its dangerous character.[63]

Same Defect Concerned. — It has sometimes been admitted, so far only as it related to the identical defect in question and as showing that such defect caused both accidents.[64]

Entire Line Defective. — So it has been admitted along with other evidence, to show that the entire line of the sidewalk was defective.[65]

Objects Frightening Horses. — And evidence showing that other horses have been frightened by the same defects or obstructions upon the highway is admissible as showing that such objects or defects are calculated to frighten horses.[66] But evidence of subsequent injuries is not admissible for this purpose.[67]

267, upon the ground that in the latter case there was no offer to show that the road was in the same condition when the others were injured as it was when the plaintiff was injured, but on the contrary it appeared that the breaks in the road of which the plaintiff complained were made the day before the accident and after the previous injuries had happened, and the court stated that on that ground alone the case was properly decided and that what was said to the effect that the admission of such testimony would present new issues was not necessary to the disposition of a case.

In Corson *v.* City of New York, 78 App. Div. 481, 79 N. Y. Supp. 604, the court said: "While in the first instance a defect might be disregarded by the municipality as insignificant, so long as its existence had never harmed any one, the occurrence of numerous accidents in consequence thereof would suffice to characterize it as dangerous, and in course of time impose upon the city authorities the obligation to repair it, or the liability to be mulcted in damages for any further injuries which it might occasion."

63. *United States.* — District of Columbia *v.* Armes, 197 U. S. 519.

Alabama. — Mayor of Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424; Birmingham U. R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525.

Maine. — Crocker *v.* McGregor, 76 Me. 282, 49 Am. Rep. 611.

New Hampshire. — Griffin *v.* Town of Auburn, 58 N. H. 121.

New York. — Corson *v.* City of New York, 78 App. Div. 481, 79 N. Y. Supp. 604.

64. Fordham *v.* Gouverneur Village, 160 N. Y. 541, 55 N. E. 290; Quinlan *v.* City of Utica, 11 Hun 217, *affirming* 74 N. Y. 603; Pomfrey *v.* Village of Saratoga Springs, 104 N. Y. 459, 11 N. E. 43; Shelley *v.* City of Austin, 74 Tex. 608, 12 S. W. 753.

65. Yeager *v.* Town of Spirit Lake, 115 Iowa 593, 88 N. W. 1095.

66. Other Horses Frightened. Crocker *v.* McGregor, 76 Me. 282, 49 Am. Rep. 611; Darling *v.* Westmoreland, 52 N. H. 401, 13 Am. Rep. 55; Wilson *v.* Town of Spafford, 57 Hun 589, 10 N. Y. Supp. 649.

Evidence which shows that other horses had been frightened by the obstruction left in the highway, and such horses were gentle, is admissible as proving the character of the object of complaint, and not as collateral matter. Golden *v.* Chicago, R. I. & P. R. Co., 84 Mo. App. 59.

67. *United States.* — District of Columbia *v.* Armes, 107 U. S. 519; Osborne *v.* City of Detroit, 32 Fed. 36.

Georgia. — City of Rome *v.* Stewart, 116 Ga. 738, 42 S. E. 1011.

Illinois. — Chicago *v.* Powers, 42 Ill. 169, 89 Am. Dec. 418.

Indiana. — Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253.

Iowa. — Wilverding *v.* City of Dubuque, 111 Iowa 484, 82 N. W. 957; Bailey *v.* City of Centerville, 108 Iowa 20, 78 N. W. 831; Smith *v.* City

(4.) As Showing Notice. — Many of the courts hold that evidence of other injuries is admissible as showing notice or circumstances from which the authorities could have known of the existence of the defect in question.[68]

i. *No Such Previous Injuries.* — As affecting the question of the condition of a highway at the place of the accident, evidence that other travelers had encountered no difficulty in passing has in some cases been held admissible on behalf of the defendant, as tending to show that the highway was suitable for the public use.[69] But such evidence is not conclusive upon the question of the dangerous condition of the road.[70] Other courts, however, hold that such evidence is not admissible.[71]

No Other Horses Frightened. — Evidence that no other horses have been frightened at the obstruction or defect in question has been

of Des Moines, 84 Iowa 685, 51 N. W. 77; Hunt *v.* City of Dubuque, 96 Iowa 314, 65 N. W. 319; Hoover *v.* Town of Mapleton, 110 Iowa 571, 81 N. W. 776.

Michigan. — Smith *v.* Township of Sherwood, 62 Mich. 159, 28 N. W. 806; Moore *v.* City of Kalamazoo, 109 Mich. 176, 66 N. W. 1089; Lombar *v.* Village of East Tawas. 86 Mich. 14, 48 N. W. 947; Corcoran *v.* City of Detroit, 95 Mich. 84, 54 N. W. 692.

Minnesota. — Morse *v.* M. & St. L. R. Co., 30 Minn. 465, 16 N. W. 358.

Washington. — Piper *v.* City of Spokane, 22 Wash. 147, 60 Pac. 138.

68. Chicago *v.* Vesey, 105 Ill. App. 191.

That Other Horses of Ordinary Gentleness Were Frightened by the same obstruction or defect in the highway has been held admissible as tending to show that travel over the way was thereby rendered dangerous, and that the public authorities had or should have had knowledge of the dangerous condition.

Smith *v.* Township of Sherwood, 62 Mich. 159, 28 N. W. 806; Darling *v.* Westmoreland, 52 N. H. 401, 13 Am. Rep. 55; Crocker *v.* McGregor, 76 Me. 282, 49 Am. Rep. 611.

Decisions in Iowa. — Evidence of a former and similar accident happening to another at the same place is not admissible in an action for damages for injury to a horse by the negligent and defective construction of a crossing. Hudson *v.* Chicago & N. W. R. Co., 50 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692.

69. Birmingham U. R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525; Sprague *v.* Bristol, 63 N. H. 430; Calkins *v.* Hartford, 33 Conn. 57, 87 Am. Dec. 194. *Compare* Taylor *v.* Monroe, 43 Conn. 46.

70. Lane *v.* Town of Hancock, 67 Hun 623, 22 N. Y. Supp. 470; Maxim *v.* Town of Champion, 50 Hun 88, 4 N. Y. Supp. 515.

The fact that no like accident had happened within six years, although some evidence in support of defendant's contention that the sidewalk was in proper repair, is not sufficient to overturn the conclusion reached by the jury in giving the verdict to plaintiff in an action to recover for a defective sidewalk. Lloyd *v.* Village of Walton, 57 App. Div. 288, 67 N. Y. Supp. 929.

71. Branch *v.* Libbey, 78 Me. 321, 5 Atl. 71, 57 Am. Rep. 810; Bunker *v.* Gouldboro, 81 Me. 188, 16 Atl. 543.

Evidence showing that other persons with their carriages and vehicles had previously passed or met at the same place where the plaintiff's accident was said to have occurred and at the time when the road was in the same condition, without collision or accident, and that there was room to spare on each side, is inadmissible in an action to recover injuries through a defective highway to show the way was not defective in point of width. Aldrich *v.* Pelham, 1 Gray (Mass.) 510.

held inadmissible upon the ground that it is too remote and uncertain to have any bearing upon the question at issue.[72]

j. *Custom.* — It has been held that the public authorities cannot escape liability by showing the general use of or custom to allow the obstruction to remain in the public highway, as no use, custom or practice can excuse or justify an encroachment or negligence.[73]

Customary Action. — Where the defective condition is caused by snow, the defendants cannot give in evidence their customary action in respect to snow-drifts in highways, either to show the sufficiency of the way or the plaintiff's negligence.[74]

k. *Usual Condition of Other Streets.* — So evidence showing that the public street or highway was in the same condition as usual or in no worse condition than other roads has been held inadmissible in such actions.[75] And evidence showing the condition of the *locus in quo* as compared with other parts has been held inadmissible.[76]

l. *Similarly Constructed Walks.* — Evidence showing that the walks were similarly constructed in other places is also inadmissible.[77]

A witness for the defense cannot testify as to whether he had heard or knew of any one ever being injured by the defect in question. Langworthy *v.* Township of Green, 88 Mich. 207, 50 N. W. 130.

72. Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643.

73. Tiesler *v.* Town of Norwich, 73 Conn. 199, 47 Atl. 161.

Evidence which shows that it was usual and customary and necessary for the convenient use and enjoyment of dwelling-houses in the city to have underground entrances or areas into them, and that the house in question was one of this character, is not admissible as showing the justification for such encroachment or obstruction upon the sidewalk, as no usage or custom will justify an encroachment on a public highway, or the presence therein of an obstruction which renders it unsafe for the uses to which it is dedicated. McNerney *v.* City of Reading, 150 Pa. St. 611, 25 Atl. 57.

In an action brought under the Mass. Gen. Stat., ch. 44, § 22, evidence that it was usual for towns in the county to leave drains uncovered is inadmissible in an action against a town for injuries caused by leaving the drain uncovered in a highway. Hinckley *v.* Inhabitants of Barnstable, 109 Mass. 126.

74. Rowell *v.* Hollis, 62 N. H. 129.

75. Kidder *v.* Inhabitants of Dunstable, 11 Gray (Mass.) 342.

The public authorities cannot prove that the streets were in a worse condition in other places, more particularly when such places are outside the bounds of their own town or village, in order to escape liability for damages occasioned by a defective sidewalk or street. Hyatt *v.* Trustees of the Village of Rondaut, 44 Barb. (N. Y.) 385.

76. Langworthy *v.* Green, 88 Mich. 207, 50 N. W. 130.

Evidence showing that the place of the accident was not more dangerous than the rest of the highway, or showing a like condition in other places, or the general bad character of the roads in the county and the practice of towns in respect to them, relates to collateral matter, and is therefore inadmissible as against a plaintiff in an action to recover damages for injuries sustained through a defective highway, although he might frequently have passed by the place where the accident occurred, unless it is shown that the plaintiff knew of such practice. Hinckley *v.* Inhabitants of Barnstable, 109 Mass. 126.

77. Hubbard *v.* City of Concord, 35 N. H. 52, 69 Am. Dec. 520.

m. *Character of Driver and Horse.* — In the case of injuries sustained while driving on a highway, evidence of the general character of the plaintiff as a driver has been held inadmissible to show the exercise of due care on his part.[78] But evidence showing the character of the driver[79] and also of the animal[80] he was driving at the time of the accident has been held admissible for the defendant.

C. ORDINANCES. — City ordinances have been held admissible where they are made for the enforcement of a public duty, and also to show negligence in construction of streets.[81]

78. McDonald *v.* Inhabitants of Savoy, 110 Mass. 49.

79. Brennan *v.* Town of Friendship, 67 Wis. 223, 29 N. W. 902.

80. Stone *v.* Langworthy, 20 R. I. 602, 40 Atl. 832; Ford *v.* Rowley, 8 Allen (Mass.) 51; Maggi *v.* Cutts, 123 Mass. 535.

The defendant may prove the habits of the horse which the plaintiff rode or drove when injured. Brennan *v.* Town of Friendship, 67 Wis. 223, 29 N. W. 902. As for example that it was in the habit of running away. Cheney *v.* Town of Ryegate, 55 Vt. 499.

Evidence of the Previous Bad Behavior of a Horse is admissible where the defense is that the injury was occasioned by driving rapidly an unbroken and unmanageable horse in the night and not by the badness of the road. Dennett *v.* Inhabitants of Wellington, 15 Me. 27.

Propensity for Stumbling. — So evidence that a horse stumbles is admissible as a relevant fact bearing upon the question of contributory negligence on the plaintiff's part in driving such an animal and as showing that the accident was not occasioned by a defect in the highway. Patterson *v.* South & N. A. R. Co., 89 Ala. 318, 7 So. 437; Judd *v.* Town of Claremont, 66 N. H. 418, 23 Atl. 427.

Where evidence is first offered to show that the horse had been restive and unmanageable previous to the occasion in question, testimony that he subsequently manifested a similar disposition is admissible to prove that his previous conduct was not accidental or unusual. Todd *v.* Inhabitants of Rowley, 8 Allen (Mass.) 51.

81. Shumway *v.* City of Burlington, 108 Iowa 424, 79 N. W. 123; Smith *v.* City of Pella, 86 Iowa 236, 53 N. W. 226.

Evidence showing that the provisions of a city ordinance relating to the construction of a private sewer were not being enforced, as the same was not being made with a written consent of the sanitary committee, was held admissible in an action to recover damages for injuries sustained by reason of the construction of such sewer. City of Corsicana *v.* Tobin (Tex. Civ. App.), 57 S. W. 319.

Guarding and Fencing. — A city ordinance regulating the construction and guarding of cellar-ways in cities is admissible in evidence, as it relates to the subject under investigation in the case, and enforces the performance of a public duty. McLeod *v.* City of Spokane, 26 Wash. 346, 67 Pac. 74.

A city ordinance declaring that openings in a sidewalk should be properly guarded is admissible in evidence in an action to recover damages sustained by falling into an open area on the public street, as it relates to the subject under investigation, and the general rule that the acts and declarations of parties concerning matter involved in the suit are admissible in evidence applies, and also for the reason that it was an ordinance enforcing the performance of a common-law duty and as such was properly admitted. McNerney *v.* City of Reading, 150 Pa. St. 611, 25 Atl. 57.

A city ordinance under which curbing and parking were done is properly admitted in order to show the defendant's negligence where the accident occurred through a

Excavations a Misdemeanor. — An ordinance making it a misdemeanor to make an excavation in the street and leave the same open and unguarded has also been held admissible.[82] And an ordinance making it the duty of a public officer to remove obstructions from streets and sidewalks or to report the same to the department of public works, has been held admissible upon the question of notice.[83]

D. PHOTOGRAPHS. — a. *In General.* — Upon the question of the admissibility of a photograph or picture of the place where the accident occurred, the true rule would seem to be that a plan or picture, whether made by the hand of man or by photography, is admissible in evidence to assist the jury in understanding the case if verified by proof that it is a true representation of the subject.[84]

Subsequent Change. — A photograph of the place where the accident happened is admissible in evidence, even though there has been a change in the *locus in quo* before the taking thereof, if the nature of such changes is properly proved.[85]

stone placed in the street in course of repair to prevent driving over the curb and the parking at the side thereof. Herries *v.* City of Waterloo, 114 Iowa 374, 86 N. W. 306.

82. Browne *v.* Bachman, 31 Tex. Civ. App. 430, 72 S. W. 622.

83. Bibbins *v.* City of Chicago, 193 Ill. 359, 61 N. E. 1030, *reversing* 94 Ill. App. 319.

84. Blair *v.* Inhabitants of Pelham, 118 Mass. 420.

Photographs of the place at which the accident occurred may be given in evidence under certain circumstances in order to assist the jury in understanding the case, when they are verified as being true representations. City of Chicago *v.* Vesey, 105 Ill. App. 191.

Subsequently Taken. — They are evidence as showing that the *locus in quo* was in the same condition as when the accident occurred. Barker *v.* Town of Perry, 67 Iowa 146, 25 N. W. 100.

Examination by Jury. — And it is admissible to allow the jury to examine them with a magnifying glass. Barker *v.* Town of Perry, 67 Iowa 146, 25 N. W. 100. See article "PHOTOGRAPHS."

85. Beardslee *v.* Columbia Twp., 188 Pa. St. 496, 41 Atl. 617, 68 Am. St. Rep. 883. Upon this question the court say: "In photographs, as in plans, maps, or other drawings used as evidence, there ought to be substantial identity in the person, place or thing photographed and that which the jury are to consider in the case. But photographs of the scene of an accident taken at or near to the time are not always obtainable; and, bearing in mind the object sought — the assisting of the jury by knowledge of the locality, to judge the conduct of the parties with reference to the issue raised — the only practicable rule would seem to be that the changes must not be such as to destroy the substantial identity, and that the changes, whatever they are, must be carefully pointed out and brought to the jury's attention. This would have to be the course pursued if a view were allowed to the jury at the trial, and no other appears practicable in regard to plans, photographs, or other substitutes for a view. With these safeguards a subject must be left largely to the discretion of the trial judge."

The photograph of the place where the accident occurred, although taken subsequently and after the fence had been erected at the place of the accident, was held admissible, the court instructing the jury that any subsequent change in the place was no evidence of negligence on the part of the public authorities. Glazier *v.* Town of Hebron, 62 Hun 137, 16 N. Y. Supp. 503.

Not Substantially Necessary or Instructive. — Where photographs are not substantially necessary or instructive to show material facts or conditions, and are of such a character as to rouse the sympathy or indignation or divert the minds of the jury to improper or irrelevant considerations, they should be excluded.[86]

b. *Must be True Photographic Print.* — A photograph of the place in which the accident happened can not be received in evidence unless it is shown by evidence *aliunde* to be a true photographic print.[87]

Verification of the photograph need not be made by the testimony of the photographer, but may be by any one competent to speak from personal observation.[88]

When found to Be so Inaccurate and Misleading as to be of no value, photographs are properly excluded.[89]

E. Admissions and Declarations. — a. *Of Third Persons.* The declarations of third persons as to the defective condition of the highway have been received in evidence as proving notice.[90]

b. *By Public Authorities.* — **(1.) Generally.** — Admissions and statements made by public authorities must be made by them as agents of the municipality, and must also be within the scope of their authority, in order to bind the public.[91]

86. Selleck *v.* City of Janesville, 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691; Harris *v.* Quincy, 171 Mass. 472, 50 N. E. 1042.

87. Baustian *v.* Young, 152 Mo. 317, 52 S. W. 921.

88. McGar *v.* Borough of Bristol, 71 Conn. 652, 42 Atl. 1000.

89. Harris *v.* City of Ansonia, 73 Conn. 359, 47 Atl. 672.

At Variance With Testimony. A photograph of the place of the accident, taken by an amateur photographer more than fourteen years after the happening of the injury, is not admissible in evidence where it is shown to be at variance with other testimony given. City of Chicago *v.* Vesey, 105 Ill. App. 191.

90. Piper *v.* City of Spokane, 22 Wash. 147, 60 Pac. 138.

91. Weeks *v.* Inhabitants of Needham, 156 Mass. 289, 31 N. E. 8.

Statements made by a street commissioner at the time of laying out a street, that he was doing so according to his own discretion and had no specific directions as to the manner in which it should be laid out, are not admissible in evidence as disproving his authority as agent of the village. Betts *v.* Village of Gloversville, 56 Hun 639, 8 N. Y. Supp. 795.

Selectman's Statement as to Payment. — The statement made by a selectman of a town, when served with a notice of the injury, to the effect that the plaintiff should bring no suit and that he had heard that the road was bad and that when plaintiff ascertained the extent and amount of his injury the town would pay, is not binding upon the town and cannot be given in evidence. Wheelock *v.* Town of Hardwick, 48 Vt. 19.

Highway Commissioner's Letter. A letter received from the highway commissioner is not admissible, nor are conversations and negotiations had with him. Davis *v.* Town of Rochester, 66 Hun 629, 21 N. Y. Supp. 215.

Declarations of Highway Commissioner. — The declarations made by a highway commissioner after the accident has happened are not admissible, where it is sought to charge the town with liability by reason of the negligence of such commissioner. Stone *v.* Town of Poland, 58 Hun 21, 11 N. Y. Supp. 498.

Trustee's Knowledge of Defect. The evidence of a village trustee,

(2.) As Notice of Defective Condition. — Conversations and declarations had with the public authorities subsequent to the accident, in which they admit their knowledge of the defective condition of the highway or walk, are admissible in evidence against them, upon the ground of notice.[92]

V. ABANDONMENT OF HIGHWAYS.

1. Presumptions and Burden of Proof. — A. In General. — One who alleges the abandonment of a highway has the burden of proving it.[93]

B. Presumption from Non-User. — As to whether or not the abandonment of a highway may be presumed from the fact of its non-user there is conflict in the authorities. On the one hand several of the courts hold that non-user will raise such a presumption;[94] on the other hand other courts hold that the abandonment

proving statements made by him after the accident, showing that he and the village authorities generally knew before the injury that the street was defective, and would have repaired it but for delays, is not admissible. Village of Mount Morris *v.* Kanode, 98 Ill. App. 373.

92. Radichel *v.* Village of Kendall (Wis.), 99 N. W. 348; Mauch *v.* City of Hartford, 112 Wis. 40, 87 N. W. 816.

Conversation With Mayor. — Evidence of a conversation with the mayor of a town in which he was said to have admitted that he had known long prior to the accident that the plank which was the occasion of the plaintiff's fall was loose and had directed it to be repaired, is properly admitted where the other evidence established knowledge of the defect. Colorado City *v.* Smith, 17 Colo. App. 172, 67 Pac. 909.

The statements made by an alderman of the village that he knew that the street was more or less defective and that the village had done work at that spot a few days before the plaintiff was hurt, and described its condition as such that people could get across by careful driving, and admitted that careful driving was necessary at night, is sufficient to show notice to the authorities. Village of Mount Morris *v.* Kanode, 98 Ill. 373.

The evidence of an alderman that he had noticed in passing over a walk that it would spring as though the center stringer was rotten and that he thought the city marshal had examined the walk in the same month and found it would spring when walked on, was properly admitted as involving notice to the city of the walk's condition. Canfield *v.* City of Jackson, 112 Mich. 120, 70 N. W. 444.

Statements made by a highway commissioner as to the condition of the road are admissible, as tending to show notice on the part of the public authorities of the defective condition of the road. Glazier *v.* Town of Hebron, 62 Hun 137, 16 N. Y. Supp. 503.

93. Horey *v.* Haverstraw, 124 N. Y. 273, 26 N. E. 532; Reilley *v.* Racine, 51 Wis. 526, 8 N. W. 417.

Where the existence of a highway as such has been shown, its continuance is to be presumed until proof to the contrary appears. Beckwith *v.* Whalen, 65 N. Y. 322.

Clear Proof. — When an abandonment of the highway is relied upon it must be clearly proved. Township of Madison *v.* Gallagher, 159 Ill. 105, 42 N. E. 316; Township of Lewiston *v.* Proctor, 27 Ill. 414.

94. Beardslee *v.* French, 7 Conn. 125, 18 Am. Dec. 86; Jeffersonville, M. & I. R. Co. *v.* O'Connor, 37 Ind. 95; Fox *v.* Hart, 11 Ohio 414. See also Larsen *v.* Fitzgerald, 87 Iowa 402, 54 N. W. 441; Burgwyn *v.* Lockhart, 60 N. C. 264; State *v.*

Culver, 65 Mo. 607, 27 Am. Rep. 295; Corning *v.* Gould, 16 Wend. (N. Y.) 531.

Rule Stated. — "Where the public authorities have permitted the owners of property along the line of a highway to occupy and improve their property in such a way, and had acquiesced for such a length of time, as that to involve such owners in criminal consequences, although acting in good faith on the appearance of things, would be manifest injustice, an abandonment will be presumed. Where the owner or occupant of lands along a highway does nothing more than to maintain the highway at the general uniform width at which it has been maintained by adjoining owners for twenty years or more, it would be manifest injustice to maintain a criminal prosecution against such owner. Whatever else the public may do, it cannot assert its right to reopen the highway by that method. In such a case as we have assumed, a presumption of abandonment will be indulged; and when to disturb long-established lines would involve criminal consequences, or work serious injury to valuable improvements made in good faith, such presumption will be conclusive." Hamilton *v.* State, 106 Ind. 361, 7 N. E. 9. *Compare* Lawrenceburgh *v.* Wesler, 10 Ind. App. 153, 37 N. E. 956, where the court, in *distinguishing* Hamilton *v.* State, said: "While there are in the books some general expressions to the effect that an abandonment of a highway may be proved by facts showing a non-user for a long time, such statements must be considered with certain qualifications as to conditions which have no existence here. That there may be instances in which, by the acquiescence of the public along the line of a highway in its occupancy and the erection of improvements thereon, an estoppel may be created, must be conceded. Hamilton *v.* State, 106 Ind. 361, 7 N. E. 9; Railroad Co. *v.* Shanklin, 98 Ind. 573. And there is likewise good authority in support of the doctrine that a public highway, other than a street or alley, in a city or town, which has been created by implied dedication, may be abandoned by the public, and the same rule may be applied to a public square, and perhaps to a common, in a city or town. Town of Freedom *v.* Norris, 128 Ind. 377, 27 N. E. 869. But there is no element of estoppel in the present case, nor does the doctrine of abandonment or ordinary easements apply to streets or alleys."

In California, a statute (Pol. Code, § 2631) provides that "by taking and accepting land for a highway the public acquire only the right of way, and the incidents necessary to enjoying and maintaining the same, subject to the regulations in this and the Civil Code provided." Another statute (Civ. Code, §§ 806, 811) provides that "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired," and is extinguished, "when the servitude was acquired by enjoyment, by the disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment." And in McRose *v.* Bottyer, 81 Cal. 122, 22 Pac. 393, the court said: "The reason of the law is clearly to protect the public in the use of public highways by preventing an abandonment of the right to the use being presumed from the cessation of the use for any period less than that by which the right may be acquired."

Hartford *v.* New York & N. E. R. Co., 59 Conn. 250, 22 Atl. 37, where the court said: "Divers authorities hold that abandonment of a public easement in a highway may be inferred from a non-user commensurate with the period required in order to gain the easement by user or prescription. But this is generally of an easement acquired by prescription. Whether the same limit would apply to public highways by dedication we need not stop to consider. At all events non-user, if continued 'for many years,' is *prima facie* evidence of abandonment. But abandonment must be voluntary and intentional." See also Woodruff *v.* Paddock, 56 Hun 288, 9 N. Y. Supp. 381, *holding* that when in connection with non-user there is

of a highway is not a question of the time of its non-user, but is simply to be established like any other question of fact.[95]

C. Presumption from Construction of New Road. — Abandonment of a highway will be presumed where the public have ceased to use it and have adopted another, and the owner of the fee over which the highway in question passes resumes the use and occupancy thereof, and the public acquiesces therein for a period of several years.[96]

2. Mode of Proof. — A. Occupancy Inconsistent with Use as Highway. — On an issue as to whether or not a highway has been abandoned it is competent to show that the way had been shut up,

affirmative evidence of a clear determination to abandon, the public interest is extinguished.

An Intention to Abandon an Easement for a Slope for a Street Grade is not shown by the mere fact that the city built a retaining wall along the street line. Kuschke *v.* St. Paul, 45 Minn. 225, 47 N. W. 786.

In Grandville *v.* Jenison, 84 Mich. 54, 47 N. W. 600, it was held that encroachments upon the highway made at various times by the building of chicken parks, piling lumber, wood, etc., which did not obstruct travel, did not necessarily show a non-user; that the statute recognizes the fact that such things will occur and provides a remedy, but that the rights of the public will not be lost by anything short of an actual abandonment of the use by which they secured it.

95. Brockhausen *v.* Boehland, 36 Ill. App. 224. See also Champlin *v.* Morgan, 20 Ill. 181, where the court said: "It is true the public can be charged with abandonment of a road, but the proof to establish it must be strong enough to establish another line as the road. A road is of public necessity, and indispensable to public convenience. It cannot, therefore, be alleged that they have abandoned such an indispensable necessity, without showing they have acquired another in lieu of it." Holt *v.* Sargent, 15 Gray (Mass.) 97; Com. *v.* Moorehead, 118 Pa. St. 344, 12 Atl. 424, 4 Am. St. Rep. 599; Power *v.* Watkins, 58 Ill. 380, where it was held that the act of an individual cannot divest the public of its rights unless submitted to for such a period of time as to raise a fair presumption of abandonment.

In Michigan a statute (How. Stat. § 1315) provides that "all highways regularly established in pursuance of existing laws, all roads that shall have been used as such for ten years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been, or which may hereafter be, laid out, and not recorded, and which have been used eight years or more, shall be deemed public highways, subject to be altered or to be discontinued according to the provisions of this act." And in McNamara *v.* Minneapolis, St. P. & S. S. M. R. Co., 95 Mich. 545, 55 N. W. 440, where the road in question had actually been occupied, laid out and constructed by the township, and actually used for at least eight years, it became a public highway, and it was held that the mere non-user for a period of two years, in the absence of any proceedings to discontinue the highway, did not entitle the company to exclude the public by fencing in its right of way at that point.

96. Shelby *v.* State, 10 Humph. (Tenn.) 165. See also Grube *v.* Nichols, 36 Ill. 92; Galbraith *v.* Littiech, 73 Ill. 209, where the court said: "Where a public highway has been abandoned for a great length of time and another road has been opened, traveled by the public and recognized by the public authorities intrusted with the control of public

the land inclosed by permanent fences or walls, and occupied or improved for purposes inconsistent with its use as a public way.[97]

B. Deviation to Avoid Obstruction. — The fact that the public travel passes out of the road merely for the purpose of avoiding an obstruction does not show any intention on the part of the public wholly to abandon the use of the road or even that portion of it which the public for the time being fails to use; it merely shows an intention on the part of each individual using the road not to use it at that particular place and time.[98]

C. Opinion Evidence. — Whether or not a highway has been abandoned is a question as to which the opinion or conclusion of a witness is not admissible.[99]

highways, and repaired by them as such, an abandonment may be presumed." Kelly Nail & Iron Co. *v.* Lawrence Furnace Co., 46 Ohio St. 544, 22 N. E. 639, 5 L. R. A. 652.

97. Holt *v.* Sargent, 15 Gray (Mass.) 97.

98. Stickel *v.* Stoddard, 28 Kan. 510. See also Zimmerman *v.* Snowden, 88 Mo. 218; Maire *v.* Kruse, 85 Wis. 302, 55 N. W. 389, 26 L. R. A. 449.

99. Lathrop *v.* Central I. R. Co., 69 Iowa 105, 28 N. W. 465.

HIRING. — See Bailments.

HISTORICAL BOOKS. — See Books.

HOLOGRAPHIC WILLS. — See Wills.

HOMESTEADS AND EXEMPTIONS.

By A. I. McCormick and C. R. Mahan.

CROSS-REFERENCES:

Fraudulent Conveyance;

Husband and Wife;

Intent.

I. HOMESTEAD CHARACTER IN GENERAL.

1. Question of Fact. — The question as to whether certain premises at a certain time constituted a homestead is a question of fact to be determined from all the evidence.[1]

2. Occupancy and Intent Essential. — A. GENERALLY. — In order to establish the homestead character of premises, it must be shown that they are occupied and used by the owner thereof for homestead purposes, and that he intends them as his homestead.[2] Proof of

1. Holden *v.* Pinney, 6 Cal. 234; Klenk *v.* Noble, 37 Ark. 298; Johnson *v.* Turner, 29 Ark. 280; Keith *v.* Hyndman, 57 Tex. 425; Andrews *v.* Hagadon, 54 Tex. 571.

2. Holden *v.* Pinney, 6 Cal. 234; Keith *v.* Hyndman, 57 Tex. 425. See also Sill *v.* Sill, 185 Ill. 594, 57 N. E. 812.

Compliance With Public Land Laws Relating to Homesteads. Where actual residence and occupancy of the premises as a home is requisite in order to constitute them a homestead, evidence that the claimant had complied with the requirements of the United States statutes and rules of the land department in

such intent without proof of such occupancy and use is generally insufficient,[3] nor does proof of the mere occupancy and use of the premises establish the fact of homestead, in the absence of evidence supplying the essential element of the occupant's intent.[4]

B. Homestead Before Actual Occupancy. — It is not, however, always essential that actual occupancy of the premises be shown by the claimant in order to entitle him to claim the exemption.[5] Thus, evidence of a purchase of property with intent, in good faith, subsequently to occupy the same as a home, such intent being manifested by acts of preparation, sufficiently establishes the home-

relation to the acquisition of homestead rights on the public domain, and that his final proof had been accepted as satisfactory, is insufficient to establish the character of occupancy and residence required by the state homestead laws. Brokken *v.* Baumann, 10 N. D. 453, 88 N. W. 84.

Lot Adjacent to Home. — There is no presumption, nor does it follow, that an adjacent lot is a part of the homestead merely because it adjoins the lot on which the residence is located. The question is one of fact and intent. Andrews *v.* Hagadon, 54 Tex. 571. And the burden is on claimant. Howard *v.* Raymers, 64 Neb. 213, 89 N. W. 1004.

3. Feurt *v.* Caster, 174 Mo. 289, 73 S. W. 576; Hale *v.* Heaslip, 16 Iowa 451; Swenson *v.* Kiehl, 21 Kan. 533; Gregg *v.* Bostwick, 33 Cal. 220, 91 Am. Dec. 637; Evans *v.* Calman, 92 Mich. 427, 52 N. W. 787, 31 Am. St. Rep. 606; *In re* Duerson (Ky.), 13 Nat. Bank Reg. 183, and see cases cited in note 8, *infra.*

In St. Louis Brg. Ass'n *v.* Howard, 150 Mo. 445, 51 S. W. 1046, the court said: "It is a visible occupancy of the premises as the head of a family at the time of the levy of the writ which fixes the homestead rights of the defendant. There is no other way in which it can be made to appear beyond cavil, question, or the possibility of fraud on creditors, than by actual visible occupancy."

In Grosholz *v.* Newman, 21 Wall. (U. S.) 481, it was held that to establish the homestead character of premises, it must be shown that "the premises were actually used or manifestly intended to be used as a part of the home of the family."

When Occupancy is Non-Essential. Statute. — Some decisions are based on statutes or constitutional provisions giving the homestead claimant the absolute right of selecting as his homestead any piece of property owned by him whenever the necessity of exercising such right may arise; and in such case he is not required to establish occupancy or residence on the premises in order to entitle him to claim the exemption. See First Nat. Bank *v.* Meachem (Tenn. Ch.), 36 S. W. 724; Meyer Bros. Drug Co. *v.* Bybee, 179 Mo. 354, 78 S. W. 579. And this was held to be the law where the constitution exempted from forced sale "every homestead and the dwelling and buildings used therewith . . . to be selected by the owner thereof." Fulton *v.* Roberts, 113 N. C. 421, 18 S. E. 510.

4. Clark *v.* Evans, 6 S. D. 244, 60 N. W. 862; Keith *v.* Hyndman, 57 Tex. 425; Andrews *v.* Hagadon, 54 Tex. 571. But this proof of intention may appear by presumption. See *infra*, I, 5, B.

5. Homestead Without Occupancy. — Actual residence upon property intended as a homestead is not an indispensable condition to its being in law a homestead, and, as such, exempt from execution, but "to bring it within the exemption, when it is not actually occupied as such at the time of the levy, it must satisfactorily be made to appear that the intention in good faith exists to occupy it as such, and such intention must have existed prior to and at the time of the levy." Bowles *v.* Hoard, 71 Mich. 150, 39 N. W. 24; Reske *v.* Reske, 51 Mich. 541, 10 N. W. 895.

stead character of such property.[6] Evidence of a purchase with a view to occupancy followed by actual occupancy within a reasonable time has been held sufficient,[7] but proof of the party's mere intent or contemplation to occupy and claim the premises as a homestead, in the absence of evidence showing some overt act clearly manifesting this intention, does not satisfy the requirements,[8] although it has been intimated that this rule might be relaxed in case present occupancy was impossible, and the claimant was without a home.[9]

3. Domicile of Wife as Affecting Homestead. — The domicile and residence of the husband is, in general, conclusively presumed to be the domicile and residence of the wife, and therefore the premises

6. Furtner *v.* Edgewood Distilling Co., 16 Tex. Civ. App. 359, 41 S. W. 184; Gardner *v.* Douglass, 64 Tex. 76; Franklin *v.* Coffee, 18 Tex. 413, 70 Am. Dec. 292; Mills *v.* Hobbs, 76 Mich. 122, 42 N. W. 1084; Deville *v.* Widoe, 64 Mich. 593, 31 N. W. 533, 8 Am. St. Rep. 852; Hanlon *v.* Pollard, 17 Neb. 368, 22 N. W. 767.

In Scofield *v.* Hopkins, 61 Wis. 371, 21 N. W. 259, the court said: "The *bona fide* intention of acquiring the premises for a homestead without defrauding any one is evidenced by overt acts in fitting them to become such, followed by actual occupancy in a reasonable time, and must be held to give the premises answering the description prescribed in the statute the character of a homestead." And this relates back to the time of the purchase.

In Cameron *v.* Gebhard, 85 Tex. 610, 22 S. W. 1033, 34 Am. St. Rep. 832, the court, in speaking of the intention to make the premises a homestead, as manifested by acts of preparation, said: "Preparation — that is, such acts as manifest this intention — is but the corroborating witness to the declaration of intention, the safeguard against fraud and assurance of the *bona fides* of the declared intention of the party."

Construction of Dwelling After Execution Sale. — In Gallagher *v.* Keller, 87 Tex. 472, 29 S. W. 647, it was held that the facts that the claimant had built his dwelling-house on the land claimed and moved into it some months after it had been sold under execution against him were relevant and competent circumstances tending to prove his intention to occupy the premises as a homestead from the beginning, and the continuance of such intent, and that such evidence should be considered by the court. But the general rule is that the fact of homestead must be determined by the facts existing at the time of the levy. Bowles *v.* Hoard, 71 Mich. 150, 39 N. W. 24.

7. See Edwards *v.* Fry, 9 Kan. 417; Gilworth *v.* Cody, 21 Kan. 702.

Where the Constitution Requires Occupancy. — This rule applies although the constitution requires that the premises be "occupied as a residence by the family of the owner." Monroe *v.* May, 9 Kan. 466.

8. *Kentucky.* — Stovall *v.* Hibbs, 17 Ky. L. Rep. 906, 32 S. W. 1087; Fant *v.* Talbot, 81 Ky. 23.

Michigan. — Coolidge *v.* Wells, 20 Mich. 79.

North Dakota. — See Brokken *v.* Baumann, 10 N. D. 453, 88 N. W. 84.

Texas. — Moreland *v.* Barnhart, 44 Tex. 275; Anderson *v.* McKay, 30 Tex. 186; Franklin *v.* Coffee, 18 Tex. 413, 70 Am. Dec. 292; Brooks *v.* Chatham, 57 Tex. 31; Mullins *v.* Looke, 8 Tex. Civ. App. 138, 27 S. W. 926; Bente *v.* Lange, 9 Tex. Civ. App. 328, 29 S. W. 813.

9. In Mullins *v.* Looke, 8 Tex. Civ. App. 138, 27 S. W. 926, the court said: "We are aware of no case in which it has been held that undisclosed intention alone is sufficient to fix the homestead character upon a new place never before occupied, even though it be in the possession of the tenant, in the absence of evidence that the claimant was without any home." See also Moreland *v.* Barnhart, 44 Tex. 275. *Compare* Sill *v.* Sill, 185 Ill. 594, 57 N. E. 812.

occupied and intended by him as his homestead constitute the homestead of the family, although the wife and children may live separate and apart from him.[10] But this rule is not always conclusive against the right of the wife to possess a homestead in a place other than that in which the husband is domiciled.[11]

4. Burden of Proof. — A. In General. — The party seeking to exempt property from the claims of creditors or to have a deed or mortgage thereof declared invalid on the grounds of the homestead character of such property has the burden of establishing all the facts essential to constitute the property a homestead.[12]

10. Meader *v.* Place, 43 N. H. 307; Lacey *v.* Clements, 36 Tex. 661. And see Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530; Williams *v.* Swetland, 10 Iowa 51. *Compare* Schultz *v.* Barrows, 8 Okla. 297, 56 Pac. 1053.

Johnson *v.* Turner, 29 Ark. 280, involved the application of a statute granting the right of homestead to every citizen of the state, "being the head of a family," and consisting of a certain amount of land, "being the residence of such householder and head of a family;" and it was held that the residence and domicile of the wife and children was conclusively presumed to be where the husband resided, although as a matter of fact they may never have actually resided on such premises which were claimed as a homestead by the husband. The place of residence of the wife and children becomes an inquiry of importance only in connection with other circumstances to determine the fact of actual residence of the husband, and their absence from the place claimed by him as a homestead, if unexplained, might require stronger proof of his intention, but nothing more.

11. Thus it was held in France *v.* Bell, 52 Neb. 57, 71 N. W. 984, that where a wife with her children had left the husband because of their mutual understanding that they could not live together, he being a drinking man, and she with the children having removed to another state where she chose a home in which she lived with the children, partly supporting them, she was the head of the family and her selection of such homestead was held valid notwithstanding the fact that the husband was still domiciled in the state of their former residence. See also Harteau *v.* Harteau, 14 Pick. (Mass.) 181, 25 Am. Dec. 372.

12. *United States.* — Grosholz *v.* Newman, 21 Wall. 481.

Alabama. — Goodloe *v.* Dean, 81 Ala. 479, 8 So. 197.

Arkansas. — Worsham *v.* Freeman, 34 Ark. 55; Webb *v.* Davis, 37 Ark. 551.

California. — Apprate *v.* Faure, 121 Cal. 466, 53 Pac. 917; Estate of Delaney, 37 Cal. 176.

Georgia. — Pritchett *v.* Davis, 101 Ga. 236, 28 S. E. 666, 65 Am. St. Rep. 298.

Iowa. — Helfenstein *v.* Cave, 6 Iowa 374.

Kentucky. — Robertson *v.* Robertson, 14 Ky. L. Rep. 505, 20 S. W. 543.

Louisiana. — Tilton *v.* Vignes, 33 La. Ann. 240.

Michigan. — Hoffman *v.* Buschman, 95 Mich. 538, 55 N. W. 458; Newbro *v.* Friar, 131 Mich. 368, 91 N. W. 609; Amphlett *v.* Hibbard, 29 Mich. 298.

Missouri. — Meyer Bros. Drug Co. *v.* Bybee, 179 Mo. 354, 78 S. W. 579.

New York. — Griffin *v.* Sutherland, 14 Barb. 456.

North Carolina. — Fulton *v.* Roberts, 113 N. C. 421, 18 S. E. 510.

Tennessee. — Doran *v.* O'Neal (Tenn. Ch.), 37 S. W. 563; Prater *v.* Prater, 87 Tenn. 78, 9 S. W. 361, 10 Am. St. Rep. 623.

Texas. — Newman *v.* Farquhar, 60 Tex. 640; Keith *v.* Hyndman, 57 Tex. 425; Welborne *v.* Downing, 73 Tex. 527, 11 S. W. 501; Scott *v.* Parks (Tex. Civ. App.), 29 S. W. 216; Bell *v.* Greathouse, 20 Tex. Civ. App. 478, 49 S. W. 258.

Extent of Burden. — Essential Facts. — The defendant, seeking to exempt his property from the claims

B. Probate Homestead. — Upon an application to a court in probate proceedings to set apart a homestead the applicant must show not only that he is entitled to such an order, but that the particular property asked to be set apart possesses the requisite characteristics.[13]

C. To Avoid Conveyance of Husband. — Where title to land stands in the name of the husband, his right to sell the same is presumed, and the party maintaining that the husband's conveyance of such premises is void, by reason of their homestead character, has the burden of proving not only that the premises constitute a homestead,[14] but also that he was the head of a family, having a living wife.[15]

D. Unallotted Homestead. — Under a constitutional provision rendering exempt and prohibiting the alienation, without the consent of the wife, of a homestead "to be selected by the owner thereof,"

of plaintiff on the ground of its homestead character, has the burden of proving the essential facts of citizenship, family and residence. Hargadene *v.* Whitfield, 71 Tex. 482, 9 S. W. 475.

Business Homestead. — The burden is upon the claimant to establish the fact that the premises claimed as a business homestead were used by him for his business at the time of the levy. Gibbs *v.* Hartenstein (Tex. Civ. App.), 81 S. W. 59.

Head of Family. — The burden of proving that the party claiming the homestead is the head of a family is upon him who avers that the property is within the homestead exemption. McLean *v.* Ellis, 79 Tex. 398, 15 S. W. 394.

Homestead Before Occupancy. Burden of Proof. — Land unoccupied as a homestead at the time of a levy thereon is *prima facie* subject to execution, and the burden of proof is on the claimant to establish a *bona fide* intention to occupy the same as a homestead. Bowles *v.* Hoard, 71 Mich. 150, 39 N. W. 24; and also such acts of preparation for occupancy as will clearly manifest the intended use for homestead purposes. Mullens *v.* Looke, 8 Tex. Civ. App. 138, 27 S. W. 926.

When Homestead Covered by Several Mortgages. — In an action by the claimant to recover certain real estate which had been sold under the foreclosure of several mortgages, on the ground of its homestead character, it is incumbent upon him to establish the homestead as against each and all of such mortgages. Klink *v.* Cohen, 15 Cal. 200.

13. McLane *v.* Paschal, 47 Tex. 365; Estate of Delaney, 37 Cal. 176; Harris *v.* Howard (Ky.), 81 S. W. 275; Higgins *v.* Higgins, 25 Ky. L. Rep. 1824, 78 S. W. 1124.

Existing Debts as a Condition Precedent. — Under a statute providing that a homestead set apart during the claimant's lifetime descends, on his death, absolutely to his heirs, unless there are debts against such deceased, in which case the homestead right is continued in the widow for life, the burden of proving the existence of such debts is on the widow, and in the absence of such proof the presumption arises that there are no creditors; and the fact that the homestead was claimed by the deceased during his lifetime is not, as against his heirs, even presumptive proof that there are subsisting debts outstanding against the estate. Barker *v.* Jenkins, 84 Va. 895, 6 S. E. 459.

14. Iken *v.* Olenick, 42 Tex. 195; Hughes *v.* Hodges, 102 N. C. 236, 9 S. E. 437; Goodloe *v.* Dean, 81 Ala. 479, 8 So. 197.

15. This is because if the claimant had no wife living he would be bound by his absolute deed, notwithstanding the fact that the property was his homestead, and as such protected from debts. McLean *v.* Ellis, 79 Tex. 398, 15 S. W. 394.

and providing for its allotment on the owner's petition or by an officer in accordance with law, it has been held that where the claimant seeks to have the property in question allotted to him as a homestead he has the burden of proving that a homestead has not before been allotted to him.[16]

E. Purchase of New Homestead With Proceeds of Sale of Former. — Under a statute allowing the claimant to sell the homestead and hold the proceeds exempt provided he intends to reinvest such proceeds in another homestead, the party claiming such proceeds as exempt has the burden of proving the sale of such former homestead and that the same was made in pursuance of a design to purchase another homestead with the proceeds thereof.[17] Likewise where such a statute continues the exemption attached to the original homestead to a new one purchased with the proceeds of the sale of such original, it is incumbent on the party claiming the continuance of such exemption to show that the new homestead was purchased with the proceeds of the sale of the former.[18]

16. Fulton *v.* Roberts, 113 N. C. 421, 18 S. E. 510.

Deed by Husband Without Signature of Wife. — Under such a constitutional provision as described in the text, it was held in Hughes *v.* Hodges, 102 N. C. 236, 9 S. E. 437, where the grantor (claimant) sought to have his conveyance of the homestead premises set aside on the ground that it was not signed by the wife, the claimant must prove not only that no actual allotment of homestead in other lands had ever been made to him, but also that the premises in question had either been allotted to him, or, if not, that such allotment was necessary to protect him against existing creditors; otherwise the deed was valid.

17. Huskins *v.* Hanlon, 72 Iowa 37, 33 N. W. 352; State *ex rel.* Schneider *v.* Hull, 100 Mo. App. 703, 74 S. W. 888.

18. Johnson Co. Sav. Bank *v.* Carroll (Iowa), 78 N. W. 247; First Nat. Bank *v.* Thompson, 72 Iowa 417, 34 N. W. 184.

In an action to subject a homestead to the payment of a debt contracted prior to its acquisition, where the claimants contend that such homestead is exempt because purchased with the proceeds of the sale of the former homestead owned and occupied by them prior to the contracting of the debt in question, the plaintiff makes out a *prima facie* case by proving that the debt was contracted before the acquisition of the present homestead, and the burden is then upon the defendants (claimants) to show the purchase of the present homestead with the proceeds of the sale of the former. First Nat. Bank *v.* Baker, 57 Iowa 197, 10 N. W. 633.

Where Former Homestead Exceeded the Acreage Exempted. White *v.* Kinley, 92 Iowa 598, 61 N. W. 176, was decided under a statute providing in effect that the owner of a homestead may change his home and hold the new acquisition exempt from execution *to the extent in value* of the old homestead in all cases where such old homestead would have been exempt, and the homestead was limited to forty acres in extent. It appeared that the homestead formerly occupied consisted of a farm of 170 acres of land, of the value of $6000; such farm was sold and soon thereafter the house and lot in controversy, which was of the value of $900, was purchased with the proceeds of the sale of such farm. The question at issue being whether the homestead in controversy equaled or exceeded the value of the homestead right in the farm; it was held that it was not incumbent upon the claimant to show the value of the homestead forty acres in the farm as separate from the value of the farm as a

F. When Burden on Contestant. — a. *In General.* — It has been held that where the execution purchaser in an action of ejectment against the homestead claimant proves, in his case in chief, not only his own chain of title, but also that the claimant at the time of the execution sale owned no other property, and that the sale had been made without the allotment provided by law, the burden is on the plaintiff to prove that the property was not exempt as a homestead.[19]

b. *Conveyance of Homestead. — Statutory Requirements.* Where the law prohibits the conveyance or incumbrance of the homestead except upon a compliance with certain prescribed requisites, it is incumbent upon the party asserting the validity of such conveyance or incumbrance to prove a strict compliance with such requirements; they cannot be supplied by presumption.[20]

5. How Determined. — A. In General. — Use to Which Applied. — In the absence of statutory or constitutional provision requiring a formal mode of selecting or designating a homestead, the guiding principle in determining whether a given piece of property is or is not a homestead is the use to which the property is applied,[21] and its adaptability to use as a homestead;[22] and it has been held

whole; nor was it necessary for him to show that the money received from the homestead forty acres alone was actually invested in the new homestead; and it was further held that if it could be found from the evidence that the value of the farm as a whole was sufficient, that every forty acres of it would equal in value the new homestead, this was sufficient.

19. Mobley *v.* Griffin, 104 N. C. 112, 10 S. E. 142.

20. Cross *v.* Everts, 28 Tex. 524. And see Texas Loan Agency *v.* Hunter, 13 Tex. Civ. App. 402, 35 S. W. 399.

Recital in Conveyance by Husband and Wife. — The Iowa Code, § 1990, provides that "a conveyance or incumbrance . . . is of no validity unless the husband and wife . . . concurred in and signed the same joint instrument." In Wilson *v.* Christopherson, 53 Iowa 481, 5 N. W. 687, which was an action to foreclose a mortgage upon the homestead, to which mortgage the names of both the husband and wife were signed, but the name of the wife did not appear in the granting part, and at the close of the mortgage was a clause in these words: "And the said Even Christopherson [the wife] hereby relinquishes her right of dower in and to the above described real estate," it was held that the mortgage was invalid, the presumption being that the wife's concurrence and signature related only to the clause releasing her dower and not to the part of the mortgage whereby the incumbrance was designed to be created.

21. Gregg *v.* Bostwick, 33 Cal. 220, 91 Am. Dec. 637; Ford *v.* Fosgard (Tex. Civ. App.), 25 S. W. 445; Malone *v.* Kornrumpf, 84 Tex. 454, 19 S. W. 607; Iken *v.* Olenick, 42 Tex. 195; St. Louis Brg. Ass'n *v.* Howard, 150 Mo. 445, 51 S. W. 1046; Anderson *v.* Stadlmann, 17 Wash. 433, 49 Pac. 1070. And see Laughlin *v.* Wright, 63 Cal. 113.

In Houston & G. N. R. Co. *v.* Winter, 44 Tex. 597, the court uses the following language: "What is meant by the 'homestead of the family' in the country and its approximate locality is determinable by the obvious facts as a determinate object, and not by the variable intention, privately entertained or openly declared by the husband, he and his wife residing on the land in their home at the time."

22. Ford *v.* Fosgard (Tex. Civ. App.), 25 S. W. 445.

that where the evidence shows that the premises were actually occupied and used for homestead purposes this is conclusive, notwithstanding the declarations or testimony of the husband or wife to the contrary.[23]

B. Presumption From Occupancy. — a. *In General.* — In the absence of a statutory or constitutional provision requiring some formal act of selection, the actual occupancy of the premises as a home by the claimant and family is, of itself, presumptive evidence of the homestead character of such premises, and of the occupant's selection thereof as his homestead.[24]

23. Jacobs *v.* Hawkins, 63 Tex. 1; Rose *v.* Blankenship (Tex.), 18 S. W. 101; Keller *v.* Beattie (Tex. Civ. App.), 34 S. W. 667; Medlenka *v.* Downing, 59 Tex. 40.

In Ruhl *v.* Kauffman, 65 Tex. 723, the court said: "The actual use of a lot for the convenience of the family has always been regarded as the most satisfactory evidence of an intention to make it part of the homestead; and even the positive and formal declaration of both husband and wife of a contrary intent has been held not sufficient to divest property actually used as a homestead of the homestead protection."

24. *Arkansas.* — Tumlinson *v.* Swinney, 22 Ark. 400, 76 Am. Dec. 432; Webb *v.* Davis, 37 Ark. 551. See Johnson *v.* Turner, 29 Ark. 280.

California. — Cook *v.* McChristian, 4 Cal. 26; Harper *v.* Forbes, 15 Cal. 202; Holden *v.* Pinney, 6 Cal. 234; Taylor *v.* Hargous, 4 Cal. 268, 60 Am. Dec. 606; Brooks *v.* Hyde, 37 Cal. 366.

Kansas. — See Moore *v.* Reaves, 15 Kan. 150.

Michigan. — Riggs *v.* Sterling, 60 Mich. 643, 27 N. W. 705, 1 Am. St. Rep. 554; Thomas *v.* Dodge, 8 Mich. 51.

Tennessee. — First Nat. Bank *v.* Meachem (Tenn. Ch.), 36 S. W. 724.

Texas. — Crebbin *v.* Moseley (Tex. Civ. App.), 74 S. W. 815.

Utah. — Kimball *v.* Lewis, 17 Utah 381, 53 Pac. 1037.

Washington. — Anderson *v.* Stadlmann, 17 Wash. 433, 49 Pac. 1070; Philbrick *v.* Andrews, 8 Wash. 7, 35 Pac. 358.

Wisconsin. — Phelps *v.* Rooney, 9 Wis. 70, 76 Am. Dec. 244; Moore *v.* Smead, 89 Wis. 558, 62 N. W. 426. And see Kent *v.* Lasley, 48 Wis. 257, 4 N. E. 23.

In St. Louis Brg. Ass'n *v.* Howard, 150 Mo. 445, 51 S. W. 1046. it is said: "This occupancy is always *prima facie* evidence to any officer of the law, charged with the execution of a writ, that it is a homestead."

In Beecher *v.* Baldy, 7 Mich. 488, the court said: "Where the whole tract owned and occupied by the debtor does not exceed the quantity mentioned in the constitution, and is admitted to be within the prescribed value, the law, in the absence of any proof, must presume the acceptance by the debtor of the benefit conferred by the constitution to the full amount of the constitutional exemption." *Reversing* People *v.* Plumsted, 2 Mich. 469.

Where a person owning several properties is found living on one of them, "the presumption is that he is at home where he is found living, but this presumption may be rebutted by showing his abode to be temporary and his home elsewhere." Jarvais *v.* Moe, 38 Wis. 440.

Proof that the party is in actual possession and use of one house and premises as a dwelling is conclusive evidence that he cannot have a homestead right in another house and premises by construction and claim merely. Schoffen *v.* Landauer, 60 Wis. 334, 19 N. W. 95.

In Klenk *v.* Noble, 37 Ark. 298, it is said: "Actual residence is a palpable thing of which every one must take notice, and any attempt by a lender to take or a borrower to give a mortgage on an actual residence must of necessity be an effort to evade the constitutional policy," rendering void all incumbrances on the homestead.

b. *When Record Title in Wife.* — Occupancy of the premises by the husband and family as a home is presumptive evidence of the homestead character of the premises occupied, and is constructive notice thereof to creditors, although the record or paper title thereto be in the name of the wife.[25]

c. *When Premises Exceed Statutory Limit.* — Where the right to select a homestead exists and the premises on which the claimant resides exceeds in extent the quantity allowed by law, and no particular selection has been made by the claimant, the law will presume a selection of that portion of the premises on which the dwelling-house is situated equal in extent and value to the amount allowed by law.[26] Accordingly a conveyance or mortgage of the whole[27] of the premises or of a part thereof other than that on which the dwelling stands,[28] while perhaps void as to the homestead because prohibited by law, will nevertheless be held valid as to the excess.

Occupancy by Wife as Constructive Notice. — In Lynn *v.* Sentel, 183 Ill. 382, 55 N. E. 838, 75 Am. St. Rep. 110, it is held that the possession of the premises by the wife and family, the husband having deserted the wife, is presumptive evidence of the homestead character of the premises and is constructive notice of the wife's right therein to purchasers and creditors.

Distinction Between Conveyance and Execution Sale. — Under Tennessee act 1879, ch. 171, exempting real estate in possession of the head of the family, to the value of $1000, and giving him the right to select any piece of property belonging to him as his homestead, whether the family resides thereupon or not, it was held, in First Nat. Bank *v.* Meachem (Tenn. Ch.), 36 S. W. 724, that the adoption of a particular piece of land of the value of at least $1000 by the head of the family as a home by his living upon it raises the presumption that it had been selected as his homestead, and his other lands were thereby released from exemption; but this rule was held to apply only as between the head of a family and the person with whom he deals in the matter of deeds, incumbrances and the like, and was not applicable to cases where it was sought to subject the land to the payment of a debt, the husband in such cases being allowed to select any of his lands, whether living thereupon or not.

Presumption Not Conclusive. "The presumption arising from residence may be defeated by facts and circumstances *aliunde*." Holden *v.* Pinney, 6 Cal. 234.

25. Broome *v.* Davis, 87 Ga. 584, 13 S. E. 749.

26. Herrick *v.* Graves, 16 Wis. 157; Kent *v.* Lasley, 48 Wis. 257, 4 N. E. 23.

In Miller *v.* McAlister, 197 Ill. 72, 64 N. E. 254, the court said: "Where the several forty-acre tracts lie contiguous, and the debtor has a dwelling on any given forty-acre tract, which, with the building thereon, is of a value of more than $1000, in such case the law regards the forty acres on which the debtor's residence is situated as the farm or lot of ground selected by him as a homestead."

But see Meyer Bros. Drug Co. *v.* Bybee, 179 Mo. 354, 78 S. W. 579, in which it is held that where the law gives the claimant the right to designate the part of his premises, in case they exceed the limit, to which the exemption should apply, "the mere fact that his residence was on one of the tracts did not confine his homestead exemption to that particular tract," and that the homestead exemption may be selected from any portion of the whole tract desired by the claimant.

27. De Graffenried *v.* Clark, 75 Ala. 425.

28. In Hall *v.* Gottsche, 114 Iowa 147, 86 N. W. 257, it was held that the separate conveyance by the husband of a portion of the premises, leaving a balance thereof equal in value and extent to the amount al-

Governmental Subdivisions of Sections. — It has been held that where the claimant owns and is in possession of premises exceeding in extent the statutory limit, and has made no selection, it is conclusively presumed that he intended to select that governmental subdivision of the section of land on which the dwelling-house stands and which contains the quantity of land allowed by law,[29] but another court has held the contrary.[30]

d. *Probate Homestead — Election to Take Homestead in Lieu of Distributive Share.* — Under a statute providing in effect that upon the death of either spouse the survivor has the election either to take his or her distributive share of the estate in fee-simple or to hold the homestead for life; and further providing that the setting-off of the distributive share shall extinguish the homestead, the continuous occupancy of the homestead for a considerable period of time, without having the distributive share set apart, raises a presumption that the surviving spouse has elected to take the homestead right in lieu of the distributive share.[31] Likewise the fact that the surviving widow after her husband's death left the former homestead, took up her residence in another place and applied the rents of such homestead to her support, raises the presumption that she elected to

lowed by law and containing the improvements, raised the presumption of an election to treat such remainder as the homestead, and such conveyance was held valid although the wife did not sign the same. But see Goodrich *v* Brown, 63 Iowa 247, 18 N. W. 893.

29. Kent *v.* Lasley, 48 Wis. 257, 4 N. E. 23, *overruling* Kent *v.* Agard, 22 Wis. 150.

30. Under a statute limiting the extent of a homestead to 160 acres and providing for its selection by the making and filing of a written declaration containing among other things a description of the premises claimed as a homestead, it appearing that no such declaration had been filed and that the claimant owned and occupied all of a governmental section of land on one-quarter of which he lived, it was held, in Foogman *v.* Patterson, 9 N. D. 254, 83 N. W. 15, that the failure to make and file such declaration did not defeat the homestead right, but until the selection was made by the claimant, the particular one hundred and sixty acres constituting the homestead could not be determined, and there was no presumption that the one-quarter section on which the owner resided constituted his homestead, the court saying: "There is not the slightest presumption that it follows governmental subdivisions of sections."

31. Stephens *v.* Hay, 98 Iowa 37, 66 N. W. 1048; McDonald *v.* McDonald, 76 Iowa 137, 40 N. W. 126; Zwick *v.* Johns, 89 Iowa 550, 56 N. W. 665; Thomas *v.* Thomas, 73 Iowa 657, 35 N. W. 693; Butterfield *v.* Wicks, 44 Iowa 310.

Will. — Where the will of the deceased husband devises to the surviving widow the right to possess and occupy all of his realty, including the homestead, during her lifetime, it will be presumed in the absence of a showing to the contrary that her continued occupancy of the homestead for a period of seven years after his death was under the will, and that it was an election to take the homestead in lieu of her distributive share of the real estate. *In re* Franke's Estate, 97 Iowa 704, 66 N. W. 918.

Occupancy by Surviving Husband. Where the title to the homestead was in the name of the wife, the continued occupancy of the premises by the husband for more than nine years after her death raises the presumption that he elected to hold it as a

take the land as her distributive share and not as a homestead.[32] But the surviving spouse has a reasonable length of time within which to make such election, and no presumption of an election to take the homestead arises from an occupancy during such reasonable time.[33] In any event the presumption is not conclusive and may be rebutted by any competent evidence tending to show a contrary intention,[34] although it has been held that where such occupancy continued for a period of seventeen years after the husband's death the presumption became practically conclusive.[35]

C. Direct Evidence — Testimony of Claimant. — Where the question as to whether certain premises constituted a homestead depends upon the intent or purpose of the person who had the right to claim such homestead, such person may testify directly that his purpose and intent was[36] or was not[37] to treat such premises as his homestead. Such direct testimony, however, is not conclusive and is entitled to little or no weight when the circumstances clearly indicate the contrary;[38] and it has been held that where the physical facts of occupancy and use are of such character as to conclusively show that the premises were actually used as a homestead, the testimony of the claimant to the contrary or that he did not consider them his homestead is immaterial and incompetent.[39]

D. Written Declaration or Application for Homestead. a. *Essentials to Admission as Evidence.* — Where the law provides that the homestead shall be selected or designated by the making and filing of a written declaration or application which shall contain certain specified statements of facts, such application, in order to be admissible as evidence, must, on its face, comply with all the

homestead for life in lieu of his distributive share. McGuire *v.* McGuire (Iowa), 81 N. W. 451.

32. Peebles *v.* Bunting, 103 Iowa 489, 73 N. W. 882.

33. Egbert *v.* Egbert, 85 Iowa 525, 52 N. W. 478. See also Whited *v.* Pearson, 87 Iowa 513, 57 N. W. 30, McDonald *v.* Young, 109 Iowa 704, 81 N. W. 155.

34. Stephens *v.* Hay, 98 Iowa 37, 66 N. W. 1048; McDonald *v.* Young, 109 Iowa 704, 81 N. W. 155; Robson *v.* Lambertson, 115 Iowa 366, 88 N. W. 943.

35. Huit *v.* Huit, 122 Iowa 338, 98 N. W. 123.

36. Gallagher *v.* Keller, 87 Tex. 472, 29 S. W. 647; Tromans *v.* Mahlman, 111 Cal. 646, 44 Pac. 327.

37. Clark *v.* Evans, 6 S. D. 244, 60 N. W. 862.

38. Tromans *v.* Mahlman, 111 Cal. 646, 44 Pac. 327; Clark *v.* Evans, 6 S. D. 244, 60 N. W. 862. And see *supra*, "Use to Which Applied," and *infra*, "Acts and Declarations."

39. Jacobs *v.* Hawkins, 63 Tex. 1. In Clark *v.* Evans, 6 S. D. 244, 60 N. W. 862, the court, in distinguishing Jacobs *v.* Hawkins, *supra*, said: "If Evans' [the husband] use and occupation of these premises were such as to prove them to be his home, his declaration that they were not would not prevail against evidence of such use and occupation. But here the very vital question is, Did he so use it? What was the character of his use and occupation? . . . His testimony as to his purpose and intent might not and should not prevail against inconsistent overt acts, but it was not incompetent. It was entitled to be considered for what it was worth, in connection with other facts and circumstances of the case."

requirements of the statute;[40] and any defect or omission therein cannot be remedied by evidence *aliunde*.[41]

b. *For What Purposes Competent.* — The homestead papers prepared and filed in accordance with law are admissible for the purpose of showing any admissions made therein against the interest of the person who prepared and filed them.[42]

A declaration of homestead is admissible to show a compliance with the law requiring the making and filing of the same for record;[43] but such declaration is no evidence of the truth of the facts therein stated,[44] except where the statute makes the same *prima facie* evidence of the truth of its contents.[45]

c. *Original Papers Best Evidence.* — The original application or declaration of homestead is the best evidence of whether the same complies with the law in respect to its contents, and the record thereof is secondary.[46]

d. *Failure to Make and File Declaration.* — The failure of the claimant to make and file the written declaration of homestead as provided by law, is relevant as a circumstance tending to show that the parties never intended to reside on or use the premises as a homestead.[47]

E. Homestead of Decedent. — Inventory of Estate as Evidence. — Where the law provides that the homestead is no part of the estate of the deceased husband, but descends directly to the surviving widow and children without administration, it has been held that the fact that the property in question was inventoried and appraised as part of the testator's estate is *prima facie* evidence that it was not his homestead.[48]

40. Reid *v.* Englehart-Davidson Merc. Co., 126 Cal. 527, 58 Pac. 1063, 77 Am. St. Rep. 206; Langford *v.* Driver, 70 Ga. 588; Wilder *v.* Frederick, 67 Ga. 669; Pegram *v.* Hancock, 105 Ga. 185, 31 S. E. 419; Coffee *v.* Adams, 65 Ga. 347.

41. Reid *v.* Englehart-Davidson Merc. Co., 126 Cal. 527, 58 Pac. 1063, 77 Am. St. Rep. 206.

42. Stevenson *v.* Moody, 85 Ala. 33, 4 So. 595; Huntington *v.* Chisholm, 61 Ga. 270. And see Brennan *v.* Wallace, 25 Cal. 108.

Declaration as Evidence to Avoid Deed of Husband to Wife. — Under a statute requiring the consent of both husband and wife to the conveyance of property covered by a homestead and providing that a homestead can only be abandoned by a declaration or grant executed by both husband and wife, a declaration of homestead, filed by the wife previous to the execution of a trust deed by the husband alone to his wife, of such property, is admissible in evidence for the purpose of avoiding the trust deed. Graves *v.* Baker, 68 Cal. 133, 8 Pac. 691.

43. Apprate *v.* Faure, 121 Cal. 466, 53 Pac. 917.

44. Apprate *v.* Faure, 121 Cal. 466, 53 Pac. 917.

Declaration as Evidence of Value. The statement in the declaration of homestead filed of record as to the value of the homestead is no evidence of the value thereof. Estate of Delaney, 37 Cal. 176.

45. Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54; Murphy *v.* Hunt, 75 Ala. 438.

46. Pritchett *v.* Davis, 101 Ga. 236, 28 S. E. 666, 65 Am. St. Rep. 298; Larey *v.* Baker, 85 Ga. 687, 11 S. E. 800; Brown *v.* Driggers, 62 Ga. 354, *s. c.*, 60 Ga. 114.

47. Brokken *v.* Baumann, 10 N. D. 453, 88 N. W. 84.

48. Hamm *v.* Hutchins, 19 Tex. Civ. App. 209, 46 S. W. 873.

F. Circumstantial Proof. — a. *In General.* — Circumstantial evidence is competent to prove or disprove the homestead character of premises or its incidents.[49]

b. *Acts and Declarations of Claimant.* — The acts and declarations of the party claiming the homestead are competent evidence of his purpose and intent concerning the premises.[50] Statements made by the husband or wife at the time to which the inquiry relates, tending to show that they did not use or intend to claim the premises as a homestead, are competent.[51] But the courts in Texas seem

49. Gallagher *v.* Keller, 87 Tex. 472. 29 S. W. 647; Tromans *v.* Mahlman, 111 Cal. 646, 44 Pac. 327.

In Johnson *v.* Turner, 29 Ark. 280, the court held that the question of whether a homestead right existed at a certain time is a question of fact and "is to be determined from the evidence in the case and may consist of acts, declarations, circumstances and general conduct of the party which tend to show what his *bona fide* intention was."

50. Johnson *v.* Turner, 29 Ark. 280; Clark *v.* Evans, 6 S. D. 244, 60 N. W. 862; Furtner *v.* Edgewood Distilling Co., 16 Tex. Civ. App. 359, 41 S. W. 184; Jacobs *v.* Hawkins, 63 Tex. 1.

Where the question at issue is which of two places constituted the claimant's homestead, one of such places being his farm and the other a place in the city where he had living rooms, his declarations as to his intent, which declarations accompanied his acts in removing to and fro between such places, are admissible to show which place he intended as his homestead, being part of the *res gestae.* Mills *v.* Mills, 141 Mo. 195, 42 S. W. 709.

Voting Where Homestead Situated. Evidence that the claimant voted at the place where the premises are situated is competent on the question of residence, but is not conclusive proof of such residence as required under the homestead law, in the absence of some act toward the land itself tending to show an active effort to occupy the same. Brokken *v.* Baumann, 10 N. D. 453, 88 N. W. 84.

Holding Elective Office in Other Place. — The residence and intent of the person upon whose residence and intent the homestead right depends being the question at issue, evidence showing that he was elected to, qualified and held a public office in a district which did not include the site of the premises in question is relevant and competent, he being ineligible to such office if a non-resident. Clark *v.* Evans, 6 S. D. 244, 60 N. W. 862.

Premises Not Yet Occupied. — Improving Other Property. — Where the claimant maintains that by reason of his intention to occupy and use the premises as a homestead, such intention being evidenced by acts of preparation, the property is exempt notwithstanding that it is not yet actually occupied by him, proof of the fact of his working and improving other property is admissible as tending to weaken the effect of his evidence of intent, but is not conclusive. Furtner *v.* Edgewood Distilling Co., 16 Tex. Civ. App. 359, 41 S. W. 184.

Mortgaging Part of Premises as Security for Loan. — On the question as to whether a lot adjacent to that on which a dwelling-house was situated constituted part of a homestead, the fact that the claimant and wife selected such lot from others and sought to mortgage the same as security for a loan is a potent circumstance tending to show its non-homestead character. Andrews *v.* Hagadon, 54 Tex. 571.

51. Hickey *v.* Behrens, 75 Tex. 488, 12 S. W. 679; Harmsen *v.* Wesche (Tex. Civ. App.), 32 S. W. 192; Anderson *v.* Kent, 14 Kan. 207.

Recital in Deed of Trust Not Conclusive. — But it has been held that a recital in a deed of trust executed by the husband and wife, to the effect that the premises conveyed "are

to confine the competency of declarations disparaging the homestead right to cases where the property has either never been used as a homestead or was not so used at the time in question, and to hold that, if the property was in actual use as a homestead no declaration of the husband or wife or both is competent to change its character.[52]

c. *Declarations of Husband as Evidence Against Wife.* — The homestead rights of the wife are in general dependent upon the acts and conduct of her husband in using and occupying the premises so as to make it a homestead, and therefore his declarations tending to show that he never claimed or intended the property to be his homestead are competent against the wife, although not made in her presence or with her consent.[53] But it has been held that if it be shown that the husband is acting in fraud of the rights of the wife in the premises, his declarations, made in her absence, are not competent as evidence to prejudice her rights in the homestead.[54]

II. WHO MAY CLAIM.

1. In General. — Presumption. — Under a statute granting the right of homestead to all persons, except those of a certain class, a person claiming a homestead is presumed to be entitled to claim the

no part of our homestead" is not conclusive upon the question of homestead where it appears that such recital was placed in the instrument merely to evade the homestead law which prohibited absolutely the conveyance of a homestead with a defeasance. Howell *v.* Stephenson (Tex. Civ. App.), 36 S. W. 302.

52. Rose *v.* Blankenship (Tex.), 18 S. W. 101; Keller *v.* Beattie (Tex. Civ. App.), 34 S. W. 667; Medlenka *v.* Downing, 59 Tex. 40. But see Clark *v.* Evans, 6 S. D. 244, 60 N. W. 862, and *compare* Howe *v.* O'Brien (Tex. Civ. App.), 45 S. W. 813.

In Jacobs *v.* Hawkins, 63 Tex. 1, the court said: "In cases in which property has not been used as a homestead, or is not so used, the declarations of the husband would seem to be admissible for the purpose of showing that there was no intention so to use it as to make it a homestead. This would seem to be true, where a place formerly used as a homestead is no longer occupied; and so, for the purpose of indicating an intention never again to use it, which, coupled with the act of removal, would amount to an abandonment. But where in fact the property is actually in use for homestead purposes, neither the declaration of the husband or wife, or both, can change its character."

53. Clark *v.* Evans, 6 S. D. 244, 60 N. W. 862; Sheperd *v.* White, 11 Tex. 346. And see Brennan *v.* Wallace, 25 Cal 108.

54. In Newman *v.* Farquhar, 60 Tex. 640, which was an action by the grantee in a conveyance signed by the husband alone, the wife claiming the premises as a homestead and charging fraud and collusion between the husband and the plaintiff in hostility to her interests, it was held that the declarations of the husband, not made in the presence of the wife, to the effect that he had never claimed the property as a homestead, and tending to deny the fact of homestead, were incompetent, the court saying: "When we consider the attitude in which the husband, in this case, stands to his wife as disclosed by the record, we do not believe his declarations, made in her absence, and under such circumstances, should be allowed to prejudice her rights." And see Smith *v.* Uzzell, 56 Tex. 315; Rose *v.* Blankenship (Tex.), 18 S. W. 101.

same and not to be within the exception,[55] and especially is this true where the claim has been recognized by an officer of the law.[56]

2. Head of Family. — A. Question of Fact. — Whether the claimant is the head of a family as defined in the constitution or statute is a question of fact to be determined from all the evidence.[57]

B. Presumption of Continuance. — Where it is shown that at the time of the establishment of the homestead the claimant was the head of a family, it is presumed that such state of facts continued until the contrary is shown.[58]

C. Application by Wife. — Where the wife has the right to apply for the setting apart of a homestead when the husband refuses to do so, and provided he does not object thereto, his acquiescence in her application will be presumed from his silence and failure to complain thereof.[59]

III. VALUE.

1. Presumption. — In the absence of evidence thereon the court cannot presume the value of the premises claimed as a homestead to be at any particular sum,[60] and certainly it will not be presumed that such value is in excess of the amount allowed by law.[61]

2. Burden of Proof. — A. In General. — It seems that the decisions have not settled upon any uniform rule as to who has the burden of proof on the question of exemption generally,[62] and especially where the question at issue is whether the homestead does or does not exceed in value the limit allowed by law. It has been held that the "quantity" and "value" of the homestead form no part of the

55. Where the right is granted to all persons except negroes, the presumption obtains that the claimant is a white person; it cannot be assumed that he was within the exception. Thorn *v.* Darlington, 68 Ky. 448.

56. In Tumlinson *v.* Swinney, 22 Ark. 400. 76 Am. Dec. 432, it was held that where the constitution granted the right of homestead only to white persons, and it was claimed that the homestead claimant did not expressly prove himself to be a white person, such an omission was immaterial where the proof showed that on the date of the sale of the premises under execution he claimed the benefit of the homestead act and the sheriff so far recognized his right as to allow the claim. It is presumed that the sheriff knew the law and properly performed his duty, and, therefore, the fact that the claimant was a white person followed as a necessary conclusion.

57. Hyde *v.* Hyde, 60 Neb. 502, 83 N. W. 673; Mathewson *v.* Kilburn (Mo.), 81 S. W. 1096.

58. Ferguson *v.* Kumler, 25 Minn. 183.

59. Connally *v.* Hardwick, 61 Ga. 501.

60. Hargadene *v.* Whitfield, 71 Tex. 482, 9 S. W. 475.

Change of Homestead to Other of Equal Value. — Judicial Notice. Under a statute authorizing the claimant to change his former homestead to another of equal value the court will not take judicial notice of the fact that such former homestead or the quantity of land constituting it is of the value of the new homestead, or of any certain sum. White *v.* Kinley, 92 Iowa 598, 61 N. W. 176.

61. Mueller *v.* Conrad, 178 Ill. 276, 52 N. E. 1031; Hargadene *v.* Whitfield, 71 Tex. 482, 9 S. W. 475.

62. See State *ex rel.* Schneider *v.* Hull, 100 Mo. App. 703, 74 S. W. 888.

definition, and are mere limitations upon the right after its establishment.[63] However, an examination of the authorities will disclose the fact that the burden, in most cases, was held to be upon the moving party therein, whether he was the homestead claimant or the party attacking the homestead.[64] But this rule seems to have been departed from.[65] Under a statute limiting the extent of a

63. Gregg *v.* Bostwick, 33 Cal. 220, 91 Am. Dec. 637. And see Ham *v.* Santa Rosa Bank, 62 Cal. 125, 45 Am. Rep. 654.

In a suit brought to foreclose a judgment lien, which was resisted by defendants upon the ground that the property constituted their urban homestead, the court, in Fitzhugh *v.* Connor (Tex. Civ. App.), 74 S. W. 83, held that while it was necessary for the claimants of the homestead to allege and to prove the facts necessary to constitute the property a homestead, the quantity and value formed no part of the definition of a homestead, and were mere limitations upon it after its establishment, and, therefore, the charge of the lower court to the effect that the burden of proof as to such value was upon the claimants, was held material error. *Citing* Demartin *v.* Demartin, 85 Cal. 71, 24 Pac. 594.

64. Thus, where an execution creditor or his successor in interest claims that the value of the homestead exceeds the sum allowed by law and seeks to subject the excess to the payment of a debt, the burden is upon him to prove such excessive value before the court can take any action. Fitzhugh *v.* Connor (Tex. Civ. App.), 74 S. W. 83; Beecher *v.* Baldy, 7 Mich. 488; Kilmer *v.* Garlick, 185 Ill. 406, 56 N. E. 1103. And see Demartin *v.* Demartin, 85 Cal. 71, 24 Pac. 594.

Under Nebraska statute, providing in effect that upon the levy of an execution the claimant may notify the sheriff of what he regards as his homestead, with a description thereof, which homestead, to the extent of 160 acres of land in quantity and $2000 in value, becomes exempt, and if in excess thereof, the remainder may be sold, it was held in Quigley *v.* McEvony, 41 Neb. 73, 59 N. W. 767, the claimants having served such notice on the sheriff, and the property selected being within the limit as to quantity, no further proceedings were requisite on the part of the claimant, and the burden was upon the creditor to prove an excess in value before the sale was valid as to any part of the land.

Where Claimant is Moving Party. Where the homestead claimant or his wife seeks by ejectment or otherwise to have his mortgage or conveyance of the premises avoided on the ground that the property involved constituted his homestead, he or she must prove that such homestead does not exceed in value the limit allowed by law. McClendon *v.* Equitable M. Co., 122 Ala. 384, 25 So. 30; Martin *v.* Platt, 64 Mich. 629, 31 N. W. 552.

Individual Deed by Husband to Wife. — Where the statute limits the value of the homestead to $1000, and the wife, who claims the property as the grantee of her husband under his individual deed which is void, under the statute, because not signed by her, seeks to establish the validity of the deed on the ground that the property was of excessive value, she has the burden of proving the fact. Strayer *v.* Dickerson, 205 Ill. 257, 68 N. E. 767.

65. On a trial of a writ of entry for possession of premises, the demandant, basing his title on a deed from the sheriff on an execution sale of the premises against the tenant, and the tenant contending that the premises were homestead, it was held that the demandant, by reason of such sale and deed, was the general owner, entitled to the possession of the whole, except so far as tenant's right of homestead might exclude him; and the tenant, seeking to establish an exclusive right to part of the premises as a homestead, had the burden of proving that the value of the property was such that his homestead rights covered the whole of the part claimed. Swan *v.* Stephens, 99 Mass. 7.

homestead to one-half an acre, unless the value of the whole be less than a specified amount, it has been held that an owner seeking to set aside an execution sale of a homestead which exceeds one-half an acre in extent has the burden of proving the whole to be within the maximum value.[66]

B. Probate Homestead. — A surviving widow, petitioning a probate court to set apart to her the homestead of her deceased husband, has the burden of proving the value thereof, and that it was not excessive.[67]

C. Homestead of Insolvent Debtor. — Under a statute providing that the court "may" on its own motion, or on petition therefor, in proceedings in insolvency, exempt and set apart to the insolvent debtor his homestead thertofore selected in the mode provided by law, it has been held that whenever a proper application is made for such setting apart the court must grant the same, and the burden of proof is upon the contesting creditors to show that the value of the premises asked to be set apart exceeded the limit of exemption.[68]

3. How Shown. — A. In General. — The rules of evidence relating to the proof of value in general apply equally where the subject of inquiry is the value of a homestead.[69]

B. Where Premises Are Excessive in Quantity. — Although the premises occupied, covered, in the aggregate, several governmental subdivisions and exceeded in value and quantity the amount allowed by law, the court will take judicial notice of each of said subdivisions and its boundaries, and it is competent for the claimant to show that the particular subdivision on which the home was actually situated was not excessive in value or quantity.[70]

C. Time to Which Evidence Directed. — a. *In General.* — The value of the homestead should be determined as of the date of the trial of the issue and not as of the time of the levy thereon, or when the homestead was initiated.[71]

66. Boot *v.* Brewster, 75 Iowa 631, 36 N. W. 649, 9 Am. St. Rep. 515.

67. Estate of Delaney, 37 Cal. 176.

68. Demartin *v.* Demartin, 85 Cal. 71, 24 Pac. 594.

69. See fully article "Value."

Price Obtained at Execution Sale. The price at which the homestead sold on execution is not conclusive, nor is it the best evidence of the value thereof; and in a subsequent action involving the validity of such execution sale the claimant may establish the actual value of the homestead by any competent evidence. Riggs *v.* Sterling, 60 Mich. 643, 27 N. W. 705, 1 Am. St. Rep. 554.

Admission of Claimant as a Witness. — The admission by the claimant as a part of his testimony that the homestead exceeds in value the amount allowed by law is conclusive upon him. Cincinnati Leaf Tobacco W. Co. *v.* Thompson, 20 Ky. L. Rep. 1439, 49 S. W. 446.

Claimant's Offer to Sell at Certain Amount. — It has been held that evidence showing that the claimant once offered to sell the homestead premises for a sum less than the limit of the exemption is sufficient to establish the fact that the homestead is within the exemption, in the absence of evidence to the contrary. Boot *v.* Brewster, 75 Iowa 631, 36 N. W. 649, 9 Am. St. Rep. 515.

70. Hill *v.* Bacon, 43 Ill. 477.

71. Moore *v.* Scharf, 110 Ala. 518, 17 So. 933.

b. *Probate Homestead.* — Where it is sought to have the homestead of the decedent set apart in probate to the surviving widow and family, the evidence of value must be directed to the time of the decedent's death.[72]

4. Decision of Appraisers. — The value of the homestead premises, as fixed by the appraisers in setting off a homestead, is conclusive until vacated in a direct proceeding brought for such purpose, and parol evidence is inadmissible to contradict such determination in a subsequent collateral action.[73]

IV. THE EXEMPTION. — EXCEPTION AS TO PARTICULAR DEBTS.

1. Presumption and Burden of Proof. — A. In General. — Proof of the homestead character of the premises makes out a *prima facie* case of exemption on the part of the claimant, and the party seeking to subject the property to the satisfaction of a particular debt on the ground that such debt comes within the provisions of the law, excepting certain specified classes of debts from the homestead exemption, has the burden of proving that the debt in question comes within such exception.[74]

72. Estate of Delaney, 37 Cal. 176; McLane *v.* Paschal, 74 Tex. 20, 11 S. W. 837.

73. Barney *v.* Leeds, 54 N. H. 128; Fletcher *v.* State Capital Bank, 37 N. H. 369; Globe Phosphate Co. *v.* Pinson, 52 S. C. 185, 29 S. E. 549.

74. *Illinois.* — Bach *v.* May, 163 Ill. 547, 45 N. E. 248; Stevenson *v.* Marony, 29 Ill. 532; Huening *v.* Buckley, 87 Ill. App. 648.

Iowa. — Walker *v.* Walker, 117 Iowa 609, 91 N. W. 908.

Kentucky. — Morehead *v.* Morehead, 16 Ky. L. Rep. 34, 25 S. W. 750.

Missouri. — Anthony *v.* Rice, 110 Mo. 223, 19 S. W. 423.

North Carolina. — Mebane *v.* Layton, 89 N. C. 396; McCracken *v.* Adler, 98 N. C. 400, 4 S. E. 138, 2 Am. St. Rep. 340; Hill *v.* Oxendine, 79 N. C. 331.

Tennessee. — Christian *v.* Clark, 10 Lea 630.

Compare. — McWatty *v.* Jefferson Co., 76 Ga. 352; Durham *v.* Bostwick, 72 N. C. 353.

In White *v.* Clark, 36 Ill. 285, the court said: "When the defendant shows that he was the head of a family, is a householder, and owned and occupied the lot of ground as a residence when the judgment was rendered or the deed or mortgage was given, and the right to claim the benefit of the act has not been released, he has brought himself *prima facie* within the provisions of the law. And to overcome his *prima facie* case, the plaintiff must show that it falls within some of the exceptions which render it liable."

Claim for Material Used on Homestead. — The burden of proving that the indebtedness was for property or material furnished before the homestead was occupied, or before the homestead character attached, is upon the creditor alleging the same, and the fact that the material was used on the homestead is insufficient to satisfy the burden, the judgment being obtained while the homestead existed. Delavan *v.* Pratt, 19 Iowa 429. And see Flowers *v.* Miller, 13 Ky. L. Rep. 250, 16 S. W. 705.

The party seeking to subject the homestead to his claim must show the liability of the land to the satisfaction of the debt; and this is not satisfactorily shown by proof of the record in the suit in which the execution issued — such record not showing that the action was to foreclose a mechanic's lien which constituted the exception — although the

B. When Sale Ordered by Court. — And this rule applies although the sale of the property claimed as a homestead was made under the order of a court.[75]

C. Liability for Prior Debt. — Where the claim sought to be enforced against the homestead is based upon an indebtedness accruing before the homestead property was acquired, the burden is on the claimant to establish the homestead character of the property and that it is exempt in the particular instance.[76]

D. Time When Homestead Set Apart. — Where the homestead act in force makes all homesteads set apart after its passage liable to the satisfaction of debts due for the purchase-money thereon, the former act making no such exception, it is incumbent upon the claimant to prove that the homestead was set apart before the passage of the act in force, otherwise the exemption does not apply.[77]

judgment directs the sheriff to sell the property owned by the defendant at the time plaintiffs "filed their lien." McMillan *v.* Parker, 109 N. C. 252, 13 S. E. 764.

Contra. — In Toole *v.* Dibrell (Tex. Civ. App.), 29 S. W. 387, which was trespass to try title, it appearing that the plaintiffs had purchased the property under a trust deed, it was held necessary for the defendants, in order to introduce evidence for the purpose of establishing the homestead character of the property at the time of the execution of such trust deed, to first prove that the trust deed was not given for the purchase price, nor for any such indebtedness as was, by the constitution, made an exception to the general exemption; and in the absence of such preliminary proof, evidence tending to show that the property was a homestead was held properly excluded.

75. Kelsay *v.* Frazier, 78 Mo. 111; Rogers *v.* Marsh, 73 Mo. 64.

Sale by Administrator. — In Anthony *v.* Rice, 110 Mo. 223, 19 S. W. 423, it was held that the purchaser at a sale made by the administrator of an estate, under the order of the probate court, had the burden of proving that the property was sold to pay a debt as to which the homestead was not exempt at the time of the sale. *Overruling* on this point Murphy *v.* DeFrance, 105 Mo. 53, 16 S. W. 861.

76. Paine *v.* Means, 65 Iowa 547, 22 N. W. 669. See also First Nat. Bank *v.* Baker, 57 Iowa 197, 10 N. W. 633.

Liabilities Accruing Before Acquisition. — Limitation. — Where land claimed as a homestead is charged with equities and incumbrances preceding its acquisition and antedating its purchase, the husband, acting in good faith, has the right to adjust such equities and incumbrances and to substitute for them a new lien; and where the husband thereafter seeks to avoid such new lien, as having been given on a homestead which was in fact free from all previous equities or incumbrances and which he could not incumber, he has the burden of establishing his equitable defense with reasonable certainty. Gillum *v.* Collier, 53 Tex. 592. And his defense being that the original lien was barred by limitation at the time the new lien was substituted therefor, evidence should be produced tending to negative the existence of any fact keeping the old lien alive.

Debt Accruing After Establishment. — And where the statute or constitution exempts the homestead only as to such debts as accrue after the homestead is established, the claimant must prove the date of such establishment and that the debt accrued thereafter. Meyer Bros. Drug Co. *v.* Bybee, 179 Mo. 354, 78 S. W. 579.

77. Griffin *v.* Elliott, 60 Ga. 173.

E. Purchase of Outstanding Title. — Where the husband, desiring to perfect the title to the homestead property, purchases an outstanding title it is presumed that such purchase was necessary and that the homestead is liable for the payment of the unpaid portion of such purchase-price; but this presumption may be rebutted by showing that the claimant or his wife owned the paramount title when such outstanding title was acquired.[78]

F. Exhausting Other Property. — The party seeking to restrain the sale of the homestead on execution, on the ground that the creditor has failed to exhaust the owner's other property, has the burden of showing that the claimant owns other available property not exempt from execution and which has not been levied upon.[79]

G. In Equity. — It has been held that where the proceeding is in chancery, the general rule holding that the burden is upon the creditor or purchaser to show that his claim is of such character that the homestead is not exempt therefrom, does not apply, and that the homestead claimants must show the debt to be one against which the homestead is exempt.[80]

2. Date of Indebtedness Evidenced by Note. — The judgment debtor may show that, although the note which evidences the indebtedness bears date anterior to the time when his homestead right originated, it, in reality, was not executed and the indebtedness did not accrue until after his homestead rights had become fixed, and that consequently the homestead is exempt.[81]

3. Character of Debt Reduced to Judgment. — Where a debt against the homestead claimant has been reduced to a judgment, such debt is presumed to have been contracted as of the date of the judgment, in the absence of evidence to the contrary.[82] But the party seeking to enforce such judgment against the homestead may show that the original indebtedness was of such a character that the exemption did not apply to it,[83] or that such indebtedness was contracted before the homestead right was initiated, and that therefore the exemption did not apply, although the judgment was rendered after the homestead became effective.[84]

78. Cassell *v.* Ross, 33 Ill. 244, 85 Am. Dec. 270.

79. Hale *v.* Heaslip, 16 Iowa 451; Stevens *v.* Myers, 11 Iowa 183.

Sale of Homestead Premises Separately. — Presumption of Proper Performance of Official Duty. — In an action to set aside a sale of several parcels of land, one of them constituting a homestead, on the ground that the whole was sold together instead of being sold separately, the homestead being salable only to supply the deficiency, if any, after exhausting the other property, the presumption is that the officer did his duty in this respect in the absence of any showing to the contrary. Eggers *v.* Redwood, 50 Iowa 289.

80. See Kitchell *v.* Burgwin, 21 Ill. 40. This decision seems to be based upon the rule of practice allowing the defendant, in chancery, by cross-bill, to have discovery of complainant to prove his defense.

81. Ingraham *v.* Dyer, 125 Mo. 491, 28 S. W. 840.

82. Mebane *v.* Layton, 89 N. C. 396.

83. Hurd *v.* Hixon, 27 Kan. 722.

84. Gilson *v.* Parkhurst, 53 Vt. 384; Anthony *v.* Rice, 110 Mo. 223,

V. PART OF BUILDING AS A HOMESTEAD.

Where it is shown that a part of a building is, in good faith, used and occupied by the claimant for homestead purposes, the whole of such building is presumptively a homestead and within the exemption,[85] and this presumption has been held conclusive.[86] But it has also been held that it is competent to show that a part of the building is exempt and part not exempt.[87]

VI. CHARACTER OF HOMESTEAD. — URBAN OR RURAL.

1. In General. — It has been held that, except under extraordinary circumstances,[88] there can be no blending of homestead rights so that part of the homestead may be in a town or incorporated city and part in the country;[89] and the homestead partakes of the character of that part of the premises on which the residence is situated.[90]

2. Presumption. — A homestead shown to have been rural in character when established will be presumed to continue as such until the contrary is shown.[91]

3. Character of Place of Business. — The fact that the claimant residing on the homestead premises transacts his business in the town or city is immaterial on the question of whether the homestead be rural or urban in character, although such homestead may be within the limits of such town or city.[92]

4. Homestead Within City or Town. — The fact that the homestead was at the time of its establishment within the limits of a town or city,[93] or, if not within such limits at the time of its establishment, the fact that the corporate limits have been extended so as

19 S. W. 423; Murphy *v.* DeFrance, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861; Ingraham *v.* Dyer, 125 Mo. 491, 28 S. W. 840; *overruling* Daudt *v.* Harmon, 16 Mo. App. 203.

Debt Allowed by Probate Commissioners. — Parol evidence is admissible to show that the debts against an estate allowed by the probate commissioners accrued before the homestead right became fixed, and that such homestead was therefore liable to sale, although the commissioners' report fails to show anything about the date or time of the contracted debts. Perrin's Adm'r *v.* Sargeant, 33 Vt. 84.

85. Rhodes *v.* McCormick, 4 Iowa 368, 68 Am. Dec. 663; Phelps *v.* Rooney, 9 Wis. 70, 76 Am. Dec. 244; Hogan *v.* Manners, 23 Kan. 392.

86. Phelps *v.* Rooney, 9 Wis. 70, 76 Am. Dec. 244. And see Hogan *v.* Manners, 23 Kan. 392.

87. Rhodes *v.* McCormick, 4 Iowa 368, 68 Am. Dec. 663. *Compare In re* Lammer, 7 Biss. 269, 14 Fed. Cas. No. 8031, and Tiernan *v.* His Creditors, 62 Cal. 286.

88. See Taylor *v.* Boulware, 17 Tex. 74, 67 Am. Dec. 642.

89. Keith *v.* Hyndman, 57 Tex. 425; Iken *v.* Olenick, 42 Tex. 195.

90. Keith *v.* Hyndman, 57 Tex. 425.

91. Lauchheimer *v.* Saunders (Tex.), 76 S. W. 750; Wilder *v.* Mcconnel (Tex.), 45 S. W. 145.

92. Posey *v.* Bass, 77 Tex. 512, 14 S. W. 156.

93. Harris *v.* Matthews (Tex. Civ. App.), 81 S. W. 1198.

Nor is the fact that the homestead is within the limits of a town or village, not incorporated, conclusive evidence of its rural character. Wilder *v.* McConnell (Tex.), 45 S. W. 145.

to include it,[94] is not conclusive evidence that it is urban in character. But should the town or city actually build and extend so as to include what was before in the country and make it distinctively of town or city character, the character of the homestead would be changed without regard to the question of incorporation.[95]

5. Character and Situation of Homestead. — Whether the homestead be urban or rural is, in general, to be determined by the nature and character of the property in question and the character and conditions of its surroundings at the time the adverse right is asserted.[96]

6. Corporate Limits. — Relevancy. — The fact that the property at the time of the establishment of the homestead was within the corporate limits of the city, while not conclusive[97] that it was an urban homestead, is competent evidence to be considered in connection with the other evidence on the question as to whether such homestead was urban or rural.[98]

VII. ABANDONMENT.

1. Question of Fact. — Whether the homestead claimant has abandoned the homestead[99] or whether his removal therefrom, or his other acts in applying the premises to uses inconsistent with the homestead character thereof, were done or accompanied with the intention of abandoning the homestead rights,[1] are, generally,

94. *Iowa.* — Finley *v.* Dietrick, 12 Iowa 516.

Michigan. — Barber *v.* Borabeck, 36 Mich. 399.

Texas. — Posey *v.* Bass, 77 Tex. 512, 14 S. W. 156; Lauchheimer *v.* Saunders, 76 S. W. 750; Bassett *v.* Messner, 30 Tex. 604; Neeley *v.* Case (Tex. Civ. App.), 32 S. W. 785; Taylor *v.* Boulware, 17 Tex. 74, 67 Am. Dec. 642.

Contra. — Bull *v.* Conroe, 13 Wis. 233; Parker *v.* King, 16 Wis. 223.

95. Lauchheimer *v.* Saunders (Tex.), 76 S. W. 750; Iken *v.* Olenick, 42 Tex. 195; Harris *v.* Matthews (Tex. Civ. App.), 81 S. W. 1198.

96. Lauchheimer *v.* Saunders (Tex.), 76 S. W. 750; Iken *v.* Olenick, 42 Tex. 195.

97. See notes 93 and 94, *supra.*

98. Harris *v.* Matthews (Tex. Civ. App.), 81 S. W. 1198.

99. *Alabama.* — Murphy *v.* Hunt, 75 Ala. 438.

Illinois. — Potts *v.* Davenport, 79 Ill. 455.

Iowa. — Leonard *v.* Ingraham, 58 Iowa 406, 10 N. W. 804; Cotton *v.* Hamil, 58 Iowa 594, 12 N. W. 607.

Missouri. — Mathewson *v.* Kilburn, 81 S. W. 1096.

Texas. — Rollins *v.* O'Farrel, 77 Tex. 90, 13 S. W. 1021; White *v.* Epperson (Tex. Civ. App.), 73 S. W. 851.

1. *Alabama.* — Beckert *v.* Whitlock, 83 Ala. 123, 3 So. 545.

Arkansas. — Wolf *v.* Hawkins, 60 Ark. 262, 29 S. W. 892.

Illinois. — Feldes *v.* Duncan, 30 Ill. App. 469.

Iowa. — Fyffe *v.* Beers, 18 Iowa 4, 85 Am. Dec. 577.

Michigan. — Gardner *v.* Gardner, 123 Mich. 673, 82 N. W. 522; Kaeding *v.* Joachimsthal, 98 Mich. 78, 56 N. W. 1101; Hoffman *v.* Buschman, 95 Mich. 538, 55 N. W. 548.

New Hampshire. — Wood *v.* Lord, 51 N. H. 448.

Texas. — Cline *v.* Upton, 56 Tex. 319; Gouhenant *v.* Cockrell, 20 Tex. 96; Kutch *v.* Holley, 77 Tex. 220, 14 S. W. 32.

Where several lots in a city, on one of which the residence stands,

questions of fact[2] to be determined upon a consideration of all the evidence in the case. The determination of such question depends upon the particular facts of each individual case, it being difficult to lay down any general rules to govern all cases.[3]

2. Necessary Proof. — A. GENERALLY. — In order to establish an abandonment of the homestead, the evidence must show each of two things, namely: first, a physical act on the part of the claimant by which the premises, or part thereof, are applied to other inconsistent uses or are no longer used for homestead purposes, and, second, an intent on the part of the claimant to abandon.[4] Neither proof of such physical act without proof of the intent,[5] nor proof of the intent without proof of such act,[6] is sufficient to establish abandonment.

B. STATUTORY ABANDONMENT. — Where the statute prescribes

are used as a homestead the question whether a temporary renting of one of the other lots than that on which the residence stands is of such character as to indicate an intention to abandon it for the purposes of a home, there being a house thereon, is a question of fact to be determined from a consideration of all the evidence. Newton *v.* Calhoun, 68 Tex. 451, 4 S. W. 645.

2. Question of Law and Fact. In Wolf *v.* Hawkins, 60 Ark. 262, 29 S. W. 892, it is held that abandonment is a mixed question of law and fact.

3. McMillan *v.* Warner, 38 Tex. 411; Wapello Co. *v.* Brady, 118 Iowa 482, 92 N. W. 717; Fyffe *v.* Beers, 18 Iowa 4, 85 Am. Dec. 577; Campbell *v.* Adair, 45 Miss. 170.

4. Eckman *v.* Scott, 34 Neb. 817, 52 N. W. 822; Union Stock Yards Nat. Bank *v.* Smout, 62 Neb. 227, 87 N. W. 14.

In Leonard *v.* Ingraham, 58 Iowa 406, 10 N. W. 804, the court said: "It requires two things to constitute an abandonment of the homestead. There must be an intention to do so, and an abandonment in fact."

5. *Arkansas.* — Euper *v.* Alkire, 37 Ark. 283.

Iowa. — Jones *v.* Blumenstein, 77 Iowa 361, 42 N. W. 321.

Kansas. — Moses *v.* White (Kan. App.), 51 Pac. 622.

Michigan. — Karn *v.* Nielson, 59 Mich. 380, 26 N. W. 666; Bunker *v.* Paquette, 37 Mich. 79; Kaeding *v.* Joachimsthal, 98 Mich. 78, 56 N. W. 1101.

Nebraska. — Edwards *v.* Reid, 39 Neb. 645, 58 N. W. 202, 42 Am. St. Rep. 607; Eckman *v.* Scott, 34 Neb. 817, 52 N. W. 822.

New Hampshire. — Wood *v.* Lord, 51 N. H. 448.

Texas. — McMillan *v.* Warner, 38 Tex. 411.

"The abandonment of a homestead, after it has once been in good faith established, is always essentially a question of intention." Gates *v.* Steele, 48 Ark. 539, 4 S. W. 53. See also Murphy *v.* Hunt, 75 Ala. 438. But *compare* Cabeen *v.* Mulligan, 37 Ill. 230, 87 Am. Dec. 247.

In Corey *v.* Schuster, 44 Neb. 269, 62 N. W. 470, the court said: "The rule is that, to establish abandonment of a homestead, the evidence must show, not only that the party removed from the homestead, but that he did so with the intention of not returning, or, after such removal, he formed the intent of remaining away."

In Cline *v.* Upton, 56 Tex. 319, the court said that abandonment, "considering the munificent purpose of the exemption, ought never to be found to exist, unless the removal and accompanying acts clearly show that the party, in removing, never intended to return to the homestead and use it as a homestead."

6. Archibald *v.* Jacobs, 69 Tex. 248, 6 S. W. 177; Powars *v.* Palmer (Tex. Civ. App.), 81 S. W. 817.

Such a change of domicile as will amount to an abandonment cannot be

an express mode in which the homestead may be abandoned, the proof must show an abandonment in the precise mode pointed out by the statute, and nothing short thereof will be held sufficient.[7]

3. Presumptions and Burden of Proof. — A. In General. Where it appears that a homestead once existed, it is presumed to have continued as such, and the burden of proof is upon the party averring the abandonment.[8]

B. Removal from Homestead. — a. *In General.* — A number of cases lay down the rule that, in the absence of a statute requiring some formal act to constitute abandonment, the voluntary removal of the husband and family from the premises, of itself, raises a presumption of abandonment of the homestead and throws upon the claimant the burden of proving that the removal was only temporary and was accompanied with a *bona fide* intention to return

effected by intention alone. It can be accomplished only by a completed act done with the purpose of consummating permanent removal from the original domicile without the intention of returning. Murphy *v.* Hunt, 75 Ala. 438.

In Locke *v.* Rowell, 47 N. H. 46, it is said: "It is only the unequivocal purpose or act of the claimant which should deprive him of his homestead, or an absolute abandonment thereof, such as is evidenced by a sale and conveyance thereof and a substitution of a like estate elsewhere, or other undoubted change of domicile."

7. Porter *v.* Chapman, 65 Cal. 365, 4 Pac. 237. See also Dunn *v.* Tozer, 10 Cal. 167.

Under Illinois statute, providing that no release, waiver or conveyance of the homestead shall be valid, unless in writing subscribed by the householder and his or her wife or husband, "or possession is abandoned or given pursuant to the conveyance," it is held, in Strayer *v.* Dickerson, 205 Ill. 257, 68 N. E. 767, *citing* Gray *v.* Schofield, 175 Ill. 36, 51 N. E. 684, that a grantee in such a deed, claiming the benefit thereof upon the ground that the homestead had been abandoned pursuant to the deed, has the burden of proving affirmatively "that such abandonment was for the express purpose of giving effect to the deed, and not simply because another homestead had been secured to which the wife and husband transferred their home."

8. *Alabama.* — Caldwell *v.* Pollak, 91 Ala. 353, 8 So. 546.

Arkansas. — Tumlinson *v.* Swinney, 22 Ark. 400, 76 Am. Dec. 432.

Illinois. — See Walters *v.* People, 188 Ill. 194, 65 Am. Dec. 730.

Iowa. — Boot *v.* Brewster, 75 Iowa 631, 36 N. W. 649, 9 Am. St. Rep. 515; First Nat. Bank *v.* Baker, 57 Iowa 197, 10 N. W. 633; Bradshaw *v.* Hurst, 57 Iowa 715, 11 N. W. 672; Balzer *v.* Pence, 76 N. W. 731; Maguire *v.* Hanson, 105 Iowa 215, 74 N. W. 776; Robinson *v.* Charleton, 104 Iowa 296, 73 N. W. 616.

Michigan. — Beecher *v.* Baldy, 7 Mich. 488.

Nebraska. — Union Stock Yards Nat. Bank *v.* Smout, 62 Neb. 227, 87 N. W. 14; McCord *v.* Tessier, 96 N. W. 342.

Texas. — Harle *v.* Richards, 78 Tex. 80, 14 S. W. 257; Graves *v.* Campbell, 74 Tex. 576, 12 S. W. 238; Lauchheimer *v.* Saunders, 76 S. W. 750; Welborne *v.* Downing, 73 Tex. 527, 11 S. W. 501.

Abandonment of Particular Part. A purchaser under an execution sale of property the whole of which had once been the homestead, has the burden of proving not only that as to a part of the homestead there had been an abandonment, but also that the particular part abandoned is the particular property in question. Hayes *v.* Cavil (Tex. Civ. App.), 31 S. W. 313.

and reoccupy the same as a homestead.[9] One case, at least, has gone to the extent of holding that where the family removed beyond the state, the presumption was conclusive,[10] but the majority of the cases hold that the presumption, even in such case, is not conclusive,[11] unless the proof further shows that the claimant during his absence has obtained a residence and domicile in such other state.[12]

9. *Alabama.* — Murphy *v.* Hunt, 75 Ala. 438.

California. — Harper *v.* Forbes, 15 Cal. 202; Cohen *v.* Davis, 20 Cal. 187. *Contra.* — See Moss *v.* Warner, 10 Cal. 297.

Illinois. — See Cabeen *v.* Mulligan, 37 Ill. 230, 87 Am. Dec. 247; Kloss *v.* Wylezalek, 207 Ill. 328, 69 N. E. 863.

Iowa. — Newman *v.* Franklin, 69 Iowa 244, 28 N. W. 579.

Michigan. — Hoffman *v.* Buschman, 95 Mich. 538, 55 N. W. 458.

Missouri. — Kaes *v.* Gross, 92 Mo. 647, 3 S. W. 840. 1 Am. St. Rep. 767. And see Smith *v.* Bunn, 75 Mo. 559.

Nebraska. — Blumer *v.* Albright, 64 Neb. 249, 89 N. W. 809.

Wisconsin. — Blackburn *v.* Lake Shore T. Co., 90 Wis. 362, 63 N. W. 289.

In Jackson *v.* Sackett, 146 Ill. 646, 35 N. E. 234, the court said: "Where there is a removal from the homestead premises it will be taken as an abandonment unless it clearly appears that there is an intention to return and occupy it."

Rebuttal of Presumption. "When he made the removal the presumption was that he did so *animo manendi*. . . . This presumption might be rebutted by circumstances and conditions surrounding the removal, or declarations accompanying it, manifesting a temporary purpose and an intention to return; but not satisfactorily by *ex post facto* professions, after intervening occurrences had made return advantageous. The intention which is sufficient to rebut the presumption must be positive and certain, not conditional or indefinite." Jarvais *v.* Moe, 38 Wis. 440.

10. In Reece *v.* Renfro, 68 Tex. 192, 4 S. W. 545, it is said: "In such case, the wife is held to have relinquished any right of the homestead which she might have retained had she continued an inhabitant of this state."

11. See Harbison *v.* Tennison (Tex. Civ. App.), 38 S. W. 232; Rix *v.* Capital Bank, 2 Dill. 367, 20 Fed. Cas. No. 11,869; Hixon *v.* George, 18 Kan. 253; Bradshaw *v.* Hurst, 57 Iowa 745, 11 N. W. 672. And see cases cited in note 15, *infra*.

In Murphy *v.* Hunt, 75 Ala. 438, where the claimant was absent from the state at the time of the levy, the question of abandonment was held to depend upon the question of domicile, and it was said that "the old domicile continues until a new one is acquired *facto et animo*. . . . A change of domicile cannot be inferred from an absence which is shown to be temporary and attended with the requisite *animus revertendi*."

In Fulton *v.* Roberts, 113 N. C. 421, 18 S. E. 510, it was held that, where it was shown that the claimant had been a resident of the county in which the homestead was situated, the burden was on the party attacking to show that the removal, although to another state, was of such a character as to deprive the claimant of the right to claim the homestead.

12. Baker *v.* Legget, 98 N. C. 304, 4 S. E. 37.

In Lee *v.* Moseley, 101 N. C. 311, 7 S. E. 874, 2 L. R. A. 106, it was held that the removal of the husband and the family to another state for the purpose of cultivating certain lands of the wife there situated and placing the same in a condition to rent, accompanied with the intent to return in two years, was conclusive proof of abandonment, notwithstanding evidence of the claimant's intent not to abandon, together with further evidence showing that only a portion of the personal property was removed from the homestead and the claimant returned two or three times

b. *Temporary Removal.* — On the other hand, some cases hold that where the departure was for a temporary purpose, it will be presumed that the claimant did not intend to abandon, but to return and reoccupy, the homestead,[13] even though the purpose of the departure was to search for another home, which search was unsuccessful.[14] In any event, an abandonment of the homestead cannot be inferred from an absence which is shown to be temporary and attended with the requisite *animus revertendi*.[15]

c. *Continuance of Intention to Return.* — Where it is proved that the intention to return once existed, it will be presumed that such intent continued, at least, until the happening of some overt act indicating the contrary.[16] But where it is shown that the claimant's original intention to return was abandoned during his absence, and the property has meanwhile been levied upon by a creditor, the party opposing such levy has the burden of showing that the claimant's intention not to return was formed subsequent to the levy.[17]

C. Acquisition and Use of New Home. — It has often been held that the most satisfactory evidence of the abandonment of a place once a homestead is the acquisition and use of another.[18] Evidence of the family's occupancy and use of other premises as a home is relevant,[19] and raises a strong presumption of abandonment

yearly to care for the homestead. Merrimon, J., *dissenting*.

13. Bradshaw *v.* Hurst, 57 Iowa 745, 11 N. W. 672.

14. Ives *v.* Mills, 37 Ill. 73; Kitchell *v.* Burgwin, 21 Ill. 40.

15. *Alabama.* — Murphy *v.* Hunt, 75 Ala. 438.

Arkansas. — Brown *v.* Watson, 41 Ark. 309; Euper *v.* Alkire, 37 Ark. 283.

Kansas. — Hixon *v.* George, 18 Kan. 253.

Kentucky. — Central Ky. L. Asylum *v.* Craven, 17 Ky. L. Rep. 667, 32 S. W. 291; Campbell *v.* Potter, 16 Ky. L. Rep. 535, 29 S. W. 139.

Massachusetts. — Lazell *v.* Lazell, 8 Allen 575; Dulanty *v.* Pynchon, 6 Allen 510.

Mississippi. — Campbell *v.* Adair, 45 Miss. 170.

Utah. — Kimball *v.* Lewis, 17 Utah 381, 53 Pac. 1037.

Vermont. — West River Bank *v.* Gale, 42 Vt. 27.

Thirteen Years' Absence. — In Hughes *v.* Newton, 89 Fed. 213, the absence continued for a period of thirteen years before claimant's death, and yet, in view of the fact that the surrounding circumstances showed that the absence was not intended to be permanent, it was held that no abandonment was shown.

16. Benbow *v.* Boyer, 89 Iowa 494, 56 N. W. 544; Bradshaw *v.* Hurst, 57 Iowa 745, 11 N. W. 672.

17. Bell *v.* Greathouse, 20 Tex. Civ. App. 478, 49 S. W. 258. But *compare* Bradshaw *v.* Hurst, 57 Iowa 745, 11 N. W. 672.

18. *Kansas.* — McAlpine *v.* Powell, 44 Kan. 411, 24 Pac. 353.

Massachusetts. — Drury *v.* Bachelder, 11 Gray 214.

Michigan. — Wheeler *v.* Smith, 62 Mich. 373, 28 N. W. 907.

Missouri. — Kaes *v.* Gross, 92 Mo. 647, 3 S. W. 840, 1 Am. St. Rep. 767.

Texas. — Slavin *v.* Wheeler, 61 Tex. 654; Gouhenant *v.* Cockrell, 20 Tex. 96; Cline *v.* Upton, 56 Tex. 319; Ogden *v.* Giddings, 15 Tex. 486.

And see Buck *v.* Conlogue, 49 Ill. 391; Titman *v.* Moore, 43 Ill. 169.

19. Wapello Co. *v.* Brady, 118 Iowa 482, 92 N. W. 717; Avres *v.* Grill, 85 Iowa 720, 51 N. W. 14; Baum *v.* Williams (Tex. Civ. App.), 41 S. W. 840. And see Davis *v.* Andrews, 30 Vt. 678; Keller *v.* Beattie

of the old homestead.[20] Such presumption, however, is not conclusive, and the removal to and occupancy of the new home may be shown to be merely for a temporary purpose, with the intention of returning to the old homestead;[21] but if the surrounding facts and circumstances clearly indicate the contrary, the presumption becomes conclusive.[22] Some decisions have held that the old homestead is presumed to continue as such until it is affirmatively shown that another homestead has been acquired,[23] especially where the wife

(Tex. Civ. App.), 34 S. W. 667. And see cases cited in note 21, *infra*.

Homestead Application for Public Lands. — Evidence of the application, entry, etc., for a homestead under the public land laws of the United States, together with residence thereon as required by law, is relevant and may be sufficient to show an abandonment of a homestead selected and acquired before such acts. Donaldson *v.* Lamprey, 29 Minn. 18, 11 N. W. 119. But it is not conclusive of such abandonment when the acts show a retention of the old homestead in good faith. Robertson *v.* Sullivan, 31 Minn. 197, 17 N. W. 336.

20. Maguire *v.* Hanson, 105 Iowa 215, 74 N. W. 776; Ayres *v.* Grill, 85 Iowa 720, 51 N. W. 14; Conway *v.* Nichols, 106 Iowa 358, 76 N. W. 681, 68 Am. St. Rep. 311; Jarvais *v.* Moe, 38 Wis. 440; Moore *v.* Smead, 89 Wis. 558, 62 N. W. 426.

In Wolf *v.* Hawkins, 60 Ark. 262, 29 S. W. 892, it was said: "When the owner of a homestead purchases another dwelling, apart from the old homestead, to which he removes his family with his household furniture and utensils of all kinds, and there resides for a considerable time, the natural presumption, in the absence of opposing evidence, is that he has abandoned the old homestead and acquired a new one. If he wishes to rebut this presumption, and show to the contrary, the burden is upon him to do so." And this requires clear and convincing evidence. Wapello Co. *v.* Brady, 118 Iowa 482, 92 N. W. 717.

21. Robinson *v.* Swearingen, 55 Ark. 55, 17 S. W. 365; Keller *v.* Beattie (Tex. Civ. App.), 34 S. W. 667; Thomas *v.* Williams, 50 Tex. 269; Baum *v.* Williams (Tex. Civ. App.), 41 S. W. 840; Wapello Co. *v.* Brady, 118 Iowa 482, 92 N. W. 717; Ayres *v.* Grill, 85 Iowa 720, 51 N. W. 14; Gunn *v.* Wynne (Tex. Civ. App.), 43 S. W. 290.

22. *Iowa.* — Davis *v.* Kelly, 14 Iowa 523.

Kansas. — Savings Bank *v.* Wheeler, 20 Kan. 625.

Minnesota. — Donaldson *v.* Lamprey, 29 Minn. 18, 11 N. W. 119.

Mississippi. — Campbell *v.* Adair, 45 Miss. 170.

Missouri. — Kaes *v.* Gross, 92 Mo. 647, 3 S. W. 840, 1 Am. St. Rep. 767.

New Hampshire. — Wood *v.* Lord, 51 N. H. 448; Horn *v.* Tufts, 39 N. H. 478.

Texas. — Slavin *v.* Wheeler, 61 Tex. 654.

In Woolfolk *v.* Ricketts, 48 Tex. 28, the court said: "When the family have distinctly and unequivocally removed from one home, . . . and its adjoining land, and taken up their permanent abode and place of residence in another house, upon a different place, and where there is nothing connected with such removal of residence indicating that it is not intended to be permanent, certainly the presumption arises, if indeed the absolute conclusion is not warranted, in support of the title of one who has purchased it in good faith from the husband, that the place from which the family have gone is abandoned as their homestead."

23. Woodbury *v.* Luddy, 14 Allen (Mass.) 1, 92 Am. Dec. 731. And see Drury *v.* Bachelder, 11 Gray (Mass.) 214; Locke *v.* Rowell, 47 N. H. 46.

In Caldwell *v.* Pollak, 91 Ala. 353, 8 So. 546, in speaking of the abandonment of a homestead shown to

and children remain in possession, although the husband's absence may have been long and unexplained.[24] But the general rule seems to be that proof of the acquisition of a new homestead is not essential to establish an abandonment of the old.[25]

D. Dedication of Part to Other Purposes. — The dedicating or setting aside by the claimant of a particular portion of the homestead premises to a use inconsistent with the homestead character thereof raises the inference of an abandonment of such part as a homestead.[26]

E. Desertion of Husband by Wife. — In an action involving the right of a wife to her husband's homestead, the defendant, claiming under the husband and averring that the wife, by reason of her desertion of her husband during his lifetime, thereby abandoned her rights to the homestead, has the burden of proving a voluntary abandonment of the husband by the wife, in her own wrong and without his consent.[27] and it has been held that evidence of the wife's desertion of her husband and her suing for a divorce, while a relevant circumstance, is not conclusive against her.[28]

have been once acquired, the court said: "It is presumed to continue, until another is acquired by actual residence with the intention of abandoning the former one. And the burden of proof lies on the party who asserts the change." He must satisfy the jury that the claimant, "by leaving the premises did not intend to return, but in fact and in intent abandoned the possession with no intention of returning and resuming possession and occupancy."

24. Thoms *v.* Thoms, 45 Miss. 263.

Prolonged and Unexplained Absence of Husband. — Where the family has been deserted by the husband but have still remained in possession and occupancy of the homestead, it is presumed that the place still continued the home and residence of the husband, as well as of his family, until it is affirmatively proven that he has acquired a home and a settlement elsewhere, and this the law can never assume he has done. The presumption is that he continues a wanderer, without a home, until he returns to his duty and his family. Moore *v.* Dunning, 29 Ill. 130, 81 Am. Dec. 301.

25. McMillan *v.* Warner, 38 Tex. 411; Cotton *v.* Hamil, 58 Iowa 594, 12 N. W. 607; Moore *v.* Johnson, 12 Tex. Civ. App. 694, 34 S. W. 771; Cline *v.* Upton, 56 Tex. 319. And see Titman *v.* Moore, 43 Ill. 169; Davis, M. & Co. *v.* Kelley, 14 Iowa 523.

26. Hargadene *v.* Whitfield, 71 Tex. 482, 9 S. W. 475; Klenk *v.* Noble, 37 Ark. 298; Ashton *v.* Ingle, 20 Kan. 670. And see *infra* — "Circumstantial Proof;" "Leasing of Premises."

Compare Guy *v.* Downs, 12 Neb. 532, 12 N. W. 8, in which it is held that if the claimant continues to occupy the premises as a homestead, although he uses only the house which covers a small portion of the premises, the fact that the balance is put to some useful purpose other than formerly put to, but not necessarily inconsistent with the homestead character thereof, is no evidence of abandonment.

27. Bradley *v.* Deroche, 70 Tex. 465, 7 S. W. 779, where it is shown that she had lived apart from her husband for some time, evidence on her part explaining such absence and contradicting the charge of voluntary desertion on her part is competent; her absence from her husband and his home was held sufficiently accounted for by showing her husband's consent. And see Rosholt *v.* Mehus, 3 N. D. 513, 57 N. W. 783, 23 L. R. A. 239.

28. Griffin *v.* Nichols, 51 Mich. 575, 17 N. W. 63. And see Lies *v.*

F. Conveyance by Husband to Wife or Stranger, with Reconveyance. — In the absence of proof *aliunde,* it will not be presumed that a conveyance of his homestead by the husband to a third person, who thereafter conveys to the wife, was made by the husband for the mere purpose of vesting title in the wife and without the intention of abandoning his homestead rights.[29] The same rule has been held to apply where the conveyance is made by the husband direct to the wife.[30]

4. Substance and Mode of Proof. — A. Direct Evidence. — Testimony of Claimant. — As in other cases where the intent or motive of a party is in issue, the testimony of the homestead claimant as to his intention or purpose in removing from the homestead or in performing any other act which is claimed to constitute an abandonment is admissible and entitled to consideration.[31] Such

De Diablar, 12 Cal. 327. But see Moore *v.* Dunn, 16 Tex. Civ. App. 371, 41 S. W. 530.

29. Jones *v.* Currier, 65 Iowa 533, 22 N. W. 663.

But see McMahon *v.* Speilman, 15 Neb. 653, 20 N. W. 10, in which it was held that evidence of a conveyance by the husband and wife of the homestead premises to a third person, who immediately reconveyed to the wife, no consideration being paid, and no change of possession or occupancy having taken place and the sale being made for the sole purpose of putting the title in the name of the wife, showed no abandonment, and the homestead character still existed. And see Morrison *v.* Abbott, 27 Minn. 116, 6 N. W. 455.

Reconveyance to Husband. — The same rule applies where the reconveyance is made direct to the husband by his original grantee. De Lany *v.* Knapp, 111 Cal. 165, 43 Pac. 598, 52 Am. St. Rep. 160; Butler *v.* Nelson, 72 Iowa 732, 32 N. W. 399.

30. Deed From Husband to Wife Before Removal. — Presumption. A deed executed by the husband to the wife conveying the homestead premises just before the removal of the family therefrom to another place is presumptive evidence of an attempt to substitute the separate ownership of the wife as a bulwark against creditors, and it cannot be inferred therefrom that the deed was made by the husband in order to further protect the homestead; it indicates an intention on his part not to rely upon the homestead as against the claims of creditors, but upon the separate ownership of the wife. Murphy *v.* Farquhar, 39 Fla. 350, 22 So. 681.

31. Cline *v.* Upton, 59 Tex. 27; Glasscock *v.* Stringer (Tex. Civ. App.), 32 S. W. 920; Locke *v.* Rowell, 47 N. H. 46; Gunn *v.* Wynne (Tex. Civ. App.), 43 S. W. 290; Alexander *v.* Lovitt (Tex. Civ. App.), 56 S. W. 685; Osborne *v.* Schoonmaker, 47 Kan. 667, 28 Pac. 711; Boot *v.* Brewster, 75 Iowa 631, 36 N. W. 649, 9 Am. St. Rep. 515. See Wilkins *v.* Marshall, 80 Ill. 74.

Contra. — Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54; Fuller *v.* Whitlock, 99 Ala. 411, 13 So. 80.

"How that intent is to be established must depend to a great extent upon the circumstances and facts surrounding each case. The declarations of a party before, at the time of and after leaving his home may be given in evidence to establish the intent. But the sworn statements of the party himself, taken in a court of justice, if credible, must settle the question, for he alone has full knowledge of that intent, and his statements as to that intent can be directly contradicted by no human testimony, . . . and when such testimony is given of the intent and purposes of the mind of the witness, it can be disproved only by clearly establishing the falsity of such testimony. But when a witness has been thoroughly impeached, or when his testimony has been clearly discredited

testimony, however, is not conclusive,[32] and is entitled to little or no weight when the acts and conduct of the claimant and family, and surrounding circumstances, clearly indicate the contrary.[33] Such testimony should be directed solely to the question of intent, and claimant's testimony that he "never abandoned" the homestead amounts to little more than his opinion on the question of law involved.[34]

B. Conclusion of Witness. — A witness, other than claimant, cannot be allowed to testify his conclusion or belief as to the intent of the claimant to abandon or not to abandon his homestead.[35]

or contradicted, in such a case his testimony as to the purposes of his mind should have but little weight with a court or jury." McMillan *v.* Warner, 38 Tex. 411.

Testimony of Wife. — In Aultman *v.* Allen, 12 Tex. Civ. App. 227, 33 S. W. 679, it was held proper to allow both husband and wife to testify that when they left the homestead they intended to return to it.

Resuming Possession After Absence. — Where part of the homestead premises have been leased by the claimant and subsequently he resumes possession thereof, he may testify that he resumed such possession as a part of his homestead, intending to use it as such. Milburn Wagon Co. *v.* Kennedy, 75 Tex. 212, 13 S. W. 28.

Sufficiency of Claimant's Direct Testimony. — In Robson *v.* Hough, 56 Ark. 621, 20 S. W. 523, it was held that where the claimant testified that he had moved his family temporarily to a place about two miles distant, in order that he might be nearer a sawmill, at which he expected to and did get work, this was sufficient to sustain the finding of the court that he had not abandoned his homestead.

32. Boot *v.* Brewster, 75 Iowa 631, 36 N. W. 649, 9 Am. St. Rep. 515.

Abandonment of homestead is a question of fact and intent to be determined from the acts, conduct and words of the parties and not alone from the testimony of the claimant as a witness, where financially interested. Kutch *v.* Holley, 77 Tex. 220, 14 S. W. 32.

33. *Arkansas.* — Wolf *v.* Hawkins, 60 Ark. 262, 29 S. W. 892.

Illinois. — Buck *v.* Conlogue, 49 Ill. 391.

Iowa. — Wilson *v.* Daniels, 70 Iowa 133, 44 N. W. 246; Cotton *v.* Hamil, 58 Iowa 594, 12 N. W. 607; Davis *v.* Kelley, 14 Iowa 523.

Minnesota. — Donaldson *v.* Lamprey, 29 Minn. 18, 11 N. W. 119; Kramer *v.* Lamb, 84 Minn. 468, 87 N. W. 1024.

Missouri. — Mathewson *v.* Kilburn, 81 S. W. 1096.

Nebraska. — McCord *v.* Tessier, 96 N. W. 342.

Oklahoma. — Schultz *v.* Barrows, 8 Okla. 297, 56 Pac. 1053.

Texas. — Schoellkopf *v.* Cameron (Tex. Civ. App.), 40 S. W. 1072; Portwood *v.* Newberry, 79 Tex. 337, 15 S. W. 270. And see Vasey *v.* Board of Trustees, 59 Ill. 188. And see *supra*, "I, 5, C." and "I, 5, F. b."

34. Wolf *v.* Hawkins, 60 Ark. 262, 29 S. W. 892.

Intention Not to Abandon. — Intention to Return and Occupy. Distinction. — The claimant's statement that he intended to retain the property as a homestead during his absence therefrom is no evidence of his intention to return and occupy it as a home, which latter fact is essential. Cotton *v.* Hamil, 58 Iowa 594, 12 N. W. 607.

35. Graves *v.* Campbell, 74 Tex. 576, 12 S. W. 238.

The answer of a witness, in speaking of the intention of a former resident to remain in Texas after his return from another state, in which he stated: "From conversations had by me with J. B. [the claimant] upon the subject, I have been led to believe that it was not his intention to remain permanently in Texas after

C. General Reputation and Understanding. — Evidence that it was generally reputed and understood in the community in which the claimants resided that such residence was their home is incompetent upon the issue of whether another place, claimed as a homestead, had been abandoned.[36]

D. Circumstantial Proof. — a. *In General.* — The material question of intention involved in the issue of an abandonment may always be proved by circumstantial evidence.[37]

b. *Character of Absence.* — The character of the claimant's absence from the homestead, whether consistent or inconsistent with the fact that the premises still remain his residence, is a relevant circumstance to be considered on the question of abandonment.[38]

c. *Length of Time of Absence.* — As evidence tending to establish the intent of the claimant in removing and remaining absent from his former homestead, the length of time of his absence therefrom is always relevant,[39] and if continued for a sufficient length of time, may, of itself, raise the presumption of abandonment,[40] and

his return from Montana," was held properly excluded. Welborne *v.* Downing, 73 Tex. 527, 11 S. W. 501.

When Competent. — It has, however, been held that where the claimant, in his testimony, stated that another witness "knew of her intentions," such other witness was properly allowed to testify that she understood and believed, from conversations had with members of the family, that the removal was to be permanent. Moore *v.* Johnson, 12 Tex. Civ. App. 694, 34 S. W. 771.

36. Scottish Am. Mortgage Co. *v.* Scripture (Tex. Civ. App.), 40 S. W. 210.

37. Sanders *v.* Sheran, 66 Tex. 655, 2. S. W. 804; McMillan *v.* Warner, 38 Tex. 411; Boehm *v.* Beutler, 16 Tex. Civ. App. 380, 41 S. W. 658; Hughes *v.* Newton, 89 Fed. 213.

38. Estate of Phelan, 16 Wis. 76; Hughes *v.* Newton, 89 Fed. 213. See also *supra,* "VII, 3, B, b."

No Other Home Acquired During Absence. — This is relevant. Fyffe *v.* Beers, 18 Lowa 4, 85 Am. Dec. 577.

Absence for Benefit of Health. This is relevant and material evidence against the charge of abandonment. Benbow *v.* Boyer, 89 Iowa 494, 56 N. W. 544.

39. *Arkansas.* — Brown *v.* Watson, 41 Ark. 309.

Illinois. — Hart *v.* Randolph, 142 Ill. 521, 32 N. E. 517.

Iowa. — Maguire *v.* Hanson, 105 Iowa 215, 74 N. W. 776; Robinson *v.* Charleton, 104 Iowa 296, 73 N. W. 616; Newman *v.* Franklin, 69 Iowa 244, 28 N. W. 579; Dunton *v.* Woodbury, 24 Iowa 74.

Texas. — Portwood *v.* Newberry, 70 Tex. 337, 15 S. W. 270; Sanders *v.* Sheran, 66 Tex. 655, 2 S. W. 804; Cline *v.* Upton, 56 Tex. 319. And see cases cited in note 42, *infra.*

"While the law does not intend that the homestead shall be converted into a prison by making the continuous personal occupancy of the premises the absolute basis upon which the homestead right is dependent, yet it cannot be doubted that the length of time that the claimant is absent from his *locus in quo* will constitute an important factor, in connection with other circumstances, in determining whether the aggregate result of all the facts is sufficient to establish that a forfeiture of the acquired right has occurred by reason of abandonment." Kaes *v.* Gross, 92 Mo. 647, 3 S. W. 840, 1 Am. St. Rep. 767.

40. Fyffe *v.* Beers, 18 Iowa 4, 85 Am. Dec. 577.

"Prolonged absence from the homestead, like a removal of the family, is sufficient to cast the *onus* of rebutting the presumption of aban-

under certain circumstances may become conclusive.[41] But, in general, the length of time of absence is merely a relevant circumstance and is not conclusive of the intent to abandon.[42] In any event, its relevancy is confined solely to the question of the intent with which the removal was made or prolonged, and it is immaterial as an independent fact upon which the homestead right depends.[43]

d. *Acts and Declarations.* — **(1.) Generally.** — The acts and declarations of the husband and wife not only before[44] but at the time

donment on the claimant of the homestead." Kaes *v.* Gross, 92 Mo. 647, 3 S. W. 840, 1 Am. St. Rep. 767.

41. Cline *v.* Upton, 56 Tex. 319.

In Hart *v.* Randolph, 142 Ill. 521, 32 N. E. 517, the absence continued for twenty years, and in Cosby *v.* Stimson (Tex. Civ. App.), 26 S. W. 275, it continued for thirty years, and in each case it was held that the proof of abandonment was conclusive.

Absence for Twenty-three Years. The court, in Portwood *v.* Newberry, 79 Tex. 337, 15 S. W. 270, in speaking of the fact that the family remained away from the homestead for twenty-three or twenty-four years without any act indicating their intention to reoccupy it, said: "Such a long absence should be conclusive of the intention not to return, if absence alone could ever have such effect." And in speaking of the effect of such absence on the claim of the wife, the husband having died in the meantime, it was said: "Her long absence from it without claim is evidence of such an intention from the beginning. . . . And the jury could not have found otherwise."

42. *Iowa.* — Fyffe *v.* Beers, 18 Iowa 4, 85 Am. Dec. 577; Maguire *v.* Hanson, 105 Iowa 215, 74 N. W. 776; VanBogart *v.* VanBogart, 46 Iowa 359; Boot *v.* Brewster, 75 Iowa 631, 36 N. W. 649, 9 Am. St. Rep. 515.

Michigan. — Bunker *v.* Paquette, 37 Mich. 79.

Texas. — Sanders *v.* Sheran, 66 Tex. 655, 2 S. W. 804; Cline *v.* Upton, 56 Tex. 319. And see cases cited in note 37, *supra.*

43. Brown *v.* Watson, 41 Ark. 309.

In Cline *v.* Upton, 56 Tex. 319, the court said: "As an independent fact, or as a fact taken in connection with other facts, the length of time parties remain absent from a place formerly used as a homestead may and ought to be considered by a jury for the purpose of determining whether or not a removal from a homestead was made with intent never again to use the property as a homestead. Long continued absence can be looked to only for the purpose of ascertaining the intent with which a removal is made. It is not necessary that absence be continued for a great length of time to constitute abandonment. The fact of removal, coupled with an intention never to return to the homestead, constitutes an abandonment, and nothing less does. 41 Tex. 359; 20 Tex. 97; Thompson on Homesteads, 265. While it is true that no length of time a person is absent from a homestead can constitute an abandonment thereof, unless there be an intention never to return to it, yet an absence may be so long continued, and under such circumstances, that a jury would be authorized to find that the intention never to return and again use the homestead existed, although the party setting up the exemption had never acquired another."

44. "The declarations of the party before, at the time of and after leaving his home" are competent. McMillan *v.* Warner, 38 Tex. 411.

Declaration of Wife at Time of Former Mortgage. — In an action to foreclose a mortgage not executed by the husband, the defendant (wife) claiming that the property was a homestead at the time of the execution of the mortgage, and the mortgagee claiming that the homestead had been previously abandoned, the testimony of a witness who had acted as adviser of a mortgagee in the making of a prior mortgage, to sat-

of[45] and after[46] the acts constituting the alleged abandonment, if not inconsistent with, but tending to explain, their real purpose and intention, are entitled to consideration on the question of abandonment. Likewise, their acts and declarations during their absence from the homestead premises tending to show either an intention to permanently abandon,[47] or to return and reoccupy[48] the same are

isfy which the mortgage in suit was given, that in a conversation with her during the negotiations leading up to such prior mortgage the defendant had stated that it was her land, and that she was not living upon it, and did not intend to, on the faith of which such former mortgage was executed, was held admissible, and in connection with proof of an absence for twenty months was held sufficient to show an abandonment. VanBogart *v.* VanBogart, 46 Iowa 359.

45. Corey *v.* Schuster, 44 Neb. 269, 68 N. W. 470.

Where Openly and Publicly Made. Weight. — The cotemporary declarations of either the husband or wife would be entitled to much weight, especially if openly and publicly made, and where their subsequent conduct is in conformity with such declarations. Woolfolk *v.* Ricketts, 48 Tex. 28.

46. Willis *v.* Pounds, 6 Tex. Civ. App. 512, 25 S. W. 715; Gallagher *v.* Keller, 87 Tex. 472, 29 S. W. 647.

Declarations of the husband and wife claiming as their homestead the premises on which they actually resided after removing from a former residence are admissible against them in an action wherein they seek to recover such former residence, claiming it as their homestead, the defendant purchasing the same on the strength of such declarations. Holliman *v.* Smith, 39 Tex. 357.

On Resuming Possession After Levy. — In Gunn *v.* Wynne (Tex. Civ. App.), 43 S. W. 290, where it appeared that the claimant and family had returned to the land claimed as a homestead the day preceding the levy of an attachment thereon, and claimed it as his homestead, it was held that his declarations to the effect that his return was with the intention of remaining permanently on the land until he died, and claiming it as his homestead, which declarations were made after the attachment had been levied, but before he knew of it, were competent and admissible in his favor on the question of intent.

47. See Mathewson *v.* Kilburn (Mo.), 81 S. W. 1096; McAlpine *v.* Powell, 44 Kan. 411, 24 Pac. 353.

Letter of Claimant During Absence. — A letter written by the homestead claimant after his removal and during his absence from the premises, such letter indicating an intent to have the land forfeited by the state for the benefit of another, is competent and admissible as tending to support the charge of abandonment. White *v.* Epperson (Tex. Civ. App.), 73 S. W. 851.

It is said in Dunton *v.* Woodbury, 24 Iowa 74, that evidence that the claimant, during his absence from the homestead, expressed his purpose not to return and occupy it during the course of the negotiations for its sale, would not be conclusive evidence of abandonment, but was relevant with other circumstances.

48. Moses *v.* White (Kan. App.), 51 Pac. 622; Cincinnati Leaf Tobacco Warehouse Co. *v.* Thompson, 20 Ky. L. Rep. 1439, 49 S. W. 446; Hughes *v.* Newton, 89 Fed. 213; Fyffe *v.* Beers, 18 Iowa 4, 85 Am. Dec. 577.

In Osborne *v.* Schoonmaker, 47 Kan. 667, 28 Pac. 711, it was held that the testimony of several witnesses that the claimants, during their absence, spoke of the premises as their home and of their intention to return and reside thereon was not overcome by mere proof of the fact that they were absent therefrom for three years.

While the mere fact that the claimant, during his absence, often expressed his intention to return would not alone sufficiently show that he had not abandoned the homestead, still "when such expressed intentions are not in conflict with acts and are consistent with the accomplish-

relevant and entitled to weight. It has been said that a party's declarations are more significant in determining his intention to abandon or not to abandon, than any other species of testimony,[49] but the general rule is that such declarations are entitled to weight only when the removal or other act of abandonment is uncertain and equivocal in its character, and they cannot overcome the acts and conduct of the party, clearly indicating a contrary intent.[50]

(2.) Exercising Privileges of Citizenship at Other Place. — (A.) In General. — The fact that the claimant, while domiciled in another county or state than that in which the homestead is situated, exercised the powers and privileges of a citizen thereof, is relevant but not conclusive on the question of the abandonment of the homestead.[51]

(B.) Registering and Voting. — As a general rule, a man will be presumed to reside where he exercises the right of suffrage,[52] and therefore evidence that the homestead claimant, while located in a place other than that in which the homestead is situated, exercised the right of suffrage in such other place, is relevant as a strong circumstance tending to establish the fact of his abandonment of the homestead.[53] Evidence showing the additional fact that the claim-

ment of his purpose in going away, and there is nothing to show any change in his intentions, they should be accorded weight in determining whether there was an abandonment of the homestead." Benbow *v.* Boyer, 89 Iowa 494, 56 N. W. 544.

Filing Declaration of Homestead. This is relevant as indicating an intention to return and reoccupy. Rosholt *v.* Mehus, 3 N. D. 513, 57 N. W. 783, 23 L. R. A. 239. But is not conclusive thereof. Beckert *v.* Whitlock, 83 Ala. 123, 3 So. 545.

49. Boehm *v.* Beutler, 16 Tex. Civ. App. 380, 41 S. W. 658.

50. Reese *v.* Renfro, 68 Tex. 192, 4 S. W. 545; Woolfolk *v.* Ricketts, 48 Tex. 28; Lee *v.* Moseley, 101 N. C. 311, 7 S. E. 874, 2 L. R. A. 106; Schultz *v.* Barrows, 8 Okla. 297, 56 Pac. 1053. And see *supra*, "I, 5, C," and "I, 5, F. b," and "VII, 4, A."

Recital in Trust Deed. — A recital in a deed of trust of homestead premises to the effect that the land conveyed was no part of the grantor's homestead, and that their homestead was at another described place, is insufficient to constitute an abandonment, where the premises were used and occupied unequivocally as a homestead. Crebbin *v.* Moseley (Tex. Civ. App.), 74 S. W. 815.

51. See Clark *v.* Evans, 6 S. D. 244, 60 N. W. 862.

"One may wrongfully exercise such powers or privileges as can be exercised lawfully only by an actual citizen of the state in which they are exercised, and this may be evidence of the fact that he is a citizen of the state in which he assumes to exercise rights which pertain only to citizenship, but not conclusive evidence of that fact," nor is it conclusive of an intention to abandon a homestead in another state. Graves *v.* Campbell, 74 Tex. 576, 12 S. W. 238.

Federal Census. — The fact that the claimant and his wife, during their absence from the homestead, were enumerated by the "federal census taker" as residents of the place in which they were domiciled is of no special moment in the absence of a showing that they directed the entries under a belief that it was important that a distinction between a permanent and temporary residence should be observed. Painter *v.* Stiffen, 87 Iowa 171, 54 N. W. 229.

52. Robinson *v.* Charleton, 104 Iowa 296, 73 N. W. 616. And see article "Residence."

53. *United States.* — Ross *v.* Hellyer, 26 Fed. 413.

Florida. — Murphy *v.* Farquhar, 39 Fla. 350, 22 So. 681.

ant's vote was challenged, whereupon he took the necessary oath as to residence, adds to the weight,[54] but in no event is evidence of such registering and voting conclusive proof of the intent to abandon the former homestead, but such facts are always subject to explanation by the claimant,[55] notwithstanding it may have constituted a

Illinois. — Jackson *v.* Sackett, 146 Ill. 646, 35 N. E. 234; Titman *v.* Moore, 43 Ill. 169; Imhoff *v.* Lipe, 162 Ill. 282, 44 N. E. 493.

Iowa. — Painter *v.* Steffen, 87 Iowa 171, 54 N. W. 229; Cotton *v.* Hamil. 58 Iowa 594, 12 N. W. 607.

Kentucky. — Cincinnati Leaf Tobacco Warehouse Co. *v.* Thompson, 20 Ky. L. Rep. 1439, 49 S. W. 446; Campbell *v.* Potter, 16 Ky. L. Rep. 535, 29 S. W. 139.

Minnesota. — Donaldson *v.* Lamprey, 29 Minn. 18, 11 N. W. 119.

Nebraska. — Corey *v.* Schuster, 44 Neb. 269, 62 N. W. 470; Dennis *v.* Omaha Nat. Bank, 19 Neb. 675, 28 N. W. 512.

Texas. — Kutch *v.* Holley, 77 Tex. 220, 14 S. W. 32.

Wisconsin. — Minnesota Stoneware Co. *v.* McCrossen, 110 Wis. 316, 85 N. W. 1019, 84 Am. St. Rep. 927.

Irresistible Presumption. — In Cobb *v.* Smith, 88 Ill. 199, where it appeared that the claimant during his absence from the homestead registered and voted in another county, it was held that "the presumption is almost irresistible" that the claimant considered the place of voting to be his residence, and intended to claim it as his residence, and therefore to abandon the homestead right.

In Kramer *v.* Lamb, 84 Minn. 468, 87 N. W. 1024, the court said: "A man's intentions are not necessarily fixed by what he may declare them to be; they are determined by his conduct and circumstances surrounding him. It is unreasonable to assume that the plaintiff, K., voted at the elections at Elysian ignorantly and without intending to be identified as a resident of that place. Such conclusion is not justified, because it would lead to the inference that he was a willful violator of the election law."

54. See Rand Lumb. Co. *v.* Atkins, 116 Iowa 242, 89 N. W. 1104.

In Jackson *v.* Sackett, 146 Ill. 646, 35 N. E. 234, the court said: "While offering to vote, or even voting, may not be conclusive of the fact of residence in a collateral proceeding, since it is possible that he may have voted illegally, yet such acts are, as affecting him and those claiming under him, evidence tending to show the intention with which he removed to the place where his vote is offered; and when to that is added the oath that is prescribed by statute where the right of the vendor is challenged, the evidence is very strong that a legal change of residence was intended and actually accomplished. We are of the opinion that . . . J, at the time he moved to Morris, did so with the intention of abandoning his homestead."

55. *Illinois.* — Jackson *v.* Sackett, 146 Ill. 646, 35 N. E. 234.

Iowa. — Conway *v.* Nichols, 106 Iowa 358, 76 N. W. 681, 68 Am. St. Rep. 311; Rand Lumb. Co. *v.* Atkins, 116 Iowa 242, 89 N. W. 1104.

Kentucky. — Cincinnati Leaf Tobacco Warehouse Co. *v.* Thompson, 20 Ky. L. Rep. 1439, 49 S. W. 446.

Nebraska. — Mallard *v.* First Nat. Bank, 40 Neb. 784, 59 N. W. 511; Omaha Brew. Ass'n *v.* Zeller, 93 N. W. 762.

Wisconsin. — Minnesota Stoneware Co. *v.* McCrossen, 110 Wis. 316, 85 N. W. 1019, 84 Am. St. Rep. 927.

For a case in which it was held that the other facts and circumstances in evidence far overbalanced the evidence of the claimant's voting in another place and being there regarded as a citizen thereof, see Gouhenant *v.* Cockrell, 20 Tex. 96.

In Robinson *v.* Charleton, 104 Iowa 296, 73 N. W. 616, the court said: "While as a general rule a man will be presumed to reside where he exercises the right of suffrage, this is subject to such exceptions as will show the real intention of the party in removing from the former residence, whether *animo revertendi.*"

crime.[56] It has been held that as against the wife, she having no knowledge thereof, the circumstance of such voting is of little moment.[57]

(3.) Visiting Homestead During Absence. — The fact that claimant, during his absence from the homestead, frequently visited the premises in person, and during such visits treated them in a manner consistent with their homestead character, is relevant and entitled to consideration.[58]

(4.) Retention of Possession of Homestead Premises. — Likewise proof that the claimant, at the time of his removal from the homestead and during his entire absence therefrom, expressly retained the possession or right to use the whole[59] or part[60] of the homestead premises is relevant as indicating the temporary character of the absence and the claimant's intention to return.

(5.) Leaving Household Goods on Premises. — Evidence that during the absence of claimant from the homestead he left a considerable portion of his household goods or furniture on the premises is relevant as indicating an intention on his part to return[61] and reoc-

56. Corey *v.* Schuster, 44 Neb. 269, 62 N. W. 470.

57. Painter *v.* Steffen, 87 Iowa 171, 54 N. W. 229.

58. Hughes *v.* Newton, 89 Fed. 213; Drury *v.* Bachelder, 11 Gray (Mass.) 214; Fyffe *v.* Beers, 18 Iowa 4, 85 Am. Dec. 577; Locke *v.* Rowell, 47 N. H. 46.

59. Painter *v.* Steffen, 87 Iowa 171, 54 N. W. 229.

60. Hughes *v.* Newton, 89 Fed. 213; Rand Lumb. Co. *v.* Atkins, 116 Iowa 242, 89 N. W. 1104; Potts *v.* Davenport, 79 Ill. 455. See Shirland *v.* Union Nat. Bank, 65 Iowa 96, 21 N. W. 200.

Reservation of Rights in Leased Premises. — The fact that claimant reserved certain rights in the lease of the premises is relevant as indicating an intention to return and reoccupy. Guy *v.* Downs, 12 Neb. 532, 12 N. W. 8.

Occupancy of Old in Connection With New Homestead. — In Wapello Co. *v.* Brady, 118 Iowa 482, 92 N. W. 717, the family had moved from the property in controversy to a house across the street, owned by the wife of the claimant, and it was held that the fact that they continued to occupy the barn and part of the lot in controversy, in connection with the premises across the street on which they lived, harmonized quite as well with an intention to retain such new premises as a home as with that of returning to the old one, and hence such retention was not entitled to such significance as in ordinary cases.

Retention of Room. — The retention of a portion of the premises by the claimant on his removal therefrom is no evidence of his intent to return when not made in good faith and merely as a ruse to protect the property from creditors. Clark *v.* Dewey, 71 Minn. 108, 73 N. W. 639.

61. *Illinois.* — Potts *v.* Davenport, 79 Ill. 455; Lynn *v.* Sentel, 183 Ill. 382, 55 N. E. 838.

Iowa. — Rand Lumb. Co. *v.* Atkins, 116 Iowa 242, 89 N. W. 1104; Painter *v.* Steffen, 87 Iowa 171, 54 N. W. 229; Fyffe *v.* Beers, 18 Iowa 4, 85 Am. Dec. 577; Benbow *v.* Boyer, 89 Iowa 494, 56 N. W. 544; Reeseman *v.* Davenport, 96 Iowa 330, 65 N. W. 301; Boot *v.* Brewster, 75 Iowa 631, 36 N. W. 649, 9 Am. St. Rep. 515.

Massachusetts. — Drury *v.* Bachelder, 11 Gray 214.

Michigan. — Bunker *v.* Paquette, 37 Mich. 79.

Nebraska. — Corey *v.* Schuster, 44 Neb. 269, 62 N. W. 470.

New Hampshire. — Locke *v.* Rowell, 47 N. H. 46.

Vermont. — West River Bank *v.* Gale, 42 Vt. 27.

cupy the premises as a homestead, but is immaterial for any other purpose.[62]

(6.) Voluntary Conveyance of Homestead Premises. — (A.) In General. — The voluntary conveyance of the homestead premises is strong evidence to show that the grantors intended to abandon the property as a homestead.[63] Nor is this rule affected by the fact that such conveyance was void because made to defraud creditors.[64]

(B.) Separate Conveyance of Husband or Surviving Widow. — The fact that the husband, alone,[65] or, in case of his death, the surviving widow,[66] conveyed the premises to a third person, is relevant as a strong circumstance tending to show an intention on the part of the grantor in such conveyance to abandon the same as a homestead, notwithstanding the fact that the conveyance may be void because prohibited by law.[67]

(7.) Offering or Contracting to Sell Homestead. — Evidence showing that claimant, during his absence from the homestead, offered to sell the same,[68] or that either before or after his removal therefrom he contracted to sell the homestead,[69] is relevant as indicating his intention to abandon the premises as a homestead, but is not necessarily conclusive thereof.[70]

(8.) Declining Proposals to Purchase. — It has been held that evidence that the claimant declined proposals of other persons to purchase the homestead premises, or refused to sell the same, is entitled to little or no significance on the question of abandonment, because

62. Leonard *v.* Ingraham, 58 Iowa 406, 10 N. W. 804.

63. Cox *v.* Shropshire, 25 Tex. 113; Amphlett *v.* Hibbard, 29 Mich. 298. And see Focke *v.* Sterling, 17 Tex. Civ. App. 8, 44 S. W. 611.

64. Butler *v.* Nelson, 72 Iowa 732, 32 N. W. 399.

And in such case evidence offered by the claimant for the purpose of proving the conveyance fraudulent as to creditors, with the object of establishing the fact that the homestead right had never been divested, is incompetent. DeLany *v.* Knapp, 111 Cal. 165, 43 Pac. 598, 52 Am. St. Rep. 160.

65. Portwood *v.* Newberry, 79 Tex. 337, 15 S. W. 270; Shepard *v.* Brewer, 65 Ill. 383.

66. Garibaldi *v.* Jones, 48 Ark. 230, 2 S. W. 844; Dinsmoor *v.* Rowse, 200 Ill. 555, 65 N. E. 1079; Sanson's Ex'rs *v.* Harrell, 55 Ark. 572, 18 S. W. 1047.

67. Sale by Surviving Wife. Where the homestead descends to the widow on the death of the husband, although she cannot alienate such homestead, yet if she does attempt to sell and convey it, such act evinces an intention on her part to abandon the same as a homestead, and it at once becomes assets in the hands of the administrator for the payment of debts for the state. Garibaldi *v.* Jones, 48 Ark. 230, 2 S. W. 844.

68. Cotton *v.* Hamil, 58 Iowa 594, 12 N. W. 607; Dunton *v.* Woodbury, 24 Iowa 74; Wapello Co. *v.* Brady, 118 Iowa 482, 92 N. W. 717. *Contra.* — Dunn *v.* Tozer, 10 Cal. 167.

69. Conway *v.* Nichols, 106 Iowa 358, 76 N. W. 681, 68 Am. St. Rep. 311; Sanders *v.* Sheran, 66 Tex. 655, 2 S. W. 804.

70. Wapello Co. *v.* Brady, 118 Iowa 482, 92 N. W. 717; Dunton *v.* Woodbury, 24 Iowa 74.

See Gregory *v.* Oates, 92 Ky. 532, 18 S. W. 231, wherein it was held that the fact that the owner made a sale of the homestead premises was not inconsistent with his claim of continuous homestead, where he reinvested the proceeds in another homestead. And see Sanders *v.* Sheran, 66 Tex. 655, 2 S. W. 804.

such proposal may be entirely consistent with an intention to keep the premises for some other purpose than to occupy them as a home.[71] But, nevertheless, such evidence is relevant and entitled to consideration, especially where the offer is declined because the premises are the homestead.[72]

(9.) Leasing of Homestead Premises. — (A.) In General. — Evidence that the claimant leased the whole or a part of the homestead premises is competent and relevant as a circumstance tending to establish an abandonment of the property leased,[73] but is not conclusive of an intention to abandon.[74] The claimant may show his intention to return.[75]

(B.) Lease for Life. — Under ordinary circumstances, the execution of a lease for life by the claimant would furnish conclusive evidence of an abandonment of the homestead,[76] but the terms of the lease and the surrounding circumstances may be of such character as to overcome the presumption.[77]

71. Wapello Co. *v.* Brady, 118 Iowa 482, 92 N. W. 717.

72. See Fyffe *v.* Beers, 18 Iowa 4, 85 Am. Dec. 577.

Refusal of Wife to Sell. — In Mallard *v.* First Nat. Bank, 40 Neb. 784, 59 N. W. 511, it was held that evidence to the effect that the wife refused to give a mortgage on the property "because it was exempt" was conclusive evidence that she did not intend to abandon it and that she treated it as her home.

73. Benson *v.* Aitken, 17 Cal. 163. And see cases cited in next note.

Evidence of the leasing of the premises for a term of five years, during which time the claimant lives at other places, is relevant as signifying an intent to abandon, especially when the claimant reserved the right to terminate the lease in order to enable him to sell the homestead, which he thereafter did. Davis *v.* Andrews, 30 Vt. 678.

74. Murphy *v.* Hunt, 75 Ala. 438; Locke *v.* Rowell, 47 N. H. 46; Hixon *v.* George, 18 Kan. 253; Wapello Co. *v.* Brady, 118 Iowa 482, 92 N. W. 717.

The fact that the claimant leased one of the lots claimed as the homestead is relevant as indicating that in his opinion the rent received was sufficient to outweigh the comfort and convenience to himself and family resulting from the use of the lot as part of the homestead, but is not conclusive of abandonment. Milburn Wagon Co. *v.* Kennedy, 75 Tex. 212, 13 S. W. 28.

Ten-Year Lease of Business Homestead. — In Harbison *v.* Tennison (Tex. Civ. App.), 38 S. W. 232, it was held that a lease of the premises claimed as a business homestead for a period of ten years to the person to whom claimant had sold his business theretofore conducted thereon, and during which time claimant and wife were absent from Texas, was not sufficient or conclusive evidence of an abandonment, the facts further showing claimant had bound himself not to carry on such business for that length of time in the town.

Disposition of Rents. — The fact that claimant applied the rents received from the homestead to the discharge of debts due thereon is relevant. Corey *v.* Schuster, 44 Neb. 269, 62 N. W. 470.

Abandonment by Infant. — In Brinkerhoff *v.* Everett, 38 Ill. 263, the court said: "Even if infants are capable of abandonment, the proof in this case shows the property to have been rented by the guardian for the benefit of the minors, from which, certainly, no intent to abandon can be inferred."

75. Murphy *v.* Hunt, 75 Ala. 438.

76. Gates *v.* Steele, 48 Ark. 539, 4 S. W. 53.

77. In Gates *v.* Steele, 48 Ark. 539, 4 S. W. 53, where the absence of the claimant from the homestead was rendered compulsory by reason of

(10.) Claimant's Occupancy as Lessee of Execution Purchaser. — It has been held that where the homestead has been sold under execution, after which the claimant leased the premises from the purchaser at the sale and occupied it as his home, this constituted unmistakable evidence of an intentional change of occupancy from that of owner to that of lessee and was conclusive on the question of abandonment.[78]

(11.) Part of Homestead Applied to Inconsistent Uses. — Any fact or circumstance tending to show a permanent design on the part of the claimant to separate a portion of the homestead from the remainder on which the residence is located, or to use such portion for purposes inconsistent with the homestead character thereof, is relevant and competent.[79]

(12.) Taking Advice of Counsel. — Evidence that the claimant, before removing from the premises, took legal advice to know if such an absence as contemplated would constitute an abandonment of the homestead, and was advised that it would not, is relevant as indicating his intention, in good faith, to return and reoccupy.[80]

(13.) Claimant Requesting Levy. — Evidence that the claimant requested the person seeking to subject the alleged homestead to his claim to levy upon the same and to sell it for the satisfaction of the claim is relevant and competent as tending to show a waiver and abandonment of the homestead right.[81]

(14.) Subsequent Marriage of Female Claimant. — On the question as to whether a homestead owned and occupied as such by a woman before her marriage,[82] or by a surviving widow[83] of a

age and ill-health, the lease itself stipulating for the retention of a homestead right for the claimant, and in view of these and other circumstances it was held that the homestead was not abandoned.

78. Bradshaw *v.* Remick, 90 Iowa 409, 57 N. W. 897. But see Buck *v.* Conlogue, 49 Ill. 391.

79. Klenk *v.* Noble, 37 Ark. 298. Where the claimant has had his dwelling on a certain part of the premises, the subsequent erection by him, on another part of the homestead premises, of a large and costly building, having the appearance of a respectable and independent dwelling, is strong proof of an intention permanently to appropriate the ground covered thereby to independent uses, but is not conclusive of an abandonment, the question of intent being open to explanation. Ruhl *v.* Kauffman, 65 Tex. 723.

80. Painter *v.* Steffen, 87 Iowa 171, 54 N. W. 229; Quigley *v.* McEvony, 41 Neb. 73, 59 N. W. 767.

81. Holloway *v.* McIlhenny Co., 77 Tex. 657, 14 S. W. 240; Parsons *v.* Cooley, 60 Iowa 268, 14 N. W. 308. Evidence that the claimant, during his absence from the premises, directed the sheriff to levy execution upon the property, "ought to preclude him from claiming any homestead right." Wilson *v.* Daniels, 79 Iowa 132, 44 N. W. 246. Evidence that the widow entitled to both dower and homestead urged the purchaser at an administrator's sale to purchase the property is not conclusive of a waiver of her homestead right, because the dower and homestead being separate and each having been allowed at the time, it is presumed that she referred to the sale of the dower interest subject to the homestead. Showers *v.* Robinson, 43 Mich. 502, 5 N. W. 988.

82. Reeseman *v.* Davenport, 96 Iowa 330, 65 N. W. 301.

83. In Loveless *v.* Thomas, 152 Ill. 479, 38 N. E. 907, it was held that the fact that the surviving widow of the deceased homestead

deceased homestead claimant, was abandoned, evidence of her subsequent marriage is relevant and competent, but is not conclusive. Where the husband, after the death of his first wife, ceases to occupy the homestead, the fact that he marries again affords no presumption that his removal was temporary or accompanied with the intention to return and reoccupy the homestead.[84]

5. Intent of Husband As Affecting Rights of Wife. — A. In General. — By reason of the theoretic and legal identity of person and of interest between husband and wife, the presumption obtains that the home of the husband is the home of the wife,[85] and therefore evidence showing his individual abandonment of the homestead is competent[86] and may be sufficient[87] to establish abandonment, notwithstanding her contrary intentions or desires.

B. Exceptions. — On the other hand some courts, in their extreme desire to protect the home of the family, hold that the individual acts or declarations of the husband are insufficient to establish abandonment as against the wife, in the absence of evi-

claimant remarried and removed with her second husband to his home at another place does not raise the conclusive presumption that she intended to abandon the former homestead. The court said: "In the absence of all explanatory proof, that conclusion would doubtless obtain, yet we do not think such marriage and removal can be held conclusive." See also Buck *v.* Conlogue, 49 Ill. 391.

But see Kaes *v.* Gross, 92 Mo. 647, 3 S. W. 840, 1 Am. St. Rep. 767, in which it was held that the removal of the surviving wife and her acquisition of a new homestead, the residence of her second husband, was conclusive evidence of her abandonment of the homestead of her former husband.

84. Benson *v.* Aitken, 17 Cal. 163.

85. Leonard *v.* Ingraham, 58 Iowa 406, 10 N. W. 804; Swaney *v.* Hutchins, 13 Neb. 266, 13 N. W. 282; McClellan *v.* Carroll (Tenn. Ch.), 42 S. W. 185; Thoms *v.* Thoms, 45 Miss. 263; Buck *v.* Conlogue, 49 Ill. 391.

86. Brennan *v.* Wallace, 25 Cal. 108.

Acts of Husband in Abandoning Part. — Where the question at issue is as to whether the cessation of the use of part of the homestead premises for homestead purposes and their application to an inconsistent use was temporary only, this may be shown by the acts of the husband alone, independent of the assent of the wife thereto. Wynne *v.* Hudson, 66 Tex. 1, 17 S. W. 110.

87. Slavin *v.* Wheeler, 61 Tex. 654; Kramer *v.* Lamb, 84 Minn. 468, 87 N. W. 1024; Thoms *v.* Thoms, 45 Miss. 263; Leonard *v.* Ingraham, 58 Iowa 406, 10 N. W. 804; Guiod *v.* Guiod, 14 Cal. 506, 76 Am. Dec. 440. And see Bradshaw *v.* Remick, 90 Iowa 409, 57 N. W. 897; Perry *v.* Dillrance, 86 Iowa 424, 53 N. W. 280; Willis *v.* Pounds, 6 Tex. Civ. App. 512, 25 S. W. 715; Portwood *v.* Newberry, 79 Tex. 337, 15 S. W. 270; Moore *v.* Dunn, 16 Tex. Civ. App. 371, 41 S. W. 530.

Husband Acquiring Home in Other State. — In McClellan *v.* Carroll (Tenn. Ch.), 42 S. W. 185, it was held that where the husband removed from the state in which the homestead was situated and acquired a domicile in another state intending to make it his home, these facts raised a conclusive presumption that the domicile of the wife and family was with the husband in the state of his new residence, and that such wife could not, therefore, claim homestead rights in the old homestead, notwithstanding the fact that she still remained in possession of the same. However, it seems to be intimated in this decision that if both the husband and wife, although living separate and apart, still reside

dence establishing her individual intent to abandon.[88] Especially is this rule enforced when the acts and conduct of the husband in attempting to abandon were done in fraud of the homestead rights of the wife,[89] or where no other homestead has been acquired by him.[90] In Illinois the rights of the wife, in such cases, are protected by statute.[91]

C. Individual Intention of Wife. — Notwithstanding the general rule that the question of abandonment is to be determined upon the intention of the husband as the head of the family, yet, where it appears that the husband and wife were in accord and agreement, evidence showing the separate intention of the wife in removing temporarily from the homestead is competent and admissible.[92]

6. Sufficiency of the Evidence. — A. In General. — In order to establish the abandonment of a homestead once acquired by residence, the proof must be clear, evident and unmistakable,[93] and it

in the state in which the homestead is situated a different rule would prevail.

88. Blumer *v.* Albright, 64 Neb. 249, 89 N. W. 809; Gouhenant *v.* Cockrell, 20 Tex. 96. And see Riggs *v.* Sterling, 60 Mich. 643, 27 N. W. 705, 1 Am. St. Rep. 554; Moore *v.* Dunning, 29 Ill. 130, 81 Am. Dec. 301; Drury *v.* Bachelder, 11 Gray (Mass.) 214.

Removal of Wife After Conveyance. — The removal of the wife with her husband from the homestead, after conveyance by him without her consent, does not show abandonment by her. Collins *v.* Baytt, 87 Tenn. 334, 10 S. W. 512, *overruling* Levison *v.* Abrahams, 14 Lea (Tenn.) 336. See also Taylor *v.* Hargous, 4 Cal. 268, 60 Am. Dec. 606. But this last case is *criticised* in Gee *v.* Moore, 14 Cal. 472.

Husband's Desertion of Wife. Evidence that the husband and wife remained absent from the homestead for over two years, and that the husband had deserted the wife, is insufficient to establish abandonment against her. Gardner *v.* Gardner, 123 Mich. 673, 82 N. W. 522.

89. Medlenka *v.* Downing, 59 Tex. 40; Newman *v.* Farquhar, 60 Tex. 640.

90. Thoms *v.* Thoms, 45 Miss. 263; Drury *v.* Bachelder, 11 Gray (Mass.) 214.

91. In Lynn *v.* Sentel, 183 Ill. 382, 55 N. E. 838, 75 Am. St. Rep. 110, it was held that the act of the husband in leaving the homestead, abandoning the wife and family and removing to the state of Missouri, where he procured a decree of divorce upon substituted service of process and subsequently remarried, had no effect upon the wife's rights in the homestead chosen from his property, she remaining all the time in possession thereof and claiming the same as a homestead. This was decided under a statute providing that in case a husband or wife desert the family, the exemption shall continue in favor of the occupant of the residence.

92. In Gunn *v.* Wynne (Tex. Civ. App.), 43 S. W. 290, the court said: "The idea presented under these assignments is that the husband has the right to select the homestead of the family, and that the intentions of the wife should have no controlling effect in the solution of the question of whether there was an abandonment. If this were a case where the husband and wife were not in accord in their intentions and purposes relating to the homestead, the proposition might be urged with some force. But in this case the husband and wife were shown to be in perfect agreement, and the intentions and expressions of the wife as to their common purpose and intention were pertinent and material testimony in support of the appellees' claim of homestead."

93. Rix *v.* Capital Bank, 2 Dill. 367, 20 Fed. Cas. 11,869; Gouhenant *v.* Cockrell, 20 Tex. 96; Newton *v.*

has been held that the element of intent involved therein should be proved by the best accessible evidence.[94] Especially is this rule strictly enforced in cases where no other homestead has been actually acquired.[95]

B. Where Other Apparent Home Has Been Acquired. — The rule requiring strict proof of abandonment does not apply to a case where the evidence shows the acquisition and use by the claimant of another place having the apparent characteristics of a home.[96] But, in such case, the proof of intent to return and reoccupy the premises as a homestead must be positive, clear and satisfactory.[97]

C. Prolonged Absence. — Intention to Return. — When the absence of the claimant from the homestead premises is prolonged to an unreasonable length of time,[98] or is otherwise of such

Calhoun, 68 Tex. 451, 4 S. W. 645; Langston *v.* Maxey, 74 Tex. 155, 12 S. W. 27; Rollins *v.* O'Farel, 77 Tex. 90, 13 S. W. 1021.

In Campbell *v.* Adair, 45 Miss. 170, the court said: "We are of the opinion that the waiver or forfeiture of the homestead right should be declared only upon 'clear and decisive proof of an intention totally to relinquish and abandon such right,' accompanied by removal from the premises, and that it ought 'clearly, and beyond all reasonable ground of dispute, to appear that the abandonment was with an intention not to return and claim the exemption.' 'A doubtful or mixed case,' say the authorities, 'will not avail to cut off the right.'"

Degree of Proof on Part of Creditor Denying Abandonment. — Where the husband and wife do not dispute the charge of abandonment, a judgment creditor, denying the abandonment, must make a strong and clear case in order to show that the homestead was not abandoned. Anderson *v.* Kent, 14 Kan. 207.

But, in Moore *v.* Dunn, 16 Tex. Civ. App. 371, 41 S. W. 530, the court said: "It was not error to refuse a charge which required that the evidence clearly establish abandonment."

94. McMillan *v.* Warner, 38 Tex. 411.

95. Gouhenant *v.* Cockrell, 20 Tex. 96; Shepherd *v.* Cassiday, 20 Tex. 24, 70 Am. Dec. 372.

In Thomas *v.* Williams, 50 Tex. 269, the court held that while a homestead may be regarded as abandoned although no other has been actually acquired, yet in order to establish abandonment under such circumstances, the evidence "must be undeniably clear and beyond almost the shadow, at least, of all reasonable ground of dispute, that there has been a total abandonment with the intention not to return and claim the exemption."

For an exceptionally strong case sustaining this doctrine, see Mills *v.* Von Boskirk, 32 Tex. 361.

96. In Boehm *v.* Beutler, 16 Tex. Civ. App. 380, 41 S. W. 658, the court said: "Appellants contend that it is a rule established by the cases in this state that the abandonment of a homestead once acquired by residence must be shown by clear, evident, and unmistakable proof, and that when a doubt exists in respect to this issue it must be resolved against the theory of abandonment. We do not believe that such rule was ever intended to apply to a case when another place answering the purposes of a home has been obtained and settled upon and used with all the externals of a home, and where the decisive question resolved itself into the fact of intention."

97. Jarvais *v.* Moe, 38 Wis. 440; Wapello Co. *v.* Brady, 118 Iowa 482, 92 N. W. 717; Buck *v.* Conlogue, 49 Ill. 391.

98. In Fyffe *v.* Beers, 18 Iowa 4, 85 Am. Dec. 577, where the absence had continued for the period of five years, the court said: "When the absence is so prolonged as in this case, the court is of opinion that the intention to return to the premises as

a character as would ordinarily lead to the presumption that it was intended to be permanent,[99] the proof of intention on the part of the claimant to return and reoccupy the premises as a homestead must be clear, strong and satisfactory.

D. When Lien Attaches During Occupancy. — It requires clearer and stronger proof to establish abandonment when the lien or indebtedness sought to be enforced against the homestead accrued or attached during the time that the homestead was actually occupied by the claimant, than when it arises during the time that the claimant was not in actual possession thereof.[1]

VIII. EXEMPTIONS OF PERSONAL PROPERTY.

1. Presumptions and Burden of Proof. — A. In General. — One claiming that personal property is exempt from levy and sale under execution has the burden of showing the facts necessary to bring the property within the statute,[2] as for example the habitual use

a home should be clear and unmistakable."

99. See Titman *v.* Moore, 43 Ill. 169. And see cases cited in note 97, *supra.*

Where the surviving widow of a homestead claimant, who died seized of the homestead, marries another person with whom she removes to another town, taking her child with her and leasing the premises, while such facts are not conclusive of an abandonment, yet in such case the proof of intention on the part of claimant to return and occupy the homestead, must be clear, strong and satisfactory. Buck *v.* Conlogue, 49 Ill. 391.

1. Boot *v.* Brewster, 75 Iowa 631, 36 N. W. 649, 9 Am. St. Rep. 515; Dunton *v.* Woodbury, 24 Iowa 74; Davis *v.* Kelly, 14 Iowa 523.

When the indebtedness sought to be enforced against a homestead claimed to have been abandoned was contracted while the land was occupied as a homestead, more satisfactory evidence of its abandonment is required than if credit had been extended on the faith that it was subject to the payment of debts. Robinson *v.* Charleton, 104 Iowa 296, 73 N. W. 616.

2. *Alabama.* — Ely *v.* Blacker, 112 Ala. 311, 20 So. 570.

Arkansas. — Blythe *v.* Jett, 52 Ark. 547, 13 S. W. 137; Porch *v.* Arkansas Mill Co., 65 Ark. 40, 45 S. W. 51.

California. — Murphy *v.* Harris, 77 Cal. 194, 19 Pac. 377.

Iowa. — Joyce *v.* Miller, 59 Iowa 761, 13 N. W. 664; Oakes *v.* Marquardt, 49 Iowa 643.

Massachusetts. — Clapp *v.* Thomas, 5 Allen 158; Gay *v.* Southworth, 113 Mass. 333.

Michigan. — O'Donnell *v.* Segar, 25 Mich. 367.

New Hampshire. — Howard *v.* Farr, 18 N. H. 457.

New York. — Gilewicz *v.* Goldberg, 69 App. Div. 438, 74 N. Y. Supp. 984; Carnrick *v.* Myers, 14 Barb. 9; Brown *v.* Davis, 9 Hun 43; Griffin *v.* Sutherland, 14 Barb. 456; Twinam *v.* Swart, 4 Lans. 263.

Tennessee. — Wolfenbarger *v.* Standifer, 3 Sneed 659.

Vermont. — Chamberlain *v.* Whitney, 65 Vt. 488, 27 Atl. 72; Connell *v.* Fisk, 54 Vt. 381; Rollins *v.* Allison, 59 Vt. 188, 10 Atl. 201.

Wisconsin. — Hesse *v.* Hargraves, 74 Wis. 648, 43 N. W. 736.

See also Winsor *v.* McLachlan, 12 Wash. 154, 40 Pac. 727.

"It lies with the party claiming property to be exempt to prove the facts affirmatively which go to establish it. Until it is made to appear, at least, what are the articles, and their value of wearing apparel, selected and reserved by the judgment debtor, the court cannot determine whether the privilege of the exemption laws has been properly exercised or abused to

the injury of creditors." Stewart *v.* McClung, 12 Or. 431, 8 Pac. 447, 53 Am. Rep. 374.

In Chamberlain *v.* Whitney, 65 Vt. 488, 27 Atl. 72, where the plaintiff claimed to recover for a wagon under a statute exempting a wagon or ox-cart as the debtor might elect, it was held incumbent on him to show that he had no ox-cart, or that he had elected the wagon as exempt.

Proceeds of Life Insurance. — Under a statute exempting from execution any "money, right, privilege or immunity accruing or in any manner whatever growing out of any life insurance on the life of the debtor, made in any insurance company incorporated under the laws of this state," with certain exceptions, it is incumbent upon the claimant to show, first, that the insurance was made by an insurance company "incorporated under the laws of this state;" second, that the insurance in question is an "insurance on the life of the debtor," and third, that the policy is not of the excepted class mentioned in the proviso to the statute. Briggs *v.* McCullough, 36 Cal. 542.

Exemption From Garnishment. The burden is on the defendant debtor in garnishment proceedings to show that the funds belonging to him in the hands of the garnishee are exempt from seizure for the payment of his debts. Fletcher *v.* Staples, 62 Minn. 471, 64 N. W. 1150. See also Ely *v.* Blacker, 112 Ala. 311, 20 So. 570.

Residence of Claimant. — In Astley *v.* Capron, 89 Ind. 167, where the residence of the complainant was shown to have been in Indiana for a number of years, it was held that his residence would be presumed to have continued there until shown that he acquired a residence elsewhere, and that accordingly the burden of proof was on the contestant to show that the claimant had acquired a residence elsewhere than in Indiana before the commencement of that action.

Debt Founded on Contract. — Under a statute exempting property owned by any resident householder from execution "for any debt grow-out of or founded upon a contract, express or implied," it is incumbent upon the execution debtor, where he seeks to recover property levied upon the ground of its being exempt, to show not only that he is a resident householder, but that the judgment upon which the execution issued was recovered for a debt growing out of or founded upon a contract, express or implied. Thompson *v.* Ross, 87 Ind. 156.

Exemption as Ground for Failure of Officer to Levy. — Where a defendant in execution is in possession of personal property, the sheriff, sued for a failure to seize it under execution and subject it to sale, seeking to justify his failure on the ground that the property was exempt from execution, has the burden of proving that fact. Bonnell *v.* Bowman, 53 Ill. 460. See also People *v.* Palmer, 46 Ill. 398.

Demand and Selection. — In Amend *v.* Smith, 87 Ill. 198, it was held incumbent upon a claimant to show that he demanded and claimed the property as exempt, and selected it as exempt before levy or as soon as he had notice thereof. See also Graham *v.* Crockett, 18 Ind. 119. And in Hombs *v.* Corbin, 34 Mo. App. 393, it was held on the authority of Stone *v.* Spencer, 77 Mo. 356, that between an officer, claiming under the execution levy, and the vendee of the debtor, the burden of proof was on the vendee to show exemption of property by reason of the selection thereof in lieu of property exempted under the statute; that is, that the debtor had the right to make the statutory selection and made it as to the disputed property.

Exemption From Landlord's Lien. Under the Iowa statute providing for a landlord's lien for rent, it is held that although the burden of proof is in the first instance upon the landlord to show that the property distrained was owned by the lessee and used on the demised premises, one who asserts that the lien does not attach by reason of the property being exempt has the burden of proving that fact. Hays *v.* Berry, 104 Iowa 455, 73 N. W. 1028.

The Kansas Statute provides "that the personal earnings of the debtor for the three months next preceding the issuing of the process" cannot be applied to the payment of his debts, when it is made to appear by

of the property,[3] that he is a housekeeper,[4] and the like. And where the property claimed as exempt is not specifically made so by statute, it is incumbent upon him to show that it is in fact exempt.[5]

Replevin. — So also it is held that before an execution debtor can maintain a replevin to recover possession of personal property seized under a writ issued against him, on the ground that the property is exempt from execution, he has the burden of establishing that fact.[6]

Supplementary Proceedings. — The rule in proceedings supplementary to execution, however, is that the plaintiff has the burden of affirmatively showing that the property sought to be reached is subject to execution.[7]

Proof of Exceptions. — But where the claimant has made a *prima facie* case of exemption,[8] as, for example, that he is the owner of

the debtor's *affidavit* or otherwise that such earnings are necessary for the maintenance of a family, supported wholly or partly by his labor. And in Muzzy *v.* Lantry, 30 Kan. 49, 2 Pac. 102, it is held that this statute renders the affidavit, for all the purposes of the garnishment proceedings, and proceedings founded thereon, sufficient evidence, *prima facie*, of all the facts properly set forth therein; and that if the creditors have any desire to question or controvert any such facts, they must do so by the aid of other competent evidence.

3. Habitual Use of Property. Where the statute exempts from execution certain property enumerated by which persons of a certain class enumerated habitually earn their living, a person claiming property to be exempt under such a statute must show that he is one of the persons of the class mentioned in the statute, and that he habitually earns his living by the use of the property in question. Calhoun *v.* Knight, 10 Cal. 393. See also Murphy *v.* Harris, 77 Cal. 194, 19 Pac. 377; Stanton *v.* French, 91 Cal. 274, 27 Pac. 657, 25 Am. St. Rep. 174; Corp *v.* Griswold, 27 Iowa 379.

4. Householder. — Under the Indiana statute, although it is necessary that the claimant should show that he is a householder (Kingen *v.* Stroh, 136 Ind. 610, 36 N. E. 519; Thompson *v.* Ross, 87 Ind. 156; Phenix Ins. Co. *v.* Fielder, 133 Ind. 557, 33 N. E. 270), it is not necessary for him to show that he is the occupier of a house; a housekeeper; he is to be deemed a householder upon whom rests the duty of supporting the members of his family or household. See also Bunnell *v.* Hay, 73 Ind. 452.

Compare Prewitt *v.* Walker, 7 J. J. Marsh. (Ky.) 332, *construing* the Kentucky statute in force at that time, whose provisions extended only to "actual *bona fide* housekeepers with a family."

5. McMasters *v.* Alsop, 85 Ill. 157, where the court said: "The law does not presume that a person does not have the property exempted by the statute, nor does the mere claim that property is not enumerated prove that it is exempt. The fact must be satisfactorily proved by evidence, as it is not a matter of legal presumption one way or the other."

6. Hartlep *v.* Cole, 101 Ind. 458.

7. Lowry *v.* McAlister, 86 Ind. 543. See fully on this question the article "SUPPLEMENTARY PROCEEDINGS."

8. In Shiver *v.* Williams, 85 Ga. 583, 11 S. E. 876, where the property in question had been properly exempted by the ordinary under a statute providing therefor and the claimant's exemption papers had been introduced in evidence by him, it was held incumbent upon a creditor who claimed that the property was subject to a distress warrant for arrearages of rent to show that it was so subject.

Compare Kolsky *v.* Loveman, 97 Ala. 543, 12 So. 720, wherein it is

the property and that it is within the statutory limit as to value, if the contestant asserts that the property is not in fact exempt by reason of some exception to the general law he has the burden of proving the fact of such exception.[9]

B. Head of a Family. — Where the exemption is claimed by one as head of a family, that fact must be clearly shown before its benefits can be allowed to the claimant.[10]

C. Necessity of the Articles. — It is also incumbent on the claimant to show the necessity[11] of the articles claimed to be ex-

held that when a creditor contests a claim of exemption as to goods levied upon, it devolves upon him to prove that the property claimed is not exempt. Todd *v.* McCraney, 77 Ala. 468, wherein it is held that under the Alabama statute (Code, p. 2831) a declaration and claim of exemption in due form for record in the probate court is "*prima facie* evidence of the correctness of such claim."

9. As for example, where the defendant in an action to recover personal property claims that the property was not exempt under a statute expressly providing that no exemption shall be allowed against an execution issued for the purchase money of property seized under the execution. Wagner *v.* Olsen, 3 N. D. 69, 54 N. W. 286.

Or where the contestant asserts that the judgment, to collect which the property was taken, was "a judgment for labor," against which it was claimed that the property would not be exempt. Paddock *v.* Balgord, 2 S. D. 100, 48 N. W. 840.

10 Head of a Family. — In McMasters *v.* Alsop, 85 Ill. 157, it was held that a statement by the claimant that it would require a certain amount of provisions to supply his family for the time allowed by statute does not prove that he was the head of a family and living with them; that "where this privilege is claimed it must be clearly shown before its benefits can be allowed to the claimant." See also Barnes *v.* Rogers, 23 Ill. 290; Pollard *v.* Thomason, 5 Humph. (Tenn.) 56; Wolfenberger *v.* Standifer, 3 Sneed (Tenn.) 659; Bowen *v.* Witt, 19 Wend. (N. Y.) 475.

"Head of a Family Residing in This State." — In Florida the constitutional exception of $1000 worth of personal property inures to the head of a family residing in that state; and in Post *v.* Bird, 28 Fla. 1, 9 So. 888, it was held that before a claimant could avail himself of the exemption allowed he must show that he was at that time the head of the family residing in that state, and that proof merely that he was a resident of the state was insufficient.

Wife as Head of Family. — In Clinton *v.* Kidwell, 82 Ill. 427, it is held that ordinarily, at least where the wife lives with the husband, he must be regarded as the head of the family, and if he has no control of the family and is not the head thereof, but the wife is, that fact must be shown by proof; that the inference that he is the head must be rebutted by proof, and in a penal action that proof must clearly rebut such inference. In that case the only facts relied upon to sustain the proposition that the wife was at the time the head of the family were that the residence of the family was on her premises, that the property on the premises was her own separate property, and that she had children by her former husband residing with her; all of which was held insufficient.

11. Van Sickler *v.* Jacobs, 14 Johns. (N. Y.) 434. See also *In re* Mitchell, 102 Cal. 534, 36 Pac. 840; O'Donnell *v.* Segar, 25 Mich. 367; Richards *v.* Hubbard, 59 N. H. 158, 47 Am. Rep. 188, where the court said: "If there is any doubt whether an article, claimed to be exempt from attachment, is a tool, under the statute, the question should be submitted to the jury, whether its use as a tool by the debtor in his business is reasonably necessary."

In Dowling *v.* Clark, 3 Allen (Mass.) 570, where the property in

empted, and not merely that they were a convenience.[12] It is not incumbent upon him, however, to employ the word "necessary" in his evidence; it is sufficient if he shows facts that prove, or tend to prove, this necessity.[13]

D. Value of the Articles. — The value of the articles in its relation to the limit fixed by the statute must also be shown.[14]

E. Avocation of Claimant. — And sometimes it is held incumbent upon the claimant, in order to bring himself within the provisions of the statute, to show the business in which he was wholly or principally engaged.[15]

F. Ownership of Other Property. — Where articles specifically enumerated by the statute as exempt are claimed by the debtor, and their necessity and value are shown, it is not incumbent on the claimant to further show what other property he may own.[16]

question was a sewing machine, and the claimant alleged and introduced evidence tending to show that shortly before the levy he was engaged in the manufacture of ready-made clothing, the court instructed the jury that the burden of proof was on him to satisfy them that at the time he was engaged in the trade or business of manufacturing ready-made clothing, the sewing machine was necessary for that business, and if without it such trade or business could not be successfully carried on, then it was necessary within the meaning of the law.

Testimony of Claimant Insufficient. In Wymond *v.* Amsbury, 2 Colo. 213, where the claimant testified that he was the owner of the goods seized, it was held that as to the wearing apparel this was probably sufficient, for as to such goods the ownership may show the use to which they were applied; but that as to household goods, such as beds, bedding, and the like, his testimony was insufficient because the statute protects only such as are kept for use by the debtor and his family, and these must be of certain kinds which are described, or if of other kinds not exceeding a certain amount in value, and as to both the use and the value his testimony was silent.

Under the Minnesota Statute exempting "the provisions for the debtor and his family necessary for one year's support, either provided or growing, or both;" such "food" and "provisions" to "be chosen by the debtor, his agent, clerk or legal representative, as the case may be;" also "necessary seed grain" (not exceeding certain quantities) "for the actual personal use of the debtor, for one season, to be selected by him," when the levy is upon food for stock, provisions and seed grain, the question of what and how much is "necessary" is one of fact to be established by the claimant. Howard *v.* Rugland, 35 Minn. 388, 29 N. W. 63. See also Haugen *v.* Younggren, 57 Minn. 170, 58 N. W. 988.

12. Willson *v.* Ellis, 1 Denio (N. Y.) 462.

13. Smith *v.* Slade, 57 Barb. (N. Y.) 637.

14. Dains *v.* Prosser, 32 Barb. (N. Y.) 290; Tuttle *v.* Buck, 41 Barb. (N. Y.) 417; Wymond *v.* Amsbury, 2 Colo. 213; Coppage *v.* Gregg, 1 Ind. App. 112, 27 N. E. 570. See also Astley *v.* Capron, 89 Ind. 167; Graham *v.* Crockett, 18 Ind. 119; O'Donnell *v.* Segar, 25 Mich. 367; Morrill *v.* Seymour, 3 Mich. 64.

15. Murphy *v.* Mulvena, 108 Mich. 347, 66 N. W. 224, so holding in construing and applying the Michigan statute (2 How. Stat. § 7686, subd. 8). See also Morrill *v.* Seymour, 3 Mich. 64; Sutton *v.* Facey, 1 Mich. 243, *holding* that proof of claimant's having practiced as a physician is *prima facie* evidence of his professional character.

16. Smith *v.* Slade, 57 Barb. (N. Y.) 637; Reinecke *v.* Flecke, 3 Jones & S. (N. Y.) 491.

G. Waiver of Right to Claim Exemption. — It is not incumbent on the claimant in the first instance to show that he had not waived his right to claim the property under the exemption.[17] On the contrary the burden of proving the waiver is upon him who asserts that fact.[18]

2. Mode of Proof. — A. Claim of Exemption. — Inventory of Debtor's Property. — The inventory of all the property owned by the debtor, or in which he has any interest, required by law to be furnished by him to the levying officer, as a condition precedent to his right to require the officer to set off to him property as exempt from execution, is material evidence on his behalf, in an action by him against such officer and the execution creditor, to recover property alleged to have been illegally sold in disregard of a valid claim by him for its exemption from sale.[19]

B. Claimant as Householder, etc. — a. *Direct Testimony.* Whether or not the claimant is a householder is a matter as to which it is not proper to receive the opinion of a witness; although the fact of residence may be testified to directly by a witness having knowledge.[20] But where the issue is whether or not the claimant had lost his residence by removal to another state, he may be examined as to whether he had abandoned his residence and started to another state to engage in business.[21]

b. *Reputation.* — Whether or not the claimant is a householder cannot be proved by general reputation.[22]

C. Necessity of Articles. — a. *Avocation of Claimant.* — In determining the necessity of the articles in question, it is proper to consider the nature and character of his occupation.[23] But evidence in relation thereto should be confined to the time of and previous to the seizure; evidence as to his occupation at any subsequent time is immaterial.[24]

b. *Claimant's Circumstances in Life.* — In determining whether or not the property in question was reasonably necessary, suited, and proper for the claimant's use, it is proper to take into consideration his situation and circumstances in life.[25] And where

17. Gardner *v.* King, 37 Kan. 671, 15 Pac. 920.

18. State *v.* Haggard, 1 Humph. (Tenn.) 390.

19. Gregory *v.* Latchem, 53 Ind. 449.

20. Cavendish *v.* Troy, 41 Vt. 108.

21. Jones *v.* Alsbrook, 115 N. C. 46, 20 S. E. 170, where it was held proper to so direct the cross-examination of the claimant who had testified to the fact of his residence.

22. Eastman *v.* Caswell, 8 How. Pr. (N. Y.) 75.

23. Wilcox *v.* Hawley, 31 N. Y. 648; Smith *v.* Slade, 57 Barb. (N. Y.) 637; Rice *v.* Wadsworth, 59 N. H. 100. See also George *v.* Fellows, 59 N. H. 206, where it was held that the claimant's duty and business, and his use of the horse in question in that duty and business, were evidence on the question of requirement for actual use; Weed *v.* Dayton, 40 Com. 293, where the court said: "His personal wants and those of his family may depend largely upon the nature of the business whereby he is seeking a livelihood."

24. O'Donnell *v.* Segar, 25 Mich. 367.

25. Hamilton *v.* Lane, 138 Mass. 358, where the court said: "While

the issue is as to whether or not the claimant's wages were necessary for the use of his family, investigation is properly permitted as to the means through which the family actually received its support during the time in question.[26]

c. *Ownership of Other Property.* — In determining whether the article in question is necessary to the debtor, evidence of whether he has more or less property beyond the amount fixed by statute is immaterial.[27]

in certain cases it would be the duty of the court to direct the jury authoritatively that the articles furnished could not be necessaries, in others it would be for the jury to say whether they were such as could come within that class, and also to determine whether in amount, quality, quantity and value they were suitable and proper in the particular case." See also George *v.* Fellows, 60 N. H. 398.

26. Cushing *v.* Quigley, 11 Mont. 577, 29 Pac. 337. In this case the contestant was permitted to ask the claimant's witnesses concerning the quantity and value of property held in the name of claimant's wife and used in running the boarding-house business conducted by her, and by the family in common as a home, and was also permitted to introduce in evidence a list of separate property and a declaration as sole trader made by her. The theory of the claimant was that the sole question was as to whether or not such an amount as was earned during the time in question would be required for the support of the family, and that if only sufficient for that purpose the case ought to have been determined in favor of the claimant on the ground that it was his duty to support his family. But the court said: "This would leave out of consideration the question as to whether or not the family was in fact supported by the earnings of the husband, or from some other source. The earnings might not be more than sufficient to supply the family at the time if the family had no other source of supply, and in that case the exemption would surely apply. But if all other facts were excluded from consideration, the exemption on that theory, would prevail, where the wife had a large estate, and it could be shown that she had actually supported herself and child or children therefrom, and that the husband's earnings were neither required nor used for that purpose, and on that theory the exemption would have to prevail, although it could be shown that the husband had a fund from past earnings or other sources more than sufficient to supply all necessaries required for the family at the time in question; for if the amount of earnings at the time and the wants of the family, only, were considered, it would probably appear in each of such cases that the earnings were not more than sufficient for the family's support, while in fact the case might be that such earnings were neither necessary nor used for the support of the family." And further: "The question at issue pertained to the ways and means by which said family received its support at the time in question, and when it was shown that said property was used in the support of said family at the time in question the evidence as to the kind, quantity, value, and use of said property became material."

27. Wilcox *v.* Hawley, 31 N. Y. 648, where it was held that evidence tending to show that the debtor who claimed his horse to be exempt as being his team, had, shortly before the levy, owned two other horses and had other property which he had disposed of, and the proceeds of which he had transferred to his wife, was improper. The court, *quoting* from Wheeler *v.* Cropsey, 5 How. Pr. (N. Y.) 288, said: "In determining whether the team was necessary, it is entirely immaterial whether the debtor had or had not other ample means to pay the debt. If the fact that he had money enough to pay the debt is to control this question, then a teamster's horses and a mechanic's working tools are not to be exempt if the owner has money enough in his pocket to pay the judg-

It is proper, however, to inquire whether the claimant had other personal property, and how much, for the purpose of determining whether he is entitled to hold the property in question as exempt, where the statute allows personal property to be held as exempt in lieu of articles specifically exempted but not on hand.[28] Or where the debtor is required to select from property seized and inventoried by the officer.[29] But the fact that the debtor had other articles of the same kind not levied on has been held immaterial, unless it is shown affirmatively that the number was greater than was necessary for the use or comfort of himself or family.[30]

D. Waiver of Claim. — In determining whether or not the judgment debtor waived his right to the exemption and assented to the levying it is proper to take into consideration his acts and manner at the time and their possible effect in giving the officer to understand that he did in fact assent.[31]

E. Justification. — Where the issue is as to the illegality of a levy upon exempt property, evidence that the execution debtor was committing acts which would constitute ground for attachment it not admissible.[32]

ment. This cannot be the test. We think the team of every teamster, and of every other man, when it is necessary to his use, is exempt, although the owner may be worth thousands of dollars, in money or in other property. The exemption is not made in the statute to depend on the pecuniary ability of the debtor. When the debtor has money or other property, the law has provided ample remedies for collection, without resorting to exempted property for the satisfaction of the debt." See also Smith *v.* Slade, 57 Barb. (N. Y.) 637.

28. Miller *v.* Mahoney, 16 Ky. L. Rep. 799, 29 S. W. 879, where it was accordingly held that it was error to refuse to permit the claimant to be fully cross-examined upon this question.

29. Gass *v.* Van Wagner, 63 Mich. 610, 30 N. W. 198, where the court said that it was material "to know whether this horse was the only one which plaintiff owned, for if not it might have turned out he would not have been exempt by the proper statutory selection."

30. Heath *v.* Keyes, 35 Wis. 668.

31. Fogg *v.* Littlefield, 68 Me. 52. See also Smith *v.* Hill, 22 Barb. (N. Y.) 656, where it was held that the claimant, being present at the sheriff's sale, knowing the circumstances under which the property was sold, and making no objection or claim at the time, waived his claim.

What will constitute a reasonable time in which the claimant must give notice of his claim of exemption will depend upon the particular circumstances of each case; and the fact that at the time of the levy he had other property of a similar character which he could have claimed as exempt has been held to be strong if not conclusive evidence of a waiver of the right to select the particular property in question as exempt. Borland *v.* O'Neal, 22 Cal. 504.

32. Brown *v.* Bridges, 70 Tex. 661, 8 S. W. 502.

HOMICIDE.

By Edward W. Tuttle.

CROSS-REFERENCES:

Accessories, Aiders and Abettors; Accomplices;

Burden of Proof;

Character; Circumstantial Evidence; Conspiracy; Corpus Delicti;

Demonstrative Evidence;

Experiments; Expert and Opinion Evidence;

Insanity; Intent;

Presumptions;

Res Gestae;

View by Jury.

I. PRESUMPTIONS.

1. Of Innocence. — A. Generally. — The presumption of innocence[1] which exists in favor of the accused in all criminal trials is of course applied to homicide cases, and is said to continue throughout the trial until overcome by evidence proving guilt beyond a reasonable doubt.[2]

B. As Affected by Relation of Parties. — There is no stronger presumption of innocence where the relation existing between the accused and deceased is that of parent and child, or husband and wife, than in any other case.[3] The contrary, however, has been held,[4] and also that evidence is admissible to rebut the additional presumption.[5]

2. Intent. — A. From the Act. — a. *Generally.* — The intention to kill is sometimes said to be presumed from the accused's intentional[6] or deliberate[7] act, or from the mere fact of the

1. See article "Presumptions."

2. State *v.* Young, 99 Mo. 666, 12 S. W. 879; Jones *v.* State, 13 Tex. App. 1; Bird *v.* State, 43 Fla. 541, 30 So. 655. See Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

"In a criminal case, the establishment of a *prima facie* case does not, as in a civil case, take away from the defendant the presumption of innocence or change the burthen of proof. A solid reason for the distinction is the well-known difference in the measure of proof in the two classes of cases. In a civil case, the plaintiff is not required to prove, beyond all reasonable doubt, the facts on which he relies for a recovery; and therefore, when he establishes a *prima facie* case, the burthen of proof is thereby shifted, and the *prima facie* case so established entitles him to recover, unless it is destroyed by proof from the other party. But in a criminal case, the state is required to prove, beyond all reasonable doubt, the facts which constitute the offense. The establishment, therefore, of a *prima facie* case merely does not take away the presumption of innocence from the defendant, but leaves that presumption to operate, in connection with, or in aid of, any proofs offered by him to rebut or impair the *prima facie* case thus made out by the state." Ogletree *v.* State, 28 Ala. 693.

3. Hawes *v.* State, 88 Ala. 37, 7 So. 302; State *v.* Soper, 148 Mo. 217, 49 S. W. 1007, *overruling* State *v.* Leabo, 84 Mo. 168; State *v.* Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 566.

4. A stronger presumption of innocence arises where defendant and deceased were husband and wife. "This presumption is in addition to, and to be distinguished from, the legal presumption of innocence that exists in every case in favor of a party charged with the commission of a crime; and in cases where both presumptions exist the public prosecutor must overcome the force of both and establish the contrary fact before the accused can be found guilty." State *v.* Green, 35 Conn. 203. See State *v.* Watkins, 9 Conn. 47; State *v.* Hossack, 116 Iowa 194, 89 N. W. 1077; People *v.* Hendrickson, 8 How. Pr. (N. Y.) 404; People *v.* Greenfield, 23 Hun 454; *affirmed,* 85 N. Y. 75, 39 Am. Rep. 636.

5. State *v.* Green, 35 Conn. 203, *holding* competent evidence that defendant had a former wife still living and undivorced, which fact was unknown to the deceased. See also People *v.* Greenfield, 23 Hun 454, *affirmed,* 85 N. Y. 75, 39 Am. Rep. 636.

6. State *v.* Grant, 144 Mo. 56, 45 S. W. 1102.

7. Weaver *v.* People, 132 Ill. 536, 24 N. E. 571. See People *v.* Fish, 125 N. Y. 136, 26 N. E. 319.

killing,[8] because one is presumed to intend the natural and probable consequences of his act.[9]

b. *Mere Killing.* — Mere proof of the killing of the deceased by the accused, however, is not sufficient to raise a presumption of an intent to kill, without regard to the means or instrument used.[10]

B. Character of Weapon. — a. *Generally.* — When the killing is accomplished by the use of a deadly weapon[11] the intent to kill is presumed from the nature of the instrument employed.[12] This presumption, however, is not conclusive.[13] Some courts hold that no legal presumption arises from the use of a deadly weapon, but that it merely warrants an inference by the jury of an intention to kill.[14] Others say that the presumption arises only when the deadly instrument is used in a manner calculated to produce death, or upon a vital part of the body.[15]

8. State *v.* Smith, 12 Rich. L. (S. C.) 430.

9. Harrison *v.* Com., 79 Va. 374; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676. See more fully the article "Intent."

10. Connell *v.* State (Tex. Crim.), 81 S. W. 746.

In People *v.* Downs, 56 Hun 5, 8 N. Y. Supp. 521, where the only evidence as to the manner in which the homicide occurred was the defendant's testimony that during a fight with the deceased, caused by finding him in adultery with the defendant's wife, after he had been knocked on the head by the deceased he became dizzy and his pistol was discharged in some manner to him unknown. It was held that the mere fact of the killing did not create a presumption that the defendant was guilty of a criminal homicide, especially in view of the fact that the defendant's conduct at the time, and subsequent, was not in any wise suspicious. "The mere fact of the killing, without evidence as to attendant circumstances or preceding or subsequent throwing light on it, does not create an implication that defendant intended to take Logan's life. The mere fact of killing proves homicide; but it does not prove whether the homicide is a crime or is justifiable or excusable."

11. What Is a Deadly Weapon. See *infra* this article, "Presumptions — Malice — What is a Deadly Weapon."

12. *Alabama.* — Henson *v.* State, 112 Ala. 41, 21 So. 79; Sylvester *v.* State, 72 Ala. 201; McElroy *v.* State, 75 Ala. 9.

California. — People *v.* Bushton, 80 Cal. 160, 22 Pac. 127, 549.

Georgia. — Vann *v.* State, 83 Ga. 44, 9 S. E. 945; see Smith *v.* State, 73 Ga. 31; Gallery *v.* State, 92 Ga. 463, 17 S. E. 863.

Michigan. — People *v.* Wolf, 95 Mich. 625, 55 N. W. 357.

Mississippi. — Bishop *v.* State, 62 Miss. 289; Jeff *v.* State, 37 Miss. 321; *s. c.*, 39 Miss. 593.

Missouri. — State *v.* Musick, 101 Mo. 260, 14 S. W. 212; State *v.* Doyle, 107 Mo. 36, 17 S. W. 751.

New York. — Thomas *v.* People, 67 N. Y. 218. But see People *v.* Downs, 56 Hun 5, 8 N. Y. Supp. 521.

Pennsylvania. — Kilpatrick *v.* Com., 31 Pa. St. 198.

Texas. — Chalk *v.* State, 35 Tex. Crim. 116, 32 S. W. 534.

13. Clem *v.* State, 31 Ind. 480; Bradley *v.* State, 31 Ind. 492.

14. Fitch *v.* State, 37 Tex. Crim. 500, 36 S. W. 584; Danforth *v.* State, 44 Tex. Crim. 105, 69 S. W. 159.

15. Simpson *v.* State, 56 Ark. 8, 19 S. W. 99; People *v.* Batting, 49 How. Pr. (N. Y.) 392.

The deliberate use of a deadly weapon may or may not be evidence of an attempt to kill, depending upon the circumstances under which it was used and the part of the body purposely aimed at. Purposely aiming at the leg or other part of the body where the wound would not

b. *Specific Intent.* — **(1.) Generally.** — A specific intent, whenever essential, cannot be presumed from any particular act or acts.[16]

(2.) When Result Not Fatal. — Thus where the result of the act is not fatal and the crime charged is assault with intent to kill or murder, the necessary specific intent cannot be presumed from the use of a deadly weapon or from an act the natural and probable result of which would be the death of the injured person.[17] Some courts, however, hold that the same presumptions of intent flow from the character of the act or weapon, even though the result is not actually fatal.[18] The mere fact that the defendant's act would have amounted to murder in case death had ensued does not warrant an inference of the existence of the specific intent to murder.[19] The fact, however, that the accused's act did not result fatally raises no

likely prove fatal would not be "even slight evidence of an intent to kill." Cross *v.* State, 55 Wis. 261, 12 N. W. 425.

State *v.* Tabor, 95 Mo. 585, 8 S. W. 744. "It cannot be said, as a matter of law, that a party intends to kill because he stabbed another with a knife. If he intentionally stabs another in a vital part with a knife and the knife is a deadly weapon, then the law is that he is presumed to have intended death." State *v.* McKenzie, 102 Mo. 620, 15 S. W. 149.

16. Lane *v.* State, 85 Ala. 11, 4 So. 730; Simpson *v.* State, 56 Ark. 8, 19 S. W. 99.

17. *Alabama.* — Lewis *v.* State, 88 Ala. 11, 6 So. 755; Scitz *v.* State, 23 Ala. 42.

Arkansas. — Chrisman *v.* State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44.

California. — People *v.* Mize, 80 Cal. 41, 22 Pac. 80.

Georgia. — Gallery *v.* State, 92 Ga. 463, 17 S. E. 863.

Illinois. — Crosby *v.* People, 137 Ill. 325, 27 N. E. 49.

Nebraska. — Curry *v.* State, 4 Neb. 545; Krchnavy *v.* State, 43 Neb. 337, 61 N. W. 628.

Vermont. — State *v.* Taylor, 70 Vt. 1, 39 Atl. 447, 67 Am. St. Rep. 648, 42 L. R. A. 673.

Washington. — State *v.* Dolan, 17 Wash. 499, 50 Pac. 472.

Wyoming. — Bryant *v.* State, 7 Wyo. 311, 56 Pac. 596.

Assault With Intent to Murder. In Morgan *v.* State, 33 Ala. 413, an instruction that "the presenting of a pistol, loaded and cocked, within carrying distance, by one man at another, with his finger on the trigger, in an angry manner, is, of itself, an assault with intent to murder," was held error on the ground that such facts raised no legal presumption of the existence of the intent to murder.

18. People *v.* Odell, 1 Dak. 197, 46 N. W. 601; State *v.* Musick, 101 Mo. 260, 14 S. W. 212; Jeff *v.* State, 37 Miss. 321; State *v.* Munco, 12 La. Ann. 625. See Territory *v.* Reuss, 5 Mont. 605, 5 Pac. 885.

An Assault With a Deadly Weapon raises a presumption of an intention to kill, although death does not result. People *v.* Odell, 1 Dak. 197, 46 N. W. 601; State *v.* Keith, 9 Nev. 15.

An instruction that shooting in a vital part of the body raises a presumption of an intention to kill was held proper on a charge of assault with intent to kill. State *v.* Musick, 101 Mo. 260, 14 S. W. 212. See also State *v.* Doyle, 107 Mo. 36, 17 S. W. 751.

The use of a deadly weapon in a manner calculated to produce death raises a presumption of an intention to kill, although it does not result fatally. *Ex parte* Brown, 40 Fed. 81.

Pointing a Loaded Pistol at the person assaulted raises no presumption of an intention to kill. Agitone *v.* State, 41 Tex. 501.

19. State *v.* Evans, 39 La. Ann. 912.

presumption that he did not intend to kill;[20] nor does the fact that it was used on a non-vital part,[21] or that the defendant refrained from inflicting as severe a wound as he could.[22]

Opinion. — Where the offense charged is assault with intent to murder, a competent expert may give his opinion as to the natural and probable result of the injuries inflicted.[23]

C. Inference From Act. — Whatever difference of opinion and confusion there may be as to the presumption of law flowing from the acts of the accused, his intention to kill, both general[24] and specific,[25] may be inferred from the nature and circumstances of the act.

3. Malice. — A. Generally. — There is some apparent conflict in the decisions as to when, if ever, a legal presumption of malice arises. Some cases go to the extent of holding that malice is never presumed from any particular facts.[26]

20. There is no presumption that because the defendant's act did not cause death he did not intend to kill. State *v.* Gilman, 69 Me. 163, 31 Am. Rep. 257; State *v.* Postal, 83 Iowa 460, 50 N. W. 207. See also State *v.* Hersom, 90 Me. 273, 38 Atl. 160.

21. The fact that defendant shot the assaulted person in the knee raises no presumption that he did not intend to kill. State *v.* Postal, 83 Iowa 460, 50 N. W. 207.

22. Jackson *v.* State, 94 Ala. 85, 10 So. 509.

23. Curry *v.* State, 5 Neb. 412.

The opinion of a physician that the blow inflicted by the defendant upon the assaulted party would have resulted in death except for a surgical operation was held not inadmissible as an invasion of the province of the jury. Henry *v.* State (Tex. Crim.), 49 S. W. 96.

24. Crosby *v.* People, 137 Ill. 325, 27 N. E. 49; State *v.* Walker, 37 La. Ann. 560; Walker *v.* State, 136 Ind. 663, 36 N. E. 356.

If a deadly weapon is used in a deadly manner the inference of an intention to kill is almost conclusive, but if the weapon be not dangerous or not used in a deadly manner the intention must be otherwise established. Hatton *v.* State, 31 Tex. Crim. 586, 21 S. W. 679.

25. State *v.* Woodard, 84 Iowa 172, 50 N. W. 885; Lane *v.* State, 85 Ala. 11, 4 So. 730; Bryant *v.* State, 7 Wyo. 311, 56 Pac. 596; Cole *v.* State, 10 Ark. 318; Walker *v.* State, 136 Ind. 663, 36 N. E. 356.

26. State *v.* Earnest, 56 Kan. 31, 42 Pac. 359. See cases cited under the subsection, *infra,* "Use of Deadly Weapon."

"It appears that the doctrine of implied malice had its origin at a time when the crime of murder was confined to the secret killing of another, and when the rules of evidence as now established were but little known. (4 Bl. Com. 194, 195.) Such appears to have been the class of cases to which the doctrine was first applied in Massachusetts and in several other states; but it appears that some of the American writers on the law of evidence, citing and approving these cases, have, by the use of general terms, extended their application to all homicides. In many of the cases cited in support of the proposition that the law implies malice from deliberate killing with a deadly weapon, it is seen on examination that the jury found by special verdict the facts and circumstances connected with the killing, and the court upon that finding determined whether there was malice. (The King *v.* Oneby, 2 Ld. Raym. 1485-1494.) But whatever the origin of the rule may be, we are convinced that it is entirely arbitrary, contrary to the reason and the analogies of the law of criminal procedure, both at common law and under our statutes and Code." Farris *v.* Com., 14 Bush (Ky.) 362.

B. From Mere Killing. — The rule generally laid down is that malice is presumed from the mere fact of the killing in the absence of rebutting circumstances,[27] or that all homicide is presumptively malicious and therefore murder.[28]

C. Intentional or Deliberate Killing. — Some cases seem to qualify the foregoing rule by requiring that the killing be deliberate or intentional.[29]

27. *England.* — Rex *v.* Greenacre, 8 Car. & P. 35, 34 E. C. L. 280.

United States. — United States *v.* Travers, 2 Wheel. Crim. 490, 28 Fed. Cas. No. 16,537.

California. — People *v.* March, 6 Cal. 543.

Delaware. — State *v.* Miller, 9 Houst. 564, 32 Atl. 137.

Florida. — Holland *v.* State, 12 Fla. 117.

Georgia. — Wortham *v.* State, 70 Ga. 336; Wilson *v.* State, 69 Ga. 224; Clarke *v.* State, 35 Ga. 75; Marshall *v.* State, 74 Ga. 26.

Illinois. — Peri *v.* People, 65 Ill. 17.

Iowa. — State *v.* McCormick, 27 Iowa 402; State *v.* Zeibart, 40 Iowa 169.

Maine. — State *v.* Knight, 43 Me. 11.

Mississippi. — Hawthorne *v.* State, 58 Miss. 778; Green *v.* State, 28 Miss. 687; McDaniel *v.* State, 16 Miss. 401, 47 Am. Dec. 93.

Nebraska. — Williams *v.* State, 6 Neb. 334; Preuit *v.* People, 5 Neb. 377.

New Jersey. — Brown *v* State, 62 N. J. L. 666, 42 Atl. 811, attempting to harmonize Stokes *v.* People, 53 N. Y. 164, and People *v.* Schryver, 42 N. Y. 1, on the ground that the former was based upon the statute and not the common law.

North Carolina. — State *v.* Smith, 77 N. C. 488; State *v.* Lambert, 93 N. C. 618.

South Carolina. — State *v.* McDaniel, 47 S. E. 384.

Tennessee. — Bryant *v.* State, 66 Tenn. 67; Witt *v.* State, 46 Tenn. 5; Mitchell *v.* State, 13 Tenn. 340.

Texas. — Brown *v.* State, 4 Tex. App. 275.

Virginia. — Lewis *v.* Com., 78 Va. 732.

Washington. — State *v.* Tommy, 19 Wash. 270, 53 Pac. 157, *approving* State *v.* Payne, 10 Wash. 545, 39 Pac. 157.

"Where the state proves the fact of killing, without more, malice is presumed until the contrary appears from the direct or circumstantial evidence in the case, whether offered by the defendant or existing in the evidence of the state." Epperson *v.* State, 73 Tenn. 291; State *v.* Payne, 10 Wash. 545, 39 Pac. 157, *disapproving* of the rule laid down by Wharton.

28. *Alabama.* — Clements *v.* State, 50 Ala. 117.

Georgia. — Lewis *v.* State, 90 Ga. 95, 15 S. E. 697.

New Jersey. — State *v.* Zellers, 7 N. J. L. 220.

North Carolina. — State *v.* Cox, 110 N. C. 503, 14 S. E. 688.

Pennsylvania. — Com. *v.* Drum, 58 Pa. St. 9.

South Carolina. — State *v.* Coleman, 20 S. C. 441.

Virginia. — McDaniel *v.* Com., 77 Va. 281; McWhirt's Case, 3 Gratt. 594, 46 Am. Dec. 196.

West Virginia. — State *v.* Hertzog, 46 S. E. 792.

29. *United States.* — United States *v.* Outerbridge, 5 Sawy. 620, 27 Fed. Cas. No. 15,978.

District of Columbia. — United States *v.* Sickles, 2 Hayw. & H. 319, 27 Fed. Cas. No. 16,287*a*.

Indiana. — Murphy *v.* State, 31 Ind. 511.

Massachusetts. — Com. *v.* York, 9 Metc. 93, 43 Am. Dec. 373; Com. *v.* Drew, 4 Mass. 391.

Minnesota. — State *v.* Shippey, 10 Minn. 223, 88 Am. Dec. 70; State *v.* Brown, 12 Minn. 538.

Missouri. — State *v.* Holme, 54 Mo. 153; State *v.* Tabor, 95 Mo. 585, 8 S. W. 744; State *v.* Gassert, 65 Mo. 352; State *v.* Evans, 124 Mo. 397, 28 S. W. 8, *overruling* State *v.* McKinzie, 102 Mo. 620, 15 S. W. 149.

D. Unlawful Killing. — Another variation of the rule is that proof of an unlawful killing raises a presumption of malice;[30] which is in effect the same as the rule that malice is presumed from the fact of the killing.[31]

E. When Facts and Circumstances of Killing Appear. This presumption, however, ceases when the facts and circumstances attending the killing appear from the evidence.[32]

Montana. — Territory *v.* McAndrews, 3 Mont. 158.

Virginia. — Dejarnette *v.* Com., 75 Va. 867.

It is the deliberation with which the act is performed that gives its character. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320.

A Voluntary Killing constitutes *prima facie* murder and throws the burden of proving mitigation or justification upon the defendant. People *v.* Phelan, 123 Cal. 551, 56 Pac. 424.

"The implication of malice arises in every case of intentional homicide. . . . Where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed, tending to show justification or excuse, there is nothing to rebut the natural presumption of malice. This rule is founded on the plain and obvious principle that a person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and that he must intend all the natural, probable and usual consequences of his own acts. Therefore, when one person assails another violently, with a dangerous weapon, likely to kill, and which does in fact destroy the life of the party assailed, the natural presumption is that he intended death or other great bodily harm; and, as there can be no presumption of any proper motive or legal excuse for such a cruel act, the consequence follows that, in the absence of all proof to the contrary, there is nothing to rebut the presumption of malice." Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

Malice Will Be Presumed From a Wanton or Reckless Act. — Dunaway *v.* People, 110 Ill. 333.

An Intentional Shooting Into a Crowd raises a presumption of malice. State *v.* Edwards, 71 Mo. 312; Brown *v.* Com., 13 Ky. L. Rep. 372, 17 S. W. 220.

30. *Indiana.* — Boyle *v.* State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

Maine. — State *v.* Knight, 43 Me. 11.

Missouri. — State *v.* Bowles, 146 Mo. 6, 47 S. W. 892, 69 Am. St. Rep. 598.

Nebraska. — Davis *v.* State, 51 Neb. 301, 70 N. W. 984.

Texas. — Harris *v.* State, 8 Tex. App. 90; Douglas *v.* State, 8 Tex. App. 520; Hubby *v.* State, 8 Tex. App. 597; Hill *v.* State, 11 Tex. App. 456.

Utah. — People *v.* Tidwell, 5 Utah 88, 12 Pac. 61.

"When the fact of an unlawful killing is established and there are no circumstances in evidence which tend to establish the existence of express malice, nor which tend to mitigate, excuse or justify the act, then the law implies malice." Boyd *v.* State. 28 Tex. App. 137, 12 S. W. 737.

31. "Every Homicide Is Presumed Unlawful, and when the mere act of killing is proven and nothing more the presumption is that it was intentional and malicious." State *v.* Brown, 12 Minn. 538.

32. *Alabama.* — Eiland *v.* State, 52 Ala. 322.

California. — People *v.* West, 49 Cal. 610.

Georgia. — Futch *v.* State, 90 Ga. 472, 16 S. E. 102.

Massachusetts. — Com. *v.* Hawkins, 3 Gray 463.

Nebraska. — Vollmer *v.* State, 24 Neb. 838, 40 N. W. 420.

South Carolina. — State *v.* McDaniel, 47 S. E. 384; State *v.* Ariel, 38 S. C. 221, 16 S. E. 779; State *v.* Coleman, 6 S. C. 186; State *v.* Hopkins, 15 S. C. 153; State *v.* Alexander, 30 S. C. 74, 8 S. E. 440, 14

F. No Presumption From Killing. — In some jurisdictions, however, no legal presumption of malice arises from the mere fact of the homicide.[33] So in some states the statutes relating to murder have been held to abrogate the common-law doctrine.[34]

Am. St. Rep. 879; State *v.* Jones, 29 S. C. 201, 7 S. E. 296.

Tennessee. — Bryant *v.* State, 66 Tenn. 67.

West Virginia. — State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

33. *United States.* — United States *v.* Armstrong, 2 Curt. 446, 24 Fed. Cas. No. 14,467.

Alabama. — Fallin *v.* State, 83 Ala. 5, 3 So. 525.

Florida. — Newton *v.* State, 21 Fla. 53; Dukes *v.* State, 14 Fla. 499.

Kentucky. — Farris *v.* Com., 14 Bush 362.

Michigan. — See Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Nevada. — State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

New Hampshire. — State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

New York. — People *v.* Conroy, 97 N. Y. 62.

"It is true, the rule that the law presumes malice from the proof of the killing is sustained by numerous and respectable authorities. The leading authority is Com. *v.* York, 9 Metc. (Mass.) 93, 1 Benn. & H. Lead. Cr. Cas. 322. But courts and commentators have, especially of late, denied it as a sound legal principle, and condemned it as an excrescence upon the law. The true rule, more accurately stated, and which does not conflict with the presumption of innocence, the burden of proof, nor as to reasonable doubt, we think, is that malice may be implied from the intentional killing, where the jury, from the whole case before them, and beyond a reasonable doubt, find the additional fact that no circumstances of justification or excuse appear, and when there are no circumstances mitigating the killing to that of manslaughter." Territory *v.* Lucero, 8 N. M. 543, 46 Pac. 18, containing a very extended discussion of the authorities and *disapproving* Trujillo *v.* Territory, 7 N. M. 43, 32 Pac. 154.

In State *v.* McDonnell, 32 Vt. 491, Redfield, C. J., while recognizing the common law that malice is presumed from the killing, says (p. 538): "One might be allowed to question its application to the mere fact of killing, since, being but a presumption of fact, in the absence of all evidence in regard to the mode of death, the presumption of innocence must be allowed to prevail over that of malice."

34. Kent *v.* People, 8 Colo. 563, 9 Pac. 852; Goodall *v.* State, 1 Or. 333, 80 Am. Dec. 396; Nilan *v.* People, 27 Colo. 206, 60 Pac. 485.

"The simple proof of a homicide is insufficient to establish the crime of murder. Some proof must be first affirmatively made, on the part of the state, of the existence of malice in the heart of the perpetrator of the act, in order to put the accused upon his defense. Ordinarily when the act is committed deliberately, with a deadly weapon, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed. But as a general rule it has been held in different states that the presumption which arises from a killing, unattended with such circumstances of violence, is that of murder in the second degree. And as under our law there are no grades or degrees in the crime of murder, the simple proof of a killing by the accused, unattended by any circumstances of malice, could raise no stronger presumption against him than that of manslaughter." State *v.* Deschamps, 42 La. Ann. 567, 7 So. 703, 21 Am. St. Rep. 392.

State *v.* Wright, 46 La. Ann. 1403, 16 So. 366; State *v.* Trivas, 32 La. Ann. 1086; State *v.* Swayze, 30 La. Ann. 1323.

An Admission of the Killing by the defendant does not shift the burden of proving justification upon the defendant under the Oregon statute requiring other evidence of malice besides proof of the mere killing. Goodall *v.* State, 1 Or. 333, 80 Am. Dec. 396.

G. NATURE OF THE ACT. — a. *Generally.* — Malice may be presumed from the nature of the act, as from its cruelty, malignity and atrocity.[35]

b. *Use of a Deadly Weapon.* — (1.) **Generally.** — The general rule supported by the great weight of authority is that malice is presumed when the homicide is accomplished by the use of a deadly weapon, unless the contrary appears from the evidence of either the prosecution or the defense.[36] In some jurisdictions, however,

35. State *v.* Coleman, 20 S. C. 441; McDaniel *v.* State, 16 Miss. 401, 47 Am. Dec. 93; Kota *v.* People, 136 Ill. 655, 27 N. E. 53; Peri *v.* People, 65 Ill. 17; State *v.* Becker, 9 Houst. (Del.) 411, 33 Atl. 178; People *v.* McDonald, 2 Idaho 14, 1 Pac. 345; State *v.* Smith, 2 Strob. L. (S. C.) 77, 47 Am. Dec. 589.

"The law implies malice from any deliberate, cruel act against another, however sudden, and the act is deliberate within the meaning of the law when it is voluntarily done." Holland *v.* State, 12 Fla. 117.

The mere fact that the killing was by means of the fists and feet does not repel the presumption of malice, where defendant's action was cruel, barbarous and far in excess of any provocation. McWhirt's Case, 3 Gratt. (Va.) 594, 46 Am. Dec. 196.

36. *Alabama.* — Ross *v.* State, 62 Ala. 224; Young *v.* State, 95 Ala. 4, 10 So. 913; Clark *v.* State, 105 Ala. 91, 17 So. 37; Webb *v.* State, 100 Ala. 47, 14 So. 865; Commander *v.* State, 60 Ala. 1; Stillwell *v.* State, 107 Ala. 16, 19 So. 322; Robinson *v.* State, 108 Ala. 14, 18 So. 732; Compton *v.* State, 110 Ala. 24, 20 So. 119; Mitchell *v.* State, 129 Ala. 23, 30 So. 348; Dixon *v.* State, 128 Ala. 54, 29 So. 623; Harkness *v.* State, 129 Ala. 71, 30 So. 73; Kilgore *v.* State, 124 Ala. 24, 27 So. 4; Tesney *v.* State, 77 Ala. 33; Cross *v.* State, 68 Ala. 476; *Ex parte* Warrick, 73 Ala. 57; Cobb *v.* State, 115 Ala. 18, 22 So. 506; Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96; Oliver *v.* State, 17 Ala. 587; Murphy *v.* State, 37 Ala. 142.

Arizona. — Halderman *v.* Territory, 60 Pac. 876; Foster *v.* Territory, 56 Pac. 738.

Arkansas. — Sweeney *v.* State, 35 Ark. 585.

California. — People *v.* Langton, 67 Cal. 427, 7 Pac. 843.

Dakota. — United States *v.* Crow Dog, 3 Dak. 106, 14 N. W. 437.

Delaware. — State *v.* Davis, 9 Houst. 407, 33 Atl. 55; State *v.* Becker, 9 Houst. 411, 33 Atl. 178; State *v.* Walker, 9 Houst. 464, 33 Atl. 227; State *v.* Peo, 9 Houst. 488, 33 Atl. 257.

Georgia. — Gallery *v.* State, 92 Ga. 463, 17 S. E. 863; Hill *v.* State, 41 Ga. 484; Collier *v.* State, 39 Ga. 31; Hogan *v.* State, 61 Ga. 43; Hayne *v.* State, 99 Ga. 212, 25 S. E. 307.

Iowa. — State *v.* Gillick, 7 Iowa 287; State *v.* Hockett, 77 Iowa 442, 30 N. W. 742, 4 L. R. A. 298; State *v.* Perigo, 70 Iowa 657, 28 N. W. 452.

Mississippi. — Head *v.* State, 44 Miss. 731; Bishop *v.* State, 62 Miss. 289; Green *v.* State, 28 Miss. 687.

Missouri. — State *v.* Evans, 65 Mo. 574; State *v.* Musick, 101 Mo. 260, 14 S. W. 212; State *v.* Mitchell, 64 Mo. 191; State *v.* Bowles, 146 Mo. 6, 47 S. W. 892, 69 Am. St. Rep. 598.

Nebraska. — Schlencker *v.* State, 9 Neb. 241, 1 N. W. 857.

Nevada. — State *v.* Keith, 9 Nev. 15.

North Carolina. — State *v.* Utley, 132 N. C. 1022, 43 S. E. 820; State *v.* Lipscomb, 134 N. C. 689, 47 S. E. 44; State *v.* McCourry, 128 N. C. 594, 38 S. E. 883; State *v.* Craton, 28 N. C. 164; State *v.* Fuller, 114 N. C. 885, 20 S. E. 797.

Oregon. — State *v.* Bertrand, 3 Or. 61.

Pennsylvania. — McCue *v.* Com., 78 Pa. St. 185; Com. *v.* Drum, 58 Pa. St. 9.

South Carolina. — State *v.* Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799.

Tennessee. — Wright *v.* State, 17 Tenn. 342; Foster *v.* State, 74 Tenn. 213.

it is held that the use of such a weapon raises no presumption of malice, but at most justifies an inference of its existence.[37]

Where All the Circumstances of the Act Appear it has been held that no presumption of malice arises from the use of a deadly weapon.[38]

(2.) Intentional or Deliberate Use. — Under some decisions the use

Texas. — Watts *v.* State, 30 Tex. App. 533, 17 S. W. 1092; Wood *v.* State, 27 Tex. App. 393, 11 S. W. 449; Taylor *v.* State, 13 Tex. App. 184.

Vermont. — State *v.* McDonnell, 32 Vt. 491.

Virginia. — Hill *v.* Com., 2 Gratt. 594; Longley *v.* Com., 99 Va. 807, 37 S. E. 339.

West Virginia. — State *v.* Morrison, 49 W. Va. 210, 38 S. E. 481.

Wyoming. — Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

"That everyone must be held to intend the known consequences of his intentional act is a recognized canon of moral accountability, and of municipal law. Malice, as an ingredient of murder, is but a formed design, by a sane mind, to take life unlawfully, without such impending danger, to be averted thereby, as will render it excusable, and without such provocation as will repel the imputation of formed design. Hence, when life is taken by the direct use of a deadly weapon, the canon stated above comes to its aid; and, if there be nothing else in the transaction — no qualifying or explanatory circumstances — the conclusion is irresistible that the killing was done pursuant to a formed design; in other words, with malice aforethought; for malice, in such connection, is but the absence of impending peril to life or member, which would excuse the homicide, and of sufficient provocation to repel the imputation of its existence." Hadley *v.* State, 55 Ala. 31.

Where the Accused Admits the Killing with a deadly weapon but adds an explanation which might negative malice, no presumption of malice arises. Futch *v.* State, 90 Ga. 472, 16 S. E. 102.

Possibility of Accident. — Where the circumstances attending the killing are unknown, but it appears to have been done with a deadly weapon, it will be presumed to have been done maliciously, although there is a possibility that it might have been accidental. Jackson *v.* State, 53 Ga. 195.

Superiority of Weapon. — Mutual Combat. — In case of a mutual combat malice cannot be inferred from the superiority of the defendant's weapon over that of the deceased. People *v.* Barry, 31 Cal. 357.

Against Unarmed Adversary. "Whenever a dangerous weapon is used against an unarmed adversary, even upon reasonable provocation, the killing will be murder and not manslaughter, for the law implies the intent was to kill and not to fight on equal footing." Holland *v.* State, 12 Fla. 117.

This Presumption Arises Only in the Absence of Rebutting Circumstances, and an instruction that malice is presumed from a killing with a deadly weapon, without any qualification, is error. Hornsby *v.* State, 94 Ala. 55, 10 So. 522; Jordan *v.* State, 79 Ala. 9.

37. *Colorado.* — Keady *v.* People, 74 Pac. 892.

Kansas. — State *v.* Dull, 74 Pac. 235; State *v.* Earnest, 56 Kan. 31, 42 Pac. 359.

Kentucky. — Farris *v.* Com., 14 Bush 362.

Montana. — Territory *v.* Hart, 7 Mont. 489, 17 Pac. 718.

Nevada. — State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

New Mexico. — Territory *v.* Lucero, 8 N. M. 543, 46 Pac. 18.

Wyoming. — Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761; Trumble *v.* Territory, 3 Wyo. 280, 21 Pac. 1081, 6 L. R. A. 384. See Miller *v.* State, 37 Ind. 432.

38. Godwin *v.* State, 73 Miss. 873, 19 So. 712. But see Lamar *v.* State, 63 Miss. 265.

of the deadly weapon must have been deliberate or intentional in order to raise the presumption.[39]

(3.) What Is a Deadly Weapon. — (A.) GENERALLY. — In determining whether or not the weapon used by the defendant was a deadly one, not only must the nature of the instrument be considered, but also the circumstances and manner of its use, the nature of the wound and the actual results produced.[40]

(B.) WHEN QUESTION FOR COURT OR JURY. — Whenever the weapon used appears *prima facie* capable of taking life or inflicting great bodily harm,[41] or is of such a nature and has been so used that there is no doubt of its deadly character, the court should instruct the jury that its use raises a presumption of malice.[42]

Doubtful Cases. — Whether or not the weapon used is a deadly one is in doubtful cases a question for the jury, to be determined from the description of the weapon, the manner of its use, nature and locality of the wound and the attending circumstances.[43] Illustrations of these rules will be found in the notes.[44]

39. State *v.* Curtis, 70 Mo. 594; State *v.* Harris, 76 Mo. 361; State *v.* Evans, 124 Mo. 397, 28 S. W. 8; Friederich *v.* People, 147 Ill. 310, 35 N. E. 472; Davison *v.* People, 90 Ill. 221; McDermott *v.* State, 89 Ind. 187.

40. Sylvester *v.* State, 72 Ala. 201.

A Common Chair may be so used as to become a deadly weapon. Birdwell *v.* State (Tex. Crim.), 48 S. W. 583, where a common chair was held to be a deadly weapon when used to crush the skull of the deceased. "There are many things that are not ordinarily deadly weapons, yet they become deadly by the manner of their use."

The Nature and Extent of the Wound Inflicted Upon a Third Person at the same time and with the same knife is admissible to show the character of the weapon. Piela *v.* People, 6 Colo. 343.

41. State *v.* Craton, 28 N. C. 164.

42. Krchnavy *v.* State, 43 Neb. 337, 61 N. W. 628. See State *v.* Tucker (W. Va.), 44 S. E. 427.

43. Tesney *v.* State, 77 Ala. 33; State *v.* Jarrott, 23 N. C. 76.

"Where the weapon in question and the manner of its use are of such character as to admit of but one conclusion in that respect, the question whether or not it is 'deadly,' within the foregoing definition, is one of law, and the court must take the responsibility of so declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its character is one of fact, to be determined by the jury." Krchnavy *v.* State, 43 Neb. 337, 61 N. W. 628; People *v.* Valliere, 123 Cal. 576, 56 Pac. 433.

44. A Pistol from which shots were fired is a deadly weapon. Austin *v.* State (Tex. Crim.), 47 S. W. 371.

Whether a Gun or Pistol, When Used as a Club, is a deadly weapon, is a question for the jury. Shadle *v.* State, 34 Tex. 572. But see Bivens *v.* State, 11 Ark. 455.

A Knife With a Blade Two-and-a-Half Inches Long is a deadly weapon. Ross *v.* Com., 21 Ky. L. Rep. 1344, 55 S. W. 4.

A Pocket-Knife capable of making a wound two-and-a-quarter inches deep is a deadly weapon. Webb *v.* State, 100 Ala. 47, 14 So. 865.

A Long-bladed Knife is a deadly weapon. Connell *v.* State (Tex. Crim.), 81 S. W. 746.

An Ordinary Penknife, when so used as to cause death, is a deadly weapon, the use of which raises a presumption of malice. State *v.* Roan, 122 Iowa 136, 97 N. W. 997.

(C.) Deadly Character Must Be Shown. — The deadly character of the weapon must appear before any presumption arises from its use.[45] The mere fact that death resulted from the instrument used by the defendant does not necessarily show that it was a deadly instrument.[46] But it has been held that a fatal result throws the burden upon the defendant of showing that the weapon was not a deadly one.[47] Direct evidence as to the nature of the instrument used is not necessary in order to show its deadly character, which may sufficiently appear from the nature of the wound inflicted.[48]

The Weapon Itself may be produced as the best evidence of its character.[49] A gun or pistol which is discharged or attempted to be discharged at the assaulted person is presumed to have been loaded[50] with a deadly charge.[51]

A Sickle a foot long is a deadly weapon. Riojos *v.* State (Tex. Crim.), 55 S. W. 172.

An Iron Pipe, half an inch in diameter and thirty inches long, is not a deadly weapon as a matter of law. Danforth *v.* State, 44 Tex. Crim. 105, 69 S. W. 159.

A Piece of Gas-Pipe with which a very serious injury was inflicted was held sufficiently shown to be a deadly weapon. State *v.* Drumm, 156 Mo. 216, 56 S. W. 1086.

A Stone about the size of a man's fist is not necessarily a deadly weapon, the use of which would raise the presumption of an intention to kill. Nicholls *v.* State, 24 Tex. App. 137, 5 S. W. 661.

A Piece of Stovewood twenty inches long and four inches thick, and weighing five or six pounds, held to be a deadly weapon. Henry *v.* State (Tex. Crim.), 49 S. W. 96.

A Club four feet long, weighing eight to ten pounds, is a deadly weapon, and where the blow fractured the deceased's skull it was held unnecessary to submit the question to the jury. Logan *v.* State (Tex. Crim.), 53 S. W. 694.

Whether a stick three feet long, three inches wide and one inch thick is a deadly weapon is a question for the jury. State *v.* Brown, 67 Iowa 289, 25 N. W. 248.

A Hoe, both in popular and legal significance, is *per se* a deadly weapon — fully as much so as a loaded pistol or an ax. Hamilton *v.* People, 113 Ill. 34.

Whether a Billiard-Cue is a deadly weapon is a question for the jury. State *v.* Smith, 164 Mo. 567, 65 S. W. 270.

A Beer-Glass may be a deadly weapon. Griffin *v.* State (Tex. Crim.), 53 S. W. 848.

45. Williams *v.* State, 83 Ala. 16, 3 So. 616.

46. Kelly *v.* State, 68 Miss. 343, 8 So. 745.

47. State *v.* Craton, 28 N. C. 164.

48. State *v.* Bowles, 146 Mo. 6, 47 S. W. 892, 69 Am. St. Rep. 598; Thomas *v.* State, 44 Tex. Crim. 344, 72 S. W. 178; Walters *v.* State, 37 Tex. Crim. 388, 35 S. W. 652.

49. Paschal *v.* State, 68 Ga. 818. See *infra* this article "Real and Demonstrative Evidence."

50. Proof of the presentation and snapping of a pistol at the person assaulted throws the burden upon the defendant to show that the pistol was unloaded. Bedford *v.* State, 44 Tex. Crim. 97, 69 S. W. 158; Mullen *v.* State, 45 Ala. 43, 6 Am. Rep. 691.

51. State *v.* Munco, 12 La. Ann. 625. See also Porter *v.* State, 57 Miss. 300.

But in Fastbinder *v.* State, 42 Ohio St. 341, it was held that on a charge of shooting with intent to kill the burden is on the state to show that the weapon discharged was loaded with a bullet or other substance calculated to produce death when discharged.

(D.) Opinion. — The deadly character of the instrument used may be proved by the opinion of any competent witness.[52]

(4.) Rebuttal of Presumption. — The presumption of malice arising from the use of a deadly weapon is not conclusive,[53] except by statute.[54] It may be sufficiently rebutted by the evidence of either the defense or the prosecution.[55]

The Burden is on the defendant to overcome the presumption arising from the use of a deadly weapon,[56] unless it is rebutted by the evidence of the prosecution.[57]

c. *When Weapon Is Not Deadly.* — It has been held that where the weapon used, or the means employed, are such as would not ordinarily result in death, the presumption is that there was no malicious intent.[58]

H. Presumptions As to Antecedent Malice and Recent Provocation. — a. *Generally.* — It is held that where the evidence satisfactorily shows the previous existence of malice on the part of the defendant, its continuance down to the perpetration of the homicide will be presumed in the absence of evidence that such malicious purpose has been abandoned;[59] and that although a fresh provoca-

52. Perry *v.* State, 110 Ga. 234, 36 S. E. 781; People *v.* Valliere, 123 Cal. 576, 56 Pac. 433.

53. State *v.* Newton, 4 Nev. 410; Leake *v.* State, 29 Tenn. 144; Hampton *v.* State, 45 Ala. 82; State *v.* Townsend, 66 Iowa 741, 24 N. W. 535.

There is a Conclusive Presumption of malice where the killing is done by voluntarily firing a loaded pistol without excuse or justifying circumstances, even though the intention was not to kill Stovall *v.* State, 106 Ga. 443, 32 S. E. 586.

Weapon Not Previously Prepared. Where the defendant during a conflict hastily picked up a fence-rail, with which he dealt the fatal blow, the fact that he had not provided the same or any other deadly weapon beforehand was held to be a strong circumstance to rebut the implication of malice arising from the use of such a weapon. Crawford *v.* State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242. See also Ray *v.* State, 15 Ga. 223.

54. State *v.* Carver, 22 Or. 602, 30 Pac. 315. *Citing* State *v.* Lane, 64 Mo. 319.

Conclusive Only in Absence of Rebutting Circumstances. — A statutory provision raising a conclusive presumption of an intention to murder from the deliberate use of a deadly weapon, causing death, is only applicable where the circumstances of the killing do not appear. "It was only intended to apply where the mere fact of killing with a deadly weapon deliberately used is shown, without else to modify or otherwise explain the act. Wherever, therefore, there is evidence of a tendency to rebut the presumption, whether it comes from the prosecution or defense, it becomes a matter for the jury to consider whether it has been overcome." State *v.* Gibson, 43 Or. 184, 73 Pac. 333.

55. Perry *v.* State, 102 Ga. 365, 30 S. E. 903.

56. Hogan *v.* State, 61 Ga. 43; State *v.* Gillick, 7 Iowa 287; State *v.* Alexander, 66 Mo. 148; State *v.* Willis, 63 N. C. 26; State *v.* Jimmerson, 118 N. C. 1173, 24 S. E. 494. *Contra.* — Kent *v.* People, 8 Colo. 563, 9 Pac. 852. But see more fully *infra* this article the section, "Burden of Proof."

57. Gladden *v.* State, 13 Fla. 623; Dixon *v.* State, 13 Fla. 636.

58. Wellar *v.* People, 30 Mich. 16. See also Hill *v.* State, 11 Tex. App. 456; Nichols *v.* State, 24 Tex. App. 137, 5 S. W. 661.

59. Potsdamer *v.* State, 17 Fla. 895. "When an antecedent grudge

tion intervenes, the presumption is that the defendant was actuated by the antecedent malice and not by the fresh provocation.[60] The general rule, however, is that in such cases there is no presumption that the killing was upon the antecedent malice,[61] but it is a question for the jury to determine.[62]

b. *After a Reconciliation* between the parties, the homicide is presumed to be the result of any new provocation which has been shown and not of antecedent malice.[63]

4. Premeditation and Deliberation. — Under the statutes dividing murder into two degrees, premeditation and deliberation, sometimes spoken of as express malice, constitutes the distinguishing characteristic of the higher degree and is never presumed. Whenever murder is proved or presumed from the act or weapon used, it is presumptively only murder in the second degree, and the burden is upon the prosecution to show that it is murder in the first degree.[64]

has been proved and there is no satisfactory evidence to show that the wicked purpose has been abandoned, it must be clearly shown to the jury that the provocation was a grievous one in order to warrant them in finding that the blow was struck on the recent provocation and not on the old grudge." Holland *v.* State, 12 Fla. 117.

When the relation of friendship has been broken the interruption is presumed to continue. Brown *v.* State, 51 Ga. 502.

60. Where defendant's previous intention to kill or do great bodily harm to the deceased has been shown, the presumption is that he acted upon this intention and not upon a fresh provocation. State *v.* Tilly, 25 N. C. 424; State *v.* Johnson, 23 N. C. 354.

Where the defendant has prepared a deadly weapon with the intention of killing the deceased, his act will be attributed to this preconceived malice rather than to subsequent provocation. State *v.* Hogue, 51 N. C. 381. But such previous malice must have consisted in a specific intention to kill and not a mere grudge, or malice in its general sense. State *v.* Johnson, 47 N. C. 247. And see State *v.* Hildreth, 31 N. C. 429.

61. McCoy *v.* State, 25 Tex. 33, 78 Am. Dec. 520; Stapp *v.* State, 1 Tex. App. 734; Murray *v.* State, 1 Tex. App. 417; Drake *v.* State, 29 Tex. App. 265, 15 S. W. 725; Douglas *v.* State, 8 Tex. App. 520; Cannon *v.* State, 57 Miss. 147.

There is no presumption of the continuance of the deceased's expressed intention to kill the defendant. State *v.* Brown, 64 Mo. 367.

"The law will not presume a killing to have been perpetrated upon ancient threats and grudges if there be anything more immediate upon which it can be predicated." Copeland *v.* State, 26 Tenn. 479.

62. Read *v.* Com., 22 Gratt. (Va.) 924; Murray *v.* Com., 79 Pa. St. 311.

63. State *v.* Horn, 116 N. C. 1037, 21 S. E. 694; People *v.* Hyndman, 99 Cal. 1, 33 Pac. 782; State *v.* Barnwell, 80 N. C. 470. See also State *v.* Hammond, 5 Strob. L. (S. C.) 91.

64. *Alabama.* — Brown *v.* State, 109 Ala. 70, 20 So. 103.

Arkansas. — Simpson *v.* State, 56 Ark. 8, 19 S. W. 99.

California. — People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; People *v.* Gibson, 17 Cal. 283.

Connecticut. — State *v.* Johnson, 40 Conn. 136.

Delaware. — State *v.* Jefferson, 3 Har. 571.

Florida. — Cook *v.* State, 35 So. 665.

Iowa. — State *v.* McCormick, 27 Iowa 402; State *v.* Phillips, 118 Iowa 660, 92 N. W. 876.

Missouri. — State *v.* Kilgore, 70 Mo. 546; State *v.* Lane, 64 Mo. 319; State *v.* Evans, 124 Mo. 397, 28 S. W. 8; State *v.* McMullin, 170 Mo. 608, 71 S. W. 221; State *v.* Silk, 145

Under some statutes, however, an intentional homicide with a deadly weapon is presumptively murder in the first degree.[65]

II. BURDEN OF PROOF.

1. Generally. — The burden of proof is upon the state to prove all the essential elements of the crime.[66] Whether the burden of

Mo. 240, 44 S. W. 764; State *v.* Holme, 54 Mo. 153; State *v.* Jones, 78 Mo. 278; State *v.* Evans, 65 Mo. 574.

Nebraska. — Beers *v.* State, 24 Neb. 614, 39 N. W. 790; Schlencker *v.* State, 9 Neb. 241, 1 N. W. 857; Milton *v.* State, 6 Neb. 136.

New Jersey. — Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

North Carolina. — State *v.* Rhyne, 124 N. C. 847, 33 S. E. 128; State *v.* Lipscomb, 134 N. C. 689, 47 S. E. 44; State *v.* Covington, 117 N. C. 834, 23 S. E. 337; State *v.* Cole, 132 N. C. 1069, 44 S. E. 391; State *v.* Bishop, 131 N. C. 733, 42 N. E. 836; State *v.* McCourry, 128 N. C. 594, 38 S. E. 883; State *v.* Utley, 132 N. C. 1022, 43 S. E. 820; State *v.* Thomas, 118 N. C. 1113, 24 S. E. 431; State *v.* Fuller, 114 N. C. 885, 20 S. E. 797.

Oregon. — State *v.* Carver, 22 Or. 602, 30 Pac. 315.

Pennsylvania. — Com. *v.* Mika, 171 Pa. St. 273, 33 Atl. 65; McCue *v.* Com., 78 Pa. St. 185; O'Mara *v.* Com., 75 Pa. St. 424.

Tennessee. — Witt *v.* State, 46 Tenn. 5; Dains *v.* State, 21 Tenn. 439.

Texas. — Ake *v.* State, 30 Tex. 466; Summers *v.* State, 5 Tex. App. 365.

Virginia. — Myers *v.* Com., 90 Va. 705, 19 S. E. 881; McDaniel *v.* Com., 77 Va. 281; Watson *v.* Com., 85 Va. 867, 9 S. E. 418; Reed *v.* Com., 98 Va. 817, 36 S. E. 399; Willis *v.* Com., 32 Gratt. 929; Hill *v.* Com., 2 Gratt. 594.

West Virginia. — State *v.* Douglass, 28 W. Va. 297; State *v.* Cain, 20 W. Va. 297; State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380; State *v.* Hertzog, 46 S. E. 792; State *v.* Morrison, 49 W. Va. 210, 38 S. E. 481.

Express Malice is never inferred or implied from the act alone, or the means used, but must be affirmatively established like any other fact in the case. Richarte *v.* State, 5 Tex. App. 359; Murray *v.* State, 1 Tex. App. 417; Moore *v.* State, 15 Tex. App. 1; Hamby *v.* State, 36 Tex. 523; Farrer *v.* State, 42 Tex. 265.

Upon a Plea of Guilty to a charge of murder the presumption is that the crime is murder in the second degree, and the burden is upon the state to prove a higher degree. Com. *v.* Cook, 166 Pa. St. 193, 31 Atl. 56.

65. "Under our statute every intentional taking of human life not excusable or justifiable is murder in the first degree. . . . When it is made to appear in the prosecution of a case like this that the accused fired the shot, the weapon being aimed at a vital part of the body, and that death ensued as a natural and probable result, the presumption of fact as to intention to take human life in the absence of any explanatory circumstance or evidence, makes a *prima facie* case for the prosecution. The state is not bound to go further and negative any probability that the occurrence was the result of accident, or that there were circumstances reducing the homicide below that of murder in the first degree, or excusing or justifying it altogether. The accused at that point must take up the burden of rebutting the *prima facie* showing made against him. He must show by evidence at least sufficiently convincing to raise a reasonable doubt as to the intention to take human life or as to whether such taking was justifiable or excusable." Cupps *v.* State (Wis.), 97 N. W. 210, *distinguishing* cases decided under dissimilar statutes. See also State *v.* Brown, 41 Minn. 319, 43 N. W. 69; State *v.* Lautenschlager, 22 Minn. 514; Bivens *v.* State, 11 Ark. 455.

66. Wharton *v.* State, 73 Ala. 366; Green *v.* State, 97 Ala. 59, 12 So. 416; Maher *v.* People, 10 Mich. 212,

proof continues to be upon the state throughout the trial or shifts to the defendant under certain circumstances, and if it does shift, when and to what extent, are questions upon which there is considerable confusion owing to the disagreement as to the circumstances under which certain presumptions arise and as to the force of such presumptions in shifting the burden of proof, and also because of the different views as to the nature of certain defenses. It is sometimes said that the burden of proof rests upon the state throughout the trial, and never shifts to the defendant,[67] which has been explained as being strictly applicable only to the ultimate issue of guilty or not guilty.[68]

The True Rule, however, seems to be that the burden of proof upon the whole case, considering all the circumstances and the evidence of both parties, rests upon the prosecution throughout the trial.[69]

81 Am. Dec. 781; Kent *v.* People, 8 Colo. 563, 9 Pac. 852; Farris *v.* Com., 14 Bush (Ky.) 362; State *v.* Earnest, 56 Kan. 31, 42 Pac. 359.

67. Slade *v.* State, 29 Tex. App. 381, 16 S. W. 253; Ford *v.* State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117; State *v.* Hudspeth, 159 Mo. 178, 51 S. W. 483. See Territory *v.* Rowand, 8 Mont. 110, 19 Pac. 595. See Article "BURDEN OF PROOF" for a fuller discussion of the different uses of the term.

68. "It would be too broad an assertion to say that in criminal trials the burden of proof never, under any state of case, is shifted from the state to the defendant; but in so far as the question of guilt of one who stands before the court on a plea of not guilty is concerned it may be truly said that the burden of proof never shifts, but rests upon the state throughout to fasten guilt upon the accused by evidence sufficient to satisfy the minds of the jury beyond a reasonabl doubt that he is guilty." Shafer *v.* State, 7 Tex. App. 239.

69. Peyton *v.* State, 54 Neb. 188, 74 N. W. 597; People *v.* Arnold, 15 Cal. 476; State *v.* Pierce, 8 Nev. 291; State *v.* Hutto, 66 S. C. 449, 45 S. E. 13. See also Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811; Hawthorne *v.* State, 58 Miss. 778; and also *infra* this article "Degree of Proof."

"The jury should never be told that malice or any other element of crime is presumed from any one fact or partial group of facts in the case, nor should they be told that a presumption arising from one act stands until rebutted by evidence. A criminal case is not to be severed into parts by the court so that the prosecution having established by evidence certain facts is relieved from the burden of showing other essential elements of criminality. The true rule . . . is that the burden of proving the guilt of the defendant and every element of crime rests on the state throughout every stage of the trial, and that all evidence introduced on both sides is to be considered by the jury in arriving at a verdict." State *v.* Earnest, 56 Kan. 31, 42 Pac. 359.

In Gravely *v.* State, 38 Neb. 871, 57 N. W. 751, an instruction that after the state has established the intentional killing the burden is upon the defendant to prove self-defense by a preponderance of the evidence, was held error. "It is true that there are many cases which sustain the rule as given by the trial court, but the decided weight of recent authority, including commentaries as well as decisions, is to the contrary. The rule seems to be that in criminal prosecutions the burden of proof never shifts, but rests upon the state throughout; and, before a conviction can be had, the jury must be satisfied upon all the evidence beyond a reasonable doubt of the affirmative of the issue presented, viz., that the prisoner is guilty in manner and form as charged. This rule applies not alone to the case as

2. Grade and Degree of Crime. — Since a criminal homicide is presumptively murder,[70] the burden of reducing the grade of the offense to manslaughter rests upon the defendant.[71] But on the other hand since the offense is presumed to be of the lower degree,[72] the state has the burden of proving that the offense was of the higher degree.[73]

3. Cause of Death. — The burden is on the state to show that the defendant's act caused or contributed to the death of the deceased.[74] When, however, the state has shown the existence, through the act of the accused, of a sufficient cause of death, the death is presumed to have resulted from the injury or wound inflicted, unless the accused can rebut the presumption by showing that it was reasonably attributable to another cause.[75]

4. Defenses. — A. GENERALLY. — By the weight of authority when the killing by the accused has been admitted or proved, the burden is upon the defendant to show any matters in mitigation,[76]

made by the state, but to any distinct, substantive defense which may be interposed in order to justify or excuse the act charged." To the same effect see Peyton *v.* State, 54 Neb. 188, 74 N. W. 597.

70. See fully, *supra*, "Presumptions from Killing," and also *infra*, "Burden of Proof — Defenses — Generally."

Manslaughter Never Presumed. "The law presumes murder in certain cases, but it never presumes manslaughter, when the indictment is for murder, for the reason that manslaughter is a defense against a charge for murder, and can only be established by testimony. The law presumes that every man intends that which is the natural result of his acts, and if he kill another, that he so intended. It never presumes that a man kills another in the heat of passion, or under the influence of great provocation." Hague *v.* State, 34 Miss. 616.

71. State *v.* Cox, 110 N. C. 503, 14 S. E. 688; Longley *v.* Com., 99 Va. 807, 37 S. E. 339; State *v.* Hertzog (W. Va.), 46 S. E. 792; Myers *v.* Com., 90 Va. 705, 19 S. E. 881; Lewis *v.* State, 90 Ga. 95, 15 S. E. 697.

72. State *v.* Meyer, 58 Vt. 457, 3 Atl. 195. See fully, "Presumptions — Premeditation and Deliberation," *supra*, this article.

73. Longley *v.* Com., 99 Va. 807, 37 S. E. 339; State *v.* Hertzog (W. Va.), 46 S. E. 792.

74. Cole *v.* State, 59 Ark. 50, 26 S. W. 377.

75. State *v.* Briscoe, 30 La. Ann. 433; State *v.* Scott, 12 La. Ann. 274; Powell *v.* State, 13 Tex. App. 244; United States *v.* Wiltberger, 3 Wash. C. C. 515, 28 Fed. Cas. No. 16,738. See McBeth *v.* State, 50 Miss. 81.

In United States *v.* Knowles, 4 Sawy. 517, 26 Fed. Cas. No. 15,540, where the defendant, the captain of a vessel, was charged with manslaughter in failing to attempt the rescue of a seaman who had fallen overboard, it was held that the burden of proof rested upon him to show that the deceased was killed by the fall and not by defendant's negligence, or to create a reasonable doubt as to the cause of his death. But see United States *v.* Hewson, 26 Fed. Cas. No. 15,360.

Maltreatment of Wound. — Where an apparently necessary surgical operation has been resorted to for the purpose of saving the deceased from the probably fatal effect of a wound inflicted by the defendant, the burden is upon him to show clearly that maltreatment of the wound was the sole cause of death. Territory *v.* Yee Dan, 7 N. M. 439, 37 Pac. 1101.

76. *England.* — Rex *v.* Greenacre, 8 Car. & P. 35, 34 E. C. L. 280;

excuse, or justification, unless they appear from the circumstances of the homicide or the evidence of the prosecution.[77]

B. Independent or Affirmative Defenses Distinguished. A distinction is sometimes drawn both as to the burden and degree of proof between independent or affirmative defenses and those which arise out of the circumstances of the act and form part of the *res gestae*, the burden resting upon the defendant to prove the former but not the latter.[78]

Reg. *v.* Kirkham, 8 Car. & P. 115, 34 E. C. L. 318; Reg. *v.* Fisher, 8 Car. & P. 182, 34 E. C. L. 345.

United States. — United States *v.* Travers, 2 Wheel. Crim. 490, 28 Fed. Cas. No. 16,537; United States *v.* Bevans, 24 Fed. Cas. No. 14,589.

Arkansas. — Palmore *v.* State, 29 Ark. 248.

California. — People *v.* Neary, 104 Cal. 373, 37 Pac. 943; People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; People *v.* Stonecifer, 6 Cal. 405; People *v.* Milner, 122 Cal. 171, 54 Pac. 833.

Delaware. — State *v.* Frazier, 1 Houst. Crim. 176.

Florida. — Holland *v.* State, 12 Fla. 117.

Georgia. — Bell *v.* State, 69 Ga. 752.

Iowa. — State *v.* Gillick, 7 Iowa 287.

Montana. — Territory *v.* Rowand, 8 Mont. 110, 19 Pac. 595; Territory *v.* Manton, 8 Mont. 95, 19 Pac. 387; Territory *v.* McAndrews, 3 Mont. 158.

New Jersey. — Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

New York. — People *v.* Schryer, 42 N. Y. 1.

North Carolina. — State *v.* Willis, 63 N. C. 26; State *v.* Byrd, 121 N. C. 684, 28 S. E. 353; State *v.* Brittain, 89 N. C. 481; State *v.* Mazon, 90 N. C. 676; State *v.* Thomas, 68 N. C. 599, 4 S. E. 518, 2 Am. St. Rep. 351; State *v.* Jones, 98 N. C. 651, 3 S. E. 507; State *v.* Cole, 132 N. C. 1069, 44 S. E. 391; State *v.* Rollins, 113 N. C. 722, 18 S. E. 394.

Ohio. — Davis *v.* State, 25 Ohio St. 369.

Oregon. — State *v.* Bertrand, 3 Or. 61; State *v.* Conally, 3 Or. 69.

Rhode Island. — State *v.* Ballou, 20 R. I. 607, 40 Atl. 861.

South Dakota. — State *v.* Yokum, 11 S. D. 544, 79 N. W. 835.

Tennessee. — Mitchell *v.* State, 13 Tenn. 340.

Utah. — People *v.* Callaghan, 4 Utah 49, 6 Pac. 49; People *v.* Tidwell, 5 Utah 88, 12 Pac. 61.

Wyoming. — Cook *v.* Territory, 3 Wyo. 110, 4 Pac. 887.

"The implication of malice arises in every instance of homicide, and in every charge of murder, the fact of killing being first proved, the law will imply that it was done with malice, and all the circumstances of accident, necessity or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him." Holland *v.* State, 12 Fla. 117.

The defendant must satisfy the jury of the existence of such facts as will in law rebut the presumption of malice arising from the use of a deadly weapon. State *v.* Lipscomb, 134 N. C. 689, 47 S. E. 44.

77. People *v.* Lemperle, 94 Cal. 45, 29 Pac. 709; People *v.* West, 49 Cal. 610; Dixon *v.* State, 13 Fla. 636; Reid *v.* State, 50 Ga. 556; Alexander *v.* People, 96 Ill. 96; Tanks *v.* State, 71 Ark. 459, 75 S. W. 851.

Production of Evidence by Defendant Unnecessary. — Justification may appear from the prosecution's evidence, as well as from that of the defendant, hence it is error to instruct that the burden is upon the defendant *to produce evidence* of justification. Crawford *v.* State, 12 Ga. 142; Richardson *v.* State, 9 Tex. App. 612.

Hawthorne *v.* State, 58 Miss. 778; partially overruling Head *v.* State, 44 Miss. 731; Evans *v.* State, 44 Miss. 762.

78. People *v.* Lee Sare Bo, 72 Cal. 623, 14 Pac. 310; Farris *v.* Com., 14 Bush (Ky.) 362; Dent *v.* State (Tex. Crim.), 79 S. W. 525, *distinguishing* in this respect a dazed

C. Self-Defense. — In some jurisdictions self-defense is regarded as an affirmative defense,[79] and the burden of proof is upon

condition of mind caused during the fatal struggle, from the independent defense of insanity. Dubose *v.* State, 10 Tex. App. 230. See Kent *v.* People, 8 Colo. 563, 9 Pac. 852; Territory *v.* Rowand, 8 Mont. 110, 19 Pac. 595.

For the Application of This Rule see the following discussion of particular defenses.

Rule Stated. — A charge that "when the facts have been proved which constitute the offense it devolves upon the accused to establish the facts and circumstances on which he relies to excuse or justify the prohibited act," being a copy of a provision of the penal code, was held properly given in Jones *v.* State, 13 Tex. App. 1, containing a very full discussion of the previous cases in this state, approving some and disapproving of others, and stating the rules relating to the presumption of innocence, and the burden of proof, as follows: "Every person accused of crime is presumed to be innocent until his guilt is established by legal evidence to that extent which excludes any reasonable doubt of his guilt. This legal presumption of innocence continues in favor of the prisoner throughout the whole case. The burden of proof to meet and overthrow this presumption of innocence by establishing by legal evidence the guilt of the accused, beyond a reasonable doubt, rests upon the state. This burden of proof never shifts from the state upon the defendant in the sense in which it is understood to shift upon a party in a civil suit. When the defendant pleads 'not guilty,' and does not rely upon any matter as a defense which is separate and distinct from, and independent of, the facts constituting the offense, the burden of proof does no rest upon him to prove anything. . . . Thus, if the defendant is accused of murder, or of an assault, and pleads not guilty to the charge, the burden of proof is not upon him to prove self-defense, or accident, or want of evil intent, or any other defensive fact which is immediately connected with and constitutes a part of the transaction, and which is not peculiarly within the knowledge of the defendant. This is so because the burden of proof is upon the state to prove that the homicide, or the alleged assault, was unlawful, intentional, and committed with the necessary criminal intent; and until this proof is made to the exclusion of a reasonable doubt the defendant is shielded by the presumption of innocence, and is not required to prove anything. But suppose in such case his guilt is established in all essential particulars beyond any reasonable doubt, does the burden of proof then fall upon him to show justification or excuse for the act? How can he justify or excuse a murder? Murder is neither justifiable nor excusable. He can introduce evidence in rebuttal of the state's case, and break down and destroy the case made against him by the state, and thus acquit himself of the charge; but in doing this he is not justifying or excusing the act, but is combating the issue of guilt made against him by the state. But, when the defendant relies upon any substantive, distinct, separate and independent matter as a defense, which is outside of, and does not necessarily constitute a part of the act or transaction with which he is charged, such as the defense of insanity, nonage, license from proper authority to do the act, relationship, or the like, then it devolves upon him to establish such special and foreign matter by a preponderance of evidence. And, when the defendant relies upon a defensive fact which is peculiarly within his knowledge, the burden rests upon him to prove it. . . . Thus, where a defendant claims that he acted under necessity, viz., under command of a superior officer during war, or under compulsion of any kind, the burden is upon him to prove it. So in case the defendant relies upon a license to do the act, and when the license is particularly within his knowledge, the burden is upon him to prove it."

79. State *v.* McDaniel (S. C.), 47 S. E. 384; United States *v.* Crow Dog, 3 Dak. 106, 14 N. W. 437.

the defendant.[80] In others it is incumbent on the prosecution to negative this defense,[81] or at least the burden of proof does not rest upon the defendant.[82]

Elements of Self-Defense. — Where the burden of proving self-defense is held to be on the defendant, he must show that he had a reasonable apprehension of imminent danger to his life,[83] and when retreat is necessary, that there appeared to be no other reasonable means of escape or avoiding the danger except the killing of the deceased.[84] But after such a showing the burden is on the prosecu-

80. *Alabama.* — Lewis v. State, 88 Ala. 11, 6 So. 755; Kilgore v. State, 124 Ala. 24, 27 So. 4; Stewart v. State, 133 Ala. 105, 31 So. 944; Garrett v. State, 97 Ala. 18, 14 So. 327; Roden v. State, 97 Ala. 54, 12 So. 419; De Arman v. State, 71 Ala. 351; Smith v. State, 86 Ala. 28, 5 So. 478.

Dakota. — United States v. Crow Dog, 3 Dak. 106, 14 N. W. 437.

New York. — People v. Kennedy, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557.

South Carolina. — State v. Hutto, 66 S. C. 449, 45 S. E. 13.

West Virginia. — State v. Prater, 52 W. Va. 132, 43 S. E. 230.

See also the cases cited under "Defenses — Generally."

81. State v. Cross, 68 Iowa 180, 26 N. W. 62; State v. Donahoe, 78 Iowa 486, 43 N. W. 297; State v. Porter, 34 Iowa 131; Gravely v. State, 38 Neb. 871, 57 N. W. 751; People v. Coughlin, 67 Mich. 466, 35 N. W. 72; *s. c.*, 65 Mich. 704, 32 N. W. 905.

Self-defense being a defense which grows out of the transaction itself, and being part of the *res gestae*, need not be established by the defendant. State v. Tweedy, 5 Iowa 433.

Although the Defendant Was the Aggressor in the first instance the burden is not upon him to show that he desisted from the conflict and did not act in self-defense. State v. Dillon, 74 Iowa 653, 38 N. W. 525, *distinguishing* self-defense from insanity and other defenses as regards burden of proof.

82. Slade v. State, 29 Tex. App. 381, 16 S. W. 253.

83. Martin v. State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844; Pugh v. State, 132 Ala. 1, 31 So. 727.

84. Pugh v. State, 132 Ala. 1, 31 So. 727; Gibson v. State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96; Holmes v. State, 100 Ala. 80, 14 So. 864; Stitt v. State, 91 Ala. 10, 8 So. 669, 24 Am. St. Rep. 853; Compton v. State, 110 Ala. 24, 20 So. 119; State v. Hutto, 66 S. C. 449, 45 S. E. 13.

"Generally in order to sustain the plea of self-defense, it is incumbent upon the defendant to show, first, that at the time there was a necessity to take life, or that the circumstances were such as to create in the mind of the defendant a reasonable belief that it was necessary in order to save life or to prevent great bodily harm; second, that there was no reasonable mode of retreat or escape; and, third, it must not appear that the defendant provoked, or was at fault in bringing on, the difficulty. The burden always rests upon the defendant to maintain the first of these propositions. The burden rests upon the defendant to make good the second proposition, except in cases where it affirmatively appears from the evidence that there was no duty upon the defendant to retreat; as where it is shown that the party assaulted was in his own house, or within the curtilage or space usually occupied and used for the purpose of the house, or in some cases of felonious assault. . . . The burden, however, does not rest upon the defendant to show affirmatively that he was free from fault in provoking or bringing on the difficulty. When the ingredients of self-defense have been established, the burden is on the state to show that the defendant was not free from fault." Naugher v. State, 105 Ala. 26, 17 So. 24.

tion to prove that the defendant was at fault in the first instance in bringing on the difficulty,[85] or that he was the aggressor.[86]

D. MENTAL WEAKNESS. — a. *Insanity.* — In many jurisdictions the burden of proof is upon defendant when he urges his insanity as a defense.[87] In some states, however, as well as in the federal courts, it is held that the burden of proving the commission of the crime by a mentally competent person is on the prosecution, but that the presumption of sanity is sufficient to sustain this burden until a reasonable doubt of the defendant's sanity is created by the circumstances and the evidence, whether introduced by the defendant or the prosecution.[88]

b. *Temporary Unconsciousness or Weakness.* — It has been held, however, that where a temporary unconsciousness on the part of

85. Lewis *v.* State, 88 Ala. 11, 25 So. 43; Linehan *v.* State, 113 Ala. 70, 21 So. 497; McDaniel *v.* State, 76 Ala. 1; Cleveland *v.* State, 86 Ala. 1, 5 So. 426; Holmes *v.* State, 100 Ala. 80, 14 So. 864; McCormick *v.* State, 102 Ala. 156, 15 So. 438; Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96. *Contra.* — State *v.* Hutto, 66 S. C. 449, 45 S. E. 13.

86. State *v.* Workman, 39 S. C. 151, 17 N. E. 694.

87. *Alabama.* — Martin *v.* State, 119 Ala. 1, 25 So. 255; Ford *v.* State, 71 Ala. 385.

Arkansas. — Bolling *v.* State, 54 Ark. 588, 16 S. W. 658; Casat *v.* State, 40 Ark. 511; Cavaness *v.* State, 43 Ark. 331.

California. — People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093.

Connecticut. — State *v.* Hoyt, 47 Conn. 518.

Idaho. — State *v.* Larkins, 5 Idaho 200, 47 Pac. 945.

Iowa. — State *v.* Thiele, 119 Iowa 659, 94 N. W. 256; State *v.* Trout, 74 Iowa 545, 38 N. W. 405, 7 Am. St. Rep. 499; State *v.* Jones, 64 Iowa 349, 17 N. W. 911.

Kentucky. — Cotrell *v.* Com., 13 Ky. L. Rep. 305, 17 S. W. 149; Kriel *v.* Com., 68 Ky. 362.

Maine. — State *v.* Lawrence, 57 Me. 574.

Nevada. — State *v.* Lewis, 20 Nev. 333, 22 Pac. 241.

New Jersey. — Graves *v.* State, 45 N. J. L. 203.

Ohio. — Bergen *v.* State, 31 Ohio St. 111; Bond *v.* State, 23 Ohio St. 349; Loeffner *v.* State, 10 Ohio St. 598.

Pennsylvania. — Com. *v.* Heidler, 191 Pa. St. 375, 43 Atl. 211; Coyle *v.* Com., 100 Pa. St. 573.

South Carolina. — State *v.* Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879.

Texas. — Webb *v.* State, 9 Tex. App. 490; King *v.* State, 9 Tex. App. 515; White *v.* State, 32 Tex. Crim. 625, 25 S. W. 784; Carlisle *v.* State (Tex. Crim.), 56 S. W. 365.

Washington. — State *v.* Clark, 34 Wash. 485, 76 Pac. 98, 101 Am. St. Rep. 1006.

See more fully the article "INSANITY."

88. *United States.* — Davis *v.* United States, 160 U. S. 469.

Florida. — Hodge *v.* State, 26 Fla. 11, 7 So. 593.

Illinois. — Montag *v.* People, 141 Ill. 75, 30 N. E. 337; Dacey *v.* People, 116 Ill. 555, 6 N. E. 165; Chase *v.* People, 40 Ill. 352.

Indiana. — Plummer *v.* State, 135 Ind. 308, 34 N. E. 968; McDougal *v.* State, 88 Ind. 24; Polk *v.* State, 19 Ind. 170, 81 Am. Dec. 382.

Kansas. — State *v.* Crawford, 11 Kan. 32.

Michigan. — People *v.* Garbutt, 17 Mich. 9.

Mississippi. — Ford *v.* State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117; Caffey *v.* State, 24 So. 315; Cunningham *v.* State, 56 Miss. 269.

Nebraska. — Furst *v.* State, 31 Neb. 403, 47 N. W. 1116; Ballard *v.* State, 19 Neb. 609, 28 N. W. 271; Wright *v.* People, 4 Neb. 407.

the defendant, occurring during and forming an incident of the transaction itself, is urged as a defense, the burden of proof is not upon the defendant but on the prosecution.[89]

E. Accident. — The burden of proving that the killing was accidental rests upon the defendant in those jurisdictions in which he is required to show matters in excuse or justification.[90] Where, however, this defense is regarded as a part of the *res gestae* and a denial of the criminal intent, and not as an independent defense, the burden is upon the state to show that the killing was not an accident.[91]

F. Intoxication. — When intoxication is urged as a partial defense the burden of proving it rests upon the defendant.[92]

G. Discharge of Official Duty. — Where the defendant is an officer of the law and defends on the ground that the homicide is committed in the lawful discharge of his duty, there is no presumption from his official character that he acted in good faith and without malice, but the burden is upon him to show these matters of excuse or justification.[93]

H. Act, Otherwise Unlawful, Done to Save Deceased's Life. — Where death results from an act which is lawful only when necessary to save the deceased's life, the burden is on the defendant to show the necessity for the act.[94]

New Hampshire. — State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242; State *v.* Pike, 49 N. H. 399; State *v.* Bartlett, 43 N. H. 224.

New York. — People *v.* Egnor, 175 N. Y. 419, 67 N. E. 906; People *v.* McCann, 16 N. Y. 58, 69 Am. Dec. 642, per Brown, J.; People *v.* Tobin, 176 N. Y. 278, 68 N. E. 359. See O'Connell *v.* People, 87 N. Y. 377.

Tennessee. — Dove *v.* State, 50 Tenn. 348.

89. Where the defendant contended that owing to a blow from the deceased he was so dazed as to be unable to understand and appreciate the character of his own act, an instruction requiring him to establish his dazed and unconscious condition by a preponderance of the evidence was held error on the ground that such condition of mind was brought about or caused during the difficulty, and was part of the *res gestae*, and not an independent defense requiring proof by a preponderance of the evidence; distinguishing those cases in which insanity is set up as an independent defense. Dent *v.* State (Tex. Crim.), 79 S. W. 525. See also People *v.* Downs, 56 Hun 5, 8 N. Y. Supp. 521.

90. State *v.* Bonds, 2 Nev. 265; United States *v.* Schneider, 21 D. C. 381; Rex *v.* Morrison, 8 Car. & P. 22, 34 E. C. L. 277. See *supra*, "Burden of Proof — Defenses — Generally."

91. Richardson *v.* State, 32 Tex. Crim. 524, 24 S. W. 894; State *v.* Cross, 42 W. Va. 253, 24 S. E. 996.

Not an Affirmative Defense. — The plea of accidental killing is not an affirmative defense like that of self-defense, and does not place the burden of proof upon the defendant. In effect it denies the criminal intent and throws upon the state the burden of proving such intent beyond a reasonable doubt. State *v.* McDaniel (S. C.), 47 S. E. 384.

92. State *v.* Carrivau (Minn.), 100 N. W. 638; Fonville *v.* State, 91 Ala. 39, 8 So. 688; State *v.* Faino, 1 Marv. (Del.) 492, 41 Atl. 134.

93. State *v.* Rollins, 113 N. C. 722, 18 S. E. 394; People *v.* McCarthy, 110 N. Y. 309, 18 N. E. 128.

94. Under a statute making the commission of abortion resulting in

III. DEGREE OF PROOF.

1. Generally. — The prosecution must establish the defendant's guilt, including all the essential elements of the crime charged, beyond a reasonable doubt.[95] Whatever seeming conflict there may be as to the burden and degree of proof on particular issues and as to the force of certain presumptions, it seems to be the general rule, even in those jurisdictions requiring a preponderance of proof in support of certain defenses, that if from the whole evidence, whether offered by the defendant or the prosecution, there arises a reasonable doubt of the guilt of the accused, he must be acquitted.[96]

2. Defenses. — A. GENERALLY. — There is much apparent conflict and confusion, however, as to the degree of proof by which the defendant must sustain the burden of proof in those instances in which it is held to rest upon him. Three apparently conflicting general rules are laid down, respectively requiring proof to the satisfaction of the jury, by a preponderance of the evidence, and evidence sufficient to raise a reasonable doubt of guilt. And in case of insanity proof beyond a reasonable doubt is required in some jurisdictions.

B. MITIGATION, EXCUSE AND JUSTIFICATION. — Matters urged by the defendant in mitigation, excuse or justification must, according to one class of decisions, be established by a preponderance of the evidence.[97] Other authorities, even though speaking of the

death, manslaughter in the first degree, unless such abortion was necessary to preserve the life of the deceased, the burden of proof is upon the defendant when seeking to bring himself within the exception. People *v.* McGonegal, 62 Hun 622, 17 N. Y. Supp. 147.

95. Jones *v.* State, 13 Tex. App. 1; Com. *v.* Hawkins, 3 Gray (Mass.) 463; Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781. See *infra* this article, "Circumstantial Evidence — Weight and Sufficiency."

96. *Mississippi.* — King *v.* State, 74 Miss. 576, 21 So. 235.

New York. — People *v.* Riordan, 117 N. Y. 71, 22 N. E. 455; but see People *v.* Stone, 117 N. Y. 480, 23 N. E. 13; People *v.* Cassata, 6 App. Div. 386, 39 N. Y. Supp. 641; People *v.* Hill, 49 Hun 432, 3 N. Y. Supp. 564.

Texas. — White *v.* State, 23 Tex. App. 154, 3 S. W. 710; Wagner *v.* State, 35 Tex. Crim. 255, 33 S. W. 124.

Utah. — People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

While an Alibi Must Be Established by a Preponderance of the Evidence to constitute a defense, yet, "if the evidence upon that defense, considered alone, or in connection with other evidence, leaves a reasonable doubt in the minds of the jury, they cannot convict." State *v.* McGarry, 111 Iowa 709, 83 N. W. 718; *distinguishing* and *limiting* the case of State *v.* Maher, 74 Iowa 77, 37 N. W. 2, to the particular state of facts therein involved. To the same effect, People *v.* Lee Sare Bo, 72 Cal. 623, 14 Pac. 310; People *v.* Kessler, 13 Utah 69, 44 Pac. 97.

Self-defense must be established by the defendant to the reasonable satisfaction of the jury, but a failure to establish the defense does not authorize a conviction if from all the evidence there is a reasonable doubt of his guilt. State *v.* Jones, 78 Mo. 278.

97. People *v.* Tidwell, 5 Utah 88, 12 Pac. 61; Territory *v.* Edmonson, 4 Mont. 141, 1 Pac. 738; State *v.* Pierce, 8 Nev. 291; State *v.* Bertrand, 3 Or. 61; State *v.* Conally, 3

burden of proof as resting upon the defendant, hold that it is sufficient for him to introduce evidence which creates a reasonable doubt as to whether his act was excusable, justifiable, or of the grade or degree charged.[98] And some authorities require that such defenses be established to the "satisfaction of the jury,"[99] expressly distinguishing this rule from those hereinbefore enumerated. Except where the last-mentioned rule obtains, the cases are conflicting as to whether an instruction requiring a defense to be proved

Or. 69; State *v.* Ballou, 20 R. I. 607, 40 Atl. 861.

"If the prisoner claims a justification he must take upon himself the burden of satisfying the jury by a preponderance of evidence. He must produce the same degree of proof that would be required if the blow inflicted had not produced death, and he had been sued for assault and battery, and had set up a justification." People *v.* Schryver, 42 N. Y. 1.

Not Sufficient to Raise Reasonable Doubt. — Where the killing is admitted, the burden of establishing self-defense or of excusing or mitigating the crime is upon the defendant, and he must prove his defense by a preponderance of the evidence. It is not sufficient for him to raise a reasonable doubt. State *v.* Yokum, 11 S. D. 544, 79 N. W. 835 (*citing* and *following* People *v.* Schryver, 42 N. Y. 1; People *v.* Hong Ah Duck, 61 Cal. 387; People *v.* Stonecifer, 6 Cal. 405; United States *v.* Crow Dog, 3 Dak. 106, 14 N. W. 437.)

"Proof beyond reasonable doubt is necessary to establish a fact against the accused; but preponderating proof — proof sufficient to satisfy a jury of the fact — is sufficient to establish a fact in his favor. But it must go to this extent; otherwise there is nothing on which the jury can found their belief, and warrant them in considering the fact proved. It is not sufficient, therefore, to raise a doubt, even though it be a reasonable doubt, of the fact of extenuation; simply because it is no proof of the fact." Per Shaw, C. J., in Com. *v.* York, 9 Metc. (Mass.) 93, 43 Am. Dec. 373.

98. Morgan *v.* State, 16 Tex. App. 593, *overruling* Sharp *v.* State, 6 Tex. App. 650; People *v.* Marshall, 112 Cal. 422, 44 Pac. 718; People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; People *v.* Lanagan, 81 Cal. 142, 22 Pac. 482; People *v.* Bushton, 80 Cal. 160, 22 Pac. 549 (*overruling* People *v.* Hong Ah Duck, 61 Cal. 387; People *v.* Raten, 63 Cal. 421.)

Proof of the killing throws the burden upon the defendant of proving mitigation, excuse or justification, but he need raise only a reasonable doubt as to whether the act was justifiable or excusable, or the result of an accident. People *v.* Neary, 104 Cal. 373, 37 Pac. 943.

Killing With Deadly Weapon. Although the killing of the deceased by the defendant with a deadly weapon raises a presumption of malicious intent the burden is not upon the defendant to overcome the presumption by *satisfactory* evidence, but merely to raise a reasonable doubt. State *v.* Alexander, 66 Mo. 148; Bishop *v.* State, 62 Miss. 289; Ingram *v.* State, 62 Miss. 142; *Disapproving* Harris *v.* State, 47 Miss. 318; Lamar *v.* State, 63 Miss. 265; and *distinguishing* Guice *v.* State, 60 Miss. 714.

99. State *v.* Byers, 100 N. C. 512, 6 S. E. 420; State *v.* Byrd, 121 N. C. 684, 28 S. E. 353; State *v.* Smith, 77 N. C. 488; State *v.* Willis, 63 N. C. 26, *qualifying* the rule laid down in State *v.* Johnson, 48 N. C. 266, requiring proof beyond a reasonable doubt.

For the Application of This Rule to Insanity, see *infra* this article, "Degree of Proof — Insanity," and also article "INSANITY."

In State *v.* Barrett, 132 N. C. 1005, 43 S. E. 832, the court, while approving the rule laid down in the case of State *v.* Ellick, 60 N. C. 450, 86 Am. Dec. 442; State *v.* Willis, 63 N. C. 26, and State *v.* Carland, 90 N. C. 668, that the "person must

to the satisfaction of the jury, or by satisfactory evidence, is erroneous as requiring more than a preponderance of evidence, some holding that it is[1] and others that it is not error.[2]

Meaning of Rule Requiring Preponderance of Evidence. — As explained in some cases this rule seems to mean that while the *facts* tending to establish the defense must be proved by a preponderance of the evidence, yet if after such facts have been sufficintly proved they raise a reasonable doubt of the accused's guilt, he must be acquitted.[3]

C. INDEPENDENT DEFENSE. — In those jurisdictions where the burden of proving an independent defense which does not arise out of the *res gestae* is upon the defendant, he must establish such a defense by a preponderance of the evidence.[4]

satisfy the jury neither beyond a reasonable doubt, nor yet by a preponderance of testimony, but simply satisfy them of the existence of facts and circumstances which might mitigate the offense or which make out a plea of self-defense," says: "We are not prepared to say whether the jury can become satisfied of the existence of a fact unless the evidence in favor of its existence is stronger or preponderates over that against its existence."

1. Halloway *v.* People, 181 Ill. 544, 54 N. E. 1030; Appleton *v.* People, 171 Ill. 473, 49 N. E. 708; Alexander *v.* People, 96 Ill. 96; Smith *v.* People, 142 Ill. 117, 31 N. E. 599; Wacaser *v.* People, 134 Ill. 438, 25 N. E. 564, 23 Am. St. Rep. 683; Kota *v.* People, 136 Ill. 655, 27 N. E. 53; Lyons *v.* People, 137 Ill. 602, 27 N. E. 677; Kelch *v.* State, 55 Ohio St. 146, 45 N. E. 6, 60 Am. St. Rep. 680. See State *v.* Hardin, 46 Iowa 623.

An instruction that the jury must be "satisfied" of the defendant's insanity, standing alone probably requires too strong a showing of insanity, but in connection with general instructions to the effect that a reasonable doubt of defendant's guilt authorizes an acquittal, such an instruction is not misleading. Brown *v.* Com., 77 Ky. 398.

2. Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811; Holland *v.* State, 12 Fla. 117; Carlisle *v.* State (Tex. Crim.), 56 S. W. 365; Webb *v.* State, 9 Tex. App. 490; King *v.* State, 9 Tex. App. 515; Com. *v.* Kilpatrick, 204 Pa. St. 218, 53 Atl. 774. But see Coyle *v.* Com., 100 Pa. St. 573, *holding* erroneous an instruction that insanity must be proved by "clearly preponderating evidence."

Defendant must prove insanity to the *reasonable satisfaction* of the jury, but need not establish it beyond a reasonable doubt. State *v.* Redemeier, 71 Mo. 173; State *v.* Huting, 21 Mo. 464; State *v.* McCoy, 34 Mo. 531; Genz *v.* State, 58 N. J. L. 482, 34 Atl. 816. See also State *v.* Gut, 13 Minn. 341; Bonfanti *v.* State, 2 Minn. 123.

3. Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

State *v.* Pierce, 8 Nev. 291. "When, therefore, it is said that defendant must establish circumstances in mitigation or defense by preponderance of proof, it is meant that the proof should so preponderate as to the existence of the fact desired to be proved, over the evidence against it, that a jury might properly accept it as proven, and then, weighing all the proof together, give the benefit of any reasonable doubt arising upon the whole to the defendant."

4. Jones *v.* State, 13 Tex. App. 1. "The rule is that when the defense set up is, in itself, purely extrinsic, the allegations of the indictment not being denied, it is necessary that such defense be sustained by a preponderance of proof. Defenses of this character are licenses, authority from the state, former conviction, former acquittal, once in jeopardy, compulsion of any kind, and in general, defenses which do not traverse the indictment, but are in avoidance of the allegations thereof . . . the rule relating to the *res gestae* . . . applies to all defenses which traverse the

D. Self-Defense. — The evidence must preponderate in favor of self-defense to justify an acquittal in some states.[5] In others a conviction is not warranted if the evidence in the case raises a reasonable doubt as to whether the homicide was committed in self-defense.[6]

E. Insanity. — Four conflicting rules as to the degree of proof required to establish insanity are applied in various jurisdictions. One requires insanity to be proved beyond a reasonable doubt;[7] another requires it to be established by a preponderance of the evidence;[8] by a third, the accused is entitled to an acquittal if there be

averments of the indictment and go to the essence of the guilt charged against the accused. Within this class may be mentioned self-defense, provocation, heat of blood, and generally, all matters growing out of the *res gestae* which go to justify, extenuate or excuse the crime charged, including the defense of *alibi.*" Kent *v.* People, 8 Colo. 563, 9 Pac. 852. See *supra*, "Burden of Proof. — Independent or Affirmative Defenses Distinguished."

5. *Dakota.* — United States *v.* Crow Dog, 3 Dak. 106, 14 N. W. 437.

Ohio. — Weaver *v.* State, 24 Ohio St. 584; Silvus *v.* State, 22 Ohio St. 90.

Rhode Island. — State *v.* Ballou, 20 R. I. 607, 40 Atl. 861.

West Virginia. — State *v.* Manns, 48 W. Va. 480, 37 S. E. 613; State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626; State *v.* Johnson, 49 W. Va. 684, 39 S. E. 665; State *v.* Jones, 20 W. Va. 764.

6. *Alabama.* — Henson *v.* State, 112 Ala. 41, 21 So. 79; Miller *v.* State, 107 Ala. 40, 19 So. 37; Lewis *v.* State, 120 Ala. 339, 25 So. 43.

California. — People *v.* Bushton, 80 Cal. 160, 22 Pac. 127, 549.

Mississippi. — McKenna *v.* State, 61 Miss. 589; Lamar *v.* State, 63 Miss. 265.

New York. — People *v.* Downs, 123 N. Y. 558, 25 N. E. 988.

Pennsylvania. — Com. *v.* Drum, 58 Pa. St. 9.

South Carolina. — State *v.* Hutto, 66 S. C. 449, 45 S. E. 13.

West Virginia. — State *v.* Prater, 52 W. Va. 132, 43 S. E. 230.

7. State *v.* Derance, 34 La. Ann. 186, 44 Am. Rep. 426; State *v.* Hurley, 1 Houst. Crim. (Del.) 28; State *v.* West, 1 Houst. Crim. (Del.) 371. But see State *v.* Cole, 2 Pen. (Del.) 344, 45 Atl. 391. See also Beck *v.* State, 76 Ga. 452. See article "Insanity."

8. *Alabama.* — Martin *v.* State, 119 Ala. 1, 25 So. 255. But see Henson *v.* State, 112 Ala. 41, 21 So. 79; Ford *v.* State, 71 Ala. 385.

Arkansas. — Casat *v.* State, 40 Ark. 511; Bolling *v.* State, 54 Ark. 588, 16 S. W. 658; McKenzie *v.* State, 26 Ark. 334; Caveness *v.* State, 43 Ark. 331.

California. — People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093.

Connecticut. — State *v.* Hoyt, 47 Conn. 518.

Idaho. — State *v.* Larkins, 5 Idaho 200, 47 Pac. 945.

Iowa. — State *v.* Jones, 64 Iowa 349, 17 N. W. 911; State *v.* Thiele, 119 Iowa 659, 94 N. W. 256; State *v.* Trout, 74 Iowa 545, 38 N. W. 405, 7 Am. St. Rep. 499.

Kentucky. — Cotrell *v.* Com., 13 Ky. L. Rep. 305, 17 S. W. 149; Kriel *v.* Com., 68 Ky. 362; Brown *v.* State, 77 Ky. 398.

Maine. — State *v.* Lawrence, 57 Me. 574.

Nevada. — State *v.* Lewis, 20 Nev. 333, 22 Pac. 241.

New Jersey. — Graves *v.* State, 45 N. J. L. 203.

Ohio. — Bond *v.* State, 23 Ohio St. 349; Bergin *v.* State, 31 Ohio St. 111; Loeffner *v.* State, 10 Ohio St. 598.

Pennsylvania. — Com. *v.* Kilpatrick, 204 Pa. St. 218, 53 Atl. 774; Com. *v.* Heidler, 191 Pa. St. 375, 43 Atl. 211; Coyle *v.* Com., 100 Pa. St. 573.

South Carolina. — State *v.* Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879.

a reasonable doubt of his sanity upon a consideration of all the evidence;[9] and in some states, a rule differing from these three is applied, namely, that insanity must be proved to the "satisfaction" of the jury.[10]

F. ALIBI. — It is generally held that the evidence in support of an alibi need only raise a reasonable doubt of defendant's presence at the homicide.[11] In some cases, however, it is said that the accused must prove an alibi by a preponderance of the evidence,[12] subject, however, to the qualification that if the evidence on this issue considered alone, or in connection with all the evidence in the case, raises a reasonable doubt of guilt, an acquittal is necessary.[13]

Texas. — Webb *v.* State, 9 Tex. App. 490; Leache *v.* State, 22 Tex. App. 279; White *v.* State, 32 Tex. Crim. 625, 25 S. W. 784; Carlisle *v.* State (Tex. Crim.), 56 S. W. 365; Giebel *v.* State, 28 Tex. App. 151, 12 S. W. 591.

Washington. — State *v.* Clark, 34 Wash. 485, 76 Pac. 98, 101 Am. St. Rep. 1006.

9. *United States.* — Davis *v.* United States, 160 U. S. 469.

Florida. — Hodge *v.* State, 26 Fla. 11, 7 So. 593.

Illinois. — Dacey *v.* People, 116 Ill. 555, 6 N. E. 165; Chase *v.* People, 40 Ill. 352; Hopps *v.* People, 31 Ill. 385; Montag *v.* People, 141 Ill. 75, 30 N. E. 337.

Indiana. — Bradley *v.* State, 31 Ind. 492; Polk *v.* State, 19 Ind. 170, 81 Am. Dec. 382; Plummer *v.* State, 135 Ind. 308, 34 N. E. 968.

Kansas. — State *v.* Crawford, 11 Kan. 32.

Michigan. — People *v.* Garbutt, 17 Mich. 9.

Mississippi. — Cunningham *v.* State, 56 Miss. 269; Caffey *v.* State, 24 So. 315.

Nebraska. — Furst *v.* State, 31 Neb. 403, 47 N. W. 1116; Ballard *v.* State, 19 Neb. 609, 28 N. W. 271; Wright *v.* People, 4 Neb. 407.

New Hampshire. — State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242; State *v.* Pike, 49 N. H. 399; State *v.* Bartlett, 43 N. H. 224.

New York. — People *v.* McCann, 16 N. Y. 58, 69 Am. Dec. 642, per Brown J.; People *v.* Egnor, 175 N. Y. 419, 67 N. E. 906, *explaining* People *v.* Nino, 149 N. Y. 317, 43 N. E. 853; but see O'Connell *v.* People, 87 N. Y. 377.

Tennessee. — Dove *v.* State, 50 Tenn. 348.

10. Dejarnette *v.* Com., 75 Va. 867; Boswell *v.* Com., 20 Gratt. (Va.) 860; State *v.* Douglass, 28 W. Va. 297; State *v.* Robinson, 20 W. Va. 713; State *v.* Stark, 1 Strob. L. (S. C.) 506. See also State *v.* Coleman, 20 S. C. 441; State *v.* Redemeier, 71 Mo. 173; Genz *v.* State, 58 N. J. L. 482, 34 Atl. 816.

11. *Alabama.* — Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28; Pickens *v.* State, 115 Ala. 42, 22 So. 551; Henson *v.* State, 112 Ala. 41, 21 So. 79.

Arizona. — Schultz *v.* Territory, 52 Pac. 352.

California. — People *v.* Fong Ah Sing, 64 Cal. 253, 28 Pac. 233; People *v.* Tarm Poi, 86 Cal. 225, 24 Pac. 998. See People *v.* Lee Sare Bo., 72 Cal. 623, 14 Pac. 310.

Georgia. — Shaw *v.* State, 83 Ga. 92, 9 S. E. 768.

Missouri. — State *v.* Howell, 100 Mo. 628, 14 S. W. 4, *overruling* State *v.* Jennings, 81 Mo. 185, and *reaffirming* State *v.* Lewis, 69 Mo. 92.

Texas. — Villereal *v.* State (Tex. Crim.), 61 S. W. 715. See more fully the article "ALIBI."

12. Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; State *v.* McGarry, 111 Iowa 709, 83 N. W. 718; State *v.* Hardin, 46 Iowa 623; People *v.* Kessler, 13 Utah 69, 44 Pac. 97. See Wade *v.* State, 65 Ga. 756. See article "ALIBI."

13. People *v.* Kessler, 13 Utah 69, 44 Pac. 97; State *v.* McGarry, 111 Iowa 709, 83 N. W. 718.

G. Intoxication. — When intoxication is urged as a partial defense, some courts hold that the defendant must establish the defense either by a preponderance of the evidence,[14] or to the satisfaction of the jury.[15] Others hold that when it appears from the evidence that the defendant was intoxicated, the burden is upon the state to show beyond a reasonable doubt that he was not so drunk as to be unable to form a deliberate intent to kill.[16]

IV. NATURE AND COMPETENCY OF EVIDENCE.

1. When Competency in Doubt. — Where the competency of the evidence offered by the accused is doubtful, the trial court should admit it.[17] But any doubt as to the relevancy of circumstantial evidence should be resolved in favor of the accused,[18] especially when it tends to unduly prejudice his case.[19]

2. Preliminary Proceedings. — The proceedings at the preliminary examination of the accused are not competent against him,[20] nor are those taken at the coroner's inquest.[21] The accused, however, may show that he denied damaging testimony given against him at such proceedings.[22] The proceedings on an application for change of venue are not competent for any purpose.[23]

3. Testimony of Defendant on Former Trial. — The defendant's testimony in his own behalf on a previous trial for the same offense is competent evidence against him.[24]

4. Rebutting Statements Made by Prosecuting Attorney. — Evi-

14. Fonville *v.* State, 91 Ala. 39, 8 So. 688; State *v.* Pasnau, 118 Iowa 501, 92 N. W. 682; State *v.* Hill, 46 La. Ann. 27, 14 So. 294.

15. State *v.* Faino, 1 Marv. (Del.) 492, 41 Atl. 134.

16. Carr *v.* State, 23 Neb. 749, 37 N. W. 630.

17. Carr *v.* State, 43 Ark. 99; Pharr *v.* State, 9 Tex. App. 129.

18. State *v.* O'Neil, 13 Or. 183, 9 Pac. 284; People *v.* Williams, 18 Cal. 194; Mack *v.* State, 48 Wis. 287; Pharr *v.* State, 9 Tex. App. 129. But see State *v.* Dart, 29 Conn. 153, 76 Am. Dec. 596.

19. Shaffner *v.* Com., 72 Pa. St. 60. See *infra* this article, "Other Crimes."

20. See article "Examination Before Magistrate."

Accused's Failure to Testify in his own behalf at the preliminary investigation. Boyd *v.* State (Miss.), 36 So. 525. The return of the examining magistrate, that the defendant gave no evidence upon the preliminary examination, is not competent. Templeton *v.* People, 27 Mich. 501.

Refusal of Bail by the examining court. Richardson *v.* State, 9 Tex. App. 612.

The Waiver of a Preliminary Examination by the defendant when he was arrested cannot be shown. Bennett *v.* State, 39 Tex. Crim. 639, 48 S. W. 61.

21. See article "Coroner's Inquest."

22. Boyd *v.* State (Miss.), 36 So. 525.

23. Moore *v.* State (Tex. Crim.), 79 S. W. 565; Shamburger *v.* State, 24 Tex. App. 433, 6 S. W. 540.

24. Macmasters *v.* State, 83 Miss. 1, 35 So. 302, in which an authenticated copy of the stenographer's notes of the defendant's testimony on the former trial was held competent, but not as a confession, and therefore not objectionable on that ground. See article "Former Testimony," Vol. V.

dence is not admissible to rebut the effect of statements made by the prosecuting attorney during the course of the trial.[25]

5. Evidence Showing Higher Grade or Degree Than That Charged. Where the evidence offered tends to prove the crime charged, it is not inadmissible because it proves a more heinous offense.[26] Thus on a charge of manslaughter,[27] or murder in the second degree, evidence showing a higher grade or degree[28] of homicide is not necessarily inadmissible.

6. Nature and Circumstances of Act, and Surrounding Conditions. A. GENERALLY. — Evidence as to the circumstances and conditions under which the crime was committed is admissible, although it has no tendency to connect the defendant with the crime,[29] or though it shows him guilty of other crimes.[30]

B. THE CONDITION OF THE DECEASED'S BODY and clothing when discovered may always be shown as part of the *res gestae,* and as

25. Poole *v.* State (Tex. Crim.), 76 S. W. 565.

26. State *v.* Munco, 12 La. Ann. 625, in which the crime charged was assault with intent to murder. Evidence that the defendant shot and wounded the prosecuting witness was held not incompetent because proving the more aggravated offense of shooting with intent to commit murder.

27. On Charge of Manslaughter. Although the defendant is only charged with manslaughter, evidence of his previous threats against the deceased is not inadmissible because tending to prove him guilty of murder, the state being entitled to develop all the facts connected with the case. Turner *v.* State (Tex. Crim.), 51 S. W. 366. But see Com. *v.* Matthews, 89 Ky. 287, 12 S. W. 333. Where, however, the accused is charged with manslaughter without a design to effect death, evidence of previous misconduct toward and assaults upon the deceased is irrelevant because neither malice nor intention is an issue. Albrich *v.* State, 6 Wis. 74.

28. Where a conviction for murder in the second degree is reversed and a new trial ordered, evidence showing express malice is admissible on such new trial, not to prove defendant guilty of murder in the first degree, but to show that the crime was greater than manslaughter. McLaughlin *v.* State, 10 Tex. App. 340.

29. People *v.* Knott, 122 Cal. 410, 55 Pac. 154; State *v.* Gray, 116 Iowa 231, 89 N. W. 987.

"When a person is accused of a felonious homicide, it is both the right and the duty of the prosecution to give evidence of all those surrounding facts and circumstances which have any bearing upon the manner of the death, and any tendency to show whether it was natural, accidental, or felonious, and if the latter, whether the deceased was *felo de se,* or died by the hand of another. It is both a right and a duty to give to the jury, by evidence, as complete a picture as possible of all the surroundings; and this irrespective entirely of any question of subsequently connecting the defendant with the transaction by other proofs. Such evidence is a necessary preliminary to any which shall be offered to connect any particular person with the homicide, and the more full and complete the prosecution make it, the better do they discharge their duty to the public, and, if he is innocent, to the defendant also." Brown *v.* People, 17 Mich. 429.

30. On a trial for criminal negligence in causing a boiler explosion it is competent to show the effect of the explosion, even though such evidence discloses that it caused the death of others. People *v.* Thompson, 122 Mich. 411, 81 N. W. 344. See *infra* this article "Other Crimes."

evidence not only of the manner and cause of death, but also of the motives and intent of the perpetrator of the homicidal act.[31]

C. Scene of the Homicide. — a. *Generally.* — The nature, location and physical characteristics[32] of the scene of the homicide or the place where the body of the deceased was found and its immediate vicinity,[33] as well as the purposes for which it is used[34] and its condition immediately subsequent to the homicide,[35] may all be shown as part of the history of the transaction, and to assist the court and jury in understanding the testimony.

b. *Photographs and Diagrams.* — For this purpose photographs[36] and maps or diagrams[37] of the scene are admissible when shown to be

31. State *v.* Deschamps, 42 La. Ann. 567, 7 So. 703, 21 Am. St. Rep. 392; Washington *v.* State (Tex. Crim.), 51 S. W. 368; Brown *v.* People, 17 Mich. 429; People *v.* Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295; Washington *v.* State (Tex. Crim.), 79 S. W. 811.

Evidence that one of the deceased's pockets containing a purse with some change in it was partly turned inside out was held properly admitted because showing the condition of the body after the homicide. People *v.* Gleason, 127 Cal. 323, 59 Pac. 592.

The fact that the body of the deceased indicated the commission of a rape is a competent circumstance in proof of motive. Robinson *v.* State, 114 Ga. 56, 39 S. E. 862.

Evidence as to the presence of sand in the mouth, nostrils and windpipe of the deceased person when found in a river is competent as describing the condition of the body when discovered. Com. *v.* Holmes, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270.

32. State *v.* Asbell, 57 Kan. 398, 46 Pac. 770; Caw *v.* People, 3 Neb. 357; Maxwell *v.* State, 129 Ala. 48, 29 So. 981; Howard *v.* Com., 24 Ky. L. Rep. 950, 70 S. W. 295.

The condition and contents of the building where the crime was committed may be shown. State *v.* Garrington, 11 S. D. 178, 76 N. W. 326.

33. Lillie *v.* State (Neb.), 100 N. W. 316.

34. Maxwell *v.* State, 129 Ala. 48, 29 So. 981.

The Fact That the Homicide Occurred in a Bawdy House may be shown because it tends to explain the acts and declarations of the parties and the conditions under which the homicide occurred. Gibson *v.* State, 23 Tex. App. 414, 5 S. W. 314; Cook *v.* State, 22 Tex. App. 511, 3 S. W. 749.

35. Baines *v.* State, 43 Tex. Crim. 490, 66 S. W. 847.

Cartridge Shells found on the scene of the homicide shortly after the tragedy are admissible as part of the history of the case, although not tending to connect the defendant with the crime. State *v.* Gray, 116 Iowa 231, 89 N. W. 987.

The finding of empty cartridges near the scene of the homicide a week subsequent thereto was held admissible in connection with the finding of the empty frame of a revolver, as tending to show that the homicide was committed with a pistol. State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743.

36. Paulson *v.* State (Wis.), 94 N. W. 771; People *v.* Fish, 125 N. Y. 136, 26 N. E. 319; People *v.* Phelan, 123 Cal. 551, 56 Pac. 424; Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097; (*citing* People *v.* Buddensieck, 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766); Cowley *v.* People, 83 N. Y. 464; Blair *v.* Pelham, 118 Mass. 420; Udderzook *v.* Com., 76 Pa. St. 340; Reddin *v.* Gates, 52 Iowa 210. See more fully the article "Photographs."

37. *Alabama.* — Fuller *v.* State, 117 Ala. 36, 24 So. 688; Burton *v.* State, 107 Ala. 108, 18 So. 240; *s. c.* 115 Ala. 1, 22 So. 585.

Florida. — Rawlins *v.* State, 40 Fla. 155, 24 So. 65.

Kentucky. — Com. *v.* Hourigan, 89 Ky. 305, 12 S. W. 550.

Minnesota. — State *v.* Lawlor, 28 Minn. 216, 9 N. W. 698.

correct representations, and also sketches.[38] A witness may illustrate his testimony by arranging objects in the courtroom to represent those at the scene of the homicide.[39] It is no objection to photographs that they show persons arranged in the positions alleged to have been occupied by the parties to the homicide at the time of its occurrence.[40]

D. Business or Occupation of Parties. — The business or occupation of the defendant at the time of the homicide is a proper subject of inquiry as a preliminary fact assisting in a better understanding of the case.[41] It is not error to admit evidence of the

North Carolina. — State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

Texas. — Rodriques *v.* State, 32 Tex. Crim. 259, 22 S. W. 978; Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471.

A rough diagram by a witness who arrived at the scene of the homicide a few minutes after its commission, indicating the position of the surrounding objects, was held properly used for purposes of illustration, although the position of such objects might have been changed before the arrival of the witness. People *v.* Shears, 133 Cal. 154, 65 Pac. 295.

A Plat or Diagram Made by the Deceased to represent the scene of the homicide, for the purpose of illustrating his dying declaration, is admissible when shown to be correct. Grubb *v.* State, 43 Tex. Crim. 72, 63 S. W. 314.

The Fact That Portions of the Diagram Are in Red Ink will not serve to exclude it on the ground that it was "suggestive of the bloody deed and calculated to inflame the minds of the jury." Moon *v.* State, 68 Ga. 687.

Diagram Showing the Position of the Different Articles of Furniture in the room where the homicide occurred was held admissible. People *v.* Fitzgerald, 138 Cal. 39, 70 Pac. 1014.

Positions of Objects Marked on Hearsay Information. — A diagram of the scene of the homicide, with the positions of the parties marked thereon, is competent, although the marks were made by the draughtsman, not upon his own knowledge, but from information given to him by eye-witnesses. State *v.* Shaw, 73 Vt. 149, 50 Atl. 863.

Where Loaded With Explanatory Matter in the nature of hearsay, *held* properly excluded. Leonard *v.* Territory, 2 Wash. Ter. 381, 7 Pac. 872.

Correctness a Question for the Court. — Ortiz *v.* State, 30 Fla. 256, 11 So. 611.

The fact that witnesses for the defendant denied the correctness of such a diagram will not render it inadmissible. Moon *v.* State, 68 Ga. 687.

Taking Map Into Jury Room. See Campbell *v.* State, 23 Ala. 44; Burton *v.* State, 115 Ala. 1, 22 So. 585, and see more fully the article "Exhibits."

38. People *v.* Johnson, 140 N. Y. 350, 35 N. E. 604.

39. Blair *v.* State, 69 Ark. 558, 64 S. W. 948.

40. State *v.* O'Reilly, 126 Mo. 597, 29 S. W. 577; State *v.* Kelley, 46 S. C. 55, 24 S. E. 60; Shaw *v.* State, 83 Ga. 92, 9 S. E. 768; People *v.* Crandall, 125 Cal. 129, 57 Pac. 785; People *v.* Jackson, 111 N. Y. 362, 19 N. E. 54.

But in Fore *v.* State, 75 Miss. 727, 23 So. 710, photographs taken by the state's chief witness after the homicide, in which persons were arranged to illustrate the position of the parties and the condition of things at the time of the homicide, as testified to by such witness, were held inadmissible as not being mere photographs of the scene of the homicide but representations of *tableau vivants*, made for the purpose of representing situations testified to by a particular witness, and whose account was at variance with that of other witnesses.

41. O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471; State *v.* Mollchen, 53 Iowa 310, 5 N. W. 186.

occupation of the deceased.[42] The defendant, however, is not entitled to show the business of the deceased except when such fact would reasonably tend to explain his own conduct.[43]

E. Habits of Deceased. — It is competent to prove any habits of the deceased which tend to show the manner in which the homicide occurred where this fact is in doubt,[44] or to explain any seeming peculiarity in the circumstances leading up to the fatal act.[45]

F. The Whereabouts of the Accused at about the time of the homicide or shortly before and after may be shown, although this evidence does not of itself tend to establish his guilt.[46]

G. Res Gestae. — a. *Generally.* — All of the acts, declarations and circumstances forming part of the *res gestae* are admissible in accordance with the rules governing this class of evidence.[47]

b. *Acts and Circumstances.* — **(1.) Generally.** — The *res gestae* includes not only the facts and circumstances immediately attending the homicidal act, but also those preceding and following the act, if they form part of one continuous transaction.[48]

(2.) Previous to Fatal Act. — (A.) The Previous Quarrel or Difficulty

42. Evidence that the deceased was a deputy sheriff, though not material, was held not incompetent, on the ground that "it is always admissible to prove the calling or occupation of one whose conduct is made the subject of judicial inquiry or investigation." Harris *v.* Com., 25 Ky. L. Rep. 297, 74 S. W. 1044.

43. The Business or Occupation of the Deceased cannot be inquired into by the defendant where the homicide occurred during the defense, by the former, of her domicile against the latter. State *v.* Kennade, 121 Mo. 405, 26 S. W. 347.

44. Where deceased was killed at night while passing along a certain street, evidence of his habit in traveling that street alone at night after the close of his business was held properly admitted without showing that defendant had knowledge of the habit, the evidence being competent to show that the killing was by means of lying in wait. People *v.* Knott, 122 Cal. 410, 55 Pac. 154.

45. Where the defendant, a negro, killed the deceased, a white man, during a game of cards between them, evidence that the deceased had the reputation of gambling with negroes was held competent as tending to show how the card game came to be played. Rogers *v.* State, 44 Tex. Crim. 350, 71 S. W. 18.

46. Moore *v.* State, 2 Ohio St. 500; Rains *v.* State, 88 Ala. 91, 7 So. 315. See also Wrage *v.* State (Tex. Crim.), 60 S. W. 55.

Where the crime was discovered about eight hours after the deceased was last seen alive, evidence as to the defendant's whereabouts during this period was held competent, although perfectly consistent with innocence. "It was certainly competent and relevant to show the defendant's whereabouts and conduct at any time during this period." State *v.* Garrington, 11 S. D. 178, 76 N.W. 326.

The Fact That Defendant Visited a House of Prostitution during the evening shortly previous to the homicide was held properly admitted, it being competent to show the acts and conduct of the defendant immediately previous to the fatal encounter. State *v.* Gainor, 84 Iowa 209, 50 N. W. 947.

47. See article "Res Gestae."

48. *Alabama.*— Bailey *v.* State, 133 Ala. 155, 32 So. 57; Wood *v.* State, 128 Ala. 27, 29 So. 557, 86 Am. St. Rep. 71; Maxwell *v.* State, 129 Ala. 48, 29 So. 981; Armor *v.* State, 63 Ala. 173; Wesley *v.* State, 52 Ala. 182.

Georgia. — Doyal *v.* State, 70 Ga. 134; Stiles *v.* State, 57 Ga. 183; Johnson *v.* State, 88 Ga. 203, 14 S. E. 208.

Between the Parties which culminates directly in the homicide without any break in the continuation of the action forms part of the *res gestae*, and all the relevant and material circumstances and particulars thereof may be shown.[49]

(B.) Difficulties With Third Persons. — The difficulties between the defendant and third persons immediately preceding the homicidal act or assault, which are the cause or occasion of the fatal

Indiana. — Starr *v.* State, 160 Ind. 661, 67 N. E. 527.

Michigan. — Patten *v.* People, 18 Mich. 314, 100 Am. Dec. 173; Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

Montana. — State *v.* Tighe, 27 Mont. 327, 71 Pac. 3.

Washington. — State *v.* Payne, 10 Wash. 545, 39 Pac. 157.

"In proving the homicide it was competent to show, in connection with the killing, all of the attendant circumstances, who were present, what was said and done, and every other fact connected with the transaction, and so related as to form a part of the *res gestae*. So, too, any chain of facts or circumstances continuous in their nature, leading up to and eventuating in the homicide. 'It may be said generally that all parts of one continuous transaction, though not shown to have had any immediate connection with the offense — the culmination of all the circumstances and facts proximate to the consummation of the crime, which tend to shed light on the main inquiry — are admissible.'" Collins *v.* State, 138 Ala. 57, 34 So. 993.

The violent and turbulent conduct of the defendant immediately previous to the homicide, although not in the immediate presence of the deceased, who was killed by the defendant shortly after, while attempting to arrest him, held admissible as part of the *res gestae*. Hardin *v.* State, 40 Tex. Crim. 208, 49 S. W. 607.

In Dukes *v.* State, 11 Ind. 557, testimony as to the defendant's "appearance, manner and condition of mind as indicating alarm or otherwise, and the efforts made by him to sound an alarm" immediately after the shooting, was held improperly excluded, on the ground that these facts constituted part of the *res gestae*.

A letter which the deceased declared was the cause of her leaving for another place, where two days later she was found dead, was held admissible as part of the *res gestae*. Cluverius *v.* Com., 81 Va. 787.

49. *Alabama.* — Stitt *v.* State, 91 Ala. 10, 8 So. 669, 24 Am. St. Rep. 853.

California. — People *v.* Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403.

Georgia. — Robinson *v.* State, 118 Ga. 198, 44 S. E. 985.

Kentucky. — Burton *v.* Com., 22 Ky. L. Rep. 1315, 60 S. W. 526; Shotwell *v.* Com., 23 Ky. L. Rep. 1649, 65 S. W. 820.

Louisiana. — State *v.* Donelon, 45 La. Ann. 744, 12 So. 922.

Missouri. — State *v.* Kennade, 121 Mo. 405, 26 S. W. 347.

Texas. — Stanley *v.* State (Tex. Crim.), 44 S. W. 519.

The details of a difficulty an hour previous to the homicide, held part of the *res gestae*. State *v.* Bone, 114 Iowa 537, 87 N. W. 507.

Two Hours Previous. — Poindexter *v.* Com., 33 Gratt. (Va.) 766.

Where the homicide was committed during a frolic, in which there were dancing and drinking, all of the occurrences of the evening were held to constitute one continuous transaction. Jordan *v.* State, 81 Ala. 20, 1 So. 577.

The intoxicated condition of the defendant, his exhibition and firing of his pistol, and the insulting and threatening remarks made by him at a dance from ten to thirty minutes prior to the killing, were held admissible as part of the *res gestae*, since such conduct led up to and caused the fatal difficulty with the deceased, and also indicated his general malice and purpose to injure or kill some one. Hutsell *v.* Com., 25 Ky. L. Rep. 262, 75 S. W. 225. See also Whittaker *v.* Com., 13 Ky. L. Rep. 504, 17 S. W. 358.

difficulty, form part of the *res gestae*,[50] but they must be immediately connected in some way with the homicide and tend to explain it.[51]

(3.) Subsequent. — The circumstances immediately following the fatal act and constituting a direct continuation of the transaction are competent as part of the *res gestae*.[52]

(4.) Independent Criminal Acts. — The acts of the defendant when forming part of the *res gestae* are competent evidence, although they amount to independent crimes. Thus it is competent to show his assault upon or killing of a third person immediately preceding or

In Cox *v.* State, 64 Ga. 374, the defendant and deceased mutually agreed to arm themselves and return to fight out their quarrel, but the deceased reconsidered his intention and failed to keep the appointment. Within forty-five minutes the parties met on the street, and in the fight with the weapons which they had prepared the deceased was killed. Evidence as to all the acts and declarations of the parties between their first meeting and the homicide was admitted as part of the *res gestae*, including the deceased's statement that the defendant was "hounding" him and hunting him to kill him.

In Whilden *v.* State, 25 Ga. 396, evidence as to a fight between the defendant and the deceased a half hour previous to the one in which the latter was killed, was held inadmissible, it appearing that the parties had been separated and that the deceased at the time of the second attack was undergoing an examination as to his wounds. See also State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136.

Six Hours Previous. — The details of a difficulty between the defendant and the deceased on the day of the homicide and six hours previous thereto were held admissible on behalf of the defendant as part of the *res gestae*. State *v.* Nelson, 166 Mo. 191, 65 S. W. 749.

Difficulty on Preceding Day. — In Patten *v.* People, 18 Mich. 314, 100 Am. Dec. 173, the homicide occurred during the defendant's attempt to disperse a riotous body assembled about his house at night. It was held competent for the defendant to show as part of the *res gestae* that a similar gathering had occurred on the previous night and that after being dispersed they declared their purpose of getting together a crowd for the following night which would stand its ground. "All the proceedings and objects of both assemblages, the provocation thereby to the defendant and his action in opposition to them, constituted, together, one entire transaction, or the *res gestae*."

The testimony of a witness as to the discussion or dispute between the defendant and the deceased which led to the homicide is not incompetent because he failed to hear all that was said. State *v.* Daniels, 49 La. Ann. 954, 22 So. 415.

50. Bowers *v.* State (Wis.), 99 N. W. 447.

Where the prosecuting witness, on a charge of assault with intent to commit murder, was assaulted during his attempt to protect a third person from the violence of the defendant, the previous difficulty between the defendant and such third person on the same day, which was the cause of his attempted violence, was held admissible as part of the *res gestae*. Thomas *v.* State, 44 Tex. Crim. 344, 72 S. W. 178.

51. Joyce *v.* Com., 78 Va. 287. But see Havens *v.* Com. (Ky.), 82 S. W. 369.

52. Beckham *v.* State (Tex. Crim.), 69 S. W. 534; Collier *v.* State, 39 Ga. 31.

The defendant's act immediately after the homicide in running up to and approaching officer and requesting his protection was held competent as part of the *res gestae* tending to show his state of mind at the time of the homicide. Nelson *v.* State (Tex. Crim.), 58 S. W. 107.

The Pursuit and Capture of the Defendant, and all the incidents thereof occurring immediately after the injury to the deceased, are admis-

following his fatal assault upon the deceased, and forming part of a continuous transaction.[53]

(5.) The Acts of Third Persons forming part of the homicidal act or of the continuous transaction culminating therein are admissible as part of the *res gestae*.[54] Such acts, however, must tend to explain the conduct and motives of the parties to the homicide.[55] The spontaneous acts of persons not participants may be competent when contemporaneous with the main fact.[56]

(6.) Absence of Defendant. — It is not material that the facts occurred during the absence of the defendant and before he became a participant, if they form part of one continuous transaction.[57]

c. *Declarations.* — To be competent as part of the *res gestae*, declarations, whether of the parties to the act or of third persons,

sible as part of the *res gestae*. State *v.* Phillips, 118 Iowa 660, 92 N. W. 876.

53. *Alabama.* — Seams *v.* State, 84 Ala. 410, 4 So. 521; Horn *v.* State, 102 Ala. 144, 15 So. 278.

Florida. — Oliver *v.* State, 38 Fla. 46, 20 So. 803; Killins *v.* State, 28 Fla. 313, 9 So. 711.

Iowa. — State *v.* Gainor, 84 Iowa 209, 50 N. W. 947.

Kentucky. — Shotwell *v.* Com., 23 Ky. L. Rep. 1649, 65 S. W. 820.

Louisiana. — State *v.* Desroches, 48 La. Ann. 428, 19 So. 250; State *v.* Robinson, 112 La. 939, 36 So. 811.

Texas. — Alvarez *v.* State (Tex. Crim.), 58 S. W. 1013; Bibby *v.* State (Tex. Crim.), 65 S. W. 193; Powell *v.* State (Tex. Crim.), 59 S. W. 1114; Wilkerson *v.* State, 31 Tex. Crim. 86, 19 S. W. 903.

Virginia. — Reed *v.* Com., 98 Va. 817, 36 S. E. 399.

See *infra* this article, "Other Crimes — Part of One Continuous Transaction."

The defendant's attack on the deceased's companion just previous to the homicide is admissible as part of the transaction explaining the defendant's motives and malice. Reese *v.* State, 7 Ga. 373.

Where defendant was charged with murdering the deceased at a particular place for the purpose of robbery it was held competent for the state to show, as part of the *res gestae* and on the question of identity and motive, that a few minutes after the killing charged two persons, one of whom was the defendant, assaulted and shot three other persons at the same locality. Leeper & Powell *v.* State, 29 Tex. App. 63, 14 S. W. 398.

An assault upon persons who attempt to arrest the defendant immediately after the homicide is admissible as part of the *res gestae*, and as evidence of an attempt to escape. State *v.* Vinso, 171 Mo. 576, 71 S. W. 1034; State *v.* Ramsey, 82 Mo. 133; State *v.* Sanders, 76 Mo. 35.

Testimony of the assaulted person that he was robbed during the course of the assault is admissible as part of the *res gestae*. Richards *v.* State, 34 Tex. Crim. 277, 30 S. W. 229.

54. Ross *v.* State, 62 Ala. 224; People *v.* Chin Bing Quong, 79 Cal. 553, 21 Pac. 951; Blount *v.* State, 49 Ala. 381.

An Assault by Defendant's Companion Upon Another Person at the same time that defendant killed the deceased is admissible as part of the *res gestae*. Dudley *v.* State, 40 Tex. Crim. 31, 48 S. W. 179.

55. Whitaker *v.* State, 106 Ala. 30, 17 So. 456.

56. **The Acts of the Deceased's Parents,** and their manifestations of grief immediately after the homicide and at the scene thereof, are admissible as part of the *res gestae*. Goodal *v.* State (Tex. Crim.), 47 S. W. 359.

57. McMahon *v.* State, 16 Tex. App. 357.

Where deceased was killed in a difficulty between two gangs of men it was held competent to show the circumstances of the difficulty, al-

must be a part of the homicidal act or of the circumstances immediately attending the act.[58]

(1.) Length of Time Intervening Between the Act and Declaration. While some courts strictly limit the application of the doctrine of *res gestae* to those statements made during the immediate continuance of the main fact,[59] the great majority have adopted a more liberal policy.[60] It is sometimes said that the declaration to be of the *res gestae* must be "contemporaneous"[61] with the act. This is explained, however, to mean not exact concurrence in point of time, but merely such nearness as to make it reasonably certain that the declaration was spontaneous.[62]

though they occurred before defendant arrived on the scene or took part in the matter. Bowlin *v.* Com., 17 Ky. L. Rep. 1319, 34 S. W. 709.

58. State *v.* Perioux, 107 La. 601, 31 So. 1016; State *v.* Epstein (R. I.), 55 Atl. 204. See articles "DECLARATIONS," "RES GESTAE."

59. Reg. *v.* Bedingfield, 14 Cox C. C. 341; Lloyd *v.* State, 70 Miss. 251, 11 So. 689. See also Dean *v.* State, 105 Ala. 21, 17 So. 28.

"If made after the termination of the act to which they refer they are merely narratives of a past transaction, whether made within a minute or an hour afterward." People *v.* Ah Lee, 60 Cal. 85.

In Mayes *v.* State, 64 Miss. 329, the deceased's statement five minutes after the fatal blow had been inflicted, as to who stabbed him, was held incompetent as not coming within the *res gestae*. "It is not enough that the statement will throw light upon the transaction under investigation, nor that it was made so soon after the occurrence as to exclude the presumption that it has been fabricated, nor that it was made under such circumstances as to compel the conviction of its truth; the true inquiry, according to all the authorities, is whether the declaration is a verbal act, illustrating, explaining or interpreting other parts of the transaction of which it is itself a part, or is merely a history or a part of a history of a completed past affair."

Deceased's declaration as to who shot her, made to a policeman who had run a distance of one hundred and forty yards after hearing the shot, was held inadmissible because not part of the *res gestae*. People *v.* Wong Ark, 96 Cal. 125, 30 Pac. 1115, *disapproving* Com. *v.* McPike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727, and *overruling* People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 49.

60. See the discussion following.

61. Kennedy *v.* State, 85 Ala. 326, 5 So. 300; Bliss *v.* State, 117 Wis. 596, 94 N. W. 325.

62. State *v.* McDaniel (S. C.), 47 S. E. 384; Ford *v.* State (Tex. Crim.), 50 S. W. 350; State *v.* Arnold, 47 S. C. 9, 24 S. E. 926, 58 Am. St. Rep. 867; Craig *v.* State, 30 Tex. App. 619, 18 S. W. 297; Mitchum *v.* State, 11 Ga. 615; McKinney *v.* State, 40 Tex. Crim. 372, 50 S. W. 708; State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136.

Time Intervening Not Controlling. "Time intervening between the transaction or act and the declaration in reference thereto is to be considered, but is not of itself controlling. It is said in State *v.* Garrand, 5 Or. 216: 'To make declarations a part of the *res gestae*, they must be contemporaneous with the main fact; but, in order to be contemporaneous, they are not required to be precisely concurrent in time. If the declarations spring out of the transaction, if they elucidate it, if they are voluntary and spontaneous, and if they are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous.' This is the rule stated by Judge Nisbet for the court in the well-considered case of Mitchum *v.* State, 11 Ga. 615. The tendency of the courts seems to be in favor of applying the liberal rule on this subject; and as held by the supreme court of the

No General Rule can be laid down as to the length of intervening time which will render the declaration incompetent, but each case must of necessity be governed by its own circumstances.[63]

When Time Intervening Not Shown. — When the time intervening between the homicide and the defendant's statement does not appear, such statement cannot be admitted as *res gestae*.[64]

(2.) Previous to Homicidal Act. — Declarations or statements made by the participants in the quarrel or events leading up to the final act of homicide are competent as part of the *res gestae*, if the acts which they accompany and explain form part of one single transaction continuing without a break down to the homicidal act, and if the declarations otherwise conform to the rules governing *res gestae*.[65]

United States in Insurance Co. *v.* Mosley, 8 Wall. 397: 'Though generally the declarations must be contemporaneous with the event, yet, where there are connecting circumstances, they may, even when made some time afterward, form a part of the whole *res gestae*.' Each case must, of course, depend upon its facts, and the trial court must exercise a sound discretion in determining whether the facts bring the offered evidence within the rule." Lambright *v.* State, 34 Fla. 564, 16 So. 582. To the same effect State *v.* Molisse, 38 La. Ann. 381.

63. State *v.* McDaniel (S. C.), 47 S. E. 384; Lambright *v.* State, 34 Fla. 564, 16 So. 582; State *v.* Molisse, 38 La. Ann. 381; Com. *v.* Werntz, 161 Pa. St. 591, 29 Atl. 272; People *v.* Wong Ark, 96 Cal. 125, 30 Pac. 1115; State *v.* Porter, 34 Iowa 131; Mayes *v.* State, 64 Miss. 329.

64. Cahn *v.* State, 27 Tex. App. 709; 11 S. W. 723; State *v.* Pugh, 16 Mont. 343, 40 Pac. 861; Territory *v.* Armijo, 7 N. M. 428, 37 Pac. 1113. See State *v.* Christian, 66 Mo. 138.

Threats "Recently" Made. — In order that threats should be part of the *res gestae* something more must be shown than that they were made "recently." State *v.* Thomas, 111 La. 804, 35 So. 914.

65. *Alabama.* — Wesley *v.* State, 52 Ala. 182; Armor *v.* State, 63 Ala. 173.

Georgia. — Cox *v.* State, 64 Ga. 374.

Indiana. — Wood *v.* State, 92 Ind. 269.

Kentucky. — Ferrel *v.* Com., 15 Ky. L. Rep. 321, 23 S. W. 344.

Michigan. — Patten *v.* People, 18 Mich. 314, 100 Am. Dec. 173.

Missouri. — State *v.* Hoffman, 78 Mo. 256.

Texas. — Stanley *v.* State (Tex. Crim.), 44 S. W. 519, where the difficulty occurred twenty minutes before the killing.

In Wiseman *v.* State, 32 Tex. Crim. 454, 24 S. W. 413, where it appeared that defendant, charged with intent to murder one S., had been struck by S. during the course of a dance because of insulting language concerning the latter's sister, evidence of similar insulting language previously used by the defendant during the course of the dance toward another young lady was held properly admitted as part of the *res gestae* tending to show that the defendant was "fatally bent on mischief." See also Elmore *v.* State (Tex. Crim.), 78 S. W. 520.

Where defendant upon being insulted by the deceased immediately went after his gun, and upon returning killed the latter, his declaration that "he did not intend to kill deceased, but he could not insult him," made as he started home for his gun, was held admissible as part of the *res gestae*. Koller *v.* State, 36 Tex. Crim. 496, 38 S. W. 44.

The statements and acts of the parties while engaged in the transaction which was the initial step in the intended murder are competent as part of the *res gestae*, although having no apparent significance.

(3.) While Wounded and Suffering. — The fact that the statement was made while the speaker was suffering severely from wounds received during the difficulty may lengthen the time during which such statement may be considered part of the *res gestae,* both in the case of the deceased or assaulted person[66] and the accused.[67]

(4.) Of Deceased or Injured Person. — (A.) GENERALLY. — While declarations of the deceased or injured person either before or after the homicidal act may be competent as *res gestae* in accordance with the rules elsewhere stated, the cases applying these principles are not harmonious. His statements made during the continuance[68] of the homicidal act are competent, and also those immediately preceding[69]

State *v.* Lucey, 24 Mont. 295, 61 Pac. 994.

The Prosecuting Witness' Declarations to his wife concerning the assault, made as soon as he met her after walking rapidly home from the scene of the homicide, a distance of a mile and a quarter, made while he was wounded, bleeding and suffering, were held to be part of the *res gestae.* Moore *v.* State, 31 Tex. Crim. 234, 20 S. W. 563.

66. State *v.* Martin, 124 Mo. 514, 28 S. W. 12; Lewis *v.* State, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720. See also State *v.* Kuhn, 117 Iowa 216, 90 N. W. 733.

An Hour Subsequent. — The declarations of the deceased in response to questions as to how he received the burns which subsequently caused his death were held admissible as part of the *res gestae,* although made over an hour after his injuries were received, on the ground that his intense suffering had not abated; but similar declarations in response to leading questions made an hour after the first were held incompetent, although his suffering still continued. Chapman *v.* State, 43 Tex. Crim. 328, 65 S. W. 1098.

67. In Craig *v.* State, 30 Tex. App. 619, 18 S. W. 297, the defendant's version of the difficulty, made to his mother ten minutes after the homicide, and after he had ridden from the scene thereof to his father's house about a mile away, and while he was covered with blood from a severe wound in the head, which was still bleeding profusely, and while he was weak, sick and nauseated and complaining of his wound, was held competent as part of the *res gestae.*

68. State *v.* Henderson, 24 Or. 100, 32 Pac. 1030; Crookham *v.* State, 5 W. Va. 510; Wilson *v.* People, 94 Ill. 299.

69. Immediately Preceding the Fatal Shooting. — Trulock *v.* State (Ark.), 69 S. W. 677.

Identifying Assailant. — Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746; Dickson *v.* State, 39 Ohio St. 73.

Declarations of deceased immediately preceding the homicide as to the proximity of the defendant, and the deceased's fear of being shot, held properly admitted as *res gestae.* Means *v.* State, 10 Tex. App. 16, 38 Am. Rep. 640.

Where the defendant had quarreled with the deceased and gone away for a weapon, the declarations of the deceased and his companions, "there he comes with a gun," made as they saw defendant approaching immediately previous to the homicide, were held properly admitted as part of the *res gestae.* State *v.* Biggerstaff, 17 Mont. 510, 43 Pac. 709.

Need Not Be Part of the Act. In Washington *v.* State, 19 Tex. App. 521, 53 Am. Rep. 387, the deceased's declaration that he had just seen the defendant going in a certain direction with a gun over his shoulder, was held admissible as part of the *res gestae,* although made in the defendant's absence three or four minutes previous to the homicide, which no third person witnessed, and not forming a part of any difficulty be-

and following[70] such act. A statement has been excluded made two minutes[71] after the homicide, and on the other hand one made over an hour[72] after the homicidal act has been held competent as part of the *res gestae*. Between these extremes[73] are many cases in which such statements have been either admitted or excluded, depending upon the other facts and circumstances, and the strictness or liberality of the court in applying the general

tween the parties nor made in anticipation of one.

In Thomas *v.* State, 67 Ga. 460, where it appeared that the defendant and the deceased, his wife, had quarreled about the former's attentions to another woman, the deceased's declaration on the night of the homicide as she left her house, "There are two persons down the alley; I think it is H. [the defendant] and his sweetheart; I will go and see," was held admissible as part of the *res gestae*, the deceased being found murdered near where she expected to find the defendant.

Fifteen Minutes Previous. — The deceased's declaration, made fifteen minutes previous to the homicide, of his intention of using upon defendant weapons he was then procuring, is not competent as *res gestae*. State *v.* Gregor, 21 La. Ann. 473.

In Com. *v.* Crowley, 165 Mass. 569, 43 N. E. 509, a statement of the defendant made as he was let out of the saloon by a back door, immediately after the quarrel with the deceased which led to the fatal affray twenty minutes later, was held competent as part of the *res gestae* tending to show his fear of being assaulted and injured by the deceased.

70. *Alabama.* — Stevens *v.* State, 138 Ala. 71, 35 So. 122.

Georgia. — Monday *v.* State, 32 Ga. 672, 79 Am. Rep. 314; Burns *v.* State, 61 Ga. 192; Von Pollnitz *v.* State, 92 Ga. 16, 18 S. E. 301, 44 Am. St. Rep. 72.

Iowa. — State *v.* Porter, 34 Iowa 131.

Louisiana. — State *v.* Euzebe, 42 La. Ann. 727, 7 So. 784.

Massachusetts. — Com. *v.* McPike, 3 Cush. 181, 50 Am. Dec. 727.

Pennsylvania. — Com. *v.* Van Horn, 188 Pa. St. 143, 41 Atl. 469.

Rhode Island. — State *v.* Epstein, 55 Atl. 204.

Texas. — Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745; Black *v.* State, 8 Tex. App. 329.

Utah. — People *v.* Callaghan, 4 Utah 49, 6 Pac. 49.

Wisconsin. — Bliss *v.* State, 94 N. W. 325.

71. Deceased's Declaration Two Minutes After the homicide, but in the defendant's absence and after deceased had left the scene of the homicide, was held improperly admitted as part of the *res gestae* because too long a period of time had elapsed and because the defendant was not present. State *v.* Carlton, 48 Vt. 636.

72. State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136; Chapman *v.* State, 43 Tex. Crim. 328, 65 S. W. 1098.

In Freeman *v.* State, 40 Tex. Crim. 545, 46 S. W. 641, *s. c.*, 51 S. W. 230, it appeared that deceased had been removed from the scene of his injury into his own saloon and had there fainted. Fifteen minutes after consciousness had returned and when a crowd had gathered around he made a statement as to the circumstances of the affray in narrative form, prefacing it by a statement as to other matters in no wise connected with the difficulty. Although an hour had elapsed since the occurrence related by him the declaration was held admissible as part of the *res gestae*. Henderson, J., *dissenting*.

73. Deceased's statement as to who killed him, after running about eighty feet from where he was shot and into another building, was held admissible as *res gestae*. Kirby *v.* Com., 77 Va. 681.

In Andrews *v.* Com., 100 Va. 801, 40 S. E. 935, the declarations of the deceased that the defendant had shot him, made to the witness, who had been awakened by the shooting and ran four hundred yards to the scene

of the homicide, were held admissible as part of the *res gestae*.

Deceased's statement as to who shot him, made in answer to a question by the person who had run to the scene of the homicide from his residence a block distant, held properly admitted. People *v.* Simpson, 48 Mich. 474.

Two Minutes After. — Deceased's statement that defendant shot him for nothing, made two minutes after the homicide, is admissible. Drake *v.* State, 29 Tex. App. 265, 15 S. W. 725.

Declarations by deceased two or three minutes after the homicide, and after he was carried to a drug store a few feet from where he was shot, were held properly admitted as part of the *res gestae*. Territory *v.* Davis, 2 Ariz. 50, 10 Pac. 359.

Deceased's statement two minutes after the shooting, while lying where he had fallen, made to his wife, to the effect that if she had not taken his gun away from him the result would have been different, held admissible as *res gestae*. State *v.* Hudspeth, 150 Mo. 12, 51 S. W. 483.

Declarations from Three to Five Minutes after the transaction, made in the absence of the defendant, held hearsay and inadmissible. State *v.* Pomeroy, 25 Kan. 349. But in Stevenson *v.* State, 69 Ga. 68, held competent as part of the *res gestae*.

The deceased's declaration that the defendant ought to have fought him fair and ought not to have hit him with a rock, made a few minutes after the cessation of the fight, and after the deceased had entered his own house, was held properly admitted as part of the *res gestae*. Dill *v.* State, 106 Ga. 683, 32 S. E. 660.

Statements Five Minutes After Held Competent. — State *v.* Arnold, 47 S. C. 9, 24 S. E. 926, 58 Am. St. Rep. 867; McKinney *v.* State, 40 Tex. Crim. 372, 50 S. W. 708; Mitchell *v.* State, 71 Ga. 128; Pierson *v.* State, 21 Tex. App. 14, 17 S. W. 468. *Contra.* — Mayes *v.* State, 64 Miss. 329.

The deceased's reply to the witness' question as to who shot him, that it was defendant, was held admissible as part of the *res gestae*, although made five or ten minutes after the shooting. Farris *v.* State (Tex. Crim.), 56 S. W. 336.

The assaulted person's statement five minutes after the assault and after he had left the scene thereof, is not admissible as *res gestae*. State *v.* Noeninger, 108 Mo. 166, 18 S. W. 990.

Ten or Fifteen Minutes After Held Competent. — Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471; State *v.* Molisse, 38 La. Ann. 381, 58 Am. Rep. 181.

Deceased's declaration ten or fifteen minutes after the assault upon him as to how he received his injuries was held competent as part of the *res gestae*, on the ground that it was made while he was suffering from his wounds and under such circumstances as to preclude the idea of fabrication. State *v.* Murphy, 16 R. I. 528, 17 Atl. 998, *disapproving* Reg. *v.* Bedingfield, 14 Cox C. C. 341.

In State *v.* Estoup, 39 La. Ann. 219, the deceased's declaration that the defendant had shot him, made ten minutes after the fatal difficulty, and after he had moved away from the place of the shooting sixty or seventy yards, was held incompetent because not part of the *res gestae*.

A Statement Fifteen or Twenty Minutes After the Homicide Held Competent. — Benson *v.* State, 38 Tex. Crim. 487, 43 S. W. 527; Chalk *v.* State, 35 Tex. Crim. 116, 32 S. W. 534; Lindsey *v.* State, 35 Tex. Crim. 164, 32 S. W. 768; Stagner *v.* State, 9 Tex. App. 440; Irby *v.* State, 25 Tex. App. 203, 7 S. W. 705.

Contra. — Deceased's declarations, made fifteen or twenty minutes after he received his injuries, as to how he received them, were held incompetent and not part of the *res gestae*, although he was at the time suffering from his wounds and died thirty-six hours afterward. Estell *v.* State, 51 N. J. L. 182, 17 Atl. 118. See also State *v.* Epstein (R. I.), 55 Atl. 204.

Deceased's Statement Thirty Minutes After the Homicide Held Competent. — Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750.

The declaration of the deceased, an ignorant woman, made within a half an hour to an hour and

rules. Merely narrative declarations by the deceased are not admissible.[74]

(B.) As to Cause of Act. — The deceased's statement that the defendant injured him without cause is admissible if otherwise conforming to the requirements of the *res gestae* rule.[75]

(C.) Exculpating Accused. — Such statements, otherwise competent as *res gestae,* are not inadmissible because they tend to exonerate the accused and place the blame for the difficulty upon the speaker.[76]

a half after the infliction of the wounds, was held properly admitted as *res gestae,* it appearing that she had not spoken theretofore except to scream or moan with pain. Lewis *v.* State, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720.

The declarations of the deceased that he had been accidentally shot by the defendant, made more than a half hour after the shooting, and after deceased had regained consciousness and been removed to a hotel, was held improperly excluded when offered in evidence by the defendant, being competent as part of the *res gestae,* the circumstances being such as to show that it was spontaneous. Collins *v.* State, 46 Neb. 37, 64 N. W. 432; *citing* and *commenting* extensively upon the authorities.

Incompetent. — Deceased's declaration as to who killed him, made twenty-five or thirty minutes after the homicide and after he had been carried home, undressed and laid on his bed, was held not admissible as part of the *res gestae.* State *v.* Frazier, 1 Houst. Crim. (Del.) 176.

Deceased's statement in reply to a question thirty minutes after a conflict and while complaining of his injuries, that defendant had hit him with a chair, was held not part of the *res gestae* and therefore not admissible. Denton *v.* State, 1 Swan (Tenn.) 279.

74. Merely Narrative Declarations. — In the following cases statements of the deceased or injured person were held not part of the *res gestae* because merely narative.

Colorado. — Graves *v.* People, 18 Colo. 170, 32 Pac. 63; Herren *v.* People, 28 Colo. 23, 62 Pac. 833.

Idaho. — People *v.* Dewey, 2 Idaho 83, 6 Pac. 103.

Indiana. — Hall *v.* State, 132 Ind. 317, 31 N. E. 536; Montgomery *v.* State, 80 Ind. 338; Binns *v.* State, 57 Ind. 46; Jones *v.* State, 71 Ind. 66; Doles *v.* State, 97 Ind. 555.

Iowa. — State *v.* Deuble, 74 Iowa, 509, 38 N. W. 383.

Louisiana. — State *v.* Charles, 111 La. 933, 36 So. 29.

Mississippi. — Brown *v.* State, 78 Miss. 637, 29 So. 519, 84 Am. St. Rep. 641; Kraner *v.* State, 61 Miss. 158.

Missouri. — State *v.* Hendricks, 172 Mo. 654, 73 S. W. 194; State *v.* Rider, 90 Mo. 54, 1 S. W. 825.

Nevada. — State *v.* Dougherty, 17 Nev. 376, 30 Pac. 1074.

Ohio. — Forrest *v.* State, 21 Ohio St. 641.

Utah. — People *v.* Kessler, 13 Utah 69, 44 Pac. 97.

75. Norfleet *v.* Com., 17 Ky. L. Rep. 1137, 33 S. W. 938; Drake *v.* State, 29 Tex. App. 265, 15 S. W. 725.

The deceased's declaration, "I am shot all to pieces for nothing that I have done to be killed for," held competent as *res gestae.* Shotwell *v.* Com., 24 Ky. L. Rep. 255, 68 S. W. 403.

A declaration by the deceased, after he had been shot by the defendants, police officers, "Gentlemen, I am dying, I did no wrong," while not competent as a dying declaration because a conclusion, is admissible as part of the *res gestae.* Moran *v.* People (Ill.), 45 N. E. 230.

76. Collins *v.* State, 46 Neb. 37, 64 N. W. 432.

Deceased's statement made in response to a question a short time after being carried into a house immediately after the shot, to the effect that defendant shot him, but

(5.) Of Defendant Generally. — The declarations and statements of the defendant made during the continuance of the homicidal act are competent as part of the *res gestae*.[77] Those made by him subsequent to the act and when its influence has ceased to control his mind and the guarantee of their truth no longer exists, are not competent in his own behalf.[78] In applying the general rules to particular cases much depends on the circumstances of the case in question,[79] and the decisions are not altogether uniform as to the length of time, if any, which may intervene between the statement and the homicidal act. Illustrations of the rulings on the competency of statements made both previous[80] and subsequent[81] to the act will be found in the notes.

did not intend to do it, was held improperly excluded on the ground that it formed part of the *res gestae*. Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761.

Deceased's declaration immediately after the shooting and while his wound was being dressed, to the effect that defendant was not at fault, but that he, deceased, was the cause of the difficulty, and that if his pistol had not hung fire he would have killed defendant, was held improperly excluded on the ground that it was competent as part of the *res gestae*. State *v.* Sloan, 47 Mo. 604.

In State *v.* Molisse, 38 La. Ann. 381, 58 Am. Rep. 181, the exclusion of the deceased's declaration, made ten minutes after the shooting, that "if he had not been so willing to fight, he would not have been shot by the defendant," was held error.

77. State *v.* Abbott, 8 W. Va. 741; State *v.* Walker, 77 Me. 488, 1 Atl. 357; Martin *v.* State, 89 Ala. 15, 8 So. 23, 18 Am. St. Rep. 91; State *v.* Rollins, 113 N. C. 722, 18 S. E. 394. Stephens *v.* State, 20 Tex. App. 255.

78. Steel *v.* State, 61 Ala. 213; Territory *v.* Yarberry, 2 N. M. 391; Cockerell *v.* State, 32 Tex. Crim. 585, 25 S. W. 421; Stephens *v.* State, 20 Tex. App. 255; Jackson *v.* Com. (Ky.), 37 S. W. 817; Grubb *v.* State, 43 Tex. Crim. 72, 63 S. W. 314; State *v.* Talbert, 41 S. C. 526, 19 S. E. 852.

79. McGee *v.* State, 31 Tex. Crim. 71, 19 S. W. 764.

80. The declaration of the defendant shortly previous to the fatal difficulty, that he heard the deceased coming and wanted to increase his speed so as to avoid meeting him, was held improperly excluded, being part of the *res gestae*. Russell *v.* State, 11 Tex. App. 288.

See *supra* this article, the section "Res Gestae; Declarations — Previous to Homicidal Act."

81. Defendant's declaration to the first person who reached the scene of the homicide, in response to the latter's statement, "You have killed him," that "I only struck him with my fist," held admissible as part of the *res gestae*. Ross *v.* Com., 21 Ky. L. Rep. 1344, 55 S. W. 4.

The defendant's declaration to a neighbor a few minutes after the homicide, and after defendant had left the scene thereof, to the effect that he had done the act in self-defense and that he wanted his neighbor to go back to the scene of the homicide with him, was held admissible as *res gestae*. Honeycutt *v.* State, 42 Tex. Crim. 129, 57 S. W. 806.

Statements Made by the Defendant to His Captors, who had pursued him a distance of a quarter of a mile from the scene of the homicide, were held properly rejected because not part of the *res gestae*. State *v.* Pugh, 16 Mont. 343, 40 Pac. 861.

Defendant's Expressions of Regret, and His Request of the Bystanders to Summon a Doctor, made within five or six minutes after the fatal difficulty, were held admissible as part of the *res gestae*. Bateson *v.* State (Tex. Crim.), 80 S. W. 88.

The defendant's request of the witness that he go for a doctor and do all he could for the deceased, made several minutes subsequent to the kill-

(6.) Declarations of Third Persons. — (A.) GENERALLY. — The declarations or statements of third persons who participated in some manner in the homicidal act are admissible as part of the *res gestae* if they were made contemporaneously with the main act, or so near

ing, after leaving the place of the homicide, is inadmissible. State *v.* Melton, 37 La. Ann. 77.

One Minute After. — Defendant's declaration, made as he was arrested a minute after the fatal shooting, that he would shoot anybody who tried to cut his throat, was held competent as part of the *res gestae*, and as corroborative of other evidence tending to show that deceased was advancing upon defendant with a knife in his hand. Foster *v.* State, 8 Tex. App. 248.

The defendant's declaration about one minute after the killing, as he ran from the scene of the homicide to where the witness was standing, "that he would not have done it for the world," was held competent as part of the *res gestae*. Mitchum *v.* State, 11 Ga. 615.

Defendant's declaration a minute after the shooting as to his reason therefor is incompetent. King *v.* State, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681.

Two or Three Minutes After. The statement of the defendant as to how the shooting occurred, made two or three minutes afterward to a person who heard the shooting and ran about a quarter of a mile to the scene thereof, was held admissible as part of the *res gestae*. Beckham *v.* State (Tex. Crim.), 69 S. W. 534.

Defendant's declaration two minutes after the homicide and after he had fled from the scene thereof that it was done accidentally, is not admissible in his behalf as part of the *res gestae*. State *v.* Seymour, 1 Houst. Crim. Cas. (Del.) 508.

The offer by the defendant, made two or three minutes after the shooting, "to lift the deceased up," is not admissible as part of the *res gestae*, because too remote. Goley *v.* State, 87 Ala. 57, 6 So. 287.

Three or Four Minutes After. Defendant's statement, made three or four minutes after the homicide, and within thirty feet of the scene thereof, held admissible in his favor as *res gestae*. Ingram *v.* State (Tex. Crim.), 43 S. W. 518. See also Little *v.* Com., 25 Gratt. (Va.) 921.

Five Minutes After. — The defendant's "act, declaration or exclamation must be so intimately interwoven with the principal fact or event which it characterizes as to be regarded as a part of the transaction itself," hence his declaration five minutes after the tragedy, and after he had left the scene thereof and returned, is not admissible. Davis *v.* Com., 25 Ky. L. Rep. 1426, 77 S. W. 1101.

The defendant's statement as to the reason why he struck the fatal blow, and that he did not intend to kill the deceased, made five minutes after the homicide, is not part of the *res gestae*. State *v.* Davis, 104 Tenn. 501, 58 S. W. 122.

Defendant's statement five minutes after the homicide, made while he was still excited and before he had left the scene, that "I hope I haven't hurt him much. I did not think the glass was heavy enough to knock him down. I just wanted to keep him from kicking me any more," was held improperly excluded, being part of the *res gestae*. Griffin *v.* State, 40 Tex. Crim. 312, 50 S. W. 366.

Ten or Fifteen Minutes After. Defendant's statement that the shooting was accidental, made ten or fifteen minutes after the occurrence, was held not part of the *res gestae* where he was laboring under no excitement nor suffering from any injury. Brown *v.* State, 38 Tex. Crim. 597, 44 S. W. 176. But in Craig *v.* State, 30 Tex. App. 619, 18 S. W. 297, declarations ten minutes after the homicide were held part of the *res gestae*, on the ground that the defendant was at the time suffering from severe wounds received during the difficulty.

Defendant's declaration ten or fifteen minutes subsequent as to why he

in point of time as to form part of the transactions and otherwise conform to the requisites of this class of evidence.[82]

(B.) Whether Must Be Participants. — In some jurisdictions it is held that the declarations of third persons are not admissible as part of the *res gestae* unless they were participants in the homicidal act, or in some way connected with it other than as mere onlookers.[83] In others the fact that the speaker was a mere onlooker or by-

killed the deceased, made in response to a question, not admissible as *res gestae*. Jones *v.* State, 22 Tex. App. 324, 3 S. W. 230.

82. Shotwell *v.* Com., 24 Ky. L. Rep. 255, 68 S. W. 403; Hall *v.* State, 130 Ala. 45, 30 So. 422; Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823; Jeffries *v.* State, 9 Tex. App. 598.

Declaration of another who was shot at the same time as deceased competent as *res gestae*. State *v.* Schmidt, 73 Iowa 469, 35 N. W. 590.

The outcries of a third person murdered by the defendant a few minutes previous to the homicide and during the perpetration of one and the same burglary were held properly admitted as part of the *res gestae*. State *v.* Wagner, 61 Me. 178.

The declaration of a person who was struggling with the defendant at the time the latter's pistol was discharged, killing the deceased, to the effect that the occurrence was an accident, is admissible. Selby *v.* Com., 25 Ky. L. Rep. 2209, 80 S. W. 221.

A remark addressed to the defendant at the time of the homicide by his companion, who was killed during the difficulty, "You are the cause of my getting killed," and the defendant's reply, "You ought not to have gotten into it," were held admissible as part of the *res gestae*. McMahon *v.* State (Tex. Crim.), 81 S. W. 296.

Where the homicide was committed in the dark and in the midst of a crowd, and it was doubtful who inflicted a wound in the deceased's back, the declaration of a bystander immediately after the homicide that he had cut the accused in the back was held admissible as *res gestae*, it appearing that the accused himself had no such cut. Flanegan *v.* State, 64 Ga. 52.

The Declarations of Deceased's Companions, who, it is claimed, participated in his assault upon defendant, are admissible as part of the *res gestae*. People *v.* Roach, 17 Cal. 298.

Where two persons were seen running rapidly away from the place where the deceased had just been killed, the declaration of one of them, "W., you have killed him," was held admissible as part of the *res gestae*. Briggs *v.* Com., 82 Va. 554.

Threats by the Bystanders to hang the defendant, and their demonstrations in this direction, are not admissible. State *v.* Sneed, 88 Mo. 138.

83. Felder *v.* State, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777; Bradshaw *v.* State, 10 Bush (Ky.) 576; Baker *v.* State (Tex. Crim.), 77 S. W. 618; *Ex parte* Kennedy (Tex. Crim.), 57 S. W. 648.

But see Collins *v.* Com., 24 Ky. L. Rep. 884, 70 S. W. 187, in which the exclamations of the assaulted person's wife and daughter immediately after the shooting were held competent as part of the *res gestae*.

Comments and Criticisms of mere observers and bystanders are not admissible as *res gestae*. State *v.* Riley, 42 La. Ann. 995, 8 So. 469; State *v.* Oliver, 39 La. Ann. 470.

"What comes from a looker-on" characterizing the act is apt to express merely his belief or his sympathy or prejudices. His testimony, if he has any actual knowledge, is attainable, and reason prompts that he should be put on the witness stand. State *v.* Bellard, 50 La. Ann. 594, 23 So. 504. *Commenting* on State *v.* Ramsey, 48 La. Ann. 1407, 20 So. 904, and State *v.* Desroches, 48 La. Ann. 428, 19 So. 250 (apparently *contra*), and finally settling the rule excluding such evidence.

stander will not suffice to exclude his statement if it has all the other characteristics of *res gestae*.[84]

H. Position of Parties. — a. *Generally.* — Evidence as to the relative positions of the defendant and the deceased at the time of the homicide is always competent, together with testimony as to measurements of the distance between the places where they stood.[85]

b. *Opinion.* — It is not competent for a witness to state his opinion as to the relative position of the parties, either from the appearance of the wounds or other physical facts.[86] But the contrary[87]

84. Barrow *v.* State, 80 Ga. 191, 5 S. E. 64; Johnson *v.* State, 88 Ga. 203, 14 S. E. 208; United States *v.* Schneider, 21 D. C. 381; People *v.* McArron, 121 Mich. 1, 79 N. W. 944; State *v.* Sexton, 147 Mo. 89, 48 S. W. 452; State *v.* Walker, 78 Mo. 380 (*citing* Newton *v.* Insurance Co., 2 Dill. [U. S.] 154, and Insurance Co. *v.* Mosley, 8 Wall. [U. S.] 397).

The exclamation of a bystander to a person who was coming to the assistance of the deceased, "Hurry up; they have about killed this man," made on the spot in the presence of the assaulted man, while the assailants were yet in sight, just leaving their victim, was held properly admitted as *res gestae*. State *v.* Kaiser, 124 Mo. 651, 28 S. W. 182.

In Knight *v.* State, 114 Ga. 48, 39 S. E. 928, 88 Am. St. Rep. 17, the deceased, immediately after the shooting, asked who shot him. The response of a bystander that it was the defendant was held admissible.

Exclamations of third persons, present at the killing, showing the means and mode thereof, are admissible as *res gestae*. State *v.* McCourry, 128 N. C. 594, 38 S. E. 883.

85. Goodwin *v.* State, 102 Ala. 87, 15 So. 571.

A witness who saw the body of the deceased as it lay on the bed where he met his death may testify as to the position which the course of the blood showed that the body must have occupied at the time of the homicide. Dinsmore *v.* State, 61 Neb. 418, 85 N. W. 445.

An Experiment made to determine the relative position of the parties at the time of the homicide was held admissible in Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046. See more fully article "Experiments," Vol. 5, p. 483, note 31.

86. *Arkansas.* — Brown *v.* State, 55 Ark. 593, 18 S. W. 1051. But see Williams *v.* State, 50 Ark. 511, 9 S. W. 5.

California. — People *v.* Milner, 122 Cal. 171, 54 Pac. 833; People *v.* Hill, 116 Cal. 562, 48 Pac. 711; People *v.* Smith, 93 Cal. 445, 29 Pac. 64.

New York. — People *v.* Kennedy, 39 N. Y. 245.

Texas. — Thompson *v.* State, 30 Tex. App. 325, 17 S. W. 448; Williams *v.* State, 30 Tex. App. 429, 17 S. W. 1071; Morton *v.* State, 43 Tex. Crim. 533, 67 S. W. 115; Cooper *v.* State, 23 Tex. 331. See article "Expert and Opinion Evidence," Vol. V., p. 588.

Position of Deceased's Arm. — The opinion of a witness as to the position of the deceased's arm when shot, based upon the fact that the same bullet pierced the arm and the body, was held incompetent because invading the province of the jury. Foster *v.* State, 70 Miss. 755, 12 So. 822; Blain *v.* State, 33 Tex. Crim. 236, 26 S. W. 63; People *v.* Farley, 124 Cal. 594, 57 Pac. 571.

The action of the witness in illustrating the course of the bullet by pointing with his hand at points on the body of the state's counsel corresponding with the entrance and exit of a bullet is not objectionable as stating the position the parties may have occupied in order that the ball should have made the entry and exit shown. Morton *v.* State, 43 Tex. Crim. 533, 67 S. W. 115.

87. State *v.* Buralli (Nev.), 71 Pac. 532. See also Stevens *v.* State, 138 Ala. 71, 35 So. 122; Com. *v.* Lenox, 3 Brewst. (Pa.) 249.

has been held. And a competent expert may give his opinion as to the direction from which the fatal blow was given.[88]

c. *Distance Apart.* — Whether the parties were close together or far apart at the time the fatal injury was inflicted may be shown under some circumstances by experiments[89] and expert testimony.[90]

I. Range and Course of Bullet. — The range and course of the bullets which entered the body of the deceased or objects near him may be shown.[91]

7. Intent, Malice and Premeditation. — A. Direct Testimony by Defendant. — Whenever the intent or motive of the defendant is material, he may testify directly as to what it was at the time in question.[92] Thus he may testify that he did not intend to kill the deceased or injured person,[93] or that he had no malicious feelings toward him,[94] and he may give his reasons for his act.[95] It has been held, however, that when the defendant has deliberately used

In State *v.* Sullivan, 43 S. C. 205, 21 S. E. 4, it was held competent for a physician who had examined the wound to give his opinion as to the position in which the deceased was standing with reference to the pistol with which he was shot.

88. A medical expert, after describing the wound and its location, and giving his opinion as to the character of the weapon by which it was caused, may testify to the opinion that the blow came from the rear of the injured person. Perry *v.* State, 110 Ga. 234, 36 S. E. 781. See article "Expert and Opinion Evidence," Vol. V., p. 589.

A physician who has made an examination of the body may give his opinion that the gun with which the wound was inflicted must have been fired from a position higher than that of the deceased. State *v.* Merriman, 34 S. C. 16, 12 S. E. 619.

89. See article "Experiments," Vol. V., p. 496.

90. State *v.* Asbell, 57 Kan. 398, 46 Pac. 770. But see People *v.* Lemperle, 94 Cal. 45, 29 Pac. 709.

A competent expert may give his opinion as to how far apart the parties were, based on the appearance of a wound made with a load of shot. State *v.* Jones, 41 Kan. 309, 21 Pac. 265.

91. People *v.* Fitzgerald, 138 Cal. 39. 70 Pac. 1014; State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113; State *v.* Wisdom, 84 Mo. 177.

Cavaness *v.* State (Tex. Crim.), 74 S. W. 908, in which testimony that the fatal shot, when it struck the body, "was ranging in a sloping direction downward" was held improperly admitted.

Angle Formed by Bullet. — A witness may be permitted to state the angle which a bullet took which was fired into the floor during the difficulty. Spangler *v.* State (Tex. Crim.), 61 S. W. 314.

92. See fully article "Intent."

93. *Colorado.* — Taylor *v.* People, 21 Colo. 426, 42 Pac. 652.

Connecticut. — State *v.* Ferguson, 71 Conn. 227, 41 Atl. 769.

Georgia. — Alexander *v.* State, 44 S. E. 851.

Louisiana. — State *v.* Wright, 40 La. Ann. 589, 4 So. 486.

Maryland. — Jenkins *v.* State, 80 Md. 72, 30 Atl. 566.

Missouri. — State *v.* Palmer, 88 Mo. 568; State *v.* Jones, 14 Mo. App. 589; *affirming* 79 Mo. 441.

Nebraska. — Cummings *v.* State, 50 Neb. 274, 69 N. W. 756.

New York. — Kerrains *v.* State, 60 N. Y. 221, 19 Am. Rep. 158.

North Carolina. — State *v.* Hall, 132 N. C. 1094, 44 S. E. 553.

Texas. — Koller *v.* State, 36 Tex. Crim. 496, 38 S. W. 44.

94. State *v.* Crawford, 31 Wash. 260, 71 Pac. 1030; State *v.* Evans, 33 W. Va. 417, 10 S. E. 792; Jackson *v.* Com., 96 Va. 107, 30 S. E. 452.

95. Savary *v.* State, 62 Neb. 166, 87 N. W. 34.

a deadly weapon in a manner dangerous to life, he will not be permitted to say that he did not intend to kill.[96] And in one jurisdiction the direct testimony of the defendant as to his undisclosed intention or mental condition is incompetent.[97]

B. Demeanor of Defendant. — The appearance and demeanor of the defendant during the commission of the homicidal act and immediately before and after, are competent evidence of the state of his mind toward the injured person and the intent with which the act was done.[98]

C. Nature and Circumstances of Act. — a. *Generally.* — The nature of the act, the circumstances under which it was done and the consequences resulting therefrom are competent evidence of the criminal intent, malice and premeditation.[99]

The Manner in Which the Weapon of Assault Was Used by the defendant is admissible to show the specific intent of murder.[1]

b. *Nature and Effect of Wound.* — In proof of the intent necessary to support a charge of assault with intent to murder it is competent to show the nature and effect of the assaulted person's wounds,[2] the probability of their producing death,[3] and the medical

96. Where the defendant has deliberately stabbed the deceased he will not be permitted to testify that he did not intend to kill the latter. State *v.* Strong, 153 Mo. 548, 55 S. W. 78; Lewis *v.* State, 96 Ala. 6, 11 So. 259, 38 Am. St. Rep. 75.

97. Fonville *v.* State, 91 Ala. 39, 8 So. 688; Lewis *v.* State, 96 Ala. 6, 11 So. 259, 38 Am. St. Rep. 75; Burke *v.* State, 71 Ala. 377.

Defendant's Intention or Mental Condition. — The defendant cannot testify that he had no intention of engaging in a difficulty with the deceased or his family, and "that he was in a fight" just previous to the homicide. Stewart *v.* State, 78 Ala. 436. He cannot state "why he shot the deceased." Seams *v.* State, 84 Ala. 410, 4 So. 521; nor the intention or purpose with which he took his gun to the scene of the homicide. Dean *v.* State, 105 Ala. 21, 17 So. 28.

98. Blound *v.* State, 49 Ala. 381.

Testimony That the Defendant Seemed Angry is not inadmissible as a conclusion. State *v.* Utley, 132 N. C. 1022, 43 S. E. 820; Catlett *v.* State (Tex. Crim.), 61 S. W. 485; Miller *v.* State, 110 Ala. 674, 19 So. 191; Bennett *v.* State, 39 Tex. Crim. 639, 48 S. W. 61.

A witness may state whether or not the acts of the defendant toward the deceased, which caused the difficulty ending in the homicide, were done in a jocular or insulting manner. Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153. See also State *v.* Edwards, 112 N. C. 901, 17 S. E. 521.

99. State *v.* Barfield, 29 N. C. 299.

1. Henry *v.* State (Tex. Crim.), 54 S. W. 592, *holding* admissible testimony as to the manner in which defendant used a stick of stovewood.

2. State *v.* Woodward, 84 Iowa 172, 50 N. W. 885; King *v.* State, 21 Ga. 220; State *v.* Grant, 144 Mo. 56, 45 S. W. 1102; Williams *v.* Com., 19 Ky. L. Rep. 1427, 43 S. W. 455.

The description of the assaulted person's wound, the location of the bullet causing it, and the fact that partial paralysis was caused by the shooting, are admissible for this purpose. Jowell *v.* State, 44 Tex. Crim. 328, 71 S. W. 286.

On the trial of a charge of assault with intent to murder, the physicians who made a *post-mortem* examination of the injured person's body several months after the assault were allowed to testify to the appearance and condition of the wound at that time. Friederich *v.* People, 147 Ill. 310, 35 N. E. 472.

3. State *v.* Woodward, 84 Iowa 172, 50 N. W. 885.

or surgical attention which they necessitated.[4] When the wound inflicted results in death it is not competent to show that a similar wound upon any other portion of the body would not have resulted fatally.[5]

c. *Cause of the Difficulty.* — **(1.) Generally.** — While it is always competent to show the cause of the difficulty which immediately resulted in the homicide,[6] the details of a previous occurrence, which was the cause of the fatal difficulty, are not competent when not part of the *res gestae*,[7] unless the objecting party has himself partly drawn them out.[8]

(2.) Merits of Controversy. — Where the homicide results from a quarrel between the parties, the merits of the controversy are immaterial.[9] But as bearing upon their good or bad faith it is competent to show the nature and foundation of their claims.[10]

4. State *v.* Grant, 144 Mo. 56, 45 S. W. 1102; Williams *v.* Com., 19 Ky. L. Rep. 1427, 43 S. W. 455.

5. Allen *v.* State, 111 Ala. 80, 20 So. 490.

6. State *v.* Hinton, 49 La. Ann. 1354, 22 So. 617.

Remarks by the defendant to a third person previous to the fatal difficulty are admissible, although not made in the hearing of the deceased, when his subsequent knowledge of them was the cause of the difficulty. Elmore *v.* State (Tex. Crim.), 78 S. W. 520.

Where the Homicide Grew Out of a Difficulty Between Other Persons immediately previous to the killing, the fact that there was such a difficulty may be shown. Elmore *v.* State, 110 Ala. 63, 20 So. 323.

Evidence of a difficulty between the deceased and other persons a week previous to the homicide in the absence of the defendant, but which he later took sides in, which difficulty was the primary cause of the homicide, was held properly admitted. People *v.* Gibson, 106 Cal. 458, 39 Pac. 864. To the same effect, State *v.* Testerman, 68 Mo. 408.

7. McRae *v.* State, 120 Ala. 359, 25 So. 214.

A vulgar and abusive letter written by the defendant concerning his own wife, the assaulted person's mother-in-law, which was the cause of the quarrel between the parties as a consequence of which the felonious assault was made, was held improperly admitted, not being a part of the *res gestae* and having no connection with the assault, and tending to prejudice the defendant. State *v.* Williamson, 16 Mo. 394.

In Thacker *v.* Com., 24 Ky. L. Rep. 1584, 71 S. W. 931, evidence as to the particulars of a difficulty between the defendant and a third person, occurring just before the arrival of the deceased, was held inadmissible as being unconnected with the homicide. But the fact that this difficulty occurred in view of the deceased was held competent as explaining the latter's reason for going to the scene of the difficulty.

Killing of Defendant's Brother by Deceased. — The details of the killing of the defendant's brother by the deceased are not admissible to explain the defendant's state of mind toward the latter, even though such killing was the origin of the feud which resulted in the homicide. Poole *v.* State (Tex. Crim.), 76 S. W. 565.

8. Rone *v.* Com., 24 Ky. L. Rep. 1174, 70 S. W. 1042,

9. People *v.* Yokum, 118 Cal. 437, 50 Pac. 686. In this case the homicide resulted from a dispute over ownership of certain land; evidence tending to show that defendant was right in his contention was held properly excluded.

10. People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1, in which it was held proper to show that an agent of a railroad had given the person whose cause the deceased espoused the right to take certain ties, the dis-

d. *In Behalf of Defendant.* — **(1.) Generally.** — The defendant may also show all the circumstances under which his act occurred, and which tend to explain his motives and intention.[11]

(2.) Authority or Instructions From Employer. — Evidence that the accused was acting in obedience to the authority and instructions of his employer during the difficulty which resulted in the homicide is a competent circumstance in disproof of malice.[12] Such fact has, however, been held irrelevant where not known to the deceased.[13]

D. Relation of Parties. — a. *Generally.* — Any circumstances tending to show the previous relation of the parties are competent on the state of the defendant's mind toward the deceased or assaulted person at the time of the homicide or assault;[14] but such circumstances must be connected in some way with the defendant.[15]

b. *Hostile Acts and Conduct.* — **(1.) Generally.** — The accused's hostile acts and conduct toward the deceased or assaulted person,

puted right to which was the cause of the difficulty.

11. For the purpose of negativing malice the defendant may show the information given him concerning a trespass upon his premises of certain of deceased's sheep, the killing of one of which was the cause of the quarrel between himself and the deceased, and which ended in the homicide. State *v.* Campbell, 25 Utah 342, 71 Pac. 529.

Where the homicide was committed by the defendant while acting as night-watchman of a depot and railroad yards, the exclusion of evidence offered by him that previous thereto there had been a great deal of car-breaking and stealing from cars at the depot where he was on guard, was held error on the ground that the evidence tended to explain the defendant's conduct. Hobbs *v.* State, 16 Tex. App. 517. But in State *v.* Anderson, 4 Nev. 265, evidence offered by the defendant for the purpose of showing that he was in a state of great excitement, to the effect that shortly previous to the homicide he had been engaged in difficulties with third persons with which deceased was in no way connected, was held not competent for the purpose of mitigating the offense.

12. State *v.* Halliday, 111 La. 47, 35 So. 380. In this case it appeared that the homicide was committed at a private picnic ground under the charge of the defendant, during a difficulty arising from his attempt to maintain order. The exclusion of evidence as to the instructions given by the owner to the defendant was held error, on the ground that defendant's relation to the property and his authority to maintain order thereon was a competent circumstance bearing upon the question of malice.

13. Steel *v.* State, 61 Ala. 213.

14. People *v.* Barberi, 149 N. Y. 256, 43 N. E. 635.

It is competent to show, as bearing upon the intent, the previous illicit relation of the parties, the deceased's refusal to continue it, and the defendant's threats and demonstrations of violence upon such refusal. Walker *v.* State, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17.

15. In Caddell *v.* State, 129 Ala. 57, 30 So. 76, testimony that the deceased wife was frequently seen crying in the absence of the defendant was held incompetent as hearsay because not done in defendant's presence.

Evidence as to shot-holes in the walls of defendant's residence is incompetent on his trial for the murder of his wife, for the purpose of showing their relations, without proof of when or how such holes were made. Raines *v.* State, 81 Miss. 489, 33 So. 19.

both before[16] and after[17] the assault in question, are competent evidence of his intent, malice and premeditation, if not too remote.[18]

(2.) Remoteness. — No general rule can be laid down as to the length of time intervening between the hostile conduct and the final assault which will serve to exclude such evidence for remoteness. The determination of this question depends upon the circumstances of the case, the subsequent relations of the parties, and the nature of the act.[19]

(3.) Rebuttal. — The defendant in rebuttal is entitled to show the circumstances under which such acts occurred.[20] And evidence as to the deceased's previous threats against him is admissible to rebut the inference of malice arising from proof of his hostile acts, although he was the aggressor in the fatal difficulty.[21]

16. *Alabama.* — Anderson *v.* State, 79 Ala. 5; Ross *v.* State, 62 Ala. 224.

Arkansas. — Austin *v.* State, 14 Ark. 555; Milton *v.* State, 43 Ark. 367.

Maine. — State *v.* Pike, 65 Me. 111.

Maryland. — Williams *v.* State, 64 Md. 384, 1 Atl. 887.

New York. — People *v.* Jones, 99 N. Y. 667, 2 N. E. 49.

North Carolina. — State *v.* Ellis, 101 N. C. 765, 7 S. E. 704, 9 Am. St. Rep. 49.

Tennessee. — Burnett *v.* State, 82 Tenn. 439.

Virginia. — Reed *v.* Com., 98 Va. 817, 36 S. E. 399.

A Former or a Subsequent Assault by the defendant upon the assaulted person is admissible to show the intent to kill. State *v.* Pennington, 124 Mo. 388, 27 S. W. 1106.

17. McManus *v.* State, 36 Ala. 285.

18. See *infra,* "Remoteness."

His Pursuit of and Threats Against the Assaulted Party are admissible to show his intention. People *v.* Yslas, 27 Cal. 631.

Where the alleged cause of death of the deceased, a child, was a severe beating, it was held competent to show that after the beating defendant had exposed the weak and sickly child to inclement weather, such evidence being competent to show malice. Hornsba *v.* Com., 14 Ky. L. Rep. 166, 19 S. W. 845. See also Burnett *v.* State, 82 Tenn. 439.

19. See *infra* this article, "Previous Difficulties — Remoteness."

Two Years Previous Too Remote. An assault on the deceased two years previous to the homicide is too remote to show malice and is not admissible without other evidence connecting it with the homicide. "It is impossible to say how far back, as respects time, other crimes may be so connected as to be admissible. When, in view of all the facts in the cause, including lapse of time and no recurring trouble, it does not appear that there is a connection between the crime charged and the other affairs, or that they tend to prove some fact included in it, they cannot be proved." Billings *v.* State, 52 Ark. 303, 12 S. W. 574.

Two Months Previous Competent. Linehan *v.* State, 113 Ala. 70, 21 So. 497.

A Year Previous Not Too Remote. Hamilton *v.* State, 41 Tex. Crim. 644, 56 S. W. 926.

In Herman *v.* State, 75 Miss. 340, 22 So. 873, evidence of an assault by the defendant upon the deceased with an open knife twelve months previous to the homicide was held incompetent to show motive or intent, on the ground of remoteness, and further because the undisputed evidence showed a resumption of friendly relations and their continuance down to the day of the homicide.

20. People *v.* Curtis, 52 Mich. 616, 18 N. W. 385.

21. State *v.* McNeely, 34 La.

Previous Attempts by the defendant on the life of the deceased are admissible in proof of malice, criminal intent, deliberation and premeditation,[22] even though the homicide was committed in a manner wholly different from any such previous attempts.[23]

c. *Previous Difficulties and Ill-Feeling.* — **(1.) Generally.** — As evidence of intent, malice and premeditation it is competent to show previous quarrels and difficulties between the parties[24] and other circumstances indicating ill-feeling and unfriendly relations between them.[25] The pendency of a lawsuit between the parties may be shown.[26]

Ann. 1022. In this case the state proved that on the day of the homicide the defendant had gone to the deceased's house and deliberately shot at him. Evidence offered by the defendant as to the deceased's previous threats against him was admitted over objection, subject to exclusion if the defendant appeared to be the aggressor. An instruction requiring the jury to disregard the evidence of previous threats and dangerous character of the deceased, if they should find that the defendant made the first assault, was held error; the court, however, expressly limits the admissibility of such evidence to the particular circumstances of the case — viz., solely for the purpose of rebutting the evidence of defendant's previous acts introduced by the state to prove malice. See also State *v.* Birdwell, 36 La. Ann. 859. For the rules governing threats by the deceased, see *infra* this article, "Self-Defense — Threats."

22. Sullivan *v.* State, 31 Tex. Crim. 486, 20 S. W. 927, 37 Am. St. Rep. 826; State *v.* Merkley, 74 Iowa 695, 39 N. W. 111; Washington *v.* State, 8 Tex. App. 377; State *v.* Lewis, 80 Mo. 110.

23. Jahnke *v.* State (Neb.), 94 N. W. 158.

Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364, in which death was caused by sinking the deceased's boat and thereby drowning him. Evidence of previous attempts to poison the deceased was held admissible for this purpose.

24. *Alabama.* — Ellis *v.* State, 120 Ala. 333, 25 So. 1; Lawrence *v.* State, 84 Ala. 524, 5 So. 33; Tarver *v.* State, 43 Ala. 354.

California. — People *v.* Thomson, 92 Cal. 506, 28 Pac. 589; People *v.* Colvin, 118 Cal. 349, 50 Pac. 539; People *v.* Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403.

Georgia. — Brown *v.* State, 51 Ga. 502.

Indiana. — Koerner *v.* State, 98 Ind. 7.

Kentucky. — Thomas *v.* Com., 14 Ky. L. Rep. 513, 20 S. W. 226; Wade *v.* Com., 20 Ky. L. Rep. 1885, 50 S. W. 271.

Louisiana. — State *v.* Nix, 111 La. 812, 35 So. 917; State *v.* D'Angelo, 9 La. Ann. 46.

Missouri. — State *v.* Mounce, 106 Mo. 226, 17 S. W. 226.

North Carolina. — State *v.* Foster, 130 N. C. 666, 41 S. E. 284.

South Carolina. — State *v.* Adams, 47 S. E. 676.

Texas. — Flores *v.* State (Tex. Crim.), 38 S. W 790; Howard *v.* State, 25 Tex. App. 686, 8 S. W. 929; McKinney *v.* State, 8 Tex. App. 626; White *v.* State, 30 Tex. App. 652, 18 S. W. 462.

Washington. — State *v.* Ackles, 8 Wash. 462, 36 Pac. 597.

25. People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495; Bryant *v.* State (Tex. Crim.), 33 S. W. 978; Holmes *v.* State, 100 Ala. 80, 14 So. 864.

The Fact That the Deceased Challenged the Defendant's Vote on the day of the homicide is admissible to show malice. Thompson *v.* State, 55 Ga. 47.

26. State *v.* Zellers, 7 N. J. L. 220.

A petition for an injunction, filed by deceased against the defendant, the order of the judge granting the writ, and the writ itself, were held

(2.) The Details of such quarrels or difficulties, not forming part of the *res gestae*, are not competent evidence, because they are collateral to the issue.[27] But the contrary has been held.[28] Where, however, the details of such a difficulty have been partially drawn out by either party, it is not error to permit further particulars to be shown in rebuttal by the other party.[29]

(3.) Merits of Difficulty. — Since the only purpose of such evidence is to show the state of defendant's mind toward the deceased, the merits of such difficulties and quarrels cannot be inquired into.[30]

(4.) Between Husband and Wife. — Where the parties to the homicide occupied the relation of husband and wife, as evidence of criminal intent, malice and premeditation it is competent to show their

properly admitted as evidence of the malice and ill-will existing between the parties. Turner *v.* State, 33 Tex. Crim. 103, 25 S. W. 635.

Evidence that the defendant had slandered the deceased's daughter, and the declaration in the action brought thereon by the deceased against the defendant, were held admissible to show the latter's malice. Renfro *v.* State, 42 Tex. Crim. 393, 56 S. W. 1013.

Suit for Divorce. — State *v.* Callaway, 154 Mo. 91, 55 S. W. 444.

27. *Alabama.* — Garrett *v.* State, 76 Ala. 18; Gunter *v.* State, 111 Ala. 23, 20 So. 632; Tarver *v.* State, 43 Ala. 354; Lawrence *v.* State, 84 Ala. 524, 5 So. 33; Rutledge *v.* State, 88 Ala. 85, 7 So. 335; Clarke *v.* State, 78 Ala. 474, 56 Am. Rep. 45.

California. — People *v.* Thomson, 92 Cal. 506, 28 Pac. 589; People *v.* Colvin, 118 Cal. 349, 50 Pac. 539.

Kentucky. — Taber *v.* Com., 82 S. W. 443. See Hudson *v.* Com., 24 Ky. L. Rep. 785, 69 S. W. 1079.

Massachusetts. — Com. *v.* Silk, 111 Mass. 431.

Mississippi. — Thompson *v.* State, 36 So. 389; Hale *v.* State, 72 Miss. 140, 16 So. 387.

Missouri. — State *v.* Nelson, 166 Mo. 191, 65 S. W. 749.

South Carolina. — State *v.* Adams, 47 S. E. 676; State *v.* Petsch, 43 S. C. 132, 20 S. E. 993.

Texas. — Willis *v.* State (Tex. Crim.), 75 S. W. 790; Poole *v.* State (Tex. Crim.), 76 S. W. 565; Gaines *v.* State, 38 Tex. Crim. 202, 42 S. W. 385. See Curtis *v.* State (Tex. Crim.), 59 S. W. 263.

In His Statement to the Jury, the defendant cannot relate the details or particulars of a previous difficulty with the deceased, although he may state its general nature as trivial or grave. Harrison *v.* State, 78 Ala. 5.

28. Competent in Behalf of Prosecution. — State *v.* Anderson, 45 La. Ann. 651, 12 So. 737. See also Marnoch *v.* State, 7 Tex. App. 269.

In Behalf of Defendant. — State *v.* Cooper, 32 La. Ann. 1084. See also Marnoch *v.* State, 7 Tex. App. 269.

29. Kroell *v.* State, 139 Ala. 1, 36 So. 1025; Martin *v.* State, 77 Ala. 1; Litton *v.* Com., 101 Va. 833, 44 S. E. 923; Sanders *v.* State, 131 Ala. 1, 31 So. 564.

30. Clarke *v.* State, 78 Ala. 474, 56 Am. Rep. 45; State *v.* Zellers, 7 N. J. L. 220; People *v.* Colvin, 118 Cal. 349, 50 Pac. 539; People *v.* Thomson, 92 Cal. 506, 28 Pac. 589.

The Truth of a Report circulated by the deceased, charging the defendant with a heinous crime cannot be proved, although the fact that such a charge was made might be shown by the state as evidence of malice, or by the defendant to illustrate the deceased's readiness to do him bodily harm. "Mention of the matter was permissible merely as indicating the state of mind of the hostile parties, and as an existing fact explanatory of their motives and subsequent conduct." Riggs *v.* Com., 20 Ky. L. Rep. 276, 45 S. W. 866.

previous unfriendly relations and difficulties,[31] and the defendant's hostile conduct toward and assaults upon his spouse,[32] unless the circumstances and the subsequent relations of the parties were such that their difficulties have no tendency to show criminal intent or malice.[33]

A Long Course of Ill-Treatment may be shown, and is not objectionable because tending to show the general bad character of the defendant.[34]

(5.) Remoteness. — Such difficulties may be so remote from or unconnected with the homicide as to be irrelevant,[35] though it is sometimes said that remoteness goes merely to the weight and not to the competency of the evidence.[36]

31. Shaw *v.* State, 60 Ga. 246; State *v.* Hays, 23 Mo. 287; Smith *v.* State, 92 Ala. 30, 9 So. 408.

Assaults upon and ill-treatment of the deceased wife, running back several years, including threats to take her life, and also the fact that they had separated several times, each reconciliation occurring at the defendant's solicitation, were held properly admitted to show malice. Hall *v.* State, 31 Tex. Crim. 565, 21 S. W. 368.

32. Johnson *v.* State, 17 Ala. 618; People *v.* Chaves, 122 Cal. 134, 54 Pac. 596; Hamilton *v.* State, 41 Tex. Crim. 644, 56 S. W. 926; State *v.* Callaway, 154 Mo. 91, 55 S. W. 444; Williams *v.* State, 15 Tex. App. 104. But see Raines *v.* State, 81 Miss. 489, 33 So. 19.

Previous Indictment for an Assault by Defendant Upon His Wife. Competent. — Powell *v.* State (Tex. Crim.), 70 S. W. 218.

33. Periodical Drunken Quarrels between the defendant and his wife, the deceased, during a period of two years, without showing which was the aggressor, and after which they continued in peaceable relations when sober, were held improperly admitted because having no tendency to show criminal intent or malice. McBride *v.* People, 5 Colo. App. 91, 37 Pac. 953.

34. State *v.* Cole, 63 Iowa 695, 17 N. W. 183; Hall *v.* State, 31 Tex. Crim. 565, 21 S. W. 368.

"In the domestic relation the malice of one of the parties is rarely to be proved, but from a series of acts, and the longer they have existed and the greater number of them the more powerful are they to show the state of his feelings." State *v.* Rash, 34 N. C. 382, 55 Am. Dec. 420.

Previous Assaults as Part of a Continuous Course of Ill-Treatment. Medina *v.* State (Tex. Crim.), 49 S. W. 380.

Contra. — In Raines *v.* State, 81 Miss. 489, 33 So. 19, where the defendant was charged with the murder of his wife, evidence as to the defendant's having repeatedly cursed and assaulted his wife and continuously ill-treated her for a period of ten years previous to the homicide, was held incompetent whether such assaults were taken collectively or singly, on the ground that they were not closely enough connected with the crime charged.

35. Wilburn *v.* State (Tex. Crim.), 77 S. W. 3; McAnear *v.* State, 43 Tex. Crim. 518, 67 S. W. 117.

"There must be some link of association, something which draws together the preceding and subsequent acts, something which presents the cause and effect in the transaction. If separate, distinct and independent they ought to be excluded." Pound *v.* State, 43 Ga. 88.

36. "Nor is the admissibility of such testimony to be determined by the length of time which intervenes between the threat or act proved . . . and the homicide under investigation; but the effect to be attributed to it by the jury will be in

Where there is other evidence tending to show the continuance, down to the homicide, or a reasonable time previous thereto, of the intent or malice induced by the previous difficulties, they are not too remote.[37] No rule can be laid down for determining the length of intervening time which will be sufficient to warrant the exclusion of such evidence.[38] It will depend to some extent upon the nature of the difficulty, whether trivial or serious,[39] and the subsequent relations of the parties.[40] It has been held that the evidence connecting previous difficulties with the homicide must begin at the latter point and travel backward to the difficulty.[41]

F. PREPARATIONS. — a. *Generally.* — The preparations made by the defendant apparently in anticipation of trouble with the deceased

proportion to its closeness in point of time and directness of its association with the principal fact under consideration." O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121.

A quarrel "several years" previous to the homicide was held properly admitted, its remoteness going merely to its weight. People *v.* Brown, 76 Cal. 573, 18 Pac. 678.

37. An Old Feud between the parties may be shown in connection with evidence of frequent and deadly threats by the defendant. Goaler *v.* State, 64 Tenn. 678.

A Continuous Course of Ill-Treatment of His Wife for Five or Six Years previous to the homicide by the defendant husband may be shown. Spears *v.* State, 41 Tex. Crim. 527, 56 S. W. 347. *Citing* Hall *v.* State, 31 Tex. Crim. 565, 21 S. W. 368.

38. Difficulties Occurring Six Months Previous are too remote unless the ill-will arising therefrom is shown to have continued down to the time of the homicide. Monroe *v.* State, 5 Ga. 85.

A Difficulty One Year Previous is not too remote. State *v.* Hockett, 70 Iowa 442, 30 N. W. 742; Utterback *v.* Com., 22 Ky. L. Rep. 1011, 59 S. W. 515.

Where defendant was charged with murdering his wife and it appeared that he had had domestic troubles extending over several years, evidence of a quarrel between the parties two years previous to the homicide was held properly admitted to show motive and malice. Sayres *v.* Com., 88 Pa. St. 291.

Two Years Previous — Incompetent. — Hatcher *v.* State, 18 Ga. 460.

A Difficulty Occurring Eleven Years Previous to the homicide held not competent, there being nothing to connect it with the homicide. Woodward *v.* State, 42 Tex. Crim. 188, 58 S. W. 135.

39. Pound *v.* State, 43 Ga. 88.

40. Resumption of Friendly Relations. — In Starke *v.* State, 81 Ga. 593, 7 S. E. 807, evidence as to a difficulty between the parties several months previous to the homicide was held admissible in proof of malice, although the parties were afterward apparently friendly. But see McAnear *v.* State, 43 Tex. Crim. 518, 67 S. W. 117; Herman *v.* State, 75 Miss. 340, 22 So. 873.

Absence of Deceased. — Where it appeared that deceased had been absent from the neighborhood of the accused for eight or ten months preceding the homicide, evidence tending to show the ill-feeling between the parties was held properly admitted and not subject to the objection that it was too remote. Dillin *v.* People, 8 Mich. 357.

41. Horton *v.* State, 110 Ga. 739, 35 S. E. 659; Hatcher *v.* State, 18 Ga. 460; Daniel *v.* State, 103 Ga. 202, 29 S. E. 767 (*distinguishing* and *explaining* Brown *v.* State, 51 Ga. 502; Starke *v.* State, 81 Ga. 593, 7 S. E. 807; Shaw *v.* State, 60 Ga. 246).

or other person, and his accompanying conduct and statements, are competent evidence of his intent, malice and premeditation.[42]

b. *Weapons.* — **(1.) Possession Of.** — The possession of a deadly weapon by the defendant shortly previous to the homicide is a relevant circumstance tending to show his malice, intent and premeditation.[43] His subsequent possession of such weapons cannot be shown.[44]

(2.) Purchase and Preparation of Weapon. — It is competent to prove that within a reasonable time previous to the homicide the defendant purchased or procured a deadly weapon or instrumentality,[45] and prepared it, or one already in his possession, for use.[46]

42. People *v.* Jackson, 111 N. Y. 362, 19 N. E. 54; Rush *v.* State (Tex. Crim.), 76 S. W. 927; Burgess *v.* State, 93 Ga. 304, 20 S. E. 331; Luton *v.* State (Tex. Crim.), 64 S. W. 1051.

43. State *v.* Kinsauls, 126 N. C. 1095, 36 S. E. 31; Jones *v.* State (Tex. Crim.), 42 S. W. 294.

Defendant's subsequent declarations concerning his pistol are admissible to show that he carried it to use and was not merely taking it to a place of deposit. People *v.* Gleason, 122 Cal. 370, 55 Pac. 123.

44. People *v.* Yee Fook Din, 106 Cal. 163, 39 Pac. 530.

It has been held, however, that defendant's previous possession of firearms cannot be shown for this purpose unless in some way connected with the deceased. Woodward *v.* State, 42 Tex. Crim. 188, 58 S. W. 135.

Strange *v.* State, 38 Tex. Crim. 280, 42 S. W. 551, *holding* such evidence inadmissible where there was no evidence showing any animosity or hostility previous to the day of the homicide, but where on the contrary the parties appeared to be friendly up to that time.

45. State *v.* Wintzingerode, 9 Or. 153; State *v.* Rider, 95 Mo. 474, 8 S. W. 723; Perry *v.* State, 102 Ga. 365, 30 S. E. 903; Burgess *v.* State, 93 Ga. 304, 20 S. E. 331; Sanders *v.* State, 131 Ala. 1, 31 So. 564.

The Purchase of a Revolver and Cartridges. — State *v.* Doherty, 72 Vt. 381, 48 Atl. 658; Bolling *v.* State, 54 Ark. 588, 16 S. W. 658.

The fact that the deceased armed himself two weeks previous to the homicide, and then declared that he anticipated some such difficulty as the one which did actually occur, are competent circumstances. Burgess *v.* State, 93 Ga. 304, 20 S. E. 331.

An attempt by the defendant on the day of the homicide, and after the difficulty with the deceased, to exchange pocket-knives with another person, alleging as a reason that his knife was too small, is a relevant circumstance of preparation, tending to show malice and premeditation. Ford *v.* State, 71 Ala. 385.

Eight or Ten Months Previous. The borrowing by the defendant of a pistol eight or ten months before the homicide, and his declaration in that connection that if he met the deceased that day he was fixed for him and would get him, was held admissible, it appearing that this ill-will continued down to the time of the homicide. Rush *v.* State (Tex. Crim.), 76 S. W. 927.

Defendant's Purchase and Possession of Chloroform was held properly admitted to show intent, although the crime charged was poisoning with strychnine. People *v.* Cuff, 122 Cal. 589, 55 Pac. 407.

46. State *v.* Fuller, 114 N. C. 832, 19 S. E. 797.

The fact that the defendant cleaned and oiled his pistol may be shown. Ludwig *v.* Com., 22 Ky. L. Rep. 1108, 60 S. W. 8.

On the trial for an assault with the intent to murder, where it appeared that the assault was made

or that he practiced in order to become more skillful in the use or handling of the same.[47]

(3.) **Presumptions.** — It has been held that malice may be presumed from the use of a deadly weapon in the previous possession of the slayer.[48] Where, however, he has the right to wear arms or carry a deadly weapon, no presumption of malice can arise from such conduct;[49] and it has been held that secretly carrying a deadly weapon contrary to law raises no legal presumption of malice.[50]

c. *Explanation.* — **(1.) Generally.** — In rebuttal of the inferences arising from evidence as to his possession of weapons and other preparations, the defendant may prove any circumstances tending to show an innocent motive for such conduct, or otherwise to explain,[51] as that the preparations were made for an expected diffi-

with a knife, evidence that shortly previous to the assault the defendant had his pocket-knife filed so that it would not shut so readily when the point was used, was held competent, although there was no other evidence identifying this knife as the one used in the assault. Com. *v.* Roach, 108 Mass. 289.

47. Bolling *v.* State, 54 Ark. 588, 16 S. W. 658.

48. Com. *v.* Brown, 90 Va. 671, 19 S. E. 447. See fully, *supra*, the section, "Presumption — Character of Weapon."

49. Where by Law a Citizen Has the Right to Wear a Deadly Weapon, the fact of his being so armed raises no presumption of malice, though he was the aggressor in the difficulty resulting in the homicide. Cotton *v.* State, 31 Miss. 504. Openly bearing arms, being a constitutional right, is presumed to be for a lawful purpose. Farris *v.* Com., 77 Ky. 362.

A Pocket-knife is not presumed to have been carried with an evil purpose. State *v.* Brown, 15 Rich. L. (S. C.) 59.

50. Alford *v.* State, 33 Ga. 303, 81 Am. Dec. 209.

51. State *v.* Shuff (Idaho), 72 Pac. 664; People *v.* Williams, 17 Cal. 142; Creswell *v.* State, 14 Tex. App. 1; Marnoch *v.* State, 7 Tex. App. 269; State *v.* Noble, 66 Iowa 541, 24 N. W. 34; Fenwick *v.* State, 63 Md. 239; Long *v.* State, 52 Miss. 23. See Pettis *v.* State (Tex. Crim.), 81 S. W. 312.

The defendant may show that he came accidentally by the weapons with which the crime was committed. Aaron *v.* State, 31 Ga. 167.

In People *v.* Lee Chuck, 74 Cal. 30, 15 Pac. 322, in explanation of his being encased in a coat of mail and being armed at the time of the homicide, it was held competent for the defendant to show that his life had been threatened by a society of which deceased was a member; that he had prepared himself against an anticipated attack on his life.

Explanation of Carrying a Revolver. — People *v.* Jackson, 111 N. Y. 362, 19 N. E. 54.

The fact that the deceased shortly before the homicide was seeking to trade for a pistol is admissible to explain the circumstances of the shooting and the defendant's possession of a pistol at the time. Irby *v.* State, 25 Tex. App. 203, 7 S. W. 705.

Possession of an Ax. — Kerrains *v.* State, 60 N. Y. 221, 19 Am. Rep. 158.

The Preparations and Hostile Declarations of the Deceased may be shown. State *v.* Claire, 41 La. Ann. 191, 6 So. 129.

The purpose for which the defendant procured weapons previous to the homicide may be proved by a witness other than the defendant, although he has apparently derived his knowledge on this subject from the defendant's communications. Smith *v.* State (Tex. Crim.), 81 S. W. 936.

culty with another person than deceased,[52] or that he had a legal right to carry a weapon.[53]

(2.) Custom. — It is not competent to show the general custom of people in the locality to carry deadly weapons, but the defendant may show that such was his own custom.[54]

(3.) Declarations Accompanying Act. — The defendant's declarations or explanations accompanying the act of preparation are also admissible in his own behalf,[55] though it has been held to the contrary.[56]

G. Subsequent Conduct. — a. *Generally.* — The defendant's subsequent conduct when tending to show his malice or intent is competent for this purpose.[57] Any unseemly conduct toward the body of the deceased, or any indignity offered it by the accused, is a competent circumstance tending to show malice.[58]

b. *In His Own Behalf.* — The defendant's conduct toward the deceased subsequent to the assault is not admissible in his behalf,[59]

When No Circumstances Indicating Preparation or Premeditation Appear, the reason why the defendant had in his possession a deadly weapon at the time of the homicide is immaterial and cannot be shown. State *v.* Kennade, 121 Mo. 405, 26 S. W. 347; State *v.* Taylor, 126 Mo. 531, 29 S. W. 598.

52. State *v.* Claire, 41 La. Ann. 191, 6 So. 129; Long *v.* State, 52 Miss. 23.

53. In explanation of his carrying a revolver at the time of the homicide the defendant cannot show that some eight or ten months prior thereto he had a legal right to carry such weapon, the evidence being too remote. State *v.* Kohne, 48 W. Va. 335, 37 S. E. 553.

54. Creswell *v.* State, 14 Tex. App. 1.

55. Taliaferro *v.* State, 40 Tex. 523; State *v.* Claire, 41 La. Ann. 191, 6 So. 129.

When the state has shown defendant's previous declarations indicating preparation, he may show his declarations shortly afterward indicating that he was preparing for another. Long *v.* State, 52 Miss. 23.

56. Defendant's declaration at the time he purchased the weapon with which the homicide was committed, that he was getting it to kill a mad dog, held not admissible. State *v.* Holcomb, 86 Mo. 371.

57. Little *v.* State, 39 Tex. Crim. 654, 47 S. W. 984; McGee *v.* State, 31 Tex. Crim. 71, 19 S. W. 764; People *v.* Swenson, 49 Cal. 390; People *v.* Arrighini, 122 Cal. 121, 54 Pac. 591; Collier *v.* State, 39 Ga. 31, 99 Am. Dec. 449.

The effort made by the defendant after the homicide to prevent the fact being communicated to the deceased's family is a competent circumstance in proof of malice. State *v.* Mace, 118 N. C. 1244, 24 S. E. 798.

The Failure of the Defendant to Provide for the Burial of the deceased, his wife, is not competent in proof of malice. Washington *v.* State (Tex. Crim.), 79 S. W. 811.

Assaults upon third persons to prevent them coming to the relief of the deceased after the murderous attack are admissible in proof of malice. Jordan *v.* State, 22 Ga. 545.

58. Duncan *v.* Com., 11 Ky. L. Rep. 620, 12 S. W. 673, in which case the action of the defendant, two hours after the homicide, in wiping blood from the body of the deceased with his fingers, and smelling it, was held properly admitted.

59. Going for a Physician for the Deceased. — State *v.* Strong, 153 Mo. 548, 55 S. W. 78.

Offers to Wait On the dying man are inadmissible. State *v.* Whitson, 111 N. C. 695, 16 S. E. 332.

except perhaps in rebuttal of evidence on this point offered by the state, or where the conduct is part of the *res gestae*.[60]

H. Declarations of Defendant. — The declarations and statements of the accused, both previous[61] and subsequent[62] to the

Defendant's Subsequent Declaration to the party assaulted that he "had nothing against him" is not admissible in the defendant's favor to show absence of malice. Ray *v.* State (Tex. Crim.), 36 S. W. 446.

60. As Extenuating Circumstance. The fact that the defendant, immediately after striking the fatal blow, shows signs of remorse and sympathy for the deceased, and attempts to alleviate his injuries, is an extenuating circumstance which should be considered in determining whether or not the act was malicious and premeditated. Silgar *v.* People, 107 Ill. 563.

61. Moore *v.* State (Tex. Crim.), 72 S. W. 594; Harris *v.* Com., 25 Ky. L. Rep. 297, 74 S. W. 1044; State *v.* Ellis, 101 N. C. 765, 7 S. E. 704, 9 Am. St. Rep. 49; Evans *v.* State, 62 Ala. 6; Com. *v.* Hersey, 2 Allen (Mass.) 173; Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805.

Walsh *v.* People, 88 N. Y. 458, in which testimony that defendant, on the morning of the homicide, asked of a fellow-workman where the heart was located, and of another whether pepper thrown in the eyes would blind a person, and what would be done to him if such a thing should happen, was held competent to show premeditation.

The defendant's declaration a short time previous to the homicide that he was going to "start the ball to rolling," held admissible on the issue of motive and intent. *Ex parte* Kennedy (Tex. Crim.), 57 S. W. 648.

The defendant's declaration on the day previous to the homicide that he feared he would have trouble with the deceased is admissible in behalf of the state. Mott *v.* State (Tex. Crim.), 51 S. W. 368.

The previous declarations of the defendant as to his purpose in going to the place of homicide armed are admissible to show malice, although they do not refer to the particular matter which was the immediate cause of the difficulty. Furlow *v.* State, 41 Tex. Crim. 12, 51 S. W. 938.

Letter written by defendant to his brother a month before the homicide. Com. *v.* Krause, 193 Pa. St. 306, 44 Atl. 454.

Statements by the defendant, in response to advice that he go home in order to avoid a difficulty, "I will not run from him," and, "I cannot take everything," are competent as bearing upon the question of malice. Allen *v.* State, 111 Ala. 80, 20 So. 490.

62. *Alabama.* — McManus *v.* State, 36 Ala. 285.

Arkansas. — Casat *v.* State, 40 Ark. 511.

California. — People *v.* Shears, 133 Cal. 154, 65 Pac. 295.

Georgia. — Perry *v.* State, 110 Ga. 234, 36 S. E. 781.

Kentucky. — Taggart *v.* Com., 20 Ky. L. Rep. 493, 46 S. W. 674.

Oklahoma. — Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805.

South Carolina. — State *v.* Hammond, 5 Strob. L. 91.

Texas. — Clampitt *v.* State, 9 Tex. App. 27; Gaines *v.* State (Tex. Crim.), 37 S. W. 331; Garza *v.* State, 11 Tex. App. 345; Lewis *v.* State, 15 Tex. App. 647.

The deceased's statements the following day, showing his hatred toward the person assaulted, were held competent in Meeks *v.* State, 51 Ga. 429.

On the trial of an assault with intent to murder, the declarations of the defendant, made "about six minutes" after the assault, threatening and cursing the person assaulted, and forbidding him to stop at a house near-by for the purpose of dressing his wounds, were held competent in proof of malice. Henderson *v.* State, 70 Ala. 29.

The defendant's declaration as he rode away from the place of the shooting immediately thereafter, with a pistol in his hand, "I am the toughest son of a ——— ever struck

assault tending to show criminal intent, premeditation or malice toward the deceased or injured person, are competent evidence against him if not too remote,[63] although not amounting to threats.[64]

I. Threats and Expressions of Ill-Will. — a. *Generally.* The defendant's previous and subsequent threats[65] against and

this town" is admissible both as part of the *res gestae* and to show malice. State *v.* Brown, 28 Or. 147, 41 Pac. 1042.

63. State *v.* Gainor, 84 Neb. 209, 50 N. W. 547.

64. Tuttle *v.* Com., 17 Ky. L. Rep. 1139, 33 S. W. 823; People *v.* Barthleman, 120 Cal. 7, 52 Pac. 112.

Previous Conversations Between the Defendant and the Deceased, Although Not Amounting to Quarrels, are competent on the question of malice if they tend to show the relations existing between them. State *v.* Gilliam, 66 S. C. 419, 45 S. E. 6.

65. *Alabama.* — Burns *v.* State, 49 Ala. 370; Linehan *v.* State, 113 Ala. 70, 21 So. 497; Wilson *v.* State, 128 Ala. 17, 29 So. 569; Henderson *v.* State, 70 Ala. 29; Gray *v.* State, 63 Ala. 66; Barnes *v.* State, 134 Ala. 36, 32 So. 670; Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95.

Arkansas. — Casat *v.* State, 40 Ark. 511.

California. — People *v.* Chaves, 122 Cal. 134, 54 Pac. 596.

Colorado. — Babcock *v.* People, 13 Colo. 515, 22 Pac. 817.

Florida. — Milton *v.* State, 40 Fla. 251, 24 So. 60.

Georgia. — Stiles *v.* State, 57 Ga. 183.

Iowa. — State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572.

Kansas. — State *v.* Stackhouse, 24 Kan. 320.

Louisiana. — State *v.* Pain, 48 La. Ann. 311, 19 So. 138.

Mississippi. — Cannon *v.* State, 57 Miss. 147.

Nevada. — State *v.* Bonds, 2 Nev. 265.

New York. — People *v.* Jones, 99 N. Y. 667, 2 N. E. 49.

North Carolina. — State *v.* Rose, 129 N. C. 575, 40 S. E. 83.

Texas. — Howard *v.* State, 25 Tex. App. 686, 8 S. W. 929; Rambo *v.* State (Tex. Crim.), 69 S. W. 163.

Washington. — White *v.* Territory, 3 Wash. Tr. 397, 19 Pac. 37.

"I Will Fix Him," a statement by the defendant directed toward the deceased, is admissible to show malice. White *v.* State, 32 Tex. Crim. 625, 25 S. W. 784.

Evidence that the defendant when drunk and alone, and while talking to himself, threatened to kill the deceased, was held properly admitted to show malice. Smith *v.* Com., 9 Ky. L. Rep. 215, 4 S. W. 798.

A statement by the defendant to the deceased during a fight between them some hours previous to the homicide, "You had better kill me now while you got a chance," was held competent as a threat tending to show malice and premeditation. Porter *v.* State, 135 Ala. 51, 33 So. 694.

Subsequent to the Assault. In McManus *v.* State, 36 Ala. 285, it appeared that the defendant, a few hours after the fight in which he had struck the deceased with a brickbat, returned to the scene of the conflict with a pistol and said he had come to kill the person whom he had assaulted, and who had died in the meantime.

Assault With Intent to Murder. Expressions of ill-will and threats, both prior and subsequent to the assault, are competent. Waldron *v.* State, 41 Fla. 265, 26 So. 701; Hodge *v.* State, 26 Fla. 11, 7 So. 593; Rawlins *v.* State, 44 Fla. 155, 24 So. 65.

Letters. — In Karr *v.* State, 106 Ala. 1, 17 So. 328, an abusive and threatening letter found on the body of the deceased was held admissible in proof of malice, there being some evidence tending to show that it was written by the defendant. The letter was without date or signature, and it was not shown when it was written or how, or when it came to the knowledge or possession of the deceased, nor did it appear that it caused any change in the relations

expressions of ill-will[66] toward the deceased or assaulted person are admissible to show criminal intent, malice and premeditation. While it must be shown that the statement or threat was made or adopted by the defendant, this may sufficiently appear from the circumstances.[67]

b. *What Constitutes a Threat.* — Language to be competent as a threat need not be a direct statement of an intention to inflict injury,[68] but may threaten indirectly by way of inference or innu-

between deceased and the defendant, or induced the former to take any precaution. It further appeared that the cause of the homicide was a difficulty commencing two days previous thereto and continuing down to the killing. See dissenting opinion of Brickell, C. J.

A letter from the defendant evidently intended for the deceased, threatening to prosecute him for selling liquor to minors unless twenty-five dollars was paid him, is competent. Westbrook *v.* People, 126 Ill. 81, 18 N. E. 304.

66. Brown *v.* State (Tex. Crim.), 50 S. W. 354; Bateson *v.* State (Tex. Crim.), 80 S. W. 88 (*distinguishing* Vann *v.* State [Tex. Crim.], 77 S. W. 817; Denton *v.* State [Tex. Crim.], 79 S. W. 560); Ortiz *v.* State, 30 Fla. 256, 11 So. 611; State *v.* Stackhouse, 24 Kan. 320; Waldron *v.* State, 41 Fla. 265, 26 So. 701.

A statement by the defendant that a remark to him by the deceased made him so mad that he "wanted to get a gun and go to kill him," was held admissible, if not as a threat, at least as showing the animus of the defendant toward the deceased. Friday *v.* State (Tex. Crim.), 79 S. W. 815.

Previous statements by the defendant that he had settled with the deceased and was going to get his money because he, defendant, had the deceased's mules in his possession, were held competent as showing his ill-will or malice toward the deceased. Hudson *v.* State (Tex. Crim.), 70 S. W. 764.

In Williams *v.* State, 90 Ala. 649, 8 So. 825, evidence of a previous declaration of the defendant that the person assaulted had arrested him for stealing beer, and "that any man who would do that was a d—— son of a b——," was held competent as an expression of ill-will.

Defendant's statements shortly previous to the homicide showing that he was looking for the deceased are admissible to show his state of mind. State *v.* Horne, 9 Kan. 82.

A remark by the defendant that "this parish is too small for us both," following his statement that he and the deceased were not on friendly terms, held competent to show malice and premeditation. State *v.* Jones, 47 La. Ann. 1524, 18 So. 515.

Subsequent Expressions of Ill-Will Competent. — Waldron *v.* State, 41 Fla. 265, 26 So. 701.

67. Threats heard by the witness while passing defendant's house were held properly admitted, although the witness did not see the person making the threats or recognize his voice, there being other evidence, however, that defendant and deceased were quarreling at that time and no other persons were present except their children. State *v.* Feister, 32 Or. 254, 50 Pac. 561.

A conversation between defendant, deceased and others, overheard by the witness, in which threats to kill were made, but where the witness did not know by whom they were made nor toward whom they were directed, was held properly admitted because defendant was sufficiently shown to have been present. Short *v.* Com., 9 Ky. L. Rep. 255, 4 S. W. 810.

68. Rule Stated. — Defendant's statement that he did not want any trouble with the deceased, but if the latter wanted trouble he could get it, was held properly admitted, it being no objection to the competency of the threat that it was conditional.

endo.[69] It is sufficient that the statement indicate a contemplation of some hostility or violence,[70] and the fact that it is susceptible of an innocent construction does not serve to exclude it.[71]

c. *Conditional Threats.* — Such threats are not inadmissible merely because conditional,[72] but when they are of such a nature as to indicate a violent purpose only in case the prescribed contingency has happened, there must be a preliminary showing of the defendant's knowledge that the condition has been fulfilled.[73]

"The threat may not be to do any specific injury if it tends to show a malicious condition of the defendant's mind, . . . and language used need not be specific as regards the means by which, or as to the time, place or manner in which violence is to be inflicted. It is for the court to say whether the utterance of the defendant imports a threat, and the cases go very far in admitting as a threat any declaration which indicates, however vaguely and indefinitely, an intention on the part of the accused to inflict violence upon the deceased." State *v.* Sloan, 22 Mont. 293, 56 Pac. 364.

69. State *v.* Tartar, 26 Or. 38, 37 Pac. 53; People *v.* Craig, 111 Cal. 460, 44 Pac. 186.

70. Wilson *v.* State, 110 Ala. 1, 20 So. 415; State *v.* Mills, 91 N. C. 581; Parker *v.* State, 136 Ind. 284, 35 N. E. 1105; People *v.* Coughlin, 13 Utah 58, 44 Pac. 94; State *v.* Hunt, 128 N. C. 584, 38 S. E. 473; State *v.* Larkins, 5 Idaho 200, 45 Pac. 945.

A statement by the defendant "I will see you later," made during a previous difficulty between the defendant and the party assaulted, on the day of the assault, was held competent as *prima facie* importing a threat. Drake *v.* State, 110 Ala. 9, 20 So. 450.

Where it appeared that the defendant had notice of the deceased's intention to arrest one of the former's friends his declaration that he was going up and "see it well done" was held competent as being in the nature of a threat. "What was the meaning of the expression, and what probative value could be given" to it were held to be questions for the jury. Sanders *v.* State, 113 Ga. 267, 38 S. E. 841.

A statement by the defendant, while talking about his trouble with the deceased prior to the homicide, that he, defendant, "was part Indian — bad medicine — and that something serious would grow out of this trouble" is competent as tending to show a threat by him. Schoolcraft *v.* People, 117 Ill. 271, 7 N. E. 649.

71. "If one construction of the evidence would indicate a threat and the other would not the evidence would be admissible. The fact that the declaration . . . may be susceptible of an innocent construction would not go to the admissibility of the testimony, but merely to its weight." Hudson *v.* State (Tex. Crim.), 70 S. W. 764. *Citing* Howard *v.* State, 23 Tex. Crim. 265, 5 S. W. 231.

72. State *v.* Sloan, 22 Mont. 293, 56 Pac. 364. Cribbs *v.* State, 86 Ala. 613, 6 So. 109, in which case a statement by the defendant concerning a difficulty between the deceased and the person addressed that the deceased "had better not cross his path or he would kill him" was held competent.

Defendant's statement, when informed that deceased had drawn a knife upon another person, that "if he ever comes at me with a knife I will cut off his wind," although objected to as not being a threat and only conditional at most, was held competent. Self *v.* State, 39 Tex. Crim. 455, 47 S. W. 26.

73. A threat by the defendant that he would kill his wife and himself too if he knew that she was not virtuous is a conditional threat, and not admissible without proof of his knowledge of the conditional fact. Phillips *v.* State, 22 Tex. App. 139, 2 S. W. 601.

d. *Impersonal and General Threats and Expressions of Ill-Will.* (1.) **Generally.** — Impersonal and general threats are not admissible unless it appears in some way that they include or have reference to the deceased,[74] and it has been held that the burden is upon the state to show that a threat to kill some person, but not disclosing whom, was directed toward the deceased.[75] This fact, however, may sufficiently appear from the circumstances[76] or subsequent

Condition Satisfied. — Where the defendant threatens to kill the deceased unless the latter does some affirmative act and the act is never performed, the threat is as conclusive evidence of premeditation and malice as though no condition had been attached to it. State *v.* Bonds, 2 Nev. 265.

74. Stevenson *v.* United States, 86 Fed. 106; Morton *v.* State, 43 Tex. Crim. 533, 67 S. W. 115; Fossett *v.* State, 41 Tex. Crim. 400, 55 S. W. 497; Hall *v.* State, 43 Tex. Crim. 257, 64 S. W. 248; Gaines *v.* State (Tex. Crim.), 42 S. W. 385, 53 S. W. 623. And see cases in second note following.

Defendant's statement on the day preceding the homicide, that he was going to kill "somebody" or "as good a friend as he had," was held inadmissible because not shown to refer to the deceased. Godwin *v.* State, 38 Tex. Crim. 466, 43 S. W. 336, *criticising* and *declining* to follow the case of Brooks *v.* Com., 18 Ky. L. Rep. 702, 37 S. W. 1043 (see *infra*, note 80), and *distinguishing* Hopkins *v.* Com., 50 Pa. St. 9.

75. Holley *v.* State (Tex. Crim.), 46 S. W. 39, in which defendant's threat an hour previous to the homicide, "I will kill the —— —— son of a b—— and be in Mexico before morning" was held inadmissible, there being nothing to connect it with the deceased except the fact that the parties were not on friendly terms, and the homicide shortly afterward. "Nor will it do to assume that, if appellant meant some one else, he knew whom he meant, and that it was incumbent on him to point out the person alluded to. We think the rule is that the circumstances themselves in connection with the threat must with a reasonable degree of certainty establish the fact that appellant alluded to or directed the threat in question against deceased, before it can be admitted in evidence against him; and, if the circumstances in proof leave this matter in doubt, that doubt must be solved in favor of the defendant, and the threat must be excluded."

76. *California.* — People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495.

Indiana. — Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975.

Kentucky. — Com. *v.* Reynolds, 89 Ky. 147, 20 S. W. 167, 12 S. W. 132; Young *v.* Com., 19 Ky. L. Rep. 929, 42 S. W. 1141; Sparks *v.* Com., 89 Ky. 644, 20 S. W. 167; Howard *v.* Com., 24 Ky. L. Rep. 612, 69 S. W. 721; Brewer *v.* Com., 10 Ky. L. Rep. 122, 8 S. W. 339.

Missouri. — State *v.* Guy, 69 Mo. 430.

Montana. — State *v.* King, 9 Mont. 445, 24 Pac. 265.

Texas. — Ditmer *v.* State (Tex. Crim.), 74 S. W. 34; McKinney *v.* State, 8 Tex. App. 626; Davis *v.* State (Tex. Crim.), 56 S. W. 53; Brown *v.* State (Tex. Crim.), 65 S. W. 529; Holloway *v.* State (Tex. Crim.), 77 S. W. 14; Hardy *v.* State, 31 Tex. Crim. 289, 20 S. W. 561; De La Garza *v.* State (Tex. Crim.), 61 S. W. 484; Thomas *v.* State, 42 Tex. Crim. 386, 56 S. W. 70, *distinguishing* Gaines *v.* State (Tex. Crim.), 53 S. W. 623.

Rule Stated. — In Harrison *v.* State, 79 Ala. 29, threats by the defendant against a particular person, but not disclosing his identity, were held not improperly admitted. The court states the rule thus: "Evidence of threats made by the accused is admissible to show his animus at the time of committing the offense. To be admissible, they must indicate a purpose to do some

declarations[77] of the accused; and if the circumstances are such that the language used might reasonably be construed to include or refer to the deceased or injured person, the evidence should be admitted and the question left to the jury.[78]

It has, however, frequently been held that general and impersonal threats made a very short time before the assault are competent evidence of the defendant's malicious purpose, although not otherwise connected with the deceased or injured person than by their proximity to the assault.[79] And in some jurisdictions such

particular persons an injury, or must be expressions of ill-will or hate toward a class, of which the deceased is one; and must be capable of such construction as to show reference to the deceased. Where the threats are capable of being so construed, considered in connection with the other evidence, although no particular person is specially designated, and are not so far removed from the inquiry involved in the issue before the jury as to give no aid or direction in determining that issue, they are admissible; and their reference to the deceased is a question for the jury, to be determined on the whole evidence."

A declaraction by the accused made while driving along the highway shortly before he overtook and assaulted the injured persons, that "he would kill the son of a b——," is not incompetent because no person was designated as the object of the threat. It was a question for the jury to determine whether it referred to one of the persons who were assaulted shortly afterward. Starr *v.* State, 160 Ind. 661, 67 N. E. 527.

A threat in general terms, "Damn him, I am going to kill him," though not designating the person against whom it was directed, was held competent where it was made a few hours previous to the homicide, and after the defendant and the deceased had engaged in an altercation on the same day. Jones *v.* State, 76 Ala. 8.

77. Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238.

78. Madison *v.* Com., 13 Ky. L. Rep. 313, 17 S. W. 164; Ford *v.* State, 71 Ala. 385; Marchan *v.* State (Tex. Crim.), 75 S. W. 532; Taylor *v.* State, 44 Tex. Crim. 547, 72 S. W. 396.

In State *v.* Mills, 91 N. C. 581, the declaration of the defendant a few hours previous to his commission of the homicide that "he had money to pay his way out of all his difficulties, and he intended to have satisfaction before he slept that night," was held admissible as a threat, the reasonable inference being that it was directed against the deceased.

Defendant's statement about a week previous to the homicide, "I don't know but what I shall kill some one in a week," was held properly admitted, the conversation in which it was made being of such a character as to warrant the jury in believing that it was aimed at the deceased. State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

On the trial of the accused for assisting in the murder of his wife, who had been shot by the accused's paramour, evidence that the defendant, in a conversation about the conduct of one T. toward his paramour, said he would "kill anybody that interfered with him and that woman," was held competent as being a threat which might include his wife, the deceased, the question of whether it did or not being one for the jury. Caddell *v.* State, 129 Ala. 57, 30 So. 76.

79. Hopkins *v.* Com., 50 Pa. St. 9; Benedict *v.* State, 14 Wis. 423; State *v.* Hunt, 128 N. C. 584, 38 S. E. 473; State *v.* Harlan, 130 Mo. 381, 32 S. W. 997; Hodge *v.* State, 26 Fla. 11, 7 So. 593; Moore *v.* People, 26 Colo. 213, 57 Pac. 857.

Defendant's statement on the day previous to the killing that he intended "to kill someone and then

threats and expressions of violence, although not directed toward anyone, are competent as evidence of general or universal malice.[80]

kill himself" was held properly admitted, "although vague and indefinite as to the intended victim." State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113.

Evidence that the defendant, on the morning preceding the homicide, went into a saloon, stuck a two-edged dagger into the counter, and said: "That will be the death of somebody here before long," or "somebody yet," was held competent as showing his animus, although there was nothing to indicate that it referred to the deceased. Friery *v.* People, 54 Barb. (N. Y.) 319.

In People *v.* Southerland, 154 N. Y. 345, 48 N. E. 518, it was held competent to show that on the day of the shooting the defendant showed the witness a pistol and remarked: "This means business some day," as tending to show not only the defendant's possession of the pistol at that time, but that he intended to use it upon someone.

A statement by the defendant, made a short time before he committed the assault, that he expected to kill someone before he left the town, is admissible on the prosecution for assault with intent to murder, as showing intention. Read *v.* State, 2 Ind. 438.

A threat by the defendant to the effect that he had gotten drunk just to kill two or three persons in the town that night, made two or three hours previous to the fatal difficulty, which he willfully provoked, was held properly admitted though nothing further appeared to connect it with the deceased. State *v.* Hymer, 15 Nev. 49, *distinguishing* State *v.* Walsh, 5 Nev. 260.

Defendant's statement to the witness three hours previous to the homicide, "I would like to take you with me, but I have a dirty piece of business to do tonight," was held properly admitted to show malice and an "abandoned, reckless, malicious spirit on the part of the accused." State *v.* Larkins, 5 Idaho 200, 47 Pac. 945.

When No Evidence of Previous Difficulty. — Anderson *v.* State, 79 Ala. 5.

80. Williams *v.* Com., 21 Ky. L. Rep. 612, 52 S. W. 843; State *v.* Vance, 29 Wash. 435, 70 Pac. 34; Whitaker *v.* Com., 13 Ky. L. Rep. 504, 17 S. W. 358. See also Moore *v.* People, 26 Colo. 213, 57 Pac. 857; State *v.* Larkins, 5 Idaho 200, 47 Pac. 945; and *supra* the section, "General Malice."

But *contra*, see Redd *v.* State, 68 Ala. 492; Godwin *v.* State, 38 Tex. Crim. 466, 43 S. W. 336; State *v.* Barfield, 29 N. C. 303.

Defendant's statements shortly previous to the homicide that he wanted to kill somebody, and was going to kill somebody, were held admissible although not part of the *res gestae*, and not shown to refer to the deceased, on the ground that general threats by the defendant, and his declarations of his intention to commit murder, made previous to the homicide, are admissible "in order to establish general malice and purpose to injure or kill someone. . . . And in such case it is not necessary to show that the threats had reference to any particular individual. . . . But it may be observed that such evidence is proper to indicate the grade of the offense, rather than to establish the fact of guilt." Brooks *v.* Com., 18 Ky. L. Rep. 702, 37 S. W. 1043.

A remark by the defendant on the day of the homicide that he would kill somebody before the week was out, and that "he would like to kill some damned old Grand Army man," was held admissible as a threat, and as showing "a revengeful and malicious spirit." The fact that the deceased was not a Grand Army man was held insufficient to exclude the statement, it being a question for the jury whether or not it referred to the deceased. "Vague threats, not against any particular person, have often been admitted and are competent evidence." State *v.* Cochran, 147 Mo. 504, 49 S. W. 558.

The Opinion of a person who heard the threats, that they were directed toward the deceased, is not admissible.[81]

(2.) When Deceased Not in Defendant's Mind at Time of Threat. Impersonal threats sufficiently comprehensive to include deceased are admissible, although he was not in defendant's mind at the time the threat was made.[82]

(3.) Against Doer of Particular Act. — Threats against any person who might do a specified act,[83] or who has already done a particular act,[84] are competent after showing that the deceased or injured person has done the act named.

e. *Against Class or Race.* — Threats and expressions of ill-will against the class[85] or race[86] to which the deceased belonged, are competent.

81. Johnson *v.* Com., 72 Ky. 224.

82. People *v.* Durfee, 62 Mich. 487, 29 N. W. 109; Williams *v.* Com., 21 Ky. L. Rep. 612, 52 S. W. 843.

83. State *v.* Pierce, 90 Iowa 506, 58 N. W. 891; Caddell *v.* State, 129 Ala. 57, 30 So. 76.

A threat to kill "any man who fooled with Mandy Smith," made two or three years previous to the homicide, was held admissible where it appeared that the defendant and deceased were rivals for her affections down to the time of the homicide. Mathis *v.* State, 34 Tex. Crim. 39, 28 S. W. 817.

A threat by the defendant to kill "anybody who hits M. T.," made a few minutes before the homicide, although having immediate reference to one R., was held competent where it appeared that the deceased soon after struck M. T., which resulted in the fatal difficulty between himself and defendant. Jordan *v.* State, 79 Ala. 9.

A threat by the defendant that he would kill or be killed before he would go to the workhouse was held admissible to show a fixed purpose to resist arrest even to the extent of death, where the killing occurred during an attempted arrest. Quinn *v.* Com., 23 Ky. L. Rep. 1302, 63 S. W. 792.

84. In Parker *v.* State, 136 Ind. 284, 35 N. E. 1105, threats of a general character by the defendant to the effect that he would get even with all those connected with his arrest were held competent, where it appeared that the deceased had telephoned for the patrol wagon.

A declaration by the defendant that he would shoot the person who started a slanderous report about his wife if he could find out who it was, was held admissible on his trial for the killing of the person whom he subsequently accused of being its author. Williams *v.* Com., 21 Ky. L. Rep. 612, 52 S. W. 843.

85. Previous Threats Against Policemen are admissible where deceased was a policeman, although they are not otherwise shown to relate to him. State *v.* Grant, 79 Mo. 113, 49 Am. Rep. 218; Dixon *v.* State, 13 Fla. 636. See also Miller *v.* State, 31 Tex. Crim. 609, 21 S. W. 925, 37 Am. St. Rep. 836.

Against Officers. — On a charge of killing the officer who was attempting his arrest, the defendant's statement several days preceding the homicide, when informed that the officers were after him, "Let them come; I am ready for them," was held properly admitted to show malice against all who might attempt to arrest him. People *v.* Coughlin, 13 Utah 58, 44 Pac. 94.

86. Threats Against White Men are admissible where the injured person is a white man, in connection with abusive language by the defendant toward such person at the same time. Anderson *v.* State, 15 Tex. App. 447; Thompson *v.* State, 55 Ga. 47.

Against Colored Men. — Defendant's statement shortly previous to the homicide, "I just as lief shoot

f. *Against Family.* — A threat or hostile expression against all of the deceased's family as such, using the family name, is competent.[87] But such expressions of hostility or animosity toward individual members of the family are not competent unless some connection between them and the homicide is shown, or the circumstances are such that they reflect the speaker's feeling toward the deceased himself.[88]

g. *Against Corporation.* — Threats against a corporation or company may be competent on a prosecution for a murderous assault upon or the killing of one of its employes by the threatener.[89]

a black devil as not," was held properly admitted to show malice, the deceased being a colored man. State *v.* Gallehugh, 89 Minn. 212, 94 N. W. 723.

Where the deceased, a negro, was killed at a dance, the defendant's declaration the previous day that "he was going to get him a man" and that he "was gwine over to the dance and get him a negro," was held competent as a threat, the circumstances being sufficient to make it include the deceased. Harris *v.* State, 109 Ga. 280, 34 S. E. 583.

Against Mexican. — A statement by the defendant, when attempting to purchase a pistol, "that he might want to kill some damn Mexican," was held admissible, it appearing that deceased was a Mexican and that the relation between the parties was hostile. "It is not necessary to make a threat admissible that it should be directed against any particular person, when the facts and circumstances tend to point out the person against whom such threat was made. Nor is it necessary to name the threatened party when the facts and circumstances make it clear that the deceased was the party intended. Mathis *v.* State, 34 Tex. Crim. 39, 28 S. W. 817.

87. People *v.* Craig, 111 Cal. 460, 44 Pac. 186; People *v.* Gross, 123 Cal. 389, 55 Pac. 1054; People *v.* Bezy, 67 Cal. 223, 7 Pac. 643.

A threat against "all the Striplings" is admissible on the trial of a charge of assault with intent to murder a person of that family name. Sebastian *v.* State, 41 Tex. Crim. 248, 53 S. W. 875.

88. **Threats Against Deceased's Brother** are not admissible. People *v.* Bezy, 67 Cal. 223, 7 Pac. 643; Shaw *v.* State, 79 Miss. 21, 30 So. 42.

But see State *v.* Kohne, 48 W. Va. 335, 37 S. E. 553; Moore *v.* State, 31 Tex. Crim. 234, 20 S. W. 563. In the latter case evidence of the indecent language and conduct of the defendant toward the injured person's wife and daughter shortly previous to the assault was held competent on the ground that such conduct toward the *female relatives* of the person is evidence of malice toward him.

A quarrel between the defendant and deceased's wife, in the absence of the deceased, and threats by the defendant against the wife on that occasion, were held properly admitted, it appearing that such quarrel was the sole cause of the fatal difficulty. "The general rule undoubtedly is . . . that threats made by the accused prior to the homicide to kill or injure some other person than the deceased are inadmissible against him; but an exception to the rule is that threats against, or quarrels with, members of the family of the deceased may be received as tending to establish a motive, where connection is shown between such threats or quarrels and the offense." Gravely *v.* State, 45 Neb. 878, 64 N. W. 452.

89. On the trial of a charge of assault with intent to murder, evidence of threats previously made against the railroad company, which was employing the assaulted party, was held competent where it appeared that the assault was committed during an alleged invasion of the defendant's property by the person assaulted, under orders from his su-

h. *Against Third Persons.* — The defendant's threats against third persons are not ordinarily admissible,[90] except as part of the *res gestae*.[91] When, however, the circumstances or the relations of the parties are such that the threats or language used tend to show the defendant's criminal intent or malice toward the deceased or injured person, the evidence is competent;[92] as when the threats were made in the same conversation or as part of a threat against the deceased;[93] when the person threatened was killed at the same time as the deceased,[94] or it appears that a conspiracy existed to kill them both;[95] or when the defendant, intending to kill the person threatened, by mistake or accident kills another.[96] Whether or not threats against third persons include the person assaulted is a question for the jury, where the circumstances or nature of the threat are such that it might include him.[97]

periors. "If threats are made against such a company it is for the jury to determine from the character of the threats whether the employees of the company come within their scope; the company and its employees are in a measure identified, and the carrying out of a threat against the company may necessarily involve peril to, or an assault upon, its employees." Newton *v.* State, 92 Ala. 33, 9 So. 404.

90. Ogletree *v.* State, 28 Ala. 693; Ford *v.* State, 71 Ala. 385; State *v.* Barfield, 29 N. C. 299; Carr *v.* State, 23 Neb. 749, 37 N. W. 630; Abernethy *v.* Com., 101 Pa. St. 322, *distinguishing* Hopkins *v.* Com., 50 Pa. St. 9, 88 Am. Dec. 518.

Previous threats against the barkeeper of a saloon where the assault occurred were held incompetent on the trial of a charge of assault with intent to murder a policeman who attempted to eject defendant. State *v.* Driscoll, 44 Iowa 65.

91. Killins *v.* State, 28 Fla. 313, 9 So. 711.

92. Shackleford *v.* State, 79 Ala. 26. See also People *v.* Bezy, 67 Cal. 223, 7 Pac. 643.

Threats against a person attempting to alleviate the injured person's suffering subsequent to the fatal assault are competent. Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238.

Where the defendant was charged with the murder of a constable while resisting a lawful arrest by the latter, his statement made two days previous to the homicide while passing one N., who had been a constable, that "N. aims to arrest me. . . . If he tries to arrest me he will hear from this," at the same time pulling a revolver from his pocket, was held competent as showing his animus toward any officer attempting to arrest him, and his premeditated resistance to anticipated arrest. Palmer *v.* People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146.

Where the homicide occurred during the celebration of a wedding ceremony, for the purpose of showing the defendant's malice in going to the scene thereof, it was held competent to show his threats against the groom and his declarations of his intention to go to the wedding ceremony, although not invited. State *v.* Partlow, 90 Mo. 608, 4 S. W. 14.

93. State *v.* Wong Gee, 25 Or. 276, 57 Pac. 914; Shackleford *v.* State, 79 Ala. 26.

94. Previous expressions of ill-will by the defendant against his stepmother were held admissible on his trial for the homicide of his father, both such persons having been killed at the same time. Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.

95. Slade *v.* State, 29 Tex. App. 381, 16 S. W. 253. See article "CONSPIRACY."

96. See *infra*, this article, the section "Killing Another by Mistake or Accident."

97. Newton *v.* State, 92 Ala. 33, 9 So. 404.

i. *By Third Persons.* — Threats and hostile expressions toward the deceased by third persons are not competent against the accused[98] unless such persons were co-conspirators with him, or the statements were participated in or adopted by him;[99] and although made in his presence they are incompetent unless of such a character as to require a denial or repudiation which he failed to make.[1]

j. *Remoteness.* — Threats and expressions of ill-will have been held too remote in point of time to be relevant.[2] The general rule, however, is that the objection of remoteness goes only to the weight and not to the competency of such evidence.[3] The mere remoteness

98. Da La Garza *v.* State (Tex. Crim.), 61 S. W. 484.

Threats by the Defendant's Brother against the deceased are not admissible without preliminary proof of a conspiracy between such brother and the defendant. Wills *v.* State (Tex. Crim.), 22 S. W. 969; State *v.* Lague, 41 La. Ann. 1970, 6 So. 787.

99. State *v.* Ellis, 101 N. C. 765, 7 S. E. 704, 9 Am. St. Rep. 49; People *v.* State (Tex. Crim.), 76 S. W. 565.

1. Miller *v.* State, 97 Ga. 653, 25 S. E. 366. See more fully *supra*, this article, "Declarations by Third Persons — Implied Admissions."

2. Threats by defendant four or five years previous to the homicide were held incompetent for remoteness. McMasters *v.* State, 81 Miss. 374. 33 So. 2. See also Harrison *v.* State, 79 Ala. 29.

3. *California.* — People *v.* Hong Ah Duck, 61 Cal. 387; People *v.* Brown, 76 Cal. 573, 18 Pac. 678.

Connecticut. — State *v.* Hoyt, 46 Conn. 330.

Kentucky. — Abbott *v.* Com., 24 Ky. L. Rep. 148, 68 S. W. 124.

Missouri. — State *v.* Grant, 79 Mo. 113, 49 Am. Rep. 218; State *v.* Adams, 76 Mo. 355; State *v.* Wright, 141 Mo. 333, 42 S. W. 934.

Montana. — Territory *v.* Roberts, 9 Mont. 12, 22 Pac. 132.

See McDaniel *v.* State, 100 Ga. 67, 27 S. E. 158.

Remoteness of Threats. — "It is no objection to such evidence that a period of years had expired since the threats were made. On the contrary, long-continued animosity and ill-will are better evidence of a state of mind which will ripen into deliberate murder than the hasty ebullition of passion. The theory of the law of murder is that it is made on premeditation, and the motives for such an act are not less powerful because they are the result of ill feelings entertained for years." People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018; Jefferds *v.* People, 5 Park. Crim. (N. Y.) 522.

A Threat Made Thirteen Years Previous to the homicide, followed by evidence of other threats made one, three and four years previous to the homicide, was held properly admitted. State *v.* Hoyt, 46 Conn. 330.

Threats Made Three or Four Years Previous to the homicide, and repeated down to within a year and a half or two years thereof were held not too remote to be admissible. State *v.* Wright, 141 Mo. 333, 42 S. W. 934.

Threats by the defendant against the deceased "several years" previous to the homicide are held properly admitted. People *v.* Brown, 76 Cal. 573, 18 Pac. 678.

Expressions of Ill-Will Seven Months Previous to the homicide are not too remote to be competent. Tuttle *v.* Com., 17 Ky. L. Rep. 1139, 33 S. W. 823.

Six Months Previous not too remote. United States *v.* Neverson, 1 Mack. (D. C.) 152.

Threats and expressions of ill-will several months previous to homicide held competent. Waldron *v.* State, 41 Fla. 265, 26 So. 701; Frizzell *v.* State, 30 Tex. Crim. 42, 16 S. W. 751.

of the threats will not render them incompetent when there is any other evidence of a continued hostility between the accused and the deceased,[4] or when they are conditioned on the doing, by the deceased, of some act the performance of which is soon followed by the homicide.[5]

k. *Intervening Friendship.* — The mere resumption of apparently friendly relations, and their existence at the time of the homicide, while tending to negative the inference of malice to be drawn from previous threats or expressions of ill-will, is not sufficient to exclude them from the consideration of the jury.[6]

l. *Whole Statement or Conversation.* — Evidence as to the defendant's previous threats or expressions of ill-will is not incompetent because the witness cannot testify as to the whole statement or conversation in which they were made.[7] The defendant, how-

One Month Previous. — Threats by the husband against his wife one month before the homicide are not too remote. Phillips *v.* State, 62 Ark. 119, 34 S. W. 539.

4. Thirty Years Previous. — In Goodwin *v.* State, 96 Ind. 550, threats by the accused to shoot his brother, the deceased, made thirty years before the homicide, when the former was a boy of fifteen, were held competent, there being other evidence of long-continued hostility between the brothers. "The existence and continuance of malevolent feelings was a question of fact and it was proper to submit to the jury all evidence bearing upon that question, leaving to them the decision of its credibility and weight."

Threats "running through many months and coming down to a time very near the homicide" are admissible. Rains *v.* State, 88 Ala. 91, 7 So. 315.

Two Years Previous — Followed by Continuous State of Hostility down to date of homicide — competent. Com. *v.* Storti, 177 Mass. 339, 58 N. E. 1021.

Continuous threats for a period of six months previous to the homicide are admissible. Hodge *v.* State, 26 Fla. 11, 7 So. 593. See also Clemmons *v.* State, 43 Fla. 200, 30 So. 699.

5. In Abbott *v.* Com., 24 Ky. L. Rep. 148, 68 S. W. 124, the defendant's threat a year previous to the homicide that he would kill the deceased if the latter married the defendant's sister was held admissible, it appearing that the homicide was committed on the day following such marriage. The threat was objected to as being too remote. The court says: "By the very nature of things, there can be no fixed, definite limit of time within which such threats had been made to determine their competency and admissibility. In our opinion, the time when the threats proven were made must go to the weight of such testimony, to be determined by the jury, rather than to the competency of the evidence itself."

6. Wharton *v.* State, 73 Ala. 366; People *v.* Hyndman, 99 Cal. 1. 33 Pac. 782. But see State *v.* Crabtree, 111 Mo. 136, 20 S. W. 7; Herman *v.* State, 75 Miss. 340, 22 So. 873.

In Cribbs *v.* State, 86 Ala. 613, 6 So. 109, a threat by the defendant made several months previous to the homicide was held admissible, although it appeared that the defendant and the deceased had been thrown together every day for several months and were friendly, and had never had any difficulty previous to the homicide, there being evidence, however, of another threat on the night before the killing.

7. State *v.* Vallery, 47 La. Ann. 182, 16 So. 745; Sutton *v.* Com., 85 Va. 128, 7 S. E. 323; Redd *v.* State, 68 Ala. 492; People *v.* Dice, 120 Cal. 189, 52 Pac. 477; Kelsoe *v.* State, 47 Ala. 573.

ever, may introduce in evidence his whole statement or all that was said in that connection.[8]

m. *Independent Offense.* — Such threats may be admissible, although constituting a separate offense.[9]

n. *Retraction of Threats.* — The fact that the threats were retracted in the same conversation in which they were made does not render them inadmissible.[10]

o. *Explanatory Evidence.* — Evidence of the circumstances preceding the homicide may be competent in behalf of the state, to show whether or not the deceased came within the scope of general threats previously made by the defendant.[11] The defendant is entitled to show the circumstances under which the threats were made,[12] and what caused or occasioned them,[13] but for this purpose he cannot prove the deceased's bad character.[14] He may also explain what was in his mind at the time he uttered the threatening language,[15]

An Isolated and Complete Sentence of the defendant, containing a threat, was held admissible, although the witness did not hear and could not relate the remainder of the conversation or statement. State *v.* Oliver, 43 La. Ann. 1003, 10 So. 201.

8. Drake *v.* State, 110 Ala. 9, 20 So. 450; People *v.* Curtis, 52 Mich. 616, 18 N. W. 385.

9. Evidence that four days previous to the homicide the defendant ran after the deceased in the street, cursing and threatening him, is competent, although amounting to an attempted assault. Henry *v.* People, 198 Ill. 162, 65 N. E. 120.

10. Cribbs *v.* State, 86 Ala. 613, 6 So. 109.

11. Caddell *v.* State, 129 Ala. 57, 30 So. 76.

12. People *v.* Curtis, 52 Mich. 216, 18 N. W. 385; Atkins *v.* State, 16 Ark. 568, in which the exclusion of the deceased's provoking remarks, which had caused the threat, was held error.

Intoxication. — He may show that he was intoxicated at the time. People *v.* Eastwood, 14 N. Y. 562; Rex *v.* Thomas, 7 Car. & P. 753, 32 E. C. L. 751. See also Bolzer *v.* People, 129 Ill. 112, 21 N. E. 818, 4 L. R. A. 579.

13. Utzman *v.* State, 32 Tex. Crim. 426, 24 S. W. 412.

Evidence on the part of the defendant that he had been previously attacked with a hatchet by the deceased, and that he had had the latter bound over to keep the peace, is admissible as tending to explain threats made by him and to confirm his own account of the nature and character of those threats. Bolzer *v.* People, 129 Ill. 112, 21 N. E. 818, 4 L. R. A. 579.

14. State *v.* Rose, 47 Minn. 47, 49 N. W. 404.

15. State *v.* Kirby, 62 Kan. 436, 63 Pac. 752.

State *v.* Pruet, 49 La. Ann. 283, 21 So. 842. In this case the witness testified that defendant had said he would "have to kill the deceased." It was held competent for the defendant "to explain if he could that if he made the statement it was because he anticipated from threats made by the deceased and communicated to him that he would be forced to kill him in self-defense. A very different coloring would be given to defendant's expression viewed from that standpoint from that which it would have if permitted to rest at the point where the state wished to close the inquiry."

In Haynes *v.* State, 17 Ga. 465, where evidence as to the defendant's threat to take the law into his own hands had been admitted to show malice it was held competent in rebuttal and explanation of such threat to allow the defendant's license to practice law to be read to the jury.

and the intention with which the threats were made, but not after he has unequivocally denied making them.[16]

p. *Weight Of.* — In determining whether or not such threats were the expression of a deliberate purpose or design to kill it is proper for the jury to take into consideration all the circumstances under which they were made.[17] Where provocation intervenes between the threat and the killing, the value of such threat as evidence of malice may be very much weakened or entirely destroyed.[18]

J. Intoxication. — a. *Generally.* — Although voluntary intoxication or drunkenness is no excuse for a criminal homicide, nevertheless when the crime charged is murder in the first degree or assault with intent to kill or murder, the defendant may show that he was in a state of voluntary intoxication when he did the act.[19] By the great weight of authority such evidence is competent only where the specific intent or deliberation and premeditation are the gist of the offense, and is not admissible to reduce the crime from murder to manslaughter.[20] In some jurisdictions, however, volun-

16. State *v.* Harlan, 130 Mo. 381, 32 S. W. 997.

17. In Bolzer *v.* People, 129 Ill. 112, 21 N. E. 818, 4 L. R. A. 579, it is said that in determining the degree of malice implied in a threat made a month or two before the homicide, "it was proper for the jury to take into consideration the facts that the plaintiff in error was more or less intoxicated at the time; that he and the deceased were in the habit of quarreling one day and becoming friends the next day; and that before deceased was killed they may have become reconciled."

They Should Be Considered With Caution, for many an idle threat is made, and words spoken under excitement are liable to be misunderstood. People *v.* Gaimari, 176 N. Y. 84, 68 N. E. 112.

18. Bolzer *v.* People, 129 Ill. 112, 21 N. E. 818, 4 L. R. A. 579; State *v.* Johnson, 47 N. C. 247, 64 Am. Dec. 582.

19. State *v.* Wright, 112 Iowa 436, 84 N. W. 541; People *v.* Rogers, 18 N. Y. 9, 72 Am. Dec. 484; Rex *v.* Carroll, 7 Car. & P. (Eng.) 145; Rex *v.* Meakin, 7 Car. & P. (Eng.) 297; Rex *v.* Thomas, 7 Car. & P. (Eng.) 817; Cross *v.* State, 55 Wis. 261, 12 N. W. 425; People *v.* Eastwood, 14 N. Y. 562; Walker *v.* State, 91 Ala. 76, 9 So. 87; Fonville *v.* State, 91 Ala. 39, 8 So. 688.

20. *United States.* — United States *v.* Meagher, 37 Fed. 875.

Arkansas. — Casat *v.* State, 40 Ark. 511.

California. — People *v.* Belencia, 21 Cal. 544; People *v.* Langton, 67 Cal. 427, 7 Pac. 843.

Connecticut. — State *v.* Johnson, 40 Conn. 136. But see State *v.* Johnson, 41 Conn. 584.

Dakota. — People *v.* Odell, 1 Dak. 197, 46 N. W. 601.

Delaware. — State *v.* Faino, 1 Marv. 492, 41 Atl. 134; State *v.* Di Guglielmo, 55 Atl. 350.

Florida. — Cook *v.* State, 35 So. 665; Garner *v.* State, 28 Fla. 113, 9 So. 835.

Kansas. — State *v.* O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555.

Massachusetts. — Com. *v.* Hawkins, 3 Gray 463.

Minnesota. — State *v.* Welch, 21 Minn. 22. See also State *v.* Carrivau, 100 N. W. 638; State *v.* Gut, 13 Minn. 341; State *v.* Garvey, 11 Minn. 154.

Nebraska. — Hill *v.* State, 42 Neb. 503, 60 N. W. 916; Schlencker *v.* State, 9 Neb. 241, 1 N. W. 857.

New Jersey. — Wilson *v.* State, 60 N. J. L. 171, 37 Atl. 954.

Ohio. — Davis *v.* State, 25 Ohio St. 369; Nichols *v.* State, 8 Ohio St. 435.

tary intoxication may be shown not only to reduce the degree of the crime, but also to negative the existence of the malice which is essential to murder and reduce the crime to manslaughter.[21] But in one state voluntary intoxication is not competent even to show the absence of specific intent or premeditation and deliberation.[22] In another, by statute, the intoxication must amount to temporary insanity before it can be shown.[23]

b. *Where a Legal Provocation Appears,* sufficient to reduce the crime to manslaughter, evidence of voluntary intoxication at the time of the homicide is competent,[24] not to establish the sufficiency

South Carolina. — State *v.* McCants, 1 Spears 357.

Tennessee. — Cartwright *v.* State, 76 Tenn. 376; Swan *v.* State, 4 Humph. 136; Haile *v.* State, 11 Humph. 154.

Texas. — Brown *v.* State, 4 Tex. App. 275; Colbath *v.* State, 2 Tex. App. 391; Gaitan *v.* State, 11 Tex. App. 544.

Virginia. — Willis *v.* Com., 32 Gratt. 929.

West Virginia. — State *v.* Hertzog, 46 S. E. 792; State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

"The correct rule upon the subject is that, although drunkenness neither aggravates nor excuses an act done by a party while under its influence, still it is a fact which may affect both physical ability and mental condition, and may be essential in determining the nature and character of the acts of the defendant as well as the purpose and intent with which they are done. Evidently, therefore, the fact of intoxication at the time the matter in question occurs may be a fact of little or no signification, or of the utmost importance, as it may connect itself with or be shown by the other facts to bear upon or enter into the case." Ferrell *v.* State, 43 Tex. 503; State *v.* Roan, 122 Iowa 136, 97 N. W. 997.

21. *Alabama.* — Morrison *v.* State, 84 Ala. 405, 4 So. 402. See Ford *v.* State, 71 Ala. 385; Gilmore *v.* State, 126 Ala. 20, 28 So. 595.

Georgia. — Hudgins *v.* State, 2 Ga. 173; Golden *v.* State, 25 Ga. 527. See Moon *v.* State, 68 Ga. 687.

Iowa. — State *v.* Roan, 122 Iowa 136, 97 N. W. 997.

Kentucky. — Seaborn *v.* Com., 25 Ky. L. Rep. 2203, 80 S. W. 223; Wilkerson *v.* Com., 88 Ky. 29, 9 S. W. 836; Buckhannon *v.* Com., 9 Ky. L. Rep. 411, 5 S. W. 358; Bishop *v.* Com., 21 Ky. L. Rep. 1161, 60 S. W. 190; Blimm *v.* Com., 70 Ky. 320.

Louisiana. — State *v.* Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293.

"It must generally happen, in homicides committed by drunken men, that the condition of the prisoner would explain or give character to some of his language, or some part of his conduct, and therefore I am of opinion that it would never be correct to exclude the proof altogether." People *v.* Rogers, 18 N. Y. 9, 72 Am. Dec. 484.

22. State *v.* Brown (Mo.), 79 S. W. 1111; State *v.* West, 157 Mo. 309, 57 S. W. 1071; State *v.* O'Reilly, 126 Mo. 597, 29 S. W. 577; State *v.* Cross, 27 Mo. 332; State *v.* Sneed, 88 Mo. 138; State *v.* Ramsey, 82 Mo. 133.

23. Under the Texas Statute, evidence of the defendant's intoxication at the time of the homicide is not admissible in mitigation, unless it produces temporary insanity, and then only for the purpose of mitigating the penalty or reducing the degree of the murder. Evers *v.* State, 31 Tex. Crim. 318, 20 S. W. 744; *Ex parte* Evers, 29 Tex. App. 539, 16 S. W. 343; Clore *v.* State, 26 Tex. App. 624, 10 S. W. 242; Houston *v.* State, 26 Tex. App. 657, 14 S. W. 352; Williams *v.* State, 25 Tex. App. 76, 7 S. W. 661.

24. Bishop *v.* Com., 21 Ky. L. Rep. 1161, 60 S. W. 190, *reviewing* previous cases in this state.

of the provocation, but to show that defendant acted upon the provocation rather than upon the preconceived malice.[25]

c. *Degree Necessary.* — To be competent the evidence need not disclose intoxication sufficient to negative the intent, but any degree of intoxication may be shown.[26]

Sufficiency. — The sufficiency of the evidence of intoxication is a matter resting entirely with the jury[27] and depending upon the circumstances of the case.[28]

d. *Opinion Evidence.* — The opinion of the witness as to whether the defendant was so drunk at the time of the homicide as to be incapable of entertaining malice or forming a criminal intent, is not admissible.[29] But any one who saw him may state that he seemed to be intoxicated.[30]

K. Hostility to Class or Race. — Defendant's conduct and declarations indicating hostility to the class, party, race or nationality to which the deceased belongs, are competent.[31]

L. Malice Toward Third Person. — Ordinarily it is not competent to show the defendant's malice or ill-will toward third

25. State *v.* McCants, 1 Spears (S. C.) 357; State *v.* Mullen, 14 La. Ann. 570; Jones *v.* State, 29 Ga. 594.

26. Lancaster *v.* State, 70 Tenn. 575; Cartwright *v.* State, 76 Tenn. 376; Haile *v.* State, 11 Humph. (Tenn.) 154.

27. People *v.* Mills, 98 N. Y. 176. Madison *v.* Com., 13 Ky. L. Rep. 313, 17 S. W. 164.

Degree of Intoxication. — "To be too drunk to form the intent to kill, the slayer must be too drunk to form the intent to shoot." Marshall *v.* State, 59 Ga. 154; Hanvey *v.* State, 68 Ga. 612.

Temporary Destruction of Reason. Voluntary intoxication is not enough to reduce the degree of the crime unless it is "accompanied by a temporary destruction of reason." Casat *v.* State, 40 Ark. 511.

Evidence tending to show that on the morning of the homicide, which occurred about half past eight o'clock, the defendant was drinking continuously from four o'clock until seven, and was drunk at seven, "falls far short of showing" a sufficient degree of intoxication to mitigate the crime. Walker *v.* State, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17.

28. The defendant's declarations immediately after the killing, "That was a good shot, wasn't it, with my left hand?" is competent to show that he was not so intoxicated as to be incapable of understanding the nature of his act. State *v.* Utley, 132 N. C. 1022, 43 S. E. 820.

29. Armor *v.* State, 63 Ala. 173.

30. People *v.* Eastwood, 14 N. Y. 562.

31. Where the Defendant Was a Negro and the Deceased a White Man, and the latter on the day of the homicide had challenged the former's vote, the defendant's declaration an hour before the killing that "he be damned if he didn't wish every white man was in hell" was held competent to show malice. Thompson *v.* State, 55 Ga. 47.

Where Deceased Was a Mexican, evidence that three weeks previous to the homicide defendant attended and participated in two meetings, the object of which was to get rid of the Mexicans in the community because they were working too cheap, was held admissible to show his malice. Chalk *v.* State, 35 Tex. Crim. 116, 32 S. W. 534. See more fully *infra*, the section "Threats Against a Class."

Frequent Quarrels and Fights Between Opposing Factions, to which defendant and deceased belonged, and in which the latter was shown to have taken part, were held competent evidence to show ill-feeling toward the deceased. State *v.* Helm, 97 Iowa 378, 66 N. W. 751.

persons,[32] unless such evidence would tend directly to explain or characterize the assault or homicide on trial.[33]

Difficulties[34] between defendant and third persons or his hostile acts[35] toward them cannot be shown unless part of the *res gestae*,[36] or the immediate cause or occasion[37] of the fatal conflict between the parties to the homicide. When, however, third persons occupy such a relation to the deceased, or the circumstances are such that the defendant's conduct toward them is dictated by or indicates his malice or ill-will toward the deceased or injured person, it may be proved against him.[38] So also under similar circumstances the statements or declarations of the accused showing his ill-will toward such third persons are competent.[39]

Assaults upon third persons contemporaneous with and a part of

32. Evidence tending to show defendant's malice toward deceased's stepson is irrelevant and inadmissible. People *v.* Clark, 84 Cal. 573, 24 Pac. 313.

33. Winkler *v.* State, 32 Ark. 539; Fonville *v.* State, 91 Ala. 39, 8 So. 688.

34. People *v.* Mitchell, 100 Cal. 328, 34 Pac. 698.

35. People *v.* Larubia, 140 N. Y. 87, 35 N. E. 412.

36. Prior *v.* State, 77 Ala. 56. See fully this article, *supra,* section "Res Gestae."

37. State *v.* Dettmer, 124 Mo. 426, 27 S. W. 1117.

38. Blanton *v.* State, 1 Wash. 265, 24 Pac. 439; State *v.* Ramsey, 82 Mo. 133; Smith *v.* State, 88 Ala. 73, 7 So. 52.

Attempts to assault a third person who was trying to alleviate the condition of the deceased after the fatal assault, are admissible to prove malice. Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238.

Malevolent Conduct Toward the Family of Which the Deceased Was a Member is competent evidence of malice, State *v.* Kohne, 48 W. Va. 335, 37 S. E. 553; when some connection is shown between such conduct and the offense charged, Gravely *v.* State, 45 Neb. 878, 64 N. W. 452.

The indecent language and conduct of the defendant toward the assaulted person's wife and daughter shortly previous to the homicide are admissible to show malice. Moore *v.* State, 31 Tex. Crim. 234, 20 S. W. 563. "There can be no stronger evidence of animosity than that which is manifested in gratuitous insults to the female relatives of an enemy."

Evidence as to the nature and character of the wounds inflicted upon the deceased's companion at the time of the homicide is competent to show the nature and violence of the act. State *v.* Gooch, 94 N. C. 987.

Assaults Upon Third Person Mistaken for Deceased. — Defendant's previous attempts to kill another person, whom he mistook for the deceased, and his apologies and explanation that he believed such person to be the deceased, held admissible to show malice. Angus *v.* State, 29 Tex. App. 52, 14 S. W. 443.

39. Defendant's statement immediately after the assault to several of the assaulted person's friends, "I fixed one of you, and I would just as soon fix three or four more of you as not," while not part of the *res gestae,* was held admissible to show ill-will toward deceased. State *v.* Smith, 125 Mo. 2, 28 S. W. 181. To the same effect Lewis *v.* State, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720.

Defendant's statement to deceased's wife, a half hour after the homicide, that he had killed her husband and intended to kill another one of the family, was held admissible to show his malice. Fitts *v.* State, 102 Tenn. 141, 50 S. W. 756.

previous assaults upon the deceased or injured person are admissible.[40]

M. General Malice. — While it is generally held that defendant's general malice or bad intentions not connected with the deceased or in some way explaining his mental attitude toward the deceased or injured person cannot be shown,[41] yet in some jurisdictions the statements[42] and conduct[43] of the defendant shortly preceding the homicide, tending to show his general malice and disposition to do violence, are admissible although not connected with the deceased or injured person in any way except by their nearness in point of time.

N. Motive. — a. *Generally.* — As a circumstance tending to show intent, malice and premeditation, evidence of a motive for the act is competent even when the defendant admits that he did the killing and pleads self-defense or accident.[44] But circumstances

40. Hamilton *v.* State, 41 Tex. Crim. 644, 56 S. W. 926, in which an assault upon the injured person's mother a year previous to the assault charged, made at the same time as one upon the assaulted person, was held properly admitted.

41. See preceding section.

The fact that defendant, a short time previous to the homicide, while drinking, shot his own horse, is irrelevant and immaterial, and its admission prejudicial error. Naugher *v.* State, 116 Ala. 463, 23 So. 26.

42. The declarations of the defendant shortly before the homicide, but in a conversation unconnected therewith, "I feel like I could shoot a man," and "Don't tell me to take care of myself, tell the people that I pass by to take care of themselves," were held admissible to show his state of mind and his readiness to use the weapon with which he was armed upon no, or the most trifling, provocation. Muscoe *v.* Com., 87 Va. 460, 12 S. E. 790.

The declaration of the defendant that he was hunting for trouble, made shortly previous to the homicide, was held admissible to show his animus. State *v.* Hamilton, 170 Mo. 377, 70 S. W. 876.

43. Whitaker *v.* Com., 13 Ky. L. Rep. 504, 17 S. W. 358. The conduct of the defendant immediately preceding the homicide is admissible to show that he was armed and prepared to kill, and was in a reckless and mischievous frame of mind, although not directly connected with the homicide and not part of the *res gestae*, and although disclosing an assault upon a third person. Kernans *v.* State, 65 Md. 253, 4 Atl. 124.

In Havens *v.* Com. (Ky.), 82 S. W. 369, the disorderly conduct of the defendant and assaults made by him upon other persons immediately preceding the homicide were held properly admitted, because tending to show his reckless and violent disposition at the time of the homicide and the intent with which he attacked the deceased, being admissible also as part of the *res gestae*.

44. People *v.* Brown, 130 Cal. 591, 62 Pac. 1072; Sullivan *v.* State, 100 Wis. 283, 75 N. W. 956; State *v.* Brown (Mo.), 79 S. W. 1111; Barnard *v.* State (Tex. Crim.), 73 S. W. 957. See Traverse *v.* State, 61 Wis. 144, 20 N. W. 724.

Illicit Relations With Deceased's Wife competent to show the grade or degree of the crime. State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

Contra. — Evidence as to the defendant's attempts to induce the deceased's wife to leave her husband was held improperly admitted, the only issue being self-defense, such evidence being admissible only in a circumstantial case to show motive. People *v.* Gress, 107 Cal. 461, 40 Pac. 752.

which are ordinarily competent to show motive[45] are not admissible when it clearly appears from the circumstances that they did not influence the defendant's action.[46]

In Rebuttal the defendant may prove any facts tending to show the non-existence of the alleged motive or to minimize its force.[47]

b. *In Favor of Defendant.* — Evidence tending to explain the motive or inducement of the killing may also be competent in favor of the accused, in extenuation of the crime.[48]

O. Repentance and Forgiveness. — The fact that on the day following the assault the defendant repented of his act and was forgiven by the deceased is not admissible.[49]

P. Friendly Conduct Toward Deceased. — In rebuttal of evidence tending to prove malice the defendant may show his friendly conduct and acts of kindness toward the deceased previous to the homicide.[50]

Q. Sufficiency. — a. *Intent.* — Direct and positive evidence of intent is of course unnecessary[51] even in case of the specific intent necessary to the crime of assault with intent to kill or murder,[52] but may be inferred from the circumstances. The fact that the defendant having a deadly weapon in his possession, used one not ordinarily

45. See *infra* this article the section "Circumstantial Evidence — Motive."

46. **The Fact That Defendant Was Living in Adultery With Deceased's Wife** was held improperly admitted where it appeared that the deceased had driven his wife away and offered no objections to her living with defendant, and the circumstances indicated that the killing was due to another cause. Price *v.* State (Tex. Crim.), 65 S. W. 909.

47. **To Rebut Evidence of His Adultery With the Deceased's Spouse,** the defendant may show the previous brutal conduct of the deceased toward such spouse, and the fact that they were not living together at the time of the homicide. Price *v.* State (Tex. Crim.), 65 S. W. 909.

48. Flanagan *v.* State, 46 Ala. 703. See "Passion and Provocation."

49. Murphy *v.* People, 9 Colo. 435, 13 Pac. 528.

50. Murphy *v.* People, 9 Colo. 435, 13 Pac. 528.

The fact that defendant during the morning preceding the homicide acted as a friend of the deceased and tried to prevent the latter's being hurt in his quarrels with others, was held to be a competent circumstance to disprove malice. Com. *v.* Aiello, 179 Pa. St. 597, 36 Atl. 1079. To the same effect Johnson *v.* State, 8 Wyo. 494, 58 Pac. 761.

After proof by the state of defendant's previous threats against the deceased it was held error to exclude evidence that on the night before the homicide the defendant offered to make friends with the deceased and that the latter refused. Ross *v.* Com., 21 Ky. L. Rep. 1344, 55 S. W. 4.

51. State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

52. Bryant *v.* State, 7 Wyo. 311, 56 Pac. 596. *Citing* Friederich *v.* People, 147 Ill. 310, 35 N. E. 472; People *v.* Landman, 103 Cal. 577, 37 Pac. 518; Roberts *v.* People, 19 Mich. 401.

Evidence Held Insufficient to Show an Intent to Murder. — Rainbolt *v.* State, 34 Tex. 286; Maxwell *v.* State, 3 Heisk. (Tenn.) 420.

Motive and the Fact of Flight will not warrant an inference of his specific intent to kill, where the nature of the wound and the other facts and circumstances are not sufficient to raise such an inference. Simpson *v.* State, 56 Ark. 8, 19 S. W. 99.

deadly, is a strong circumstance tending to disprove a specific intent to murder.[53] On the charge of assault with intent to murder the deadly character of the weapon or instrument used must be established either by direct evidence showing the nature of such instrument, or by proof of the dangerous character of the wounds inflicted with it.[54]

b. *Malice.* — Malice may sufficiently appear from the nature and results of the act,[55] even though there be some evidence of provocation.[56] A motive for the act need not appear.[57]

c. *Express Malice or Deliberation and Premeditation* must be proved to establish the crime of murder in the first degree, but this essential element may also sufficiently appear from the circumstances without direct or positive proof.[58] The sufficiency of the evidence

53. Where defendant, although he had in his hands a pistol, laid it aside and used a piece of broomstick in the assault, it was held that the evidence was not sufficient to support a conviction for assault with intent to murder. Patrick *v.* State (Tex. Crim.), 33 S. W. 352.

54. Where the only evidence as to the deadly character of the weapon was that two wounds were inflicted upon the prosecutor's body with some sharp instrument, and that the accused when delivering the blows said, "I will kill you," and that the prosecutor had his wounds dressed at a hospital, it was held that there was not sufficient proof of an assault with a deadly weapon, or assault with intent to murder. Cage *v.* State (Tex. Crim.), 77 S. W. 806.

55. The Reckless Firing of a Gun into a crowd is sufficient evidence of premeditated malice. Bailey *v.* State, 134 Ala. 59, 32 So. 673.

Cruel and Inhuman Whipping of a Child by his parent, resulting in death, is sufficient evidence of malice. State *v.* Harris, 63 N. C. 1.

The Mere Absence of Any Previous Ill-feeling between the parties is not sufficient to reduce the crime from murder to manslaughter, where a deadly weapon is used without provocation. Weeks *v.* State, 79 Ga. 36, 3 S. E. 323.

When the Plea of Insanity Is Set Up, the atrocity of the deed is not such strong evidence of malice as it otherwise would be, but it is not of itself evidence of innocence and raises no presumption of insanity. State *v.* Stark, 1 Strob. L. (S. C.) 479.

56. Even where there is some evidence of provocation, if it appears that the killing was done in a brutal and ferocious manner it will be attributed to a malicious disposition, and not to provocation. State *v.* Hunt, 134 N. C. 684, 47 S. E. 49.

57. Cross *v.* State, 68 Ala. 476.

58. *Missouri.* — State *v.* Kilgore, 70 Mo. 546; State *v.* Mitchell, 64 Mo. 191; State *v.* Lane, 64 Mo. 319; State *v.* Foster, 61 Mo. 549; State *v.* Grant, 76 Mo. 236; State *v.* Tabor, 95 Mo. 585, 8 S. W. 744; State *v.* Vinso, 171 Mo. 576, 70 S. W. 1034; State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315.

North Carolina. — State *v.* Truesdale, 125 N. C. 296, 34 S. E. 646; State *v.* Hunt, 134 N. C. 684, 47 S. E. 49.

New York. — People *v.* Beckwith, 108 N. Y. 67, 15 N. E. 53; People *v.* Koepping, 178 N. Y. 247, 70 N. E. 778; People *v.* Schmidt, 168 N. Y. 568, 61 N. E. 907; People *v.* Conroy, 97 N. Y. 62; People *v.* Mooney, 170 N. Y. 91, 70 N. E. 97; People *v.* Corey, 157 N. Y. 332, 51 N. E. 1024.

Oregon. — State *v.* Ah Lee, 8 Or. 214.

Texas. — Gaitan *v.* State, 11 Tex. App. 544; Garza *v.* State, 11 Tex. App. 345; Hill *v.* State, 11 Tex. App. 456.

West Virginia. —State *v.* Tucker, 52 W. Va. 420, 44 S. E. 427.

"It is always to be borne in mind, however, whatever difficulty there may be in establishing the fact that

is a question for the jury, whose decision will not be interfered with unless manifestly prejudiced and opposed to the evidence.[59]

8. Purpose of Deceased. — The purpose or motive of the deceased is generally irrelevant on any issues except those of self-defense[60] and suicide,[61] or as circumstantial evidence in some cases,[62] or under some circumstances to lessen the grade of degree of the crime;[63] and can never be shown by the state to affect the defendant's intent or conduct unless known to him at the time of his act,[64] except to rebut evidence tending to show the deceased's hostile purpose[65] or as part of the *res gestae*.[66]

9. Character. — A. Of Accused. — a. *Generally.* — The accused may always offer direct evidence of his general reputation for

the killing was with express malice, still it is incumbent upon the state to prove it before the accused be properly convicted of murder of the first degree. This may be done by proof of the cool, calm and circumspect deportment and bearing of the party when the act is done, and immediately preceding and subsequent thereto; his apparent freedom from passion or excitement; the absence of any obvious or known cause to disturb his mind or arouse his passions; the nature and character of the act done; the instrument used, as well as the manner in which the murder is committed; declarations indicating not only the state of the mind, but also the purpose and intent with which he acts, and the motives by which he is actuated; and all such other matters and things pertinent to the issue which may be suggested by the facts." Gaitan *v.* State, 11 Tex. App. 544.

Unexplained Possession of Deadly Weapon. — Steffy *v.* People, 130 Ill. 98, 22 N. E. 861.

59. People *v.* Koepping, 178 N. Y. 247, 70 N. E. 778.

In State *v.* Foster, 130 N. C. 666, 41 S. E. 284, 89 Am. St. Rep. 876, a previous threat, coupled with the fact that the defendant, just before the fatal difficulty, picked up a rock with which the fatal blow was given, was held sufficient evidence of premeditation and deliberation to require its submission to the jury.

Evidence Held Insufficient to Show Express Malice. — Kemp *v.* State, 11 Tex. App. 174; Burnham *v.* State, 43 Tex. 322; People *v.* Mangano, 29 Hun (N. Y.) 259.

60. See *infra* this article, "Defenses — Self-Defense."

61. See *infra* this article, "Defenses — Suicide."

62. See *supra* this article, "Declarations — Of Deceased. — Declarations of Purpose and Intention — Previous to or Accompanying Departure," etc.

63. See *infra* this article, "Homicide Under Particular Circumstances — During Trespass."

64. Woodward *v.* State, 42 Tex. Crim. 188, 58 S. W. 135.

Adams *v.* State, 44 Tex. Crim. 64, 68 S. W. 270, in which the killing took place upon a meeting of the defendant and deceased at night. Evidence that the deceased was on his way to visit his father on a peaceful mission was held immaterial.

65. Nelson *v.* State (Tex. Crim.), 58 S. W. 107.

The Fact That Deceased Was Unarmed when he started for the scene of the homicide is admissible to show his peaceful intentions. People *v.* Yokum, 118 Cal. 437, 50 Pac. 686.

66. Merritt *v.* State, 39 Tex. Crim. 70, 45 S. W. 21; State *v.* Peffers, 80 Iowa 580, 46 N. W. 662.

Evidence that the deceased had made an arrangement on the evening preceding the homicide to go the next day to the place where it occurred, for the purpose of buying some steers, was held properly admitted to show his peaceable intent on the ground that it was part of the *res gestae*. State *v.* Jones, 64 Iowa

being a peaceable and law-abiding person,[67] even when the homicide was committed by means of poison,[68] or when he has admitted that he did the killing,[69] and pleads insanity.[70] The evidence must be confined to the particular trait of character[71] involved in the crime, however; hence he cannot show his gentle and kind disposition.[72] The state in rebuttal may show his general bad reputation with reference to the same traits of character,[73] and also his reputation for violence in the particular circumstances under which the homicide occurred.[74] But until put in issue by the defendant himself, evidence as to his character is not admissible on behalf of the state[75] even to explain the conduct of the deceased.[76]

Subsequent Good Character. — The good character and conduct of the defendant subsequent to the commission of the homicide cannot be shown.[77]

b. *Cross-Examination.* — A witness who has testified to the defendant's good character may be asked on cross-examination as to his having heard of particular instances[78] of the defendant's violent

349, 17 N. W. 911. See also Johnson *v.* State, 72 Ga. 679.

67. Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62; Basye *v.* State, 45 Neb. 261, 63 N. W. 811; State *v.* Schleagel, 50 Kan. 325, 31 Pac. 1105; State *v.* Cather, 121 Iowa 106, 96 N. W. 722; State *v.* Howell, 100 Mo. 628, 14 S. W. 4.

The Defendant's Reputation in His Boyhood Days was held properly excluded where he had been permitted to show his reputation during the latter years of his life, on the ground that it was too remote. State *v.* Barr, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. Rep. 890, 29 L. R. A. 154.

See more fully the article "CHARACTER," Vol. III, pp. 6, 20.

68. Hall *v.* State, 132 Ind. 317, 31 N. E. 536; People *v.* Wileman, 44 Hun (N. Y.) 187.

69. People *v.* Gleason, 1 Nev. 174.

70. Maston *v.* State, 83 Miss. 647, 36 So. 70.

71. Walker *v.* State, 91 Ala. 76, 9 So. 87. See also more fully the article "CHARACTER," Vol. III, p. 20.

72. Demaree *v.* Com. (Ky.), 82 S. W. 231.

73. See fully the article "CHARACTER," Vol. III, p. 20.

74. In Cook *v.* State (Fla.), 35 So. 665, it was held competent for the state to show defendant's character when drinking, the homicide having been committed under such circumstances.

75. See article "CHARACTER," Vol. III, p. 12.

76. Evidence as to the defendant's lewd character and bad reputation for chastity is not admissible to explain the deceased's purpose in catching hold of her. Thompson *v.* State, 38 Tex. Crim. 335, 42 S. W. 974. *Citing* People *v.* Fair, 43 Cal. 137.

77. Moore *v.* State, 96 Tenn. 209, 33 S. W. 1036.

While Confined in Jail. — Evidence as to the defendant's good character while confined in jail under the charge for which he is being tried is not competent. White *v.* State, 111 Ala. 92, 21 So. 330; Hill *v.* State, 37 Tex. Crim. 415, 35 S. W. 660.

78. *Alabama.* — Terry *v.* State, 118 Ala. 79, 23 So. 776; White *v.* State, 111 Ala. 92, 21 So. 330; Goodwin *v.* State, 102 Ala. 87, 15 So. 571; Hussey *v.* State, 87 Ala. 121, 6 So. 420.

Georgia. — Ozburn *v.* State, 87 Ga. 173, 13 S. E. 247.

Louisiana. — State *v.* Pain, 48 La. Ann. 311, 19 So. 138.

or criminal acts, though it has been held to the contrary.[79] Such questions, however, must be confined to acts occurring previous to the homicide.[80] Some courts allow the witness to be cross-examined as to his own knowledge[81] of particular instances of the defendant's violence or criminal conduct; others exclude such evidence as improper.[82]

c. *On Redirect Examination* of such witnesses the defendant cannot go into the particulars of the specific acts of violence or misconduct which have been brought out on cross-examination.[83]

d. *To Sustain Accused's Credibility.* — Evidence as to the defendant's good character for peace and quiet cannot be considered by the jury to sustain his credibility when he testifies in his own behalf, if no attack has been made by the prosecution upon his character for truth and veracity.[84]

e. *Weight.* — The defendant's good character may be sufficient evidence to raise a reasonable doubt of his guilt,[85] but its weight[86]

Missouri. — State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315; State *v.* Brown, 181 Mo. 192, 79 S. W. 1111; State *v.* West, 157 Mo. 309, 57 S. W. 1071; State *v.* Crow, 107 Mo. 341, 17 S. W. 745.

Texas. — Holloway *v.* State (Tex. Crim.), 77 S. W. 14.

See also the article "CHARACTER," Vol. III, p. 49.

Rumors. — The witness cannot be asked concerning rumors of particular acts of misconduct by the defendant. State *v.* Evans, 158 Mo. 589, 59 S. W. 994.

79. State *v.* Tippet, 94 Iowa 646, 63 N. W. 445; *citing* State *v.* Gordon, 3 Iowa 410; State *v.* Sterrett, 71 Iowa 386, 32 N. W. 387.

80. People *v.* McSweeney (Cal.), 38 Pac. 743.

Effect of Accusation on Reputation. — On cross-examination the defendant's witness to his good character cannot be asked as to the effect which the act for which he is on trial has had upon his reputation. Irvine *v.* State, 104 Tenn. 132, 56 S. W. 845.

81. Young *v.* State, 41 Tex. Crim. 442, 55 S. W. 331; Cook *v.* State (Fla.), 35 So. 665; Basye *v.* State, 45 Neb. 261, 63 N. W. 811; *overruling* Olive *v.* State, 11 Neb. 1, 7 N. W. 444, and Patterson *v.* State, 41 Neb. 538, 59 N. W. 917.

82. A witness, testifying to the good character of the defendant, cannot be asked on cross-examination if the defendant has not been indicted for murder in another county. "It is never competent to inquire of a witness testifying in regard to character as to particular acts or instances of crime." Harris *v.* Com., 25 Ky. L. Rep. 297, 74 S. W. 1044.

83. State *v.* Brown, 181 Mo. 192, 79 S. W. 1111; State *v.* Sterrett, 71 Iowa 386, 32 N. W. 387; White *v.* State, 111 Ala. 92, 21 So. 330.

See also the article "CHARACTER," Vol. III, p. 50.

84. Gibson *v.* State, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96.

85. Redd *v.* State (Ga.), 25 S. E. 268; Lillie *v.* State (Neb.), 100 N. W. 316; People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162; People *v.* Bell, 49 Cal. 485. See Springfield *v.* State, 96 Ala. 81, 11 So. 250, 38 Am. St. Rep. 85; State *v.* Keefe, 54 Kan. 197, 38 Pac. 302.

86. "Its value, intrinsic or relative, will vary according to the proof to which it is opposed, and in connection with which it must be weighed and estimated by the jury. It does not shield from the consequences of the criminal act proved to the satisfaction of the jury, though it may raise a reasonable doubt of the act having been done with the criminal intent." Armor *v.* State, 63 Ala. 173.

depends upon the circumstances of the case, and it should be considered by the jury merely as any other fact.[87]

B. Character of Deceased. — Testimony as to the deceased's peaceable character is not competent on behalf of the prosecution[88] until his character has been first put in issue by the defendant.[89]

10. Declarations. — A. Of Defendant. — a. *In His Own Favor.* **(1.) Generally.** — The defendant's own declarations either before or after the assault are generally inadmissible in his own behalf, except as part of the *res gestae,* because self-serving and hearsay.[90] Declarations of his mental condition or purpose are competent in behalf of the defendant in some jurisdictions under certain circumstances.[91]

(2.) Explanatory of Compromising Position or Condition. — It has been held that when the situation, condition or appearance of the accused at a particular time has been shown as circumstantial evidence of his guilt, and the circumstances testified to were such that a failure to explain them at the time they were observed by others would in itself be an additional cause for suspicion, any contemporaneous explanation of such circumstances made by the accused is admissible in his own behalf.[92] However, it is only when the circumstances are such as to require an immediate explanation to prevent an

87. State *v.* Alexander, 66 Mo. 148; Cuppe *v.* State (Wis.), 97 N. W. 210; State *v.* McNally, 87 Mo. 644; Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62; State *v.* Porter, 32 Or. 135, 49 Pac. 964; Bacon *v.* State, 22 Fla. 51.

88. State *v.* McCarthy, 43 La. Ann. 541, 9 So. 493. See *infra* this article, "Self - Defense — Character of Deceased."

89. Where the defendant was charged as the accomplice of her father in the murder of her husband, and offered evidence in mitigation and provocation that her father's act was provoked by the deceased's insulting and abusive treatment of her, evidence on the part of the state that the deceased was a peaceable, law-abiding citizen, and was reputed to be a man who did not use abusive language was held competent in rebuttal. Martin *v.* State (Tex. Crim.), 70 S. W. 973.

90. *Alabama.* — Billingslea *v.* State, 68 Ala. 486; Shelton *v.* State, 73 Ala. 5; Jackson *v.* State, 52 Ala. 305; Willingham *v.* State, 130 Ala. 35, 30 So. 429.

Georgia. — Everett *v.* State, 62 Ga. 65.

Illinois. — Carle *v.* People, 200 Ill. 494, 66 N. E. 32, 93 Am. St. Rep. 208.

Indiana. — Kahlenbeck *v.* State, 119 Ind. 118, 21 N. E. 460.

Louisiana. — State *v.* Johnson, 35 La. Ann. 968; State *v.* Rutledge, 37 La. Ann. 378.

Mississippi. — Newcomb *v.* State, 37 Miss. 383.

Missouri. — State *v.* Punshon, 133 Mo. 44, 34 S. W. 25.

North Carolina. — State *v.* Moore, 104 N. C. 743, 10 S. E. 183; State *v.* Howard, 82 N. C. 623; State *v.* Tilly, 25 N. C. 424.

South Carolina. — State *v.* Wyse, 32 S. C. 45, 10 S. E. 612; State *v.* Jackson, 32 S. C. 27, 10 S. E. 769.

Texas. — Pharr *v.* State, 9 Tex. App. 129, *s. c.* 10 Tex. App. 485; Foster *v.* State (Tex. Crim.), 74 S. W. 29; Holt *v.* State, 9 Tex. App. 571.

Defendant's self-serving statements when surrendering himself to the officers are not admissible. State *v.* Nocton, 121 Mo. 537, 26 S. W. 551.

91. See *infra* this article "Lawful Purpose of Defendant — Self-Serving Acts and Declarations."

92. The defendant's explanation of his act when found at the scene of the homicide five or ten minutes

implied admission of guilt that the explanation given may be shown.[93]

(3.) **Rebutting Appearance of Concealment.** — The subsequent statements of the defendant may be admissible as circumstances tending to rebut the appearance of concealment of previous suspicious conduct.[94]

b. *For the Prosecution.* — **(1.) Generally.** — Any declarations or statements of the defendant either before or after the commission of the homicide tending to show his connection therewith or the motive or intent with which the act was done, are competent against him,[95] even though susceptible of two interpretations, one consistent with innocence, the other indicative of guilt.[96] The rules governing confessions have no application to such statements unless they in fact amount to confessions.[97] A statement otherwise incompetent

after the shooting was held admissible in his behalf because the surrounding circumstances demanded an explanation by him, and a failure to explain would have been an inculpatory fact. Brunet *v.* State, 12 Tex. App. 521.

Where it appeared that the officer arresting the defendant found in the latter's possession a key, which fitted the lock on the door leading into the room where the deceased was murdered, the exclusion of evidence that the defendant, when informed of this fact, said that the key was one which he had carried away from a lodging-house in another city was held error. Radford *v.* State, 33 Tex. Crim. 520, 27 S. W. 143.

93. Dillin *v.* People, 8 Mich. 357.

Where the defendant, when he met the witness on the day of the homicide, exhibited his hands, which had blood on them, his voluntary statements in explanation thereof were held incompetent to rebut testimony as to this circumstance because self-serving and not part of the *res gestae*. Scaggs *v.* State, 16 Miss. 722.

94. Where the defendant's presence near the scene of the homicide had been shown as a suspicious circumstance he may show in rebuttal his declarations to third persons subsequent thereto as to the fact of his having been there, because such evidence tends to rebut any appearance of concealment. State *v.* Young, 119 Mo. 495, 24 S. W. 1038.

95. Jones *v.* State, 120 Ala. 303, 25 So. 204; State *v.* Johnson, 35 La. Ann. 968.

A conversation between the defendant and the witness tending to incriminate the former is admissible, although containing the latter's expression of opinion and belief that the accused was guilty of the murder. State *v.* Williams, 68 N. C. 60.

The defendant's statements as to where the tools with which the homicide was accomplished had been hidden is admissible not as a confession or admission of guilt, but as an incriminating circumstance, even though in the same statement he refers his knowledge to information derived from other persons. Shaw *v.* State, 102 Ga. 660, 29 S. E. 477.

The Refusal of the Defendant to Confess, when urged to do so by an alleged accomplice who had pleaded guilty, is a competent circumstance against him when in connection therewith he fails to deny his guilt. Cobb *v.* State, 27 Ga. 648.

Excitement of Defendant. — Defendant's statements subsequent to the killing are not inadmissible because made while he was excited. Balls *v.* State (Tex. Crim.), 40 S. W. 801. See also the article "CONFESSIONS."

96. Hudson *v.* State, 44 Tex. Crim. 251, 70 S. W. 764; Goodwin *v.* State, 96 Ind. 550.

97. State *v.* Feltess, 51 Iowa 495, 1 N. W. 755.

as a confession may be admissible where evidences of the crime have been discovered through the directions therein contained.[98]

(2.) Whole Conversation or Statement Competent. — Where the prosecution has introduced an inculpatory statement by the defendant, he is entitled to show his exculpatory statements made in explanation or as part of the same conversation,[99] but not those of a contrary import made at a subsequent time,[1] unless allowed to do so by statute.[2]

B. Of Deceased or Injured Person. — a. *Generally.* — The declarations of the deceased or injured person are in general subject to the same rules which apply to declarations generally, except in the case of dying declarations[3] and declarations in impeachment thereof,[4] and are not admissible either for or against the accused

The Voluntary Offer to Confess is a competent circumstance, but it is not subject to rules governing confessions. Perkins *v.* State, 60 Ala. 7.

The defendant's declaration admitting the homicide, but in effect disavowing criminal responsibility, is not a confession, although it may be a relevant circumstance tending to incriminate him. Powell *v.* State, 101 Ga. 9, 29 S. E. 309, 69 Am. St. Rep. 277. See article "Confessions."

98. Com. *v.* James, 99 Mass. 438. See article "Confessions."

99. Stevenson *v.* United States, 86 Fed. 106; Burns *v.* State, 49 Ala. 370; State *v.* Curtis, 70 Mo. 594; State *v.* Abbott, 8 W. Va. 741; Paulson *v.* State, 118 Wis. 89, 94 N. W. 771.

Where defendant's declarations explaining his possession of property belonging to the deceased were introduced, it was held error to exclude his declarations made at the same time concerning the killing, on the ground that he was entitled to show all of the conversation. Pharr *v.* State, 9 Tex. App. 129.

In Boston *v.* State, 94 Ga. 590, 21 S. E. 603, the state having proved that immediately after the killing of his wife the defendant made manifestations of grief and said he shot her by accident, it was held competent for the defendant to prove that he acted consistently with this theory by going in search of an officer and surrendering himself, saying at the time of the surrender, and as explanatory thereof, that he had killed his wife by accident, the interval between the homicide and the surrender being about half an hour, but his mere declaration subsequent to the arrest to the effect that the killing was accidental, and that he desired to return to see the body of his wife, was held inadmissible.

1. Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814; Alexander *v.* Com., 105 Pa. St. 1; State *v.* Anderson, 10 Or. 448.

The admission in evidence of the defendant's confession does not authorize the introduction of his previous self-serving inconsistent declarations, in rebuttal thereof. State *v.* Johnson, 35 La. Ann. 968. See article "Confessions."

2. Under the Texas Code when evidence of the defendant's confession or admission is introduced against him, he may show any explanatory act or statement necessary to a full understanding of the act or statement offered as an admission, although it may have transpired at a different time and at a time so remote as not to be admissible as *res gestae.* Smith *v.* State (Tex. Crim.), 81 S. W. 936; Harrison *v.* State, 20 Tex. App. 387, 54 Am. Rep. 529.

3. See article "Dying Declarations."

4. See article "Dying Declarations," Vol. IV., p. 1015.

Previous declarations of the deceased made subsequent to the homicidal act but not themselves dying declarations or part of the *res*

except as verbal acts, *res gestae,* or to show the speaker's state of mind when it is a material circumstance.[5] Neither the deceased nor the prosecuting witness who has been injured during an attempted murder is a party to the action, hence their declarations or statements are not competent as admissions.[6]

b. *Statements as to Physical Condition.* — The deceased or injured person's statements as to his present physical condition[7] are

gestae, held competent to impeach his dying declaration. State *v.* Charles, 111 La. 933, 36 So. 29; Green *v.* State, 154 Ind. 655, 57 N. E. 637; Shell *v.* State, 88 Ala. 14, 7 So. 40; Nordgren *v.* People, 211 Ill. 125, 71 N. E. 1042. *Contra.* — State *v.* Stuckey, 56 S. C. 576, 35 S. E. 263.

5. *Alabama.* — Deal *v.* State, 136 Ala. 52, 34 So. 23.
California. — People *v.* Gress, 107 Cal. 461, 40 Pac. 752.
Indiana. — Cheek *v.* State, 35 Ind. 492.
Massachusetts. — Com. *v.* Dunan, 128 Mass. 422; Com. *v.* Densmore, 12 Allen 535.
Mississippi. — Boyd *v.* State, 36 So. 525.
Missouri. — State *v.* McCoy, 111 Mo. 517, 20 S. W. 240.
Tennessee. — Wright *v.* State, 9 Yerg. 342.
Texas. — Campbell *v.* State, 8 Tex. App. 84.

Deceased's declarations several hours previous to the homicide that defendant was expected at the scene thereof, were held improperly admitted to show that defendant was present at the time of the homicide. People *v.* Carkhuff, 24 Cal. 641.

Deceased's Declarations in His Sleep are not admissible, though tending to criminate the defendant, because they are mere hearsay. State *v.* Freidrich, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332.

The Assaulted Person's Subsequent Declarations as to his hostile acts toward the defendant previous to the homicide are inadmissible. Green *v.* State, 74 Ga. 373.

Expressing Fear of Defendant. Deceased's declarations previous to the homicide as to his fear that the defendant would kill him are inadmissible. Woolfolk *v.* State, 81 Ga. 551, 8 S. E. 724; Segura *v.* State, 16 Tex. App. 221; Young *v.* State, 41 Tex. Crim. 442, 55 S. W. 331; State *v.* Shafer, 22 Mont. 17, 55 Pac. 526.

The deceased's declaration two days previous to the homicide that he expected to be killed very soon by a particular person is not admissible. Tiget *v.* State, 110 Ga. 244, 34 S. E. 1023.

6. State *v.* Maitremme, 14 La. Ann. 830.

"The person injured, whether living or dead, is not a party to the prosecution, and his admissions or statements are not evidence either for or against the accused, unless of the *res gestae,* dying declarations or threats, but are hearsay the same as those of any other third person." Shields *v.* State, 149 Ind. 395, 49 N. E. 351.

7. People *v.* Robinson, 2 Park. Crim. (N. Y.) 235; Field *v.* State, 57 Miss. 474, 34 Am. Rep. 476; State *v.* Thompson, 132 Mo. 301, 34 S. W. 31; Tooney *v.* State, 8 Tex. App. 452.

Complaints by the deceased of pain from the injuries inflicted by the defendant. Livingston *v.* Com., 14 Gratt. (Va.) 592.

On a charge of murder by poisoning, the deceased's statements shortly preceding the homicide as to the condition of his health are admissible. Reg. *v.* Johnson, 2 Car. & K. 354, 61 E. C. L. 353.

Previous declarations of the deceased concerning a peculiar tooth which she was alleged to have had in the roof of her mouth were held properly admitted for purposes of identification, as part of the *res gestae.* Edmonds *v.* State, 34 Ark. 720.

admissible, but not those as to the causes thereof, or as to his past conduct.[8]

c. *Declarations of Purpose or Intention.* — **(1.) Generally.** — When the purpose or intention of the deceased is relevant and material, his declarations of such intention or purpose are held competent in some jurisdictions not as testimonial statements, but as declarations of mental condition, of the same nature as acts or conduct.[9] In others they are inadmissible unless accompanying and explaining some act or conduct.[10]

(2.) Previous to or Accompanying Departure for Scene of Homicide. The purpose and intention of the deceased when last seen or when departing for the scene of the crime may be relevant for the purpose of connecting the defendant with the homicide in a circumstantial case, as when the deceased intends or expects to meet the defendant. In such cases declarations by the deceased of his purpose are admitted by some courts as part of the *res gestae*,[11] by others as verbal

"Natural Evidence." — On the question whether a severe burn found on the deceased's body was received by him before or after death, the deceased's declaration that he had this burn was held admissible as "natural evidence." State *v.* Harris, 63 N. C. 1. See also State *v.* Whitt, 113 N. C. 716, 18 S. E. 715.

8. Boyd *v.* State (Miss.), 36 So. 525.

Where the crime charged is murder by poisoning, the deceased's declarations as to his feelings and symptoms are admissible as part of the *res gestae*, but his declarations as to what he had previously drunk and eaten are inadmissible because hearsay. Field *v.* State, 57 Miss. 474; Smith *v.* State, 53 Ala. 486.

Contra. — The statements by deceased as to how and from whom he obtained the lunch which contained the poison, made while he was eating it, and before he had experienced any of the effects of the poison, were held improperly excluded, because part of the *res gestae*. State *v.* Thompson, 132 Mo. 301, 34 S. W. 31.

9. State *v.* Asbell, 57 Kan. 398, 44 Pac. 770; Boyd *v.* State, 82 Tenn. 161; People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624; Shaw *v.* People, 3 Hun (N. Y.) 272; Blackburn *v.* State, 23 Ohio St. 146; Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235. See also cases cited to the following section of text. See article "INTENT."

10. State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113; State *v.* Punshon, 133 Mo. 44, 34 S. W. 25; Com. *v.* Felch, 132 Mass. 22; Nordgren *v.* People, 211 Ill. 125, 71 N. E. 1042; Siebert *v.* People, 143 Ill. 571, 32 N. E. 431. See *infra* this article, "Defenses — Suicide."

11. *Alabama.* — Martin *v.* State, 77 Ala. 1; Harris *v.* State, 96 Ala. 24, 11 So. 255.

District of Columbia. — United States *v.* Nardello, 4 Mack. 503.

Iowa. — State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753.

Kansas. — State *v.* Winner, 17 Kan. 298.

Tennessee. — Carroll *v.* State, 3 Humph. 315; Kirby *v.* State, 9 Yerg. 383, 30 Am. Dec. 420.

Vermont. — State *v.* Howard, 32 Vt. 380.

Virginia. — Dock *v.* Com., 21 Gratt. 909; State *v.* Dickinson, 41 Wis. 299.

In Behalf of Defendant. — Where the defendant claimed that the body found was not that of the alleged deceased, the latter's declaration made before leaving home the last time that he intended soon to leave and never make himself known to or be heard from by his family was

acts explaining his conduct,[12] and by still others on the broader ground of their being declarations of mental condition.[13] In some cases such declarations have been held admissible merely on authority without any statement of the grounds of admissibility.[14] Such evidence, however, is competent only to show the purpose or intention of the deceased, and not to show that defendant did a particular act.[15]

d. *Exculpating Defendant.* — The declarations or admissions of the deceased as to his fault in provoking the fatal difficulty and exculpating the defendant are not competent except as dying declarations or when part of the *res gestae*.[16]

held not admissible. State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753.

12. State *v.* Hayward, 62 Minn. 474, 65 N. W. 63; West *v.* State, 2 Tex. App. 460; Burton *v.* State, 115 Ala. 1, 22 So. 585.

In State *v.* Power, 24 Wash. 34, 63 Pac. 1112, deceased's declarations while preparing for her journey to the place where she was killed as to where she was going and what her purpose was were held properly admitted not as *res gestae* but as a verbal act showing her intention.

13. State *v.* Hayward, 62 Minn. 474, 65 N. W. 63, *concurring* opinion of Start, C. J.

Deceased's declaration of his intention of going to defendant's house to collect some money, made as he left home on the night when he disappeared, was held properly admitted, not as part of the *res gestae*, but as original evidence of his intention and purpose. State *v.* Mortensen, 26 Utah 312, 73 Pac. 562, 633. *Citing* Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235.

In the Leading Case of Hunter *v.* State, 40 N. J. L. 495, the deceased's declaration to his son and his letter to his wife a few hours before leaving home on the night of the murder, to the effect that he was going to the city of C. on business, with the defendant, and would not return until late, were held properly admitted as part of the *res gestae* and also as evidence of the deceased's motive and intention. The fact that the statements were made several hours before the journey was undertaken was held no objection to their admissibility, nor the fact that they included the statement that defendant was to accompany the declarant.

14. State *v.* Garrington, 11 S. D. 178, 76 N. W. 326.

The deceased's declaration, made in the house of a neighbor while the declarant was on her way to her own house where she was killed, that she expected to meet the defendant among others at her house, was held properly admitted. Territory *v.* Couk, 2 Dak. 188, 47 N. W. 395.

15. State *v.* Dickinson, 41 Wis. 299; State *v.* Power, 24 Wash. 34, 63 Pac. 1112.

In Kirby *v.* State, 9 Yerg. (Tenn.) 383, 30 Am. Dec. 420, deceased's declaration as he started for the place where he was subsequently found dead as to his purpose and intention, and also as to the fact that defendant was going with him, was held competent so far as it related to his intention, but incompetent as to defendant's accompanying him, the latter fact constituting no part of the *res gestae*. The court *distinguishes* a former appeal of the same case, 15 Tenn. 259. But *contra*, as to last point, see Hunter *v.* State, 40 N. J. L. 495.

16. *Alabama.* — Stewart *v.* State, 78 Ala. 436.

California. — People *v.* McLaughlin, 44 Cal. 435.

Georgia. — Ratteree *v.* State, 53 Ga. 570.

Illinois. — Moeck *v.* People, 100 Ill. 242, 39 Am. Rep. 38.

Identification of Third Person by Deceased, as His Assailant. — The fact that deceased identified another than the defendant as the person responsible for his death is not admissible except as a dying declaration or when forming part of the *res gestae.*[17]

C. Of Third Persons. — a. *Generally.* — The declarations or statements of third persons are subject to the general rules governing this class of evidence, and are not admissible except as part of the *res gestae,* as implied admissions of the defendant, or in explanation of the latter's conduct and statements.[18]

b. *To Explain Defendant's Statements.* — The statements of third persons to the defendant subsequent to the homicide are admissible, in so far as they are necessary to render intelligible the declarations of the defendant concerning the homicide.[19]

c. *As Implied Admissions.* — **(1.) Generally.** — The declarations and statements of both the deceased and other persons in the presence and hearing of the defendant accusing him either directly or inferentially of a criminal connection with the homicide, and not denied by him, are admissible against him as implied admissions if the statements, and the circumstances under which they are made, are such that an innocent person would ordinarily deny them.[20]

Indiana. — Stephenson *v.* State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216.

Missouri. — State *v.* Jackson, 17 Mo. 544, 59 Am. Dec. 281; State *v.* Terry, 122 Mo. 213, 72 S. W. 513.

Texas. — Tomerlin *v.* State (Tex. Crim.), 26 S. W. 66; Davis *v.* State (Tex. Crim.), 56 S. W. 53; Franklin *v.* State, 41 Tex. Crim. 21, 51 S. W. 951.

17. State *v.* Curtis, 70 Mo. 594.

18. Mitchell *v.* State, 71 Ga. 128; Davidson *v.* State, 135 Ind. 254, 34 N. E. 072. See also articles, "Declarations," "Admissions," "Conspiracy."

Exclamations of the Defendant's Son, made in the absence of the defendant immediately upon hearing the fatal shot, that his father had killed deceased, were held improperly admitted. State *v.* Keefe, 54 Kan. 197, 38 Pac. 302.

The Declaration of Defendant's Wife that she knew her husband was going to kill the deceased is incompetent because hearsay. Skaggs *v.* State, 31 Tex. Crim. 563, 21 S. W. 257. So also is a similar declaration of defendant's son. Drake *v.* State, 29 Tex. App. 265, 15 S. W. 725.

The exclamations or declarations of a third person two days after the homicide, identifying a pistol picked up in the vicinity thereof, as the property of the deceased, are not competent. Hall *v.* State, 86 Ala. 11, 5 So. 49.

19. Watt *v.* People, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403; State *v.* Talmage, 107 Mo. 543, 17 S. W. 990; People *v.* McArron, 121 Mich. 1, 79 N. W. 944.

In People *v.* Hughson, 154 N. Y. 153, 47 N. E. 1092, the deceased's statement accusing the defendant of shooting her, though fully denied by him, was held properly admitted, not as an implied admission for which purpose it would have been incompetent, but to explain the defendant's reply, which was inconsistent with his defense of unconsciousness when the act was done.

20. *Alabama.* — Vaughn *v.* State, 130 Ala. 18, 30 So. 669.

Iowa. — State *v.* Weaver, 57 Iowa 730, 11 N. W. 675; State *v.* Gillick, 7 Iowa 287.

Mississippi. — Miller *v.* State, 68 Miss. 221, 8 So. 273.

New York. — M'Kee *v.* People, 36 N. Y. 113.

(2.) Showing Motive and Intent. — The declarations and statements of third persons, acquiesced in and acted upon by the defendant, may be admissible against him as tending to show his motive and intent.[21]

(3.) Must Have Been Heard by Defendant. — Before such statements are admissible it must appear that they were both heard[22] and understood by the accused.[23] It is sufficient, however, to show that he was in a position where he could have heard the statement.[24]

Texas. — Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471; Bennett *v.* State, 39 Tex. Crim. 639, 48 S. W. 61; Brown *v.* State, 32 Tex. Crim. 119, 22 S. W. 506.

Virginia. — Puryear *v.* Com., 83 Va. 51, 1 S. E. 512.

The request of defendant's wife, made in his presence to a third person, not to allow the defendant to "go at" the deceased any more was held properly admitted. People *v.* Hossler (Mich.), 97 N. W. 754.

A declaration of defendant's wife in his presence as to a previous difficulty between defendant and deceased is competent to prove that fact. Garrett *v.* State, 76 Ala. 18.

Statements of Defendant's Spouse Not Incompetent. — The statements of the wife in the presence of the accused, her husband, when otherwise competent as implied admissions, are not inadmissible on the ground that she would not be a competent witness as against her husband. Cobb *v.* State, 27 Ga. 648.

21. The Advice of Third Persons to the defendant urging him to prepare for the conflict with the deceased is admissible to show malice, where the defendant is acting on such advice. Workman *v.* Com., 12 Ky. L. Rep. 625, 14 S. W. 952; Fisher *v.* State, 77 Ind. 42. See also *infra* this article, "Malice, Intent, Etc. — Threats — Against Third Persons."

22. Frady *v.* State, 67 Tenn. 349; *Ex parte* Kennedy (Tex. Crim.), 57 S. W. 648; Johnson *v.* State, 22 Tex. App. 206, 2 S. W. 609; Felder *v.* State, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777; Simmons *v.* State, 115 Ga. 574, 41 S. E. 983.

Knight *v.* State, 114 Ga. 48, 39 S. E. 928, 88 Am. St. Rep. 17. In this case it was doubtful whether the defendant overheard the declaration. An instruction to the jury to disregard the evidence unless they believed the accused did hear the remark was held sufficient to prevent any injury to the defendant from its admission.

In Clarke *v.* State, 78 Ala. 474, 56 Am. Rep. 45, the testimony of the officer sent to arrest defendant that the latter's wife, while standing in the doorway, told him in a conversational tone that her husband was not at home, and that immediately thereafter the witness saw the defendant in the corner of an adjoining room, was held properly admitted, but the court says: "On account of the uncertainty of such evidence it should *prima facie* appear to the court that the accused heard and understood the purport of the conversation, and knew that the person inquiring for him was an officer; and the jury should be instructed to disregard it, unless satisfied of the preliminary requisites to its admission."

23. State *v.* Epstein (R. I.), 55 Atl. 204, in which the fact that the defendant was seriously injured and in a dazed condition was held sufficient to exclude the statements.

"It must be clearly shown that the defendant understood himself to be accused." Felder *v.* State, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777; *Ex parte* Kennedy (Tex. Crim.), 57 S. W. 648.

It must appear that they purported impliedly or directly to charge the defendant with the crime. State *v.* Shepherd, 49 W. Va. 582, 39 S. E. 676.

24. State *v.* McCourry, 128 N. C. 594, 38 S. E. 883; State *v.* Mortensen, 26 Utah 312, 73 Pac. 562, 633; People *v.* Young, 108 Cal. 8, 41 Pac. 281.

(4.) The Defendant's Acquiescence in the charge must appear either directly or from the circumstances.[25] Hence, if the statement was fully denied by him it is not admissible unless part of the *res gestae*,[26] or indicating malice.[27] But if he made a reply partially admitting the truth of the facts stated, both the statement and the reply are competent evidence.[28]

(5.) Statement and Circumstances Must Call for Denial. — (A.) GENERALLY. — The statement or declaration must be of such a nature as to call for a denial.[29] So also the circumstances under which the state-

Where the defendant was within speaking distance of the person making a statement incriminating him the burden is upon him to show that he did not hear it. Farris *v.* State (Tex. Crim.), 56 S. W. 336.

Declarations are deemed to be made in the presence of the defendant, if made where it was possible for him to have heard them. The question of whether or not he actually heard them is one for the jury. State *v.* Finley, 118 N. C. 1161, 24 S. E. 495.

Where the defendant was within hearing distance, the statements made by others cannot be excluded on the theory that he was in such a disturbed state of mind, and that there was so much confusion that he did not hear what was said. State *v.* Crafton, 89 Iowa 109, 56 N. W. 257.

In Hall *v.* State, 132 Ind. 317, 31 N. E. 536, the accused, after handing to the deceased liquor alleged to have contained poison, drove away from him to a distance of at least fifteen rods, where he remained talking to a third person while the deceased complained in a loud voice that the liquor was bitter and contained quinine. This declaration of the deceased was held competent as being made within the presence and hearing of the defendant, although the latter denied having heard it.

25. Simmons *v.* State, 115 Ga. 574, 41 S. E. 983; State *v.* Shepherd, 49 W. Va. 582, 39 S. E. 676.

The declarations of the woman who was the cause of the trouble between defendant and deceased, made to the defendant some months prior to the homicide, to the effect that if deceased's life were not taken they could not be happy, were held incompetent, it appearing that the declarations were not called out by anything said by the defendant, or that he had made any reply to it or in any way assented to it. People *v.* Larubia, 140 N. Y. 87, 35 N. E. 412.

26. Haile *v.* State, 1 Swan (Tenn.) 248; Brown *v.* State, 78 Miss. 637, 29 So. 519, 84 Am. St. Rep. 641.

See People *v.* Hughson, 154 N. Y. 153, 47 N. E. 1092, in which the rule is recognized, but such an accusation, though denied, was held competent to explain the denial and not as an implied admission, the defense being insanity and not self-defense.

27. Defendant's Profane and Abusive Denial when accused by one of the wounded persons of an attempt to commit murder is admissible to show malice, although not part of the *res gestae* and made while defendant was under arrest. Weathersby *v.* State, 29 Tex. App. 278, 15 S. W. 823.

28. State *v.* Murray, 126 Mo. 611, 29 S. W. 700; Com. *v.* Brown, 121 Mass. 69.

29. Bennett *v.* State, 39 Tex. Crim. 639, 48 S. W. 61; State *v.* Glahn, 97 Mo. 679, 11 S. W. 260; Nicks *v.* State (Tex. Crim.), 79 S. W. 35.

The Declaration of a Bystander immediately after the accused shot, "There! You done killed him!" to which the accused made no reply, was held properly admitted. Clark *v.* State, 117 Ga. 254, 43 S. E. 853.

To the same effect, State *v.* Walker, 78 Mo. 380.

Exclamations by bystanders that deceased ought to be hung are not

ment was made must have been such as to call for a denial or explanation by the accused.[30]

(B.) When Defendant Under Arrest. — In some jurisdictions the fact that the accused was under arrest when the statements were made renders them inadmissible, because under such circumstances a denial is not expected or required.[31] In other states, however, this fact alone will not exclude the statement if the circumstances otherwise call for a denial.[32]

(C.) Statements Given in Evidence in Judicial Proceedings, although made in defendant's presence and not denied by him, are not competent as implied admissions, because he has no right to interpose a denial.[33]

(D.) The Identification of the Accused by the Deceased as his assailant may be shown as an implied admission[34] unless the defendant denied the accusation,[35] or was compelled to keep silent.[36]

admissible as implied admissions, since defendant is under no obligation to deny them. Kaelin *v.* Com., 84 Ky. 354, 1 S. W. 594.

The statement of a disinterested bystander to the officer who had defendant under arrest, "You have got your right man," was held improperly admitted, because the defendant was under arrest, and therefore not required to deny such a statement, and also because the remark was made by a mere stranger in his presence and not to him and he could treat it as a mere impertinence best answered by silence. State *v.* Young, 99 Mo. 666, 12 S. W. 879.

30. Felder *v.* State, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777; *Ex parte* Kennedy (Tex. Crim.), 57 S. W. 648; People *v.* Kessler, 13 Utah 69, 44 Pac. 97; State *v.* Robinson, 51 La. Ann. 694, 25 So. 380; Bob *v.* State, 32 Ala. 560.

"A statement made in the presence of a defendant, to which no reply is made, is not admissible against him, unless it appears that he was at liberty to make a reply, and that the statement was made by such person and under such circumstances as naturally to call for a reply unless he intends to admit it." State *v.* Murray, 126 Mo. 611, 29 S. W. 700; *quoting* from Com. *v.* Brown, 121 Mass. 69.

31. State *v.* Carter, 106 La. 407, 30 So. 895; Weaver *v.* State, 43 Tex. Crim. 340, 65 S. W. 534; Geiger *v.* State, 70 Ohio 400, 71 N. E. 721; State *v.* Young, 99 Mo. 666, 12 S. W. 879; Com. *v.* McDermott, 123 Mass. 440, 25 Am. Rep. 120; State *v.* Robinson, 51 La. Ann. 694, 25 So. 380. See State *v.* Epstein (R. I.), 55 Atl. 204.

32. State *v.* Bradley, 67 Vt. 465, 32 Atl. 238; Com. *v.* Brown, 121 Mass. 69.

"The circumstance that the accused is in custody, while entitled to weight, will not, of itself, exclude the statement, if the circumstances otherwise properly called for a reply or denial by him." State *v.* Murray, 126 Mo. 611, 29 S. W. 700.

33. State *v.* Mullins, 101 Mo. 514, 14 S. W. 625, *holding* that a coroner's inquest is a judicial proceeding and that no inference of guilt could be drawn from the silence of the accused when evidence was given against him.

34. State *v.* Dennis, 119 Iowa 688, 94 N. W. 235; State *v.* Dillon, 74 Iowa 653, 38 N. W. 525; People *v.* O'Connell, 78 Hun 323, 29 N. Y. Supp. 195.

35. Brown *v.* State, 78 Miss. 637, 29 So. 519, 84 Am. St. Rep. 641.

36. Where defendant was brought before the deceased by the sheriff for purposes of identification and commanded to keep still, evidence as to the deceased's declarations identifying him as the guilty person, together with defendant's si-

11. Real and Demonstrative Evidence. — A. GENERALLY. — Any physical objects connected with the homicide or the parties thereto, and tending to show the manner in which it occurred and the person upon whom or by whom it was committed, or forming a part of the transaction, may be introduced in evidence for the inspection of the jury,[37] who may examine them at the time they are placed in evidence.[38] While such objects must be identified,[39] positive evidence as to their identity is not necessary,[40] its sufficiency being a question for the jury.[41]

B. ARTICLES FOUND AT SCENE OF HOMICIDE. — Articles found at or near the scene of the homicide subsequent thereto, which are apparently connected with and tend to explain it, are admissible, although not otherwise connected with the accused.[42] It must

lence, was held improperly admitted because under the circumstances defendant's action could not be deemed to be an acquiescence in the charge. People *v.* Kessler, 13 Utah 69, 44 Pac. 97.

37. Davidson *v.* State, 135 Ind. 254, 34 N. E. 972.

In Henry *v.* People, 198 Ill. 162, 65 N. E. 120, the buggy in which deceased was riding when shot, and showing the impression made by the shot by which deceased was killed, together with the clothes worn by the latter, were held properly admissible as serving to illustrate the position of the deceased, and the relative position of the parties, and the manner in which the shot was fired.

A Trunk found in deceased's room, the scene of the homicide, together with its contents, is admissible. State *v.* Coella, 8 Wash. 512, 36 Pac. 474.

The Door of the room in which the homicide occurred is admissible to show the location of the pistol balls therein, after a preliminary showing that it has remained in the same condition since the homicide. State *v.* Goddard, 146 Mo. 177, 48 S. W. 82.

Display of Such Articles. — In Painter *v.* People, 147 Ill. 444, 35 N. E. 64, it was held no error for the court to admit in evidence the bed, mattress, sheets, pillows and other bedclothing pertaining to the bed in the room where the deceased was murdered, together with the apron found in the room, and the defendant's overcoat, and to permit them to be displayed before the jury throughout the course of the trial. "The time and manner in which objects of this character shall be displayed in the presence of the jury is a matter wholly within the sound discretion of the court."

38. House *v.* State, 42 Tex. Crim. 125, 57 S. W. 825.

39. Clough *v.* State, 7 Neb. 320.

40. Handline *v.* State, 6 Tex. App. 347; Baines *v.* State, 43 Tex. Crim. 400, 66 S. W. 847; State *v.* Wagner, 61 Me. 178. But see State *v.* Moxley, 102 Mo. 374, 15 S. W. 556, 14 S. W. 969.

41. Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814; Vaughn *v.* State, 130 Ala. 18, 30 So. 669.

A rock, claimed to be the one with which the fatal wound was inflicted, was held admissible where the only evidence identifying it was that it was picked up at the scene of the homicide and had some hair clinging to it. "The evidence of identification was by no means complete, but it was sufficient to permit the stone to go to the jury." Dill *v.* State, 106 Ga. 683, 32 S. E. 660.

42. State *v.* Gray, 116 Iowa 231, 89 N. W. 987; State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743.

Bullets taken from a tree near where the body was found. Burton *v.* State, 115 Ala. 1, 22 So. 585; Mose *v.* State, 36 Ala. 211.

appear, however, that the conditions at the scene of the homicide have not so materially changed as to render the evidence unreliable because of possible tampering with the conditions as they existed at the time of the homicidal act.[43]

An Instrument found at the scene of the homicide, with which the fatal act seems to have been done, is admissible.[44]

C. Connecting Accused With Homicide. — Articles found at or near the scene of the homicide, tending to connect the accused therewith, are admissible,[45] and it is not necessary that they should have been discovered immediately thereafter.[46] Such articles found at a considerable distance from the place of the homicide may be admissible under some circumstances.[47] Articles found in the pos-

A bullet found at the scene of the homicide three months thereafter was held inadmissible where its size or weight was not shown, and the undisputed evidence proved that the pistols used in the fatal affray were of a particular caliber. Hickey *v.* State (Tex. Crim.), 76 S. W. 920.

43. A handkerchief and a leather strap with a piece of iron pipe tied to the end of it, found on the scene of the homicide three days afterwards, not shown to belong to nor to have been used by the accused, or otherwise connected with him, were held inadmissible, it appearing that the witness had passed the place every morning and evening after the difficulty up to that time, and that it was also open to the public. Ireland *v.* Com., 22 Ky. L. Rep. 478, 57 S. W. 616, *citing* Parrot *v.* Com., 20 Ky. L. Rep. 761, 47 S. W. 452; Henderson *v.* Com., 16 Ky. L. Rep. 289, 27 S. W. 808. See also Herman *v.* State, 75 Miss. 340, 22 So. 873.

But where the state contended that the crime had been committed with a piece of iron pipe and the evidence on this point was conflicting, such a piece of pipe found six or eight weeks after the homicide about nine steps from where the homicide was said to have been committed, was held admissible. Yancy *v.* State (Tex. Crim.), 76 S. W. 571.

44. Dill *v.* State, 106 Ga. 683, 32 S. E. 660.

A Maul found near the deceased, who was apparently killed with a blunt instrument. Betts *v.* State, 66 Ga. 508. But see Herman *v.* State, 75 Miss. 340, 22 So. 873.

45. State *v.* Wagner, 61 Me. 178; Williams *v.* Com., 85 Va. 607, 8 S. E. 470.

A Book and Pencil found on the scene of the homicide are admissible in evidence when there is testimony tending to show that they belonged to the defendant. Thornton *v.* State, 113 Ala. 43, 21 So. 356.

Gun-wadding similar to that found in the loaded barrel of the accused's shotgun, the other barrel of which was empty. Hodge *v.* State, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145. See also McBride *v.* Com., 95 Va. 818, 30 S. E. 454.

46. A revolver identified as defendant's found near the scene of the homicide eighteen days thereafter was held properly admitted. State *v.* Craemer, 12 Wash. 217, 40 Pac. 944.

A Tobacco-Sack found in the room where the homicide occurred, similar to the one in which defendant was shown to have carried his money some weeks previous to the homicide, was held properly admitted, although found on the day following the crime, after several persons had visited the premises, which had been guarded in the manner usual in such cases. State *v.* Garrington, 11 S. D. 178, 76 N. W. 326.

47. An Empty Cartridge of the same caliber as defendant's revolver was held properly admitted, although found two weeks after the homicide about two miles from the scene thereof on a public highway. The country in that locality was sparsely settled and the highway little used,

session or on the premises of the accused which appear to have been taken from the deceased or otherwise connect the former with the homicide are admissible.[48] But they must be identified, and their care and custody in the intervening time must be accounted for sufficiently to show that they have not been materially tampered with or changed.[49]

D. ACCUSED'S CLOTHING. — The clothing worn by the accused at the time of the homicide is admissible in evidence whenever it tends to shed any light on his guilt or innocence.[50] Bloodstained clothing subsequently found in his possession,[51] or that of his accomplice,[52] may be introduced in evidence without direct and positive proof that it was worn at the time of the homicide. Such action does not violate his privilege as a witness.[53]

E. DECEASED'S CLOTHING. — a. *Generally.* — The clothing of deceased worn at the time of the homicide is admissible whenever

the theory of the prosecution being that defendant had traveled over it in his flight. Horn *v.* State (Wyo.), 73 Pac. 705.

48. State *v.* Wagner, 61 Me. 178; Baines *v.* State, 43 Tex. Crim. 490, 66 S. W. 847.

A Piece of a Newspaper found in the defendant's room, apparently part of the paper which had been used for the gun-wadding found at the scene of the homicide, is competent evidence. State *v.* Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877.

Loaded Cartridges of the same caliber as defendant's pistol, found in the pocket of a coat which circumstances indicated to be his. State *v.* Hill, 65 N. J. L. 626, 47 Atl. 814.

Empty Pistol-Shells of the same caliber as bullets found in the deceased's body, discovered in the defendant's room five minutes after the homicide, were held properly admitted, although it was not shown that defendant had a pistol of that caliber in his possession and though he was not otherwise connected with the shells. State *v.* Laudano, 74 Conn. 638, 51 Atl. 860.

49. State *v.* Phillips, 118 Iowa 660, 92 N. W. 876.

50. Sanchez *v.* People, 22 N. Y. 147; Davidson *v.* State, 135 Ind. 254, 34 N. E. 972.

Accused's Blood-Stained Garments, worn on the day of the homicide, are admissible in evidence and may be exhibited to the jury. State *v.* Stair, 87 Mo. 268, 56 Am. Rep. 449; State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

Boots and Shoes and Other Personal Effects taken from the defendant upon his arrest are admissible for purposes of identification. State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.

The Defendant's Boots are admissible in evidence in connection with testimony as to measurements and comparison between the tracks found at the scene of the homicide and the boots in question. Weaver *v.* State, 43 Tex. Crim. 340, 65 S. W. 534.

51. A Blood-Stained Suit of Clothes found at the defendant's rooms subsequent to the commission of the crime is admissible in evidence, although the only proof that he wore such suit on the day of the crime was the testimony of two witnesses that he had on a dark suit of clothes on that day, the suit in question being also dark. The absence of direct proof of the latter fact was held to affect merely the weight and not the competency of the evidence. People *v.* Neufeld, 165 N. Y. 43, 58 N. E. 786.

52. Thompson *v.* State, 33 Tex. Crim. 217, 26 S. W. 198.

53. Drake *v.* State, 75 Ga. 413.

illustrative of or tending to elucidate any material issue in the case, as for the purpose of showing the nature and location of the wound, the manner in which it was inflicted, the direction from which the deadly shot was fired, or the relative positions of the parties.[54] It, however, must be properly identified[55] and shown to be in substantially the same condition as at the time of the homicide, or at least unchanged in any material respect.[56]

b. *Prejudicial Display.* — The fact that the clothing is bloody will

54. *Alabama.* — Watkins *v.* State, 89 Ala. 82, 8 So. 134.

California. — People *v.* Knapp, 71 Cal. 1, 11 Pac. 793.

Illinois. — Henry *v.* People, 198 Ill. 162, 65 N. E. 120.

Iowa. — State *v.* Winter, 72 Iowa 627, 34 N. W. 475.

Kentucky. — Seaborn *v.* Com., 80 S. W. 223.

Michigan. — People *v.* Wright, 89 Mich. 70, 50 N. W. 792.

Missouri. — State *v.* Moore, 168 Mo. 432, 68 S. W. 358.

Texas. — Hart *v.* State, 15 Tex. App. 202, 49 Am. Rep. 188; Smith *v.* State, 42 Tex. Crim. 220, 58 S. W. 97; Frizzell *v.* State, 30 Tex. Crim. 42, 16 S. W. 751; Johnson *v.* State, 44 Tex. Crim. 332, 71 S. W. 25; Thornton *v.* State (Tex. Crim.), 65 S. W. 1105; King *v.* State, 13 Tex. App. 277; Gregory *v.* State (Tex. Crim.), 43 S. W. 1017; *s. c.* (Tex. Crim.), 48 S. W. 577; Early *v.* State, 9 Tex. App. 476.

Washington. — State *v.* Cushing, 14 Wash. 527, 45 Pac. 145.

The Assaulted Person's Hat and Parasol, with shot-holes in them, may be exhibited to the jury. Meyer *v.* State (Tex. Crim.), 41 S. W. 632.

Deceased's Hat, with a gunshot hole in it. Burton *v.* State, 115 Ala. 1, 22 So. 585.

Where deceased was killed by a blow over the head with a chair, his hat and the chair were held properly admitted. Campbell *v.* State (Wis.), 86 N. W. 855.

The Deceased's Vest, perforated by shot, may be exhibited to the jury. Holley *v.* State, 75 Ala. 14.

The vest taken from deceased's body after he had been interred for five months was held properly admitted after evidence had been given that it was in the same condition as at the time of the homicide. People *v.* Hawes, 98 Cal. 648, 33 Pac. 791.

A Piece of the Dress worn by the deceased and pierced by shot may be shown to the jury for the purpose of illustrating the location and nature of the wound. Wilson *v.* State, 128 Ala. 17, 29 So. 569.

55. State *v.* Porter, 32 Or. 135, 49 Pac. 964; Barkman *v.* State, 41 Tex. Crim. 105, 52 S. W. 73; Thornton *v.* State (Tex. Crim.), 65 S. W. 1105; State *v.* Cadotte, 17 Mont. 315, 42 Pac. 857.

A hat full of shot-holes, found at the house of the deceased, where he had been taken after the homicide, was held admissible, although there was no positive testimony that it belonged to the deceased, the circumstances making it reasonably certain that it was his. Houston *v.* State (Tex. Crim.), 40 S. W. 803.

It is no objection to the testimony of a witness identifying certain clothing as belonging to the deceased and worn by him when last seen, that the witness was not sufficiently acquainted with the facts testified to, since this was a matter to be tested on cross-examination. Newell *v.* State, 115 Ala. 54, 22 So. 572.

56. State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315; Head *v.* State, 40 Tex. Crim. 265, 50 S. W. 352.

In Levy *v.* State, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826, the coat worn by the deceased at the time of the homicide was held properly admitted in evidence, although it had been given to a negro, who had worn it ever since and had cut off the skirt of the coat, and whose wife had sewed patches over the bullet-holes, there being not the slightest evidence that it had been so tampered with as not to show the character and location of the bullet-holes

not serve to exclude it when otherwise competent.[57] But owing to its tendency to arouse the passion or prejudice of the jury its admission under such circumstances, unless it serves some useful evidentiary purpose, is error.[58] Nor should it be displayed in a manner calculated to prejudice the jury.[59]

F. Clothes of Third Person. — The clothes of third persons may be admissible under some circumstances when tending to elucidate any of the issues in the case.[60]

G. Portions of Deceased's Body may be exhibited to show the nature and location of the wounds,[61] or the cause of his death.[62] So also, human remains found at the scene of the homicide are admissible for purposes of identification, and to show that a crime has been committed.[63]

Identification of such remains is necessary,[64] and it must appear

as they appeared on the date of the homicide.

57. Spears *v.* State, 41 Tex. Crim. 527, 56 S. W. 347; People *v.* Hong Ah Duck, 61 Cal. 387.

58. Christian *v.* State (Tex. Crim.), 79 S. W. 562; Cole *v.* State (Tex. Crim.), 75 S. W. 527.

59. In Patton *v.* State, 117 Ga. 230, 43 S. E. 533, where the deceased was a young boy, the exhibition to the jury by the deceased's mother of his bloody shirt, and her explanation of where the bullets went through, was held improper and sufficient to justify a new trial.

Use of Dressmaker's Frame. The deceased's clothing may be displayed to the jury upon a dressmaker's frame. People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

60. Clothing of Persons Killed at the Same Time as the deceased and as part of the same transaction was held properly admitted to show the direction from which the shots came. State *v.* Porter, 32 Or. 135, 49 Pac. 964. See also Martinez *v.* State (Tex. Crim.), 57 S. W. 838.

The Bloody Clothes of Another Person, who testified that she was holding the deceased on her lap at the time he was shot, were held not improperly admitted as corroborative of the witness' statement, the rules relating to the exhibition of the deceased's clothing having no application. Thomas *v.* State (Tex. Crim.), 74 S. W. 36.

61. Maclin *v.* State, 44 Ark. 115; Com. *v.* Brown, 14 Gray (Mass.) 419.

The Spinal Vertebra of the Deceased may be exhibited to the jury to illustrate the character and effect of the wound supposed to have caused the death. State *v.* Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556.

The Exhibition of the Bones of the Vertebral Column of the Deceased is permissible for the purpose of showing to the jury the attitudes and relative positions of the parties when the fatal shot was fired. State *v.* Wieners, 66 Mo. 13.

The Deceased's Skull and Photographs Thereof are admissible in evidence in connection with expert testimony as to the manner and cause of death. Savary *v.* State, 62 Neb. 166, 87 N. W. 34.

62. A Portion of the Deceased's Skull, His Brain and a Blood Clot, are admissible in evidence when necessary to a thorough understanding of the cause of death. Campbell *v.* State (Wis.), 86 N. W. 855.

63. Hair found where the remains were first discovered is admissible for purposes of identification. Marion *v.* State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825.

64. State *v.* Hossack, 116 Iowa 194, 89 N. W. 1077.

Where the witness testified that he had given the vertebrae to one person and had received them back from

that their condition is substantially unchanged so far as such condition has a material bearing on the purpose of their admission.[65]

H. A Model showing the nature and extent of the deceased's injuries is admissible when shown to be correct.[66]

I. Bullets Extracted From the Body of the deceased, when properly identified, are admissible.[67]

J. The Weapon used by the assailant is admissible when properly identified.[68] So also the weapons[69] used by, or in the possession

another, and that although he thought the bones were the same, yet he could not identify them by any marks or other indications, it was held that they were not sufficiently identified to warrant their admission. State *v.* Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556.

65. Hair taken from the ax with which the homicide was apparently committed, placed in a bottle and delivered to the county attorney, and the testimony of an expert who had examined the hair contained in a similar bottle delivered to him by the county attorney, was held improperly admitted because not properly identified, and because it was not shown in what manner the hair had been kept previous to its examination by the expert. The presumption that the county attorney did his duty in the matter is not sufficient preliminary proof. State *v.* Hossack, 116 Iowa 194, 89 N. W. 1077.

The Fractured Skull of the deceased was held properly admitted in evidence, although the body had lain for a day or two in a house where persons were in and out, had been buried, and after several days exhumed and the skull taken from it and kept in the possession of different persons, such as the county attorney and doctor, and was not, at all times, under lock and key, the circumstances showing that the skull was in substantially the same condition as when found after the homicide. State *v.* Novak, 109 Iowa 717, 79 N. W. 465.

66. State *v.* Fox, 25 N. J. L. 566.

67. Williams *v.* Com., 85 Va. 607, 8. S. E. 470; McCoy *v.* People, 175 Ill. 224, 51 N. E. 777; Moon *v.* State, 68 Ga. 687; State *v.* Tippet, 94 Iowa 646, 63 N. W. 445.

68. *California.* — People *v.* Hill, 123 Cal. 571, 56 Pac. 443; People *v.* Sullivan, 129 Cal. 557, 62 Pac. 101.

Illinois. — McCoy *v.* People, 175 Ill. 224, 51 N. E. 777.

Iowa. — State *v.* Tippet, 94 Iowa 646, 63 N. W. 445; State *v.* Seymore, 94 Iowa 699, 63 N. W. 661.

New York. — People *v.* Lagroppo, 90 App. Div. 219, 86 N. Y. Supp. 116.

Vermont. — State *v.* Roberts, 63 Vt. 139, 21 Atl. 424.

Washington. — State *v.* Cushing, 14 Wash. 527, 45 Pac. 145.

West Virginia. — State *v.* Henry, 51 W. Va. 283, 41 S. E. 439; State *v.* Tucker, 52 W. Va. 420, 44 S. E. 427.

The Revolver with which the homicide is alleged to have been committed may be exhibited to the jury and the manner of its discharge explained, when it has been sufficiently identified. Siberry *v.* State, 133 Ind. 677, 33 N. E. 681.

An Ax, found in the vicinity of the crime, with which defendant has admitted that the killing was done, is admissible. State *v.* Gartrell, 171 Mo. 489, 71 S. W. 1045.

Chair with which deceased was struck. Campbell *v.* State (Wis.), 86 N. W. 855.

69. Boynton *v.* State, 115 Ga. 587, 41 S. E. 993; People *v.* Childs, 90 App. Div. 58, 85 N. Y. Supp. 627.

A Small Piece of Lath picked up on the scene of the homicide shortly thereafter was held properly admitted on behalf of the prosecution to support the theory that deceased had made no attack upon defendant, or, at most, had struck him with the lath in question, which was not a

of, the deceased at the time of the homicide, are admissible when sufficiently identified.[70]

12. Other Crimes. — A. GENERALLY. — Owing to the tendency of evidence of other crimes by the accused to prejudice him unduly in the eyes of the jury, courts are careful to exclude it unless clearly relevant and material, and there is considerable confusion and conflict in the cases dealing with this class of evidence. The general rule is that proof of other crimes disconnected with the homicide charged is improper except for certain specified purposes or under particular circumstances.[71] Attempts have been made to enumerate the exceptions to this general rule[72] and the circumstances under which such evidence is admissible, and there are certain well-recognized exceptions.

The Logically Correct Rule governing this class of evidence seems to be that while the commission by the accused of other crimes is not in itself any evidence that he committed the one charged against him,[73] nevertheless such evidence, like any other, is admissible whenever it is relevant and tends to prove any material fact in the case, but that owing to its prejudicial tendency its relevancy will be subjected to closer scrutiny.[74]

dangerous weapon. State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

70. Fuller *v.* State, 117 Ala. 36, 24 So. 688. See also State *v.* Cadotte, 17 Mont. 315, 42 Pac. 857.

71. People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286; Com. *v.* Farrell, 187 Pa. St. 408, 41 Atl. 382; State *v.* Jackson, 95 Mo. 623. 8 S. W. 749; State *v.* Harris, 73 Mo. 287; Paulson *v.* State (Wis.), 94 N. W. 771; State *v.* Eastwood, 73 Vt. 205, 50 Atl. 1077; Stone *v.* State, 4 Humph. (Tenn.) 27; Watts *v.* State, 5 W. Va. 532; State *v.* Hoyt, 13 Minn. 125.

72. In People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, Werner J., after laying down the general rule, said: "The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial."

"Under some circumstances, evidence of another offense by the defendant may be given. Thus it may be to establish identity; to show the act charged was intentional and willful, not accidental; to prove motive; to show guilty knowledge and purpose, and to rebut any inference of mistake; in case of death by poison, to prove the defendant knew the substance administered to be poison; to show him to be one of an organization banded together to commit crimes of the kind charged, and to connect the other offense with the one charged, as part of the same transaction." Goersen *v.* Com., 99 Pa. St. 388; *s. c.* 106 Pa. St. 477, 51 Am. Rep. 534.

73. Farris *v.* People, 129 Ill. 521, 21 N. E. 821, 16 Am. St. Rep. 283, 4 L. R. A. 582; State *v.* Lapage, 57 N. H. 245, 24 Am. Rep. 69; Barkman *v.* State, 41 Tex. Crim. 105, 52 S. W. 23; Kearney *v.* State, 68 Miss. 233, 8 So. 292.

74. People *v.* Walters, 98 Cal. 138, 32 Pac. 864; People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; Paulson *v.* State (Wis.), 94 N. W. 771. See also Lyons *v.* People,

B. Motive. — Evidence of other crimes is always admissible when it tends to establish a motive for the homicide.[75] The mere fact that the criminal act of the defendant showing his motive for the crime was done subsequent thereto does not render evidence of it inadmissible.[76]

C. Intent, Accident and Mistake. — Such evidence is also competent when it tends to establish the criminal intent,[77] shows

137 Ill. 602, 27 N. E. 677; State *v.* Williamson, 106 Mo. 162, 17 S. W. 172; Com. *v.* Robinson, 146 Mass. 571, 16 N. E. 452.

75. *United States.* — Moore *v.* United States, 150 U. S. 57.

Kentucky. — Franklin *v.* Com., 13 Ky. L. Rep. 814, 18 S. W. 532.

Mississippi. — Herman *v.* State, 75 Miss. 340, 22 So. 873.

Missouri. — State *v.* Williamson, 106 Mo. 162, 17 S. W. 172.

New York. — People *v.* Wood, 3 Park. Crim. 681; Coleman *v.* People, 58 N. Y. 555; People *v.* Harris, 136 N. Y. 423, 36 N. E. 65.

Texas. — Renfro *v.* State, 42 Tex. Crim. 393, 58 S. W. 1013; Crass *v.* State, 31 Tex. Crim. 312, 20 S. W. 579.

In State *v.* Palmer, 65 N. H. 216, 20 Atl. 6, it was held competent to show that defendant had been suspected of a larceny from his employers because of the deceased's accusations and had been discharged and that deceased had taken an active part in searching defendant's house for the stolen property.

Where the homicide occurred during an attempt by the deceased to recover goods stolen from him two days before, evidence tending to connect the two crimes was held proper to show the motive for the homicide and as part of the history of the crime. McConkey *v.* Com., 101 Pa. St. 416.

Incestuous Connection Between the Defendant and His Sister, the wife of the deceased. Stout *v.* People, 4 Park Crim. (N. Y.) 132.

Perjury. — In Pierson *v.* People, 79 N. Y. 424, 35 Am. Rep. 524, as tending to show that the defendant's motive was a desire to possess the wife of the deceased, it was held competent to show that eleven days after the latter's death the defendant and the wife of the deceased were married, and that the former took an oath on this occasion that there was no legal objection to the marriage, although by so doing he committed the crime of perjury.

Previous Attempt to Rob Deceased, and a threat by the defendant to get deceased's money if he had to kill him to do so, competent to show motive. Com. *v.* Farrell, 187 Pa. St. 408, 41 Atl. 382.

Where the deceased was killed in an attempt to arrest his slayer, as a circumstance showing the defendant's identity with the latter an indictment against him in another state was held properly admitted, the defendant being a fugitive from the prosecution thereof, and hence having a strong motive to escape. Williams *v.* Com., 85 Va. 607, 8 S. E. 470.

The Rape of Deceased's Daughter by the accused a week previous is not competent evidence of motive. Cotton *v.* State (Miss.), 17 So. 372.

Concealment of Other Offense as motive. See *infra* this article, "Circumstantial Evidence — Motive — Concealment of Other Crime."

76. Morrison *v.* State, 40 Tex. Crim. 473, 51 S. W. 358; Pierson *v.* People, 79 N. Y. 424, 35 Am. Rep. 524.

77. Weaver *v.* State, 43 Tex. Crim. 340, 65 S. W. 534; Herman *v.* State, 75 Miss. 340, 22 So. 873; State *v.* Merkley, 74 Iowa 695, 39 N. W. 111; State *v.* Deschamps, 42 La. Ann. 567, 7 So. 703, 21 Am. St. Rep. 392; State *v.* Pennington, 124 Mo. 388, 27 S. W. 1106; Com. *v.* Birriollo, 197 Pa. St. 371, 47 Atl. 355; State *v.* Eastwood, 73 Vt. 205, 50 Atl. 1077.

deliberation and premeditation,[78] or rebuts the theory of accident or mistake,[79] as where death is due to poisoning.[80]

D. Identity. — So also such other crimes may sometimes be admissible to identify the accused as the perpetrator of the crime charged.[81]

E. Plan or Scheme. — It is competent to show that the homicide was part of a plan or scheme,[82] and the commission by the accused of other similar crimes constituting part of such plan, as evidence of identity, motive and intent.[83] But the mere similarity of the

See State *v.* Lapage, 57 N. H. 245, 24 Am. Rep. 69; People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286; State *v.* Donyes, 14 Mont. 70, 35 Pac. 455. And also more fully the article "Intent;" and *infra* this article "Intent, Malice," etc., "Motive — Relations of Parties — Previous Difficulties," — "Hostile Acts and Conduct."

78. State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322; People *v.* Shea, 147 N. Y. 78, 41 N. E. 505; State *v.* Deschamps, 42 La. Ann. 567, 7 So. 703, 21 Am. St. Rep. 392.

Testimony that the witness, upon meeting the defendant near the scene of the homicide, and half an hour previous thereto, was compelled by the latter at the point of his gun to surrender his pistol to defendant, was held competent to show premeditation and deliberation, although such act constituted a distinct crime. State *v.* Rider, 95 Mo. 474, 8 S. W. 723.

79. See People *v.* Doyle, 21 Mich. 221; Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364.

80. To Rebut the Theory of Accidental Poisoning, evidence that another member of deceased's family had died from poisoning sometime previous was held properly admitted. Zoldoske *v.* State, 82 Wis. 580, 52 N. W. 778; Goersen *v.* Com., 99 Pa. St. 388; *s. c.* 106 Pa. St. 477, 51 Am. Rep. 534. See also Reg. *v.* Cotton, 12 Cox Cr. Cas. 400; Reg. *v.* Heason, 14 Cox. Cr. Cas. 40; Mattin *v.* Attorney-General, 17 Cox Cr. Cas. 704; Reg. *v.* Roden, 12 Cox Cr. Cas. 630; Reg. *v.* Flannagan, 15 Cox Cr. Cas. 403; Reg. *v.* Gardner, 3 Fost. & F. (Eng.) 681.

81. Horn *v.* State, 102 Ala. 144, 15 So. 278; Leeper *v.* State, 29 Tex. App. 63, 14 S. W. 398. See State *v.* Barrett, 40 Minn. 65, 41 N. W. 459; Roper *v.* Territory, 7 N. M. 255, 33 Pac. 1014.

Previous Attempts on the life of a deceased are admissible to show the identity of the perpetrator of the crime, and also his malice. Washington *v.* State, 8 Tex. App. 377; Crass *v.* State, 31 Tex. Crim. 312, 20 S. W. 579. See *infra* this article, "Circumstantial Evidence."

82. Evidence that the defendant and others had agreed before coming into the state that they would rob storekeepers was held admissible to identify defendant as one of the persons who robbed and murdered the deceased, a storekeeper. Moore *v.* State, 40 Tex. Crim. 439, 50 S. W. 942. To the same effect Ford *v.* State, 34 Ark. 649.

83. People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286; Hawes *v.* State, 88 Ala. 37, 7 So. 302; State *v.* Lee, 91 Iowa 499, 60 N. W. 119; State *v.* Matthews, 98 Mo. 125, 10 S. W. 144; Goersen *v.* Com., 99 Pa. St. 388, 106 Pa. St. 477, 51 Am. Rep. 534; Melton *v.* State, 43 Ark. 367.

In Com. *v.* Robinson, 146 Mass. 571, 16 N. E. 452, where the defendant was charged with the murder of her brother-in-law by means of poison, the alleged motive was the desire to obtain the insurance upon his life, of which she was the beneficiary. The prosecution offered to prove a scheme on the defendant's part to obtain the insurance money by first murdering the deceased's

methods employed in another homicide is not sufficient to warrant its admission.[84]

F. Part of One Continuous Transaction. — Other crimes by the accused forming part of one continuous transaction with the homicide may be shown. How closely connected they must be in point of time and circumstance cannot be determined by any rule, and the cases differ.[85]

wife and then the deceased himself. As a preliminary showing in such claim evidence was offered that prior to the wife's death the accused knew of the insurance, that during the wife's illness she, defendant, expressed the opinion that her sister would never recover; that she expressed a wish to have the insured live with her, and said her sister's desire was that she, the accused, might get the insurance money; that she had herself made the beneficiary and expressed fears as to the regularity of the papers and made inquiries of the insurance company as to the certainty of her getting the insurance in case of the husband's death. These facts were held sufficient to warrant the admission of evidence tending to prove that the defendant had poisoned the wife.

But in Shaffner *v.* Com., 72 Pa. St. 60, 13 Am. Rep. 49, where defendant was charged with having poisoned his wife, evidence tending to show that he had poisoned his alleged paramour's husband four months previous to the homicide was held improperly admitted though offered to show motive and as a part of one connected transaction. The court held that the evidence did not sufficiently show that defendant's purpose was to marry the alleged paramour, saying: "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other. . . . From the nature and prejudicial character of such evidence, it is obvious it should not be received, unless the mind plainly perceives that the commission of the one tends, by a visible connection, to prove the commission of the other by the prisoner. If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner."

84. Barkman *v.* State, 41 Tex. Crim. 105, 52 S. W. 23; People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286; Shaffner *v.* Com., 72 Pa. St. 63, 13 Am. Rep. 651.

85. *Arkansas.* — Glory *v.* State, 13 Ark. 236.

California. — People *v.* Smith, 106 Cal. 73, 39 Pac. 40; People *v.* Lane, 101 Cal. 513, 36 Pac. 16.

Colorado. — Piela *v.* People, 6 Colo. 343.

Louisiana. — State *v.* Deschamps, 42 La. Ann. 567, 7 So. 703, 21 Am. St. Rep. 392.

Michigan. — People *v.* Marble, 38 Mich. 117.

Missouri. — State *v.* Perry, 136 Mo. 126, 37 S. W. 804.

New York. — People *v.* Pallister, 138 N. Y. 601, 33 N. E. 741.

Utah. — State *v.* Hayes, 14 Utah 118, 46 Pac. 752.

Vermont. — State *v.* Eastwood, 73 Vt. 205, 50 Atl. 1077.

See *supra* this article, "Nature and Circumstances of Act — *Res Gestae* — Independent Crime."

The killing by the defendant of the deceased's father and mother three miles from the scene of the homicide and twenty minutes thereafter, was held properly admitted to rebut the theory of accident, being part of one continuous transaction. People *v.* Craig, 111 Cal. 460, 44 Pac. 186.

In Lyons *v.* People, 137 Ill. 602, 27 N. E. 677, it was held proper to show the details of an affray between the defendant and his companions and some third persons, oc-

The murder of[86] or assaults upon[87] others at the time of or immediately preceding and following the homicide may be shown, but unless the evidence against him is circumstantial, the details of the other acts and his motives therefor cannot be inquired into.[88] The nature of the wounds inflicted upon such person,[89] or the cause of his death,[90] may be shown.

G. Particular Instances. — a. *Previous Assaults* by the accused upon the deceased are not admissible unless relevant to some issue,[91] but may be shown to prove intent,[92] malice,[93] and motive,[94] although not of the same character as the act charged.[95]

curing shortly previous to the homicide, in which the defendant had injured one of the persons assaulted, and also the declarations of one of defendant's companions just after this affray that they had had a scrap and were going to get even, on the ground that they constituted part of one continuous transaction and tended to show motive and premeditation on the part of the defendant.

In Farris *v.* People, 129 Ill. 521, 21 N. E. 821, 16 Am. St. Rep. 283, 4 L. R. A. 582, evidence that about a half hour after the shooting of the deceased by the defendant in the presence of his family, the defendant committed the crime of rape upon deceased's wife while she was going to the neighbors for assistance, was held incompetent as not being part of the *res gestae,* nor tending to explain the defendant's motive. It appeared that deceased's wife had been divorced from defendant.

86. Hickam *v.* People, 137 Ill. 75, 27 N. E. 88; People *v.* Coughlin, 13 Utah 58, 44 Pac. 94; People *v.* Foley, 64 Mich. 148, 31 N. W. 94; Crews *v.* State, 34 Tex. Crim. 533, 31 S. W. 373; State *v.* Craemer, 12 Wash. 217, 40 Pac. 944.

87. State *v.* Wong Gee, 35 Or. 276, 57 Pac. 914; State *v.* Testerman, 68 Mo. 408.

An assault upon a third person which had no connection with the homicide is inadmissible, although happening immediately after. People *v.* Lane, 100 Cal. 379, 34 Pac. 856, containing an extended discussion of the question. See also State *v.* Taylor, 7 Idaho 134, 61 Pac. 288.

An Assault Upon Deceased's Companion immediately preceding (People *v.* Lopez, 135 Cal. 23, 66 Pac. 965) or immediately after the killing. Seams *v.* State, 84 Ala. 410, 4 So. 521.

88. Green *v.* Com., 17 Ky. L. Rep. 943, 33 S. W. 100.

89. The Character of the Wounds of a person killed at the same time as deceased is competent. People *v.* Wright, 89 Mich. 70, 50 N. W. 792; Neal *v.* State, 32 Neb. 120, 49 N. W. 174; Logston *v.* State, 3 Heisk. (Tenn.) 414; Fernandez *v.* State, 4 Tex. App. 419; People *v.* Coughlin, 13 Utah 58, 44 Pac. 94; People *v.* Walters, 98 Cal. 138, 32 Pac. 864.

90. Where two children of the defendant died about the same time and exhibited the same symptoms of morphine poisoning, evidence as to the contents of the stomach of one was held competent on the trial for the murder of the other, the two deaths constituting part of the same transaction. People *v.* Quimby (Mich.), 96 N. W. 1061.

91. Perry *v.* State, 91 Ala. 83, 9 So. 279.

92. See *supra,* "Intent, Malice and Premeditation."

93. See *supra,* "Intent, Malice and Premeditation."

94. Sullivan *v.* State, 31 Tex. Crim. 486, 20 S. W. 927, 37 Am. St. Rep. 826. See *infra,* "Circumstantial Evidence — Motive."

A Conviction for a previous assault upon the same person is admissible to show malice and motive. Crass *v.* State, 31 Tex. Crim. 312, 20 S. W. 579.

95. On a charge of assault with intent to murder evidence of a previous attempt by the defendant to poison the assaulted party is admis-

b. *Other Felony at Time of Homicide.* — It is competent to show that the defendant was engaged in the commission of another felony at the time of the homicide, as part of the *res gestae*, and for the purpose of proving malice and premeditation.[96] His connection with other crimes may be proved where it tends to show that he was engaged in a felony at the time of the homicide.[97]

c. *In Preparation for Homicide.* — Crimes committed in preparation for the homicide may be admissible for the purpose of identification and to show premeditation.[98]

d. *Attempted Concealment.* — Criminal acts done by the accused to conceal his connection with the crime,[99] or his identity,[1] are admissible. So criminal acts, the concealment of which is the alleged motive for the homicide, may be shown.[2]

e. *During Attempted Escape.* — Where the homicide occurred during an attempted escape by the defendant, it is competent to show for what crime he had been imprisoned or convicted.[3]

sible to show the malicious intent. State *v.* Patza, 3 La. Ann. 512.

96. *California.* — People *v.* Rogers, 71 Cal. 565, 12 Pac. 697; People *v.* Olsen, 80 Cal. 122, 22 Pac. 125.

Indiana. — Kennedy *v.* State, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99.

Louisiana. — State *v.* Thibodeaux, 48 La. Ann. 600, 19 So. 680.

Pennsylvania. — Com. *v.* Major, 198 Pa. St. 290, 47 Atl. 741, 82 Am. St. Rep. 803.

Texas. — Reyes *v.* State, 10 Tex. App. 1; Roach *v.* State, 8 Tex. App. 478; Richards *v.* State, 34 Tex. Crim. 277, 30 S. W. 229.

97. Com. *v.* Pipes, 158 Pa. St. 25, 27 Atl. 839.

Where the homicide was committed during an apparent attempt to commit a burglary, evidence as to other burglaries committed by defendant just previous to the homicide was held admissible to show his motive in entering the deceased's house. Whitney *v.* Com., 24 Ky. L. Rep. 2524, 74 S. W. 257; O'Brien *v.* Com., 24 Ky. L. Rep. 2511, 74 S. W. 666.

98. Com. *v.* Roddy, 184 Pa. St. 274, 39 Atl. 211.

The Stealing of a Weapon with which to commit the homicide is admissible to show malice and intent. State *v.* Wintzingrode, 9 Or. 153.

99. An Assault With a Deadly Weapon by the defendant upon her husband, on his return home shortly after the homicide, may be shown as tending to prove a guilty knowledge and an attempt to conceal the crime by killing the person who would soon discover it. "The demeanor, conduct and acts of a person charged with crime, such as attempted flight, a desire to elude discovery, and anxiety to conceal the crime, or the evidence of it, are always proper subjects of consideration, as indicative of a guilty mind, and in determining the question of the guilt or innocence of the person charged. People *v.* Place, 157 N. Y. 584, 52 N. E. 576.

1. Stealing Clothes for the purpose of disguising himself. Williams *v.* State, 15 Tex. App. 104.

2. Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54. See also *supra*, "Circumstantial evidence — Motive."

Evidence that the defendant had burned the house where he and others were living at the time of the homicide was held a competent circumstance in support of the state's theory that the homicide was done to conceal this crime, the defendant having met the deceased and killed him at the time he, defendant, was escaping from the house with some stolen plunder. Blackwell *v.* State, 29 Tex. App. 194, 15 S. W. 597.

3. Where the assault occurred during an attempt to escape from

f. *Abortion.* — Where the homicide is claimed to have resulted during an unlawful attempt to produce an abortion, evidence that the defendant had produced abortions on others is not admissible.[4] It has been held to the contrary, however.[5]

g. *Forgery* by the defendant may be shown as the motive for the crime, either on the theory that defendant expected to benefit by means thereof, or that the homicide was committed to cover up the threatened exposure.[6]

H. The Sufficiency of the Preliminary Showing necessary to warrant the admission of evidence of other crimes is a matter resting largely in the discretion of the trial court.[7] Owing to its prejudicial character its relevancy must be clearly shown before it

jail, evidence that defendant had been tried and convicted on a charge of burglary and was in jail awaiting sentence was held properly admitted to show motive and intent. People *v.* Valliere, 123 Cal. 576, 56 Pac. 433.

4. State *v.* Crofford, 121 Iowa 395, 96 N. W. 889.

5. **To Rebut a Plea of Accident.** In People *v.* Seaman, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326, on a charge of causing death by producing an abortion, to rebut the defendant's theory that death resulted from accidental causes it was held no error to admit evidence that defendant had caused other abortions by similar means at the same place. See also Weed *v.* People, 3 Thomp. & C. (N. Y.) 50.

In People *v.* Sessions, 58 Mich. 594, 26 N. W. 291, "testimony . . . relating to respondent's possession of instruments to produce an abortion, and her use of them, and her knowledge upon the subject, and that she held herself out for the performance of such service, with the instruments, for hire, was given on the part of the prosecution. It consisted of conversations of respondent had with these four persons, extending through a period of four years previous to the death of Mrs. Peck, wherein the respondent stated to one that she had the instruments with which to produce abortion; had herself got rid of a number of children, and showed her the instruments; at the same time saying to the witness, if she wanted any help, she could help her. To another she stated that she had committed abortions, and could do it again; that she had the instruments to use in doing it. To another she stated her terms for performing such service, which she then offered to the witness, who was in the family way, and told her that she had the instruments for the purpose." This testimony, although objected to as incompetent and too remote, was held admissible to show knowledge and intent and the possession of the necessary means to accomplish the act, and it was not too remote because it appeared that the defendant during the whole time up to the homicide had in her possession the same instruments and was offering her services.

6. State *v.* Coleman (S. D.), 98 N. W. 175; Pontius *v.* People, 82 N. Y. 339.

Morrison *v.* State, 40 Tex. Crim. 473, 51 S. W. 358, in which it was held competent to show that a deed in which the defendant was named as grantee was a forgery, although the deed was executed subsequent to the commission of the homicide, the evidence being offered as part of the defendant's scheme to murder the deceased, his wife, and by fraudulent representations as to his wealth and property induce another woman to marry him.

7. Com. *v.* Robinson, 146 Mass. 571, 16 N. E. 452.

is admitted,[8] and any doubt should be resolved in favor of the accused.[9]

I. When Merely Cumulative. — When the issue upon which such evidence is relevant is already sufficiently established and proof of another crime would be merely cumulative, the evidence should be excluded because of its prejudicial effect.[10]

J. In Rebuttal defendant may introduce any evidence tending to show that he was not guilty of such other crime.[11]

13. Cause of Death. — A. Condition and Appearance of Body. The condition and appearance of the body of the deceased when discovered are competent evidence of the cause of death.[12]

B. Nature of Wound and Manner of Infliction. — a. *Generally.* — The deceased's wounds may be described by any witness who has seen them.[13] And any properly qualified witness may give his opinion as to the manner in which they were inflicted,[14] whether

8. People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286.

9. Shaffner *v.* Com., 72 Pa. St. 60, 13 Am. Rep. 49.

10. People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286; Farris *v.* People, 129 Ill. 521, 21 N. E. 821, 16 Am. St. Rep. 283, 4 L. R. A. 582.

Previous assaults by the defendant upon the deceased, his wife, are admissible to show express malice, notwithstanding the fact that the act itself was such as to raise an implication of malice. State *v.* Nugent, 71 Mo. 136.

11. Tompkins *v.* Com., 25 Ky L. Rep. 1254, 77 S. W. 712.

12. Terry *v.* State, 120 Ala. 286, 25 So. 176; Linsday *v.* People, 63 N. Y. 143.

13. Evans *v.* State, 120 Ala. 269, 25 So. 175; but see Nave *v.* Railroad Co., 96 Ala. 264, 11 So. 391; People *v.* Hong Ah Duck, 61 Cal. 387; Terry *v.* State, 120 Ala. 286, 25 So. 176.

A witness who saw the body of the deceased may testify that his neck, which was broken, "looked like it had been struck with a hot iron, and looked scarred." Perry *v.* State, 87 Ala. 30, 6 So. 425.

Testimony that the wound appeared to have been made with a knife, and that "it seemed as if the knife went in and went backward, that was the appearance of the wound," was held to be not a conclusion of the witness, but testimony as to a fact. Fuller *v.* State, 117 Ala. 36, 23 So. 688.

14. Rash *v.* State, 61 Ala. 89; Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40.

A competent expert may give his opinion as to how and by what means the deceased's wounds were inflicted or whether they could have been or were likely to have been inflicted in the manner claimed by defendant. Davis *v.* State, 38 Md. 15; State *v.* Pike, 65 Me. 111.

Whether Caused by One Blow. A physician who has examined the head of the deceased may give his opinion that the injuries thereto could not have been inflicted by a single blow. Com. *v.* Piper, 120 Mass. 185; People *v.* Schmidt, 168 N. Y. 568, 61 N. E. 907.

Bruises — Strangulation. — The opinion of an expert that certain bruises upon a deceased's throat were made by some external force, probably a hand, was held improperly admitted. State *v.* Senn, 32 S. C. 392, 11 S. E. 292. See article "Expert and Opinion Evidence," Vol. V, p. 587. But a physician who performed the autopsy and has testified that strangulation was the cause of death may further give his opinion that the means used were hands. People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

Contra. — Expert testimony as to how deceased's wounds were probably made was held properly ex-

they were such as to cause death,[15] and whether the weapon alleged to have been used would have produced such wounds.[16]

b. *When Inflicted.* — A properly qualified expert may give his opinion as to when the deceased's wound or injury was inflicted;[17] whether before or after death.[18]

c. *Nature of Instrument.* — A properly qualified witness may give his opinion as to the nature of the instrument which caused the deceased's injuries,[19] and whether or not it was of a character capable of or likely to produce death.[20] A witness familiar with gunshot wounds and otherwise properly qualified may give his opinion as to kind of firearms used,[21] and a surgeon familiar with

cluded because invading the province of the jury. State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153.

15. *Alabama.* — Sims *v.* State, 139 Ala. 74, 36 So. 138, 101 Am. St. Rep. 17.

Arkansas. — Brown *v.* State, 55 Ark. 593, 18 S. W. 1051. *Citing* Ebos *v.* State, 34 Ark. 520.

Florida. — Newton *v.* State, 21 Fla. 53.

Georgia. — Von Pollnitz *v.* State, 92 Ga. 16, 18 So. 301, 44 Am. St. Rep. 72; Wise *v.* State, 100 Ga. 68, 25 S. E. 846.

Iowa. — State *v.* Woodward, 84 Iowa 172, 50 N. W. 885.

Missouri. — State *v.* Wisdom, 84 Mo. 177.

New Jersey. — State *v.* Powell, 7 N. J. L. 244.

Pennsylvania. — Com. *v.* Birriollo, 197 Pa. St. 371, 47 Atl. 355.

Texas. — Waite *v.* State, 13 Tex. App. 169.

16. Waite *v.* State, 13 Tex. App. 169; State *v.* Seymore, 94 Iowa 699, 63 N. W. 661.

The opinion of a physician as to whether the deceased infant's skull could have been crushed by pressure of the hands, was held properly admitted. State *v.* Noakes, 70 Vt. 247, 40 Atl. 249.

17. Linsday *v.* People, 63 N. Y. 143, wherein testimony that a fracture of the bones of the skull of the deceased, taken from the river, had not been recently made, was held competent. See Hartung *v.* People, 4 Park. Crim. (N. Y.) 319.

18. People *v.* Hare, 57 Mich. 505, 24 N. W. 843; Shelton *v.* State, 34 Tex. 662; State *v.* Harris, 63 N. C. 1.

19. Williams *v.* State, 64 Md. 384, 1 Atl. 887; State *v.* Porter, 34 Iowa 131; State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625; Sebastian *v.* State, 41 Tex. Crim. 248, 53 S. W. 875; State *v.* Knight, 43 Me. 11; Bowers *v.* State (Wis.), 99 N. W. 447; Brown *v.* State, 55 Ark. 593, 18 S. W. 1051.

Opinion as to Actual and Probable Cause Distinguished. — Opinion evidence as to what actually caused the wound is not competent, but such evidence as to what might have caused the wound is admissible. People *v.* Hare, 57 Mich. 505, 24 N. W. 843.

Batten *v.* State, 80 Ind. 394, in which a properly qualified expert was allowed to state his impression that the deceased's intestines were severed by the knife used by the defendant.

20. Banks *v.* State, 13 Tex. App. 182; Sebastian *v.* State, 41 Tex. Crim. 248, 53 S. W. 875.

A physician who carefully examined deceased's injuries was held properly allowed to give his opinion as to whether they were produced by a club or due to a fall, and whether they could have been made by a club similar to the one introduced in evidence. State *v.* Seymore, 94 Iowa 699, 63 N. W. 661.

21. Patton *v.* State (Tex. Crim.), 80 S. W. 86.

A witness who had frequently seen beeves killed with a shotgun was held properly allowed to testify that from the appearance of the wound it must have been made with a shot-

gunshot wounds may give his opinion as to the caliber[22] of the bullet making the wound upon the deceased.

C. OPINION. — A properly qualified witness[23] may give his opinion as to the cause of the deceased's death,[24] and whether it resulted from disease or violence,[25] or from which of two apparently fatal wounds it resulted.[26] Nor is it always necessary that such witness be an expert.[27]

gun at close range. Thomas *v.* State (Tex. Crim.), 74 S. W. 37.

A Non-Expert who is familiar with gunshot wounds may testify that they appeared to be made with a shotgun and a rifle. Morris *v.* State, 30 Tex. App. 95, 16 S. W. 757.

Nature of Load. — A witness experienced with firearms may testify that deceased's wound was produced with a rifle loaded first with a bullet and then with shot on top of the ball, and not with a shotgun. Franklin *v.* Com., 20 K. L. Rep. 1137, 48 S. W. 986.

22. People *v.* Wong Chuey, 117 Cal. 624, 49 Pac. 833.

23. People *v.* Olmstead, 30 Mich. 431. See article "EXPERT AND OPINION EVIDENCE."

The opinions of experts as to the cause of death are competent when founded either upon a knowledge of the facts or upon statements of others as to the symptoms. McNamee *v.* State, 34 Neb. 288, 51 N. W. 821.

A physician who assisted in conducting the *post-mortem* examination, and who attended the deceased previous to his death, was held properly qualified to give his opinion as to the cause of death. State *v.* Tippet, 94 Iowa 646, 63 N. W. 445.

The Statutory Provision for an Autopsy by a medical examiner in cases of death by violence does not render testimony of other competent witnesses as to the condition and appearance of the deceased's body inadmissible. Com. *v.* Dunan, 128 Mass. 422.

24. *Alabama.* — Page *v.* State, 61 Ala. 16.

California. — People *v.* Bowers, 18 Pac. 660.

Indiana. — Batten *v.* State, 80 Ind. 394.

Iowa. — State *v.* Porter, 34 Iowa 131.

Louisiana. — State *v.* Crenshaw, 32 La. Ann. 406.

Michigan. — People *v.* Sessions, 58 Mich. 594, 26 N. W. 291; People *v.* Foley, 64 Mich. 148, 31 N. W. 94.

Mississippi. — Pitts *v.* State, 43 Miss. 472.

New Hampshire. — State *v.* Wood, 53 N. H. 484.

North Carolina. — State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

Oregon. — State *v.* Glass, 5 Or. 73.

Pennsylvania. — Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40.

South Carolina. — State *v.* Foote, 58 S. C. 218, 36 S. E. 551.

Vermont. — State *v.* Fournier, 68 Vt. 262, 35 Atl. 178.

Wisconsin. — Boyle *v.* State, 61 Wis. 440, 21 N. W. 289; Carthaus *v.* State, 78 Wis. 560, 47 N. W. 629.

The experts who performed the autopsy on the body of the deceased may be permitted to testify that they did not see any evidence of disease, other than certain conditions described by them, and that they did not discover any natural cause of death. People *v.* Benham, 160 N. Y. 402, 55 N. E. 11.

An expert may testify that no other cause of death would produce the same symptoms. People *v.* Foley, 64 Mich. 148, 31 N. W. 94.

Poisoning. — A physician may give his opinion, based upon the symptoms shown, that deceased died from strychnine poisoning. Morrison *v.* State, 40 Tex. Crim. 473, 51 S. W. 358.

25. Smith *v.* State, 43 Tex. 643.

26. Eggler *v.* People, 56 N. Y. 642.

27. Everett *v.* State, 62 Ga. 65; Edwards *v.* State, 39 Fla. 753, 23 So. 537.

D. Post-Mortem Examination and Chemical Analysis. — a. *Generally.* — The results of a *post-mortem* examination of deceased's body and of a chemical analysis of portions thereof are competent in so far as they bear upon the nature of his injuries and cause of his death, notwithstanding the fact that the accused was not present when they were made and had no notice of such proceedings.[28] Any witness who was present may testify as to what he saw,[29] and competent experts may give opinions based thereon.[30]

Where the alleged cause of death is poisoning it is competent to show the results of a chemical analysis by experts of the remaining portions of the substance, part of which was eaten or drunk by the deceased, and which are alleged to have contained the poison,[31] but they must be identified and be shown to have remained in substantially the same condition from the time they were used till they were examined.[32]

b. *Internal Organs and Contents.* — **(1.) Generally.** — Evidence as to the results of an examination of the internal organs of the deceased's body and a chemical analysis of the contents thereof is competent after a preliminary showing, or promise to show that when examined[33] they were in substantially the same condition as

A non-expert who has stated the facts connected with the homicide may give his opinion based thereon as to the cause of death. McLain *v.* State, 71 Ga. 279.

28. King *v.* State, 55 Ark. 604, 19 S. W. 110; Hayes *v.* State, 112 Wis. 304, 87 N. W. 1076; People *v.* Foley, 64 Mich. 148, 31 N. W. 94; State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330.

Second Post-Mortem Examination admissible though made without notice. State *v.* Leabo, 89 Mo. 247, 1 S. W. 288.

29. Summers *v.* State, 5 Tex. App. 365.

30. See article "Expert and Opinion Evidence," Vol. V, p. 578.

31. State *v.* Best, 111 N. C. 638, 15 S. E. 930.

32. Johnson *v.* State, 20 Tex. App. 178. In People *v.* Williams, 3 Park. Crim. (N. Y.) 84, the testimony of a physician as to his analysis of the contents of the bowl alleged to have been used by the defendant to administer poison to the deceased was held competent, although the identification of the bowl by the witnesses was not positive.

Where it appeared that deceased had been embalmed, buried, and afterward exhumed, the stomach removed, sealed up in a glass jar and delivered to the witness for chemical analysis, the latter's testimony that the stomach contained morphine was held properly admitted and not subject to the objection that it did not appear when the morphine entered the stomach, whether before or after death, it appearing that there was no mark upon the body except those made by the embalmer, the embalming fluid itself containing arsenic, but not morphine. People *v.* Quimby (Mich.), 96 N. W. 1061.

33. Johnson *v.* State, 20 Tex. App. 178.

When Shipped by Express. — The fact that the organs analyzed, after being packed securely in a box and delivered to the express company for shipment to the expert, were not accounted for while in the possession of the express company during transit, was held insufficient to warrant the exclusion of the results of the analysis, the box being received by the witness in the apparent condition in which it was when shipped. State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497.

when taken from the body, and that the body itself has not been tampered with.[34]

Sealing Unnecessary. — It is not necessary that the contents of the deceased's stomach and other vital organs should have been hermetically sealed or kept under lock and key intermediate the time it was taken from the body and when it was chemically analyzed, in order that the results of such chemical analysis should be competent evidence, but they should be so kept as to make certain that their condition remained the same as when taken from the body.[35]

The Identity of the parts and matters examined or analyzed, and of the body from which they were taken, must be established by the party offering the evidence.[36]

The Purity of the Reagents used in the analysis need not be shown.[37]

(2.) Effect of Lapse of Time and Burial. — Neither the lapse of time[38] nor the burial and disinterment of the body[39] between the death and the examination affects the competency of the evidence unless the body has so changed as to render it impossible to determine whether its condition is due to *ante-mortem* or *post-mortem* causes.

E. Physical Condition of Deceased. — The physical characteristics and condition of the deceased person previous to the infliction upon him of the injuries alleged to have caused his death may be competent in determining what was the cause of his death.[40] But

34. Stephens *v.* People, 4 Park. Crim. (N. Y.) 396.

35. State *v.* Thompson, 132 Mo. 301, 34 S. W. 31; State *v.* Cook, 17 Kan. 392.

Where it appeared that the deceased's stomach and its contents had been given to the witness for chemical analysis and kept by him in unsealed glass jars, which, however, were covered but were exposed during the autopsy and were afterward locked in a case to which the witness and the janitor, since deceased, both had access, the results of the analysis were held properly admitted in the absence of affirmative evidence that the subjects thereof had been tampered with, the witness being positive in his conviction that they had been untouched. People *v.* Bowers (Cal.), 18 Pac. 660.

36. State *v.* Thompson, 132 Mo. 301, 34 S. W. 31; State *v.* Cook, 17 Kan. 392.

37. The Presumption of Innocence Cannot be Carried to the extent of raising a presumption, in the absence of evidence to the contrary, that the reagents employed in a chemical analysis of the deceased's stomach were impure. This is a question for the jury. Dyer *v.* State, 74 Ind. 594.

38. "The mere fact that the examination is made some time after death is not, in itself, a reason why the result of such examination should be excluded, unless the interval is so great, and the condition of the body is such, that the jury could not reasonably find whether its condition was to be attributed to *ante-mortem* or *post-mortem* causes." Williams *v.* State, 64 Md. 384, 1 Atl. 887.

The results of a *post-mortem* examination made several months after death is not incompetent because of the lapse of time where the expert testifies that the body was not so far decomposed but that the wounds could be discovered, as well as the presence of blood in the chest cavity. Hayes *v.* State, 112 Wis. 304, 87 N. W. 1076.

39. People *v.* Quimby (Mich.), 96 N. W. 1061.

40. Phillips *v.* State, 68 Ala. 469.

The Fact That Deceased Had a Thin Skull is a competent circum-

evidence as to his diseased or enfeebled condition is not admissible for the purpose of showing that his death would not have resulted but for such condition from the wound inflicted by the defendant, in the absence of any evidence as to gross negligence in the treatment of such wound.[41] All the facts and circumstances attending the last sickness of deceased, and the statement of deceased concerning his condition, are admissible to determine the cause of death.[42]

F. Rebuttal by Defendant. — a. *Generally.* — The defendant may introduce any competent evidence tending to show that the decedent's death resulted from other causes, rather than from his alleged unlawful act.[43]

b. *Improper Treatment of Wound.* — Evidence as to the improper treatment of the wound inflicted by the defendant is not admissible unless an attempt is made to show that such treatment was the sole cause of death.[44]

G. Burden and Sufficiency of Proof. — a. *Generally.* — The state must prove beyond a reasonable doubt that death resulted from the defendant's act.[45] But this fact may sufficiently appear from the circumstances, and when the infliction of a dangerous wound followed by death has been shown and no other cause of death appears, this is ordinarily sufficient.[46] When there is no serious

stance to be considered in determining whether death was the result of blows inflicted thereon by the defendant. State *v.* Phillips (Iowa), 89 N. W. 1092.

The Age of the Deceased may be proved where defendant contends that his death was the result of becoming overheated in the fight between the parties. Winter *v.* State, 123 Ala. 1, 26 So. 949.

41. Griffin *v.* State, 40 Tex. Crim. 312, 50 S. W. 366, *holding* incompetent evidence that the deceased was addicted to the excessive use of alcoholic liquors and was beastly drunk two days before the killing.

42. People *v.* Aiken, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512; Morrison *v.* State, 40 Tex. Crim. 473, 51 S. W. 358; Keaton *v.* State, 41 Tex. Crim. 621, 57 S. W. 1125; Fendrick *v.* State (Tex. Crim.), 56 S. W. 626. See articles "Declarations," "Physical and Mental State."

Testimony as to what "seemed to be the matter" with the deceased during his suffering preceding his death was held properly admitted. State *v.* David, 131 Mo. 380, 33 S. W. 28.

43. Wilson *v.* State (Tex. Crim.), 24 S. W. 409.

Com. *v.* Ryan, 134 Mass. 223, in which it was held that evidence that the deceased "was a habitual drunkard would be competent if supplemented by evidence that the effects and symptoms produced by habitual drunkeness would, or might, be similar to those found to exist by an examination of the deceased," who, it was alleged, had been poisoned by the defendant. But evidence of particular acts of drunkenness not occurring at or near the time of death or connected with it in point of time was held incompetent. But see Griffin *v.* State, 40 Tex. Crim. 312, 50 S. W. 366.

44. State *v.* Strong, 153 Mo. 548, 55 S. W. 78.

45. Lewis *v.* Com., 19 Ky. L. Rep. 1139, 42 S. W. 1127; Dreesen *v.* State, 38 Neb. 375, 56 N. W. 1024; Treadwell *v.* State, 16 Tex. App. 560.

46. State *v.* Lucy, 41 Minn. 60, 42 N. W. 697; People *v.* O'Connell, 78 Hun 323, 29 N. Y. Supp. 195.

Evidence Held Sufficient to show that a blow of the fist accelerated the death. Baker *v.* State, 30 Fla. 41, 11 So. 492; and to show murder and

controversy as to the cause of death, the evidence as to the nature of the wound need not be so explicit as might otherwise be required.[47]

not suicide by drowning, where the body was found in a river. State *v.* Crabtree, 170 Mo. 642, 71 S. W. 127; and that death resulted from blows with the fist and fright; Baker *v.* State, 30 Fla. 41, 11 So. 492; State *v.* O'Brien, 81 Iowa 88, 46 N. W. 752.

Death From Pistol-Shot Sufficiently Shown. — Patton *v.* State (Tex. Crim.), 80 S. W. 86; State *v.* Murphy, 9 Nev. 394.

Death From the Infliction of a Knife-Wound held sufficiently shown. Thompson *v.* State, 38 Tex. Crim. 335, 42 S. W. 974; *disapproving* Lucas *v.* State, 19 Tex. App. 79.

"Where a wound from which death might ensue has been inflicted with murderous intent, and has been followed by death, the burden of proof is upon the party inflicting the wound to make it appear that the death did not result from such wound, but from some other cause." Edwards *v.* State, 39 Fla. 753, 23 So. 537. See also Smith *v.* State, 50 Ark. 545, 8 S. W. 941.

Where by repeated blows with a dangerous weapon inflicted upon the head of the deceased he was knocked down and from that time until his death eighteen hours later he continued speechless, insensible and motionless, it was held that it sufficiently appeared that such blows were the cause of death. United States *v.* Wiltberger, 3 Wash. C. C. 515, 28 Fed. Cas. No. 16,738.

Evidence that the deceased was shot with four buckshot in a vital place, and died three days thereafter, was held sufficient proof that his death resulted from such wound in the absence of any evidence tending to show death from any other cause. Lemons *v.* State, 97 Tenn. 560, 37 S. W. 552.

Evidence that deceased was in good health, that he was struck with an ax on the chest, producing "a big wound," and that he died three days later, held sufficient to show that the blow with the ax was the cause of his death. Scott *v.* State, 40 Tex. Crim. 105, 47 S. W. 523.

Evidence Held Insufficient. Dreessen *v.* State, 38 Neb. 375, 56 N. W. 1024; Lovelady *v.* State, 14 Tex. App. 545.

Evidence held insufficient to show that death resulted from an attempt to produce an abortion (Wilson *v.* State, 41 Tex. Crim. 179, 53 S. W. 122); or from wounds inflicted by defendant, and not from disease (Treadwell *v.* State, 16 Tex. App. 560); or whether death resulted from wounds or from burning (Lovelady *v.* State, 17 Tex. App. 286); from a brutal whipping (Bourn *v.* State, [Miss.], 5 So. 626); from blows with the fist (McNamee *v.* State, 34 Neb. 288, 51 N. W. 821); from fright (Cox *v.* People, 80 N. Y. 500).

Where the deceased in a quarrel and scuffle with defendant received a wound over the eye, and, at the solicitation of a friend who separated them both parties drank together in a saloon, and the deceased was found dead the following morning, it was held that the cause of death was not sufficiently established, there being testimony by physicians to the effect that death might have resulted from alcoholism equally as well as from the blow. People *v.* Kerrigan, 84 Hun 609, 32 N. Y. Supp. 367.

47. Where the cause of death was not seriously controverted and self-defense was mainly relied on, evidence that defendant fired directly at the deceased from a distance of six feet, and that the latter immediately fell to the ground and in a few minutes expired, and that there was fresh blood on the deceased's clothing over the breast, was held sufficient proof of the cause of death. "If there had been any controversy as to what was the cause of death it might have been necessary for the prosecution to have shown more fully the nature of the wound and that it was such as would ordinarily result in the death of the wounded party." State *v.* Moody, 7 Wash. 395, 35 Pac.

The Previous Good Health of the deceased is a circumstance to be considered.[48]

b. *Opinion Unnecessary.* — Expert testimony that the wound was mortal or that death resulted from it is not necessary.[49] The opinion of a non-expert as to these facts is sometimes competent after he has described the wound, and may be sufficient.[50] Where the wound described by the witness is such that every person of average intelligence would know from his own knowledge or experience that it was mortal, it is not necessary for the witness to express his opinion that the cause of death was the wound described.[51]

c. *Infanticide.* — In cases of alleged infanticide it must be shown beyond a reasonable doubt both that the infant was born alive and that its death was due to the defendant's criminal act.[52] These facts, however, may sufficiently appear from circumstances.[53]

132. But see High *v.* State, 26 Tex. Crim. 545, 10 S. W. 238, 8 Am. St. Rep. 488.

48. Scott *v.* State, 40 Tex. Crim. 105, 47 S. W. 523; State *v.* Murphy, 9 Nev. 394; Mayfield *v.* State, 101 Tenn. 673, 49 S. W. 742.

49. Where it appeared that deceased, a strong and apparently healthy man, was wounded by a pistol shot fired by the defendant; that he immediately took to his bed, and, after suffering intensely for two days, died, the evidence was held sufficient to show that defendant's act was the cause of death, the opinions of experts that the wound was mortal being unnecessary in the absence of any showing to the contrary. State *v.* Murphy, 9 Nev. 394.

Mayfield *v.* State, 101 Tenn. 673, 49 S. W. 742, in which case the deceased's skull was fractured and he died soon after, although treated by competent physicians, it appearing that the deceased was in good health up to the time he received the wound, and there was no suggestion in the evidence that he died from other causes.

50. "In cases of homicide it is best always to have the evidence of medical experts, if they can be obtained, as to the fatal character of wounds; but, where such evidence is not accessible, non-experts may, after describing the wounds, give their opinions as to whether such wounds caused the death, with their reasons therefor; and if, from such evidence, the jury is convinced, beyond a reasonable doubt, that the wounds thus testified about did produce the death, it is sufficient to sustain a conviction." Edwards *v.* State, 39 Fla. 753, 23 So. 537.

51. Waller *v.* People, 209 Ill. 284, 70 N. E. 681.

52. Evidence Held Insufficient. Warren *v.* State, 30 Tex. App. 57, 16 S. W. 747; Lee *v.* State, 76 Ga. 498; Sheppard *v.* State, 17 Tex. App. 74; Harris *v.* State, 28 Tex. App. 308, 12 S. W. 1102, 19 Am. St. Rep. 837; Josef *v.* State, 34 Tex. Crim. 446, 30 S. W. 1067.

See Wallace *v.* State, 10 Tex. App. 255, for a discussion of the sufficiency of the evidence to prove the post-natal vitality of a deceased infant, and holding that proof of respiration is not in itself sufficient.

Evidence held insufficient to show that the child was born alive, or that defendant abandoned it with intent that it should die. Nobles *v.* State (Tex. Crim.), 68 S. W. 989.

A conviction for child-murder was held not sufficiently supported by the evidence where the body showed no marks of violence and appeared to have been prematurely born, although there was testimony tending to show that it was born alive. Fletcher *v.* State (Tex. Crim.), 68 S. W. 173.

53. Echols *v.* State, 81 Ga. 696, 8 S. E. 443; Johnson *v.* State, 32 Tex. Crim. 504, 24 S. W. 411; Warren *v.* State, 33 Tex. Crim. 502, 26 S. W. 1082; Peters *v.* State, 67 Ga. 29.

d. *Poisoning Cases.* — **(1.) Generally.** — Where the alleged cause of death is poison, it is incumbent upon the prosecution to show that death resulted from the action of poison administered by the accused.[54] This, however, may sufficiently appear from circumstantial evidence.[55]

Expert Testimony is not essential.[56]

(2.) Necessity of Post-Mortem Examination and Chemical Analysis. In such cases it is not necessary that a *post-mortem* examination of the deceased's body or a chemical analysis of the contents of his internal organs and of the remaining portions of the alleged poisonous substance should have been made, and the results shown,[57] nor is it necessary that such an examination or analysis should disclose the presence of poison.[58] Where, however, such proceedings were not taken the evidence must be very clear and convincing,[59] and if an examination and analysis could have been, but was not, in fact, made, and the evidence is wholly circumstantial, a conviction will not ordinarily be sustained.[60]

(3.) Attempt to Poison. — On a charge of administering poison with intent to murder there must be clear and satisfactory proof that the substance administered was poison, capable of destroying human life.[61]

54. Hatchett *v.* Com., 76 Va. 1026; People *v.* Sellick, 1 Wheel. Crim. (N. Y.) 269.

Where the evidence of experts who had examined the stomach and its contents was conflicting and left it doubtful whether death was due to poison which the defendant confessed that he had administered to the deceased, or to other causes with which the defendant had no connection, the evidence was held insufficient to warrant a conviction. Pitts *v.* State, 43 Miss. 472.

55. Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042.

"Rough on Rats." — Sufficiently shown to be poison by the sickness of those to whom administered, and the testimony of a physician that in his opinion it contained poison in sufficient quantities to produce death, although he had never analyzed it, but had witnessed its effect upon other persons. Brown *v.* State, 88 Ga. 257, 14 S. E. 578.

56. Johnson *v.* State, 29 Tex. App. 150, 15 S. W. 647.

57. Johnson *v.* State, 29 Tex. App. 150, 15 S. W. 647.

58. Hatchett *v.* Com., 76 Va. 1026.

In Speights *v.* State, 41 Tex. Crim. 323, 54 S. W. 595, the evidence was held sufficient to show that death resulted from strychnine poisoning by the defendant, although a superficial chemical analysis of the contents of the deceased's stomach did not disclose the presence of strychnine.

59. Joe *v.* State, 6 Fla. 591.

Where the deceased was alleged to have been poisoned, and the symptoms were described by ignorant witnesses, upon which evidence certain experts testified that they "supposed" the deceased died from strychnine poison, and no *post-mortem* examination of the body was made nor any analysis of the contents of the bottle alleged to have contained the poison, the evidence was held insufficient to show death from poisoning. Hatchett *v.* Com., 76 Va. 1026.

60. State *v.* Nesenhener, 164 Mo. 461, 65 S. W. 230.

61. Osborn *v.* State, 64 Miss. 318. In this case it appeared that the defendant had placed a powder, which he called "Rough on Rats," in a bag of meal, a portion of which the complaining witness and his family subsequently ate, and all became sick,

14. Circumstantial Evidence. — A. GENERALLY. — Every relevant and material fact and circumstance which tends to show the accused's guilt or innocence of the crime charged is admissible.[62] Circumstances apparently trivial and irrelevant, when considered by themselves, may nevertheless be admissible when taken in connection with all of the accompanying facts and circumstances which may tend to give them an added significance.[63] But facts which might

but afterward recovered. The fact that the persons eating the meal were made sick, and that a chicken partaking of it died, was held insufficient to show that the powder was poison. "Chemical examination or the testimony of experts is not necessary, but the evidence of the action of the alleged poison must be sufficient to show it to be such. Many things taken into the stomach may produce sickness which will not result in death, and the death of a chicken from eating what made human beings very sick is an unsatisfactory test of the poisonous nature of the substance. The character of the sickness of the person, their symptoms, the remedies resorted to, the length of time after eating the bread, the duration of the sickness, are not shown by the bill of exceptions. It does not appear that any person died from eating this substance. Many were made sick and all got well. Whether antidotes to poison were used, whether a physician was summoned, or whether each of the sick recovered without any remedial agent being employed does not appear. If all the sick recovered without resorting to antidotes for poison, it may be gravely doubted if they swallowed poison."

62. State *v.* Mowry, 21 R. I. 376, 43 Atl. 871; Poe *v.* State, 78 Tenn. 673; Simms *v.* State, 10 Tex. App. 131.

"Every circumstance pointing, however slightly, to his guilt or innocence, should be submitted to the jury for their consideration." Cobb *v.* State, 27 Ga. 648.

"Necessarily, where the commission of crime can be shown only by proof of circumstances, the evidence should be allowed to take a wide range; otherwise the guilty person would often go unpunished. It is true there must be some connection between the fact to be proven and the circumstances offered in support of it; yet any fact which is necessary to introduce or explain another, or which offered an opportunity for any transaction which is in issue, or shows facilities or motives for the commission of the crime, may be proven." O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471.

Defendant's Superstitious Belief. Where the homicide was caused by wrecking a train, and the evidence connecting defendant with it was largely circumstantial, it was held competent to show that he was possessed of a superstitious belief that Thursday was a lucky day for him; that anything he attempted upon that day would succeed, such evidence tending to identify the defendant as the criminal, the wreck having occurred upon this day. Davis *v.* State, 51 Neb. 301, 70 N. W. 984.

False Statements and Explanations. — State *v.* Dickson, 78 Mo. 438; McCann *v.* State, 21 Miss. 471; Hodge *v.* State, 26 Fla. 11, 7 So. 593; Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; People *v.* Cuff, 122 Cal. 589, 55 Pac. 407.

The Attempt to Manufacture False Evidence. — Gantling *v.* State, 41 Fla. 587, 26 So. 737.

63. Com. *v.* Williams, 171 Mass. 461, 50 N. E. 1035; Com. *v.* O'Neil, 169 Mass. 394, 48 N. E. 134.

The fact that on the day following the homicide the accused made such unusual mistakes in the conduct of his business as to indicate great mental perturbation, is a competent circumstance. Noftsinger *v.* State, 7 Tex. App. 301.

The fact that defendant and her daughter, the alleged accomplice, on the night following the administering of the poison, were heard whispering together for a long time after retir-

be very significant under some circumstances are incompetent when not connected in some way with the accused.[64]

B. Tendency to Prejudice. — The mere fact that such evidence has a tendency to unduly prejudice the defendant in the eyes of the jury is no legal objection to its competency,[65] but when evidence competent only for some particular purpose and incompetent generally tends to degrade or seriously reflect upon the defendant's character, courts are more careful in determining its relevancy.[66]

C. The Condition and Appearance of the Accused's Clothing and other possessions subsequent to the homicide, indicating a possible connection with the homicide, is a competent circumstance.[67] It is not necessary to introduce such articles themselves, but any qualified witness may testify as to their condition.[68] The principles of best and secondary evidence are not extended to such matters.[69] It has been held, however, that evidence on the part of the prosecution as to the appearance of clothing or other property of the defendant in its possession, is not admissible without the production of such articles.[70] The presence subsequent to the homicide of bloodstains on the accused person, clothing or other articles belonging to or otherwise connected with him may be shown where it appears that the deceased's blood was shed.[71] The accused in

ing, was held properly admitted as an incriminating circumstance deriving its significance from the accompanying facts and circumstances. People *v.* Bemis, 51 Mich. 422, 16 N. W. 794.

64. Smith *v.* State, 137 Ala. 22, 34 So. 396.

Evidence of the finding of a bloody handkerchief about a mile and a quarter from the defendant's house, a week after the homicide, was held improperly admitted because not connected in any way with the defendant. State *v.* Thomas, 99 Mo. 235, 12 S. W. 643.

65. Ortiz *v.* State, 30 Fla. 256, 11 So. 611.

66. See *supra*, "Other Crimes."

67. Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

The dampness of defendant's shirt, found in his house on the morning following the night of the homicide, was held a competent circumstance, on the ground that his home was three miles distant from the scene of the homicide, and if the defendant had walked this distance in such warm weather his clothing would show signs of dampness. Baines *v.* State, 43 Tex. Crim. 490, 66 S. W. 847.

68. State *v.* McAfee, 148 Mo. 370, 50 S. W. 82.

69. See article "Best and Secondary Evidence," Vol. II, p. 301, note 78.

70. Johnson *v.* State, 80 Miss. 798, 32 So. 49, in which evidence as to blood stains on a pair of overalls, and their appearance of having been washed, was held incompetent without their production by the state, in whose possession they were.

71. *California.* — People *v.* Bell, 49 Cal. 485.

Georgia. — Thomas *v.* State, 67 Ga. 460.

Idaho. — State *v.* Rice, 7 Idaho 762, 66 Pac. 87.

South Dakota. — State *v.* Garrington, 11 S. D. 178, 76 N. W. 326.

Texas. — Thornton *v.* State, 20 Tex. App. 519.

Utah. — People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

Vermont. — State *v.* Bradley, 67 Vt. 465, 32 Atl. 238.

Virginia. — Barbour *v.* Com., 80 Va. 287.

West Virginia. — State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

rebuttal may show any facts giving an innocent explanation of such stains.[72] The rules governing this class of evidence will be found more fully stated elsewhere.[73]

D. Articles Found at Scene of Homicide. — The fact that articles apparently belonging to the accused, or otherwise tending to connect him with the homicide, were found on or near the scene thereof, is relevant and material,[74] and evidence is admissible to show such ownership or connection.[75]

E. Suspicious Possession of Articles. — a. *Generally.* — The accused's possession of articles tending to connect him with the homicide may be shown.[76]

See State *v.* Robinson, 117 Mo. 649, 23 S. W. 1066.

In Campbell *v.* State, 23 Ala. 44, it was held competent to show that there were dark stains upon a shirt, which the evidence tended only indirectly to show belonged to the defendant, although there was nothing besides the color to indicate that they were bloodstains.

A Stick Habitually Carried by the Defendant, bearing upon it stains apparently of blood, is admissible. Thomas *v.* State, 67 Ga. 460.

Evidence as to bloodstains on a box found in defendant's possession after the homicide is a competent circumstance. Walker *v.* State, 139 Ala. 56, 35 So. 1011.

After Leaving His Possession. In Linsday *v.* People, 63 N. Y. 143, evidence as to bloodstains found upon boards taken from the sleigh of the accused was held not incompetent because such boards had been out of the possession of the accused for considerable time, where the evidence tended to show that they were in the same condition as when they left the defendant's possession, and there was no testimony as to their having been tampered with.

72. Where evidence as to defendant's having bloodstains on his face and shirt had been introduced, it was held error to exclude evidence offered in rebuttal that on the night preceding the homicide defendant had requested the witness to lend him his handkerchief because his nose was bleeding. Murphy *v.* State, 36 Tex. Crim. 24, 35 S. W. 174.

The Absence of Such Stains cannot be shown unless it is probable from the nature and character of the wound, or the circumstances under which it was inflicted, that bloodstains would have been found upon the person or clothing of the perpetrator. Sylvester *v.* State, 72 Ala. 201.

73. See article "Bloodstains," Vol. II.

74. See *infra* this article, "Real and Demonstrative Evidence — Connecting Accused With Homicide."

That several strands of fine brown wool were found on a stick with which the crime appeared to have been committed may be shown in connection with evidence that the deceased wore a brown wool hat on the day of the homicide. State *v.* Weddington, 103 N. C. 364, 9 S. E. 577.

Positive Identification Unnecessary. — Where a bottle of the character commonly used to hold bitters of a certain kind was found in deceased's buggy, near which his dead body lay, the testimony of a witness that he had previously sold defendant the same kind of a bottle containing bitters, was held competent, the evidence of identity though weak being sufficient to warrant the admission of the evidence. State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153.

75. Logan *v.* Com., 16 Ky. L. Rep. 508, 29 S. W. 632.

76. See *infra* this article, "Real and Demonstrative Evidence — Connecting Accused With Homicide."

Where the body of the deceased appeared to have been dragged by means of a rope fastened to the

b. *Suspicious Possession of Money or Property of Deceased.* (1.) **Generally.** — The accused's possession, subsequent to the homicide, of money or property shown to belong to or to have been in the possession of the deceased previous thereto, is a competent circumstance tending to connect him therewith,[77] and evidence tending to identify such articles as the property of the deceased is admissible.[78]

The Accused's Actual Possession of such articles need not be shown, it being sufficient that he had access to the place where they were found and might have concealed them there.[79]

No Legal Presumption arises from the accused's unexplained possession of property of the deceased.[80]

(2.) The Length of Time Intervening between the homicide and the accused's possession of such articles affects the weight but not the competency of the evidence.[81] How near to the homicide the deceased's possession of the articles must have been to render evidence of it admissible, depends upon the circumstances of the case.[82]

neck, the finding on the premises of the defendant of a rope which had apparently been used for that purpose was held a competent circumstance against him. Hubby *v.* State, 8 Tex. App. 597.

77. Morris *v.* State, 30 Tex. App. 95, 16 S. W. 757; Pharr *v.* State, 9 Tex. App. 129; Williams *v.* Com., 29 Pa. St. 102; People *v.* Smith, 106 Cal. 73, 39 Pac. 40; Wilson *v.* United States, 162 U. S. 613.

The possession by the defendant, the day after the murder and robbery, of a Confederate note similar in appearance and denomination to one previously in the possession of the deceased is a competent circumstance tending to identify defendant with the murderer. Com. *v.* Roddy, 184 Pa. St. 274, 39 Atl. 211.

78. State *v.* Lucey, 24 Mont. 295, 61 Pac. 994.

79. A watch, identified as the property of the deceased, found several months after the homicide in a well to which the defendant had access after he had been notified that he was suspected of the murder, was held properly admitted. Morris *v.* State, 30 Tex. App. 95, 16 S. W. 757.

80. Kibler *v.* Com., 94 Va. 804, 26 S. E. 858.

81. Where the deceased was shown to have carried two watches in November and the murder was alleged to have been committed in December, evidence that one of these watches had been seen in the possession of the defendant in May following was held competent. "The lapse of time between the different events proved did not, under the circumstances, render the evidence incompetent, but went to its cogency as proof of guilt. It is impossible to prescribe any definite rule as to the time beyond which a party accused of crime shall not be called upon to account for the possession of property stolen or taken from a murdered man. The more recent the possession the more cogent the evidence, and the lapse of time weakens the presumption of guilt, while other circumstances, such as the manner of keeping or using the article, may affect the inference to be drawn from the possession." Linsday *v.* People, 63 N. Y. 143.

82. Where it appeared that the deceased seemed to have had no bank account and to have kept his money as he earned it, except very small sums spent for his living, as tending to show that certain gold pieces found in defendant's possession had been taken from the deceased, it was held competent to prove that the latter had received one such gold piece six months previous to the homicide, and had ex-

(3.) Possession of Third Person.— The subsequent possession of deceased's property by a third person may be proved where there is evidence that he was a co-conspirator or accomplice.[83] And it has been held competent to show by the acts and declarations of a third person in possession of such property that he held it merely as custodian for the accused, without regard to any question of conspiracy between them.[84]

F. Unusual or Unnatural Conduct with reference to the deceased, about the time of the homicide, may be shown.[85] The failure of the defendant to assist in discovering the criminal is competent evidence where the circumstances are such that his assistance in this matter would be naturally expected.[86]

G. Attempted Concealment by the defendant, of circumstances which might be used as evidence against him, is a suspicious fact.[87]

hibited several such pieces on different occasions in the interval. Com. *v.* Williams, 171 Mass. 461, 50 N. E. 1035.

83. Musser *v.* State, 157 Ind. 423, 61 N. E. 1, *distinguishing* such evidence from the subsequent acts and appearance of a co-conspirator, concerning the admissibility of which the authorities are conflicting. See fully the articles "Conspiracy" and "Accomplices."

84. Mimms *v.* State, 16 Ohio St. 221.

85. State *v.* Brabham, 108 N. C. 793, 13 S. E. 217; Moore *v.* State, 2 Ohio St. 500.

Evidence that the defendant, on the day of the homicide, was in a place where he did not usually go, which was near the scene of the homicide, is a relevant circumstance. Campbell *v.* State, 23 Ala. 44.

Indifference to the fate of the deceased, toward whom he has occupied the relation of an accepted suitor, and to her relatives, who look to him for assistance. State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625. See also State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676.

Indifference and Gratification at death of deceased spouse. People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846.

Opinion Evidence. — See People *v.* Smith, 172 N. Y. 210, 64 N. E. 814, and the article "Expert and Opinion Evidence."

86. Baines *v.* State, 43 Tex. Crim. 490, 66 S. W. 847, in which the defendant's refusal to look for tracks in the vicinity of the attempted murder of his sister-in-law was held properly admitted.

87. State *v.* Dickson, 78 Mo. 438; Burton *v.* State, 107 Ala. 108, 18 So. 284; Betts *v.* State, 66 Ga. 508; People *v.* Place, 157 N. Y. 584, 52 N. E. 576.

The Removal From the Person or Clothing of Stains of blood or other marks tending to show complicity in the crime. State *v.* Brown, 168 Mo. 449, 68 S. W. 568.

In Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401, the testimony of a witness that a pair of shoes found in defendant's house after the homicide, and which it was contended fitted the tracks alleged to have been made by the murderer, appeared to have been recently washed, was held competent.

Efforts to Prevent Search in the place where the body was found. State *v.* Hayes, 14 Utah 118, 46 Pac. 752.

Inadmissible Conclusion. — A witness cannot testify that defendant's clothes "looked like ashes had been smeared over them to hide the blood," this being an inadmissible conclusion. Moffatt *v.* State, 35 Tex. Crim. 257, 33 S. W. 344. See article "Expert and Opinion Evidence."

H. Consciousness of Guilt. — Evidence tending to show a consciousness of guilt[88] or contemplation of the act[89] is admissible.

I. Physical Strength of Parties. — Where deceased's injuries are such as would require great physical strength for their infliction, it is competent to show that the accused is a strong man.[90] So also the relative size and strength of both parties may be proved, to show that the accused could have overcome the deceased in the manner claimed.[91]

J. Ability to Use, or Skill With, Weapon. — It is competent to show the accused's ability to use the weapon with which the homicide was committed,[92] and also his peculiar skill with such weapon when the act appears to have been done under circumstances requiring skill.[93]

K. Membership in Criminal Organization. — The fact that the accused was a member of an organization or society whose object was to commit murder is a relevant and competent circumstance.[94]

L. The Suppression of Evidence by the defendant is a material circumstance to be considered by the jury.[95]

88. Clarke *v.* State, 78 Ala. 474. "Any indications of a consciousness of guilt by a person charged with or suspected of crime, or who, after such indications, may be suspected or charged with crime, are admissible in evidence against him; and the number of such indications cannot be limited or their nature or character defined. However minute or insignificant they may be, if they tend to elucidate the transaction, they should be admitted." Hart *v.* State, 15 Tex. App. 202.

89. Evidence tending to show that defendant expected something to happen to the deceased is competent. State *v.* Smith, 106 Iowa 701, 77 N. W. 499.

90. People *v.* Thiede, 11 Utah 241, 39 Pac. 837; *s. c.* 159 U. S. 510.

91. **In Support of the Theory of Suffocation.** — Davidson *v.* State, 135 Ind. 254, 34 N. E. 972.

Self-Defense. — For the relevancy of such evidence on this issue, see *infra* this article, "Defenses — Self-Defense."

92. The defendant's familiarity with firearms, and the fact that for many years she had been accustomed to their use, was held a competent circumstance on the trial of a wife for the murder of her husband. Lillie *v.* State (Neb.), 100 N. W. 316.

93. **Skill of Defendant.** — Where the deceased was shot from ambush at a considerable distance, and three out of the six shots fired struck him and the fourth lodged in a stick of wood which he was carrying, evidence that the defendants habitually carried their rifles, practiced at targets and excelled in marksmanship was held properly admitted. Allen *v.* Com. (Ky.), 82 S. W. 589.

94. **"Molly Maguires."** — Evidence that defendant was a member of a secret society popularly known as the "Molly Maguires," which had for its object the commission of crimes, including murder and the protection of its members from arrest and punishment, was held properly admitted to show the opportunity, preparation and motive on the part of the defendant to commit the crime in question. Hester *v.* Com., 85 Pa. St. 139; McManus *v.* Com., 91 Pa. St. 57; Carroll *v.* Com., 84 Pa. St. 107; Campbell *v.* Com., 84 Pa. St. 187.

95. Fincher *v.* State, 58 Ala. 215; Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

Attempts to Suppress Evidence by Intimidating the witness subsequent to the homicide, a competent circumstance. Fitts *v.* State, 102 Tenn. 141, 50 S. W. 756.

M. Agency of Persons not Accused. — a. *Generally.* — Where the evidence is circumstantial and the crime might have been committed by others than the defendant, the state may introduce evidence tending to show the impossibility or improbability of such other persons' connection with the crime.[96]

b. *Accounting for Deceased's Companion.* — The circumstances indicating the manner of the death of deceased's companion, killed at or about the same time, are admissible to show that the homicide was not committed by him.[97]

N. Conduct, Demeanor and Appearance of Accused. — a. *Generally.* — The conduct, demeanor and appearance of the accused at or about the time of the homicide,[98] and both previous[99] and

96. Where the crime was committed on shipboard and the evidence against defendant circumstantial, it was held competent for the state to show the whereabouts of the other members of the crew on the night of the assault for the purpose of diverting suspicion from them and rendering it more certain that defendant was the guilty party. State *v.* Warren, 41 Or. 348, 69 Pac. 679.

97. People *v.* Smith, 106 Cal. 73, 39 Pac. 40; State *v.* Hayes, 14 Utah 118, 46 Pac. 752.

Where deceased was last seen with another person it was held competent to show that the latter had been murdered apparently at the same time and at the same place as the deceased, such evidence being competent to rebut the inference that he and not the defendant was the guilty person. Smart *v.* Com., 10 Ky. L. Rep. 1035, 11 S. W. 431; Logston *v.* State, 3 Heisk. (Tenn.) 414.

98. Linsday *v.* People, 63 N. Y. 143; Murphy *v.* People, 63 N. Y. 590; State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; Davis *v.* State, 126 Ala. 44, 28 So. 617.

"The acts and conduct of a party at or about the time when he is charged to have committed a crime are always received as evidence of a guilty mind, and while in weighing such evidence ordinary caution is required, such inferences are to be drawn from them as experience indicates is warranted. And the demeanor of a prisoner at the time of his arrest, or soon after the commission of the crime, or upon being charged with the offense, is a proper subject of consideration in determining the question of guilt. Such indications, however, are by no means conclusive, and must depend greatly upon the mental characteristics of the individual. Innocent persons, appalled by the enormity of a charge of crime, will sometimes exhibit great weakness and terror, and those who have been crushed with the weight of a great sorrow will manifest the greatest composure and serenity in their grief, and meet it without shedding a tear. While the manifestations at such a time sometimes indicate excitement and great disturbance of the physical system, and do not always sanction an inference of guilt, they are admissible evidence for the jury to pass upon, in view of the circumstances." Greenfield *v.* People, 85 N. Y. 75.

Defendant's Presence Near the Scene of the Homicide About the Time of Its Commission. — Yarborough *v.* State, 105 Ala. 43, 16 So. 758; Miller *v.* State, 130 Ala. 1, 30 So. 379; Spraggins *v.* State, 139 Ala. 93, 35 So. 1000.

99. Rodriquez *v.* State, 32 Tex. Crim. 259, 22 S. W. 978; People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624; State *v.* Gooch, 94 N. C. 987.

In Hainsworth *v.* State, 136 Ala. 13, 34 So. 203, it appeared that deceased was shot at night while sitting on his porch. Four or five hours previous thereto he had a difficulty with the defendant near his own home, and the latter made

subsequent thereto,[1] may be shown in so far as it tends to connect him in any way with the commission of the homicide.[2] Everything that he did on the day or night of the homicide may be shown,[3] although consistent with innocence.[4]

The acts, declarations and demeanor of the accused when arrested,[5] when charged with the commission of the crime,[6] and when confronted by the injured person[7] or his corpse,[8] are competent evidence against him. The conduct of the defendant while in cus-

threats against him. The defendant, shortly after the difficulty, attended a prayer meeting. Testimony as to the facial expression of the defendant while at this meeting, some two hours before the homicide, was held not incompetent on the ground of remoteness, or as calling for a conclusion of the witness.

Where robbery was the apparent motive for the crime, evidence that defendant was seen hiding in the bushes adjoining the deceased's residence thirteen days prior to the homicide was held properly admitted. State *v.* Craemer, 12 Wash. 217, 40 Pac. 944.

Previous Demonstration of Ability. Where deceased appeared to have been strangled and his neck plainly showed finger marks, evidence as to defendant's previous demonstration of a grip by which he claimed he could "shut anybody's wind off" was held properly admitted. Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40.

1. People *v.* Hughson, 154 N. Y. 153, 47 N. E. 1092; Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28; People *v.* Leung Ock, 141 Cal. 323, 74 Pac. 986; People *v.* Hamilton, 137 N. Y. 531, 32 N. E. 1071; People *v.* Greenfield, 23 Hun (N. Y.) 454; Dean *v.* Com., 32 Gratt. (Va.) 912.

His Apparent Excitement. Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28.

Evidence that three-quarters of an hour after the homicide the defendant seemed to be excited is admissible. Miller *v.* State, 18 Tex. App. 232.

Testimony that the defendant "looked paler than usual" shortly after the homicide. Burton *v.* State, 107 Ala. 108, 18 So. 284; or on the morning thereof; Spangler *v.* State, 41 Tex. Crim. 424, 55 S. W. 326.

Silence, Indicating Unusual Seriousness on the part of the defendant after the homicide, is a relevant circumstance. Johnson *v.* State, 17 Ala. 618.

2. Evidence that defendant's shirt was torn about the collar when seen by the witness an hour after the shooting, and after the defendant had been home, was held incompetent because the shirt was not shown to be the one worn at the time of the difficulty. The court refrained from determining the admissibility of this fact if such showing should be made. State *v.* Moore, 68 Mo. 432, 68 S. W. 358.

3. Terry *v.* State, 120 Ala. 286, 25 So. 176; Campbell *v.* State, 23 Ala. 44.

4. State *v.* Garrington, 11 S. D. 178, 76 N. W. 326.

5. People *v.* Abbott (Cal.), 4 Pac. 769; Beavers *v.* State, 58 Ind. 530; State *v.* Lucey, 24 Mont. 295, 61 Pac. 994.

When Arrested for Another Crime. Where the defendant was ignorant of the cause of his arrest his conduct on that occasion was held competent on his trial for homicide, although he was arrested for another crime which he had committed. People *v.* Higgins, 127 Mich. 291, 86 N. W. 812.

6. State *v.* Bradley, 64 Vt. 466, 24 Atl. 1053; State *v.* Dennis, 119 Iowa 688, 94 N. W. 235.

7. State *v.* Dennis, 119 Iowa 688, 94 N. W. 235; People *v.* Smith, 172 N. Y. 210, 64 N. E. 814.

8. Handline *v.* State, 6 Tex. App. 347.

tody or confined in jail awaiting trial may be shown,[9] but in some jurisdictions not as an implied admission.[10]

b. *In His Own Behalf.* — **(1.) Generally.** — The defendant's conduct and declarations subsequent to the homicide are not ordinarily competent evidence in his own behalf[11] unless the circumstances are such as to demand some act or statement on his part.[12] Such evidence has, however, been held admissible under some circumstances,[13] and when evidence of his suspicious conduct has been introduced he may show his accompanying declarations.[14]

(2.) Failure to Flee or Attempt Escape, and Voluntary Surrender. — His failure to flee after suspicion against him has been excited,[15] his offer to surrender himself,[16] or his failure to attempt an escape upon a favorable opportunity,[17] is not competent evidence in behalf of the defendant except in rebuttal of evidence of flight or an attempt to escape.

O. Possession and Similarity of Deadly Weapon or Instrumentality. — As a circumstance tending to connect the accused with the act charged, it is competent to show his possession of a deadly weapon or instrumentality similar to that with which the homicide appears to have been committed, at the time thereof,[18] or

9. Siberry *v.* State, 133 Ind. 677, 33 N. E. 681.

To Show His Guilty Knowledge. Cordova *v.* State, 6 Tex. App. 207.

10. Evidence as to the defendant's conduct and appearance when charged with the murder and while under arrest is not admissible. Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750. See more fully *supra* this article, "Declarations — Of Third Persons — Implied Admissions."

A refusal by the defendant while under arrest to view the body of the deceased is not competent against him. Weaver *v.* State, 43 Tex. Crim. 340, 65 S. W. 534.

11. Hall *v.* State, 40 Ala. 698.

His Surprise When Informed of the Homicide. — Campbell *v.* State, 23 Ala. 44.

Offers of Assistance by the defendant in the search for the body of the deceased subsequently found on his premises are not competent evidence in his behalf. Dunn *v.* State (Ind.), 67 N. E. 940.

Offer to Be Taken Before the Wounded Man for Identification. Walker *v.* State, 139 Ala. 56, 35 So. 1011.

12. See *supra*, "Declarations — Of Defendant — In His Own Favor."

13. Where the Evidence Was Wholly Circumstantial the exclusion of evidence as to the defendant's willingness to try his shoe in the foot-prints found near the scene of the homicide, and as to his request that the measure of his horse's foot should be applied to the horse-tracks found there, was held error. Bouldin *v.* State, 8 Tex. App. 332.

14. Sullivan *v.* State, 101 Ga. 800, 29 S. E. 16.

15. Griffin *v.* State, 90 Ala. 596, 8 So. 670; Johnston *v.* State, 94 Ala. 35, 10 So. 665; Com. *v.* Hersey, 2 Allen (Mass.) 173; Walker *v.* State, 139 Ala. 56, 35 So. 1011.

16. Vaughn *v.* State, 130 Ala. 18, 30 So. 669.

An Immediate Voluntary Surrender is a self-serving act and not admissible. State *v.* Musick, 101 Mo. 260, 14 S. W. 212.

17. State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

18. Merrick *v.* State, 63 Ind. 327.

within a reasonable time previous[19] or subsequent,[20] or that he prepared such a weapon for use.[21] But it is not proper to show the possession of a weapon with which the wound could not have been inflicted.[22] Any evidence is competent which tends to show that the weapon or instrument which seems to have been used in the homicide is the same kind or size as one which was or may have been in the possession of the accused at the time of the killing;[23] or which

19. Possession of Knife Previous to Homicide Competent Where the Wound Appears to Have Been Made by a Knife. — Jones *v.* State, 137 Ala. 12, 34 So. 681; People *v.* Rogers, 18 N. Y. 9, 72 Am. Dec. 484. See also Gilmore *v.* State, 126 Ala. 20, 28 So. 595.

Borrowing of Knife. — Finch *v.* State, 81 Ala. 41, 1 So. 565.

The Defendant's Possession of a Pistol shortly previous to the killing is admissible. Garlitz *v.* State, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601; State *v.* Dunn, 116 Iowa 219, 89 N. W. 984; Burton *v.* State, 107 Ala. 108, 18 So. 284.

Pistol of Same Caliber. — Evidence tending to show defendant's possession of a revolver of the same caliber as the one apparently used in the homicide is competent. State *v.* Barrett, 40 Minn. 65, 41 N. W. 459; People *v.* Higgins, 127 Mich. 291, 86 N. W. 812; De La Garca *v.* State (Tex. Crim.), 61 S. W. 484.

Brass Knuckles — Slung-Shot. Where the wound was of such a nature that it could have been made with a pair of brass knuckles, it was held competent to show the defendant's possession of such knuckles previous to the homicide. State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153. So also his possession of a slung-shot may be shown where the deceased's wounds were such that that they might have been caused by a slung-shot. People *v.* McDowell, 64 Cal. 467, 3 Pac. 124.

Evidence that a coupling pin like the one with which the crime was committed was seen on defendant's premises the day before the homicide is admissible, together with the fact that soon after it had disappeared. State *v.* Brabham, 108 N. C. 793, 13 S. E. 217.

The Possession of an Auger of the same size as the holes in the boat, the sinking of which caused deceased's death, is a competent circumstance to connect the defendant with the crime. Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364.

20. Burton *v.* State, 107 Ala. 108, 18 So. 284. See also Maxwell *v.* State, 129 Ala. 48, 29 So. 981.

The Finding of a Pistol in Defendant's Trunk soon after the homicide is a competent circumstance. Murphy *v.* State, 36 Tex. Crim. 24, 35 S. W. 174.

It is competent to show that a revolver frame, partially covered with black grease and emitting a smell of burnt powder, was found upon the defendant's premises after the murder, as also a center pin and several cartridges of a caliber similar to the bullets extracted from decedent's head, without showing that the cylinder of the revolver was found, or that there was a cylinder in the frame while it was in defendant's possession. People *v.* Smith, 172 N. Y. 210, 64 N. E. 814.

21. The Fact That Defendant Had a Revolver Repaired a month before the homicide, and that it was found in his house thereafter, is admissible. State *v.* McKinney, 31 Kan. 570, 3 Pac. 356.

22. The possession of a pistol after the homicide is not competent where the evidence tends to show that the homicide was committed with an ax. Riggins *v.* State, 42 Tex. Crim. 472, 60 S. W. 877.

23. State *v.* Dunn, 116 Iowa 219, 89 N. W. 984.

The fact that a bullet was found in the wall of the room where the murder was committed on the day following the homicide is admissible in connection with evidence that it

tends to explain any apparent differences in these respects.[24] So also it is competent to show that as a result of an examination, no other person in the locality of the homicide was found possessed of a weapon of the same kind or size.[25] Evidence showing the defendant's opportunity immediately after the homicide to conceal the weapon with which the wounds may have been inflicted, is admissible.[26]

P. Flight and Attempts to Escape. — a. *Generally.* — The accused's flight and evasion of arrest after the homicide,[27] and his attempts[28] or preparations[29] to escape after arrest, are competent circumstances indicating guilt. It has been held that evidence of

fitted defendant's gun. Norris *v.* State (Tex. Crim.), 64 S. W. 1044.

The fact that a bullet taken from a tree near the scene of the homicide and one taken from the defendant's body fitted molds found in the defendant's possession, was held a competent circumstance. State *v.* Outerbridge, 82 N. C. 617.

The Character of Shot taken from the pocket of defendant's trousers, which were found in his house, is admissible. Baines *v.* State, 43 Tex. Crim. 490, 66 S. W. 847.

Result of Comparison. — A witness may state the result of a comparison between shot taken from defendant's gun and those found at the scene of the assault, where they had been fired by the assailant. Granger *v.* State (Tex. Crim.), 31 S. W. 671.

24. The testimony of a physician that a leaden bullet passing through tissue and bone of the body would be reduced in weight was held admissible in rebuttal of the defendant's evidence that the bullet found in deceased's body was not sufficiently heavy to have been fired from defendant's pistol, shown to be of a certain caliber. Dugan *v.* Com., 19 Ky. L. Rep. 1273, 43 S. W. 418.

25. Dean *v.* Com., 32 Gratt. (Va.) 912.

26. Freeman *v.* State, 40 Tex. Crim. 545, 46 S. W. 641.

27. *California.* — People *v.* Giancoli, 74 Cal. 642, 16 Pac. 510; People *v.* Sullivan, 129 Cal. 557, 62 Pac. 101.

Georgia. — Hudson *v.* State, 101 Ga. 520, 28 S. E. 1010.

Idaho. — State *v.* Lyons, 7 Idaho 530, 64 Pac. 236.

Mississippi. — McCann *v.* State, 21 Miss. 471.

New York. — People *v.* Driscoll, 107 N. Y. 414, 14 N. E. 305.

North Dakota. — State *v.* Pancoast, 67 N. W. 1052.

Texas. — Sebastian *v.* State, 41 Tex. Crim. 248, 53 S. W. 875.

But see Morgan *v.* Com., 77 Ky. 106.

28. Williams *v.* Com., 85 Va. 607, 8 S. E. 470; Anderson *v.* Com., 100 Va. 860, 42 S. E. 865.

An Attempt to Escape During the Progress of the Trial. — State *v.* Morgan, 22 Utah 162, 61 Pac. 527.

While Intoxicated — Attempted Bribery. — In McRae *v.* State, 71 Ga. 96, the attempt of the defendant to bribe the officers who had arrested him to permit him to escape was held admissible although made while the defendant was in a state of intoxication produced by the arresting officers.

29. The fact that defendant had saws concealed on his person during his imprisonment previous to the trial is admissible as evidence of an attempted flight. State *v.* Duncan, 116 Mo. 288, 22 S. W. 699. So also is his possession of two pistols in his cell. Barnes *v.* Com., 24 Ky. L. Rep. 1143, 70 S. W. 827.

The fact that a slung-shot was discovered in the accused's pocket when he was brought into court to hear the rendition of the verdict is competent evidence against him on a second trial. State *v.* Houser, 28 Mo. 233.

A request by the defendant of his fellow-prisoner to assist in an escape

flight is not limited to cases where the evidence is purely circumstantial.[30] But it has also been held that when the killing is admitted, such evidence is not admissible.[31] In proof of flight it is competent to show that after the homicide the accused was not seen about his home or the place where he might reasonably be expected to be found.[32] So also the steps taken by the officers of the law to find and arrest him may be shown.[33]

b. *Accompanying Circumstances.* — All the facts and circumstances connected with such flight are admissible for the purpose of increasing or diminishing its probative force;[34] thus it is competent to show any conduct on the part of the accused during his flight which tends to characterize it,[35] including his resistance to and killing of the officers attempting his arrest;[36] also the steps taken to recapture him.[37]

c. *Rebuttal.* — The accused may show in rebuttal any circumstances tending to explain and give an innocent interpretation of his

is admissible. State *v.* Jackson, 95 Mo. 623, 8 S. W. 749.

30. Hardin *v.* State, 4 Tex. App. 355; Blake *v.* State, 3 Tex. App. 581; *overruling* Williams *v.* State, 43 Tex. 182.

31. People *v.* Ah Choy, 1 Idaho 317.

32. Gray *v.* State, 42 Fla. 174, 28 So. 53; Sylvester *v.* State, 72 Ala. 201.

33. State *v.* Pancoast (N. D.), 67 N. W. 1052.

The testimony of the sheriff as to where the arrest was made is competent to prove flight. State *v.* Austin, 104 La. 409, 29 So. 23.

Evidence of the steps taken to apprehend the defendant immediately after the homicide, including the reward offered and descriptions of defendant sent to different parts of the country, was held properly admitted as tending to show flight and concealment. State *v.* Lucey, 24 Mont. 295, 61 Pac. 994.

34. Waite *v.* State, 13 Tex. App. 169; Caddell *v.* State, 136 Ala. 9, 34 So. 191; Williams *v.* State, 69 Ga. 11.

In Ford *v.* State, 129 Ala. 16, 30 So. 27, evidence that when the defendant in the course of his flight reached the house of a friend the latter held his pursuers at bay with a rifle, was held competent as part of the *res gestae* of the flight.

35. The Fact That Defendant Disguised Himself after his flight is admissible. State *v.* Chase, 68 Vt. 405, 35 Atl. 336.

The refusal of the defendant to surrender his gun after the homicide "until he got through with it" was held admissible as an act characterizing his flight. Patterson *v.* State (Tex. Crim.), 60 S. W. 557.

The conduct of defendant during his flight, his false declarations, the use of assumed names, his place of residence, carrying of firearms, etc., were held properly admitted. Paulson *v.* State (Wis.), 94 N. W. 771.

Living Under Assumed Name. The fact that the defendant was living under an assumed name when he was discovered several years after having fled from the place of the homicide is a competent circumstance. State *v.* Whitson, 111 N. C. 695, 16 S. E. 332.

36. State *v.* Shaw, 73 Vt. 149, 50 Atl. 863; Com. *v.* Biddle, 200 Pa. St. 647, 50 Atl. 264; People *v.* Flannelly, 128 Cal. 83, 60 Pac. 670.

But see Spriggins *v.* State, 42 Tex. Crim. 341, 60 S. W. 54.

37. Bowles *v.* State, 58 Ala. 335, holding competent the requisition of the governor for the arrest and surrender of the prisoner in another state.

flight.[38] Thus it is proper to show that his act was due to his fear of being mobbed or lynched by the friends of the deceased.[39] Any hostile manifestations by such persons not known to him at the time of his flight are not admissible.[40] The explanatory circumstances must be proved by otherwise competent evidence.[41] When evidence of the flight itself is not competent, rebuttal evidence is of course inadmissible.[42]

The Accused's Voluntary Return and Surrender tends to weaken the inference of guilt arising from his flight,[43] but does not render the latter fact incompetent,[44] nor does it rebut the presumption which is held in some jurisdictions to arise from flight.[45]

d. *Weight Of.* — It is said in some jurisdictions that flight raises

The Circumstances of His Pursuit and Capture. — People *v.* Fredericks, 106 Cal. 554, 39 Pac. 944.

38. Batten *v.* State, 80 Ind. 394.

His Poverty and Inability to Defend. — In State *v.* Melton, 37 La. Ann. 77, the court suggests that evidence as to the defendant's poverty, offered for the purpose of showing his inability to employ counsel to properly defend him, may be admissible to explain the unfavorable inference arising from his flight after the homicide.

The Filthy Condition of the Jail in which the defendant was about to be confined cannot be shown by him as an excuse for his attempted escape, although he apprehended serious danger to his life therefrom. Kennedy *v.* Com., 77 Ky. 340.

Fear of Injury to Health. — See Williams *v.* State, 33 Tex. Crim. 98, 25 S. W. 929.

39. Lewis *v.* State, 96 Ala. 6, 11 So. 259, 38 Am. St. Rep. 75; Golden *v.* State, 25 Ga. 527.

He may show that his flight was due to a gathering of the friends of the injured party, and to information received from others that his life was in danger from these parties. Evans *v.* State (Tex. Crim.), 76 S. W. 467. But in State *v.* Chevallier, 36 La. Ann. 81, evidence offered by the defendant in explanation of his fleeing from justice and the forfeiture of his bail bond, that the deceased had large and influential family connections and friends, by whom the defendant's life had been threatened after his arrest, was held irrelevent because it could not rebut the inference of guilt arising from his flight.

Dangerous Character of Persons Threatening Him. — Where defendant, in explanation of his flight, has shown threats by the friends and relatives of the deceased to kill him, it is error to exclude his evidence of the dangerous and desperate character of the persons making the threats. State *v.* Barham, 82 Mo. 67.

40. Cortez *v.* State, 44 Tex. Crim. 169, 69 S. W. 536.

41. Defendant's Declaration to a third person that he left the neighborhood of the homicide after he learned that he had been charged with its commission because he was afraid he would be mobbed, held not competent to prove this fact. Golin *v.* State, 37 Tex. Crim. 90, 38 S. W. 794.

"General Talk" of the Community. — Evidence as to the "general talk" in the community that if certain persons found the defendant they would kill him without attempting to arrest him, is incompetent. Taylor *v.* Com., 90 Va. 109, 17 S. E. 812. But see Evans *v.* State (Tex. Crim.), 76 S. W. 467.

42. People *v.* Ah Choy, 1 Idaho 317.

43. Bowles *v.* State, 58 Ala. 335.

44. Carden *v.* State, 84 Ala. 417, 4 So. 823.

45. State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315.

a presumption of guilt.[46] But the contrary is also held,[47] and it seems to be generally regarded merely as evidence of guilt which may be strong or weak, depending upon the circumstances.[48]

Q. Attempted Suicide. — The defendant's attempt to commit suicide while in prison awaiting trial raises no presumption of guilt.[49]

R. Footprints. — a. *Generally.* — It is competent to show the presence of footprints at and near the scene of the homicide,[50] or that they led away therefrom to the house or premises of the accused, without identifying them as his or similar to his.[51]

b. *The Similarity* of the footprints found at or near the scene of the homicide with those of the accused, or their correspondence with his shoes, may be shown,[52] although the measurements or comparison were made without notice to him and not in his pres-

46. State *v.* Adler, 146 Mo. 18, 47 S. W. 794; State *v.* Walker, 98 Mo. 95, 9 S. W. 646; State *v.* Pancoast (N. D.), 67 N. W. 1052.

The mere fact that defendant fled from the place where the homicide was committed immediately thereafter, and went home not more than half a mile distant, was held insufficient to warrant an instruction that flight raises a presumption of guilt. State *v.* Hopper, 142 Mo. 428, 44 S. W. 272.

47. Madison *v.* Com., 13 Ky. L. Rep. 313, 17 S. W. 164.

48. Anderson *v.* Com., 100 Va. 860, 42 S. E. 865; Hudson *v.* State, 101 Ga. 520, 28 S. E. 1010.

While flight is a competent circumstance "its value is ordinarily slight, but circumstances may invest it with peculiar force." Smith *v.* State, 58 Miss. 867. And see the preceding cases involving this class of evidence.

49. State *v.* Coudotte, 7 N. D. 109, 72 N. W. 913, *distinguishing* the probative force of this fact from that of an attempted flight or escape on the ground that the motives may be very different. "One who flees does so generally for the purpose of avoiding punishment that follows violated law. One who commits or attempts suicide seeks to avoid no punishment; he deliberately accepts the highest punishment the law could possibly inflict — death. Hence, the very circumstances that raise a presumption of guilt from flight are absolutely wanting in suicide. . . . The number of innocent persons who commit suicide within any given time is always many times greater than the number of guilty persons who commit suicide within the same time; hence suicide can always be accounted for upon the hypothesis of innocence more readily than upon the hypothesis of guilt."

50. Baines *v.* State, 43 Tex. Crim. 490, 66 S. W. 847; State *v.* Daniels, 134 N. C. 641, 46 S. E. 743.

Evidence that tracks were seen going to and coming from the scene of the homicide was held admissible without identifying them as defendant's where the latter admitted that he passed over the same route. Ransom *v.* State (Tex. Crim.), 70 S. W. 960.

51. Testimony that the tracks found upon the ground where the homicide was committed were traced to the home of the defendant is admissible without regard to any ascertained or determined similarity between such tracks and other tracks made by the defendant. Parker *v.* State (Tex. Crim.), 80 S. W. 1008. See also State *v.* Davis, 55 S. C. 339, 33 S. E. 449.

52. Hodge *v.* State, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145.

Any Peculiarity in the foot-prints corresponding to peculiarities in the defendant's shoes or tracks may be shown. Jenkins *v.* State (Tex. Crim.), 75 S. W. 312; Davis *v.* State, 126 Ala. 44, 28 So. 617.

ence[53] or with a shoe illegally obtained.[54] So also the similarity of footprints found there with those made by the defendant's horse may be shown.[55]

c. *The Comparison* may be made by means of comparative measurements[56] by actually placing the defendant's shoes or feet in the tracks,[57] or by having him make footprints either in or out of court.[58]

The Accused's Protest against, or his repugnance to, having his shoes or feet measured for this purpose is a competent incriminating circumstance.[59]

d. *When Made.* — Evidence as to the results of such a comparison is not admissible merely because the measurements were not taken immediately after the footprints were made,[60] or because the footprints used as a standard of comparison were made a short time before or after the homicide.[61]

e. *Qualifications of Witness.* — The witness testifying as to the identity of footprints need not be an expert,[62] but any person who has observed them may describe their appearance and measurements.[63]

53. State *v.* Morris, 84 N. C. 756.

54. Myers *v.* State, 97 Ga. 76, 25 S. E. 252.

55. In Campbell *v.* State, 23 Ala. 44, evidence that the shoes taken from the defendant's horse "seemed to fit in every particular" tracks found near the body of the deceased, was held admissible.

56. Hodge *v.* State, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145.

57. Squires *v.* State (Tex. Crim.), 54 S. W. 770; State *v.* Sexton, 147 Mo. 89, 48 S. W. 452.

Where the foot-prints found near the body of the deceased were described by witnesses, it was held proper to exhibit the impressions in sand made with defendant's boots in the presence of the jury. Johnson *v.* State, 59 N. J. L. 535, 37 Atl. 949, 38 L. R. A. 373.

58. Campbell *v.* State, 55 Ala. 80.

59. State *v.* Brown, 168 Mo. 449, 68 S. W. 568.

60. The fact that defendant's shoes were not fitted to the tracks until two or three days after the homicide affects the weight but not the competency of the evidence. State *v.* Sexton, 147 Mo. 89, 48 S. W. 452.

Two Weeks Subsequent. — Evidence as to the measurement of the accused's foot-prints made for the purpose of comparing them with those found at the scene of the homicide was held properly admitted, although the measurements were not taken until two weeks after the foot-prints were made. People *v.* McCurdy (Cal.), 10 Pac. 207.

61. Where it appeared that the tracks around the body of the deceased indicated a peculiarity in the shoe making them, the testimony of a witness that the tracks made by the defendant over a month before the homicide displayed the same peculiarity was held not incompetent on the ground of remoteness. Gray *v.* State, 42 Fla. 174, 28 So. 53.

62. State *v.* Morris, 84 N. C. 756.

63. Weaver *v.* State, 43 Tex. Crim. 340, 65 S. W. 534.

Evidence as to whether the person making them appeared to be running or walking is not incompetent as a conclusion. Smith *v.* State, 137 Ala. 22, 34 So. 396.

Testimony as to the measurement of a track is admissible without producing the measure itself in open court. Wade *v.* State, 65 Ga. 756; Weaver *v.* State, 43 Tex. Crim. 340, 65 S. W. 534.

f. *Opinion.* — Some courts hold that while a witness may describe the footprints and their points of similarity, he cannot give his opinion or conclusion as to their identity;[64] others allow him to state that the footprints found at the homicide are similar to those made by the defendant,[65] but only when he has made comparative measurements, an actual test, or observed some striking peculiarity common to the footprints compared.[66]

g. *Sufficiency.* — The mere similarity of the footprints found at the scene of the homicide with those made by the accused is not sufficient to warrant a conviction.[67] But the fact that such foot-

64. Clough *v.* State, 7 Neb. 320; Terry *v.* State, 120 Ala. 286, 25 So. 176; *citing* and *commenting* on Hodge *v.* State, 97 Ala. 37, 12 So. 164; Riley *v.* State, 88 Ala. 193, 7 So. 149; Gilmore *v.* State, 99 Ala. 154, 13 So. 536; James *v.* State, 104 Ala. 20, 16 So. 94.

Where the tracks of a horse were traced from the scene of the homicide to the defendant's house, and one of the tracks was of a peculiar shape similar to that made by a horse ridden by the defendant on the day of the homicide, it was held error to allow witnesses to state as a fact or give their opinion that the tracks in question were made by the defendant's horse, because such testimony invaded the province of the jury. Russell *v.* State, 62 Neb. 512, 87 N. W. 344.

65. Johnson *v.* State, 59 N. J. L. 271, 35 Atl. 787.

66. Smith *v.* State (Tex. Crim.), 77 S. W. 453; Mosely *v.* State (Tex. Crim.), 67 S. W. 103, *distinguishing* Weaver *v.* State, 43 Tex. Crim. 340, 65 S. W. 534, and Baines *v.* State, 43 Tex. Crim. 490, 66 S. W. 847, on the ground that in the former case measurements were made by the witness, and in the latter the witness had seen tracks made by the defendant, whereas in the instant case the testimony was based simply on a view of the defendant's feet at the trial.

In Parker *v.* State (Tex. Crim.), 80 S. W. 1008, the testimony of a witness that he found tracks near the scene of the homicide, which seemed to have been made by a "worn, everyday shoe," but that he did not measure either the tracks there found or the track or shoe of the defendant, was held insufficient to warrant an expression of opinion as to the similarity between defendant's tracks or shoes and those found at the scene of the homicide. The court says: "Before he can give his opinion, the witness must have made some measurement of the tracks found upon the ground and the foot or shoe of defendant; or have made some comparison between tracks found upon the ground and shoes known to be defendant's — as placing the shoes of defendant in tracks on the ground; or, if there are peculiarities in the tracks made upon the ground, such as worn places, or peculiar tacks, and such places or tacks were found upon the shoes known to belong to defendant, the witness can detail such facts, and can then give his opinion as to the matter of similarity between said tracks. McLain *v.* State, 30 Tex. App. 482, 17 S. W. 1092, 28 Am. St. Rep. 934; Rippey *v.* State, 29 Tex. App. 37, 14 S. W. 448; Grant *v.* State, 42 Tex. Crim. 275, 58 S. W. 1025; Mosely *v.* State (Tex. Crim.), 67 S. W. 103; Thompson *v.* State (Tex. Crim.), 77 S. W. 449; Smith *v.* State (Tex. Crim.), 77 S. W. 453, 8 Tex. Ct. Rep. 843;" *overruling* previous cases to the contrary or apparently so; Thompson *v.* State, 19 Tex. App. 593; Clark *v.* State, 28 Tex. App. 89, 12 S. W. 729, 19 Am. St. Rep. 817.

67. Patton *v.* State, 117 Ga. 230, 43 S. E. 533; Dunn *v.* People, 158 Ill. 586, 42 N. E. 47.

Although the evidence strongly and conclusively tends to establish the fact that tracks seen near the place of the crime, and made on the

prints correspond in certain peculiarities, coupled with some other incriminating circumstances, has been held sufficient to sustain a conviction.[68]

S. PREPARATIONS. — a. *Generally.* — Any conduct on the part of the accused indicating that he was preparing to commit such a crime[69] is competent. Thus where the homicide was committed by the use of poison it is proper to show previous purchases of the same kind of poison by the accused.[70]

b. *Rebuttal.* — In explanation of his purchase or possession of a deadly weapon, the accused may show that he secured it for a lawful purpose, or one unconnected with the deceased.[71] He may show that he had been threatened by the deceased.[72] Where evidence has been introduced by the prosecution tending to show his possession of a weapon previous and subsequent to the homicide, evidence tending to show the impossibility of his having concealed or disposed of such weapon prior to his arrest is relevant and admissible,[73]

night it was committed, correspond in minute particulars with the shoes belonging to the accused, this is not sufficient to establish his guilt beyond a reasonable doubt. Cummings *v.* State, 110 Ga. 293, 35 S. E. 117.

68. McKinney *v.* State (Tex. Crim.), 71 S. W. 753. But see Bright *v.* State (Miss.), 28 So. 845.

In Gregory *v.* State, 80 Ga. 269, 7 S. E. 222, the conviction was based chiefly upon the similarity of the tracks found at the scene of the homicide and those voluntarily made by the defendant in a box of sand in the presence of the jury, corroborated solely by the fact that a piece of wrapping paper, evidently dropped by the culprits, corresponded in quality with paper found in the prisoner's pocket. These facts were held sufficient to sustain the conviction, although "not altogether satisfactory."

69. Goodwin *v.* State, 96 Ind. 550.

An unsuccessful attempt by the defendant to procure insurance upon the deceased's life without her knowledge may be shown. Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40.

Where defendant's hostility appeared to be directed toward deceased and another person jointly, it was held competent as evidence of motive, preparation and opportunity to show that just previous to the homicide he had secured the arrest and imprisonment of such other person on a trumped-up charge. Hubby *v.* State, 8 Tex. App. 597.

70. Com. *v.* Hobbs, 140 Mass. 443, 5 N. E. 158; People *v.* Ledwon, 153 N. Y. 10, 46 N. E. 1046.

Purchase of Poison a Year Previous to the homicide, held a competent circumstance. State *v.* Cole, 94 N. C. 958.

Where it appeared that the deceased's death was caused by white arsenic and there was evidence to show that previous to the homicide the defendant had bought two boxes of "Rough on Rats" with the declared purpose of using it as poison, and there was testimony that this article was of a uniform quality, evidence of a chemist's analysis of another box of such article, showing that it consisted almost wholly of white arsenic, was held competent. Com. *v.* Hobbs, 140 Mass. 443, 5 N. E. 158.

71. Smith *v.* State (Tex. Crim.), 81 S. W. 936.

72. Hunter *v.* State, 74 Miss. 515, 21 So. 305.

73. Burton *v.* State, 107 Ala. 108, 18 So. 284. In this case where the defendant's evidence tended to show the improbability of his having been able to dispose of or sell the weapon subsequent to the time of his alleged possession, elsewhere than in or on the dwelling and premises of

but he cannot show that he was seen apparently without the weapon previous to the homicide and after the time testified to by the prosecution.[74]

Possession of Poison. — Where the previous purchase or possession of poison by the accused has been proved he may show why he purchased the poison.[75]

T. Pecuniary Circumstances of Parties. — Where the motive alleged is robbery, it is competent to show the accused's impecunious condition shortly preceding and his possession of a considerable or unusual amount of money shortly following the homicide,[76] not only in connection with evidence that the deceased was robbed by the perpetrator of the crime,[77] but also when, though robbery was the motive, there is no evidence that any money was taken from him.[78] Nor is it necessary, when it is shown that deceased was robbed, to identify such money as having been in the previous possession of the deceased.[79] In connection with such circumstances any evidence is competent which tends to show the deceased's possession of money within a reasonable length of time previous to the homicide.[80] The accused's previous lack of money may be proved by his acts[81] and declarations[82] at the time.

his father, the testimony of the latter that after the homicide and arrest of the defendant he searched his dwelling and premises without finding the revolver was held relevant and competent.

74. State *v.* O'Neil, 13 Or. 183, 9 Pac. 284.

75. On a charge of murder by poisoning, where the purchase and possesion of strychnine by the defendant has been proved, he may show in rebuttal that he owned a ranch and that ranchers, generally, in his locality had strychnine in their possesson for the purpose of poisoning "varmints." People *v.* Cuff, 122 Cal. 589, 55 Pac. 407.

76. People *v.* Leung Ock, 141 Cal. 323, 74 Pac. 986; State *v.* Hansen, 25 Or. 391, 35 Pac. .976; Gates *v.* People, 14 Ill. 433; State *v.* Wintzingerode, 9 Or. 153; State *v.* Rice, 7 Idaho 762, 66 Pac. 87.

77. Betts *v.* State, 66 Ga. 508.

78. Garza *v.* State, 39 Tex. Crim. 358, 46 S. W. 242.

79. Chapman *v.* State, 43 Tex. Crim. 328, 65 S. W. 1098; Lancaster *v.* State (Tex. Crim.), 31 S. W. 515.

The possession by the defendant of two bars of gold bullion similar to that taken from the deceased at the time of the homicide was held properly admitted, although not shown to be the same. People *v.* Collins, 64 Cal. 293, 30 Pac. 847.

80. The Details of Deceased's Financial Transactions several days previous to the homicide, the nature and amount of the money in her possession prior to her death, and other evidence as to the manner and place in which she kept her money, and that a search of her house after the murder failed to disclose any of the money which she was known to have had at that time, held properly admitted. The possibility of her having spent the money or of its having been stolen from the house in the interim was held to affect the weight but not the competency of the evidence. Com. *v.* O'Neil, 169 Mass. 394, 48 N. E. 134.

81. The deposit for drinks at a saloon, shortly before the murder, of pay checks representing wages due him. State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

82. Gates *v.* People, 14 Ill. 433.

In Rebuttal the defendant may give in evidence his declarations made at the time he was seen to be in possession of such sums, in explanation thereof,[83] but not those previous thereto.[84]

U. Failure to Explain. — The failure of the accused to explain suspicious circumstances,[85] or his whereabouts at the time of the homicide, may be considered as indications of guilt.[86]

V. Letters written by the parties to each other[87] which show their relations and a possible motive for the crime, and also those written by the defendant to third persons,[88] are admissible. The letters themselves are the best evidence of their contents.[89] Letters of the accused which in any other way tend to connect him with the homicide are also admissible.[90]

83. Lancaster *v.* State (Tex. Crim.), 31 S. W. 515, in which the exclusion of defendant's declarations, made when he displayed the money, to the effect that he had won it at cards, was held error.

84. The declarations of the defendant previous to the homicide as to his intention to buy a farm were held incompetent to explain his possession of money at the time of the homicide. The court, however, recognizes the rule that declarations are competent evidence to establish the fact of intent in a proper case. Buel *v.* State, 104 Wis. 132, 80 N. W. 78.

85. Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

86. McCann *v.* State, 21 Miss. 471.

87. Written by Deceased. — Stevens *v.* People, 4 Park. Crim. (N. Y.) 396.

Written by Defendant. — O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471.

Letters written by the defendant to a deceased woman, whom he was accused of having poisoned, were held competent, although they were all found in the defendant's possession after his arrest, and it was not proved directly that they had ever been delivered to the deceased when written. Simons *v.* People, 150 Ill. 66, 36 N. E. 1019.

The Letters of the Deceased to the defendant, found in his possession, showing the writer's affection for him and her belief that he was responsible for her pregnancy, and showing her dependence upon him, are admissible, not for the purpose of proving any fact stated in them, but as tending to prove a sufficient motive for the crime. People *v.* Southerland, 154 N. Y. 345, 48 N. E. 518.

88. State *v.* Calloway, 154 Mo. 91, 55 S. W. 444; O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471; Stricklin *v.* Com., 83 Ky. 566.

Eleven Months Subsequent. — In Stephens *v.* People, 19 N. Y. 549, where the accused was charged with the murder of his wife, an anonymous letter in the defendant's handwriting, written eleven months after the murder to a person about to marry one S. B., was held competent as tending to establish the defendant's previous affection for the latter and his disappointment in failing to obtain her, the defendant's love for her being the alleged motive for the crime.

89. Bowens *v.* State, 106 Ga. 760, 32 S. E. 666.

90. Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122.

A letter found in old clothes left by the defendant upon his disappearance after the homicide, which was signed with his name and stating his intention to commit suicide, is competent against him without proof of his handwriting. State *v.* Batson, 108 La. 479, 32 So. 478.

The fact that defendant, shortly after the homicide, wrote a letter to a person known to have been implicated in the crime, is a competent circumstance. Darlington *v.* State, 40 Tex. Crim. 333, 50 S. W. 375.

W. Statements by Accused tending to identify him as the guilty party are admissible.[91]

X. Threats. — a. *Generally.* — The accused's threats against the deceased or injured person previous to the homicide or assault are competent evidence to connect him therewith.[92] But an expression, to be admissible as a threat, must be of such a character or made under such circumstances as to indicate a hostile purpose on the part of the speaker.[93] The mere fact that they were in some

91. Four Years Previous.—Where it appeared that the deceased wife had been killed partly by beating, the defendant husband's declarations four years previous to the homicide, that he had beaten his wife and thought he had a right to do so, were held admissible to connect him with the crime. Shaw *v.* State, 60 Ga. 246.

False Representations as to the State of the Deceased's Health and his liability to sudden death are competent circumstances. Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364. See also Com. *v.* Robinson, 146 Mass. 571, 16 N. E. 452.

Explanation of the Deceased's Absence. — State *v.* Brown, 168 Mo. 449, 68 S. W. 568.

The Defendant's Declarations, Indicating a Knowledge of the circumstances of the homicide. McCann *v.* State, 21 Miss. 471.

Where the party assaulted was shot from ambush the declarations of the defendant, a few days previous, that if he should ever have a difficulty with the assaulted person he, defendant, would not "fight a fair fight," were held competent to connect him with the crime. Spraggins *v.* State, 139 Ala. 93, 35 So. 1000.

92. *Alabama.* — Davis *v.* State, 126 Ala. 44, 28 So. 617; Jarvis *v.* State, 138 Ala. 17, 34 So. 1025; Clarke *v.* State, 78 Ala. 474.

Arkansas. — Edmonds *v.* State, 34 Ark. 720; Rawlins *v.* State, 40 Fla. 155, 24 So. 65.

Michigan. — People *v.* Simpson, 48 Mich. 474.

Mississippi. — Harris *v.* State, 47 Miss. 318.

Nevada. — State *v.* Bonds, 2 Nev. 775.

North Carolina. — State *v.* Moore, 104 N. C. 714, 10 S. E. 143.

Pennsylvania. — Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40.

"Declarations of intention and threats are admissible in evidence, not because they give rise to a presumption of law as to guilt, which they do not, but because from them, and in connection with other circumstances, and on proof of the *corpus delicti*, guilt may be logically inferred." Painter *v.* People, 147 Ill. 444, 35 N. E. 64.

Threats Made in Presence of Accused. — In Mask *v.* State, 32 Miss. 405, threats made by one of a company, composed of the three defendants and two other persons, in the presence and hearing of all of them a few hours previous to the killing, were held admissible, although the witness was unable to designate by which of the party the threats were made.

93. The defendant was charged with having advised the murder of the deceased revenue officer, and with having furnished ammunition for the purpose. Evidence of his statements made a year prior to the homicide, that "If the revenue officers do not quit bothering out there there will be some more of them shot," and "I do not mean that I will do it but it will be done" was held incompetent because not constituting a threat, there being nothing to show that at that time the defendant had any personal animosity toward the revenue officers, and because his words indicated no intention on his part to do the shooting or assist in it. Owens *v.* State, 80 Miss. 499, 32 So. 152.

Threats to "Fix" the deceased are admissible. State *v.* Palmer, 65 N. H. 216, 20 Atl. 6.

respects conditional or subsequently retracted does not render them inadmissible.[94] A threat of injury to the deceased by means of instruments other than those used in the homicide is competent.[95]

b. *Against Whom Directed.* — It must appear from the language used or the circumstances and relations of the parties that the threat was directed toward the deceased or injured person,[96] or was broad enough to include him within its terms.[97]

Threats Against a Class[98] or Family[99] of which the deceased is a member, or against any person who may do a particular forbidden act which is subsequently done by the deceased,[1] are competent.

c. *A Restoration of Friendly Relations* between the parties is not of itself sufficient to exclude previous threats.[2]

d. *Against Third Persons.* — Threats against third persons may be admissible where the connection between them and the deceased is such that under certain circumstances the threats would import harm to or hostility toward deceased.[3] Threats by the accused

See *supra* this article, "Intent, Malice, Etc. — Threats."

94. Cribbs *v.* State, 86 Ala. 613, 6 So. 109. See also *supra* this article, "Intent, Malice, Etc. — Threats."

95. LaBeau *v.* People, 34 N. Y. 223, in which, although the murder was accomplished by means of poison, previous threats of injury with a slung-shot were held competent.

96. Patton *v.* State (Tex. Crim.), 80 S. W. 86; McMahon *v.* State (Tex. Crim.), 81 S. W. 296.

97. Com. *v.* Madan, 102 Mass. 1. Where the homicide appeared to be the result of the defendant's jealousy because of the deceased's attentions toward the former's mistress, the defendant's statement to such mistress four days previous to the homicide, "I am going to do some devilment and get my name in the papers," was held competent because it appeared to have been aimed at the deceased, and because it was of such a malignant character as to embrace the deceased. "Although the name of the deceased be not mentioned, yet, if it can be reasonably gathered that deceased was meant or alluded to, the evidence of such threat will be admissible. Moreover, if the threats, though general, were of such malignant character as to embrace deceased, and the circumstances of the killing were such as would indicate that deceased must have been referred to, the testimony will be admissible." Taylor *v.* State, 44 Tex. Crim. 547, 72 S. W. 396. To the same effect see Barnes *v.* Com., 24 Ky. L. Rep. 1143, 70 S. W. 827.

98. Threats Against Sheepmen held competent where the deceased, a sheep man, was killed on his range, and circumstances connected defendant with the homicide. State *v.* Davis, 6 Idaho 159, 53 Pac. 678.

99. State *v.* Phelps, 5 S. D. 480, 59 N. W. 471.

In State *v.* Belton, 24 S. C. 185, a threat by the defendant against the "Deans" was held admissible, the deceased being of that name and family, although the defendant's quarrel had been only with other members of that family.

1. State *v.* Gates, 28 Wash. 689, 69 Pac. 385; Caddell *v.* State, 129 Ala. 57, 30 So. 76.

In Brown *v.* State, 105 Ind. 385, 5 N. E. 900, threats to kill anyone whose attentions his mistress should receive in preference to his own, held competent, deceased being a rival suitor.

2. Insufficient to exclude threats made two years previous to the homicide. Jefferds *v.* People, 5 Park. Crim. (N. Y.) 522. See also *supra* this article, "Intent, Malice, Etc. — Threats."

3. In Mimms *v.* State, 16 Ohio St. 221, where it appeared that the deceased was employed by one W.,

against any person who should assist in connecting him with the crime are also admissible.[4]

e. *The Remoteness* of such threats is sometimes said to be no objection to their competency,[5] and even if it should be so considered, there is no rule by which it can be determined what lapse of time will suffice to exclude them.[6] When the hostile relations appear to have continued,[7] or the threat is conditional on the doing of an act which the deceased has performed shortly previous to the homicide,[8] the intervening time is of little importance.

f. *Explanation.* — While the defendant may offer evidence in explanation of his threats, he cannot show that he is a man of violent passions and often in the habit of using threatening language.[9]

g. *The Weight* to be given to such evidence depends upon the character of the threats, their remoteness and the attending circumstances, and is a question for the jury.[10]

and in possession of money belonging to him, and money was found in the possession of the defendant shortly after the homicide, it was held competent to show threats by the accused to knock W. on the head and take every cent he had.

4. Threats made by the defendant while under arrest and in jail, against any one who might come to the jail to identify him, were held properly admitted. People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697.

5. People *v.* Cronin, 34 Cal. 191; State *v.* Gates, 28 Wash. 689, 69 Pac. 385. In both of these cases the threats were made one year previous.

6. "We are not aware of any rule of law which fixes any definite time within which a threat must be made, before the perpetration of the act to which it is supposed to refer, in order to render testimony as to the making of the threat competent evidence. Of course, where a great or even a considerable length of time has elapsed between the making of the threat and the perpetration of the deed to which it is supposed to point, such length of time is a circumstance to be considered by the jury in determining whether there is any connection between the threat and the deed, but there is no rule of law, and, in the nature of things, it would be practically impossible to prescribe any rule, fixing the limit beyond which a threat would not be competent evidence." State *v.* Lee, 58 S. C. 335, 36 S. E. 707; State *v.* Campbell, 35 S. C. 32, 14 S. E. 292.

Four Months Previous to the Homicide — Competent. — Pate *v.* State, 94 Ala. 14, 10 So. 665; Griffin *v.* State, 90 Ala. 596, 8 So. 670.

7. Clough *v.* State, 7 Neb. 320.

In Everett *v.* State, 62 Ga. 65, threats by the defendant against deceased, uttered several years previous to the homicide, and which were evidently due to his jealousy, were held competent to connect him with the crime, the relations of the parties being the same and indicating clearly a continuance of the same passion.

Three Years Previous to the Homicide. — Threats by the defendant, made three years previous to the homicide, that he "would kill deceased if it took him ten years to do it," were held competent in connection with evidence of other threats during the interval. Pullian *v.* State, 88 Ala. 1, 6 So. 839.

8. State *v.* Bradley, 64 Vt. 466, 24 Atl. 1053; State *v.* Gates, 28 Wash. 689, 69 Pac. 385.

Threats by the defendant to kill the deceased, his wife, if she should leave him, made three years previous, were held properly admitted, it appearing that he thought she had left him. State *v.* Bradley, 67 Vt. 465, 32 Atl. 238.

9. State *v.* Duncan, 28 N. C. 236.

10. Pate *v.* State, 94 Ala. 14, 10 So. 665; Griffin *v.* State, 90 Ala.

Y. MOTIVE. — a. *Generally.* — Any circumstance is competent which tends to show that the accused person had a motive for the commission of the homicide or assault charged.[11] The fact that the motive attempted to be shown seems wholly inadequate to account for the crime is not sufficient to exclude the evidence.[12]

Facts and Circumstances Not Known to the Defendant are not admissible to establish his motive.[13]

The Remoteness of the evidence is no objection to its competency if it tends in any way to show motive.[14]

b. *For Killing Another.* — It is competent to show the accused's motive for murdering another person who was killed at the same time as the deceased and as part of the same transaction.[15]

c. *Previous Declarations.* — Any previous declarations or statements by the accused tending to show a possible motive on his part

596, 8 So. 670; Fulton *v.* State, 58 Ga. 224; Cribbs *v.* State, 86 Ala. 613, 6 So. 109.

11. State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625; Noles *v.* State, 26 Ala. 31; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676; Miller *v.* State, 130 Ala. 1, 30 So. 379; State *v.* Lucey, 24 Mont. 295, 61 Pac. 994. "Any fact shedding light upon the motives of the transaction will not be excluded from the consideration of the jury, whether it goes to the attestation of innocence or points to the perpetrator of the crime." Hunter *v.* State, 43 Ga. 483.

Friendship for Deceased's Spouse. Evidence tending to show defendant's intimate friendship for deceased's wife is admissible to show motive, although of a very vague and general character. People *v.* Brown, 130 Cal. 591, 62 Pac. 1072.

Difficulty With Deceased's Brother. In Sanders *v.* State, 134 Ala. 74, 32 So. 654, evidence that the deceased had a difficulty with defendant's brother on the day preceding the homicide was held competent on the question of motive. "Evidence of motive, though sometimes weak and inconclusive, is relevant and admissible."

12. State *v.* Pancoast (N. D.), 67 N. W. 1052; State *v.* Rathbun, 74 Conn. 524, 51 Atl. 540.

Lillie *v.* State (Neb.), 100 N. W. 316, in which case it was held no error to admit evidence that the defendant had been gambling on the stock market and other circumstances tending to show that he was in need of money, the alleged motive being the existence of a policy of insurance upon the deceased's life in favor of the defendant. "The fact that the motive shown is out of proportion to the crime committed does not require that the evidence shall be excluded."

13. People *v.* Morgan, 124 Mich. 527, 83 N. W. 275; Son *v.* Territory, 5 Okla. 526, 49 Pac. 923; State *v.* Reed, 53 Kan. 767, 37 Pac. 174. See also Barkman *v.* State, 41 Tex. Crim. 105, 52 S. W. 23; Attaway *v.* State (Tex. Crim.), 55 S. W. 45. But see People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697.

Statements by the deceased derogatory to the character of the defendant's sister, not shown to have been communicated to the defendant, are inadmissible against him to prove motive. Marler *v.* State, 67 Ala. 55.

14. Weaver *v.* State, 43 Tex. Crim. 340, 65 S. W. 534; *s. c.* 81 S. W. 39; Baines *v.* State, 43 Tex. Crim. 490, 66 S. W. 847; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676.

15. State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743.

are competent against him.[16] And their remoteness will not serve to exclude them.[17]

d. *Relation of Parties.* — **(1.) Generally.** — The previous relations between the defendant and deceased may be shown in so far as they indicate a possible motive for the homicide.[18] Any witness who has had sufficient opportunity for observation may state whether or not their relations were friendly.[19]

(2.) Illicit Relations. — Evidence of the illicit relations existing between the parties previous to the homicide is competent to show motive.[20]

(3.) Ill-Feeling and Hostility Toward Deceased. — (A.) GENERALLY.

16. People *v.* Foley, 64 Mich, 148, 31 N. W. 94; Jones *v.* State, 4 Tex. App. 436; Gregg *v.* State, 106 Ala. 44, 17 So. 321; Davidson *v.* State, 135 Ind. 254, 34 N. E. 972.

A Conversation Between the Witness and the Defendant, in which the latter stated that the deceased, his employer, had discharged him because a third person stuffed him full of lies, and that the deceased treated his wife like a dog, may be given in evidence, as also the fact that when asked by the witness if the trouble was jealousy defendant laughed without answering, as tending to show the defendant's motives and state of mind. Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770.

A Threat by the defendant to kill anyone who interfered with himself and his paramour is competent on his trial for the murder of his wife, as tending to show a motive. Caddell *v.* State, 129 Ala. 57, 30 So. 76.

17. State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676.

18. Phillips *v.* State, 68 Ala. 469; State *v.* Crafton, 89 Iowa 109, 56 N. W. 257; McMeen *v.* Com., 114 Pa. St. 300, 9 Atl. 878; State *v.* Asbell, 57 Kan. 398, 46 Pac. 770; Webb *v.* State, 73 Miss. 456, 19 So. 238; State *v.* Palmer, 65 N. H. 216, 20 Atl. 6.

"It is competent to prove the business and social relations existing between the defendant and the deceased for a reasonable time before the commission of the homicide." State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676.

On the trial of a slave for murder by mixing poison in the food prepared for her owner and his family, in proof of motive it was held competent to show the defendant's conduct and deportment toward her owner, his wife and family, and her expressions of content or discontent toward them, and her acts of kindness or unkindness, obedience or disobedience. Josephine *v.* State, 39 Miss. 613.

Anticipated Litigation Between the Defendant and the Deceased, or between the latter and members of the former's family, coupled with threats, is competent to show the state of feeling between the parties. Commander *v.* State, 60 Ala. 1.

It is competent to show that defendant and deceased were not on speaking terms previous to the homicide. State *v.* Seymore, 94 Iowa 699, 63 N. W. 661.

19. State *v.* James, 31 S. C. 218, 9 S. E. 844; State *v.* Stackhouse, 24 Kan. 320. See article, "EXPERT AND OPINION EVIDENCE."

Envy. — "A witness cannot testify that the defendant was envious of the deceased. It is true . . . that a witness may testify as to a state of affection between the parties, and this is generally based upon outward manifestation. Whether one is actuated by envy is something not within the power of any witness to testify to as a fact." People *v.* Dowd, 127 Mich. 140, 86 N. W. 546.

20. People *v.* Southerland, 154 N. Y. 345, 48 N. E. 518; O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121; People *v.* Young, 102 Cal. 411, 36 Pac. 770.

It is competent to show ill-feeling and hostility on the part of the defendant toward the deceased as evidence of a motive for the act.[21]

(B.) Grounds For. — (a.) *Generally.* — Any fact or circumstance tending to show some cause or grounds for such ill-feeling or hostility is competent.[22]

(b.) *Previous Difficulties* between the parties tend to show a motive for the crime, and hence are competent circumstantial evidence to connect the defendant therewith.[23] Nor is their mere remoteness sufficient to exclude them.[24]

Reconciliation. — It has been held that previous difficulties cannot be considered where there has been a genuine reconciliation continued down to the time of homicide.[25]

(c.) *Previous Hostile Conduct.* — The accused's previous hostile conduct toward the deceased is a competent circumstance.[26] So also is his hostility toward a class or body of persons of which deceased was a member.[27]

(d.) *Conduct of Deceased.* — The previous conduct of the deceased injuriously affecting the defendant or calculated to arouse hostile feeling on his part toward the deceased may be shown.[28] It is proper to show his hostile or unlawful conduct toward the defend-

21. Rawlins *v.* State, 40 Fla. 155, 24 So. 65; State *v.* Dickson, 78 Mo. 438.

Ill-feeling extending back for a period of two years previous to the homicide was held properly admitted, although objected to as too remote. "It was certainly going back a good ways, but we cannot say that the trial judge exceeded the limits of a just discretion in receiving the evidence." People *v.* Bemis, 51 Mich. 422, 16 N. W. 794.

22. Gonzales *v.* State, 31 Tex. Crim. 508, 21 S. W. 253.

Dissatisfaction With the Accounts kept by the deceased with the defendant. State *v.* Gooch, 94 N. C. 987.

The fact that defendant objected to a marriage between his sister and the deceased is admissible to show his ill-feeling toward the latter. Villereal *v.* State (Tex. Crim.), 61 S. W. 715.

Conviction for Burglarizing Deceased's House. — The fact that defendant had been convicted of a burglary of deceased's house, had served his sentence, and returned three days before the homicide is admissible to show motive. Powell *v.* State, 13 Tex. App. 244.

23. Thomas *v.* Com., 14 Ky. L. Rep. 288, 20 S. W. 226; State *v.* Coleman, 111 La. 303, 35 So. 560; Honeycutt *v.* State (Tex. Crim.), 63 S. W. 639; O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121; People *v.* Kemmler, 119 N. Y. 580, 24 N. E. 9; Yanke *v.* State, 51 Wis. 464, 8 N. W. 276.

A previous quarrel seen by the witness may be shown, although the parties used a language which witness did not understand. State *v.* Moelchen, 53 Iowa 310, 5 N. W. 186.

24. O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121.

A Difficulty Ten Months Before the homicide is not too remote. State *v.* McKinney, 31 Kan. 570, 3 Pac. 356.

25. State *v.* Hossack, 116 Iowa 194, 89 N. W. 1077.

26. Howard *v.* State, 8 Tex. App. 53.

27. Hostility Toward Sheepmen, to which class deceased belonged. State *v.* Davis, 6 Idaho 159, 53 Pac. 678.

28. Opposition to the Renewal of Defendant's License to sell liquor. State *v.* Gordon, 1 R. I. 179.

Giving Information to the officers

ant's friends or relatives,[29] and his friendly acts toward the defendant's enemies or those whom he is trying to injure or has already injured.[30]

Accusation of Crime. — Thus it may be shown that the deceased had previously accused the defendant of crime:[31]

Loss of Employment. — It is competent to prove that the accused had been employed by the deceased and discharged by him or by his agent, although the latter may have acted without the deceased's knowledge or sanction;[32] also that he had lost his employment with others through the deceased,[33] or that his employer had threatened to put deceased in his place.[34]

of the defendant's unlawful conduct. State *v.* Rose, 129 N. C. 575, 40 S. E. 83.

Previous Arrest of the accused, and his detention by the police at the drug store of the deceased, and the latter's use of his telephone for the purpose of calling the patrol wagon, are competent circumstances for the purpose of showing malice and motive. Parker *v.* State, 136 Ind. 284, 35 N. E. 1105.

Impeaching Defendant's Testimony. — Evidence that the trial of an indictment, based on defendant's testimony, had failed because defendant had been discredited by the deceased's testimony, was held properly admitted to show motive. Rea *v.* State, 76 Tenn. 356.

Preventing Marriage. — Where defendant was an acceptable suitor of the deceased's sister, it was held competent to show that deceased was the only one who opposed their marriage and that the sister had declared her intention of following the direction of the deceased. State *v.* Lentz, 45 Minn. 177, 47 N. W. 720.

29. The fact that the deceased was implicated in the killing of the defendant's brother is admissible to show motive. Pryor *v.* State, 40 Tex. Crim. 643, 51 S. W. 375.

The fact that deceased was a witness against defendant's brother-in-law, on a charge against the latter for theft. Easterwood *v.* State, 34 Tex. Crim. 400, 31 S. W. 294.

Assaults Upon Deceased by a Friend and Relative of the accused shortly preceding the homicide, originating in the latter's quarrel with the deceased, and in which such friend was killed, held admissible to show motive. Kelsoe *v.* State, 47 Ala. 573.

Infliction of an Indignity Upon the Defendant's Paramour. — State *v.* Lawlor, 28 Minn. 216, 9 N. W. 698.

30. Protection Extended Defendant's Wife after she had been beaten by defendant and forced to leave home. Stone *v.* State, 4 Humph. (Tenn.) 27.

Becoming Bondsman for one who had been charged with assault to murder defendant. People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697.

An indictment against defendant for an assault upon one W., and an indictment against the latter for his assault upon the defendant, together with his bail bond, on which deceased was a surety, were held properly admitted to show motive and identity, in connection with evidence of ill-will and threats of the defendant against the deceased because of his friendship for W. Rucker *v.* State, 7 Tex. App. 549.

31. Martin *v.* State, 41 Tex. Crim. 242, 53 S. W. 849; State *v.* Miller, 156 Mo. 76, 56 S. W. 907; Williams *v.* State, 69 Ga. 11; Roberts *v.* Com., 10 Ky. L. Rep. 433, 8 S. W. 270.

The fact that deceased suspected the accused of stealing his wood, and had been watching him to the knowledge of the accused, is admissible to show motive. State *v.* Fontenot, 48 La. Ann. 220, 19 So. 112.

32. Morrison *v.* State, 84 Ala. 405, 4 So. 402.

33. State *v.* Palmer, 65 N. H. 216, 20 Atl. 6.

34. Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153.

(4.) **Jealousy.** — The defendant's jealousy of the deceased may be shown as evidence of motive,[35] either by his declarations,[36] or by evidence showing the relations of both himself and the deceased with the person who appears to have been the cause of the jealousy, and indicating his belief in the latter's preference for the deceased.[37]

(5.) **When Parties Are Husband and Wife.** — (A.) GENERALLY. — When the parties to the homicide or deadly assault were husband and wife, in proof of motive it is competent to show their unhappy conjugal relations.[38] And for this purpose the previous statements and conduct of the defendant are admissible.[39]

35. McCue *v.* Com., 78 Pa. St. 185.

36. State *v.* Larkins, 5 Idaho 200, 47 Pac. 945.

Defendant's Accusation Against His Wife that she showed a preference for the deceased held competent to show defendant's feelings toward deceased. Brewer *v.* Com., 10 Ky. L. Rep. 122, 8 S. W. 339.

37. Evidence that the deceased and the defendant lived alternately in concubinage with the same woman in whose presence the killing occurred, is competent to show a motive. State *v.* Reed, 50 La. Ann. 990, 24 So. 131.

The Fact That Defendant Had Been a Persistent and Unsuccessful Suitor for the hand of the girl whom deceased successfully wooed was held properly admitted, but the details and manner of the defendant's wooing should have been excluded because tending to prejudice him. People *v.* Cuff, 122 Cal. 589, 55 Pac. 407.

The Defendant's Quarrel With and Threat to Shoot the Woman who was the cause of the difficulty between himself and the deceased was held properly admitted in support of the alleged motive of jealousy. Com. *v.* McManus, 143 Pa. St. 64, 21 Atl. 1018, 14 L. R. A. 89. To the same effect see Hoxie *v.* State, 114 Ga. 19, 39 S. E. 944.

Rumors of the Deceased's Approaching Marriage with one of whom the defendant was a rejected suitor, held admissible in Hunter *v.* State, 43 Ga. 483.

38. *United States.* — Thiede *v.* Utah, 159 U. S. 510.

California. — People *v.* Kern, 61 Cal. 244.

Indiana. — Doolittle *v.* State, 93 Ind. 272; Siberry *v.* State, 133 Ind. 677, 33 N. E. 681.

New York. — People *v.* Harris, 136 N. Y. 423, 33 N. E. 65; People *v.* Willson, 109 N. Y. 345, 16 N. E. 540.

North Carolina. — State *v.* Langford, 44 N. C. 436; Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40.

In McCann *v.* People, 3 Park. Crim. (N. Y.) 272, it was held competent to show that the deceased wife kept a separate bank account in her own name and took measures to keep the bank book out of the defendant's, her husband's, hands, and that he had made complaint of being without money because of her action.

Evidence that shortly before the commission of the crime the defendant accompanied a prostitute to a village where he and his wife were well known, and registered her as his wife, is competent as tending to show the relations between the deceased and the defendant. People *v.* Benham, 160 N. Y. 402, 55 N. E. 11.

Threat While Intoxicated, to Secure Divorce. — In Raines *v.* State, 81 Miss. 489, 33 So. 19, a threat, made three weeks before the homicide by the defendant, while intoxicated, to procure a divorce from the deceased, his wife, was held incompetent.

39. Smith *v.* State, 92 Ala. 30, 9 So. 408. People *v.* Hendrickson, 8 How. Pr. (N. Y.) 404.

The conduct and declarations of the accused husband during his married life, which reflect upon his wife or exhibit his feelings toward her, or

(B.) Suit for Divorce and Criminal Actions. — The pendency of a suit for divorce brought by the deceased's spouse,[40] or the fact that the latter has made a criminal complaint against the defendant,[41] may be shown, and for the purpose parol evidence is sufficient.[42] But a decree of divorce in favor of the assaulted party rendered after the assault charged is not admissible.[43]

The Complaint or Petition for divorce is not competent, because mere hearsay;[44] the record, however, of criminal proceedings by the deceased's spouse against the defendant has been held admissible.[45]

(C.) Previous Assaults Upon and Ill-Treatment of the deceased's spouse by the defendant may be shown.[46]

The Remoteness of such treatment is held by some courts to be no objection to the competency of the evidence;[47] by others its exclusion on this ground is a matter resting in the discretion of the trial

show a desire to be rid of her, as well as his conduct at the time of and after her death, showing his indifference and gratification at being rid of her, are admissible in proof of his motive for poisoning her. People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846.

40. Pinckord *v.* State, 13 Tex. App. 468; Binns *v.* State, 57 Ind. 46, 26 Am. Rep. 48.

41. McCann *v.* People, 3 Park. Crim. (N. Y.) 272; People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624.

42. The Warrant sworn out by the deceased against the defendant, her husband, and his paramour, for living in adultery, is competent on the question of motive. Caddell *v.* State, 136 Ala. 9, 34 So. 191; Binns *v.* State, 66 Ind. 428.

Parol evidence is admissible as to the grounds of divorce in a suit by the deceased wife against the defendant. Malcek *v.* State, 33 Tex. Crim. 14, 24 S. W. 470.

43. Pinchord *v.* State, 13 Tex. App. 468.

44. Pinchord *v.* State, 13 Tex. App. 468; State *v.* Kennedy, 177 Mo. 698, 75 S. W. 979; State *v.* Kuehner, 93 Mo. 193, 6 S. W. 118.

The Record in such suit containing the orders of a court for the payment of alimony and the transfer of property, etc., is irrelevant and incompetent. Binns *v.* State, 57 Ind. 46, 26 Am. Rep. 48.

45. The Record of Criminal Proceedings, instituted by the wife against her husband two years previous, charging the latter with disorderly conduct, threats, assaults and abandonment, is admissible on his trial for her murder, not as proof of the facts therein contained, but as tending to show their relation and the motive for the alleged crime. People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624.

46. State *v.* Bradley, 67 Vt. 465, 32 Atl. 238; Boyle *v.* State, 61 Wis. 440, 21 N. W. 289; People *v.* Simpson, 48 Mich. 474, 12 N. W. 662; Carroll *v.* State, 45 Ark. 539.

Wife's Screams and Bruises. Where a continuous course of mistreatment by the defendant of the deceased, his wife, has been shown by direct evidence, the testimony of witnesses as to having heard her scream at her house and to having seen her bruises is admissible without further evidence connecting defendant with such sounds and bruises. People *v.* Thiede, 11 Utah 241, 39 Pac. 837, *distinguishing* Territory *v.* Armijo, 7 N. M. 428, 37 Pac. 1113, in which evidence as to bruises and marks of violence seen on the person of the deceased wife twelve hours previous to the homicide was held inadmissible because not otherwise connected with the defendant except by evidence of repeated acts of cruelty for several years previous to the homicide.

47. Boyle *v.* State, 61 Wis. 440, 21 N. W. 289.

court.[48] A long-continued course of ill-treatment extending down to or near the time of the homicide may be proved.[49]

(D.) Infidelity of Deceased. — The knowledge or belief of the defendant in the unfaithfulness of the deceased spouse to his or her marriage vows is a competent circumstance to show motive.[50]

(E.) Desire to Be Rid of Spouse and Illicit Relations With Another. It is competent to show the defendant's lack of affection for and desire to be free from his spouse,[51] and for this purpose evidence tending to show his love for and illicit relations with another is admissible.[52] The existence of such relations previous to the homi-

48. Com. *v.* Holmes, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270.

49. Painter *v.* People, 147 Ill. 444, 35 N. E. 64.

Brutal assaults by the defendant upon the deceased occurring within a year preceding and continuing down to the time of the homicide, are admissible. State *v.* O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555.

Quarrel Two Years Previous to the homicide may be proved where they are shown to be part of a course of mistreatment by the defendant of the deceased, his wife, continuing down to the time of her death. People *v.* Benham, 160 N. Y. 402, 55 N. E. 11.

Nine Years Previous. — In Com. *v.* Holmes, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270, it was held competent to show threats and acts of violence on the part of the defendant toward the deceased, his wife, from the time of their marriage to the date of the homicide, a period of about nine years. It appeared that these acts and threats occurred with more or less frequency during the whole of the time with the exception of a period of fifteen months, during which the parties were separated, and of a few months after they commenced to live together again. It was held that they sufficiently appeared to be part of a continuous course of ill-treatment and that the period of separation, even if followed by a reconciliation, did not form such a break in their relations as to render evidence of the former acts and threats incompetent. But *contra*, see Raines *v.* State, 81 Miss. 489, 33 So. 19.

50. This knowledge or belief must be proved by as satisfactory and conclusive evidence as any other fact necessary to be proved by the State. Phillips *v.* State, 22 Tex. App. 139, 2 S. W. 601.

51. Lack of Affection. — "Anything tending to show want of affection, whether on the part of one or both of the parties, is competent on the ground of disclosing the motive, and this is especially true where want of affection is thus disclosed on the part of the accused." State *v.* Callaway, 154 Mo. 91, 55 S. W. 444, *holding* admissible letters written by the defendant husband to a third person, showing his lack of affection, his threats to sue her for a divorce, and his improper relations with other women.

52. *Alabama.* — Johnson *v.* State, 17 Ala. 618; Duncan *v.* State, 88 Ala. 31, 7 So. 104; Brunson *v.* State, 124 Ala. 37, 27 So. 410; Hall *v.* State, 40 Ala. 698; Johnson *v.* State, 94 Ala. 35, 10 So. 667.

Connecticut. — State *v.* Watkins, 9 Conn. 47, 21 Am. Dec. 712; State *v.* Rathbun, 74 Conn. 524, 51 Atl. 540.

Illinois. — Siebert *v.* People, 143 Ill. 571, 32 N. E. 431.

Indiana. — Pettit *v.* State, 135 Ind. 393, 34 N. E. 1118; Hinshaw *v.* State, 147 Ind. 324, 47 N. E. 157.

Iowa. — State *v.* Hinckle, 6 Iowa 380; State *v.* Kuhn, 117 Iowa 216, 90 N. W. 733.

Kentucky. — O'Brien *v.* Com., 89 Ky. 354, 12 S. W. 471; Stricklin *v.* Com., 83 Ky. 566.

Missouri. — State *v.* Callaway, 154 Mo. 91, 55 S. W. 444; State *v.* Dues-

cide, and their continuance subsequent thereto, may be shown.[53] So any evidence is competent which tends to show the great intensity of the defendant's unlawful passion.[54]

(F.) Conduct and Declarations of Deceased. — The nature of the relations existing between the parties cannot be shown on the part of the state or the defendant, by the conduct and declarations of the deceased not known to the defendant.[55] Such statements, however, which have been communicated to the latter, are admissible.[56]

(G.) In Rebuttal of evidence tending to show his hostile or unfriendly relations with the deceased, the defendant may show that their relations were pleasant and friendly,[57] by the deceased's letters[58] to him, but, it has been held, not by her statements to others.[59]

e. *Relations With Others.* — (1.) **Generally.** — Evidence as to the relations between the accused and third persons is admissible when

trow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

Nebraska. — Dinsmore *v.* State, 61 Neb. 418, 85 N. W. 445.

New York. — People *v.* Scott, 153 N. Y. 40, 46 N. E. 1028; People *v.* Montgomery, 176 N. Y. 84, 68 N. E. 258; People *v.* Harris, 136 N. Y. 423, 33 N. E. 65; Pierson *v.* People, 79 N. Y. 424, 35 Am. Rep. 524; People *v.* Wileman, 44 Hun 187.

Texas. — Wilkerson *v.* State, 31 Tex. Crim. 86, 19 S. W. 903.

Wisconsin. — Sullivan *v.* State, 100 Wis. 283, 75 N. W. 956.

Where the Homicide Was Committed by Wrecking a Train, upon which the defendant's wife was riding by his directions, evidence as to his love for another woman was held competent as tending to show a motive for the act. Shaw *v.* State, 102 Ga. 660, 29 S. E. 477.

Incestuous Connection With Sister. — In Stout *v.* People, 4 Park. Crim. (N. Y.) 71, where the relations between the defendant and his deceased wife were shown to have been very unhappy, it was held competent to give evidence tending to show an incestuous connection between defendant and his sister, who had been present at the homicide.

53. St. Louis *v.* State, 8 Neb. 405, 1 N. W. 371; State *v.* Goddard, 162 Mo. 198, 62 S. W. 697.

54. State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

In People *v.* Harris, 136 N. Y. 423, 33 N. E. 65, where the defendant was accused of poisoning his wife, with whom he was secretly married, evidence as to the conversation between defendant and a woman with whom he was holding illicit intercourse, in which the defendant suggested that she marry some rich old man and that they could give him a pill and get him out of the way, was held competent as tending to show the intensity and permanence of his passion for such woman, and his great desire to be rid of his wife.

55. Phillips *v.* State, 22 Tex. App. 139, 2 S. W. 601; State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322; Weyrich *v.* People, 89 Ill. 90.

State *v.* Punshon, 124 Mo. 448, 27 S. W. 1111, overruling State *v.* Leabo, 84 Mo. 168, in which the deceased wife's letters to a friend, containing expressions of great affection for her husband, were held improperly excluded.

56. O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121.

57. Josephine *v.* State, 39 Miss. 613; State *v.* Punshon, 124 Mo. 448, 27 S. W. 1111; State *v.* Leabo, 84 Mo. 168.

58. State *v.* Punshon, 124 Mo. 448, 27 S. W. 1111.

59. Pettit *v.* State, 135 Ind. 393, 34 N. E. 1118.

tending to show the former's relations with the deceased and indicating a possible motive for the homicide.[60]

(2.) Love For and Illicit Relations With the Deceased's Spouse. (A.) GENERALLY. — The defendant's love for and illicit relations with the deceased's spouse may be shown as evidence of motive,[61] and his own declarations[62] and such spouse's letters[63] to him are competent for this purpose.

(B.) SUBSEQUENT TO HOMICIDE. — It is competent to show that the defendant entered into illicit relations with the deceased's spouse immediately following the homicide.[64] It has been held, however, that a single act of adultery after the killing is irrelevant because having no tendency to establish an adulterous desire previous thereto,[65] and that such subsequent illicit relations cannot be shown without other evidence that defendant occupied similar relations with or entertained great affection for the deceased's wife previous to the homicide.[66]

(3.) Hostility Toward Third Person. — The hostility of the accused toward third persons may be shown when the relation between them and the deceased is such that the conduct of the accused toward them indicates hostility toward the deceased.[67] Thus it is competent to

60. Webb *v.* State, 73 Miss. 456, 19 So. 238.

Jones *v.* State, 64 Ind. 473, in which evidence as to the defendant's subsequent offer to the family of the deceased to compromise the trouble alleged to have been the motive for the crime, accompanied by a threat in case of refusal, was held properly admitted.

The relations between the defendant and the woman who was the cause of the difficulty between him and the deceased were held properly admitted to show the defendant's feelings toward the deceased. Boyd *v.* State, 63 Tenn. 319; State *v.* Larkin, 11 Nev. 314.

Evidence as to frequent difficulties between the defendant and his employer, and threats by the latter to discharge the defendant and employ the deceased in his place, is admissible to show motive. Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153.

61. *Alabama.* — Griffin *v.* State, 90 Ala. 596, 8 So. 670.

California. — People *v.* Brown, 130 Cal. 591, 62 Pac. 1072.

Florida. — Johnson *v.* State, 24 Fla. 162, 4 So. 535.

Kansas. — Reed *v.* State, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

Michigan. — Templeton *v.* People, 27 Mich. 501.

Mississippi. — Ouidas *v.* State, 78 Miss. 622, 29 So. 525.

Pennsylvania. — Com. *v.* Fry, 198 Pa. St. 379, 48 Atl. 257.

Texas. — Weaver *v.* State (Tex. Crim.), 81 S. W. 39; *s. c.* 43 Tex. Crim. 340, 65 S. W. 534.

Vermont. — State *v.* Chase, 68 Vt. 405, 35 Atl. 336.

62. State *v.* Aughtry, 49 S. C. 285, 26 S. E. 619; *s. c.* 27 S. E. 199.

63. Stokes *v.* State, 71 Ark. 112, 71 S. W. 248.

64. Gardner *v.* United States (Ind. Ter.), 82 S. W. 704.

The fact that the defendant immediately after the homicide appropriated the deceased's wife as his concubine is competent as showing motive. Miller *v.* State, 68 Miss. 221, 8 So. 273.

65. Traverse *v.* State, 61 Wis. 144, 20 N. W. 724.

66. Massie *v.* Com., 93 Ky. 588, 20 S. W. 704.

67. Hubby *v.* State, 8 Tex. App. 597.

show that a near relative of the deceased had preferred a criminal charge against the accused or was a witness against him on such a charge.[68]

f. *Pecuniary Gain.* — **(1.) Generally.** — As evidence of motive it is competent to prove any facts or circumstances which tend to show that the accused expected to benefit financially by the death of the deceased.[69]

(2.) Robbery. — (A.) Generally. — Where the theory of the prosecution is that robbery or burglary was the motive for the crime, any facts or circumstances tending to support this theory are competent, whether or not they are connected with the defendant.[70]

(B.) The Deceased's Possession of Money or Property which might tempt robbers or burglars may be shown.[71] The length of time intervening between such possession and the homicide which will

68. Mask *v.* State, 32 Miss. 405.

The Arrest of Defendant on a charge preferred by deceased's sister, who was a member of the family against whom defendant was shown to have entertained hatred, was held properly admitted to show motive. State *v.* Phelps, 5 S. D. 480, 59 N. W. 471.

69. State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743.

Evidence of a will contest between the parties, who were brothers, and that the will provided liberally for defendant and disinherited deceased and that the latter's deposition was about to be taken, was held properly admitted to show motive. State *v.* Ingram, 23 Or. 434, 31 Pac. 1049.

A Deed from Deceased to defendant, conditioned on the latter's supporting the former the remainder of his life, is admissible, although its acknowledgment is void. Davidson *v.* State, 135 Ind. 254, 34 N. E. 972.

70. **The Deceased's Empty Pocketbook,** picked up a day or two after the homicide, near the scene thereof, held properly admitted as tending to show that he had been robbed. State *v.* Donnelly, 130 Mo. 642, 32 S. W. 1124.

The Possession of a Pocketbook by the deceased immediately preceding the homicide may be shown in connection with evidence that immediately thereafter it could not be found. Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805.

71. Jerome *v.* State, 61 Neb. 459, 85 N. W. 394; Marble *v.* State, 89 Ga. 425, 15 S. E. 453.

The Deceased's Possession of Money the Day Previous to the homicide. State *v.* Donnelly, 130 Mo. 642, 32 S. W. 1124; Cordova *v.* State, 6 Tex. App. 207.

Amount of Deceased's Bank Deposit which defendant was expecting deceased to withdraw. State *v.* Lucey, 24 Mont. 295, 61 Pac. 994.

The Account Books of Deceased showing the amount of money which he should have had in cash at the time of the homicide were held properly admitted in connection with evidence showing that a much smaller sum was found and that defendant, though previously hard pressed for money, immediately after the homicide paid numerous debts. State *v.* Rice, 7 Idaho 762, 66 Pac. 87.

The Inventory of the Estate of the Deceased is competent proof of motive when offered to show "that the deceased kept a sufficient quantity of money and property in his house to tempt thieves and robbers." State *v.* Crowley, 3 La. Ann. 782.

The Administration Account of the Estate of the deceased, showing that the administrator found no money in the deceased's possession, was held properly admitted, there being other evidence that deceased had been in possession of money previous to her death. Howser *v.* Com., 51 Pa. St. 332.

render the evidence irrelevant, depends largely on the circumstances.[72]

(C.) As Motive on Part of Accused. — (a) *Generally.* — Any circumstance which tends to show that at the time of the homicide the accused may have been actuated by a strong desire to obtain money is competent in support of the theory that robbery was the motive for the crime. Thus it is proper to show any proposed action on his part which would necessitate the expenditure of money.[73] It may be shown that the accused planned to commit a robbery, where this appears to have been the motive for the homicide;[74] that he proposed to cheat the deceased out of his money;[75] or that he had previously stolen from the latter.[76]

(b.) *The Knowledge or Belief of the Accused* that the deceased was in possession of money is competent evidence of motive,[77] and may be

72. In Kennedy *v.* People, 39 N. Y. 245, where it appeared that deceased was somewhat miserly and led a solitary life, it was held competent to show what produce he had sold the previous fall, the murder having been committed the following summer, and that he had in his possession six weeks before the homicide a certain amount of gold, which he had offered for sale.

Evidence that the deceased had a large sum of money before he came to the state, a considerable length of time previous to the homicide, was held admissible notwithstanding its remoteness. Early *v.* State, 9 Tex. App. 476.

73. In Kennedy *v.* People, 39 N. Y. 245, it was held competent to show that the accused at about the time of the murder proposed to purchase land in the neighborhood. The court, while suggesting that such evidence should be weighed with extreme caution because perfectly consistent with innocence, says: "The temptation furnished by the proof in this case would seem wholly inadequate to the commission of the crime; but that, to the upright mind, is true of any pecuniary or other motive of mere gain that can be suggested. Unfortunately, in the history of mankind, such motives to crime are sometimes influential, and proof of their existence must be left to the jury to be weighed, whether apparently greater or less in connection with the other circumstances disclosed by the testimony, and in view of the condition, circumstances, habits and character of the party on whom such motives are alleged to operate."

Intended Marriage. — Defendant's statement two weeks before the homicide that he was going to get married and must hustle up to get some money, held competent. People *v.* Wolf, 95 Mich. 625, 55 N. W. 357.

74. Stafford *v.* State, 55 Ga. 591.

75. Where it appeared that defendant knew deceased had money in his possession, evidence that several days previous to the homicide the defendant had proposed to certain persons that they assist him in engaging deceased in a game of cards so as to cheat him out of his money, was held competent in proof of motive. Byers *v.* State, 105 Ala. 31, 16 So. 716.

76. Evidence that the accused had stolen money from the deceased previous to the day of the homicide was held competent not only to show a motive of robbery, but in connection with testimony that deceased had accused defendant of taking the money, it was competent to show a motive for putting the deceased out of the way. Roberts *v.* Com., 10 Ky. L. Rep. 433, 8. S. W. 270.

77. State *v.* Jackson, 95 Mo. 623, 8 S. W. 749; Jerome *v.* State, 61 Neb. 459, 85 N. W. 394.

shown by his own statements,[78] or his relations with the accused.[79]

The Deceased's General Reputation for keeping large sums of money on his person or premises may be shown,[80] but not unless it appears that the accused lived in the neighborhood where the reputation prevailed or was otherwise acquainted with it.[81]

(c.) *Rebuttal.* — The defendant may show in rebuttal that shortly previous to the homicide the deceased was impecunious.[82]

But the Mere Declarations of the deceased are not competent for this purpose.[83]

(3.) Acquirement of Deceased's Property. — Any facts or circumstances tending to show that the accused's motive for the act was a desire to obtain possession or control of the deceased's property are competent.[84] Thus it is proper to show that the latter had made a will beneficial to the accused,[85] or that the accused was or supposed

78. State *v.* Jackson, 95 Mo. 623, 8 S. W. 649.

79. Where the motive of the killing appeared to have been robbery, the fact that the deceased had money on his person shortly before he was killed was held admissible without showing by direct evidence that the accused had seen the money or knew the deceased had it, it appearing that he had on the same day been in the deceased's company, done some work for him, and might have had an opportunity to see his pocket-book and know that it contained money. Marable *v.* State, 89 Ga. 425, 15 S. E. 453.

80. Where the theory of the state is that the motive of the crime was burglary or robbery, in connection with other evidence tending to establish this theory, it is competent to show that it was generally understood in the neighborhood that the deceased kept large sums of money about his house. Musser *v.* State, 157 Ind. 423, 61 N. E. 1. See also State *v.* Howard, 82 N. C. 623.

81. Lancaster *v.* State, 36 Tex. Crim. 16, 31 S. W. 515.

Statement One Year Previous. Where it appeared that the deceased had been robbed on the night of the homicide, and he was generally reputed to be a man of property and to keep money in his house, a remark by the defendant a year previous to the killing, "Don't you reckon if anyone was to run in on [the deceased] he would get a handful of money?" was held admissible to charge him with the knowledge of the reputation that the deceased kept money in his house. State *v.* Howard, 82 N. C. 623.

82. Lancaster *v.* State, 36 Tex. Crim. 16, 31 S. W. 515, in which testimony offered by defendant as to a business transaction between himself and the deceased shortly previous to the homicide, in which the latter stated that he had no money and conveyed one-half of the homestead to secure a lawyer's fee in a litigation against him for his home.

But evidence as to the largest sum of money which the deceased ever had in the bank at any one time was held properly excluded because immaterial and too indefinite. State *v.* Coella, 8 Wash. 512, 36 Pac. 474.

83. Kennedy *v.* People, 39 N. Y. 245.

His Complaints of hard times, and of being out of money, and of debts that he owed, held incompetent in rebuttal. Lancaster *v.* State, 36 Tex. Crim. 16, 31 S. W. 515.

84. Marion *v.* State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676.

Declarations Three Years Previous. — Clough *v.* State, 7 Neb. 320.

85. State *v.* Kuhn, 117 Iowa 216, 90 N. W. 733. In People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846, it was held competent to introduce deeds made by the deceased wife to the defendant, her husband, shortly

he was the deceased's heir,[86] in which case the amount and value of the deceased's property may be proved.[87]

(4.) Insurance on Deceased's Life. — Any facts are competent which tend to show that the defendant's motive for the crime was his desire to obtain the benefit of the insurance on deceased's life,[88] as that he or his accomplice had taken out a policy upon it,[89] or that one had been assigned to him,[90] or that he or his accomplice was a beneficiary under it,[91] in which latter case it has been held necessary to show the accused's knowledge of the existence of such a policy and the fact that it was, or that he believed it to be, a valid and subsisting one.[92]

g. *Concealment of Other Crime or Misconduct.* — **(1.) Generally.** It is competent to prove any facts or circumstances which tend to show that the motive of the accused was to conceal other crimes or misconduct on his part,[93] as that the deceased knew,[94] or was

after their marriage, and also her will made three days prior thereto, by which all her property would become his, in case of her death, after their marriage.

Legally Insufficient Will. — A will, executed by the deceased to the knowledge of the defendant, in which the latter was the beneficiary, is admissible to show motive, although it might not be legally sufficient as a testamentary conveyance. Golin *v.* State, 37 Tex. Crim. 90, 38 S. W. 794.

86. **The Defendant's Declaration Two Years Previous** to the homicide that he was going to inherit certain property, which it appeared belonged at that time to the murdered persons, was held admissible. Woolfolk *v.* State, 81 Ga. 551, 8 S. E. 724.

87. Davidson *v.* State, 135 Ind. 254, 34 N. E. 972.

88. Com. *v.* Clemmer, 190 Pa. St. 202, 42 Atl. 675.

The defendant's application for insurance, medical examination sheet, medical certificate, application for additional insurance, and his will making the deceased his beneficiary are competent evidence in support of the state's theory that these acts were done by the defendant to induce similar action on the part of the deceased in favor of the defendant, as a part of his scheme to secure the amount of the insurance by killing the deceased. State *v.* Coleman (S. D.), 98 N. W. 175.

89. Brandt *v.* Com., 94 Pa. St. 290.

90. State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153.

91. People *v.* Morgan, 124 Mich. 527, 83 N. W. 275.

92. State *v.* Felker, 27 Mont. 451, 71 Pac. 668.

93. State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153; State *v.* Dooley, 89 Iowa 584, 57 N. W. 414. See State *v.* Brantley, 84 N. C. 766.

On a Prosecution for Child-Murder evidence that the child was a bastard is competent to show motive. Fletcher *v.* State (Tex. Crim.), 68 S. W. 173.

Where it was claimed that defendant was the father of the deceased, an illegitimate child, evidence as to his improper relations with deceased's mother was held properly admitted to show motive. State *v.* Noakes, 70 Vt. 247, 40 Atl. 249.

The Pregnancy of the Deceased, an unmarried woman, may be shown as evidence of motive (Jackson *v.* Com., 100 Ky. 239, 38 S. W. 422, 66 Am. St. Rep. 336) and the accused's illicit relations with her (State *v.* Kline, 54 Iowa 183, 6 N. W. 184).

94. Smith *v.* State, 44 Tex. Crim. 53, 68 S. W. 267.

likely to discover,[95] facts which might incriminate the accused, and that the latter had committed other crimes to the knowledge of the deceased.[96] The remoteness of such other crime does not render evidence thereof irrelevant.[97]

(2.) **In Rebuttal** the defendant may introduce evidence of any circumstances or previous declaration on his part tending to show that he is not guilty of the alleged crime, which would have been competent on a trial for such offense.[98]

h. *Civil and Criminal Actions Against Accused and Others.* (1.) **Generally.** — The fact that the deceased had instituted either a civil action[99] or a criminal prosecution[1] against the accused, or his near relative,[2] is competent evidence of motive because indicating a possible ground of hostility toward the deceased.

95. In State *v.* Pancoast (N. D.), 67 N. W. 1052, evidence of a previous murder by the defendant was held competent, the alleged motive being the fear of a discovery of such crime by the deceased, although the latter was defendant's wife and would not have disclosed it so as to subject him to criminal prosecution.

96. Hamlin *v.* State, 41 Tex. Crim. 135, 50 S. W. 1019; Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54.

Previous Murder in which he was deceased's accomplice. State *v.* Posey, 4 Strob. L. (S. C.) 142.

The Commission of Thefts by the defendant, which were known to the deceased, may be shown as evidence of motive. State *v.* Seymore, 94 Iowa 699, 63 N. W. 661.

A Conspiracy to Obtain Insurance Money, which has been successfully carried out by the defendant and the deceased. Bess *v.* Com., 25 Ky. L. Rep. 1091, 77 S. W. 349.

97. State *v.* Pancoast (N. D.), 67 N. W. 1052, in which evidence of a murder by the defendant twenty years previous was held properly admitted.

98. Goebel *v.* State (Tex. Crim.), 76 S. W. 460.

99. State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743; State *v.* Geddes, 22 Mont. 68, 55 Pac. 919; Murphy *v.* People, 63 N. Y. 590.

The Record of a Suit for Malicious Prosecution, brought by the deceased against the defendant, is admissible to show the relations between the parties. State *v.* Bodie, 33 S. C. 117, 11 S. E. 624.

1. State *v.* Geddes, 22 Mont. 68, 55 Pac. 919; State *v.* Phelps, 5 S. D. 480, 59 N. W. 471; Carden *v.* People, 84 Ala. 417, 4 So. 823; Butler *v.* State, 91 Ga. 161, 16 S. E. 984.

"An indictment against the defendant, charging him with a separate offense from the one for which he is on trial, may be introduced in evidence against him when such indictment tends, even in a remote degree, to show a motive on the part of the defendant to commit the crime for which he is on trial." Kunde *v.* State, 22 Tex. App. 65, 3 S. W. 325.

An Affidavit by the Deceased, charging the defendant with an offense the prosecution for which was pending at the time of the homicide, is admissible to show motive. Robinson *v.* State, 16 Tex. App. 347.

A Previous Indictment Against the Defendant for another offense, which indictment the defendant believed to have been procured by the deceased, is admissible in proof of motive. Gillum *v.* State, 62 Miss. 547.

The Indictment and Conviction in a case in which deceased was prosecuting witness. Kelly *v.* State, 49 Ga. 12. So also in Crass *v.* State, 31 Tex. Crim. 312, 20 S. W. 579.

2. The Indictment of Defendant's Brother for the theft of a mule belonging to deceased was held

(2.) Deceased Was an Expected Witness. — (A.) Against Defendant. It is competent to show that the accused had been charged with the commission of another offense, upon the trial of which the deceased was expected to be a witness against him.[3] Such evidence is relevant not only as showing probable grounds for hostility and malice, but as indicating a desire to suppress evidence. So the fact that the deceased testified against the defendant in another case is competent evidence of motive,[4] while the details of such other misconduct cannot be inquired into;[5] yet it is proper to show the extent of the deceased's knowledge thereof, because the more cogent his testimony against the defendant the stronger would be the latter's motive for killing him.[6] And it has been held competent to show that such a crime has been actually committed, but not to go into the defendant's connection therewith.[7]

(B.) Against Relative of Accused. — An indictment against a near relative of the accused, on which deceased was a witness, may be shown for the same reason.[8]

(3.) Method of Proof. — The indictment, warrant of arrest, complaint or petition is competent evidence of such other civil or crim-

properly admitted to show motive. Coward *v.* State, 6 Tex. App. 59.

3. *Alabama.* — Carden *v.* State, 84 Ala. 417, 4 So. 823; Hodge *v.* State, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145; Childs *v.* State, 55 Ala. 25; Marler *v.* State, 68 Ala. 580.

Georgia. — Turner *v.* State, 70 Ga. 765; Kirk *v.* State, 73 Ga. 620.

Kentucky. — Martin *v.* Com., 93 Ky. 189, 19 S. W. 580.

North Carolina. — State *v.* Morris, 84 N. C. 756.

Texas. — Attaway *v.* State, 41 Tex. Crim. 395, 55 S. W. 45; Hart *v.* State, 15 Tex. App. 202; Hudson *v.* State, 28 Tex. App. 323, 13 S. W. 388; Naverette *v.* State (Tex. Crim.), 40 S. W. 791.

Defendant's Efforts to Induce the Deceased to leave the country to prevent the continuance of a criminal prosecution against the defendant, in which the deceased was the prosecuting witness. State *v.* Birdwell, 36 La. Ann. 859.

An Indictment Against the Defendant Subsequent to the Homicide, for another crime, is admissible to show motive where it appears that he was charged with its commission previous to the homicide, and that deceased was an important witness against him. Kunde *v.* State, 22 Tex. App. 65, 3 S. W. 325.

4. Mask *v.* State, 32 Miss. 405.

At Coroner's Inquest. — Barkman *v.* State, 41 Tex. Crim. 105, 52 S. W. 73.

5. Carden *v.* State, 84 Ala. 417, 4 So. 823; Martin *v.* Com., 93 Ky. 189, 19 S. W. 580.

6. Easterwood *v.* State, 34 Tex. Crim. 400, 31 S. W. 294. See also State *v.* Miller, 156 Mo. 76, 56 S. W. 907; Attaway *v.* State, 41 Tex. Crim. 395, 55 S. W. 45.

7. In Williams *v.* State, 69 Ga. 11, testimony as to the particulars of a larceny, with the commission of which defendant had been charged by the deceased, was held admissible, but only for the purpose of showing that a larceny had been committed, and not to the extent of determining the defendant's guilt or innocence of the charge.

8. In Johnson *v.* State, 29 Tex. App. 150, 15 S. W. 647, indictments against defendant's uncle, with whom he was living, which showed deceased to be the main witness for the state, were held properly admitted to show motive.

inal action.[9] It may also be shown by parol.[10] The contrary has been held.[11]

(4.) Weight and Sufficiency. — Motive is not an essential element of the crimes[12] of manslaughter, murder or assault with intent to murder and need not be proved even where the evidence is wholly circumstantial. In cases, however, where the evidence is conflicting and the defendant's connection with the crime doubtful, motive is a very important circumstance.[13]

i. *Explanation of Delay in Acting on Alleged Motive.* — Evidence

9. Martin *v.* Com., 93 Ky. 189, 19 S. W. 580; Hart *v.* State, 15 Tex. App. 202; Carden *v.* State, 84 Ala. 417, 4 So. 823; Turner *v.* State, 70 Ga. 765; Naverette *v.* State (Tex. Crim.), 40 S. W. 791; State *v.* Morris, 84 N. C. 756.

The Warrant Sworn Out by the Deceased, charging the defendant with a misdemeanor, and the bond given by the latter for his appearance, are admissible. Butler *v.* State, 91 Ga. 161, 16 S. E. 984.

10. Caddell *v.* State, 136 Ala. 9, 34 So. 191; Binns *v.* State, 66 Ind. 428.

Parol Evidence of the warrant of arrest sworn out by the deceased against the defendant is admissible. Kitts *v.* State, 70 Ark. 521, 69 S. W. 545.

11. Childs *v.* State, 55 Ala. 25.

12. *United States.* — Pointer *v.* United States, 151 U. S. 396.

Alabama. — Davis *v.* State, 126 Ala. 44, 28 So. 617; Brunson *v.* State, 124 Ala. 37, 27 So. 410.

Arkansas. — Green *v.* State, 38 Ark. 304.

California. — People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

Colorado. — Keady *v.* People, 74 Pac. 892.

Connecticut. — State *v.* Rathbun, 74 Conn. 524, 51 Atl. 540.

Georgia. — Carson *v.* State, 80 Ga. 170, 5 S. E. 295; Sterling *v.* State, 89 Ga. 807, 15 S. E. 743; Davis *v.* State, 74 Ga. 869.

Idaho. — State *v.* Schieler, 4 Idaho 120, 37 Pac. 272.

Indiana. — Hinshaw *v.* State, 147 Ind. 324, 47 N. E. 157; Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975.

Kansas. — State *v.* Dull, 67 Kan. 793, 74 Pac. 235.

Kentucky. — Marcum *v.* Com., 8 Ky. L. Rep. 418, 1 S. W. 727.

Mississippi. — McCullough *v.* State, 28 So. 946.

Missouri. — State *v.* Brown, 181 Mo. 192, 79 S. W. 1111; State *v.* David, 131 Mo. 380, 33 S. W. 28; State *v.* Gregory, 178 Mo. 48, 76 S. W. 970; State *v.* Dunn, 179 Mo. 95, 77 S. W. 848.

Montana. — State *v.* Lucey, 24 Mont. 295, 61 Pac. 994.

Nebraska. — Clough *v.* State, 7 Neb. 320; Lillie *v.* State, 100 N. W. 316.

New York. — People *v.* Place, 157 N. Y. 584, 52 N. E. 576; People *v.* Koepping, 178 N. Y. 247, 70 N. E. 778; People *v.* Cornetti, 92 N. Y. 85; People *v.* Fish, 125 N. Y. 136, 26 N. E. 319; People *v.* Kennedy, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557; People *v.* Cassata, 6 App. Div. 386, 39 N. Y. Supp. 641.

North Carolina. — State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

South Carolina. — State *v.* Workman, 39 S. C. 151, 17 N. E. 694; State *v.* Coleman, 20 S. C. 441.

The Absence of Motive is a strong circumstance in favor of the accused, but amounts to nothing where the defendant's participation in the crime is otherwise sufficiently established. State *v.* Crabtree, 170 Mo. 642, 71 S. W. 127; Stokes *v.* State, 71 Ark. 112, 71 S. W. 248; People *v.* Feigenbaum, 148 N. Y. 636, 43 N. E. 78; People *v.* Schmidt, 168 N. Y. 568, 61 N. E. 907; People *v.* Ferraro, 161 N. Y. 365, 55 N. E. 931; State *v.* David, 131 Mo. 380, 33 S. W. 28; Cupps *v.* State (Wis.), 97 N. W. 210.

13. People *v.* Place, 157 N. Y. 584, 52 N. E. 576; Davis *v.* State, 74 Ga. 869; State *v.* Brown, 181 Mo. 192, 79 S. W. 1111.

on the part of the prosecution tending to explain the apparent failure of the defendant to act promptly upon the alleged motive is relevant.[14]

Z. Failure to Testify or Produce Witnesses. — The defendant's failure to testify raises no unfavorable inference against him, and cannot be considered by the jury.[15] When, however, he testifies in his own behalf, his failure to deny that he killed the deceased, while not an admission or confession, is a circumstance which may be considered against him, and it is not error to so instruct the jury.[16] Defendant's failure to call a material witness is a strong circumstance against him,[17] which he may explain by showing the impossibility of securing the attendance of such witness.[18] So also the prosecution may explain its failure to produce important witnesses.[19]

AA. Sufficiency. — Generally. — Circumstantial evidence alone may sufficiently establish the defendant's guilty participation in a homicide,[20] and support a verdict for murder in the first

14. Jones *v.* State, 64 Ind. 473, in which it was held proper to show that the deceased and his family always remained within the house after dark, fastened all the doors and slept upstairs, until the night of the homicide, where the alleged motive was ill-will engendered by the settlement of an estate four years previous, in which all the parties were interested.

15. State *v.* Robinson, 112 La. 939, 36 So. 811; Leonard *v.* Territory, 2 Wash. Ter. 381, 7 Pac. 872; Gray *v.* State, 42 Fla. 174, 28 So. 53; Hart *v.* State, 38 Fla. 39, 20 So. 805; State *v.* Hudspeth, 150 Mo. 12, 51 S. W. 483.

Comment Improper. — Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750.

16. Hodge *v.* State, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145.

17. Hinshaw *v.* State, 147 Ind. 324, 47 N. E. 157.

18. Long *v.* State (Ark.), 81 S. W. 386.

19. The Marriage of the Defendant With the Principal Witness of the state on the day before the trial may be proved by the prosecution in explanation of its failure to put such witness on the stand. Moore *v.* State (Tex. Crim.), 75 S. W. 497.

20. *Georgia.* — Hudson *v.* State, 92 Ga. 472, 17 S. E. 847; Butler *v.* State, 91 Ga. 161, 16 S. E. 984; Echols *v.* State, 81 Ga. 696, 8 S. E. 443; Kelly *v.* State, 49 Ga. 12.

Indiana. — Hinshaw *v.* State, 147 Ind. 324, 47 N. E. 157.

Iowa. — State *v.* Foster, 91 Iowa 164, 59 N. W. 8.

Missouri. — State *v.* Howell, 100 Mo. 628, 14 S. W. 4.

Nebraska. — Lillie *v.* State, 100 N. W. 316.

New York. — People *v.* Johnson, 140 N. Y. 350, 35 N. E. 604.

Tennessee. — Jim *v.* State, 5 Humph. 145; Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777.

Texas. — Baldez *v.* State, 37 Tex. Crim. 413, 35 S. W. 664; Hernandez *v.* State (Tex. Crim.), 72 S. W. 840; Scott *v.* State, 23 Tex. App. 452, 5 S. W. 189.

Virginia. — Finchin *v.* Com., 83 Va. 689, 3 S. E. 343.

"Evidence . . . is not to be discredited because circumstantial. It has often more reliable elements than direct evidence. Where it points irresistibly and exclusively to the commission by the defendant of the crime, a verdict of guilty may rest upon a surer basis than when rendered upon the testimony of eye-witnesses, whose memory must be relied upon and whose passions or prejudices may have influenced their testimony. If taken together, it leads to a conclusion of guilt with which no material fact is at variance, it constitutes the higher form of evidence which the law demands, where the life, or the liberty, of the defend-

degree.[21] The facts and circumstances proved must of course establish his guilt beyond all reasonable doubt, and must be inconsistent with any other reasonable hypothesis than that of the defendant's guilt.[22] The absence of evidence indicating the guilt of any other person is a circumstance to be considered against the accused.[23] But the mere fact that a mysterious crime can be solved only on the supposition of the defendant's guilt does not warrant his conviction.[24] It is not sufficient for the state to raise a strong suspicion[25] or even a strong probability[26] of the accused's guilt. A mere possibility of the latter's innocence, however, is not sufficient to require an acquittal.[27] When the state relies upon a chain of circumstances, each essential fact in the chain must be proved with the same degree of certainty as the main fact in issue, and all the facts proved must be consistent with each other and the defendant's

ant is at stake, and neither jurors nor the court can conscientiously disregard it." People *v.* Harris, 136 N. Y. 423, 33 N. E. 65.

21. Russell *v.* Com., 78 Va. 400; Duncan *v.* State, 30 Tex. App. 1, 16 S. W. 753; Chapman *v.* State, 34 Tex. Crim. 27, 28 S. W. 811; Dean *v.* Com., 32 Gratt. (Va.) 912.

22. *Georgia.* — Lee *v.* State, 71 Ga. 260; King *v.* State, 86 Ga. 355, 12 S. E. 943; Davis *v.* State, 74 Ga. 869; Ward *v.* State, 102 Ga. 531, 28 S. E. 982.

Indiana. — Plummer *v.* State, 135 Ind. 308, 34 N. E. 968.

Mississippi. — Perkins *v.* State, 23 So. 579; Petty *v.* State, 83 Miss. 260, 35 So. 213.

Missouri. — State *v.* Moxley, 102 Mo. 374, 14 S. W. 969.

North Carolina. — State *v.* Goodson, 107 N. C. 798, 12 S. E. 329.

Texas. — Pullen *v.* State, 28 Tex. App. 114, 12 S. W. 502; Lowe *v.* State (Tex. Crim.), 77 S. W. 220.

Virginia. — Tilley *v.* Com., 90 Va. 99, 17 S. E. 895; *reversing* 89 Va. 136, 15 S. E. 526, *s. c.*, 90 Va. 705, 19 S. E. 881; Tucker *v.* Com., 88 Va. 20, 13 S. E. 298; Davis *v.* Com., 99 Va. 868, 39 S. E. 585.

Washington. — State *v.* Pagano, 7 Wash. 549, 36 Pac. 387.

Washington Territory. — Miller *v.* Territory, 3 Wash. Ter. 554, 19 Pac. 50, 16 L. R. A. 614.

23. Hall *v.* State, 40 Ala. 698; State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625. But see McBride *v.* Com., 95 Va. 818, 30 S. E. 454.

24. Schusler *v.* State, 29 Ind. 395.

25. *Mississippi.* — Cancelliere *v.* State, 23 So. 515.

North Carolina. — State *v.* Gragg, 122 N. C. 1082, 30 S. E. 306.

Texas. — Clifton *v.* State, 39 Tex. Crim. 619, 47 S. W. 642; Tollett *v.* State, 44 Tex. 95; Hogan *v.* State, 13 Tex. App. 319; Ellis *v.* State, 29 Tex. App. 413, 16 S. W. 256; Jones *v.* State, 7 Tex. App. 457.

Virginia. — Davis *v.* Com., 99 Va. 868, 39 S. E. 585.

The fact that defendant concealed the birth of her deceased child, which was found buried in an out-of-the-way place, that she left that section of country and denied her name when arrested, although suspicious circumstances, are not sufficient to establish her guilt. Sheppard *v.* State, 17 Tex. App. 74.

26. Casey *v.* State, 20 Neb. 138, 29 N. W. 264; Jones *v.* State, 7 Tex. App. 457.

"A High Degree of Probability" that the defendant was the guilty party is not sufficient to justify his conviction. Byrd *v.* State, 69 Ark. 537, 64 S. W. 270.

27. Cook *v.* State (Fla.), 35 So. 665; Smith *v.* State, 92 Ala. 30, 9 So. 408; Jarvis *v.* State, 138 Ala. 17, 34 So. 1025; Jimmerson *v.* State, 133 Ala. 18, 32 So. 141; Cox *v.* People, 80 N. Y. 500; Hamlin *v.* State, 39 Tex. Crim. 579, 47 S. W. 656.

guilt.[28] This rule, however, applies only to the essential facts, and not those subsidiary and evidentiary facts of which evidence has been offered as a means of establishing such essential facts.[29] But these essential facts need not be established independently of all the other facts in the case.[30]

15. Homicide Under Particular Circumstances. — A. During Discharge of Duty. — a. *Execution of Process.* — Where an officer has been killed during his execution of process the defendant cannot show that the deceased was not a *de jure* officer;[31] nor can the merits of the suit on which the officer's action is based be inquired into.[32] The defendant cannot show that he acted under the advice of his attorney.[33]

b. *During Defendant's Resistance to Arrest.* — **(1.) Burden of Proof.** When the state relies upon the fact that the homicide was committed by the defendant during his resistance to a lawful arrest, it has the burden of proving the legality of the arrest.[34]

(2.) By Private Citizen. — Where a private citizen is killed while attempting to arrest the defendant it is competent to show that the defendant had committed a felony of which deceased had been informed,[35] or which the appearance of the defendant indicated.[36]

28. *California.* — People *v.* Smith, 106 Cal. 73, 39 Pac. 40.

Massachusetts. — Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

Missouri. — State *v.* Crabtree, 170 Mo. 642, 71 S. W. 127; State *v.* Moxley, 102 Mo. 374, 14 S. W. 969.

Texas. — Hill *v.* State, 37 Tex. Crim. 415, 35 S. W. 665; Harrison *v.* State, 6 Tex. App. 42; Hampton *v.* State, 1 Tex. App. 652.

Utah. — State *v.* Hayes, 14 Utah 118, 46 Pac. 752.

29. Hauk *v.* State, 148 Ind. 238, 46 N. E. 127; Bradshaw *v.* State, 17 Neb. 147, 22 N. W. 361; Seibert *v.* People, 143 Ill. 571, 32 N. E. 431; Weaver *v.* People, 132 Ill. 536, 24 N. E. 571; Wade *v.* State, 71 Ind. 535; Smith *v.* State, 61 Neb. 296, 85 N. W. 49.

30. Com. *v.* Williams, 171 Mass. 461, 50 N. E. 1035; People *v.* Johnson, 140 N. Y. 350, 35 N. E. 604.

31. State *v.* Brooks, 39 La. Ann. 817, 2 So. 498, in which the deceased, a constable, was killed during an attempted seizure, under proper process, of the property in the possession of the defendant, it was held that the legality of his appointment could not be collaterally attacked.

32. State *v.* Brooks, 39 La. Ann. 817, 2 So. 498. But see Smith *v.* State (Tex. Crim.), 81 S. W. 936.

33. Smith *v.* State (Tex. Crim.), 81 S. W. 936.

34. Com. *v.* Carter (Mass.), 66 N. E. 716.

35. State *v.* Healey, 105 Iowa 162, 74 N. W. 916.

In Kennedy *v.* State, 107 Ind. 144, 6 N. E. 305, 57 Am. St. Rep. 99, it appeared that the deceased, a private citizen, had been killed while pursuing and attempting to arrest defendant, a suspected pickpocket. It was held competent to show that the pockets of several other persons had been picked by a gang, of whom defendant appeared to be one, at the time of the attempt to arrest him. "It is not necessary that an offender whom a citizen undertakes to arrest should be connected with a felony by direct evidence; it is sufficient if the evidence supplied by circumstances establishes this connection."

36. Dryer *v.* State, 139 Ala. 117, 36 So. 38.

The fact that the latter had committed a crime is also competent as indicating his motive to resist arrest.[37]

(3.) **By Officer.** — (A.) Warrant of Arrest. — The warrant of arrest under which the deceased was acting is not inadmissible because not under seal.[38] But if not in his possession at the time of the arrest it is inadmissible,[39] unless held by a person actively assisting him.[40] The fact that the person attempting to arrest the defendant had a warrant may be shown by parol,[41] but it has been held that its legality cannot be attacked without producing or properly accounting for the warrant itself.[42]

The Illegality of the warrant may be shown by the defendant to negative malice on his part.[43] But the state may on the other hand show that it was a legal warrant.[44]

(B.) Purpose and Conduct of Deceased. — Any conduct on the part of the defendant[45] or persons associated with him[46] known to the deceased and which would tend to explain the latter's conduct and purpose during the attempted arrest, may be shown.

37. State *v.* Healey, 105 Iowa 162, 74 N. W. 917.

38. Palmer *v.* People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146.

39. Miers *v.* State, 34 Tex. Crim. 161, 29 S. W. 1074, 53 Am. St. Rep. 705.

40. People *v.* Durfee, 62 Mich. 487, 29 N. W. 109.

41. Zimmerman *v.* State (Ala.), 30 So. 18, a prosecution for assault with intent to murder, in which parol evidence that the constable whom the person assaulted was assisting in the arrest had a warrant was held competent on the ground that this fact was purely collateral to the issue and did not require the production of the warrant.

42. State *v.* Spaulding, 34 Minn. 361, 25 N. W. 793.

43. Rafferty *v.* People, 69 Ill. 111, 18 Am. Rep. 601; State *v.* Spaulding, 34 Minn. 361, 25 N. W. 793.

44. Parol Evidence is admissible to contradict an indorsement on the back of the warrant to the effect that it had been already executed, where the warrant has never been returned to the magistrate issuing it. Com. *v.* Moran, 107 Mass. 239.

45. The Threats of the Defendant communicated to the deceased officer are admissible to explain the precautions taken by him, and to show the circumstances under which the killing took place. People *v.* Gosch, 82 Mich. 22, 46 N. W. 101.

Information Received by the Deceased officer as to the defendant's threats against another person attempting to arrest him was held properly admitted to explain the deceased's conduct in approaching the defendant with his weapons in his hands, and to show that defendant had no right to apprehend unnecessary violence from this fact. Miller *v.* State (Tex. Crim.), 20 S. W. 1103.

Information as to the Defendant's Whereabouts and as to His Being Armed, received by the officers and posse attempting defendant's arrest, was held admissible to explain the motives and conduct of the parties and to show that the attempted arrest was legal. Jacobs *v.* State, 28 Tex. App. 79, 12 S. W. 408.

46. The fact that a person, who was constantly with the defendant subsequent to the crime for which the arrest of the latter was attempted, down to the time of the homicide, went habitually armed was held admissible not only for the purpose of showing that such person was openly aiding defendant to resist arrest, but also to explain the conduct of the officers and to show their apprehension of a dangerous resistance by the

(C.) Officer's Information. — As bearing upon the reasonableness of the deceased officer's belief in the defendant's previous commission of a felony, for which the arrest was attempted, it is competent to show what information he had received from others regarding such matter.[47]

The law presumes that a citizen from whom he obtained his information is a credible person.[48]

(D.) Official Character of Deceased. — The official character of the deceased may be proved without an allegation of such fact in the indictment.[49] Parol proof is competent and sufficient.[50] It is unnecessary to prove that he was an officer *de jure*, but it is sufficient to show that he was a *de facto* officer, and any evidence is competent which tends to establish this fact.[51] Whether or not he was an officer is a question for the court.[52]

(E.) Defendant's Innocence. — Evidence to show the defendant's innocence of the crime for which the arrest was attempted is not competent, because his actual guilt or innocence of such crime is immaterial.[53]

(F.) Intent of Defendant. — (a) *Generally.* — It is competent to show

defendant. Jacobs *v.* State, 28 Tex. App. 79, 12 S. W. 408.

47. State *v.* Taylor, 70 Vt. 1, 39 Atl. 447, 67 Am. St. Rep. 648, 42 L. R. A. 673; People *v.* Coughlin, 13 Utah 58, 44 Pac. 94; Jacobs *v.* State, 28 Tex. App. 79 12 S. W. 408.

People *v.* Wilson, 141 N. Y. 185, 36 N. E. 230, in which case it was held proper to show the instructions given to the officer by his superiors and the information as to a burglary, and of the persons suspected of its commission, given to the deceased by the chief of detectives.

The Declarations of the Bystanders indicating the parties supposed to be guilty were held properly admitted as original evidence on the question of whether the officer had reasonable ground to believe that a felony had been committed. Werner *v.* Com., 80 Ky. 387, *distinguishing* Bradshaw *v.* Com., 73 Ky. 576.

In Keady *v.* People (Colo.), 74 Pac. 892, the complaint of a third person to the police department concerning defendant and such person's statement as to defendant's being a bad man and carrying a revolver were held properly admitted for the purpose of showing the facts upon which the officer relied in attempting the arrest of defendant. See also People *v.* Wilson, 141 N. Y. 185, 36 N. E. 230.

48. Miller *v.* State (Tex. Crim.), 20 S. W. 1103.

49. State *v.* Green, 66 Mo. 631, Dilger *v.* Com., 88 Ky. 550, 11 S. W. 651; Lyons *v.* State, 9 Tex. App. 636.

50. Hardin *v.* State, 40 Tex. Crim. 208, 49 S. W. 607. *Distinguishing* Huff *v.* State, 23 Tex. App. 291, 4 S. W. 890.

51. State *v.* Ziebart, 40 Iowa 169; State *v.* Holcomb, 86 Mo. 371; Temple *v.* State, 15 Tex. App. 304; State *v.* Taylor, 70 Vt. 1, 39 Atl. 447, 67 Am. St. Rep. 648.

Martin *v.* State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91, in which case testimony that the deceased was acting as marshal of the town, that he wore a badge and carried a policeman's baton, was held admissible.

52. Hendrickson *v.* Com. (Ky.), 81 S. W. 266.

53. State *v.* Symes, 20 Wash. 484, 55 Pac. 626.

that the defendant had previously determined to resist an arrest.[54] Any facts tending to show his knowledge or ignorance of the officer's purpose are competent,[55] even though the defendant was a fugitive from justice.[56]

(b.) *Commission of Other Crime.* — As bearing upon the motive and intent of the defendant and his appreciation of the deceased's purpose and the justification and legality of the arrest[57] it is competent to show that the accused had committed another crime previous to the

54. In English *v.* State, 34 Tex. Crim. 190, 30 S. W. 233, it was held competent to show that the defendant and his companion were connected in the business of horse-stealing, that they did not propose to be arrested, and that they would resort to deadly weapons to prevent even a legal arrest.

55. The Defendant's Knowledge of the Official Character of the person attempting the arrest is a strong circumstance tending to prove that he had notice of the deceased's purpose to make a lawful arrest, and the inhabitants of an officer's bailiwick are ordinarily presumed to know him as an officer. Croom *v.* State, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 79.

Previous Assaults Upon Defendant. — In Cahill *v.* People, 106 Ill. 621, the defendant shot the deceased, a police officer, while the latter was breaking into defendant's house for the purpose of arresting him. The latter offered to prove that on the night preceding the shooting his house was stoned by a crowd, a part of which was present at the time of the attempted arrest, the defense being ignorance of the authority of the officer. This evidence was held inadmissible.

56. The fact that a fugitive from justice was ignorant of the purpose and intention on the part of the deceased officer to arrest him may be considered in determining whether or not the defendant was actuated by malice in resisting an attack upon his liberty, since the consciousness of being subject to arrest for a given offense would not be equivalent to knowledge that arrest for that offense was contemplated in the particular instance. Croom *v.* State, 85 Ga. 718, 11 S. E. 1335, 21 Am. St. Rep. 79.

57. *California.* — People *v.* Wilson, 117 Cal. 688, 49 Pac. 1054; People *v.* Pool, 27 Cal. 573.

Iowa. — State *v.* Healey, 105 Iowa 162, 74 N. W. 916.

Kentucky. — Bishop *v.* Com., 109 Ky. 558, 60 S. W. 190.

Massachusetts. — State *v.* McCue, 16 Gray 226.

Mississippi. — White *v.* State, 70 Miss. 253, 11 So. 632.

Missouri. — State *v.* Grant, 79 Mo. 113, 49 Am. Rep. 218.

Pennsylvania. — Com. *v.* Major, 198 Pa. St. 290, 47 Atl. 741, 82 Am. St. Rep. 803.

Utah. — State *v.* Morgan, 22 Utah 162, 61 Pac. 527; People *v.* Coughlin, 13 Utah 58, 44 Pac. 94.

A Pending Indictment Against the Defendant for Murder held properly admitted. Jacobs *v.* State, 28 Tex. App. 79, 12 S. W. 408.

On a trial for the murder of a policeman, committed during the officer's attempt to arrest the defendant, after the latter's escape from jail where he was confined on a felony charge, it was held competent to show the pendency of the indictment charging the defendant with a felony, the forfeiture of his bail bond, the issue of a capias, and the reward offered by his sureties for his arrest, in connection with a knowledge of these facts on the part of the deceased, and the defendant's acquaintance with him, as shedding light on the animus of the defendant, and as bearing on the issue of self-defense. Floyd *v.* State, 82 Ala. 116, 2 So. 683.

That He Was a Fugitive From Justice and was in a state of armed hostility to, and in apparent defiance of, the lawful authorities. Smalls *v.*

attempted arrest, or was a fugitive from justice. Such evidence is competent even though the arrest were illegal.[58]

(G.) Arrest Without Warrant. — Where the arrest was attempted with a warrant the state may show any facts tending to prove the legality of the arrest.[59] Where, however, it clearly appears that an arrest without a warrant would have been illegal under the circumstances, evidence relating thereto and to the misconduct upon which it was based is not admissible.[60]

B. During Attempted Arrest by Defendant. — a. *Official Capacity and Duty.* — Where the defendant pleads the discharge of official duty as a justification of his act, a void commission is not competent evidence of his official capacity, but he may show that he was a *de facto* officer.[61] The nature of his official duty need not be proved, but will be judicially noticed by the court.[62]

b. *Intent, Malice, Good Faith, etc.* — Facts and circumstances which tend to show the intent, malice or good faith of the defendant may be proved.[63] Where one ground of arrest is urged as a justification, evidence of another valid cause therefor is not

State, 99 Ga. 25, 25 S. E. 614; Patterson *v.* State (Tex. Crim.), 60 S. W. 557.

58. A Previous Homicide by the defendant may be proved as a circumstance explaining the conduct and intentions of the parties during the killing for which the defendant is on trial, although the latter killing was done while resisting an illegal arrest. Cortez *v.* State, 43 Tex. Crim. 375, 66 S. W. 453. But see Miers *v.* State (Tex. Crim.), 29 S. W. 1074.

59. State *v.* Roberts, 15 Mo. 28.

Where the alleged justification for the attempted arrest was the officer's belief that defendant had been engaged in a recent bank robbery it was held competent in proof of the reasonableness of this belief to show that defendant, when arrested soon after the homicide, had considerable money, weapons and other articles upon his person. State *v.* Phillips, 118 Iowa 660, 92 N. W. 876.

60. Cortez *v.* State, 43 Tex. Crim. 375, 69 S. W. 536. *Distinguishing* Jacobs *v.* State, 28 Tex. App. 79, 12 S. W. 408, and Cortez *v.* State, 44 Tex. Crim. 169, 66 S. W. 453, on the ground that in those cases the defendants were fugitives from justice at the time of the attempted arrest. In the latter case the previous killing of another officer, by the defendant, during the officer's attempt to arrest him, was held properly admitted with regard to the legality of the second arrest, because it tended to show the defendant's purpose to kill any one attempting to arrest him, without regard to whether the arrest was legal or illegal.

61. Helms *v.* United States, 2 Ind. Ter. 595, 52 S. W. 60.

See more fully, article "Officers."

62. Lynn *v.* People, 170 Ill. 527, 48 N. E. 964.

63. Evidence that the United States marshal had authorized the defendants to arrest the deceased was held improperly excluded, on the ground that although such authorization was not legal and was no justification, it tended to disprove premeditation and malice. Brannigan *v.* People (Utah), 24 Pac. 767.

Any fact tending to show that the defendant knew that the deceased did not intend to commit a felony, or do him any bodily harm, is relevant and admissible. Noles *v.* State, 26 Ala. 31, 62 Am. Dec. 711.

The Proximity of an Officer to the scene of the alleged felony is admissible as bearing upon the good faith of the private citizen in attempting the arrest. Hart *v.* Com., 22 Ky. L. Rep. 1183, 60 S. W. 298.

Facts Not Known to Defendant. Evidence that the deceased's gun

admissible.[64] Information communicated to the officer as to the bad or violent character of the person to be arrested is not admissible,[65] nor are the instructions given him at the time the warrant is put into his hands.[66] Neither the guilt of the deceased[67] nor his lawful purpose in going to the scene of the homicide is material or relevant.[68]

C. During Trespass. — Where the homicide occurs during an alleged trespass by the deceased, the defendant may show his ownership or right to possession of the premises, not as a justification, but to establish his good faith and lack of malice.[69] But he cannot show what advice had been given him by his attorney as to his rights.[70] It has been held, however, that he may show what instructions were given him by the officer placing him in possession of the premises.[71] The state cannot prove the legal ownership or right to possession to be in the deceased unless this fact were known to the defendant.[72] Circumstances showing the deceased's hostility toward the accused[73] and his violent character may be proved.[74] Where an alleged trespasser has killed the owner of the premises trespassed upon he cannot show a custom permitting such trespasses.[75] It is competent

was loaded with small shot was held inadmissible in the absence of a showing that such fact was known to the defendant. Carr *v.* State, 41 Tex. Crim. 380, 55 S. W. 51.

64. Davis *v.* Com., 25 Ky. L. Rep. 1426, 77 S. W. 1101.

65. Miers *v.* State, 34 Tex. Crim. 161, 29 S. W. 1074, 53 Am. St. Rep. 705.

66. Jackson *v.* State, 66 Miss. 89, 5 So. 690, 14 Am. St. Rep. 542.

67. Roten *v.* State, 31 Fla. 514, 12 So. 910.

68. Evidence tending to show that deceased went on lawful business to the place where he was shot was held improperly admitted, because throwing no light upon the question whether, under the circumstances, defendant was justified in attempting to arrest the deceased. People *v.* Kilvington, 104 Cal. 86, 37 Pac. 799, 43 Am. St. Rep. 73.

69. People *v.* Costello, 15 Cal. 350; State *v.* Donges, 14 Mont. 70, 35 Pac. 455. See People *v.* Thomson, 92 Cal. 506, 28 Pac. 589; People *v.* Honshell, 10 Cal. 83.

70. Weston *v.* Com., 111 Pa. St. 251, 2 Atl. 191. See also Gallaher *v.* State, 28 Tex. App. 247, 12 S. W. 1087.

71. Carr *v.* State, 41 Tex. Crim. 380, 55 S. W. 51.

72. Carr *v.* State, 41 Tex. Crim. 380, 55 S. W. 51; Sims *v.* State, 38 Tex. Crim. 637, 44 S. W. 522.

73. Carr *v.* State, 41 Tex. Crim. 380, 55 S. W. 51.

Deceased's Declaration of His Intention of going upon the premises in controversy at all hazards, shown to have been communicated to the defendant, is admissible in his behalf. State *v.* Lattin, 19 Wash. 57, 52 Pac. 314.

74. The Deceased's Violent Character may be considered, although he was attempting no violence toward the defendant at the time of the homicide, but was killed by the latter during an alleged attempt to enter the house where defendant was a guest, for the purpose of assaulting an inmate thereof. King *v.* State, 55 Ark. 604, 19 S. W. 110.

75. In Davis *v.* State, 92 Ala. 20, 9 So. 616, where it appeared that the defendant killed the deceased while attempting to enter the latter's house, in which a social party was being held, evidence offered by the defendant of an alleged custom in that neighborhood for young men to go uninvited to entertainments at private houses was held incompetent.

to show whether he was rightfully or wrongfully on the premises.[76]

D. NEGLIGENT HOMICIDE. — Where the homicide is a crime only by virtue of the criminal negligence of the accused, any competent evidence tending to establish negligence is admissible in accordance with rules elsewhere discussed.[77]

16. Killing Another Through Mistake or Accident. — A. GENERALLY. — When the defendant, intending to kill or injure one person, by mistake or accident kills or injures another, any evidence which would have been competent on his trial for assault upon or the killing of the intended victim is admissible on the trial for the crime actually resulting.[78]

B. EVIDENCE BY PROSECUTION. — Under such circumstances the prosecution may prove any facts tending to establish his malice or ill-will toward the intended victim.[79]

C. EVIDENCE FOR DEFENDANT. — Where the defendant claims that

76. But a Previous Conviction for the trespass is not competent evidence on this issue. Gay *v.* State, 115 Ga. 204, 41 S. E. 685.

77. See fully the article "NEGLIGENCE."

On a trial for homicide due to criminal negligence in attending to a steam boiler, evidence of the defendant's negligent acts in absenting himself from the room on days immediately preceding the homicide was held improperly admitted because having no tendency to establish the particular negligent act charged, but evidence that the defendant had been warned that disastrous results would follow from his negligent conduct was held properly admitted to show recklessness on the part of the defendant. People *v.* Thompson, 122 Mich. 411, 81 N. W. 344, *citing* and *commenting* exhaustively upon the cases laying down a similar rule in both civil and criminal cases.

78. See following discussion and cases.

79. Mistaken Identity. — Clarke *v.* State, 78 Ala. 474, 56 Am. Rep. 45, in which case there was an absence of evidence showing any malice or ill feeling on the part of the defendant toward the deceased, L., but the state contended that the accused shot L. in the dark, mistaking him for A., whom he really intended to kill. Evidence of the defendant's previous threats against A. was held properly admitted. "While the general rule is that a threat to kill some person, other than the deceased, does not prove or tend to prove the offense charged, yet, in case of mistaken identity, evidence evincing malice, criminal intent, and a motive to kill the person really intended, is admissible, on the same principles, and for the same reasons, as if such person had been killed under the same circumstances. The credibility and sufficiency of the evidence to establish mistaken identity, as to which we intimate no opinion, is a question exclusively for the jury, who should receive instructions to give no weight or consideration to the threats, unless satisfied that the defendant shot under the belief that the deceased was A."

Previous Threats Against and Assaults upon a third person for whom defendant mistook deceased at the time of the homicide are admissible. People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093.

Subsequent Declarations by the defendant showing malice toward the intended victim. State *v.* Kohne (W. Va.), 37 S. E. 553.

Killing Bystander. — Threats against a third person whom defendant intended to kill are admissible on his trial for the killing of a bystander. State *v.* Crawford, 115 Mo. 620, 22 S. W. 371; likewise previous difficulties and the hostile relations of the parties; Bob *v.* State, 29 Ala. 20; Dixon *v.* State, 74 Miss. 271, 20 So. 839.

he mistook the deceased for another person,[80] or that the homicide occurred accidentally while he was defending himself against an attack by a third person,[81] any evidence is admissible on his behalf which would have been competent on a trial for killing the person attacking him.

V. DEFENSES.

1. Generally. — The accused has the right to introduce testimony tending to establish his theory of the case, however improbable it may appear to the court.[82] But when he relies upon one particular defense, evidence tending to establish another and inconsistent defense is not admissible unless relevant to the one relied upon.[83]

2. Physical and Mental Condition of Defendant. — The defendant may show his physical and mental condition at the time of the homicide.[84]

3. Lawful Purpose of Defendant. — A. GENERALLY. — The defendant may show that his purpose in seeking the deceased or in going to the scene of the homicide was peaceable or lawful,[85] either by

80. Cleveland *v.* State, 86 Ala. 1, 5 So. 426, in which case the homicide occurred in the dark, the defendant mistaking the deceased for a person with whom he had a difficulty a few moments previous. See also State *v.* Spaulding, 34 Minn. 361, 25 N. W. 793.

In support of defendant's theory that he shot the assaulted person, supposing that he was one of the crowd who had been pursuing him, and from whom he apprehended danger to his life, it was held competent for him to show that one of the persons composing such crowd was armed with a revolver, of which fact the defendant had knowledge. State *v.* Evans, 122 Iowa 174, 97 N. W. 1008.

81. **Killing Bystander.** — Previous threats against accused by the alleged assailant, though not communicated, are competent to show who was the aggressor. Hart *v.* Com., 85 Ky. 77, 2 S. W. 673, 7 Am. St. Rep. 576, where deceased, an innocent bystander, was killed during the difficulty.

82. Utzman *v.* State, 32 Tex. Crim. 426, 24 S. W. 412.

83. State *v.* Gosey, 111 La. 616, 35 So. 786; Manning *v.* State, 79 Wis. 178, 48 N. W. 209; Brittain *v.* State (Tex. Crim.), 40 S. W. 297.

84. "Independent of any question of insanity the defendant in a criminal cause has the right to have his general physical as well as his mental condition at the time of the commission of the supposed crime explained to the jury, so as to put them in possession of all the facts connected with the transaction, and the better to enable them to judge of its character." Sage *v.* State, 91 Ind. 141. See *infra*, "Self-Defense."

Remoteness. — Evidence as to defendant's physical and mental condition eight months previous to the homicide was held not improperly excluded for remoteness, being a matter resting in the discretion of the trial court. Enlow *v.* State, 154 Ind. 664, 57 N. E. 539.

85. State *v.* Prater, 52 W. Va. 132, 43 S. E. 230; State *v.* Welch, 22 Mont. 92, 55 Pac. 927.

Character of Deceased's House. For the purpose of explaining his object in going there the defendant may show that the house of the deceased, where the homicide occurred, was a house of ill-fame. Villareal *v.* State, 26 Tex. 107.

Statements by the Deceased reflecting upon the character of defendant and his female relatives, and reported to the defendant, are admissible in his behalf in support of his

direct testimony[86] or by circumstances.[87] But such circumstances are not admissible unless there is some evidence tending to show a criminal or unlawful purpose on the part of the defendant at the time they occurred.[88]

B. Self-Serving Acts and Declarations. — a. *Generally.* The defendant's previous self-serving acts and declarations indicating his lawful purpose or motives with reference to the deceased are not ordinarily admissible in his own behalf, unless part of the *res gestae.*[89] In some jurisdictions, however, it is held that when there is any evidence tending to establish the unlawful purpose or design of the defendant[90] he may show his own declarations and conduct shortly previous as evidence of his mental state at the time of the homicide.[91]

b. *Accompanying or Preparatory to Departure for Scene.* — The statements of the defendant explanatory or indicative of his purpose, made shortly preceding and preparatory to his departure for the

contention that his motive in seeking out the deceased was to get the latter's explanation. Massie *v.* Com., 15 Ky. L. Rep. 562, 24 S. W. 611.

86. State *v.* Hall, 132 N. C. 1094, 44 S. E. 553; Alexander *v.* State, 118 Ga. 26, 44 S. E. 851.

87. Tesney *v.* State, 77 Ala. 33.

To rebut the contention that defendant sought a meeting with the deceased, his wife, with the intention of killing her, evidence that shortly after sending the letter urging her to meet him, the defendant took steps to get possession of her clothes from her mother-in-law was held properly admitted to show that defendant was endeavoring to persuade the deceased to live with him. Schlemmer *v.* State, 51 N. J. L. 23, 15 Atl. 836.

88. Where it appeared that defendant and deceased went hunting and defendant returned without the latter, who was subsequently found dead, the defendant's solicitations of a third person to accompany them on the hunt were held properly excluded in the absence of any evidence tending to show that he was entertaining a criminal purpose at that time. State *v.* Anderson, 10 Or. 448.

89. McBride *v.* Com., 95 Va. 818, 30 S. E. 454; Oder *v.* Com., 80 Ky. 32; State *v.* Harlan, 130 Mo. 381, 32 S. W. 997; Walling *v.* Com., 18 Ky. L. Rep. 812, 38 S. W. 429; Colquit *v.* State, 107 Tenn. 381, 64 S. W. 713; Stewart *v.* State, 78 Ala. 436.

90. State *v.* Anderson, 10 Or. 448; Gaines *v.* State, 38 Tex. Crim. 202, 42 S. W. 385. But see Murphy *v.* People, 9 Colo. 435, 13 Pac. 528.

91. Nelson *v.* State (Tex. Crim.), 58 S. W. 107.

A declaration by the defendant an hour or two before the homicide, after being informed of a threat against himself by the deceased a short time before, and made in response to an invitation to go down the street, that he didn't want to get cooped up in one of those saloons by the deceased and his crowd, was held admissible to show the condition of the defendant's mind, that he was desirous of avoiding a difficulty, and apprehended danger from the deceased, and not incompetent as self-serving. So also, his declaration at the same time in response to advice not to have a conflict with the deceased, that he did not want to have any trouble with him, and would not if he could avoid it, but that he might have such trouble as the deceased was drinking and he was afraid he would attempt to kill him, was held admissible for the same purpose. "Of course, such testimony might be manufactured and be self-serving, but we are not passing here on the credibility of the witness, but on the admissibility of the testimony as going to show appellant's condition of mind before and at the time of the difficulty." Poole *v.* State (Tex. Crim.), 76 S. W. 565.

scene of the homicide, or a meeting with the deceased,[92] or made while on his way thither,[93] are competent in his own behalf to show his peaceable or lawful purpose. Some courts, however, exclude such statements because hearsay and self-serving.[94]

4. Passion and Provocation. — A. PRELIMINARY SHOWING. — It is not essential to the competency of evidence as to passion and provocation on the part of the defendant that it be sufficient to establish these partial defenses.[95] But it must appear that the alleged provocation was acted upon at the first opportunity after it was brought to the knowledge of the defendant.[96]

B. COOLING TIME. — a. *Generally.* — It is generally held that facts which might show passion and provocation are not admissible when a period of time has elapsed between the defendant's first knowledge of them and his action, sufficient for his passion to cool.[97]

The defendants' declarations, previous to the homicide, as to their proposed method of dealing with the deceased if he did not straighten out a slander attributed to him, and their remarks on being told that the deceased had denied making the slanderous statement, were held admissible in defendants' favor to explain their purpose in seeking out the deceased at the time of the fatal difficulty. Butler *v.* State, 33 Tex. Crim. 232, 26 S. W. 201.

92. State *v.* Cross, 68 Iowa 180, 26 N. W. 62; State *v.* Young, 119 Mo. 495, 24 S. W. 1038; Irvine *v.* State, 104 Tenn. 132, 56 S. W. 845.

In rebuttal of evidence that the defendant sought a meeting with the deceased for the purpose of killing him, the defendant may show as a part of the *res gestae* his refusal to go to the place of meeting and his statement of his reasons therefor made at the time, as well as the circumstances under which he did go subsequently. Tesney *v.* State, 77 Ala. 33. See also Johnson *v.* State, 29 Tex. App. 150, 15 S. W. 647.

93. Price *v.* State, 72 Ga. 441; Garber *v.* State, 44 Tenn. 161.

94. State *v.* Spell, 38 La. Ann. 20; Conn *v.* People, 116 Ill. 458, 6 N. E. 463.

State *v.* Ching Ling, 16 Or. 419, 18 Pac. 844. But in this case, which was a prosecution of a Chinaman for the murder of another Chinaman, the court suggests that it would be much better for the trial court to admit such evidence where the proof depends wholly upon Chinese witnesses, and not attempt a strict application of the technical rules of evidence.

95. "The judge, it is true, must to some extent assume to decide upon the sufficiency of the alleged provocation, when the question arises upon the admission of testimony; and when it is so clear as to admit of no reasonable doubt upon any theory that the alleged provocation could not have had any tendency to produce such state of mind in ordinary men, he may properly exclude the evidence; but if the alleged provocation be such as to admit of any reasonable doubt, whether it might not have had such tendency, it is much safer, I think, and more in accordance with principle, to let the evidence go to the jury, under the proper instructions." Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781.

96. Howard *v.* State, 23 Tex. App. 265, 5 S. W. 231; State *v.* Herrell, 97 Mo. 105, 10 S. W. 387, 10 Am. St. Rep. 289.

The deceased's previous insulting remarks about the defendant's mother were held admissible, although the defendant did not act upon them immediately after meeting the deceased for the first time, but first took him to one side and asked him if he meant what he said. Richardson *v.* State, 28 Tex. App. 216, 12 S. W. 870.

97. State *v.* Baker, 30 La. Ann. 1134; Compton *v.* State, 117 Ala. 56, 23 So. 350; State *v.* Lawry, 4 Nev. 161.

In some jurisdictions what constitutes a sufficient cooling time is held to be a question for the court.[98] In others it is said to be a question for the jury.[99] However, in determining the admissibility of the evidence the court must of course first pass upon the question and decide whether such a period of time has intervened as to render the evidence inadmissible. In many cases it is clear that a sufficient time for cooling has elapsed.[1] In cases, however, where facts are so recent as to render it doubtful whether or not the passion provoked by them has subsided, the offered evidence should be admitted and the question left with the jury under appropriate instructions.[2]

b. *Circumstances to Be Considered.* — In determining whether a sufficient cooling time has intervened, the relation of the parties, nature of the provocation and all the surrounding circumstances[3]

98. State *v.* Sizemore, 52 N. C. 206; State *v.* McCants, 1 Spears (S. C.) 357; *citing* Rex *v.* Onebey, 1 Ld. Raymond 1485; Reg. *v.* Fisher, 8 Car. & P. 182, 34 E. C. L. 345.

In Rogers *v.* State, 117 Ala. 9, 22 So. 666, evidence of the deceased's seduction of the defendant's daughter, the knowledge of which came to the defendant two days before the homicide, was held inadmissible as evidence of passion or provocation on the ground of remoteness. Flanagan *v.* State, 46 Ala. 703, is expressly overruled.

99. State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434; State *v.* Thomas, 138 Mo. 168, 39 S. W. 459; White *v.* State, 118 Ga. 787, 45 S. E. 595; State *v.* Cooper, 112 La. 281, 36 So. 350. *Citing* Rex *v.* Hayward, 6 Car. & P. (Eng.) 157; Rex *v.* Lynch, 5 Car. & P. (Eng.) 324.

1. Johnson *v.* Com., 82 Ky. 116.

A Difficulty an Hour Previous excluded. State *v.* Wood, 124 Mo. 412, 27 S. W. 1114.

Two Hours. — In Richardson *v.* State (Miss.), 28 So. 817, a lapse of two hours was held sufficient cooling-time to render evidence of a previous difficulty incompetent.

An Assault by the Deceased Two or Three Hours Previous to the homicide, from which the defendant was still suffering, was held improperly excluded from the consideration of the jury, although there was no act of provocation immediately connected with the homicide. Thomas *v.* State, 42 Tex. Crim. 386, 56 S. W. 70.

Difficulties Six Hours Previous are not admissible to show provocation in the absence of evidence of any intervening difficulties. State *v.* Grayor, 89 Mo. 600, 1 S. W. 365; People *v.* Smith, 26 Cal. 666.

Two Days Is Sufficient Cooling Time. Perry *v.* State, 102 Ga. 365, 30 S. E. 903.

Three Days Is as a Matter of Law Sufficient Cooling-Time.—Rockmore *v.* State, 91 Ga. 97, 16 S. E. 305.

2. Rockmore *v.* State, 91 Ga. 97, 16 S. E. 305; Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781. See also Thomas *v.* State, 42 Tex. Crim. 386, 56 S. W. 70.

3. Circumstances to Be Considered. — "In all cases where the time of cooling may be under consideration, whether the time be regarded as evidence of the fact of cooling, or as constituting, of itself, when reasonable, legal deliberation, the whole circumstances are to be taken into the estimate in determining whether the time be reasonable. The nature of the provocation, the prisoner's physical and mental constitution, his condition in life and peculiar situation at the time of the affair, his education and habits (not of themselves voluntary preparations for crime), his conduct, manner and conversation throughout the transaction; in a word, all pertinent circumstances may be considered and the time in which an ordinary man, in like circumstances, would have cooled, is the reasonable time." State *v.* McCants, 1 Spears (S. C.) 357.

should be considered. The effects of previous habits of drunkenness may be considered, but not those of existing intoxication.[4]

C. Facts Which May Be Shown. —a. *Generally.* — What facts and circumstances may be shown as evidence of passion and provocation depends largely upon what is recognized in the particular jurisdiction as a legal provocation, a matter outside the scope of this work; hence the following discussion must be considered with this fact in mind.

b. *Previous Difficulties, Insults, etc.* — In proof that he acted in hot blood under a sufficient legal provocation the defendant may show his difficulties with the deceased shortly preceding the homicide,[5] insulting epithets or charges by the latter against the defendant at the time but not previous to the killing,[6] except where they were not communicated to him until shortly previous thereto.[7] Any acts of the deceased coming to the knowledge of the defendant shortly before the homicide, and which would naturally tend to excite his passions against the deceased, are admissible on the question of the existence and sufficiency of provocation.[8]

Abusive Letters.— Abusive letters received by the defendant from the deceased immediately preceding the assault have been held incompetent.[9]

Under the Texas Statute information as to insults by the deceased to the defendant's female relatives may be shown as evidence of legal provocation, although such knowledge or information was acquired some time previous to the homicide, if it was acted upon at the first subsequent meeting of the parties.[10] Neither the mar-

4. State *v.* McCants, 1 Spears (S. C.) 357. But see *supra*, this article, "Intent, etc. — Intoxication."

5. Thomas *v.* State, 42 Tex. Crim. 386, 56 S. W. 70.

6. State *v.* Brown, 181 Mo. 192, 79 S. W. 1111. See also State *v.* Jackson, 17 Mo. 544, 59 Am. Dec. 281.

7. Massie *v.* Com., 16 Ky. L. Rep. 790, 29 S. W. 871.

8. Cheek *v.* State, 35 Ind. 492, holding admissible evidence of an attempt by the deceased, the father of defendant's wife, to induce her to elope with another man.

A previous injury inflicted upon defendant's granddaughter by the assaulted person, communicated to the defendant shortly previous to the assault, is admissible to show provocation. Smallwood *v.* Com., 17 Ky. L. Rep. 1134, 33 S. W. 822.

The fact that deceased informed the defendant that he had whipped his daughter for going to a concert with the defendant was held admissible on the question of provocation. Turner *v.* State (Tex. Crim.), 46 S. W. 830.

9. Teague *v.* State, 120 Ala. 309, 25 So. 209; Crosby *v.* People, 137 Ill. 325, 27 N. E. 49.

10. Wright *v.* State, 36 Tex. Crim. 427, 37 S. W. 732.

Information as to insults to the defendant's female relative, acquired several weeks previous to the homicide, was held admissible where it was also shown that the killing occurred upon the first meeting thereafter between the parties. Willis *v.* State (Tex. Crim.), 75 S. W. 790.

Evidence that the defendant had been informed of deceased's efforts to induce the former's sister to leave her home with the deceased without any offer of marriage, was held inadmissible to show provocation because no indecent overture being shown it did not sufficiently appear in itself to be an insult toward the

riage[11] nor death[12] of such relative takes them without the scope of the statute.

c. *Wife's Adultery and Deceased's Improper Relations With or Conduct Toward Her.* — The defendant may show that he had recently detected or been informed of the deceased's illicit relations with or insulting conduct toward defendant's wife.[13] So also he may prove circumstances strongly tending to show such illicit relations immediately preceding the homicide.[14] But the knowledge or information must have been so recent as not to permit the defendant's passion to cool.[15] When charged with the murder of his wife, evidence that he had just been informed of her previous adultery is competent,[16] but he cannot show her lewd conduct previously known to him.[17]

d. *Character of Deceased.* — The deceased's character and reputation for violence is not competent evidence of provocation,[18] nor is his reputation for unchastity admissible,[19] except to show that the defendant believed the information given him concerning the deceased's rape upon his wife.[20] It has been held competent, however, to show the deceased's reputation for turbulence and insolence.[21]

e. *Quick Temper of Defendant.* — In the absence of any evidence of provocation the defendant cannot show his irascible disposition and that he is subject to fits of passion from slight causes.[22] And it has been held that he cannot show his quick-tempered disposition even to intensify a recent provocation.[23]

f. *The Relative Size of the Parties* cannot be considered in determining the adequacy of the provocation.[24]

defendant's sister. Flores *v.* State (Tex. Crim.), 79 S. W. 808.

11. Willis *v.* State (Tex. Crim.), 75 S. W. 790.

12. Willis *v.* State (Tex. Crim.), 75 S. W. 790.

13. People *v.* Webster, 139 N. Y. 73, 34 N. E. 730.

14. Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781, in which it was held error to exclude evidence that defendant had within a half hour previous to the homicide seen the deceased and his wife go into and come out of the woods together, and that he was informed that they had committed adultery on the day previous.

15. Sanchez *v.* People, 22 N. Y. 147; Sawyer *v.* State, 35 Ind. 80.

16. Greta *v.* State, 10 Tex. App. 36.

17. Meyer *v.* State (Tex. Crim.), 38 S. W. 193.

18. Brucker *v.* State, 19 Wis. 539; State *v.* McNeill, 92 N. C. 812.

19. Pence *v.* Com., 21 Ky. L. Rep. 500, 51 S. W. 801.

20. Jones *v.* State, 38 Tex. Crim. 87, 41 S. W. 638, 40 S. W. 807.

21. In State *v.* Tackett, 8 N. C. 210, in which the evidence as to the provocation was circumstantial, it was held competent to show that the deceased, a slave, was generally turbulent and insolent toward white people, as tending to show that the defendant, a white man, acted under a strong provocation. See also Jolly *v.* State, 21 Miss. 223.

22. Sindram *v.* People, 88 N. Y. 196.

23. Garlitz *v.* State, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601. See also Jacobs *v.* Com., 121 Pa. St. 586, 15 Atl. 465.

24. State *v.* McNeill, 92 N. C. 812. But see Wells *v.* State, 115 Ga. 577, 42 S. E. 39.

g. *Circumstances Intensifying Recent Provocation.* — It is competent for the defendant to show any previous or concurrent facts and circumstances which reasonably tend to increase or intensify a recent provocation.[25]

Previous Insults and provoking facts, although not of themselves competent, may be admissible after the insult immediately causing the homicide has been proved, as giving character to the last insult and showing the state of the accused's mind.[26]

h. *Rebuttal.* — The state may show facts which tend to disprove the alleged provocation or show that it was not calculated to arouse the defendant's passions.[27] Thus where his wife's adultery is urged as the provocation for killing either her or her paramour, it is competent to show that she and the defendant were not lawfully married,[28] or that he was living separate from her in adulterous relations with others.[29] Where the alleged provocation is an insult to his wife or to a female relative, it is competent to show her general reputation for but not her particular acts of unchastity,[30] without proving that

25. Stanton *v.* State, 42 Tex. Crim. 269, 59 S. W. 271.

Evidence that the defendant was in possession of certain land which the deceased was attempting to trespass upon was held admissible on behalf of the defendant not as a justification or excuse, but to show the feelings of the parties toward each other, and that they were such that passion might be more easily aroused. State *v.* Zellers, 7 N. J. L. 220.

Testimony that the person accompanying the deceased in his trespass upon the defendant's property was a prostitute is competent as tending to show a greater cause for complaint and provocation on the part of the defendant. Amos *v.* State, 96 Ala. 120, 11 So. 424.

The Age of the Relative with whom defendant discovered deceased in improper relations is not admissible to increase the provocation. Caveness *v.* State (Tex. Crim.), 37 S. W. 750.

26. Willis *v.* State (Tex. Crim.), 75 S. W. 790; Martin *v.* State, 40 Tex. Crim. 660, 51 S. W. 912; Messer *v.* State, 43 Tex. Crim. 97, 63 S. W. 643. But see Hodges *v.* Com., 89 Va. 265, 15 S. E. 513.

Where the alleged provocation was the deceased wife's conduct toward another person, the exclusion of evidence as to the criminal intimacy of the deceased with such person twenty days previous to the homicide, which fact had been communicated to the defendant, was held error on the ground that it tended to explain the immediate provocation. Greta *v.* State, 10 Tex. App. 36.

27. Rains *v.* State, 88 Ala. 91, 7 So. 315.

State *v.* Holme, 54 Mo. 153.

28. People *v.* Webster, 139 N. Y. 73, 34 N. E. 730.

29. Where defendant contended that he killed the deceased, his wife, in a heat of passion engendered by her confession of adultery, it was held competent for the state to show that defendant at the time was living separate from his wife in illicit relations with other women, such evidence tending to negative the alleged provocation. Garlitz *v.* State, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601.

30. Wood *v.* State, 31 Tex. Crim. 571, 21 S. W. 602.

Contra. — Where the provocation shown was the seduction of defendant's daughter by the deceased, evidence of such daughter's bad reputation for unchastity was held properly excluded because not shown to have been known to the defendant, there being no presumption that general reports or reputation as to such a matter would come to his knowledge. State *v.* Kirby, 62 Kan. 436, 63 Pac. 752.

such reputation was known to the defendant;[31] and also that defendant was not legally married to his alleged insulted wife.[32] Where, however, the insult does not involve her chastity in any way, such rebuttal evidence is not competent.[33] The state cannot show that the insulting statement which defendant has been informed was made by the deceased was actually made by another and not by the deceased.[34]

i. *Knowledge and Belief of Defendant.* — Facts which were not brought to the notice of the defendant or not known to him previous to the homicide are not competent evidence to show passion or provocation, because they could not have influenced his conduct.[35] Such facts, however, may be competent in corroboration of other evidence, showing his knowledge of the alleged provocation.[36] The statements of third persons may be admissible to show the source of the defendant's information concerning the provoking facts.[37]

j. *Truth or Falsity of Information or Statements.* — The truth or falsity of the matters, information concerning which is the alleged provocation, is not material, and cannot be shown[38] except to corroborate the defendant's own testimony.[39] The state cannot show the truth of an insulting charge or statement by the deceased,[40] but the defendant may prove its falsity, because this fact would increase its provoking effect.[41]

31. Griffin *v.* State (Tex. Crim.), 54 S. W. 586.

32. Watson *v.* Com., 87 Va. 608, 13 S. E. 22.

33. Where the Alleged Provocation Was a Slanderous Publication concerning defendant's wife, which contained no imputation against her chastity, evidence that she was a woman of unchaste reputation held not admissible to lessen the provocation. Williams *v.* State, 40 Tex. Crim. 497, 51 S. W. 220.

34. Williams *v.* State, 40 Tex. Crim. 497, 51 S. W. 220.

35. People *v.* Hill, 116 Cal. 562, 48 Pac. 711; McVey *v.* State (Tex. Crim.), 81 S. W. 740; Pence *v.* State, 21 Ky. L. Rep. 500, 51 S. W. 801; Combs *v.* State, 75 Ind. 215; Pitts *v.* State, 29 Tex. App. 374, 16 S. W. 189; Cockerell *v.* State, 32 Tex. Crim. 585, 25 S. W. 421.

Letters Found on the Body of the Deceased, showing his illicit relations with defendant's sister, but of the existence of which the defendant was ignorant at the time of the homicide, are inadmissible either in aggravation or palliation of the offense. Robinson *v.* State, 108 Ala. 14, 18 So. 732.

36. Letters Written by the Deceased to defendant's sister, and found in deceased's trunk after his death, showing his improper relations with the defendant's sister, were held admissible in corroboration of other evidence showing defendant's knowledge of such relation, although the letters were never delivered and were not known to defendant. McAnear *v.* State, 43 Tex. Crim. 518, 67 S. W. 117.

37. State *v.* Grote, 109 Mo. 345, 19 S. W. 93.

38. People *v.* Webster, 139 N. Y. 73, 34 N. E. 730.

39. Where defendant alone testified that deceased informed him as to his having whipped his daughter for going with defendant to a concert, it was held competent for defendant to show the truth of deceased's alleged conduct in corroboration of his own testimony. Turner *v.* State (Tex. Crim.), 46 S. W. 830.

40. Massie *v.* Com., 16 Ky. L. Rep. 790, 29 S. W. 871.

41. Where the cause of the difficulty was the injured person's charges against the defendant of the

k. *The Defendant's Declarations* or statements to the deceased[42] or to others[43] regarding the alleged provocation are not admissible unless to show his knowledge of or belief in the alleged facts.

l. *Double Killing.* — Where two persons are killed at the same time, evidence competent to show provocation for killing one is not thereby rendered competent to show provocation for killing the other, unless the latter has previously adopted the words or conduct constituting the provocation.[44]

5. Suicide. — A. Presumption. — Where the cause of the deceased's death does not appear there is no presumption that he did not commit suicide.[45]

B. Mental Condition of Deceased. — In determining whether or not the deceased killed himself, it is proper to show by his acts and declarations[46] the condition of his mind within a reasonable time preceding the homicide, whether cheerful or gloomy,[47] and it has

latter's improper relations with the former's wife, it was held error to exclude defendant's evidence as to the falsity of the charge, on the ground that the consciousness of innocence would make the provocation much greater. Wadlington *v.* State, 19 Tex. App. 266.

42. The defendant's declaration at the time of the homicide, charging the deceased with insulting defendant's wife, is not admissible in the absence of evidence that such insult was in fact made. Bassham *v.* State, 38 Tex. 622.

43. The statements of the defendant previous to the homicide to third persons, as to what his wife had told him regarding the insult to her by the deceased, held not admissible. Merritt *v.* State (Tex. Crim.), 50 S. W. 384, *distinguishing* Jones *v.* State, 38 Tex. Crim. 87, 41 S. W. 638, 40 S. W. 807, in which the alleged provocation was a communication to defendant by his wife as to the deceased's improper and criminal conduct toward her. The exclusion of testimony that immediately after such communication the defendant had sought out the witness and informed him of such fact, and of his belief in the truth of the communication, was held error on the ground that such evidence was admissible to show notice to the defendant of the alleged provocation, and also to show the defendant's belief in the truth of his wife's story.

44. Willis *v.* State (Tex. Crim.), 75 S. W. 790.

45. "When the defendant had shown conduct, declarations and circumstances pointing to a suicidal intent, it devolved upon the state to show satisfactorily and beyond doubt that it was not suicide before the defendant could be deprived of the benefit of such reasonable doubt as his facts would create. . . . Upon a charge of homicide even when the body has been found, and although indications of a violent death be manifest, it shall still be fully and satisfactorily proved that the death was neither caused by natural causes, by accident, nor by the deceased himself." Persons *v.* State, 90 Tenn. 291, 16 S. W. 726.

46. "That the acts and declarations of a person alleged to be insane, or predisposed to suicide, are competent to prove a contrary state of mind is not and cannot be doubted, but then they should be only such acts and declarations as fairly tend to prove the mental condition." Jumpertz *v.* People, 21 Ill. 374. See also State *v.* Marsh, 70 Vt. 288, 40 Atl. 836.

A Letter written by the deceased shortly before the homicide was held properly admitted to show her condition of health and mind, which were wholly inconsistent with the theory of suicide. State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318.

47. State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; State *v.* Lentz, 45 Minn. 177, 47 N. W. 720.

been held that mere remoteness in point of time affects only the weight of such evidence.[48]

C. Health. — The state of his health at the time of the homicide may be shown.[49]

D. Traits of Character in the deceased showing a suicidal tendency are admissible.[50]

E. His Condition in Life and Surroundings may be inquired into in so far as they are likely to impel him to suicide.[51] But particular isolated difficulties or troubles cannot be shown.[52]

F. Absence of Motive. — The state in rebuttal may show any facts tending to prove the absence of a motive for suicide.[53]

G. Experiments to determine whether the fatal wound could have been self-inflicted have been held competent.[54]

H. Intention to Commit Suicide. — a. *Generally.* — It is competent to show his intention to take his own life, nor is it essential to the admission of such evidence that there be any direct evidence of suicide so long as the circumstances of the death are not inconsistent with this theory.[55]

b. *Declarations.* — The cases are not in accord upon the question of whether the previous declarations of the deceased are competent evidence of his intention to commit suicide. Some courts hold such declarations admissible not as testimonial statements of the fact, but

48. In Blackburn *v.* State, 23 Ohio St. 146, the exclusion of evidence that six years previous to her death the deceased was of a melancholy condition of mind and predisposed to suicide, and had threatened to take her own life, was held error on the ground that the lapse of time affected merely the weight, though not the competency, of the testimony. See also People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624, and Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235, *holding* that such evidence is not inadmissible because of remoteness so long as the conditions producing it have not materially changed.

49. State *v.* Lentz, 45 Minn. 177, 47 N. W. 720; State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318. See State *v.* Marsh, 70 Vt. 288, 40 Atl. 836.

50. Hall *v.* State, 132 Ind. 317, 31 N. E. 536.

51. "This does not mean that the general character and habits of the past life may be inquired into, but that the condition and surroundings at the time of the death may be looked into, if of a character likely to impel to suicide." Boyd *v.* State, 82 Tenn. 161.

Evidence as to the Deceased's Habit of Becoming Intoxicated offered to support a theory of suicide was held properly excluded, there being no other evidence of suicide in the case. State *v.* O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555.

52. Hall *v.* State, 132 Ind. 317, 31 N. E. 536, in which proof of isolated facts as to financial condition and domestic trouble was held incompetent as collateral.

53. State *v.* Lentz, 45 Minn. 177, 47 N. W. 720, in which it was held competent to show that the deceased was engaged to be married and that it was the expressed intention of his father to give him a farm on which to start for himself.

54. An Experiment made by placing the weapon in the hands of the corpse and observing whether its direction corresponds with that of the wound is competent on the issue of suicide; so also is a similar experiment made by a living person upon his own body. Boyd *v.* State, 82 Tenn. 161. See article, "Experiments."

55. Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235.

as an act of the speaker indicating his existing state of mind.[56] Others hold them inadmissible unless accompanying and indicating such a purpose.[57]

I. OPINION. — The opinion of a witness as to whether or not the wound could have been self-inflicted is not competent[58] unless the nature and position of the wound are such that the opinion of an expert is necessary to assist the jury in arriving at a correct conclusion.[59] The contrary has been held, however.[60]

6. Alibi. — Any relevant and material circumstances may be proved which tend to support the plea of alibi.[61]

7. Hypnotism. — Where defendant urges as a defense that he did the act under hypnotic influence, he cannot prove the effect of

56. Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; State *v.* Asbell, 57 Kan. 398, 46 Pac. 770; Boyd *v.* State, 82 Tenn. 161; Blackburn *v.* State, 23 Ohio St. 146. See also Puryear *v.* Com., 83 Va. 51, 1 S. E. 512; and *supra* this article, "Declarations — By Deceased — Declarations of Purpose."

In Shaw *v.* People, 3 Hun (N. Y.) 272, a trial of a husband for the murder of his wife, there was evidence that the deceased and her three children died from the effects of arsenical poisoning, the alleged motive being the defendant's desire to get rid of them in order that he might marry another woman. The theory of the defense was that the deceased had poisoned herself and her children. In support of this theory it was held competent to prove the declaration of the deceased made several days prior to the illness of herself and children that she had poison and knew how to use it, and that rather than the defendant's paramour should have her children "she would put them all under the sod." This declaration was held competent as a fact or circumstance indicating the deceased's intention to commit suicide.

Evidence that three years prior to the homicide the deceased was seen with a pistol in her hand, and had then stated that she intended to commit suicide, was held competent, though somewhat remote, but its exclusion was not prejudicial error where the other evidence of suicide was exceedingly weak. People *v.* Conklin, 175 N. Y. 333, 67 N. E. 624.

57. Com. *v.* Felch, 132 Mass. 22; State *v.* Punshon, 133 Mo. 44, 34 S. W. 25; *approving* and *following* State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113; Nordgren *v.* People, 211 Ill. 425, 71 N. E. 1042, *distinguishing* Siebert *v.* People, 143 Ill. 571, 32 N. E. 431, on this ground, and holding such evidence competent as explanatory of the deceased's action in keeping bottles of strychnine in her room, this being the poison with which her death was caused.

58. State *v.* Bradley, 34 S. C. 136, 13 S. E. 315.

59. State *v.* Lee, 65 Conn. 265, 30 Atl. 1110. See also State *v.* Knight, 43 Me. 11, and article "EXPERT AND OPINION EVIDENCE," Vol. III, p. 590.

60. A Non-Expert, after describing the wound, may give his opinion, with the reasons therefor, that the deceased could not possibly have inflicted the wound on himself. Everett *v.* State, 62 Ga. 65.

61. Gray *v.* State, 42 Fla. 174, 28 So. 53. See article, "ALIBI."

In Goodwin *v.* State, 114 Wis. 318, 90 N. W. 170, it was held error to exclude testimony of the defendant's domestic servant as to familiar sounds heard by the latter, which she had good reason to believe were made by the defendant preparatory to retiring for the night, such evidence being competent to show that the defendant was in his own home and not at the scene of the homicide, at the time it occurred.

hypnotic suggestion or control without first showing that he was subject to its influence.[62]

8. Somnambulism. — The defendant may show any facts or circumstances which tend to support his contention that he did the act while in a somnambulistic state.[63]

9. Commission by Another. — A. GENERALLY. — Evidence tending to show that the crime was committed by some person other than the accused is competent whenever the circumstances are such as to show its relevancy to this defense,[64] even though such other person has been tried and acquitted of the offense, the judgment of

62. People *v.* Worthington, 105 Cal. 166, 38 Pac. 689.

63. In Fain *v.* Com., 78 Ky. 183, 39 Am. Rep. 213, defendant had gone to sleep on the floor of a public house, and the deceased, a total stranger to him, after considerable difficulty, succeeded in partially awaking him. Defendant, while in this condition, drew his pistol and killed the deceased. There was not the slightest evidence of a motive, and defendant showed his good character and peaceful habits. On the theory that he was a somnambulist, and at the time was unconscious, or only partially conscious of what he was doing, defendant offered to show that he had been a sleep-walker from infancy; that he had to be watched to prevent injury to himself while asleep, and that upon being aroused he frequently seemed frightened and attempted violence, and for some minutes seemed unconscious of his actions or surroundings. The testimony of medical experts was also offered to prove that persons asleep sometimes act as if awake, walking, talking and doing many other things of which they are unconscious or semi-conscious. Defendant further offered to show that he had for some days previous lost much sleep and that his life had been threatened by a third person on the day of the homicide. The exclusion of this evidence was held error on the ground that it tended to show the absence of a criminal intent, and that the threats against him tended to sustain his contention that he was acting under the impression that he was being assaulted by deceased. "If he had been threatened it was natural, or at least not unnatural, especially while near to the person who had threatened him, that the threat should make such an impression on his mind as would contribute to develop with more than ordinary force the predisposition to imagine himself assaulted, and to make resistance, and particularly so when, on being aroused, he found himself in the hands of a stranger, by whom he was being persistently and violently shaken."

64. Keith *v.* State, 157 Ind. 376, 61 N. E. 716; Ogden *v.* State (Tex. Crim.), 58 S. W. 1018. See State *v.* Lambert, 93 N. C. 618.

In Green *v.* State, 154 Ind. 635, 57 N. E. 637, it appeared that the wound was caused by a small-caliber revolver in the hands of a person wearing a long overcoat and with hat pulled down over the eyes, whose voice was apparently feigned, being neither like that of a man nor of a woman. In connection with a dying declaration, accusing a certain woman of the crime, it was held competent to show that this woman a few days previous to the murder had a small-caliber revolver prepared, and that she had told one witness that she was jealous of the deceased and a certain man, that she would kill the former by disguising herself as a man, calling the deceased out of her house at night and shooting her; that she was seen to leave her house on the night of the murder, disguised with a man's hat and overcoat.

Where it was claimed by the prosecution that defendant was the only person present at the homicide who had a knife, evidence that a police officer received a stab during the difficulty, but while defendant was not

acquittal in such case being inadmissible.[65] It has been held that such evidence is admissible only where the case against defendant is wholly circumstantial,[66] and also that it is irrelevant and inadmissible where more than one person appears to have been concerned in the commission of the homicide.[67]

The Mere Proximity of a third person to the scene of the homicide or assault is irrelevant.[68]

The Arrest or Indictment of another person for the homicide cannot be shown.[69]

B. The Hostility of Third Persons Toward the Deceased may be shown when coupled with other evidence connecting them with the homicide or showing their opportunity to commit it.[70] Such

in the same room, was held improperly excluded. Com. *v.* Werntz, 161 Pa. St. 591, 29 Atl. 272.

In Synon *v.* People, 118 Ill. 609, 59 N. E. 508, it was held competent to show that a person living with the deceased prior to the homicide was an ex-convict, and that he knew when the deceased had money on his person; that he disappeared on the day the crime was committed and had not been heard of since, and any other fact or circumstance tending to show that such person, and not the accused, was the criminal.

A question, "Do you know a fact pointing to the guilt of someone else?" is not competent because too general. Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28.

65. People *v.* Mitchell, 100 Cal. 328, 34 Pac. 698.

66. Means *v.* State, 10 Tex. App. 16, 38 Am. Rep. 640. See also Crawford *v.* State, 112 Ala. 1, 21 So. 214.

In Holt *v.* State, 9 Tex. App. 571, a third person's previous threats, and his subsequent declarations of his guilt, were held properly excluded, even though it appeared that he had prepared himself to execute his threats and shortly before the killing was seen going in the direction of the scene of the homicide, because it appeared almost conclusively from the circumstances that the defendant alone was present when the homicide was committed.

67. State *v.* Gee, 92 N. C. 756.

The defendant may show that "some other person committed the homicide by the same character of evidence relied upon by the state for a conviction. If, however, the facts show that more than one person participated in the homicide this evidence would possess no tendency to weaken the case as made by the state, and should therefore be rejected unless under peculiar circumstances, which we will not attempt to give at this time." Dubose *v.* State, 10 Tex. App. 230.

68. State *v.* Beck, 73 Iowa 616, 35 N. W. 684; State *v.* Myers, 12 Wash. 77, 40 Pac. 626.

69. Taylor *v.* Com., 90 Va. 109, 17 S. E. 812; Baker *v.* State, 122 Ala. 1, 26 So. 194.

70. Crawford *v.* State, 12 Ga. 142; Morgan *v.* Com., 77 Ky. 106; Kunde *v.* State, 22 Tex. App. 65, 3 S. W. 325, *overruling* contrary expressions in previous cases in that state. See Baker *v.* State, 122 Ala. 1, 26 So. 194; Wilkins *v.* State, 35 Tex. Crim. 525, 34 S. W. 627.

Evidence that a third person, under the belief that deceased had eloped with his wife, was hunting for the latter with a gun and making threats against him about the time of the homicide was held improperly excluded, where the evidence as to the time and circumstances of the homicide was wholly circumstantial. Alexander *v.* United States, 138 U. S. 353.

Deceased's Feuds with other persons in the neighborhood cannot be shown in the absence of evidence connecting such persons with the homicide. Horn *v.* State (Wyo.), 73 Pac. 705.

Of Persons in the Neighborhood. In Leonard *v.* Territory, 2 Wash.

evidence, however, may be excluded for remoteness[71] in the discretion of the trial court.[72] The dangerous or bad character of the deceased is not admissible to show that the crime may have been committed by his enemies.[73]

C. Threats by Third Person. — Previous threats by a third person against the deceased are not of themselves competent evidence that he committed the crime with which the accused is charged, but when coupled with other evidence tending to show his opportunity to commit or connection with the homicide, such threats are admissible in support of this defense.[74]

D. Motive of Third Person. — Evidence tending to show a third person's motive for killing the deceased is not admissible unless such person is otherwise connected in some way with the homi-

Ter. 381, 7 Pac. 872, testimony offered by the defendant to prove "that a person other than himself residing in the neighborhood of the supposed homicide was there on the day of it, entertained hostile feelings toward the deceased and had threatened to kill him" was held improperly excluded. "The evidence for the prosecution was wholly circumstantial and some of it tending to identify the defendant as the slayer was of a like description to that proposed to be obtained from this witness. Defendant, therefore, had a right to meet and neutralize or overcome the evidence of the prosecution, tending to identify himself as the guilty party by evidence of the same nature tending to identify some other person as the perpetrator of the crime."

Where there was some evidence "of the proximity on the day of the homicide of other persons, whose identity was not recognized" the exclusion of evidence as to the animosity and threats against deceased of persons living in his vicinity was held error. Murphy *v.* State, 36 Tex. Crim. 24, 35 S. W. 174.

71. Wilkins *v.* State, 35 Tex. Crim. 525, 34 S. W. 627; McInturf *v.* State, 20 Tex. App. 335.

72. Com. *v.* Abbott, 130 Mass. 472.

73. Lawrence *v.* State (Fla.), 34 So. 87; State *v.* D'Angelo, 9 La. Ann. 46.

Murders Committed by the Deceased were held properly excluded where there was no offer to show that "anyone connected with or related to, or who were likely to avenge the murdered parties, were in proximity to the place of the homicide at or about the time it was committed, or had any opportunity to kill the deceased." The court states the rule to be: "Investigation with reference to other parties than the accused should not be permitted in cases either positive or circumstantial unless the inculpatory facts are such as are proximately connected with the transaction. In other words, to show remote acts or threats would not be admissible unless there were other facts also in proof proximately and pertinently connecting such third party with the homicide at the time of its commission. McInturf. *v.* State, 20 Tex. App. 335.

74. *Alabama.* — Banks *v.* State, 72 Ala. 522.

Florida. — Lawrence *v.* State, 34 So. 87.

Georgia. — Woolfolk *v.* State, 81 Ga. 551, 8 S. E. 724; Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.

Indiana. — Keith *v.* State, 157 Ind. 376, 6 N. E. 716; Green *v.* State, 154 Ind. 635, 57 N. E. 637.

Missouri. — State *v.* Cooper, 83 Mo. 698.

North Carolina. — State *v.* Gee, 92 N. C. 756; State *v.* Duncan, 28 N. C. 236.

Texas. — Martin *v.* State, 44 Tex. Crim. 279, 70 S. W. 973; Henry *v.* State (Tex. Crim.), 30 S. W. 802; Hart *v.* State, 15 Tex. App. 202, 49 Am. Rep. 188; Walker *v.* State, 6 Tex. App. 576.

cide.[75] Where, however, the evidence is wholly circumstantial, and the state has introduced evidence to show the defendant's motive, it is held that the latter is entitled to show the same or a similar motive on the part of third persons without other evidence connecting them with the homicide.[76]

E. Admissions and Confessions by Third Persons. — Neither the extrajudicial admissions or confessions[77] of third persons,

See Harris *v.* State, 31 Tex. Crim. 411, 20 S. W. 916; Boothe *v.* State, 4 Tex. App. 202.

Wisconsin. — Buel *v.* State, 104 Wis. 132, 80 N. W. 78.

Wyoming. — Horn *v.* State, 73 Pac. 705.

Such threats are inadmissible unless it is shown who made them, and there is other evidence tending to connect such person with the crime. State *v.* Johnson, 31 La. Ann. 368.

Threats of a third person, who immediately after the homicide disappeared, are not admissible. Crookham *v.* State, 5 W. Va. 510.

In State *v.* Jones, 80 N. C. 415, evidence that on the night of the murder a third person procured a pistol, saying that deceased had injured him and he was going to hunt him up, and then absented himself and had not returned, was held inadmissible.

Evidence that the person who lived next door to the defendant and the deceased, his wife, was insane; that he had said she was a devil and had threatened to kill her on many occasions, was held properly excluded. Com. *v.* Schmous, 162 Pa. St. 326, 29 Atl. 644.

In State *v.* Hawley, 63 Conn. 47, 27 Atl. 417, where defendant's wife had been separately indicted for the homicide and defendant claimed that she was in a position in which she might have committed the offense, evidence as to her previous threats against the deceased was held competent. *Distinguishing* State *v.* Beaudet, 53 Conn. 536, 4 Atl. 237, in which the threats of a third person were excluded because there was no other evidence connecting him with the homicide.

75. Com. *v.* Abbott, 130 Mass. 472; Means *v.* State, 10 Tex. App. 16, 38 Am. Rep. 640; Dubose *v.* State, 10 Tex. App. 230; Josephine *v.* State, 39 Miss. 613; Walker *v.* State, 139 Ala. 56, 35 So. 1011; Ogden *v.* State (Tex. Crim.), 58 S. W. 1018; State *v.* Brown, 21 Kan. 43.

76. Sawyers *v.* State, 83 Tenn. 694. See also State *v.* Johnson, 30 La. Ann. 921; Morgan *v.* Com., 77 Ky. 106; Leonard *v.* Territory, 2 Wash. Ter. 381, 7 Pac. 872.

Where the evidence connecting defendant with the crime was wholly circumstantial, and in proof of motive evidence as to his unlawful intimacy with the deceased, resulting in her pregnancy, had been given, the exclusion of testimony offered by the defendant as to a similar intimacy between deceased and a third person was held improperly excluded. Franklin *v.* Com., 20 Ky. L. Rep. 1137, 48 S. W. 986.

77. *Alabama.* — Goodlett *v.* State, 136 Ala. 39, 33 So. 892; Owensby *v.* State, 82 Ala. 63, 2 So. 764.

Indiana. — Jones *v.* State, 64 Ind. 473; Green *v.* State, 154 Ind. 635, 57 N. E. 637.

Kentucky. — Selby *v.* Com., 25 Ky. L. Rep. 2209, 80 S. W. 221.

Massachusetts. — Com. *v.* Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235.

Missouri. — State *v.* Duncan, 116 Mo. 288, 22 S. W. 699.

North Carolina. — State *v.* Boon, 80 N. C. 461; State *v.* Duncan, 28 N. C. 236.

Texas. — Bowen *v.* State, 3 Tex. App. 617.

Vermont. — State *v.* Totten, 72 Vt. 73, 47 Atl. 105.

The letter of a third person, indicating that he was the murderer, together with an anonymous letter to the sheriff containing a confession of guilt, was held properly excluded in

though made as dying declarations,[78] nor their acts and conduct[79] in the nature of admissions, are admissible to show that they and not the defendant are guilty of the homicide charged. Such evidence has, however, in some cases, been held admissible.[80] Where, however, such third person is a witness for the prosecution, evidence as to his admissions of his own guilt is admissible without a preliminary showing of his connection with the crime.[81]

Flight of Another Charged With the Crime. — Evidence as to the flight of another person suspected of or charged with the same offense for which the defendant is on trial is not admissible in his favor.[82]

F. Declarations and Apprehensions of Deceased. — The declarations of the deceased concerning the hostility of other persons toward him,[83] and his apprehension of bodily harm from them, are not admissible.[84]

G. Rebuttal by State. — Where the defendant contends that the crime was committed by another person the state may introduce any competent testimony tending to show that such person was not guilty of the crime.[85] But the failure of the proper officers to arrest

Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636.

The expressions of opinion by the members of the posse who were following the defendant that the deceased had been accidentally killed by one of themselves is inadmissible. Cortez *v.* State, 43 Tex. Crim. 375, 66 S. W. 453.

The Declarations of a Co-Defendant, made directly after the fatal affray, are inadmissible in favor of the other defendant, whether they tend to implicate the former or excuse the latter. Crosby *v.* People, 137 Ill. 325, 27 N. E. 49.

78. West *v.* State, 76 Ala. 98.

79. State *v.* Gee, 92 N. C. 756; Owensby *v.* State, 82 Ala. 63, 2 So. 764.

80. Where the homicide was committed during a free fight between a number of persons, and it was doubtful whether defendant struck the fatal blow, evidence that one of the other participants immediately after the killing and after leaving the scene thereof said that he "had gotten his man" was held admissible in behalf of the defendant, it appearing that only one man was killed. So, also, evidence that the same person fled and resisted arrest on the day following was held competent to show that he and not the defendant did the killing. Jackson *v.* State (Tex. Crim.), 67 S. W. 497. See also Bailey *v.* State, 26 Tex. App. 706, 9 S. W. 270; State *v.* Terrell, 12 Rich. L. (S. C.) 321.

81. *Ex parte* Gilstrap, 14 Tex. App. 240.

82. Levison *v.* State, 54 Ala. 520; Owensby *v.* State, 82 Ala. 63, 2 So. 764; Goodlet *v.* State, 136 Ala. 39, 33 So. 892.

83. Murphy *v.* State, 36 Tex. Crim. 24, 35 S. W. 174; Goodlett *v.* State, 136 Ala. 39, 33 So. 892; State *v.* Beck, 73 Iowa 616, 35 N. W. 684; Tatum *v.* State, 13 Ala. 32, 31 So. 369.

84. Wallace *v.* State (Tex. Crim.), 81 S. W. 966; Woolfolk *v.* State, 85 Ga. 69, 11 S. E. 814.

85. People *v.* Clarke, 130 Cal. 642, 63 Pac. 138.

Cecil *v.* State, 44 Tex. Crim. 450, 72 S. W. 197, in which evidence as to such person's movements shortly before and after the homicide was held competent on the part of the state.

Where the crime was committed in such a manner that the perpetrator's clothes must have become bloody, evidence that the clothes of a third person, whom defendant accused of the crime had no blood on them the morning after the killing, was held properly admitted. People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

such person cannot be shown for this purpose; nor can the dismissal of a charge against him for the commission of the homicide.[86]

10. Accident or Mistake. — A. GENERALLY. — The defendant may show any facts or circumstances which tend to prove that the killing was an accident,[87] and after introducing such evidence he may prove that his previous relations with the deceased were friendly.[88] The state may likewise show circumstances tending to prove the contrary,[89] or rebut the evidence of the defendant.[90] It is competent to show the actions, manner and appearance of the defendant immediately after the homicide,[91] and the fact that he had a motive.[92]

B. THE OPINION of an eye-witness as to whether or not the killing was accidental is not admissible.[93] But a competent expert may give his opinion that the deceased's wounds could not have been inflicted accidentally in the manner claimed by defendant.[94]

C. THE DECLARATIONS OF THE DECEASED are not competent[95] on

The Friendly and Intimate Relations between such person and the deceased up to the time of the homicide may be shown. Walker *v.* State, 17 Tex. App. 16.

86. Cecil *v.* State, 44 Tex. Crim. 450, 72 S. W. 197.

The fact that the sheriff organized a posse immediately after the homicide and thoroughly searched the locality of the homicide without discovering a single questionable character is not competent. Lillie *v.* State (Neb.), 100 N. W. 316.

87. In support of the theory that the discharge of his pistol, when taken from his pocket, was accidental, the defendant offered evidence that he carried his money and his revolver in the same pocket, and that when about to use money on the day of the homicide, at other places, he had taken the revolver out of his pocket. The exclusion of this evidence was held error. Also evidence that the defendant did not point the revolver, which was the cause of the homicide, is competent. State *v.* Wright, 112 Iowa 436, 84 N. W. 541.

88. Nelson *v.* State, 61 Miss. 212.

89. Evidence as to Defendant's Possession of a Pistol shortly previous to the homicide is admissible where he claims that the shooting was accidental. State *v.* McGowan, 66 Conn. 392, 34 Atl. 99.

90. The Pregnancy of the Deceased, defendant's wife, was held a competent circumstance in rebuttal of defendant's statement that she was killed accidentally during his attempt to shoot a person whom he found in adultery with her. Washington *v.* State (Tex. Crim.), 79 S. W. 811.

91. Cross *v.* State, 68 Ala. 476.

92. Defendant's Jealousy of the Deceased. — Fitzgerald *v.* State, 112 Ala. 34, 20 So. 966. See *supra* this article, "Motive."

93. State *v.* Vines, 93 N. C. 493, 53 Am. Rep. 466; Watts *v.* State, 30 Tex. App. 533, 17 S. W. 1092; Barnard *v.* State (Tex. Crim.), 73 S. W. 957; State *v.* Ross, 32 La. Ann. 854; Gunter *v.* State, 111 Ala. 23, 20 So. 632.

94. Davis *v.* State, 38 Md. 15. See *supra* this article, "Cause of Death — Opinion."

95. Collins *v.* State, 46 Neb. 37, 64 N. W. 432, in which a declaration by deceased half an hour after the shooting, that it was an accident, held competent as part of the *res gestae.*

Where the deceased, an aged woman, was found dead lying on her face in a pool of water near her house, and defendant claimed that she had fallen in a fit and been accidentally drowned, evidence as to her

this issue unless part of the *res gestae* or dying declarations,[96] and even these latter are not admissible when consisting merely of the deceased's opinion that the act was or was not accidental.[97]

D. Poisoning Cases. — Where the alleged cause of death is poisoning, any facts or circumstances showing an opportunity for the accidental taking of poison by deceased are competent.[98]

11. Self-Defense. — A. Circumstances of the Act. — a. *Generally.* — In determining whether the defendant acted in self-defense it is competent to show all the circumstances under which the fatal difficulty occurred, and which could in any manner have affected the defendant's motives and apprehensions,[99] or indicate the mental state of the deceased.[1]

b. *Appearance of Parties.* — The testimony of a witness as to

previous declarations that she had several times fallen on her face when attacked with a fit was held properly excluded as hearsay. State *v.* Dart, 29 Conn. 153, 76 Am. Dec. 596.

96. Tomerlin *v.* State (Tex. Crim.), 26 S. W. 66.

97. Ogletree *v.* State, 115 Ga. 835, 42 S. E. 255; Kearney *v.* State, 101 Ga. 803, 29 S. E. 127. But see State *v.* Lee, 58 S. C. 335, 36 S. E. 706; Tomerlin *v.* State (Tex. Crim.), 26 S. W. 66.

98. Hall *v.* State, 132 Ind. 317, 31 N. E. 536, in which it was held proper to show that the deceased kept bottles of medicine marked poison, and in connection with them also kept bottles of whisky marked in the same manner to deceive his family.

See *supra* this article, "Other Crimes" for the competency of evidence to negative accident or mistake in poisoning cases.

Previous Use by Deceased. Evidence that ten years previous to the alleged poisoning by arsenic the deceased had been known to take arsenic medicinally may be admissible on behalf of the defendant, if accompanied by other testimony showing such act or habit within any reasonable period previous to the homicide, otherwise it is inadmissible. Goersen *v.* Com., 106 Pa. St. 477, 51 Am. Rep. 534.

99. Alexander *v.* Com., 105 Pa. St. 1; Gedye *v.* People, 170 Ill. 284, 48 N. E. 987.

"Before a jury shall be required to say whether the defendant did anything more than a reasonable man should have done under the circumstances, it should, as far as can be, be placed in the defendant's situation, surrounded with the same appearances of danger, with the same degree of knowledge of the deceased's probable purpose which the defendant possessed." State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455. See also Williams *v.* People, 54 Ill. 422.

Difficulty of Accurately Observing Movements of Deceased. — Keaton *v.* State, 99 Ga. 197, 25 S. E. 615.

Where defendant has introduced evidence to show a violent struggle between himself and deceased, the state in rebuttal may show that from the position of the body of the deceased there could not have been such struggle. Com. *v.* Conroy, 207 Pa. St. 212, 56 Atl. 427.

Evidence on the part of the defendant that the homicide occurred in a house of ill-fame was held irrelevant. Braswell *v.* State, 42 Ga. 609.

1. The fact that the deceased went to the place of the homicide on the invitation of a third person is admissible as part of the *res gestae*. Watkins *v.* United States, 3 Ind. Ter. 281, 54 S. W. 819, *citing* Com. *v.* Webster, 5 Cush. (Mass.) 295.

In Explanation of Deceased's Threatening Action in leaning over in his hack as though about to get his gun, it was held proper to show that deceased at that time had no gun in his hack, although this was objected to by the defendant, because even if true it was not known to him. Williams *v.* State, 30 Tex. App. 429, 17 S. W. 1071.

appearance of the defendant[2] or the deceased[3] at the time of the homicide, whether indicating fear or anger, is relevant and not inadmissible as a conclusion.

c. *Deceased's Intoxication.* — The defendant may show the deceased's intoxication at the time of the homicide as bearing upon his motive or intention,[4] and the defendant's belief in the imminence of his danger,[5] except when the circumstances show no foundation whatever for such a belief,[6] and the fact that he had been drinking a short time previous to the difficulty is competent evidence of such condition.[7] Such condition may also be proved by the state for the purpose of showing that the deceased was incapable of doing serious injury.[8]

d. *Injury to Defendant's Person and Clothing.* — The nature and extent of the defendant's injuries received at the hands of the prosecuting witness or the deceased may be proved in corroboration of a claim of self-defense.[9]

Bruises and Injury to Clothing.— The defendant may also show that shortly after the homicide he had fresh bruises upon his person, and rents or holes in the clothing that he wore during the difficulty. Nor is it necessary to connect such bruises with the deceased other-

Motives of Deceased's Companions. — Where the homicide was the result of a conflict between the opposing factions of negroes and white people who were present at the defendant's trial for another offense, and the evidence was conflicting as to which side began the conflict, it was competent for the state to ask one of the persons who was present and participated why he went there armed, on the ground that proof of innocent motives of those present would tend to show that they did not bring on the difficulty. Wicks *v.* State, 28 Tex. App. 448, 13 S. W. 748.

2. Brownell *v.* People, 38 Mich. 732; State *v.* Tighe, 27 Mont. 327, 71 Pac. 3.

3. State *v.* Tighe, 27 Mont. 327, 71 Pac. 3.

An eye-witness may testify as to the deceased's manner when advancing upon the defendant, whether threatening or conciliatory. Frady *v.* State, 67 Tenn. 349.

The Angry Looks of the Deceased just before he overtook the defendant and before the killing took place were held improperly excluded because such fact tended to show the deceased's state of mind, and was a competent circumstance on the question as to who was the aggressor. State *v.* Cross, 68 Iowa 180, 26 N. W. 62; *distinguishing* State *v.* Sullivan, 51 Iowa 144, 50 N. W. 572.

Evidence that after the first difficulty between defendant and deceased, and shortly before the homicide, the latter "looked scared" and "looked as if he wanted to get away" was held properly admitted. State *v.* Ramsey, 82 Mo. 133.

4. State *v.* Westfall, 49 Iowa 328; Holmes *v.* State, 11 Tex. App. 223; Thomas *v.* State, 40 Tex. 36.

The fact that the deceased was a "drinking man" was held immaterial on the ground that evidence of intoxication should be confined to the time of the homicide. Seaborn *v.* Com., 25 Ky. L. Rep. 2203, 80 S. W. 223.

5. Com. *v.* Brewer, 164 Mass. 577, 42 N. E. 92.

6. State *v.* Mullen, 14 La. Ann. 570.

7. State *v.* Westfall, 49 Iowa 328.

8. State *v.* Horne, 9 Kan. 81.

9. People *v.* Hall, 57 Cal. 569.

Pain and Suffering. — Where the defendant alleges that he was attacked and beaten by the deceased, evidence as to his pain and suffering is admissible if confined to a reasonable period of time elapsing after the

wise than by their proximity in point of time.[10] The prosecution may show in rebuttal of alleged injuries that no marks or bruises were found on defendant's body.[11]

e. *Nature of Deceased's Injuries.* — The nature and extent of the deceased's injuries received at the time of the homicide,[12] or in the difficulty leading up to it,[13] may be considered in determining who was the aggressor.

f. *Possession and Use of Weapon by Deceased.* — **(1.) Generally.** In support of his plea of self-defense the defendant may show that

homicide, and his exclamations and expressions indicating the existence of present pain and suffering made by him on the day of the homicide, whether given in the course of a medical examination, or while describing his particular pain or trouble to another, are also competent. Powell *v.* State, 101 Ga. 9, 29 S. E. 309.

10. Atkins *v.* State, 16 Ark. 568.

In Scott *v.* State, 56 Miss. 287, the evidence was conflicting as to whether or not the deceased struck at the defendant with a stick which he had in his hand. The exclusion of evidence that on the evening of the day of the homicide the defendant had a bruise freshly made on the left side of his head was held error, although the accused admitted that he could not make proof by other evidence that the bruise was received in the combat. The defendant's plea being self-defense, he "was entitled to prove any circumstances that might be calculated, however, feebly, to sustain his hypothesis."

Marks on Body and Clothing. Where the evidence as to whether the deceased assaulted the defendant was conflicting, the exclusion of testimony that late on the evening of the day following the homicide the witness saw several cuts in the defendant's clothes, being the same which the latter wore at the time of the homicide, and also a cut on defendant's neck, neither of which was done previous to the difficulty, was held error on the ground that they were physical facts of an exculpatory nature corroborating the defendant's testimony as to the deceased's hostile conduct. "It was the defendant's right to support his defense by every legitimate circumstance; that is, by every fact, however apparently trivial, which would tend in even a remote degree to that end. That fresh knife cuts were seen upon his person a few hours after the rencontre might convince the jury that Dent had assaulted and attempted to kill him with a knife, and, if thus convinced, he might be acquitted. . . . That evidence of this character is easily fabricated is true, but this fact is no valid objection to its competency. It is an objection only to its weight, and such objection can only be considered by the jury. . . . It is not the time when the cuts are first discovered that controls the competency of evidence in regard to them. It is the time when they were inflicted that determines that question." Good *v.* State, 18 Tex. App. 39, *distinguishing* West *v.* State, 7 Tex. App. 150, on the ground that in that case there was an uncertainty as to the exact time after the killing when the cut was observed.

11. Where defendant claims that the homicide was committed during a fight in which he was knocked down and received injuries from deceased, it is competent to show that when arrested he had no marks of injury upon his person. State *v.* Dillon, 74 Iowa 653, 38 N. W. 525.

12. Testimony as to where the wound was located is admissible as tending to show that the deceased was not making a hostile demonstration, and the witness may indicate its location by pointing out the spot on the body of a person in full view of the jury. Gunter *v.* State, 111 Ala. 23, 20 So. 632.

13. Evidence of bruises on the body of the deceased is admissible on behalf of the prosecution to show who was the aggressor in the difficulties during the day of the homicide, and leading up to it, although

the deceased had a deadly weapon in his hands or on his person at the time of the homicide.[14] It has been held that his previous possession of such a weapon is not relevant unless known to the defendant.[15] His habit of going armed is elsewhere discussed.[16]

(2.) Previous Preparation. — It seems the deceased's previous preparation of such weapon for use cannot be shown unless known to the defendant at the time of the homicide,[17] or part of the *res gestae*.[18]

(3.) Rebuttal. — (A.) GENERALLY. — In rebuttal of evidence that the defendant believed that the deceased was armed at the time of the homicide the prosecution may show that the deceased was in fact not armed,[19] but cannot prove this by evidence of his previous declara-

the deceased was killed by a pistol-shot. Billings *v.* State, 52 Ark. 303, 12 S. W. 574.

14. Evidence tending to show deceased's possession of a pistol at the time of the homicide held admissible in corroboration of defendant's testimony that deceased made a motion as though to draw a weapon. Lilly *v.* State, 20 Tex. App. 1. See Ellison *v.* State, 12 Tex. App. 557. But see Stacey *v.* State (Tex. Crim.), 33 S. W. 348.

The deceased's possession of a box of cartridges and a pistol is a competent circumstance tending to show that he had prepared for the difficulty and was the aggressor. Domingus *v.* State, 94 Ala. 9, 11 So. 190.

The Discharge and Reloading, twenty minutes before the homicide, of two pistols in his possession at the time of the difficulty, competent as part of the *res gestae*, though unknown to defendant. Reynolds *v.* State, 1 Ga. 222.

Presumption of Intention From Possession. — A statute providing in effect that the use of a deadly weapon raises a presumption of an intent to kill, when applied to the threatening acts of the deceased in attempting to draw his pistol, does not require a showing that he actually used the pistol in order to raise a presumption that he intended to kill the defendant. Ward *v.* State, 30 Tex. App. 687, 18 S. W. 793.

Opinion as to Recent Use. — A witness, acquainted with the use of firearms and their appearance after being used, may give his opinion that the gun and empty shell found near the deceased's body had been recently fired. State *v.* Davis (S. C.), 33 S. E. 449.

Deceased's Skill in the Use of Weapons. — See Moriarty *v.* State, 62 Miss. 654.

15. Adams *v.* People, 47 Ill. 376; Carr *v.* State, 14 Ga. 358. *Contra*, Holler *v.* State, 37 Ind. 57, 10 Am. Rep. 74. See State *v.* Lewis, 118 Mo. 79, 23 S. W. 1082.

16. See *infra*, "Habits of Deceased — Habit of Carrying Weapons."

17. Carr *v.* State, 14 Ga. 358. Where it appeared that deceased had a pistol in his pocket at the time of the homicide, but made no apparent attempt to use it, evidence as to his purchase of ammunition several hours previous to the homicide was held properly excluded because not part of the *res gestae*, and not known to the defendant. Turpin *v.* State, 55 Md. 462.

18. Reynolds *v.* State, 1 Ga. 222.

19. People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75.

Where defendant testifies that he believed deceased was armed, it is competent for the state to show that such was not the fact. People *v.* Seehorn, 116 Cal. 503, 48 Pac. 495.

Shortly After. — Testimony that the deceased had no weapon upon his person shortly after the homicide is admissible to rebut evidence that at the time of the homicide he made a demonstration as if to draw a pistol. Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046.

Evidence That Three Days Previous to the homicide the deceased left his pistol at a bank was held admissible as a circumstance tending to

tions[20] or of his habit of not carrying weapons.[21] Negative testimony is competent for this purpose.[22]

(B.) Condition of Weapon. — The state cannot show that the weapon was in such condition as to be incapable of effective use unless it appears that this fact were known to the defendant at the time;[23] but it is held to the contrary.[24] It is competent to show that the condition of deceased's gun may have been due to the subsequent acts of others.[25]

(C.) Explanation of Possession. — In rebuttal, facts tending to explain the reason why the deceased was armed at the time of the homicide are competent,[26] but only such as were known to the defendant are relevant for this purpose.[27]

show that he had no pistol at the time of the homicide. State *v.* Reed, 137 Mo. 125, 38 S. W. 574.

20. People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75.

21. Parker *v.* Com., 96 Ky. 212, 28 S. W. 500; People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75.

22. Tate *v.* State, 35 Tex. Crim. 231, 33 S. W. 121.

Negative Testimony. — Testimony of an employee of deceased who had been living with him that he had never seen deceased have the pistol introduced in evidence and alleged to have been held by him when he was killed, is admissible. State *v.* Lattin, 19 Wash. 57, 52 Pac. 314.

The deceased's wife may testify as to the number and character of the firearms owned by the deceased, and as to whether he had them with him at the time of the affray, although she was not present at the homicide. State *v.* Crawford, 31 Wash. 260, 71 Pac. 1030.

Where the evidence rendered it doubtful as to whether or not the deceased was armed at the time of the homicide the testimony of his wife that at that time he owned no firearms, and had none at home, was held competent. Pettis *v.* State (Tex. Crim.), 81 S. W. 312. *Distinguishing* McCandless *v.* State, 42 Tex. Crim. 58, 57 S. W. 672.

A witness who saw the deceased after the homicide may testify that if the latter had been in possession of a revolver the witness would have observed it. Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

23. Evidence that deceased's pistol, when taken from his body, was loaded with rim-fire cartridges, but was only capable of exploding center-fire cartridges, and therefore could not have been discharged as loaded, was held properly excluded as irrelevant and immaterial because it was a fact not known to the defendant, and was not shown to have been known to the deceased. Everett *v.* State, 30 Tex. App. 682, 18 S. W. 674.

24. State *v.* Chevallier, 36 La. Ann. 81, in which evidence that the deceased's pistol could not have been snapped was held competent.

25. Where evidence was introduced by the defendant tending to show that deceased's gun had been discharged, it was held competent for the prosecution to show that the gun had been in the hands of several persons after the homicide, and before it was seen by the witness testifying as to its condition. State *v.* Shaw, 73 Vt. 149, 50 Atl. 863.

26. Information as to Defendant's Hostile Statements, derived from a third person, *held* competent. People *v.* Shea, 8 Cal. 539.

27. Karr *v.* State, 100 Ala. 4, 14 So. 851, 46 Am. St. Rep. 17, in which the admission of a threatening and abusive anonymous letter received by the deceased two months previous to the homicide was held error on the ground of the remoteness of the threats therein contained, and because defendant was not shown to have been in any way connected therewith, or cognizant of its existence and reception by the deceased.

B. Relations of Parties. — The relations of the parties at the time of the homicide may be shown upon the issue of self-defense.[28] But the defendant cannot show his own previous unfriendly acts toward the deceased as evidence of the latter's vindictiveness, unless the fatal difficulty is in some way connected with such acts.[29]

C. Direct Testimony of Defendant. — The defendant may testify directly as to his belief and apprehension at the time of the homicide that he was in immediate great danger from the deceased,[30] even though the evidence shows that he had no reasonable ground for such belief,[31] and may give his reasons therefor.[32] So also he may testify as to what he thought the deceased intended to do.[33]

28. Helms *v.* United States, 2 Ind. Ter. 595, 52 S. W. 60; De Forest *v.* State, 21 Ind. 23.

In determining the reasonableness of the defendant's fear it is admissible to show the exact relations and feelings of the parties toward each other, and for this purpose evidence of previous conversations, difficulties, attacks and threats is admissible. Glenewinkel *v.* State (Tex. Crim.), 61 S. W. 123.

Facts Tending to Show Jealousy of the Deceased toward the defendant are competent to show who was at fault in bringing on the difficulty. Walker *v.* State, 63 Ala. 105.

The Nature and Terms of a Compromise between the parties subsequent to their first difficulty are admissible to show who was in the wrong, in the difficulty immediately preceding the homicide, which arose over the same question previously in dispute. Com. *v.* Gray, 17 L. Rep. 354, 30 S. W. 1015.

Previous Malicious Accusation by Deceased Against Defendant. Defendant may show that deceased's accusation against him for a particular crime was made without probable cause and without any belief in its truth, but he cannot show this fact by the opinion of a witness who had investigated the matter and come to this conclusion. Tillery *v.* State, 24 Tex. App. 251, 5 S. W. 842.

29. Daniel *v.* State, 103 Ga. 202, 29 S. E. 767.

30. Com. *v.* Woodward, 102 Mass. 155; Williams *v.* Com., 90 Ky. 596, 14 S. W. 595; Upthegrove *v.* State, 37 Ohio St. 662; Duncan *v.* State, 84 Ind. 204; State *v.* Austin, 104 La. 409, 29 So. 23.

Cross-Examination. — Where the defendant has testified as to his belief in the imminence of his danger it is not competent for the prosecution to question him as to the nature and character of this belief, whether negative or positive, reasonable or unreasonable, strong or weak, sufficient or insufficient, since this is an invasion of the province of the jury. State *v.* Austin, 104 La. 409, 29 So. 23.

But in Alabama and Missouri the rule is otherwise; the defendant can only state the facts which might induce such a belief. State *v.* Gonce, 87 Mo. 627, *holding* "that it was for the jury to determine from the facts in evidence whether defendant had reasonable cause to believe or apprehend danger to his life or limb." In Mann *v.* State, 134 Ala. 1, 32 So. 704, the defendant's testimony that there was no reasonable or safe method of escape was held properly excluded as invading the province of the jury.

31. Williams *v.* Com., 90 Ky. 596, 14 S. W. 595.

32. Upthegrove *v.* State, 37 Ohio St. 662; State *v.* Austin, 104 La. 409, 29 So. 23.

33. Taylor *v.* People, 21 Colo. 426, 42 Pac. 652.

Defendant may testify as to what he thought the deceased intended to do at the time of the homicide where there is evidence that the latter made some hostile demonstration. Wallace *v.* United States, 162 U. S. 466.

Com. *v.* Woodward, 102 Mass. 155, in which the defendant's testimony

D. Lawful Purpose of Deceased. — The lawful and inoffensive purpose of the deceased known to the defendant at the time of the homicide may be shown by the prosecution to rebut the theory of self-defense.[34] But the previous acts and declarations of the deceased, not part of the *res gestae* and not known to the defendant, are not admissible to show the deceased's lawful or peaceable purpose.[35]

E. Apprehension of Danger. — a. *Facts Not Known to Defendant* are not admissible to show his apprehension of danger.[36]

b. *Precautionary Measures.* — The defendant may show what precautions he took to avoid anticipated injury,[37] but he cannot show that he attempted to have the deceased placed under bond to keep the peace because of threats or hostile conduct,[38] nor can the prosecution show that he neglected to take such action.[39]

c. *Warnings by Third Persons.* — The previous warnings as to deceased's violent intentions, given to defendant by third persons, are not admissible.[40] It is held to the contrary, however, that such

that he meant to hit the deceased's shoulder and not his head was held competent.

34. People *v.* Adams, 137 Cal. 580, 70 Pac. 662; Casner *v.* State, 43 Tex. Crim. 12, 62 S. W. 914. See also State *v.* Moelchen, 53 Iowa 310, 5 N. W. 186.

Deceased's remarks as he approached the accused immediately previous to the homicide, that he was going to bid the latter "good night," were held properly admitted to rebut a showing of self-defense, it appearing to have been made within hearing distance of the accused. People *v.* Farrell (Mich.), 100 N. W. 264.

35. *California.* — People *v.* Fitchpatrick, 106 Cal. 286, 39 Pac. 605.

Kansas. — State *v.* Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

Kentucky. — Parker *v.* Com., 21 Ky. L. Rep. 406, 51 S. W. 573; Com. *v.* Gray, 17 Ky. L. Rep. 354, 30 S. W. 1015.

Mississippi. — Lamar *v.* State, 63 Miss. 265.

Montana. — State *v.* Shafer, 22 Mont. 17, 55 Pac. 526.

Texas. — Burnett *v.* State (Tex. Crim.), 79 S. W. 550; Wall *v.* State (Tex. Crim.), 62 S. W. 1062; Johnson *v.* State, 22 Tex. App. 206, 2 S. W. 609; Casner *v.* State, 43 Tex. Crim. 12, 62 S. W. 914; Stanton *v.* State, 42 Tex. Crim. 269, 59 S. W. 271; Brumley *v.* State, 21 Tex. App. 222, 17 S. W. 140.

"Acts and declarations of deceased, offered for the purpose of showing his friendly disposition toward appellant, or a peaceful motive for his acts and conduct, but which have not been communicated to appellant, are never admissible as evidence against appellant, because they could in no manner be supposed to have influenced his action, and should not be used either to aid in establishing or aggravating his crime, since it is a well-known rule that the facts must be judged and passed upon from appellant's standpoint." Stell *v.* State (Tex. Crim.), 58 S. W. 75.

36. People *v.* Cook, 39 Mich. 236, 33 Am. Rep. 380.

37. Previous Precautionary Measures. — While the defendant may show acts of precaution taken by himself and his family in and about his house shortly previous to the homicide, he cannot show directly that the reason for such precautions was his fear of deceased, this being an inference for the jury to draw. Nunn *v.* Com., 17 Ky. L. Rep. 1211, 33 S. W. 941.

38. State *v.* Doty, 5 Or. 491.

39. Newman *v.* State (Tex. Crim.), 70 S. W. 951.

40. State *v.* Cross, 68 Iowa 180, 26 N. W. 62; Hudgins *v.* State, 2 Ga. 173; Crockett *v.* State (Tex. Crim.), 77 S. W. 4. See "Threats — Information as to," *infra.*

communications made shortly preceding the fatal difficulty, although not of the *res gestae,* are competent evidence to show the defendant's apprehension of serious injury.[41]

d. *Opinion and Apprehension of Third Person.* — **(1.) Generally.** The opinion of a third person that the homicide was committed in self-defense is not competent,[42] nor is the opinion of an eye-witness as to the deceased's purpose and intention during the difficulty,[43] or that the defendant was in imminent danger of great bodily harm,[44] or that the weapon used by the deceased was capable of inflicting serious injury.[45] But such a witness may give his opinion as to whether the defendant could have escaped when attacked by the deceased.[46]

It is not competent to show that defendant was warned to "look out" for the deceased. People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75.

The previous declaration of a third person to defendant that the deceased "would shoot him [defendant] down like a dog" is inadmissible. Poole *v.* State (Tex. Crim.), 76 S. W. 565.

In Monroe *v.* State, 5 Ga. 85, the exclamations of a third person that the deceased was approaching with his gun was held competent, but not his statement that the deceased intended to shoot the defendant.

41. Wood *v.* State, 92 Ind. 269, in which the exclusion of testimony as to warnings by a third person to the defendant concerning violence to be apprehended from the accused, made immediately before the homicide, was held error. "Statements made a few minutes before the encounter, and while the deceased was within full sight and hearing, and made in connection with threats uttered by the deceased a minute or two before ought to have gone to the jury, whether they were repetitions of the threats of the deceased or the statements of the fears of the witness."

The statement of a bystander, who was in no way connected with the homicide, made in the hearing of the accused immediately preceding the fatal shot, that the deceased was about to attack the accused, although not a part of the *res gestae,* was held improperly excluded because it tended to show that the accused was acting in good faith and under reasonably grounded fear. Stroud *v.* Com., 14 Ky. L. Rep. 179, 19 S. W. 976.

42. People *v.* Reed (Cal.), 52 Pac. 835.

43. Hawkins *v.* State, 25 Ga. 207, 71 Am. Dec. 166; Hudgins *v.* State, 2 Ga. 173; State *v.* Scott, 26 N. C. 409, 42 Am. Dec. 148.

The opinion of a witness as to what the deceased intended to do with a pistol, for the possession of which he was struggling with a third person at the time he was shot by the defendant, is not admissible. Gardner *v.* State, 90 Ga. 310, 17 S. E. 86, 35 Am. St. Rep. 202.

In State *v.* Brooks, 39 La. Ann. 817, 2 So. 498, it was held no error to exclude evidence as to the impression produced upon the mind of the witness, a bystander, by the deceased's action in throwing his hand to his hip pocket.

The opinion of a witness who has testified to the particulars of the fatal difficulty that at a given moment the time had come for the accused "to either run or fight" is inadmissible. Lowman *v.* State, 109 Ga. 501, 34 S. E. 1019.

Testimony of a witness that from the demonstrations of the deceased and his manner of expression the witness believed deceased was about to hurt the defendant, held inadmissible. Smith *v.* Com., 23 Ky. L. Rep. 2271, 67 S. W. 32.

44. State *v.* Rhoads, 29 Ohio St. 171; Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269; State *v.* Summers, 36 S. C. 479, 15 S. E. 369.

45. Thomas *v.* State, 40 Tex. 36.

46. Stewart *v.* State, 19 Ohio 302, 53 Am. Dec. 426. "A variety of cir-

(2.) As to Defendant's State of Mind. — Another person cannot testify as to the defendant's state of mind at the time of or previous to the homicide.[47] He may, however, as explanatory of his own conduct during the difficulty, state what he thought the defendant intended to do.[48]

(3.) The Effect Produced on a Bystander by the conduct of the deceased at the time of the homicide is a competent circumstance on behalf of the defendant to show the influence of such conduct upon the latter's mind, and the witness may state that his action was due to the conduct and appearance of the deceased.[49]

(4.) The Apprehension of Others as to defendant's safety cannot be shown.[50]

e. *Previous Expressions of Fear and Desire to Avoid Difficulty.* The defendant's previous expressions of his fear of the deceased and his desire to avoid a difficulty with him are not admissible in his

cumstances that could only be perceived, but not detailed, would constitute the aggregate from which the opinion would be formed. The person who had witnessed the transaction could alone, most probably, form any idea on the subject that could be relied on with safety."

47. Testimony that the defendant "was afraid" to work in the field alone or to go about his premises after dark on account of threats made against him by the deceased is incompetent as a conclusion of the witness. Poe *v.* State, 87 Ala. 65, 6 So. 378.

48. In Harrison *v.* State (Tex. Crim.), 25 S. W. 284, on a charge of assault with intent to murder, the testimony of a witness that he struck the defendant over the head with a chair because he was afraid that the latter intended to kill the person assaulted, was held properly admitted and not objectionable as calling for the opinion of the witness. But a witness who was present at the homicide cannot testify that he did not attempt to arrest defendant because he was afraid of him. Carr *v.* State, 23 Neb. 749, 37 N. W. 630.

49. Thomas *v.* State, 40 Tex. 36, *holding* admissible a bystander's reason for his action in seizing the deceased's arm during the fatal difficulty.

Testimony by a witness who was standing just to the left of the defendant immediately before the fatal shot was fired, that "the reason he passed from defendant's left side around behind his back to his right side was that he [witness] expected that deceased would strike at defendant with that billiard cue and that he feared deceased might miss the defendant and hit him" was held improperly excluded on the ground that "the effect produced on a bystander by the conduct of the party [deceased] would illustrate the effect likely to be produced on the mind of the accused himself." Cochran *v.* State, 28 Tex. App. 422, 13 S. W. 651, *quoting* from Thomas *v.* State, 40 Tex. 36.

Testimony of eye-witnesses that the appearance and conduct of the deceased were such as to awaken fear in them was held properly admitted in connection with other testimony as to how deceased appeared and acted on the occasion of the homicide, "to give color to their verbal descriptions and convey to the jury with greater distinctness and emphasis the way in which the aggressor most probably appeared to the defendant." People *v.* Lilly, 38 Mich. 270.

But a witness cannot testify that the position and threatening attitude of the deceased, and his appearance at the time, caused the witness to think that a fight was going to begin, and caused him to leave to avoid danger. Phipps *v.* State, 36 Tex. Crim. 216, 36 S. W. 753.

50. Gregory *v.* State (Tex. Crim.), 48 S. W. 577.

behalf, unless part of the *res gestae*.[51] Such expressions have, however, been held admissible as declarations of mental condition when made such short time previous as to indicate the state of the defendant's mind at the time of the homicide.[52]

f. *Efforts to Effect Reconciliation Through Third Person.* Generally the defendant's previous efforts to induce a third person to effect a reconciliation between himself and the deceased, or an amicable settlement of their difficulties, are not admissible in his behalf,[53] but this is largely dependent upon the facts of the particular case.[54]

g. *Avoidance of Quarrels With Deceased.* — The defendant's previous avoidance[55] of quarrels and conflicts with the deceased, with whom he was on bad terms, is competent in his behalf to show

51. *Alabama.* — Martin *v.* State, 77 Ala. 1.

Missouri. — State *v.* Evans, 65 Mo. 574; State *v.* Umfried, 76 Mo. 404.

Tennessee. — Colquit *v.* State, 107 Tenn. 381, 64 S. W. 713.

Texas. — *Ex parte* Albitz, 29 Tex. App. 128, 15 S. W. 173; Harrell *v.* State, 39 Tex. Crim. 204, 45 S. W. 581; Red *v.* State, 39 Tex. Crim. 414, 46 S. W. 408; Wynne *v.* State (Tex. Crim.), 51 S. W. 909.

Vermont. — State *v.* Raymo, 57 Atl. 993.

Where there was evidence of a previous difficulty between the parties and of threats by the deceased against the defendant, the latter's expression of his fear of the deceased about three minutes previous to the fatal meeting, and while the deceased was in sight, was held properly excluded because hearsay and not part of the *res gestae*. State *v.* Carey, 56 Kan. 84, 42 Pac. 371.

52. Poole *v.* State (Tex. Crim.), 76 S. W. 565. See also Gaines *v.* State, 38 Tex. Crim. 202, 42 S. W. 385; and *supra*, "Lawful Purpose of Defendant — Self-Serving Acts and Declarations."

The defendant's request to the authorities to protect him from anticipated violence at the hands of the deceased, and his declarations that he was afraid the deceased would kill him, made after a difficulty with the deceased a few hours previous to the homicide, are admissible in the defendant's favor to show his intentions at the time of the homicide, his desire for peace and his apprehension of danger. Nelson *v.* State (Tex. Crim), 58 S. W. 107.

53. State *v.* Umfried, 76 Mo. 404; Martin *v.* State, 77 Ala. 1.

The efforts of the defendant to secure the presence of a mutual friend for the purpose of making peace between himself and the deceased on the day of the homicide, in the interval between the first and second difficulty, were held not competent as part of the *res gestae*. State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136; *s. c.* 150 Mo. 12, 51 S. W. 483.

54. Where evidence of a previous difficulty between the parties had been introduced, it was held competent for the defendant to show in connection therewith, and as explanatory of his having remained on his own premises subsequent thereto down to the time of the homicide, that he had gone to a third person, related to him the circumstances of the difficulty, asked his advice and requested him to act as peacemaker, informing him that he was willing to apologize if he had done wrong or to do anything necessary to settle the difficulty, and that he was willing to leave the whole matter to their neighbors to settle; and further that such person advised defendant to remain at home until the troubles could be amicably settled. Everett *v.* State, 30 Tex. App. 682, 18 S. W. 674. See also Gaines *v.* State, 38 Tex. Crim. 202, 42 S. W. 385.

55. State *v.* Westfall, 49 Iowa 328. See Harrell *v.* State, 39 Tex. Crim. 204, 45 S. W. 581.

that he was not the aggressor. His own previous declarations are not competent for this purpose.[56]

h. *Advice of Third Persons.* — It has been held competent for the defendant to show that he was acting at the time of the homicide in accordance with the advice of his friends.[57]

F. Aggression or Provocation of Attack. — a. *Generally.* Any fact is admissible which tends to show which party was the aggressor in the conflict immediately resulting in the homicide, where this question is properly in issue.[58] The previous declarations or expressions of intention by either party are admissible.[59] The

But see State *v.* Noble, 66 Iowa 541, 24 N. W. 34.

56. See "Previous Expressions of Fear and Desire to Avoid Difficulty."

57. Everett *v.* State, 30 Tex. App. 682, 18 S. W. 674.

Evidence that defendant was advised by a friend to go where the assaulted party was and help him gather corn in accordance with defendant's previous agreement, and that defendant immediately acted upon this advice, was held improperly excluded because it was part of the *res gestae* of the defendant's act in going to the place of the homicide and tended to show that such action was with innocent intent. Farrar *v.* State, 29 Tex. App. 250, 15 S. W. 719.

Where it appeared that shortly previous to the homicide the deceased, armed with a gun, was hunting for the defendant and threatening to kill him because of certain alleged insulting conduct, it was held competent for the defendant to show, in explanation of his purpose and motive in seeking the deceased, that he was advised by his friends and relatives to go to the deceased and explain matters, and that he carried a gun only at the solicitation of his brother, who had informed him that the deceased was armed. Simmons *v.* State, 31 Tex. Crim. 227, 20 S. W. 573.

58. "Any fact, however remote, which tends to show that the one or the other was the aggressor is competent. . . . To show that the deceased was the aggressor it was competent to prove his previous conduct toward the defendant; his state of bad feeling toward him, if such existed; or previous threats, whether communicated or not, if any were made; whether he went to the place of conflict armed or not — or any other facts which tend to show whether his going there was peaceable or otherwise. . . . Any testimony which would tend to disprove such facts would be relevant, not for the purpose of vindicating the deceased, for that would be immaterial, but for the purpose of establishing the negative fact that the deceased was not the aggressor, and thereby, inferentially at least, showing the affirmative fact that the defendant was." Watkins *v.* United States, 3 Ind. Ter. 281, 54 S. W. 819. The court disapproves of the reasoning and the conclusion in those cases which hold that the purpose of the deceased, when not known to the defendant, cannot be shown.

59. Leverich *v.* State, 105 Ind. 277, 4 N. E. 852; State *v.* Jefferson, 43 La. Ann. 995, 10 So. 199; Burns *v.* State, 49 Ala. 370.

In People *v.* Arnold, 15 Cal. 476, the deceased's declaration at the time of borrowing a pistol of his intention to use it against the defendant was held properly admitted as part of the *res gestae* of the act of preparation, the evidence rendering it doubtful which party began the assault.

In Horn *v.* State, 98 Ala. 23, 13 So. 329, it was held competent to show a declaration of the defendant previous to the homicide that the deceased had some of his money, that he was going after it or give him "a frailing" as bearing both on the question of malice and as to who was the aggressor.

Inadmissible When Defendant the Aggressor. — Campbell *v.* State, 111 Wis. 152, 86 N. W. 855.

deceased's expressions to others of his animosity toward the defendant are admissible to show that he was the aggressor.[60] It is competent to show the previous conduct of the defendant, indicating his peaceable or hostile intentions,[61] or that of the deceased showing his hostile purpose,[62] or his fear of the defendant.[63]

b. *The Circumstances Immediately Preceding* the homicide may be shown if they tend to illustrate the motives of the parties.[64] Thus

60. "As a general rule, it is admissible in a murder trial, where self-defense is set up, to show that the deceased entertained unfriendly feelings toward the defendant; but the details of conversations showing animosity are generally held inadmissible. But, if proof of hatred or unfriendliness is admissible, we can see no reason why the very language conveying and giving color to this feeling should be held inadmissible. It shows the exact state of feeling." Holley *v.* State, 39 Tex. Crim. 301, 46 S. W. 39. See also Watkins *v.* State, 3 Ind. Ter. 281, 54 S. W. 819.

But see Levy *v.* State, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826; State *v.* Campagnet, 48 La. Ann. 1470, 21 So. 46; State *v.* Gooch, 94 N. C. 987.

61. Stewart *v.* State, 19 Ohio 302, 53 Am. Dec. 426.

Overtures for Peace made by the defendant to the deceased, previous to the homicide, are admissible. Schauer *v.* State (Tex. Crim.), 60 S. W. 249.

General Malice. — Evidence that shortly before the homicide the defendant and his brother attempted in a violent manner to make a third person "treat" them was held admissible as tending to show that they were the aggressors in the subsequent difficulty with deceased. "All the evidence indicates that whichever side provoked it [the difficulty] was actuated by a reckless disposition and utterly disregardful of the rights of others. As illustrative of this, and as tending to support the theory of the state, it was competent to show that defendant and his brother . . . were drinking and carousing, and were manifesting a turbulent and lawless disposition." Clay *v.* State, 40 Tex. Crim. 593, 51 S. W. 370.

62. The Deceased's Hostile Preparations just previous to the homicide, although unknown to defendant, are competent in proof that he was actuated by malice, as they are part of the *res gestae*. Reynolds *v.* State, 1 Ga. 222.

The Fact That Deceased Sought Advice of Counsel as to how he could avoid the legal consequences of killing the defendant is admissible to show his animus, and does not come within the rule of privileged communications between attorney and client. Everett *v.* State, 30 Tex. App. 682, 18 S. W. 674.

In Stewart *v.* State, 19 Ohio 302, 53 Am. Dec. 426, it was held competent to show that the deceased and the persons with him had agreed to go to the defendant's house for the purpose of quarreling with him, and also the conversation of the parties in relation to such agreement, although the defendant was ignorant of these facts.

63. The fact that the deceased, shortly previous to the homicide, fled on the approach of the defendant armed with a pistol, is competent to show his fear of the latter, thus indicating that he was not the aggressor. Red *v.* State, 39 Tex. Crim. 414, 46 S. W. 408.

64. Where the evidence was conflicting as to which party began the difficulty, testimony that while the defendant was dancing someone touched him on the shoulder and said that the deceased was outside and was going to kill him, whereupon the defendant went outside and the shooting occurred soon after, was held admissible as tending to show who began the difficulty. Reeves *v.* State, 34 Tex. Crim. 483, 31 S. W. 382; Watkins *v.* United States, 3 Ind. Ter. 281, 54 S. W. 819.

the directions given by a third person to deceased to prepare himself for the anticipated difficulty may be relevant.[65]

c. *Evidence of the Defendant's Previous Provoking Words* is not admissible on the part of the state to explain the decedent's making the first assault or beginning the difficulty.[66]

d. *Threats.* — Whenever the evidence leaves it doubtful who began the difficulty or there is any evidence tending to show that one or the other party was the aggressor, their previous threats against each other are competent upon this question.[67]

G. Size, Strength and Physical Characteristics of Parties. a. *Generally.* — On the issue of self-defense it is competent to show the relative size and strength of the parties as bearing upon the defendant's apprehension of danger, and the question as to who was the aggressor;[68] and such evidence is competent on behalf of the prosecution in the first instance without waiting for the question to

65. The Declaration of Deceased's Mother, made two hours previous to the homicide, that she had compelled her son, the deceased, to clean up the shotgun and load it with buckshot, and had told him if defendant came on her premises to kill him, was held improperly excluded, on the ground that it tended to show the deceased's hostile preparations and purpose, and rendered more probable the defendant's evidence of self-defense. Tow *v.* State, 22 Tex. App. 175, 2 S. W. 582. But see Sanders *v.* Com., 13 Ky. L. Rep. 820, 18 S. W. 528.

66. State *v.* Bartlett, 170 Mo. 658, 71 S. W. 148, in which the defendant's previous slanders of decedent's brother were held inadmissible for this purpose.

67. *Arkansas.* — Brown *v.* State, 55 Ark. 593, 18 S. W. 1051.

California. — People *v.* Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; People *v.* Travis, 56 Cal. 251.

Illinois. — Sharp *v.* People, 29 Ill. 464.

Indiana. — Wood *v.* State, 92 Ind. 269; Cluck *v.* State, 40 Ind. 263.

Missouri. — State *v.* Hollingsworth, 156 Mo. 178, 56 S. W. 1087; State *v.* Smith, 164 Mo. 567, 65 S. W. 270.

Texas. — Stewart *v.* State, 36 Tex. Crim. 130, 35 S. W. 985. See more fully *infra*, "Threats."

68. *United States.* — Smith *v.* United States, 161 U. S. 85.

Alabama. — Wilkins *v.* State, 98 Ala. 1, 13 So. 312.

Georgia. — Hinch *v.* State, 25 Ga. 699.

Indiana. — Stephenson *v.* State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216.

Iowa. — State *v.* Collins, 32 Iowa 36; State *v.* Benham, 23 Iowa 154, 92 Am. Dec. 417.

Kansas. — Wise *v.* State, 2 Kan. 419, 85 Am. Dec. 595.

Massachusetts. — Com. *v.* Barnacle, 134 Mass. 215, 45 Am. Rep. 319, *distinguishing* Com. *v.* Hilliard, 2 Gray 294, and *overruling* Com. *v.* Mead, 12 Gray 167, 71 Am. Dec. 741.

Michigan. — Brownell *v.* People, 38 Mich. 732; People *v.* Harris, 95 Mich. 87, 54 N. W. 648.

Montana. — State *v.* Shafer, 22 Mont. 17, 55 Pac. 526.

Pennsylvania. — Alexander *v.* Com., 105 Pa. St. 1.

Tennessee. — Boyd *v.* State, 82 Tenn. 161.

Wisconsin. — State *v.* Nett, 50 Wis. 524, 7. N. W. 344.

Cause of Physical Condition. Where the evidence showing the relative physical strength and condition of the defendant and the deceased is unquestioned, it is not competent to inquire into the cause for such physical condition. Mann *v.* State, 134 Ala. 1, 32 So. 704.

Youth of assaulted person. Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17.

be raised by the defendant;[69] but the physical infirmity of the deceased, which is unknown to the defendant, cannot be shown to negative any apprehension by the latter.[70] The size and appearance of the parties may be shown by means of photographs;[71] and specific instances and the results of tests known to the witness may be testified to.[72] The evidence as to the relative strength of the parties must be confined to their physical condition at the time of the homicide.[73]

b. *The Opinion* of a non-expert, however, as to the relative strength of the parties is not competent,[74] although it has been held to the contrary.[75] Expert opinion is not admissible as to the effect of a particular physical disability upon the defendant's courage.[76]

c. *Peculiar Sensitiveness to Fear.* — It is not competent to show the peculiar sensitiveness of the defendant to fear because of the weak and deformed condition of his body.[77]

69. Wilkins *v.* State, 98 Ala. 1, 13 So. 312; Mott *v.* State (Tex. Crim.), 51 S. W. 368; State *v.* Goddard, 162 Mo. 198, 62 S. W. 697.

In Warren *v.* State, 31 Tex. Crim. 573, 21 S. W. 680, the assaulted person's testimony that defendant was a professional pugilist and ex-champion of his class, and a much larger and stronger man than the witness, was held competent to sustain and explain the witness' testimony that he drew his pistol in self-defense in the first instance and not with a desire to seek or provoke a quarrel.

70. State *v.* Cross, 68 Iowa 180, 26 N. W. 62.

71. A Full-length Photograph of the Defendant and a Witness is admissible to show the relative size of the defendant and that he was much smaller than the deceased. Com. *v.* Keller, 191 Pa. St. 122, 43 Atl. 198.

A Photograph of Deceased taken while he was alive, and shown to be a correct likeness, is admissible as evidence of his physical characteristics and hence, as tending to strengthen or rebut the defendant's alleged belief that he was in great danger of bodily harm at the hands of the deceased. People *v.* Webster, 139 N. Y. 73, 34 N. E. 730.

72. Stephenson *v.* State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216. See also State *v.* Knapp, 45 N. H. 148.

Contra. — Special tests or specific acts showing the strength of the deceased are inadmissible, especially when not known to the defendant. State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

73. State *v.* Crea (Idaho), 76 Pac. 1013, *excluding* evidence of the defendant's physical condition two years previous to the homicide.

74. Stephenson *v.* State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216, *citing* Cook *v.* State, 24 N. J. L. 843.

75. The opinion of witnesses personally familiar with both parties, as to their relative strength, tempers and other personal qualities, not capable of any description except by opinion, are admissible. Brownell *v.* People, 38 Mich. 732, *citing* Hurd *v.* People, 25 Mich. 405.

76. Where defendant had been allowed to prove without objection that prior to the killing his right shoulder was subject to frequent dislocation upon any exertion, the testimony of a physician that this disability had a tendency to produce a state of nervous sensibility and mental cowardice, and a hasty apprehension of danger, not found in an ordinarily healthy person, was held properly excluded as being a question for the jury. State *v.* Sorenson, 32 Minn. 118, 19 N. W. 738.

77. State *v.* Shoultz, 25 Mo. 128.

d. *Preliminary Showing.* — Before evidence regarding the relative size and strength of the parties is admissible on the part of the defendant, there must be a preliminary showing of some act of aggression or hostile conduct on the part of the deceased.[78]

H. Habits of Deceased. — a. *Generally.* — Any habits of the deceased may be shown which tend to explain his apparently hostile conduct,[79] if known to the accused at the time.[80] So also any of deceased's habits that tend to explain facts which unexplained would warrant inferences favorable to the defendant, may be proved.[81]

b. *Habit of Carrying Weapons.* — After a proper preliminary showing[82] it is competent to prove in support of a claim of self-defense that the deceased habitually carried arms or deadly weapons[83]

78. State *v.* Broussard, 39 La. Ann. 671, 2 So. 422. See more fully *infra,* "Character — Of Deceased — Showing of Self-Defense Necessary," and *infra* "Threats."

The Crippled Condition of the defendant cannot be taken into consideration in the absence of evidence that the deceased was the aggressor. State *v.* Giroux, 26 La. Ann. 582.

In Doubtful Cases. — Deceased's size and strength may be shown where there is doubt as to who was the aggressor. State *v.* Nett, 50 Wis. 524, 7 N. W. 344, *distinguishing* Brucker *v.* State, 19 Wis. 539, on this ground.

79. Where the alleged hostile act by the deceased was placing his hand in or near his hip pocket, it was held competent, in connection with evidence of defendant's great intimacy with deceased and his familiarity with the latter's habits, to show that deceased was noted for a marked peculiarity which consisted in resting his hand on his hip or his hip pocket while walking or standing. People *v.* Grimes, 132 Cal. 30, 64 Pac. 101.

80. Where the alleged threatening act of the deceased was placing his hands in the waistband of his pants and leaning forward, evidence that deceased had a habit of doing this thing was held improperly admitted, it not appearing that the defendant knew of any such habit. Phipps *v.* State, 34 Tex. Crim. 560, 31 S. W. 397.

81. In White *v.* State, 100 Ga. 659, 28 S. E. 423, it appeared that deceased's pistol, immediately after the homicide, contained one empty shell, upon which the hammer rested. It was held competent to show that it was his habit and custom to carry his revolver with the hammer upon an empty shell, as tending to rebut the inference that it had been fired during the homicide.

82. State *v.* Yokum, 14 S. D. 84, 84 N. W. 389. When the circumstances are such that it is doubtful whether defendant was acting from motives of self-preservation or malice, such evidence is admissible. State *v.* Ellis, 30 Wash. 369, 70 Pac. 963. See fully *supra,* "Character — Of Deceased" and *infra* "Threats."

83. *Alabama.* — Cawley *v.* State, 133 Ala. 128, 32 So. 227.

California. — People *v.* Howard, 112 Cal. 135, 44 Pac. 464.

Florida. — Garner *v.* State, 31 Fla. 170, 12 So. 638.

Iowa. — State *v.* Graham, 61 Iowa 608, 16 N. W. 743.

Kentucky. — Riley *v.* Com., 15 Ky. L. Rep. 46, 22 S. W. 222; Com. *v.* Booker, 25 Ky. L. Rep. 1025, 76 S. W. 838. See Payne *v.* Com., 58 Ky. 370.

Mississippi. — King *v.* State, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681.

South Dakota. — State *v.* Yokum, 14 S. D. 84, 84 N. W. 389, *reversing s. c.* 11 S. D. 544, 79 N. W. 835.

Texas. — Lilly *v.* State, 20 Tex. App. 1; Glenewinkel *v.* State (Tex. Crim.), 61 S. W. 123.

Washington. — State *v.* Crawford, 31 Wash. 260, 71 Pac. 1030.

In Explanation of Threatening Movement. — The defendant, charged with the murder of his wife, after

even though he made no motion to use one.[84] It must appear, however, that the defendant knew of such habit,[85] and the evidence must not be too remote.[86] The state cannot show in rebuttal of evidence as to the deceased's apparent attempt to draw a weapon, that he was not in the habit of carrying deadly weapons.[87] Nor can the accused show this fact in support of his plea of self-defense.[88]

In Rebuttal it is competent to show by witnesses familiar with the deceased's habits, that they had never seen him with a weapon.[89]

I. CHARACTER. — a. *Of Deceased.* — **(1.) Generally.** — Evidence as to the deceased's violent or dangerous character is relevant only

introducing evidence as to her dangerous character and testifying that he wanted to take her home because she had been drinking, and that as he approached she cursed him and threw her hands toward her bosom while stepping toward him, may further show her habit of carrying a pistol in her bosom, although the state's evidence shows that no pistol was found upon her body and that she was standing still when shot holding her hands down in front of her person, and that the defendant, while trying to borrow a pistol, had threatened to kill her if she did not go home with him. Wiley *v.* State, 99 Ala. 146, 13 So. 124.

Where the deceased, while making a threat against the defendant, places his hand upon his hip pocket, it is competent to show his habit of carrying a pistol in that pocket. Naugher *v.* State, 116 Ala. 463, 23 So. 26. So where the deceased, upon provocation of words alone, placed his hand behind him and advanced upon the accused, it was held error to reject evidence that the deceased habitually and notoriously carried a pistol, and that this was known to the accused. Daniel *v.* State, 103 Ga. 202, 29 S. E. 767.

It is proper to show that the deceased was reputed to be a person who habitually carried on his person deadly weapons such as knives, pistols and brass knuckles. Glenewinkel *v.* State (Tex. Crim.), 61 S. W. 123.

In State *v.* Thompson, 109 La. 296, 33 So. 320, defendant was allowed to show the deceased's habit of going armed, and his proneness to use his weapons, and also that his nickname, "Draws," was derived from this readiness to draw weapons.

84. Branch *v.* State, 15 Tex. App. 96. In this case evidence that the deceased habitually carried a pistol was held erroneously excluded, although there was no evidence of an act on his part indicating that he was armed with a pistol, or that he was attempting to use it. It appeared, however, that deceased, after dismounting from his horse for the purpose of fighting with defendant, advanced upon him in the dark in an angry and threatening manner.

85. Sims *v.* State, 139 Ala. 74, 36 So. 138; People *v.* Howard, 112 Cal. 135, 44 Pac. 464; Garner *v.* State, 31 Fla. 170, 12 So. 638; Grissom *v.* State, 8 Tex. App. 386. But see State *v.* Ellis, 30 Wash. 369, 70 Pac. 963, in which it is suggested that such habit, though unknown to defendant, may be relevant to show who was the aggressor.

86. His habit of carrying a weapon seven or eight years previous to the homicide is too remote. People *v.* Barthleman, 120 Cal. 7, 52 Pac. 112.

87. McCandless *v.* State, 42 Tex. Crim. 58, 57 S. W. 672. See also Parker *v.* Com., 96 Ky. 212, 28 S. W. 500.

88. State *v.* Chevallier, 36 La. Ann. 81.

89. State *v.* Mims, 36 Or. 315, 61 Pac. 888.

Where evidence of deceased's habit of carrying a weapon has been introduced, the testimony of a witness who had lived with deceased for a considerable time, that he had never seen deceased with a pistol in

upon the issue of self-defense.[90] Such evidence may be offered for two distinct purposes, first, to show the reasonableness and degree of the defendant's apprehensions of injury from the deceased's threatening acts or demonstrations during the difficulty, and second, as bearing upon the deceased's state of mind and the question of whether or not he was the aggressor in the fatal conflict. Owing to the frequent confusion of these issues, the cases are in considerable conflict, even in a single jurisdiction, and many of them obscure.

(2.) On Behalf of Defendant. — (A.) GENERALLY. — Where the issue is self-defense it is generally held that the dangerous and violent character of the deceased may be proved to characterize his conduct and statements during the difficulty, to show the reasonableness and degree of the defendant's apprehensions from such conduct.[91] It is also competent for the purpose of showing that the deceased was probably the aggressor where this question is in doubt,[92] although there are cases to the contrary.[93]

(B.) WHAT CHARACTER RELEVANT. — (a.) *Generally.* — In accordance

his possession, was held competent. People *v.* Grimes, 132 Cal. 30, 64 Pac. 101.

90. People *v.* Rodawald (N. Y.), 70 N. E. 1; Daniel *v.* State, 103 Ga. 202, 29 S. E. 767; Com. *v.* Straesser, 153 Pa. St. 451, 26 Atl. 17; Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; State *v.* Morrison, 49 W. Va. 210, 38 S. E. 481. But see State *v.* Tackett, 8 N. C. 210; Jolly *v.* State, 21 Miss. 223; and also *infra* this article, "Mitigation of Punishment."

In State *v.* Floyd, 51 N. C. 392, the court intimates that perhaps the character of the deceased for violence might be admissible to explain the fact that the defendant commenced the fight with a deadly weapon, and to rebut the inference of malice arising therefrom.

Where the Defense Interposed Is Accidental Killing evidence as to the deceased's violent character is not relevant. Brittain *v.* State (Tex. Crim.), 40 S. W. 297.

91. *United States.* — Smith *v.* United States, 161 U. S. 85.

Alabama. — Perry *v.* State, 94 Ala. 25, 10 So. 650; Roberts *v.* State, 68 Ala. 156.

Iowa. — State *v.* Collins, 32 Iowa 36.

Kentucky. — Riley *v.* Com., 15 Ky. L. Rep. 46, 22 S. W. 222.

Mississippi. — Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62.

Missouri. — State *v.* Brown, 63 Mo. 439.

Montana. — State *v.* Shafer, 22 Mont. 17, 55 Pac. 526.

New York. — People *v.* Druse, 103 N. Y. 655.

North Carolina. — State *v.* Matthews, 78 N. C. 523; State *v.* McIver, 125 N. C. 645, 34 S. E. 439.

Ohio. — Upthegrove *v.* State, 37 Ohio St. 662.

Tennessee. — Rippy *v.* State, 39 Tenn. 217.

The Texas Statutory Provision making evidence of deceased's violent character admissible in connection with evidence of his previous threats does not render such character inadmissible in other cases where no previous threats were made. Horbach *v.* State, 43 Tex. 242.

92. State *v.* Cushing, 14 Wash. 527, 45 Pac. 145; State *v.* Rider, 90 Mo. 54, 1 S. W. 825; State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455; Palmore *v.* State, 29 Ark. 248; Williams *v.* Fambro, 30 Ga. 232; State *v.* Spendlove, 44 Kan. 1, 24 Pac. 67; State *v.* Robinson, 52 La. Ann. 616, 27 So. 124.

93. Marts *v.* State, 26 Ohio St. 162. And see Connell *v.* State (Tex. Crim.), 75 S. W. 512; Henderson *v.*

with the rule confining evidence of character to the trait in question,[94] it is competent only to show the deceased's character for violence and quarrelsomeness and not his general bad moral character.[95]

(b.) *Character for Violence of Particular Kind.* — It is competent to show that he was reputed to be violent under particular circumstances, or had a reputation for a particular kind or practice of violence, or for executing his violent intentions in a particular way, or under particular circumstances.[96]

State, 12 Tex. 525; State *v.* Burns, 30 La. Ann. 679.

"Such evidence is not received to show that the deceased was the aggressor, for if competent for that purpose, similar evidence could be given as to the reputation of the defendant, as bearing on the probability that he was the aggressor. It is competent only in cases where the killing took place under circumstances which afforded the slayer reasonable grounds to believe himself in peril, and then solely for the purpose of illustrating to the jury the motive which actuated him." People *v.* Rodawald (N. Y.), 70 N. E. 1.

94. See article "CHARACTER."

95. Com. *v.* Hoskins, 18 Ky. L. Rep. 59, 35 S. W. 284; Copeland *v.* State, 41 Fla. 320, 26 So. 319; Martin *v.* State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844; State *v.* Thompson, 109 La. 296, 33 So. 320; State *v.* Sumner, 130 N. C. 718, 41 S. E. 803; Plasters *v.* State, 1 Tex. App. 673.

"The evidence should be confined to a character and habits of violence, treachery, etc., such as may beget reasonable apprehensions of grievous bodily harm and reduce the other party to the apparent necessity to slay in self-preservation." State *v.* Turner, 29 S. C. 34, 6 S. E. 891.

The Recklessness of deceased cannot be shown because it is not relevant on the question of self-defense. State *v.* Middleham, 62 Iowa 150, 17 N. W. 446.

The Fact That the Deceased Was Domineering and Overbearing among his own race was not competent. Com. *v.* Bright, 23 Ky. L. Rep. 1921, 66 S. W. 604.

Evidence That the Deceased Was a Practiced Boxer does not tend to show that he was a dangerous or desperate character. State *v.* Talmage, 107 Mo. 543, 17 S. W. 990.

What Characteristics May Be Shown. — In the following cases will be found illustrations of those charactertistics which have been held competent — "Violent, turbulent, revengeful, bloodthirsty, dangerous man," Fields *v.* State, 47 Ala. 603, 11 Am. Rep. 771; "turbulent, violent and bloodthirsty man," Williams *v.* State, 74 Ala. 18; "violent, dangerous, or regardless of human life," but not "overbearing, turbulent or impetuous," Spivey *v.* State, 58 Miss. 858; "a good man in a fight," Davis *v.* People, 114 Ill. 86, 29 N. E. 192; "a powerful man of violent temper," Brownell *v.* People, 38 Mich. 732; "desperate and dangerous," State *v.* Bryant, 55 Mo. 75; "quarrelsome and dangerous person," Smith *v.* United States, 161 U. S. 85; "violent and desperate man," State *v.* Lull, 48 Vt. 581; "strength, ferocity, vindictiveness, quarrelsomeness," Bowlus *v.* State, 130 Ind. 227, 28 N. E. 1115.

What Characteristics Must Be Incorporated in Question. — In De Arman *v.* State, 71 Ala. 351, the action of the court in compelling counsel for defendant to incorporate in his question as to the deceased's character the words "bloodthirsty," "quarrelsome," "turbulent," "revengeful" and "dangerous," was held error on the ground that there are degrees in this trait of character, and that it is not necessary for the deceased to have possessed all the vicious qualities enumerated.

96. In State *v.* Sumner, 130 N. C. 718, 41 S. E. 803, it was held error

(c.) *Toward a Class.* — It is competent to show the deceased's general character for violence and vindictiveness toward the particular class of persons of which defendant is a member.[97]

(C.) KNOWLEDGE OF DEFENDANT. — The deceased's violent or quarrelsome character cannot be proved unless known to the defendant.[98] But it has been held that when such evidence is offered to show who was the aggressor or to characterize the conduct of the deceased, knowledge on the part of the defendant is unnecessary,[99] and this would seem to be the logically correct rule in analogy with that governing the use of deceased's uncommunicated threats.[1]

Direct Proof that the defendant had knowledge of the deceased's violent character or previous threats is not necessary. It is sufficient if it reasonably appears that he knew[2] or may be supposed to

to exclude evidence offered to prove the deceased's violent character, to the effect that he had "the reputation of being a man who would take the advantage of another, representing himself to be his friend, and get the advantage of him and do him some bodily harm, making out at the time that he was his friend." But see State *v.* Elkins, 63 Mo. 159.

The Deceased's Desperate Character When Drinking may be shown where it appears that he was drinking at the time of the homicide (Lewallen *v.* State, 6 Tex. App. 475; State *v.* Beird, 118 Iowa 474, 92 N. W. 694); or when engaged in quarrels (State *v.* Ellis, 30 Wash. 369, 70 Pac. 963). In State *v.* Hunter, 118 Iowa 686, 92 N. W. 872, the exclusion of evidence that the deceased was violent and quarrelsome when he had lost money at gambling was held error.

97. State *v.* Spangler, 64 Kan. 661, 68 Pac. 39, 47 Am. Rep. 749, in which the exclusion of evidence of the deceased's general character for hostility and vindictiveness toward state marshals, which office defendant filled, was held error.

98. *Louisiana.* — State *v.* Nash, 45 La. Ann. 1137, 13 So. 732.

Missouri. — State *v.* Kennade, 121 Mo. 405, 26 S. W. 347.

New York. — People *v.* Rodawald, 70 N. E. 1.

North Carolina. — State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455; State *v.* Hensley, 94 N. C. 1021.

Pennsylvania. — Com. *v.* Straesser, 153 Pa. St. 451, 26 Atl. 17.

South Carolina. — State *v.* Smith, 12 Rich. L. 430.

Texas. — Henderson *v.* State, 12 Tex. 525.

See also State *v.* Spangler, 64 Kan. 661, 68 Pac. 39.

Deceased's Reputation for Violence in a Foreign Country, not shown to have been known to the defendant, is not admissible. May *v.* People, 8 Colo. 210, 6 Pac. 816.

Subsequent Effects of Deceased's Assault upon a third person shortly previous to the homicide, are not admissible because they would have no bearing upon the condition of defendant's or deceased's mind at the time of the difficulty. State *v.* Sorenson, 32 Minn. 118, 19 N. W. 738.

The acts of the deceased on the evening of the homicide in assaulting a third person with a knife and slapping the naked knife against the cheek of another man, at the same time using threatening language, were held properly excluded because not known to the defendant. People *v.* Henderson, 28 Cal. 466.

99. State *v.* Ellis, 30 Wash. 369, 70 Pac. 963; State *v.* Robinson, 52 La. Ann. 616, 27 So. 124. See State *v.* Spendlove, 44 Kan. 1, 24 Pac. 67.

1. See *infra*, "Threats by Deceased."

2. State *v.* Turner, 29 S. C. 34, 6 S. E. 891. In this case an offer to prove the general reputation of the deceased for violence was held a sufficient showing of the defendant's knowledge of such character. "General character is that character which

have known these facts. His general reputation is presumed to be known to defendant.[3]

(D.) Showing of Self-Defense Necessary. — (a.) *Generally.* — Evidence as to the character of the deceased is not admissible until there has been some showing of self-defense,[4] hence in case of a mutual combat or duel,[5] or where the defendant has invited the attack upon himself,[6] or is clearly the aggressor,[7] he cannot show the deceased's violent character.

(b.) *Sufficiency of Preliminary Showing.* — Many cases hold that before such evidence is admissible there must be a preliminary showing that the deceased was the aggressor in the fatal difficulty, and was making an overt act of attack upon the defendant at the time;[8]

is generally known, and if the witnesses offered had been allowed to testify and they had proved that the general character of the deceased for violence was bad we think it would have reasonably appeared that the prisoner knew this as well as others."

The fact that defendant was acquainted with deceased and lived in the same neighborhood was held sufficient evidence of his knowledge of the deceased's violent character. State *v.* Matthews, 78 N. C. 523. See also State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455.

3. Harrison *v.* Com., 79 Va. 374, 52 Am. Rep. 634; Trabune *v.* Com., 13 Ky. L. Rep. 343, 17 S. W. 186; Childers *v.* State, 30 Tex. App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

4. *Colorado.* — McKeone *v.* People, 6 Colo. 346.

Delaware. — State *v.* Faino, 1 Marv. 492, 41 Atl. 134.

Florida. — Bond *v.* State, 21 Fla. 738.

Georgia. — Drake *v.* State, 75 Ga. 413.

Nebraska. — Basye *v.* State, 45 Neb. 261, 63 N. W. 811.

Nevada. — State *v.* Pearce, 15 Nev. 188.

North Carolina. — State *v.* Chavis, 80 N. C. 353; State *v.* Gooch, 94 N. C. 987.

Tennessee. — Boyd *v.* State, 82 Tenn. 161.

Texas. — Evers *v.* State, 31 Tex. Crim. 318, 20 S. W. 744; Hudson *v.* State, 6 Tex. App. 565, 32 Am. Rep. 593; Irwin *v.* State, 43 Tex. 236; Horbach *v.* State, 43 Tex. 242.

Washington. — State *v.* Cushing, 17 Wash. 544, 50 Pac. 512. But see State *v.* Smith, 12 Rich. L. (S. C.) 430.

During Attempted Arrest. — On the Trial of an Officer for the murder of a person whom he was attempting to arrest, evidence of the deceased's bad character is not admissible unless it appears that deceased was resisting and threatening the officer's life. See York *v.* Com., 82 Ky. 360.

5. **Mutual Combat.** — Incompetent without proof that the accused had desisted and was attempting to retreat. Jackson *v.* Com., 98 Va. 845, 36 S. E. 487.

6. Jones *v.* People, 6 Colo. 452, 45 Am. Rep. 526.

7. People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162; People *v.* Edwards, 41 Cal. 640.

8. *Alabama.* — Pritchett *v.* State, 22 Ala. 39, 58 Am. Dec. 250; Morrell *v.* State, 136 Ala. 44, 34 So. 208.

Colorado. — Davidson *v.* People, 4 Colo. 145.

Florida. — Roten *v.* State, 31 Fla. 514, 12 So. 910; Copeland *v.* State, 41 Fla. 320, 26 So. 319.

Kansas. — State *v.* Riddle, 20 Kan. 711.

Louisiana. — State *v.* Jackson, 37 La. Ann. 896; State *v.* Claude, 35 La. Ann. 71; State *v.* Jackson, 33 La. Ann. 1087; State *v.* Tasby, 110 La. 121, 34 So. 300; State *v.* Taylor, 44 La. Ann. 783, 11 So. 132; State *v.* Green, 46 La. Ann. 1522, 16 So. 367; State *v.* Carter, 45 La. Ann.

or that the evidence must be such as to make it doubtful whether or not the defendant acted in self-defense.[9] It has been held that the deceased's character can be shown only when the evidence as to the difficulty is wholly circumstantial, and not when there is direct testimony as to its nature.[10] In some courts it is held that while

1326, 14 So. 30; State *v.* Robertson, 30 La. Ann. 340.

New York. — Abbott *v.* People, 86 N. Y. 460; People *v.* Hess, 8 App. Div. 143, 40 N. Y. Supp. 486.

Oregon. — State *v.* Morey, 25 Or. 241, 36 Pac. 573.

Pennsylvania. — Abernethy *v.* Com., 101 Pa. St. 322.

Texas. — Bowman *v.* State (Tex. Crim.), 21 S. W. 48; West *v.* State, 18 Tex. App. 640. But see later cases to the contrary.

Washington. — Smith *v.* United States, 1 Wash. Ter. 262.

Striking With a Quirt is a sufficient hostile act on the part of the deceased at the time of the homicide to justify the admission of evidence as to his violent and dangerous character. Moore *v.* State, 15 Tex. App. 1; *quoting* and *approving* Horbach *v.* State, 43 Tex. 242.

A Conditional Threat by the deceased is not sufficient evidence to justify the admission of evidence as to his dangerous character, without some hostile act at the time of the homicide. State *v.* Vance, 32 La. Ann. 1177.

9. *Alabama.* — Quesenberry *v.* State, 3 Stew. & P. 308.

Arizona. — Territory *v.* Harper, 1 Ariz. 399, 25 Pac. 528.

Arkansas. — Palmore *v.* State, 29 Ark. 248; Bell *v.* State, 69 Ark. 148, 61 S. W. 918.

California. — People *v.* Lombard, 17 Cal. 317; People *v.* Anderson, 39 Cal. 703; People *v.* Murray, 10 Cal. 310.

Kansas. — State *v.* Keefe, 54 Kan. 197, 38 Pac. 302; Wise *v.* State, 2 Kan. 419, 85 Am. Dec. 595.

Minnesota. — State *v.* Dunphey, 4 Minn. 438; State *v.* Ronk, 98 N. W. 334.

Missouri. — State *v.* Hicks, 27 Mo. 588; State *v.* Talmage, 107 Mo. 543, 17 S. W. 990; State *v.* Downs, 91 Mo. 19, 3 S. W. 219.

Nevada. — State *v.* Pearce, 15 Nev. 188.

North Carolina. — State *v.* Sumner, 130 N. C. 718, 41 S. E. 803.

Wisconsin. — State *v.* Nett, 50 Wis. 524, 7 N. W. 344.

"Evidence of the general character of the deceased as a violent and dangerous man is admissible where there is evidence tending to show that the killing may have been done from a principle of self-preservation, and also where the evidence is wholly circumstantial and the character of the transaction is in doubt." State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455; State *v.* Hensley, 94 N. C. 102.

In People *v.* Stock, 1 Idaho 218, the deceased, a large, powerful man, but unarmed, during a quarrel rushed toward defendant threatening to wring his neck, and the defendant without retreating drew his pistol and fired; these circumstances were held insufficient to warrant the admission of evidence of deceased's violent character.

In State *v.* Turner, 29 S. C. 34, 6 S. E. 891, where it appeared that during a fight between the parties on the morning of the day of the homicide the deceased had attempted to kill the defendant with an ax, and later on followed the defendant to his house and was approaching the door thereto when killed by the defendant, the circumstances were held sufficient to render the exclusion of evidence as to the deceased's violent character reversible error.

A Prima Facie Showing of Self-Defense an essential prerequisite. Doyal *v.* State, 70 Ga. 134; Harrison *v.* Com., 79 Va. 374, 52 Am. Rep. 634.

Sufficiency of Preliminary Showing a Question for the Court. State *v.* Green, 46 La. Ann. 1522, 16 So. 367. See also Franklin *v.* State, 29 Ala. 14. But see *infra*, "Threats by Deceased."

10. Territory *v.* Perkins, 2 Mont. 467; State *v.* Barfield, 30 N. C. 344;

there must be some act or conduct on the part of the deceased which his violent character may illustrate, and combined with which may tend to produce a reasonable belief in the imminence of the danger, it is not necessary that there be sufficient preliminary showing to raise a doubt as to whether the defendant's act was done in self-defense;[11] and in others it is held that when there is any evidence which if believed might warrant an acquittal, evidence as to the deceased's character should be admitted.[12]

(c.) *Defendant's Testimony or Statement.* — The unsupported testimony of the defendant himself has been held sufficient to render such evidence admissible, although contradicted by others.[13] His sworn

State *v.* Byrd, 121 N. C. 684, 28 S. E. 353.

11. Franklin *v.* State, 29 Ala. 14, in which the court says that the admission of such evidence cannot be confined to "cases of doubt, because in such cases the defendant is entitled to an acquittal, and therefore to so limit it would deny to it all practical effect. When the conduct of the deceased, although in itself innocent, is such that, illustrated by his character, its tendency is to excite a reasonable belief of imminent peril the evidence ought to be admitted, and the question of its effect left to the determination of the jury. It would be for the court to determine in every case whether the facts are such as would justify the admission of the evidence." To same effect, Eiland *v.* State, 52 Ala. 322. See also Quesenberry *v.* State, 3 Stew. & P. (Ala.) 308.

"The general character of the accused for violence should be allowed to be proved, not as a substantive fact, in whole or in part abstractly constituting a defense, but as auxiliary to and explanatory of some fact or facts proved to have occurred at and in connection with the killing, which tend to establish a defense when thereby aided, by furnishing reasonable ground for the belief on the part of the slayer that he is then in immediate and imminent danger of the loss of his life from the attack of his assailant. It is observable in most of these cases that it is said that the evidence of character for violence is admissible in a doubtful case; it can hardly be meant by this that it is admissible only in a doubtful case of guilt; for if that is doubtful, there is no need of proof of character or anything else to help out the defense. . . . The explanation, it is submitted, is that the person killing is presumed to have committed murder by the act of killing, and in arraying the facts to establish that he acted in self-defense, if an act of the deceased at the time of the killing is of doubtful import, or is otherwise of a character that it would be explained and construed more favorably for the accused by adding to it the proof of the character of the deceased for violence, then such proof is admissible." Horbach *v.* State, 43 Tex. 242.

12. Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; Helms *v.* United States, 2 Ind. Ter. 595, 52 S. W. 60; Carle *v.* People, 200 Ill. 494, 66 N. E. 32; *citing* Cannon *v.* People, 141 Ill. 270, 30 N. E. 1027. See also State *v.* Spangler, 64 Kan. 661, 68 Pac. 39; State *v.* Graham, 61 Iowa 608, 16 N. W. 743; State *v.* Peterson, 24 Mont. 81, 60 Pac. 809; State *v.* Ellis, 30 Wash. 369, 70 Pac. 963.

Testimony as to threats made by the deceased, and as to his illicit intercourse with defendant's wife, does not authorize the introduction of testimony as to deceased's character. Jimmerson *v.* State, 133 Ala. 18, 32 So. 141.

13. Hart *v.* State, 38 Fla. 39, 20 So. 805; Allen *v.* State, 37 Fla. 44, 20 So. 807; Enlow *v.* State, 154 Ind. 664, 57 N. E. 539; Smith *v.* State, 75 Miss. 542, 23 So. 260; State *v.* Peterson, 24 Mont. 81, 60 Pac. 809. See also State *v.* Ellis, 30 Wash. 369, 70 Pac. 963.

statement to the jury is not a sufficient preliminary showing where he does not thereby become a witness.[14]

(E.) Method of Proof. — (a.) *Generally.* — The violent character of the deceased can be established only by showing his general reputation in this respect, and particular acts of violence are not admissible for this purpose.[15]

In Williams *v.* State, 74 Ala. 18, evidence as to the deceased's violent character was excluded, although the defendant's testimony tended to prove self-defense. "The statement made by the defendant upon the trial of this cause appears to be in direct conflict with the testimony of several witnesses who were examined, as to the circumstances of the alleged killing of the deceased by him. It was competent for the jury to discredit such statement, on this account, if they saw fit. The court, however, was not at liberty to do so, but should have considered its evidential tendencies, as a statement of alleged facts, in all rulings upon the introduction of evidence offered subsequent to the making of the statement, or in connection with it. The tendency of this statement, however incredible the jury may have believed it to be, was to establish a case of self-defense on the part of the prisoner. If the jury had believed it, they might have acquitted the defendant upon the theory of an excusable homicide. In this aspect of the case, it was error for the court to exclude the evidence."

14. Steele *v.* State, 33 Fla. 348, 14 So. 841. But see Hart *v.* State, 38 Fla. 39, 20 So. 805, *construing* a later modification of the statute.

15. *Alabama.* — Franklin *v.* State, 29 Ala. 14; Garrett *v.* State, 97 Ala. 18, 14 So. 327.

California. — People *v.* Griner, 124 Cal. 19, 56 Pac. 625.

Georgia. — Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269; Powell *v.* State, 101 Ga. 9, 29 S. E. 309; Andrews *v.* State, 118 Ga. 1, 43 S. E. 852.

Indiana. — Pratt *v.* State, 56 Ind. 179.

Iowa. — State *v.* Peffers, 80 Iowa 580, 46 N. W. 662.

Minnesota. — See State *v.* Ronk, 98 N. W. 334.

Mississippi. — Moriarty *v.* State, 62 Miss. 654; Wesley *v.* State, 37 Miss. 327, 75 Am. Dec. 62.

Missouri. — State *v.* Jones, 134 Mo. 254, 35 S. W. 607.

Nevada. — State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

New Mexico. — United States *v.* Densmore, 75 Pac. 31.

New York. — People *v.* Gaimari, 176 N. Y. 84, 68 N. E. 112; People *v.* Druse, 103 N. Y. 655, 8 N. E. 733; Thomas *v.* People, 67 N. Y. 218; Eggler *v.* People, 56 N. Y. 642.

Oregon. — State *v.* Mimms, 36 Or. 315, 61 Pac. 888.

Texas. — Darter *v.* State, 39 Tex. Crim. 40, 44 S. W. 850; Brownlee *v.* State, 13 Tex. App. 255. See also Grissom *v.* State, 8 Tex. App. 386.

In Dupree *v.* State, 33 Ala. 380, 73 Am. Dec. 422, evidence that he was an escaped convict was held inadmissible.

Previous Indictments against the deceased for murder are not admissible to show his violent character. "It is always admissible to prove the character of deceased by general reputation, but it is not admissible, in the first instance, to prove this by isolated facts. This character of testimony might be admissible on cross-examination of state's witness who was testifying to the good character of deceased, as going to discredit the witness, etc. But it is not usually permissible, in the first instance, to establish the character of deceased by isolated acts." Nelson *v.* State (Tex. Crim.), 58 S. W. 107.

The Use of Specific Acts to Show Deceased's Character must be distinguished from their use to show defendant's apprehensions. See State *v.* Burton, 63 Kan. 602, 66 Pac. 633; State *v.* Shadwell, 22 Mont. 559, 57 Pac. 281, and *infra* "Deceased's Dif-

(b.) *Knowledge of Witness.* — The witness cannot testify as to his own knowledge of the deceased's character.[16] Nor can he be asked on cross-examination as to having heard of particular acts of misconduct.[17] His knowledge of the deceased's general reputation must have been acquired previous to the homicide,[18] since the latter's reputation subsequent thereto is irrelevant.[19]

(c.) *Defendant's Actual Knowledge.* — It has been held that the defendant is not confined to evidence of reputation, but may show his actual knowledge of the deceased's violent character.[20]

(3.) On Behalf of Prosecution. — The prosecution cannot show the deceased's peaceable character until it has been attacked by the defendant in some way,[21] even when there is doubt as to whether the killing was done in self-defense.[22] When, however, evidence as to his violent or dangerous character has been introduced, it is competent to show in rebuttal that he was reputed to be peaceable and law-abiding.[23] It is not necessary, however, that his character be attacked directly, but evidence as to his previous threats,[24] his previous hostile conduct,[25] or as to his attack upon the defendant at the

ficulties With and Hostile Conduct Toward Defendant," and "Violence Toward Third Person."

16. Doyal *v.* State, 70 Ga. 134; Carleton *v.* State, 43 Neb. 373, 61 N. W. 699. But see State *v.* Sterrett, 68 Iowa 76, 25 N. W. 936; State *v.* Lee, 22 Minn. 407, 21 Am. Rep. 769. See also *infra,* "Character," and article "CHARACTER."

17. Fitzhugh *v.* State, 81 Tenn. 258. But see Nelson *v.* State (Tex. Crim.), 58 S. W. 107; Andrews *v.* State, 118 Ga. 1, 43 S. E. 852; and *supra* this article, "Character."

18. State *v.* Kenyon, 18 R. I. 217, 26 Atl. 199.

19. Burks *v.* State, 40 Tex. Crim. 167, 49 S. W. 389.

20. Marts *v.* State, 26 Ohio St. 162; Bowlus *v.* State, 130 Ind. 227, 28 N. E. 1115; Boyle *v.* State, 97 Ind. 322. See also Spangler *v.* State, 41 Tex. Crim. 424, 55 S. W. 326; State *v.* Burton, 63 Kan. 602, 66 Pac. 633; People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75, and *infra* "Violence Toward Third Persons." But see State *v.* Cross, 68 Iowa 180, 26 N. W. 62, and also the cases cited under "Method of Proof — Generally," *supra.*

21. Moore *v.* State (Tex. Crim.), 79 S. W. 565; Dock *v.* Com., 21 Gratt. (Va.) 909; State *v.* Eddon, 8 Wash. 292, 36 Pac. 139; State *v.* Potter, 13 Kan. 414; Ben *v.* State, 37 Ala. 103; Pound *v.* State, 43 Ga. 88; People *v.* Anderson, 39 Cal. 703. But see Carroll *v.* State, 3 Humph. (Tenn.) 315. See article "CHARACTER," Vol. III, p. 14.

22. State *v.* Potter, 13 Kan. 414.

23. Pettis *v.* State (Tex. Crim.), 81 S. W. 312; Davis *v.* People, 114 Ill. 86, 29 N. E. 192.

Evidence Confined to General Reputation. — The state cannot show that the deceased was not *in fact* a dangerous man, but is confined to his reputation. People *v.* Anderson, 39 Cal. 703; Stalcup *v.* State, 146 Ind. 270, 45 N. E. 334. See *infra,* "Method of Proof."

Negative Evidence as to the deceased's good reputation is admissible. People *v.* Adams, 137 Cal. 580, 70 Pac. 662.

Deceased's General Reputation in Prison, where he had been previously confined, may be shown by the prosecution in rebuttal of evidence as to his reputation for violence. Thomas *v.* People, 67 N. Y. 218.

24. Sims *v.* State, 38 Tex. Crim. 637, 44 S. W. 522; Russell *v.* State, 11 Tex. App. 288; Bowlus *v.* State, 130 Ind. 227, 28 N. E. 1115.

25. State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733. Evidence that the de-

time of the homicide,[26] has been held sufficient to warrant proof of his peaceable character.

b. *Of Third Persons.* — Evidence as to the reputation for violence of the deceased's companion is admissible where he assisted deceased in the assault upon the defendant.[27]

J. Deceased's Difficulties With and Hostile Conduct Toward Defendant. — a. *Generally.* — By the great weight of authority when the evidence as to self-defense is conflicting, or a sufficient preliminary showing has been otherwise made,[28] the defendant may show his previous difficulties with the deceased or the latter's previous attempts upon his life, or other assaults upon or hostile conduct toward him.[29] Such evidence is competent because

fendant had been informed of certain acts, conduct and difficulties on the part of the deceased, indicating his violent and dangerous character, sufficiently puts that character in issue to warrant rebuttal evidence on the part of the state. Pettis *v.* State (Tex. Crim.), 81 S. W. 312.

26. Thrawley *v.* State, 153 Ind. 375, 55 N. E. 95; Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370; Fields *v.* State, 134 Ind. 46, 32 N. E. 780; State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

27. Tiffany *v.* Com., 121 Pa. St. 165, 15 Atl. 462, 6 Am. St. Rep. 775. But see Goldsmith *v.* State, 105 Ala. 8, 16 So. 933; Andersen *v.* U. S. 170 U. S. 481, 18 Sup. Ct. 689. See also Amos *v.* State, 96 Ala. 120, 11 So. 424; Croom *v.* State, 90 Ga. 430, 17 S. E. 1003; Warren *v.* Com., 99 Ky. 370, 35 S. W. 1028.

28. See *infra* "Threats," and *supra* "Character — Sufficiency of Preliminary Showing."

Inadmissible When Defendant the Aggressor. — State *v.* Smith, 164 Mo. 567, 65 S. W. 270; State *v.* McAfee, 148 Mo. 370, 50 S. W. 82.

Incompetent Without Preliminary Proof of Overt Act or Hostile Demonstration. — State *v.* Jefferson, 43 La. Ann. 995, 10 So. 199.

29. *Alabama.* — Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17.

California. — People *v.* Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; People *v.* Thomson, 92 Cal. 506, 28 Pac. 589.

Indiana. — Enlow *v.* State, 154 Ind. 664, 57 N. E. 539.

Iowa. — State *v.* Graham, 61 Iowa 608, 16 N. W. 743.

Kansas. — State *v.* Schleagel, 50 Kan. 325, 31 Pac. 1105; State *v.* Sorter, 52 Kan. 531, 34 Pac. 1036; State *v.* Scott, 24 Kan. 68.

Minnesota. — State *v.* Dee, 14 Minn. 27, 100 Am. Dec. 190.

Mississippi. — Guice *v.* State, 60 Miss. 714.

Montana. — State *v.* Peterson, 24 Mont. 81, 60 Pac. 809.

New York. — People *v.* Taylor, 177 N. Y. 237, 69 N. E. 534.

South Carolina. — State *v.* Adams, 68 S. C. 421, 47 S. E. 676; State *v.* Smith, 12 Rich. L. 430.

Texas. — Jackson *v.* State, 28 Tex. App. 108, 12 S. W. 501; Williams *v.* State, 44 Tex. Crim. 316, 70 S. W. 756.

Vermont. — State *v.* Raymo, 57 Atl. 993.

In Haynes *v.* State, 17 Ga. 465, the action of the trial court in restricting evidence of a quarrel on the day previous solely to the question of the defendant's malice was held error on the ground that it was admissible and should be considered "as a key to the motives and conduct of the parties during the fatal difficulty."

Lying in Wait for Defendant near the latter's house the night previous to the homicide, competent to show who was aggressor, the same as uncommunicated threats. Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17.

Evidence that about a month before the killing the defendant met the deceased in the road and the latter put his hand in his coat pocket and looked mad, and passed the defendant

it tends to explain the conduct of the deceased at the time of the homicide, and shows grounds for the defendant's fear of injury. The remoteness of such acts or conduct is said to be no objection to their competency,[30] but it has been held otherwise,[31] and in some states it must very closely precede the fatal difficulty.[32] But evidence as to the deceased's hostile acts or conduct, after the infliction of the fatal wound, is inadmissible.[33]

b. *The Particulars* of such difficulties or conduct will not be inquired into,[34] though it is held to the contrary.[35]

K. Deceased's Violence Toward Third Person. — a. *Generally.* — There is some conflict in the decisions, even within the same jurisdiction, as to whether particular acts of violence toward third

without speaking, was held admissible. Com. *v.* Booker, 25 Ky. L. Rep. 1025, 76 S. W. 838.

An Indictment Against the Deceased charging him with an aggravated assault and battery upon the defendant about a month before the homicide was held competent as bearing upon who was the aggressor, where the evidence on that question was conflicting, and as showing an additional reason for deceased's hostility toward the defendant and the latter's consequent apprehension of injury. Johnson *v.* State, 28 Tex. App. 17, 11 S. W. 667.

30. State *v.* Felker, 27 Mont. 451, 71 Pac. 668.

Previous hostile acts by the deceased extending over a period of several years down to the time of the homicide are admissible to show a reasonable apprehension of great danger. People *v.* Thomson, 92 Cal. 506, 28 Pac. 589.

31. Difficulty Two Months Previous. — A previous difficulty between the defendant and the deceased, occurring two months before the homicide and having no immediate connection therewith, was held inadmissible in defendant's favor because it would neither justify nor palliate his act, nor shed any legitimate light on the transaction, although defendant's evidence tended to show self-defense. Jimmerson *v.* State, 133 Ala. 18, 32 So. 141.

Difficulties a Year Previous to the homicide may "possibly be considered as too remote." Grayson *v.* Com., 18 Ky. L. Rep. 205, 35 S. W. 1035.

32. State *v.* Sale, 119 Iowa 1, 92 N. W. 680, *distinguishing* State *v.* Beird, 118 Iowa 474, 92 N. W. 694.

33. State *v.* Broussard, 39 La. Ann. 671, 2 So. 422, *holding* incompetent, evidence that after the deceased had been stabbed he ran off, picked up a brick and struck the accused with it, and then went into his house and got his gun.

34. Sanders *v.* Com., 13 Ky. L. Rep. 820, 18 S. W. 528; State *v.* Cooper, 32 La. Ann. 1084; Gordon *v.* State, 140 Ala. 29, 36 So. 1009; State *v.* Sorter, 52 Kan. 531, 34 Pac. 1036.

35. Russell *v.* State, 11 Tex. App. 288. See also Poer *v.* State (Tex. Crim.), 67 S. W. 500; State *v.* Foster (Tenn.), 49 S. W. 747.

Particulars of Feud. — In Coxwell *v.* State, 66 Ga. 309, where the defendant's line of defense was that a continuous feud had existed between himself and the deceased, and that the latter by threats and otherwise had kept the defendant in continual fear of his life, all the facts connected with such fued, including its origin, were held admissible in order that the jury might fully understand the case, although it appeared that the deceased was killed in accordance with a prearranged plan by two of defendant's friends just as he drew his pistol on the defendant and commanded him to halt, saying: "I will fix you!"

Details of Conspiracy. — In Williams *v.* People, 54 Ill. 422, it was held error to exclude the details of a conspiracy of which deceased was a member, formed to clean out or "whip the defendant and his family,"

persons are competent evidence in behalf of the defendant after a proper preliminary showing. The general rule is that such evidence is not admissible even when the violent conduct is known to the defendant.[36] When unknown to him such conduct is not relevant.[37] Some courts, however, hold that such previous acts of violence in the defendant's presence, or which have been brought to his knowledge, are admissible to show his reasonable apprehension of danger,[38]

of which conspiracy defendant had knowledge.

36. *Alabama.* — Jones *v.* State, 76 Ala. 18; Davenport *v.* State, 85 Ala. 336, 5 So. 152.

Arkansas. — Campbell *v.* State, 38 Ark. 498.

California. — People *v.* Griner, 124 Cal. 19, 56 Pac. 625.

Georgia. — Andrews *v.* State, 118 Ga. 1, 43 S. E. 852.

Iowa. — State *v.* Beird, 118 Iowa 474, 92 N. W. 694.

Maryland. — Jenkins *v.* State, 80 Md. 72, 30 Atl. 566.

Michigan. — People *v.* Dowd, 127 Mich. 140, 86 N. W. 546, *distinguishing* People *v.* Harris, 95 Mich. 87, 54 N. W. 648.

Mississippi. — King *v.* State, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681.

New York. — Thomas *v.* People, 67 N. Y. 218; McKenna *v.* People, 18 Hun 580; Nichols *v.* People, 23 Hun 165.

Oregon. — State *v.* Mims, 36 Or. 315, 61 Pac. 888.

Pennsylvania. — Alexander *v.* Com., 105 Pa. St. 1.

South Carolina. — See State *v.* Dill, 48 S. C. 249, 26 S. E. 567.

Texas. — Heffington *v.* State, 41 Tex. Crim. 315, 54 S. W. 755; *distinguishing* Childers *v.* State, 30 Tex. App. 160, 16 S. W. 903, 28 Am. St. Rep. 899; Bybee *v.* State (Tex. Crim.), 47 S. W. 367.

What a third person told defendant as to the deceased being a bad man, and as to his having killed other men, is not admissible. Harrell *v.* State, 39 Tex. Crim. 204, 45 S. W. 581.

Toward a Servant or Agent of Defendant. — Incompetent. — Dupree *v.* State, 33 Ala. 380, 73 Am. Dec. 422.

Previous Attempt to Shoot Defendant's Brothers is not admissible. State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733.

Specific Acts of Violence Toward Other Members of the Defendant's Family were held inadmissible to prove his dangerous character. Connell *v.* State (Tex. Crim), 75 S. W. 512. The court *distinguishes* Childers *v.* State, 30 Tex. Crim. 160, 16 S. W. 993, 28 Am. St. Rep. 899, on the ground that in that case "the parties were strangers to each other and the appellant was not acquainted with the general character and reputation of the deceased; but he did know the specific act or declaration of deceased with regard to himself, which was provable. In this case the parties were well acquainted with each other, and if deceased bore the reputation of being a dangerous man . . . it could be proved by evidence of general reputation; the general doctrine being that specific acts of violence and the details thereof are not admissible in evidence."

37. Spangler *v.* State, 41 Tex. Crim. 424, 55 S. W. 326; Patterson *v.* State (Tex. Crim.), 56 S. W. 59.

38. Bowlus *v.* State, 130 Ind. 227, 28 N. E. 1115, in which it was competent for the defendant to testify to his having prevented, on a certain occasion, the deceased from injuring another person in a quarrel, and having at another time seen deceased sharpen his knife in anticipation of trouble. The court says: "The defendant may put in evidence every fact legitimately tending to show that he had reasonable ground to apprehend serious danger to himself. We see no reason why he should in such case be limited to show general reputation of the injured party. . . . If he personally knows the party attacking him to be quarrelsome, vindictive, revengeful, of great physical strength, etc., why is he not

as is also his information concerning such conduct.[39] And it has been said that while defendant may show that he has heard of particular acts of violence committed by the deceased upon other persons, he cannot show that such acts were actually committed.[40]

authorized to act upon such personal knowledge? If so, it is of course competent for him to prove such specific facts as were within his personal knowledge when the attack was made."

See People *v.* Farrell (Mich.), 100 N. W. 264; State *v.* Graham, 61 Iowa 608, 16 N. W. 743; State *v.* Dill, 48 S. C. 249, 26 S. E. 567.

Evidence as to the Details of Attacks made by the deceased upon two different persons previous to the homicide and brought to the attention of the defendant, was held improperly excluded because it tended to explain the deceased's threatening demonstration made without apparent cause, and the defendant's prompt action in defending himself. Poer *v.* State (Tex. Crim.), 67 S. W. 500.

Testimony that the deceased, on an occasion previous to the homicide, shot at one E., "thinking that it was defendant" is not admissible, but the mere fact that he had shot at E. would be competent to give a deadlier cast to previous threats against the defendant. Forney *v.* State, 98 Ala. 19, 13 So. 540.

The Boisterous and Violent Conduct of the Deceased Toward Others, in defendant's presence, shortly previous to the homicide, is admissible to show the defendant's grounds of apprehension, but deceased's general reputation for violence cannot be established by proof of specific acts toward third persons. State *v.* Shadwell, 22 Mont. 559, 57 Pac. 281.

39. People *v.* Harris, 95 Mich. 87, 54 N. W. 648; People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75.

Declarations of Third Persons As to Deceased's Statements Regarding His Violent Character. — In Childers *v.* State, 30 Tex. App. 160, 16 S. W. 903, 28 Am. St. Rep. 899, the exclusion of evidence that a few days before the homicide two persons had pointed out the deceased to the defendant, who was a stranger in the place, as the man who had told them of many exploits of a kind to illustrate his dangerous and desperate character, was held error. "If the accused had reasonable grounds for believing, and did believe, that the deceased was a dangerous man, the source of his information or belief is altogether immaterial. . . . If the accused was in fact influenced and controlled by his belief that the deceased was a dangerous or desperate man, what matters it to him whether that belief be occasioned by the general reputation of the deceased, which the accused is only presumed to know, and which in fact he may not know, or whether that belief was generated by the statements of the deceased himself, the question at last being, did that belief exist and was the conduct of the accused influenced by it?" But see Connell *v.* State (Tex. Crim.), 75 S. W. 512.

Deceased's Previous Statements. In Boyle *v.* State, 97 Ind. 322, the exclusion of the defendant's testimony that the deceased had admitted to him his participation in certain robberies and murders, and that he preferred a knife to a pistol, was held error, the court says: "As, in personal conflicts, every man is permitted, within reasonable limits, to act upon appearances and determine for himself when he is in real danger, it would seem to follow, as an inevitable consequence, that whoever relies upon appearances, and a reasonable determination upon such appearances, as a defense in a case of homicide, ought to be allowed to prove every fact and circumstance known to him, and connected with the deceased, which was fairly calculated to create an apprehension for his own safety. Any narrower rule than this would, we think, prove inadequate to full justice in all cases of homicide, and would in many cases operate as a serious abridgment of the law of self-defense."

40. People *v.* Farrell (Mich.), 100 N. W. 264.

b. *Violent Conduct Shortly Before.* — The violent conduct of the deceased shortly preceding the homicide, though in the absence of and unknown to the accused, is admissible to show his condition of mind and characterize his conduct during the fatal difficulty[41] and by some courts is regarded as part of the *res gestae*.[42]

c. *Prior Conviction.* — The prior conviction of the deceased for crime is not competent to show the fear in which the defendant might have held him.[43] But it has been held proper to show his previous conviction for another homicide,[44] or that he had informed the deceased of his conviction and imprisonment for murder.[45]

L. Violence of Third Persons. — The hostile acts and conduct of third persons toward the defendant are not competent in his behalf,[46] except as part of the *res gestae*.[47]

M. Threats. — a. *By Deceased.* — **(1.) Generally.** — Threats by the deceased are generally regarded as relevant only on the issue of self-defense.[48] A few cases, however, seem to indicate that the deceased's threats may be relevant under certain circumstances to characterize a recent provocation and reduce the grade of the

41. State *v.* McIver, 125 N. C. 645, 34 S. E. 439; Hampton *v.* State (Tex. Crim), 65 S. W. 526. See also State *v.* McNally, 87 Mo. 644; Musco *v.* Com., 87 Va. 460, 12 S. E. 790.

The deceased's behavior on his way to the scene of the homicide is admissible to corroborate testimony as to his violent conduct during the conflict. People *v.* Lilly, 38 Mich. 270.

42. State *v.* Hunter, 118 Iowa 686, 92 N. W. 872.

In State *v.* Beird, 118 Iowa 474, 92 N. W. 694, evidence that the deceased, on the night of the homicide, while intoxicated, and going from one saloon to another shortly preceding the homicide, made an assault upon a third person, was held improperly excluded on the ground that it indicated "a state of mind continuing up to the time of the affray, and which would be likely, in ordinary human experience, to lead to aggression and combativeness at that time . . . it would seem that such acts, as a part of the course of conduct of the deceased immediately preceding the affray and continued up to the time of the affray, would be part of the *res gestae* with reference to the intention or disposition with which the affray was entered into by him."

43. People *v.* Rodawald (N. Y.), 70 N. E. 1.

44. The Record of the Conviction of the Deceased for Manslaughter is admissible to show his dangerous character. The objection to the introduction of particular acts is the want of information and preparation to meet them by rebutting evidence, which objection has no application to the deceased's previous conviction. Brunet *v.* State, 12 Tex. App. 521.

45. Dodson *v.* State, 44 Tex. Crim. 200, 70 S. W. 969.

46. People *v.* Scoggins, 37 Cal. 676; State *v.* Sullivan, 51 Iowa 144, 50 N. W. 572; State *v.* Brown, 34 S. C. 41, 12 S. E. 662; State *v.* Nelson, 166 Mo. 191, 65 S. W. 749. See Rainey *v.* Com., 19 Ky. L. Rep. 390, 40 S. W. 682.

A previous difficulty between defendant and deceased's son held irrelevant. State *v.* Ramsey, 82 Mo. 133. See also State *v.* Sullivan, 51 Iowa 144, 50 N. W. 572.

47. Evidence that the deceased's son, who was with him at the time of the homicide, ran for a pistol, was held properly admitted. Rapp *v.* Com., 53 Ky. 614.

48. Creswell *v.* State, 14 Tex. App. 1; and see discussion and cases following.

crime,[49] or to rebut evidence as to defendant's previous hostile conduct toward deceased.[50]

(2.) Must Amount to Threat. — The language used by the deceased must amount to a threat to be admissible as such, and must indicate an intention on the part of the deceased to take life or do serious bodily injury.[51] The deceased's previous expressions of hostility toward the defendant, which have been communicated to the latter, do not, however, come within this rule, being competent not as threats, but as a fact bearing upon defendant's apprehensions.[52]

(3.) Impersonal Threats by the deceased must be shown to refer to the defendant before they are admissible,[53] but this may appear from

49. State *v.* Kenyon, 18 R. I. 217, 26 Atl. 199. See Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; Eiland *v.* State, 52 Ala. 322; Com. *v.* Hoskins, 18 Ky. L. Rep. 59, 35 S. W. 284.

50. Even though he was the aggressor. State *v.* McNeely, 34 La. Ann. 1022. But see State *v.* Frierson, 51 La. Ann. 706, 25 So. 396. See *supra*, "Intent, Malice, etc. — Hostile Acts — Rebuttal."

51. Combs *v.* State, 75 Ind. 215; Chalk *v.* State, 35 Tex. Crim. 116, 32 S. W. 534; State *v.* Campagnet, 48 La. Ann. 1470, 21 So. 46; Myers *v.* State, 33 Tex. 525.

Merely Vituperative and Abusive Language about the defendant does not amount to a threat and is not admissible as such, nor is it competent for any purpose when not communicated to the defendant prior to the homicide. Levy *v.* State, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826. But as to the latter proposition see *supra*, "Aggression or Provocation of Attack" and cases thereunder cited.

Deceased's statement that if he could not get a certain sum from the defendant in any other way he would take it out of the latter's hide was held properly excluded, because not amounting to a threat. State *v.* Cushing, 17 Wash. 544, 50 Pac. 512, *distinguishing* State *v.* Coella, 3 Wash. 99, 28 Pac. 28, on the ground that the statement there admitted had been communicated to the defendant.

Statements of the deceased showing that he "had a prejudice" against the defendant are not admissible as threats. State *v.* Wize, 33 S. C. 582, 12 S. E. 556.

A statement by the deceased previous to the homicide that the defendant "was not fit to live in a civilized community," was held not to amount to a threat nor necessarily to show ill-feeling. State *v.* Sullivan, 43 S. C. 205, 21 S. E. 4.

52. State *v.* Cushing, 17 Wash. 544, 50 Pac. 512. See also *supra*, "Relations of Parties." But see State *v.* Campagnet, 48 La. Ann. 1470, 21 So. 46.

53. Heffington *v.* State, 41 Tex. Crim. 315, 54 S. W. 755; People *v.* Farley, 124 Cal. 594, 57 Pac. 571; Henson *v.* State, 120 Ala. 316, 25 So. 23. See also People *v.* Kennedy, 67 Hun 652, 22 N. Y. Supp. 267.

Deceased's declaration ten days before the killing that he was going to the school election, where the killing afterward occurred, and that if things did not go his way "he would kill some —— ——" was held inadmissible because defendant was at that time a stranger to deceased, and because the threat was too indefinite and not shown to refer to the accused, nor was it communicated to the latter. Com. *v.* Hoskins, 18 Ky. L. Rep. 59, 35 S. W. 284.

Where it appeared that the deceased was killed during a quarrel, while gambling, evidence that on the night previous to the homicide he said: "I am going to win some money tonight or kill some —— ——" is not admissible because too general and indefinite, and having no reference to the defendant. King *v.* State, 89 Ala. 146, 7 So. 750.

Deceased's statement four years previous to the homicide, that "there

the accompanying circumstances,[54] the rule as to admissibility then being the same as in the case of threats by the defendant against the deceased.[55]

(4.) Conditional Threats. — A general threat conditioned upon a particular event is competent if the defendant brought himself within the condition.[56] But a threat conditional on an assault by the defendant is not admissible.[57]

(5.) Against Family. — General threats against a family, which mention no individual but are directed against those bearing the defendant's family name, are sufficiently definite to be admissible.[58]

(6.) Communicated Threats. — (A.) GENERALLY. — Threats by the deceased against the defendant which have been previously[59] com-

were quite a lot of people that he would like to put out of the way if it was not for the law" was held too general to be admissible. Gregory *v.* State (Tex. Crim.), 48 S. W. 577, *s. c.* (Tex. Crim.), 43 S. W. 1017.

Idle Boasting. — In State *v.* Guy, 69 Mo. 430, deceased's statement that "the first nigger that fools with me I'll put him to his end" was held inadmissible, although communicated to the defendant, because a mere conditional threat directed against no particular person, being a mere idle boast.

54. Heffington *v.* State, 41 Tex. Crim. 315, 54 S. W. 755.

General Threat Shortly Preceding Homicide. — Deceased's threat, made fifteen minutes before the shooting, that "he was going to have blood before morning" was held improperly excluded although not connected by other evidence with the defendant, on the ground that such threats are "not to be rejected because of their vagueness or the obscurity of language in which they are couched, human experience and the annals of crime having established that very frequently those intending crime in particular or crime in general are accustomed to indulge in mysterious innuendos or vague boasts, having reference to the perpetration of some homicidal offense . . . such language indicates 'a heart regardless of social duty and fatally bent on mischief, and that its possessor was likely to prove the aggressor in some sudden quarrel.'" State *v.* McNally, 87 Mo. 644. See also *supra* this article, "Intent, Malice, etc. — General Malice."

55. See *infra* this article, "Intent, Malice, etc. — Threats."

56. Territory *v.* Hall, 10 N. M. 545, 62 Pac. 1083.

57. See Knowles *v.* State, 31 Tex. Crim. 383, 20 S. W. 829; State *v.* Cushing, 17 Wash. 544, 50 Pac. 512; Evans *v.* State, 44 Miss. 762.

58. **Threats Against the "Hopper Boys"** held not too vague or uncertain to be admissible, defendant being of that name. State *v.* Hopper, 142 Mo. 478, 44 S. W. 272. See *supra*, "Intent, Malice, etc. — Threats — Against Family."

59. *Arkansas.* — Coker *v.* State, 20 Ark. 53; Atkins *v.* State, 16 Ark. 568.

Colorado. — Redus *v.* People, 10 Colo. 208, 14 Pac. 323.

Delaware. — State *v.* Warren, 1 Del. 487, 41 Atl. 190.

Georgia. — Van *v.* State, 83 Ga. 44, 9 S. E. 945; Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269.

Iowa. — State *v.* Sullivan, 51 Iowa 144, 50 N. W. 572; State *v.* Maloy, 44 Iowa 104.

Louisiana. — State *v.* Fisher, 33 La. Ann. 1344; State *v.* Chevallier, 36 La. Ann. 81; State *v.* Bowser, 42 La. Ann. 936, 8 So. 474.

Minnesota. — State *v.* Dumphey, 4 Minn. 438.

Mississippi. — Newcomb *v.* State, 37 Miss. 383.

North Carolina. — State *v.* Rollins, 113 N. C. 722, 18 S. E. 394.

Oregon. — State *v.* Dodson, 4 Or. 65.

municated to the latter, after a sufficient preliminary showing,[60] are admissible in behalf of the defendant to characterize the deceased's threatening conduct and to show the degree of apprehension under which the defendant acted.[61]

Defendant's Declarations at the time the threats were communicated to him are not competent in his own behalf.[62]

(B.) PRELIMINARY SHOWING. — Such threats, however, are not admissible except when the evidence tends to show some acts or conduct on the part of the deceased threatening immediate injury to the defendant,[63] or tends in some way to prove that the homicide was committed in self-defense.[64] The contrary,[65] however, has been

Wisconsin. — Carthaus *v.* State, 78 Wis. 560, 47 N. W. 629.

See also cases cited to the sections following which involve communicated threats.

60. See following section "Preliminary Showing" and the analogous section under "Uncommunicated Threats" and "Character of Deceased."

61. *United States.* — Allison *v.* United States, 160 U. S. 203, 16 Sup. Ct. Rep. 252.

Alabama. — Dupree *v.* State, 33 Ala. 380, 73 Am. Dec. 422; Powell *v.* State, 19 Ala. 577.

California. — People *v.* Tamkin, 62 Cal. 468; People *v.* Travis, 56 Cal. 251.

Illinois. — McCoy *v.* People, 175 Ill. 224, 51 N. E. 777.

Iowa. — State *v.* Collins, 32 Iowa 36.

Kansas. — State *v.* Scott, 24 Kan. 68.

Minnesota. — State *v.* Dee, 14 Minn. 35.

Mississippi. — Johnson *v.* State, 27 So. 880.

Missouri. — State *v.* Harrod, 102 Mo. 590, 15 S. W. 373.

Montana. — State *v.* Shadwell, 22 Mont. 559, 57 Pac. 281.

Virginia. — Lewis *v.* Com., 78 Va. 732.

Where defendant armed himself with a deadly weapon before going to order off trespassers, one of whom was killed in the ensuing conflict, such fact was held insufficient to exclude evidence of the deceased's prior threats against defendant. Wallace *v.* United States, 162 U. S. 466.

62. Harrell *v.* State, 39 Tex. Crim. 204, 45 S. W. 581; Angus *v.* State, 29 Tex. App. 52, 14 S. W. 443.

63. McPherson *v.* State, 29 Ark. 225; Roberts *v.* State, 68 Ala. 156; State *v.* Brown, 63 Mo. 439; Hull *v.* State, 74 Tenn. 249. But see Fitzhugh *v.* State, 81 Tenn. 258.

Mutual Combat — Incompetent. Foreman *v.* State, 33 Tex. Crim. 272, 26 S. W. 212.

64. People *v.* Taylor, 177 N. Y. 237, 69 N. E. 534.

In Wallace *v.* United States, 162 U. S. 466, it is held that if the defendant had reasonable belief in the imminence of great bodily harm at the hands of the deceased, and "if that belief . . . might in any view the jury could properly take of the circumstances surrounding the killing, have excused his act or reduced the crime from murder to manslaughter," then evidence of the deceased's prior threats is relevant and it is error to exclude them.

65. "Evidence of previous threats made by the deceased against the prisoner, and communicated to him before the killing, is admissible without reference to the question whether there is any evidence tending to show that at the time of the killing the deceased was doing some overt act manifesting a present intention to carry such threats into execution; or without reference to the question whether there was proof that the defendant may have acted upon a reasonable belief that he was in danger of death or great bodily harm. State *v.* Abbott, 8 W. Va. 741; *quoting* from Jackson *v.* State (Tenn.), Hor. & T., "Cases on Self-Defense," p. 476.

held. If there is any evidence whatever tending to support the defendant's claim of self-defense the threats should be admitted.[66]

(C.) Information as to Threats. — The defendant may show the source of his information regarding the deceased's threats, and for this purpose the statements made to him by third persons are not hearsay, the question at issue being the communication of the alleged threats and not the fact that they were actually made.[67] It has been held, however, that there must be some showing that the deceased actually made the statements attributed to him.[68]

(7.) Uncommunicated Threats. — (A.) Generally. — There are some cases which seem to hold that threats by the deceased which have not been communicated to the defendant previous to the homicide are never admissible,[69] or only when part of the *res gestae*.[70] These

66. Jackson *v.* State, 65 Tenn. 452. See more fully *infra*, "Uncommunicated Threats — Showing of Self-Defense — Sufficiency."

In Harris *v.* State, 92 Miss. 99, 16 So. 360, where evidence of the deceased's previous communicated threats was excluded on the ground of the insufficiency of the preliminary proof, this ruling was held error because there was some testimony and circumstances tending to show an overt act on the part of the deceased. The court says: "Unless we are clearly satisfied that in no reasonably possible view was there any testimony supporting defendant's theory offered or admitted in evidence, we cannot say . . . the threats (were) properly excluded."

"Where there is any evidence which tends to show even in the slightest degree that the deceased at the time of the killing was advancing in a threatening manner on the defendant or occupying a menacing attitude toward him, or made the slightest move toward attack, or did any act indicating a present intent to do defendant great bodily harm, . . . if there is even slight evidence to indicate that the act of killing was done under a present, reasonable apprehension of great bodily harm, prior communicated threats should not be excluded." Thomason *v.* Territory, 4 N. M. 150, 13 Pac. 223.

67. Palmore *v.* State, 29 Ark. 248; State *v.* Coella, 3 Wash. 99, 28 Pac. 28; State *v.* Harris, 76 Mo. 361. See also Carico *v.* Com., 70 Ky. 124; Crockett *v.* State (Tex. Crim.), 77 S. W. 4.

Testimony by a witness that he heard the person to whom deceased had made his threats communicate the same to the defendant is not inadmissible as hearsay. Logan *v.* State, 17 Tex. App. 50.

An Anonymous Communication containing an implied threat was held improperly excluded where defendant offered to testify that he believed and had good reason to believe that the deceased was the author of the communication. "Whether that belief existed in the mind of the defendant or not, and whether it was reasonable from all the circumstances or was too hastily drawn by defendant were matters for the jury to determine. If the communication had been signed with the name of the deceased it would have been clearly admissible, although the signature might in fact have been a forgery and the deceased entirely innocent of any connection with it." Territory *v.* Pratt, 10 N. M. 138, 61 Pac. 104.

68. Hudson *v.* Com., 24 Ky. L. Rep. 785, 69 S. W. 1079. See also State *v.* Cross, 68 Iowa 180, 26 N. W. 62.

The alleged threat must be more than a mere rumor which defendant's informant had heard. State *v.* McGonigle, 14 Wash. 594, 45 Pac. 20, attempting to distinguish State *v.* Coella, 3 Wash. 99, 28 Pac. 28, in which a contrary ruling seems to be laid down.

69. People *v.* Arnold, 15 Cal. 476; Rogers *v.* State, 62 Ala. 170. See Nevling *v.* Com., 98 Pa. St. 322.

70. The uncommunicated threats of the deceased while on his way to the scene of the homicide were held

cases, however, have nearly all been overruled by subsequent decisions, which with practical unanimity hold that after a sufficient preliminary showing[71] such threats are relevant for several purposes.[72] Thus such threats are competent to characterize the apparently hostile conduct of the deceased during the difficulty, or to show his state of mind and the fact that he was the aggressor when this question is in issue.[73]

(B.) To Corroborate Communicated Threats. — Where a proper foundation has been laid, and evidence of communicated threats by the deceased against the defendant has been admitted, it is competent to prove similar uncommunicated threats made subsequent thereto and previous to the homicide, as corroborating the communicated threats, and indicating their meaning and seriousness.[74]

(C.) To Show Reasonableness of Apprehension. — In some cases it

admissible as part of the *res gestae*. Pitman *v.* State, 22 Ark. 354, *distinguishing* Atkins *v.* State, 16 Ark. 568; Coker *v.* State, 20 Ark. 53, where uncommunicated threats were excluded, on the ground that in those cases the threats were not part of the *res gestae*.

71. See *infra*, "Showing of Self-Defense Necessary."

72. "There are a few cases which hold that threats, to be admissible for any cause, must be shown to have been communicated to the accused, and others which hold that uncommunicated threats are not admissible unless they constitute a part of the *res gestae;* but the more modern and better-reasoned cases favor the admission of such evidence in the following instances: (a) To show who began affray; (b) to corroborate evidence of communicated threats; and (c) to show the attitude of the deceased." Territory *v.* Hall, 10 N. M. 545, 62 Pac. 1083.

73. *Alabama.* — Roberts *v.* State, 68 Ala. 156. (*Overruling* previous cases to the contrary.)

California. — People *v.* Tamkin, 62 Cal. 468.

Georgia. — Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269.

Illinois. — Campbell *v.* People, 16 Ill. 17, 61 Am. Dec. 49.

Indiana. — Holler *v.* State, 37 Ind. 57, 10 Am. Rep. 74.

Kansas. — State *v.* Spendlove, 44 Kan. 1, 24 Pac. 67.

Kentucky. — Com. *v.* Hoskins, 18 Ky. L. Rep. 59, 35 S. W. 284. See Cornelius *v.* Com., 54 Ky. 539.

Louisiana. — State *v.* Williams, 40 La. Ann. 168, 3 So. 629.

Montana. — State *v.* Felker, 27 Mont. 451, 71 Pac. 668; State *v.* Shadwell, 26 Mont. 52, 66 Pac. 508.

New York. — People *v.* Rodawald, 70 N. E. 1; Stokes *v.* People, 53 N. Y. 164, 13 Am. Rep. 492.

North Carolina. — State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455.

Oregon. — State *v.* Tartar, 26 Or. 38, 37 Pac. 53.

Rhode Island. — State *v.* Kenyon, 18 R. I. 217, 26 Atl. 199.

Tennessee. — Little *v.* State, 65 Tenn. 491.

Washington. — White *v.* Territory, 3 Wash. Ter. 397, 19 Pac. 37; State *v.* Cushing, 14 Wash. 527, 45 Pac. 145.

West Virginia. — State *v.* Evans, 33 W. Va. 417, 10 S. E. 792.

74. *Alabama.* — Roberts *v.* State, 68 Ala. 156.

Iowa. — State *v.* Helm, 92 Iowa 540, 61 N. W. 246.

Kansas. — State *v.* Spendlove, 44 Kan. 1, 24 Pac. 67; State *v.* Brown, 22 Kan. 222.

Kentucky. — Cornelius *v.* Com., 54 Ky. 539.

Louisiana. — State *v.* Williams, 40 La. Ann. 168, 3 So. 629.

New Mexico. — Territory *v.* Hall, 10 N. M. 545, 62 Pac. 1083.

North Carolina. — State *v.* Turpin, 77 N. C. 473, 24 Am. Rep. 455.

Texas. — Levy *v.* State, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826.

is said that uncommunicated threats are competent to show the reasonableness of the defendant's apprehensions.[75]

(D.) Showing of Self-Defense Necessary. — (a.) *Generally.* — Before evidence as to the deceased's previous uncommunicated threats is admissible there must be some showing which raises the issue of self-defense.[76]

Where the Homicide Was the Result of a Mutual Combat previously agreed upon, evidence as to previous threats by the deceased against the defendant is not admissible, unless the defendant had desisted from the conflict and was making an attempt to retreat at the time of the homicide.[77]

75. State *v.* Cushing, 14 Wash. 527, 45 Pac. 145; State *v.* Felker, 27 Mont. 451, 71 Pac. 668; State *v.* Evans, 158 Mo. 589, 59 S. W. 994. See also State *v.* Williams, 40 La. Ann. 168, 3 So. 629.

76. *Alabama.* — King *v.* State, 90 Ala. 612, 8 So. 856; Payne *v.* State, 60 Ala. 80; Amos *v.* State, 96 Ala. 120, 11 So. 424; Goldsmith *v.* State, 105 Ala. 8, 16 So. 933; Baker *v.* State, 122 Ala. 1, 26 So. 194; Lang *v.* State, 84 Ala. 1, 4 So. 193, 5 Am. St. Rep. 324.

Missouri. — State *v.* Privitt, 175 Mo. 207, 75 S. W. 457; State *v.* Reed, 137 Mo. 125, 38 S. W. 574.

Texas. — Carter *v.* State, 8 Tex. App. 372.

Washington. — State *v.* McGonigle, 14 Wash. 594, 45 Pac. 20.

"Threats made by deceased, and the dangerous character of deceased, are only admissible when it is shown that at the time of the homicide the deceased did some act indicating his purpose then to take the life of the defendant, or did him some serious bodily harm . . . or when the circumstances of the case raise a doubt" as to whether the homicide was committed in self-defense. Creswell *v.* State, 14 Tex. App. 1.

Explanation of Rule Requiring Preliminary Showing. — "We understand the rule in respect to the admission of evidence, on the part of a defendant on trial for murder, of previous threats by, or difficulties with, or ill-feeling on the part of the deceased, to be this: that when any phase of the testimony would, if believed, present a case of self-defense, then the accused, using this aspect of the facts adduced as a predicate therefor, may go further, and strengthen it, by showing that the deceased had threatened him, or entertained ill-feeling toward him, or that there had been difficulties between them; and a like doctrine obtains with respect to evidence of the violent character of the slain. Or, to state the principle in a more concrete form, the evidence adduced must have some tendency to establish the constituents of the right to destroy life that life may be preserved — which are, that the accused was without fault in bringing on the fatal rencounter; that he was in imminent peril, real or reasonably apparent, of loss of life or limb; and that he could not, as the matter presented itself to him, retreat or avoid the combat with safety to himself — before any state of facts exists in the case upon which testimony of character, threats, ill-feeling, etc., of the deceased, could shed any light. The theory of the rule is that a right to kill can never be the result of the violent, blood-thirsty disposition, revengeful feeling, or threats of the deceased; and hence, until there are facts offered which go in some measure to establish the necessity to strike as the law defines that necessity, such evidence is patently irrelevant. These matters, in other words, are competent to give character to a necessity otherwise shown; and no such necessity being otherwise shown, there is an utter absence of the predicate upon which alone such qualifying evidence should be received." Rutledge *v.* State, 88 Ala. 85, 7 So. 335.

77. Nairn *v.* State (Tex. Crim.), 45 S. W. 703; State *v.* Wilson, 43 La. Ann. 840, 9 So. 490.

(b.) *When Defendant the Aggressor.* — Where it appears clearly from the circumstances that the defendant was the aggressor in the fatal difficulty, he is not entitled to prove previous threats by the deceased.[78]

(c.) *Necessity of Overt Act of Attack.* — The rule as frequently stated is that there must be evidence of some overt act by the deceased of a threatening or hostile nature[79] before his previous threats can

78. *Alabama.* — Teague *v.* State, 120 Ala. 309, 25 So. 209; Burke *v.* State, 71 Ala. 377; Winter *v.* State, 123 Ala. 1, 26 So. 949.

Arkansas. — Harris *v.* State, 34 Ark. 469.

Florida. — Bond *v.* State, 21 Fla. 738; Wilson *v.* State, 30 Fla. 234, 11 So. 556, 17 L. R. A. 654.

Georgia. — Gardner *v.* State, 90 Ga. 310, 17 S. E. 86, 35 Am. St. Rep. 202; Vaughn *v.* State, 88 Ga. 731, 16 S. E. 64.

Louisiana. — State *v.* Watson, 36 La. Ann. 148; State *v.* Fontenot, 48 La. Ann. 305, 19 So. 111.

Michigan. — People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

Mississippi. — Oden *v.* State, 27 So. 992.

Missouri. — State *v.* Harris, 73 Mo. 287; State *v.* Jackson, 17 Mo. 544, 59 Am. Dec. 281.

Montana. — Territory *v.* Campbell, 9 Mont. 16, 22 Pac. 121.

New Mexico. — Thomason *v.* Territory, 4 N. M. 150, 13 Pac. 223.

North Carolina. — State *v.* Barfield, 30 N. C. 344.

Texas. — Turner *v.* State (Tex. Crim.), 46 S. W. 830.

Where the Defendant Is Attempting an Unlawful Arrest he is the aggressor, and cannot introduce evidence to show self-defense. Helms *v.* United States, 2 Ind. Ter. 595, 52 S. W. 60.

"**When the Defendant Admits That He Began the Attack** which resulted in the killing, and offers no evidence tending to prove the facts necessary to revive his right of self-defense, it is competent for the judge, as a preliminary to ruling on the admissibility of evidence, to assume the non-existence of such facts, even though they bear upon the question of guilt or innocence; and his ruling that the evidence, the admissibility of which depended upon their existence, should be excluded, will be sustained." State *v.* Kellogg, 104 La. 580, 29 So. 285.

79. *Alabama.* — Ragsdale *v.* State, 134 Ala. 24, 32 So. 674; Roberts *v.* State, 68 Ala. 156; Tidwell *v.* State, 70 Ala. 33.

Arkansas. — See Kitts *v.* State, 70 Ark. 521, 69 S. W. 545.

California. — People *v.* Campbell, 59 Cal. 243, 43 Am. Rep. 257, but see the dissenting opinion in which the distinction between the admissibility of such evidence and its sufficiency as a justification is clearly pointed out and the cases of People *v.* Arnold, 15 Cal. 476, and People *v.* Scoggins, 37 Cal. 676, are distinguished.

Colorado. — Jones *v.* People, 6 Colo. 452, 45 Am. Rep. 526.

Florida. — Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; Smith *v.* State, 25 Fla. 517, 6 So. 482.

Georgia. — Hoye *v.* State, 39 Ga. 718, *distinguishing* Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269; Lingo *v.* State, 29 Ga. 470.

Indiana. — Ellis *v.* State, 152 Ind. 326, 52 N. E. 82; Leverich *v.* State, 105 Ind. 277, 4 N. E. 852.

Kentucky. — Morrison *v.* Com., 24 Ky. L. Rep. 2493, 74 S. W. 277.

Louisiana. — State *v.* Wiggins, 50 La. Ann. 330, 23 So. 334; State *v.* Hickey, 50 La. Ann. 600, 23 So. 504; State *v.* Perioux, 107 La. 601, 31 So. 1016; State *v.* Harrison, 111 La. 304, 35 So. 560; State *v.* Thomas, 111 La. 804, 35 So. 914; State *v.* Wilson, 43 La. Ann. 840, 9 So. 490; State *v.* Haab, 105 La. 230, 29 So. 725; State *v.* Depass, 45 La. Ann. 1151, 14 So. 77; State *v.* Demareste, 41 La. Ann. 617, 6 So. 136; State *v.* Vallery, 47 La. Ann. 182, 16 So. 745; State *v.* Labuzan, 37 La. Ann. 489; State *v.*

be shown, unless the statute provides otherwise.[80] The overt act or hostile demonstration must be immediately connected with the defendant's act.[81]

What Constitutes an Overt Act under this rule varies with the cir-

Fontenot, 48 La. Ann. 305, 19 So. 113.

Maryland. — Turpin *v.* State, 55 Md. 462, 475; Jenkins *v.* State, 80 Md. 72, 30 Atl. 566.

Mississippi. — Moriarty *v.* State, 62 Miss. 654; Hinson *v.* State, 66 Miss. 532, 6 So. 463.

Missouri. — State *v.* Alexander, 66 Mo. 148.

Nebraska. — Binfield *v.* State, 15 Neb. 484, 19 N. W. 607.

New Mexico. — Territory *v.* Hall, 10 N. M. 545, 62 Pac. 1083.

Utah. — People *v.* Halliday, 5 Utah 467, 17 Pac. 118.

Washington. — State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

Threats by deceased against the defendant are not admissible where deceased's hostile demonstrations are not against the defendant, but against his son. State *v.* Downs, 91 Mo. 19, 3 S. W. 219.

In State *v.* Field, 14 Me. 244, 31 Am. Dec. 52, it appeared that about an hour after a violent quarrel between the parties, in which both were injured, the deceased, a younger and stronger man than defendant, violently entered the room occupied by the prisoner, but which each party had an equal right to occupy, and immediately upon entering was struck by the defendant with an ax and killed, the exclusion of evidence as to deceased's violent and dangerous character when drunk was held not error on the ground that the circumstances were not sufficient to warrant the use of a deadly weapon by the defendant.

A Hostile Demonstration Subsequent to the Defendant's Act Commencing the Difficulty is not a sufficient preliminary showing. State *v.* Brooks, 39 La. Ann. 817, 2 So. 498.

80. Under the Texas Statute providing that "where a defendant seeks to justify himself on the ground of threats against his own life he may be permitted to introduce evidence of the threats made, but the same shall not be regarded as affording a justification for the offense unless it be shown that at the time of the homicide the person killed, by some act then done, manifested an intention to execute the threat so made," evidence of such threats is admissible without preliminary proof of an overt act of hostility by the injured person, although they will neither justify nor mitigate the offense unless there was some hostile demonstration or act from which the defendant might reasonably infer an intention to execute them. "This statute does not pretend to define the rule as to the admissibility of the threats as evidence, but only the effect to be given to threats when admitted at the instance of a defendant who is seeking to justify his acts on account of such threats." Howard *v.* State, 23 Tex. App. 265, 5 S. W. 231; *quoting* approvingly from Horbach *v.* State, 43 Tex. 252, to the same effect; *distinguishing* Penland *v.* State, 19 Tex. App. 365, which lays down an apparently contrary doctrine. To the same effect see Williams *v.* State (Tex. Crim.), 70 S. W. 756; Peck *v.* State, 5 Tex. App. 611.

But for cases to the contrary which lay down the general rule stated in the text, see West *v.* State, 18 Tex. App. 640; Allen *v.* State, 17 Tex. App. 637; Irwin *v.* State, 43 Tex. 236; Myers *v.* State, 33 Tex. 525; Gonzalez *v.* State, 31 Tex. 495; Johnson *v.* State, 27 Tex. 758; Dawson *v.* State, 33 Tex. 492, expressly *overruling* Pridgen *v.* State, 31 Tex. 420, *holding* that such preliminary showing is unnecessary.

81. State *v.* Paterno, 43 La. Ann. 514, 9 So. 442; State *v.* Wilson, 43 La. Ann. 840, 9 So. 490.

The killing must immediately follow and be in response to the overt act of attack. Guice *v.* State, 60 Miss. 714.

cumstances, a very slight movement being sufficient in some cases.[82] The act or demonstration must have been of such a nature or made under such circumstances that it would tend to induce a reasonable belief on the part of the defendant that he was in immediate danger of great bodily harm.[83]

(d.) *When Question of Self-Defense or Aggression in Doubt.* — Another statement of the rule is that when the evidence or circumstances render it doubtful whether the homicide was committed in self-defense, or whether the defendant or the deceased was the aggressor, uncommunicated threats are admissible.[84]

82. Jackson *v.* State, 65 Tenn. 452; Allison *v.* United States, 160 U. S. 203. See also Renfro *v.* Com., 11 Ky. L. Rep. 246, 11 S. W. 815.

Threats Alone Do Not Constitute an Overt Act. — State *v.* King, 47 La. Ann. 28, 16 So. 566.

"**Words of Abuse** alone are not demonstrations against the accused, but they may be important to show the character of the overt act." State *v.* Williams, 46 La. Ann. 709, 15 So. 82.

A Mere Blow With the Fist and Feet is not a sufficient hostile demonstration to justify the admission of evidence of deceased's previous threats or violent character. Chase *v.* State, 46 Miss. 683.

Raising a Stick in Position to Strike was held a sufficient hostile demonstration to justify the admission of the deceased's previous uncommunicative threats. Pittman *v.* State, 92 Ga. 480, 17 S. E. 856.

Placing Right Hand on Hip Pocket a Sufficient Overt Act. — State *v.* Sumner, 130 N. C. 718, 41 S. E. 803.

But this action held not to constitute a hostile demonstration, where it was not shown that the pocket contained, or had contained, a weapon, or that the deceased was making any personal threat or doing any act to make the hip-pocket movement significant of danger to the defendant. Gafford *v.* State, 122 Ala. 54, 25 So. 10.

Merely "Turning Towards the Defendant" is not in itself such a hostile act or demonstration as to justify the admission of evidence as to previous threats by the deceased. Jones *v.* State, 116 Ala. 468, 23 So. 135.

83. *California.* — People *v.* Scoggins, 37 Cal. 676.

Louisiana. — State *v.* Campagnet, 48 La. Ann. 1470, 21 So. 46; State *v.* Williams, 46 La. Ann. 709, 15 So. 82; State *v.* Cosgrove, 42 La. Ann. 753, 7 So. 714; State *v.* Stewart, 47 La. Ann. 410, 16 So. 945; State *v.* Baum, 51 La. Ann. 1112, 26 So. 67.

Mississippi. — Harris *v.* State, 47 Miss. 318.

New York. — People *v.* Hess, 8 App. Div. 143, 40 N. Y. Supp. 486.

Utah. — People *v.* Halliday, 5 Utah 467, 17 Pac. 118.

Mistaking Umbrella for Gun. The act of the deceased in advancing upon the defendant in a hostile manner with an umbrella which defendant testified he thought was a gun was held sufficient to warrant the introduction of the deceased's previous threats and hostile conduct. Enlow *v.* State, 154 Ind. 664, 57 N. E. 539.

84. *United States.* — Wiggins *v.* Utah, 93 U. S. 465.

Alabama. — Myers *v.* State, 62 Ala. 599; Burns *v.* State, 49 Ala. 370; Rhea *v.* State, 100 Ala. 119, 14 So. 853.

Arkansas. — Palmore *v.* State, 29 Ark. 248; Mize *v.* State, 36 Ark. 653; Bell *v.* State, 69 Ark. 148, 61 S. W. 918.

California. — People *v.* Scoggins, 37 Cal. 676; People *v.* Farley, 124 Cal. 594, 57 Pac. 571; People *v.* Alivtre, 55 Cal. 263.

Florida. — Wilson *v.* State, 30 Fla. 234, 11 So. 556, 17 L. R. A. 654.

Georgia. — May *v.* State, 90 Ga. 793, 17 S. E. 108; Howell *v.* State, 5 Ga. 48; Monroe *v.* State, 5 Ga. 85.

Iowa. — State *v.* Helm, 92 Iowa 540, 61 N. W. 246; State *v.* Beird, 118 Iowa 474, 92 N. W. 694.

(e.) *When Evidence Wholly Circumstantial.* — When the evidence as to the fatal difficulty is wholly circumstantial such threats are admissible.[85]

(f.) *Sufficiency of Showing.* — The courts are not in entire harmony as to what constitutes a sufficient preliminary showing of an overt act, or how much evidence is required to raise a doubt as to who was the aggressor. The best and the prevailing rule is that if there is any evidence whatever reasonably tending to show an overt act of attack by the deceased, or the necessity for defensive action by the defendant, the offered threats should be admitted without regard to any evidence to the contrary.[86] The rule requiring a showing suf-

Kansas. — State *v.* Brown, 22 Kan. 222; State *v.* Spendlove, 44 Kan. 1, 24 Pac. 67.

Kentucky. — Hart *v.* Com., 85 Ky. 77, 2 S. W. 673, 7 Am. St. Rep. 576 (leading case); Young *v.* Com., 19 Ky. L. Rep. 929, 42 S. W. 1141.

Michigan. — People *v.* Cook, 39 Mich. 236 33 Am. Rep. 380; Brownell *v.* People, 38 Mich. 732.

Minnesota. — But see State *v.* Dumphey, 4 Minn. 438.

Mississippi. — Prine *v.* State, 73 Miss. 838, 19 So. 711; Guice *v.* State, 60 Miss. 714; Chase *v.* State, 46 Miss. 683.

Missouri. — State *v.* Bailey, 94 Mo. 311, 7 S. W. 425; State *v.* Evans, 158 Mo. 589, 59 S. W. 994; State *v.* Elkins, 63 Mo. 159; State *v.* Nelson, 166 Mo. 191, 65 S. W. 749. See State *v.* Rapp, 142 Mo. 443, 44 S. W. 270.

Oregon. — State *v.* Tartar, 26 Or. 38, 37 Pac. 53.

South Carolina. — State *v.* Faile, 43 S. C. 52, 20 S. E. 798.

Texas. — Williams *v.* State, 14 Tex. App. 102, 46 Am. Rep. 237; Pitts *v.* State, 29 Tex. App. 374, 16 S. W. 189; Levy *v.* State, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826. See Sebastian *v.* State, 42 Tex. Crim. 84, 57 S. W. 820.

In Wiggins *v.* People, 3 Otto (U. S.) 465, uncommunicated threats were held improperly excluded, although the only eye-witness besides the parties testified that he saw no hostile act whatever on the part of the deceased; it appeared, however, from the condition of defendant's and deceased's pistols that one shot was probably fired by the deceased. The court based its conclusion on the ground that the evidence and circumstances left it doubtful whether or not the defendant was the aggressor. See, however, dissenting opinion.

In Wilson *v.* State, 30 Fla. 234, 11 So. 556, 17 L. R. A. 654, the deceased's wife was the only person present at the scene of the homicide. She testified that the defendant came to the house, shot into the back door, and that her husband went to the front door and opened it and the defendant demanded certain money which he had lost to the deceased while gambling, and asked the deceased what he had in his hand. The fatal shot was immediately fired. After the homicide a white-handled pistol was found outside the door, which the witness said was not her husband's. The evidence was conflicting as to whether the defendant shot with a white-handled or a black-handled pistol. The exclusion of evidence as to the deceased's previous uncommunicated threats was held error on the ground that there was sufficient evidence of a hostile act by the deceased to make it doubtful who was the aggressor, in spite of the fact that the deceased was in his own house.

85. Where the Evidence of the Killing Is Wholly Circumstantial, and its attendant circumstances unknown, the deceased's violent character and threats are admissible as tending to show the inherent probabilities of the transaction. State *v.* Byrd, 121 N. C. 684, 28 S. E. 353, *overruling* anything in previous cases to the contrary.

86. *United States.* — See Wiggins *v.* Utah, 93 U. S. 465.

ficient to make it doubtful whether or not the defendant was acting in self-defense, has been criticised as requiring him to raise a reasonable doubt of his guilt, which would in itself require an acquittal without further evidence.[87] In some jurisdictions, however, the court is permitted to some extent to pass upon the weight of the evidence and the credibility of the witness in determining this preliminary question.[88]

(g.) *Testimony and Statement of Defendant.* — The defendant's testimony alone may be sufficient preliminary showing, although con-

Alabama. — Roberts *v.* State, 68 Ala. 156; Harkness *v.* State, 129 Ala. 71, 30 So. 73; DeArman *v.* State, 71 Ala. 351.

California. — People *v.* Scoggins, 37 Cal. 676.

Colorado. — Babcock *v.* People, 13 Colo. 515, 22 Pac. 817; Davidson *v.* People, 4 Colo. 145.

Florida. — Hart *v.* State, 38 Fla. 39, 20 So. 805.

Kentucky. — Miller *v.* Com., 89 Ky. 653, 10 S. W. 137.

Mississippi. — King *v.* State, 65 Miss. 576, 5 So. 97, 7 Am. St. Rep. 681.

Tennessee. — Jackson *v.* State, 65 Tenn. 452.

New Mexico. — Territory *v.* Hall, 10 N. M. 545, 62 Pac. 1083.

Slightest Evidence. — In Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232, Raney, C. J., says; "If there is the slightest evidence tending to prove a hostile demonstration, which may be reasonably regarded as placing the accused apparently in imminent danger of losing his life or sustaining great bodily harm, the threats should not be excluded."

"In All Cases Where the Proof Justifies the Giving of a Charge on the Law of Self-Defense the defendant is entitled to show that the deceased, prior to the homicide, entertained toward him hostile feelings, that he had made uncommunicated threats against him, or that something had occurred between them to create unfriendly feelings on the part of the deceased. This is allowed as tending to show that at the time of the killing the deceased was the aggressor." Helms *v.* United States, 2 Ind. Ter. 595, 52 S. W. 60.

Where There Is "Ground for Argument" as to whether the deceased was the first to make a hostile demonstration, his previous uncommunicated threats should be admitted. Green *v.* State, 69 Ala. 6.

Where the Evidence Does Not Establish Beyond a Reasonable Doubt that the defendant brought on the difficulty the previous uncommunicated threats of the deceased are admissible to show who was the aggressor. Prine *v.* State, 73 Miss. 838, 19 So. 711.

87. Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; State *v.* Bartmess, 33 Or. 110, 54 Pac. 167; Horbach *v.* State, 43 Tex. 242; Franklin *v.* State, 29 Ala. 14; Eiland *v.* State, 52 Ala. 322.

88. State *v.* Ford, 37 La. Ann. 443; State *v.* Janvier, 37 La. Ann. 644; State *v.* Napoleon, 104 La. 164, 28 So. 972.

"In passing on such a question the trial court must of necessity be clothed with the authority to decide whether a proper foundation has been laid for the proffered evidence, and that authority necessarily includes the discretion to ignore and not consider testimony which his reason refuses to believe." State *v.* Ford, 37 La. Ann. 443; State *v.* Spell, 38 La. Ann. 20; State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

In State *v.* Frierson, 51 La. Ann. 706, 25 So. 396, where the testimony of the defendant, and other of his witnesses, was that the deceased put his hand on his hip pocket and exclaimed: "Look out, boys! I've got him!" was contradicted by all the witnesses of the state, testimony as to threats by the deceased was excluded. This ruling was held no error on the ground that the weight of the evidence negatived the alleged attack by the deceased, and proved

tradicted by other witnesses,[89] but not his unsworn statement to the jury.[90] Nor is his sworn statement sufficient where it does not make him a witness.[91]

(h.) *Whether Question for Court or Jury.* — Whether the evidence of an overt act or hostile demonstration on the part of the deceased is sufficient to justify the admission of testimony as to his antecedent threats is said to be a question for the court,[92] whose decision is conclusive on appeal, except in case of an abuse of discretion.[93] The rule seems to be that the court should admit the threats if there is any evidence which, if true, would make the threats relevant. The truth of such evidence is for the jury.[94]

(8.) Circumstances Explaining Threats and Intensifying Their Effect. The circumstances under which a threat was made are competent to explain its meaning and significance, and when known[95] to the

that the defendant and not the deceased was the assailant. To the same effect see State *v.* Barker, 46 La. Ann. 798, 15 So. 98.

89. State *v.* Ellis, 30 Wash. 369, 70 Pac. 963; State *v.* Cushing, 14 Wash. 527, 45 Pac. 145; Territory *v.* Hall, 10 N. M. 545, 62 Pac. 1083; Williams *v.* State, 14 Tex. App. 102, 46 Am. Rep. 237; Hart *v.* State, 38 Fla. 39, 20 So. 805.

90. Vaughn *v.* State, 88 Ga. 731, 16 S. E. 64; Bond *v.* State, 21 Fla. 738.

Where defendant testified that he killed the deceased to save his own life it was held error to exclude evidence of threats by deceased against his life, and the deceased's quarrelsome and dangerous character. State *v.* Hayden, 83 Mo. 198.

91. Steele *v.* State, 33 Fla. 348, 14 So. 841. But see Hart *v.* State, 38 Fla. 39, 20 So. 805, *interpreting* a later modification of the statute.

92. *Alabama.* — King *v.* State, 90 Ala. 612, 8 So. 856; Stidwell *v.* State, 107 Ala. 16, 19 So. 322.

Florida. — Wilson *v.* State, 30 Fla. 234, 11 So. 556, 17 L. R. A. 654; Garner *v.* State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

Louisiana. — State *v.* Campagnet, 48 La. Ann. 1470, 21 So. 46; State *v.* Ford, 37 La. Ann. 443; State *v.* Janvier, 37 La. Ann. 644; State *v.* Christian, 44 La. Ann. 950, 11 So. 589; State *v.* Beck, 46 La. Ann. 1419, 16 So. 368; State *v.* Perioux, 107 La. 601, 31 So. 1016.

93. State *v.* Walsh, 44 La. Ann. 1122, 11 So. 811; State *v.* Perioux, 107 La. 601, 31 So. 1016.

94. Jackson *v.* State, 65 Tenn. 452; State *v.* Shadwell, 22 Mont. 559, 57 Pac. 281. See also State *v.* Abbott, 8 W. Va. 741.

"It is only when the court can say that there is no overt act established and no evidence from which the jury might rightfully find the existence of such act that testimony should be excluded which is admittedly competent if the overt act is established. Where testimony is offered by a party the competency of which depends upon the existence of another fact, and that other fact is not supported by testimony from which the jury might fairly infer its existence, then from the necessity the judge determines upon its non-existence; but where the evidence is of such character that if the case should be withdrawn from the jury by a demurrer to the evidence the judgment would be that the demurrer should be overruled, then for the purpose of determining as to the admissibility of the offered evidence the controverted fact must be taken as established." Hawthorne *v.* State, 61 Miss. 749.

95. Poole *v.* State (Tex. Crim.), 76 S. W. 565. See also Williams *v.* People, 54 Ill. 422. But see State *v.* Parker, 172 Mo. 191, 72 S. W. 650.

In Russell *v.* State, 11 Tex. App. 288, it was held competent for the defendant to show not only the de-

defendant to show the effect upon his apprehensions.[96] But it is held to the contrary.[97] For the same purposes, also, it is competent to prove any circumstances bearing upon the nature and cause of the deceased's enmity toward the defendant.[98]

(9.) **In Rebuttal** any evidence tending to show that the deceased did not make the alleged threats is competent.[99] The state may show any acts of friendly association between the defendant and the deceased subsequent to the communication of the threats.[1] The deceased's subsequent conduct[2] and declarations[3] indicating his peaceable intentions, may be shown. So also may the information received by the defendant as to the deceased's subsequent declarations[4] or

ceased's previous threats against him, and previous difficulties between the parties, but also the circumstances under which such threats were made and such difficulties occurred. "These remote facts, to wit, the threats, difficulties and affrays, being of so much importance, then their character should be thoroughly understood by the jury. If they were not serious the apprehensions of defendant would not be so well founded; but if they were grave his fears would be found reasonable; hence, to determine the gravity, all of the facts — the threats, the manner, the pressure, the occasion — in fact, everything done by the parties, or any other person, tending to show the character of these threats, difficulties and affrays, should be presented to the jury."

The material portions of what the person to whom the threats were made said during the conversation are admissible so far as they explain the true meaning and significance of the threats. People *v.* Phelan, 123 Cal. 551, 56 Pac. 424.

Evidence that the deceased's manner at the time of making an alleged threat was not threatening but peaceable and quiet, is not inadmissible as a conclusion. Myers *v.* State, 37 Tex. Crim. 331, 39 S. W. 938.

The Ability of the Deceased to Execute Threats. — See State *v.* Jackson, 44 La. Ann. 160, 10 So. 600.

96. Glenewinkel *v.* State (Tex. Crim.), 61 S. W. 123.

97. Willingham *v.* State, 130 Ala. 35, 30 So. 429; Harkness *v.* State, 129 Ala. 71, 30 So. 73, in which testimony that at the time the deceased threatened to kill the defendant the former had an open knife in his hand, was walking rapidly toward the latter, and was within a few feet of him, was held properly excluded.

98. Gafford *v.* State, 122 Ala. 54, 25 So. 10, in which, after evidence of threats by the deceased against the defendant had been introduced, the exclusion of testimony as to an adulterous connection between the deceased and the defendant's widowed sister, as well as specific acts of adultery on their part, was held error on the ground that it tended to explain the cause of the threats, and to show what degree of danger to himself the defendant might be justified in inferring from them. But see dissenting opinion.

99. In Maxwell *v.* State, 129 Ala. 48, 29 So. 981, where there was testimony that the deceased threatened to "run off" the defendant who killed him, it was held competent for the prosecution to show that the deceased was not a resident of the place, but a stranger in the community, as tending to negative any motive for such a threat, there being no evidence of any trouble or difficulty between the parties.

1. Naugher *v.* State, 116 Ala. 463, 23 So. 26, in which it was held competent to show that the defendant borrowed meat from the deceased.

Shooting at a Target Together. Naugher *v.* State, 105 Ala. 26, 17 So. 24.

2. The Fact That Deceased Was Preparing to Move from the neighborhood of the defendant. Trumble *v.* State, 25 Tex. App. 631, 8 S. W. 814.

3. State *v.* Chaffin, 56 S. C. 431, 33 S. E. 454.

4. Information as to declarations of the deceased to the effect that he

conduct[5] indicating an abandonment of his hostile purpose. Previous declarations of the defendant showing that the deceased's threats were not seriously regarded by him may be proved.[6] It is not competent to prove similar threats by the defendant against the deceased,[7] but it may be shown that the latter's hostile declarations were due to an anticipated deadly assault by the defendant.[8]

(10.) Remoteness. — Threats may be too remote to be relevant,[9] although it has been held that their remoteness goes merely to their weight and not to their competency.[10]

(11.) Subsequent Threats or Hostile Statements. — Threats against the defendant by the deceased or assaulted person, or the latter's hostile statements subsequent to the act charged, are not admissible unless part of the *res gestae*.[11]

b. *Threats by and Against Third Person.* — **(1.) By Third Person.** Previous threats against the defendant by a third person are not ordinarily admissible, in the absence of evidence of a conspiracy

had nothing against the defendant and was afraid of him; Rush *v.* State (Tex. Crim.), 76 S. W. 927; and that he intended to drop the difficulty. Johnson *v.* State, 22 Tex. App. 206, 2 S. W. 609.

5. In Jimmerson *v.* State, 133 Ala. 18, 32 So. 141, it was held competent to ask the defendant on cross-examination if he had not heard that deceased was about to move from the neighborhood.

6. Miller *v.* State, 27 Tex. App. 63, 10 S. W. 445. In rebuttal of threats made shortly before the homicide, evidence as to the defendant's declaration a year previous thereto that the threats of the deceased "did not amount to more than those of an old woman" was held properly admitted.

7. State *v.* Jaggers, 58 S. C. 41, 36 S. E. 434.

8. Ponder *v.* State, 87 Ga. 262, 13 S. E. 464.

9. "If they have been made a long time antecedent to the commission of the act they may be not only valueless but entirely inadmissible. The relations of the parties may have since entirely changed, and in the intervening time the person making them may have wholly abandoned any previously conceived intention of harming the person against whom they were intended." State *v.* Elkins, 63 Mo. 159.

Incompetent When Time of Making Not Shown. — Gillooley *v.* State, 58 Ind. 182.

The Threats Must Have Been Recently Made. — State *v.* Hays, 23 Mo. 287.

Where the Deceased's Previous Threats Are Continued down to the time of the homicide they are not objectionable as too remote. State *v.* Sloan, 47 Mo. 604. *Citing* and *quoting* with approval Monroe *v.* State, 5 Ga. 85.

Deceased's Threats a Year Previous held properly excluded in the absence of any showing of the continuation of the ill-feeling connecting such threats with the homicide. Ross *v.* Com., 21 Ky. L. Rep. 1344, 55 S. W. 4.

10. Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269.

Threats a year previous are not too remote. "The length of time between the utterance of the threat and the commission of the homicide does not destroy the competency of the evidence though it may weaken its effect." Babcock *v.* People, 13 Colo. 515, 22 Pac. 817.

11. Caw *v.* People, 3 Neb. 357.

The deceased's declarations thirty minutes after the homicide, that if he could have gotten to the accused he would have cut his heart out, made while brandishing a knife, held not admissible. Mayfield *v.* State, 101 Tenn. 673, 49 S. W. 742.

between such person and the deceased,[12] unless known to and adopted by the latter.[13] Where, however, it appears that the defendant does not recognize the person assaulting him, the communicated threats of another person against him may be admissible to show his apprehension of danger.[14]

(2.) Against Third Person. — Deceased's threats against a third person are not admissible[15] unless there is evidence to show that the defendant's act was in defense of the life of such person.[16]

12. Defense of Another. — Where the homicide was committed in the defense of another any evidence is competent to establish justification which would have been admissible if the act had been done in self-defense.[17] The deceased's threats against the defendant himself are not competent on this issue.[18]

12. Threats by the Deceased's Wife Are Not Competent. — State *v.* Sullivan, 51 Iowa 142, 50 N. W. 572.

Threats by the Assaulted Person's Son are not admissible. State *v.* Stark, 72 Mo. 37.

13. Mayfield *v.* State, 110 Ind. 591, 11 N. E. 618.

14. Fain *v.* Com., 78 Ky. 183, 39 Am. Rep. 213. See *supra,* "Somnambulism."

In People *v.* Rector, 19 Wend. (N. Y.) 569, the threats of third persons who had broken into the prisoner's house a week previous to the homicide, that they would return and break in again, were held competent to show the defendant's apprehension of violence, it appearing that he did not recognize his assailant, who was trying to force an entrance into his house.

15. Talbert *v.* State, 8 Tex. App. 316; Gibson *v.* State (Tex. Crim.), 68 S. W. 174.

Threats Against the Defendant's Brother were held properly excluded, although the defendant had been placed in the position of his brother, subject to the same orders which had caused the difficulty between such brother and the deceased. Drake *v.* State, 5 Tex. App. 649.

16. See *infra,* "Defense of Another."

17. People *v.* Curtis, 52 Mich. 616, 18 N. W. 385.

State *v.* Felker, 27 Mont. 451, 71 Pac. 668, in which the deceased's previous assaults upon the person whom defendant interfered to protect were held improperly excluded. See People *v.* M'Kay, 122 Cal. 628, 55 Pac. 594.

Where the accused defended on the ground of imminent danger to his brother, the declarations and acts of the aggressor were held competent, although not known to the defendant. Wood *v.* State, 128 Ala. 27, 29 So. 557.

Where defendant was a guest of one R. and killed the deceased during the latter's attempt to enter R.'s house for the purpose of assaulting B., another inmate thereof, recent threats by the deceased against B. were held improperly excluded on the ground that they tended to show that such an unlawful assault was made by the deceased. King *v.* State, 55 Ark. 604, 19 S. W. 110.

It is competent for the accused to state the facts occurring just prior to and at the time of the homicide, and that because of this circumstance he believed that he, or the person whom he was defending, was in imminent danger at the hands of the deceased. State *v.* Austin, 104 La. 409, 29 So. 23.

Particulars of Previous Difficulty between deceased and person defended, competent. State *v.* Foster (Tenn.), 49 S. W. 747.

Previous Threats by Deceased against the person defended, offered to show defendant's apprehension of danger to such person, are incompetent when not known to the defendant at the time. Tudor *v.* Com., 19 Ky. L. Rep. 1039, 43 S. W. 187.

18. State *v.* Marshall, 35 Or. 265, 57 Pac. 902; Mealer *v.* State, 32 Tex.

VI. MITIGATING OR INCREASING PUNISHMENT.

1. Mitigation. — A. GENERALLY. — Where the jury is given a certain discretion in fixing the punishment of the defendant in case of conviction, evidence though otherwise incompetent may be admissible to mitigate the punishment.[19] But the contrary has been held.[20]

Crim. 102, 22 S. W. 142; Moriarty *v.* State, 62 Miss. 654.

19. Fletcher *v.* People, 117 Ill. 184, 7 N. E. 80; Nowacryk *v.* People, 139 Ill. 336, 28 N. E. 961. In this case it was held proper to show that during the whole of the day previous to the homicide the father of the deceased, armed with a deadly weapon, had been in persistent pursuit of the defendant, threatening to kill him at sight, as tending to show a less degree of turpitude on the part of the defendant in killing the deceased accidentally while attempting to shoot her father. The competency of the evidence was held not to be affected by the fact that there was no direct, but only circumstantial, proof of the defendant's knowledge of the threats.

Evidence as to the defendant's rights in the land in dispute is admissible to show his good faith in the fatal difficulty for the purpose of mitigating his punishment. Where the punishment is largely in the discretion of the jury "they should be placed as far as possible in the situation of the parties." Utterback *v.* Com., 105 Ky. 723, 49 S. W. 479.

"Testimony is as necessary and important to enable the jury to exercise this discretion prudently and properly, as to enable them to determine the guilt or innocence of the defendant. The jury have two important duties to perform, and both are to be governed and controlled by the evidence, and neither can be wisely or rightly discharged without evidence. As these duties are different, the evidence must necessarily be different. After the guilt of the defendant is settled, the proper evidence, to determine the degree of his crime, and what should be the extent and severity of his punishment, must, in great measure, depend upon a careful examination of the circumstances, not those only immediately attendant on the killing, but those also which may reasonably be supposed to have led to it; and these circumstances should be considered in connection with the good or bad character, both of the defendant and the deceased." Fields *v.* State, 47 Ala. 603, 11 Am. Rep. 771.

Threats by the Deceased admissible to aid the jury in fixing the punishment. State *v.* Abbott, 8 W. Va. 741.

The Extent of Defendant's Imprisonment Previous to his trial may be shown. Kistler *v.* State, 54 Ind. 400.

Defendant's Intoxication is not competent in mitigation of punishment. State *v.* Johnson, 40 Conn. 136.

20. Perry *v.* State, 110 Ga. 234, 36 S. E. 781. See Perry *v.* State, 102 Ga. 365, 30 S. E. 903.

Gardner *v.* State, 90 Ga. 310, 17 S. E. 86, 35 Am. St. Rep. 202, in which the deceased's previous threats against the defendant and his reputation for violence, otherwise incompetent, were held inadmissible when offered solely for this purpose. "When such evidence is admissible at all, its primary object must be to throw light upon the guilt or innocence of the accused, including, of course, the proper grading of his offense should he be guilty of any. When the jury have it before them for this purpose, they may use it as a guide in recommending or forbearing to recommend as to the punishment; but we wholly repudiate the doctrine inculcated by the case of Fields *v.* State, 47 Ala. 603, that it may be received and used for the latter purpose only when inadmissible

The defendant is entitled to introduce evidence in rebuttal of any fact which might serve to increase the penalty inflicted.[21] But where the penalty is not fixed by the jury such evidence is inadmissible.[22]

The Nature and Extent of the Assaulted Person's Injury is admissible to guide the jury in fixing the amount of the punishment for an assault with intent to murder.[23]

B. Previous Insults to the defendant by the deceased, although not competent evidence of provocation, are admissible for the purpose of extenuating or mitigating the punishment by showing the absence of express malice.[24]

C. Character. — The good character of the defendant may be considered by the jury in determining the punishment to be inflicted,[25] and the court may hear evidence of his bad moral character before passing sentence, for the same purpose.[26] The bad or violent character of the deceased, unless otherwise competent, is not admissible for this purpose.[27]

2. Increasing Punishment. — Evidence is admissible also on behalf of the prosecution for the purpose of increasing the punishment, where the penalty to be inflicted rests to a certain degree in the discretion of the jury.[28]

for the former. The law considers the murder of a bad man no less criminal than the homicide of a good one. . . . When character is not relevant as evidence either to justify or mitigate a homicide, it has no relevancy to the question of punishment. Its tendency to negative or mitigate guilt is the sole reason for considering it in mitigation of punishment; and, when that tendency is so completely absent as to require its exclusion on the principal question, the incidental question is disposed of. Any recommendation which the jury are competent to make as to punishment is to be made upon such facts as are admissible upon the inquiry as to the crime. The whole investigation to which the evidence is addressed relates to the fact of crime, none of it to the measure of punishment. Such, at least, is the system of criminal procedure in this state, there being no statute which provides for enlightening the jury for the distinct and separate purpose of aiding them in the exercise of their discretion as to punishment."

21. Simpson *v.* State (Tex. Crim.), 77 S. W. 819.

22. State *v.* Tally, 23 La. Ann. 677.

23. Williams *v.* Com., 102 Ky. 381, 43 S. W. 455.

24. Willis *v.* State (Tex. Crim.), 75 S. W. 790.

25. Maston *v.* State, 83 Miss. 120, 36 So. 70; Aneals *v.* People, 134 Ill. 401, 25 N. E. 1022. See also Winter *v.* State, 123 Ala. 1, 26 So. 949.

26. State *v.* Summers, 98 N. C. 702, 4 S. E. 120.

27. State *v.* Williams, 46 La. Ann. 709, 15 So. 82.

28. People *v.* Hong Ah Duck, 61 Cal. 387, in which it was held proper for the prosecution to show that defendant was at the time of the homicide serving a sentence of life imprisonment, on the ground that in order to exercise their discretion "in a wise and intelligent manner the jury should be put in possession of all the facts in the case." *Citing* Fields *v.* State, 47 Ala. 603, 11 Am.

VII. NUMBER OF WITNESSES REQUIRED.

1. Generally. — No particular number of witnesses is required on a prosecution for homicide,[29] except by statute.[30]

2. Necessity of Producing Eye-witnesses. — By the weight of authority the prosecution cannot be compelled to produce and examine all the eye-witnesses to the homicide.[31] The English rule, however, obtains in some states, making it the duty of the prosecution to examine such witnesses whether they are favorable or unfavorable.[32] In other jurisdictions this matter rests in the discretion of the trial court.[33] It has been suggested that in any case when it appears that the prosecution are attempting to suppress evidence the court may compel the production of witnesses.[34] On the other hand it has been held that strict rule requiring the examination by the prosecution of all the eye-witnesses will not be enforced unless it appears that the failure to do so would result in the suppression of material evidence.[35] While the state is not required to place upon the witness-stand all of the eye-witnesses of the homicide, it cannot introduce indirect or opinion evidence

Rep. 771; Kistler *v.* State, 54 Ind. 400.

29. See Territory *v.* Hanna, 5 Mont. 248, 5 Pac. 252.

30. By Statute in Connecticut no person shall be convicted of any crime punishable by death without the testimony of at least two witnesses or that which is equivalent thereto. It is not required, however, that each immediate fact be proved by the testimony of two witnesses or its equivalent. It is enough if the evidence as a whole is equivalent to that of two witnesses. State *v.* Smith, 49 Conn. 376.

31. *Arizona.* — Halderman *v.* Territory, 60 Pac. 876; *relying* on Kidwell *v.* State (Tex. Crim.), 33 S. W. 342.

California. — People *v.* Robertson, 67 Cal. 646, 8 Pac. 600.

Iowa. — State *v.* Middleham, 62 Iowa 150, 17 N. W. 446; *distinguishing* Maher *v.* People, 10 Mich, 212.

Minnesota. — State *v.* Smith, 78 Minn. 362, 81 N. W. 17.

Missouri. — State *v.* Harlan, 130 Mo. 381, 32 S. W. 997; State *v.* Johnson, 76 Mo. 121; State *v.* Eaton, 75 Mo. 586; State *v.* David, 131 Mo. 380, 33 S. W. 28.

Texas. — Mayes *v.* State, 33 Tex. Crim. 33, 24 S. W. 421; Jackson *v.* State (Tex. Crim.), 24 S. W. 896.

Wyoming. — Ross *v.* State, 8 Wyo. 351, 57 Pac. 924.

32. Reg. *v.* Holden, 8 Car. & P. 606, 34 E. C. L. 547; Wellar *v.* People, 30 Mich. 16; Hurd *v.* People, 25 Mich. 405.

33. State *v.* Payne, 10 Wash. 545, 39 Pac. 157; Territory *v.* Hanna, 5 Mont. 248, 5 Pac. 242; State *v.* Tighe, 27 Mont. 327, 71 Pac. 3, *citing* State *v.* Rolla, 21 Mont. 582, 55 Pac. 523. See State *v.* Russell, 13 Mont. 164, 32 Pac. 854; Morrow *v.* State, 57 Miss. 836.

While it is the duty of the prosecution to "present all the testimony of material facts, whether adverse to the defendant or favorable to him, the court in its discretion may limit the number of witnesses to be called. . . . It was the right of the defendant to have all the facts connected with the shooting fully and fairly disclosed by the prosecution, but it was not his right to have them repeated over and over indefinitely by all the persons who saw the occurrence." Com. *v.* Keller, 191 Pa. St. 122, 43 Atl. 198.

34. Ross *v.* State, 8 Wyo. 351, 57 Pac. 924. See also State *v.* Barrett, 33 Or. 194, 54 Pac. 807.

35. Bonker *v.* People, 37 Mich. 4, *distinguishing* previous cases.

upon matters to which there were eye-witnesses whose testimony is available but has not been offered.[36]

The Defendant's Relatives, when eye-witnesses, form no exception to the rule.[37]

36. Thompson *v.* State, 30 Tex. App. 325, 17 S. W. 448, "but suppose it be urged that the defendant could have put these witnesses upon the stand to prove the facts they knew, to force him to do so would be to deprive the defendant of the benefit of the presumption of innocence, and to throw upon him the burden of proving his innocence."

37. Hurd *v.* People, 25 Mich. 405; *citing* Chapman's Case, 8 Car. & P. (Eng.) 559; Orchard's Case, *Id.*, note; Roscoe's Crim. Ev. 164. But see People *v.* Bush, 71 Cal. 602, 12 Pac. 781; Hale *v.* State, 72 Miss. 140, 16 So. 387.

HOSTILE WITNESS.—See Bias; Cross-Examination; Direct Examination.

HOUSE OF ILL-FAME.—See Disorderly House.

HUSBAND AND WIFE.

By Clark Ross Mahan.

I. RIGHTS AND LIABILITIES.

1. Conjugal Agency. — A. Presumptions and Burden of Proof. a. *In General.* — As a general rule the agency of one spouse for the other will not be presumed from the fact of the marital relation alone,[1] but must be proved as in the case of strangers,[2] although that fact is relevant,[3] and the burden of proof is on a party asserting the existence of the agency.[4] No presumption of agency arises

1. *Arkansas.* — Hoffman *v.* McFadden, 56 Ark. 217, 19 S. W. 753, 35 Am. St. Rep. 101.
Georgia. — Dobbins *v.* Blanchard, 94 Ga. 500, 21 S. E. 215.
Illinois. — Wallace *v.* Munroe, 22 Ill. App. 602.
Indiana. — Rowell *v.* Klein, 44 Ind. 290.
Kansas. — Wheeler & W. Mfg. Co. *v.* Morgan, 29 Kan. 519.
Missouri. — Eystra *v.* Capelle, 61 Mo. 578.
Nebraska. — Rust - Owen Lumb. Co. *v.* Holt, 60 Neb. 80, 82 N. W. 112, 83 Am. St. Rep. 512.
Texas. — Magee *v.* White, 23 Tex. 180.
Vermont. — Sawyer *v.* Cutting, 23 Vt. 486.
Wisconsin. — Savage *v.* Davis, 18 Wis. 608.
See also Barnett *v.* Glutting, 3 Ind. App. 415, 29 N. E. 927; Benjamin *v.* Benjamin, 15 Conn. 347, 39 Am. Dec. 384.

2. Yazel *v.* Palmer, 81 Ill. 82; Coolidge *v.* Smith, 129 Mass. 554; McKee *v.* Kent, 24 Miss. 131; Early *v.* Rolfe, 95 Pa. St. 58; Cox *v.* Hoffman, 20 N. C. 180; Gray *v.* Otis, 11 Vt. 628.

A Husband's Agency to Manage His Wife's Separate Property will not be presumed from the mere fact of the marriage relation. Wagoner *v.* Silva, 139 Cal. 559, 73 Pac. 433, where the court said that less evidence might establish the agency of the husband in such case than would show an agency between ordinary cotenants not thus related, but that something more than the mere marriage relation must appear.

In a joint action against husband and wife, not sued as partners, there is no implied authority in the husband to employ counsel in behalf of the wife on her credit. Shelton *v.* Holderness, 94 Ga. 671, 19 S. E. 977.

The Agency of a Husband Will Be Implied when the wife accepts or makes an effort to secure the benefits resulting from the transactions of the husband, the circumstances and tendency of proof in view of the relationship of the parties indicating an agency, or when the husband is the ostensible agent of his wife. American Express Co. *v.* Langford, 1 Ind. Ter. 233, 39 S. W. 817.

3. Early *v.* Rolfe, 95 Pa. St. 58.

The Marital Relation Does Not Disqualify one of the parties to it from acting as agent of the other. Greenberg *v.* Palmieri (N. J. L.), 58 Atl. 297.

4. Wallace *v.* Munroe, 22 Ill. App. 602; Benjamin *v.* Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Reakert *v.* Sanford, 5 Watts & S. (Pa.) 164; Savage *v.* Davis, 18 Wis. 608; Saunders *v.* King, 119 Iowa 291, 93 N. W. 272. See also Pence *v.* Makepeace, 65 Ind. 345; Day *v.* Boyd, 6 Heisk. (Tenn.) 458.

Residing With Her Husband Upon Premises Leased by Her in His Name is no evidence that the wife authorized the leasing, and in the absence of proof of authority or that she had knowledge that the hiring was made in her name she is not liable for the rent or the value of the use and occupation. Sanford *v.* Pollock, 105 N. Y. 450, 11 N. E. 836.

Work and Labor, claimed to have been extra work done at the request of the defendant's wife, cannot be recovered for in the absence of evidence showing that she was authorized by her husband to have the work done. Ross *v.* Dunn, 130 Mich. 443, 90 N. W. 296.

from the mere fact that the husband occupies or manages and controls his wife's property.[5]

b. *Business Agency.* — It has been held that where the husband and wife live together and she transacts business it will be presumed she was acting as his agent.[6]

Where a Husband is Authorized to Sell and Accept Payment for his wife's property, there is no presumption that he is authorized to receive in payment notes of a third person, but the burden is upon the purchaser to show affirmatively that the husband was so authorized. Runyon *v.* Snell, 116 Ind. 164, 18 N. E. 522, 9 Am. St. Rep. 839.

The Husband is Not Liable on a Negotiable Note Given by His Wife, even in an action by a *bona fide* indorser, unless it was given with his authority or approbation, and that must be shown before the note is admissible in evidence against the husband. Reakert *v.* Sanford, 5 Watts & S. (Pa.) 164, *holding* that the husband's authority cannot be inferred from his knowledge that his wife was carrying on business and gave the note in the course of it.

The Rule Requiring a Higher Degree of Proof of the fact of agency of a husband for his wife than in cases where the parties occupied different relations, has no application to a case where both husband and wife are joined as parties to the action, and both are affirming the fact of the agency for the benefit of the wife. Bridges *v.* Russell, 30 Mo. App. 258.

One Seeking to Enforce the Specific Performance of a Contract to convey lands owned by the wife, made by her husband as her agent, has the burden of establishing the agency of the husband. Saunders *v.* King, 119 Iowa 291, 93 N. W. 272.

Authority to Compromise Claim. The authority of a husband acting as agent for his wife to purchase a mortgage and demand payment and institute proceedings to collect the amount due by foreclosure proceedings does not prove that the husband, as such agent, had further authority to compromise and settle the amount due under the mortgage for less than its face. Eaton *v.* Knowles, 61 Mich. 625, 28 N. W. 740.

5. Hoffman *v.* McFadden, 56 Ark. 217, 19 S. W. 753, 35 Am. St. Rep. 101. See also Saunders *v.* King, 119 Iowa 291, 93 N. W. 272, where the issue was as to the authority or agency of the husband to contract for the sale of land owned by his wife, and it appeared that she had permitted her husband to manage the property, dispose of the products thereof, handle the proceeds as he saw fit, depositing the same in the bank in his own name, etc. The court said: "Admitting all this, there is no warrant for saying that therefrom the conclusion can be drawn that he had authority to contract for and to sell the farm itself. A wife may permit her husband to manage and control her property, and there are cases undoubtedly where she may be bound by his contracts connected with or growing out of such control and management. It does not follow, however, that, in the absence of express authority, the husband may bind his wife by contract entered into by him without her knowledge or consent, looking to an absolute disposition of her property."

The Fact That a Husband Cultivates His Wife's Land does not raise a presumption either of law or of fact that he was her agent. Jones *v.* Harrell, 110 Ga. 373, 35 S. E. 690.

6. Mackinley *v.* McGregor, 3 Whart. (Pa.) 369. *Compare* McQuaid *v.* Fontane, 24 Fla. 509, 5 So. 274, where it is held that if a married woman be engaged in mercantile business and her husband, as agent, purchases goods for her, the fact that it is her business and that the purchase was made for her is not sufficient to determine whether the credit was given to her or to her husband; it should be shown that the fact was known to the creditor

c. *Domestic Agency.* — (1.) **Generally.** — When a husband and wife are living together there is a presumption arising from that relation that the husband assents to contracts made by the wife for necessaries[7] suitable to his degree and estate.[8]

(2.) Articles Not of Ordinary Household Use. — When the articles are not of ordinary household use no such presumption arises from the mere fact that the parties were living together as husband and wife; but to hold the husband liable in such case there must be some affirmative proof of authority from him, either express or implied from his acts or conduct.[9]

B. Mode of Proof. — a. *In General.* — A written appointment by one spouse of the other as agent can be proved as other writings are proved.[10] More often, perhaps, than in other cases the agency of

or that between him and the husband there was a clear and distinct understanding that credit was given to the wife.

7. Clifford *v.* Lauton, 3 Car. & P. (Eng.) 15; Connerat *v.* Goldsmith, 6 Ga. 14; Compton *v.* Bates, 10 Ill. App. 78; S. E. Olson Co. *v.* Youngquist, 76 Minn. 26, 78 N. W. 870; Tebbets *v.* Hapgood, 34 N. H. 420. See also Wagner *v.* Nagel, 33 Minn. 348, 23 N. W. 308.

8. **A Wife Living With Her Husband as the Head and Manager of His Household** is presumed to have authority from him to purchase on his credit such goods or services as, in the ordinary arrangement of her husband's household, are required for family use. Bergh *v.* Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362, where the court said: "This presumption is founded upon the well-known fact that in modern society, almost universally, the wife, as the manager of the household, is clothed with authority thus to pledge her husband's credit for articles of ordinary household use."

9. Bergh *v.* Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362.

10. **A General Agency on the Part of the Husband** for his wife cannot be shown by the introduction in evidence of a power of attorney from her to him which purports merely to give him authority for certain purposes. Trimble *v.* Thorson, 80 Iowa 246, 45 N. W. 742.

In Lane *v.* Lockridge, 17 Ky. L. Rep. 1082, 33 S. W. 730, in order to show the written authority alleged to have been given the husband by his wife to sign the note in question, evidence was offered: "First, to show by one or more witnesses that they had seen the husband with a writing, to which the name [of the wife] was attached, authorizing him to transact all her business, and to sign her name for that purpose; second, to show by certain witnesses that in a conversation with the husband he said this power had been given him in writing by his wife, and in the opinion of the witnesses she was near enough to have heard what was said; third, that the husband had, in two or more instances, in transactions disconnected with the one in controversy, signed the wife's name to certain obligations, and by one witness that two years prior to the date of the note the husband and wife had given him a mortgage, and the wife, when called on to affix her signature, said it would have been all right if the husband had signed her name. There was no other evidence of the execution of this power, and an entire absence of proof showing that the signature to it was that of the wife, or that the husband had any special authority to execute the note to the bank or that the wife had any knowledge of the fact that her name had been signed to that paper, or any other obligation," and it was held the entire evidence upon which the execution of the written authority was sought to be established was incompetent. For a full discussion of this question, see article "Principal and Agent."

one spouse for the other must be proved by circumstantial evidence.[11] And an agency may be and often is more readily inferred from the acts of a husband or wife than in the case of strangers.[12]

b. *Other Like Transactions.* — Where the authority of a husband to act for his wife in relation to her separate property is in issue it is proper to receive evidence that she had allowed him to so act in other like transactions with other persons.[13]

11. Krebs *v.* O'Grady, 23 Ala. 726, 58 Am. Dec. 312. See also Gray *v.* Otis, 11 Vt. 628; Cox *v.* Hoffman, 20 N. C. 180.

In Webster *v.* Laws, 89 N. C. 224, an action to recover the purchase price of property sold by the plaintiff to the defendants, husband and wife, the court charged the jury that if the *feme* defendant acted under the directions of her husband, and as his agent in the transaction, he would be liable for the agreed price; that it was not necessary to prove the agency by direct testimony, but it could be inferred from circumstances; that if he was present when his wife made the contract, and came the next week and took possession of the property and carried it to his own house, and then sold it after having long used it, these were cirumstances from which the agency of the wife might be inferred. The charge was sustained.

The Fact of the Husband's Living Separate from His Wife without making provision for her support has been held properly shown as a circumstance tending with other evidence to prove his assent to a contract by her. Chamberlain *v.* Davis, 33 N. H. 121, an action by a husband to recover for the services of his wife, wherein the defense was set up that the plaintiff's wife was boarding in the defendant's family where she rendered the services under a contract that nothing was to be paid for them beyond her board, and it appeared that the wife had made such a contract.

12. Brown *v.* Woodward, 75 Conn. 254, 53 Atl. 112. See also Shelton *v.* Pendleton, 18 Conn. 417.

Estoppel of Husband to Deny Wife's Authority. — In Kreiger *v.* Smith, 13 Mont. 235, 33 Pac. 937, an action to recover for goods purchased from the plaintiff by the defendant's wife and charged to the defendant, the evidence showed that the husband and wife were living pleasantly together. She had no separate estate or business. He was present, seeing her purchase, and as the evidence tended to show, being by her consulted as to the purchase of a large bill of goods. He offered no protest or objection, and gave her his check to assist in making payment, and all this in the presence of the persons to whom he had given notice not to permit her to buy goods on his account, without his order, she knowing of such notice having been given. The court said: "Can no authority be implied from the acts, and this conduct on the part of the husband? Was the wife not justified, and were respondents not authorized to presume authority in the wife from such acts and conduct of the husband? Were the presence and these acts and conduct of the appellant not equivalent to an order from him? We think so. We think, under the circumstances of this case, the appellant is estopped from questioning the authority of his wife to purchase these goods."

13. Barnett *v.* Glutting, 3 Ind. App. 415, 29 N. E. 927. *Compare* Three Rivers Nat. Bank *v.* Gilchrist, 83 Mich. 253, 47 N. W. 104, where the issue was as to his authority to act for her in making a loan, and it was held that evidence that he had acted for her in other like transactions was not admissible.

In First Com. Bank *v.* Newton, 117 Mich. 453, 75 N. W. 934, an action against a married woman by a bank on notes given for overdrafts which the plaintiff claimed had been executed by the defendant's husband in her name as her agent, it was held that evidence of contracts for the

c. *Declarations.* — The authority of a husband to act as agent for his wife in relation to her separate property cannot be established by evidence of declarations of the husband alone.[14]

2. Conjugal Transactions. — A. FAIRNESS. — a. *Presumptions and Burden of Proof.* — Dealing between husband and wife is watched with extreme jealousy and solicitude, and one who is benefited by the transaction has the burden of establishing entire good faith.[15] There is authority, however, to the effect that undue

purchase of property by the defendant's husband in which the defendant had participated was admissible as tending to show the agency of the husband in contracts relating to her bank account.

Where the controversy was whether a married woman had allowed her husband, as her agent, to manage a farm in all respects as his own, it was held relevant to prove that the husband had rented to another, in his own name, a part of the land. Owens *v.* Gentry, 30 S. C. 490, 9 S. E. 525.

14. Whitescarver *v.* Bonney, 9 Iowa 480; Three Rivers Nat. Bank *v.* Gilchrist, 83 Mich. 253, 47 N. W. 104; Just *v.* State Sav. Bank, 132 Mich. 600, 94 N. W. 200.

Compare Bird *v.* Phillips, 115 Iowa 703, 87 N. W. 414, where the issue was as to whether or not a husband was the authorized agent for his wife to make a certain contract upon which there was other competent evidence; it was held that letters of the husband, covering the time in controversy, containing admissions of his agency were clearly admissible.

15. Hovorka *v.* Havlik (Neb.), 93 N. W. 990. See also Converse *v.* Converse, 9 Rich. Eq. (S. C.) 535.

Darlington's Appeal, 86 Pa. St. 512, 27 Am. Rep. 726, where the court said: "It is equally unnecessary to show by authority that the most dominant influence of all relations is that of the husband over his wife. From the proud and untutored savage to the cultured and refined Anglo-American, the wife is affectionately anxious to please her husband. This is first in her heart, whether she be in the menial service of a rude hut, or in daily toil for support of her family, or in charge of an elegant mansion. When he commands, she obeys; when he persuades, she yields; when he gently hints a wish, she grants. When treated almost as a servant — when governed and corrected as a child, as did our sturdy ancestors — or when confided in as a companion and equal, her will is subdued to her lord. True, there are exceptional women, whose nature is unaffected by marriage, who cannot yield or bend, and, as wives, would not be happy, save with effeminate husbands; but these are not so numerous as to cloud perception of the mental and moral differences of the sexes. The common-law rights and disabilities consequent upon marriage grew out of these differences, and the husband's power and influence distinctly appear."

The Courts Will Rigidly Scrutinize an Antenuptial Contract apparently unjust or unreasonable in its terms and especially where it operates to deprive the wife of her interests in the husband's estate without provision for her in event she survived him; and in such case, in order to have it upheld, the burden is cast upon the husband or those who represented him to show that the contract was fairly procured. Fisher *v.* Koontz, 110 Iowa 498, 80 N. W. 551.

Agreements Between Husband and Wife, in relation to her separate estate, which are injurious to the wife and beneficial to the husband, will not be presumed; but every reasonable intendment will be indulged to the contrary. Burks *v.* Loggins, 39 Miss. 462.

Any Transaction by Which the Title of the Separate Property of the wife becomes vested in the husband is regarded with scrutiny and jealousy by the court; and it is incumbent on the husband to show that it was fair and honest, and such

influence is not to be presumed from the mere relation of the parties; that it must either appear upon the face of the transaction or be shown by competent evidence[16] that there was no consideration, or that the marital confidence was used unfairly or subsequently violated.[17]

Provision Disproportionate to Property of Intended Husband. — A presumption of designed concealment arises from a provision for a wife in a marriage settlement, in lieu of dower, disproportionate to the property of the intended husband, and throws the burden upon those claiming in his right to prove that she had knowledge of the

as in equity and good conscience the wife ought to have acceded to. Burks *v.* Loggins, 39 Miss. 462. See also Pennington *v.* Acker, 30 Miss. 161.

Where a Husband Obtains His Wife's Property Under the Form of a Purchase, surrounded by suspicious circumstances and strong evidence of fraud and for a consideration merely nominal, it is incumbent upon him to make clear and satisfactory proof of good faith; otherwise the courts will presume that he has made improper use of his influence as husband to extort the conveyance. Stiles *v.* Stiles, 14 Mich. 72, an action by a wife against her husband to have set aside a deed from her to him on the ground that it was obtained by fraud.

On a proceeding to set aside a conveyance by a husband to his wife on the ground that it was induced by undue influence and fraudulent practices, the burden of proving the absence of undue influence is upon the wife where the conveyance is itself so unreasonable as to practically beggar the husband's children and there is evidence of undue influence on the part of the wife. Lins *v.* Lendhardt, 127 Mo. 271, 29 S. W. 1025.

In the case of a transaction between husband and wife whereby the husband acquires an advantage either for himself or his estate and which comes under review in a court of equity, the burden of proof is upon the husband, or those who represent his estate, to show the utmost fairness in the transaction. Way *v.* Union Central Life Ins. Co., 61 S. C. 501, 39 S. E. 742.

The Relations Between Persons Engaged to Be Married Are Confidential. — The intended husband may not, either by contrivance or omission, obtain an agreement before marriage which deprives the intended wife of so much of the benefit which she would have obtained by the marriage that it is reasonable to believe she was misled into making the antenuptial agreement; and where it is shown that the agreement does have this effect the burden is upon the representatives of the husband to show that she acted with knowledge of the sacrifices which she made. Russell *v.* Russell, 60 N. J. Eq. 282, 47 Atl. 37.

To enable a husband to specifically enforce against his wife a contract by which she has agreed to convey to him certain real estate, the burden is upon him to show that the contract had for its support some consideration. Greene *v.* Greene, 42 Neb. 634, 60 N. W. 937, 47 Am. St. Rep. 724.

16. In Lins *v.* Lendhardt, 127 Mo. 271, 29 S. W. 1025, an action to set aside a conveyance to a wife on the ground that it was procured by means of fraudulent practices and undue influence, it was held proper to permit the plaintiffs to show what was a reasonable allowance per annum for the support of a wife in the condition of that of the defendant. The court said: "In order to determine whether such gift or provision is reasonable, it is proper to consider the condition of the parties as to its reasonableness."

17. Dimond *v.* Sanderson, 103 Cal. 97, 37 Pac. 189. See also Hardy *v.* VanHarlingen, 7 Ohio St. 216; Ford *v.* Ford, 193 Pa. St. 530, 44 Atl. 561.

"The law recognizes and sustains the right of a husband to the use of all proper influence over the wife, even for his own benefit; and does

character and extent of his property, or that the circumstances were such that she ought reasonably to have had such knowledge at the time the instrument was executed.[18]

The Unreasonableness of the Settlement, the lack of independent counsel for the wife, and the omission of the power of revocation, are circumstances to be considered upon the vital question of undue influence.[19]

b. *Mode of Proof.* — Essentially, as to the mode of proving fraud, undue influence and the like, there can be no difference when that fact is in issue whether the transaction be between husband and wife or between strangers.[20]

3. Husband's Liability for Necessaries. — A. HUSBAND AND WIFE LIVING TOGETHER. — When a husband and wife are living together there is a presumption that the husband assents to contracts made by the wife for necessaries, but this presumption may be rebutted by proof that the husband had provided them or had furnished the wife with the means of furnishing them for herself,[21] or that the credit was in fact given to the wife.[22]

B. HUSBAND AND WIFE LIVING APART. — When the husband and wife live separate and apart, proof of their marriage raises no presumption of liability for necessaries, but the party alleging it must

not impose upon him, or those claiming under him, who seek to uphold her settlement, the burden of showing that the settlement is fair or reasonable, or was made under independent advice, as in the case of settlements made in the other relations which are called 'confidential' or 'fiduciary.' But the wife is protected against settlements made upon the husband through fear or improper influence on his part, and, if she is able to establish this, the settlement will be declared void. And, while a court of equity will scrutinize the transaction with jealousy, in order to ascertain whether the settlement was made through fear of the husband, or whether the husband exercised improper influence over the wife, the burden is on the wife to show improper influence of the husband, in order to avoid her settlement on him." Curtis *v.* Crossley, 59 N. J. Eq. 358, 45 Atl. 905.

The Heirs of a Husband who attack a deed by him to his wife, on the ground of undue influence and duress, have the burden of proving the facts alleged. Brown *v.* Brown, 44 S. C. 378, 22 S. E. 412. See also Todd *v.* Wickliffe, 18 B. Mon. (Ky.) 866, a contest between the heirs of a wife and her husband as to the validity of a deed made by the wife to her husband through a third person, where it was held that it would not be presumed that the conveyance was fraudulent so as to impose upon the husband proof if its fairness.

The fact of the relationship between husband and wife being one of confidence and trust, and that a conveyance between them was without valuable consideration, does not warrant the presumption of law that undue influence was exercised in obtaining it. Ford *v.* Ford, 193 Pa. St. 530, 44 Atl. 561.

18. Yarde *v.* Yarde, 187 Ill. 636, 58 N. E. 600.

19. Curtis *v.* Crossley, 59 N. J. Eq. 358, 45 Atl. 905.

20. See articles "FRAUD;" "UNDUE INFLUENCE."

21. Compton *v.* Bates, 10 Ill. App. 78; Mott *v.* Comstock, 8 Wend. (N. Y.) 544. See also Tibbets *v.* Hapgood, 34 N. H. 420; Gotts *v.* Clark, 78 Ill. 229; Baker *v.* Carter, 83 Me. 132, 21 Atl. 834, 23 Am. St. Rep. 764; Reed *v.* Crissey, 63 Mo. App. 184.

22. Connerat *v.* Goldsmith, 6 Ga. 14.

establish its existence;[23] and a plaintiff in an action to recover for necessaries furnished the wife while so living apart from her husband has the burden to show that her absence was such as to give her a right to use her husband's credit.[24]

If the Husband Compels His Wife to Leave Him and does not make a suitable provision for her, she carries with her the authority to obtain upon his credit the necessaries of life adapted to her condition and his circumstances.[25]

Goods Furnished on Credit of Husband. — So, also, where the issue is as to whether or not goods furnished the wife were so furnished on the credit of the husband, or on her credit, circumstantial evidence is of necessity often resorted to.[26]

4. Separate Maintenance. — To sustain a bill for separate mainte-

23. Rea *v.* Durkee, 25 Ill. 503; Mitchell *v.* Treanor, 11 Ga. 324, 56 Am. Dec. 421; Mickelberry *v.* Harvey, 58 Ind. 523; Peaks *v.* Mayhew, 94 Me. 571, 48 Atl. 172; Walker *v.* Simpson, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216. *Compare* Frost *v.* Willis, 13 Vt. 202.

Rule Stated. — "Where they are living separate and apart, the seller, in order to establish the liability of the husband for goods purchased by the wife, must affirmatively show the wife's authority in fact, express or implied, to pledge the husband's credit, or that the goods sold were necessaries, and that the husband had neglected or refused to provide a suitable support for his wife." S. E. Olson Co. *v.* Youngquist, 76 Minn. 26, 78 N. W. 870.

A Wife Who Has Deserted Her Husband is not presumed to be his agent, so as to render him liable for her support. Peaks *v.* Mayhew, 94 Me. 571, 48 Atl. 172.

24. Mitchell *v.* Treanor, 11 Ga. 324, 56 Am. Dec. 421; Mahew *v.* Thayer, 8 Gray (Mass.) 172; Sturbridge *v.* Franklin, 160 Mass. 149, 35 N. E. 669.

See also Scherer *v.* Scherer, 23 Ind. App. 384, 55 N. E. 494, 77 Am. St. Rep. 437, where the contract of separation between the husband and wife recited that the parties were living apart "by reason of the abandonment one of the other" and it was held that this would not show that the wife left her husband for reasons justified by law, and that in the absence of such showing she can have no claim against him for support. Rutherford *v.* Cox, 11 Mo. 347; Benjamin *v.* Dockham, 132 Mass. 181.

25. Ott *v.* Hentall, 70 N. H. 231, 47 Atl. 80, 51 L. R. A. 226. See also Cunningham *v.* Reardon, 98 Mass. 538; Eastland *v.* Burchill (L. R.), 3 Q. B. 432; Peaks *v.* Mayhew, 94 Me. 571, 48 Atl. 172.

26. Payment for Other Like Purchases. — In an action against a husband to recover the purchase price of goods purchased by the wife, the fact that the defendant had paid for other articles bought by his wife upon his credit is admissible as having some bearing upon the issue of the authority which he had given her to make purchases, and upon the question of his means and situation in life, and is rightfully permitted to be shown. Raynes *v.* Bennett, 114 Mass. 424. See also Lovell *v.* Williams, 125 Mass. 439, where, however, the wife was sought to be charged.

Evidence of the Style of Living and expenditures in the circles to which he introduced her and where he expects her to find her intimates and associates is pertinent in an action involving the right and authority of a married woman to bind her husband by purchases made in his name without his knowledge or express assent. Clark *v.* Cox, 32 Mich. 204.

That at About the Time in Question the Husband Was Not "Paying Anybody" is a "relevant fact as tending to show that he was so circumstanced that he was not provid-

nance the wife must show that she lives separate and apart from her husband without her fault.[27]

5. Abandonment. — A. Presumptions and Burden of Proof. a. *In General.*— Upon the criminal prosecution of a husband for abandoning his wife the prosecution has the burden of showing not only the facts of abandonment and subsequent failure and refusal to support, but also that the defendant had not good cause for the abandonment.[28]

b. *Danger of Wife Becoming Public Burden.* — It is not incumbent upon the prosecution, however, to show that the danger of becoming a burden on the public is immediate or imminent, and

ing for the wants and necessities of the family, and also as tending to show the fact that the goods at the time were not charged to the husband, but to the wife." Hirshfield *v.* Waldron, 83 Mich. 116, 47 N. W. 239.

Evidence of Prior Efforts to Collect a Claim against the husband which had been standing for a long time is admissible as having some bearing on the issue as to whether or not credit for goods sold by the plaintiff had been extended to the husband or to the wife. Hirshfield *v.* Waldron, 83 Mich. 116, 47 N. W. 239.

Entries in Books of Account. The mere entry in the seller's books of account of goods furnished the wife charging her therefor is not conclusive that credit was not given to the husband. Furlong *v.* Hyson, 35 Me. 332.

In Wright *v.* Wright, 114 Iowa 748, 87 N. W. 709, an action by a wife against her husband's father for support under a contract providing therefor in case of non-support by the husband, it was held that testimony by the wife as to the manner in which her husband treated her from the time of their marriage to the time of the alleged abandonment was material as tending to show the alleged desertion by the husband and his failure to furnish support.

27. Scherer *v.* Scherer, 23 Ind. App. 384, 55 N. E. 494, 77 Am. St. Rep. 437.

If the Wife Voluntarily Abandoned her husband, or if he was compelled to abandon her on account of her adultery, or her wicked conduct, the verdict would necessarily have to be against her. Proof of fault in one is not evidence of correct deportment in the other. Nor does it follow that because one is unable to maintain an action the other must necessarily be entitled to recover. Wahle *v.* Wahle, 71 Ill. 510.

28. State *v.* Greenup, 30 Mo. App. 299; State *v.* Satchwell, 68 Mo. App. 39, where the court in so ruling said: "The state must show this although it involves the necessity of proving a negative, for the rule in this state, even in civil cases, is that where the plaintiff grounds his right of action in a negative averment, and the proof of the affirmative is not peculiarly within the knowledge and power of the defendant, the establishment of the negative is an essential element of the plaintiff's case." See also State *v.* Linck, 68 Mo. App. 161; State *v.* Hopkins, 130 N. C. 647, 40 S. E. 973, where it was held that a husband prosecuted for abandonment of his wife and children was on trial for a criminal offense in which he was presumed to be innocent, and that this presumption continued until he was found to be guilty by the jury beyond a reasonable doubt.

In State *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125, a prosecution for unlawfully neglecting and refusing to support the defendant's wife, it was said: "Ordinarily the conduct of married women is such that when any husband neglects or refuses to support his wife the law itself presumes such neglect to be unlawful. Having shown the marriage and the neglect, the attorney for the state could safely rest upon that presumption. The unlawfulness

not dependent on any future contingency, however probable, in the ordinary course of events.[29]

B. Substance and Mode of Proof. — Necessarily, upon such a prosecution the evidence not only as to the fact of abandonment,[30] but also as to the *animus* and purpose of the defendant in so doing, must be circumstantial.[31]

Evidence of the Wife's Infidelity After the Abandonment cannot be received when there is no proof of her infidelity during the marriage and before the abandonment.[32]

Wife Becoming Public Burden. — Facts bearing approximately on the probability or improbability of the abandoned wife becoming a burden on the public are admissible in evidence on a prosecution for abandonment.[33]

was deemed to be proved *prima facie*. And when the defendant interposed a defense based upon such misconduct of his wife as made it lawful for him to refuse to support her, it was incumbent upon him to prove such misconduct as he set up, that is her adultery, and to prove it, as before stated, by a preponderance of evidence."

29. Carney *v.* State, 84 Ala. 7, 4 So. 285.

30. It is error to refuse to permit the defendant to show that he had rented a house which his wife refused to occupy. The court said: "If defendant furnished his wife with a suitable house he had so far contributed to her support; and if she refused to occupy it it certainly was not his fault." State *v.* White, 45 Mo. 512.

31. He should be permitted to prove the amount of his income and his ability to support his wife and family. State *v.* Linck, 68 Mo. App. 161.

He should be permitted to show that his wife was an habitual drunkard, so as to furnish ground for separation and divorce. State *v.* Satchwell, 68 Mo. App. 39.

The Record of a Divorce Suit by a husband against his wife showing its commencement and dismissal by him is competent evidence as showing the animus and purposes of the defendant in abandoning his wife. State *v.* Wonderly, 17 Mo. App. 597.

In Com. *v.* Ham, 156 Mass. 485, 31 N. E. 639, a prosecution under the Massachusetts statute charging the defendant with unreasonably neglecting to provide for the support of his wife, wherein the defendant asserted that his neglect was not unreasonable in view of her conduct, and charged her with various breaches of her marriage duty, and with having declared that she would not live with him; it was held proper to permit the prosecution, on rebuttal and for the purpose of explaining her conduct, to put in evidence a record of a decree upon the petition of the wife for separate maintenance, declaring that the wife was living apart from the husband for justifiable cause; and a decree in a suit for divorce filed by the husband on the grounds of drunkenness and cruelty, denying him the relief prayed for. The court said: "The decrees were facts bearing on the same subject, and tending to explain her conduct, and therefore were admissible in rebuttal. The alleged declaration of the wife, for instance, that she would not live with the defendant, assumed a different color if made after the two proceedings the records of which were introduced."

But evidence by the defendant that his wife had filed a motion for alimony *pendente lite* in a divorce suit, which was denied, is properly excluded. Com. *v.* Simmons, 165 Mass. 356, 43 N. E. 110.

32. Hall *v.* State, 100 Ala. 86, 14 So. 867.

33. Carney *v.* State, 84 Ala. 7, 4 So. 285.

In People *v.* Karlsioe, 1 App. Div. 571, 37 N. Y. Supp. 481, a prosecu-

II. PRIVILEGES AND DISABILITIES OF COVERTURE.

1. Coercion or Control of Wife by Husband. — A. PRESUMPTIONS AND BURDEN OF PROOF. — a. *Torts.* — When a tort is committed by the wife in the presence of her husband and nothing more appears, the presumption is that she acted under his coercion.[34]

b. *Crimes.* — **(1.) Generally.** — If a wife commits any felony in the presence of her husband it will be presumed[35] that she did it

tion of the defendant for abandoning his wife, it was held error to exclude evidence offered by the defendant to the effect that the wife had ample means of support and was not in the least likely to become a public burden, and that her financial circumstances were far better than those of her husband.

34. *Indiana.* — Ball *v.* Bennett, 21 Ind. 427.

Maine. — Marshall *v.* Oakes, 51 Me. 308.

Maryland. — Nolan *v.* Traber, 49 Md. 460, 33 Am. Rep. 277.

Michigan. — Miller *v.* Sweitzer, 22 Mich. 391.

Minnesota. — Brazil *v.* Moran, 8 Minn. 236.

Missouri. — Dailey *v.* Houston, 58 Mo. 361.

New Hampshire. — Carleton *v.* Haywood, 49 N. H. 314.

New York. — Cassin *v.* Delany, 38 N. Y. 178.

Ohio. — Sisco *v.* Cheney, Wright 9.

South Carolina. — McKeowen *v.* Johnson, 1 McCord 578; Edwards *v.* Wessinger, 65 S. C. 161, 43 S. E. 518, 95 Am. St. Rep. 789; Park *v.* Hopkins, 2 Bail. 411.

Texas. — McQueen *v.* Fulgham, 27 Tex. 463.

Vermont. — Jackson *v.* Kirby, 37 Vt. 448.

35. *England.* — Rex *v.* Knight, 1 Car. & P. 116; Reg. *v.* Cruse, 2 Moody C. C. 53.

Alabama. — Hensley *v.* State, 52 Ala. 10.

Indiana. — State *v.* Banks, 48 Ind. 197.

Maine. — State *v.* Cleaves, 59 Me. 298, 8 Am. Rep. 422.

Massachusetts. — Com. *v.* Neal, 10 Mass. 152.

Missouri. — State *v.* Bentz, 11 Mo. 27.

New Hampshire. — Haines *v.* State, 35 N. H. 207.

New York. — Goldstein *v.* People, 82 N. Y. 231.

North Carolina. — State *v.* Williams, 65 N. C. 398.

Ohio. — Davis *v.* State, 15 Ohio 72, 45 Am. Dec. 559.

Rhode Island. — State *v.* Boyle, 13 R. I. 537.

Vermont. — State *v.* Potter, 42 Vt. 495.

West Virginia. — Gill *v.* State, 39 W. Va. 479, 20 S. E. 568.

Wisconsin. — Miller *v.* State, 25 Wis. 384.

"A Prima Facie Case of Coercion Was Established when it was shown that the defendant was a married woman, and that the criminal act was done in the presence of the husband, and that this presumption might be rebutted by evidence that the acts of the wife were done by her while not in her husband's presence, nor so immediately near him as fairly to be held under his control, and in his presence.

Now, how the consent of the wife to the husband's illicit intercourse with the prosecuting witness, months before the alleged crime was committed, would tend to rebut the presumption of coercion, in the attempt to produce a miscarriage, we are at a loss to discover. True, it tends to show that the wife connived at her husband's adultery, but its effect would rather be to show that, instead of acting independent of the coercion of her husband, she was so entirely under his control as to consent to his adulterous intercourse with the prosecuting witness.

No wife of any individuality, self-respect, or independence of thought or action, would consent to such a crime against herself. In our opinion this evidence should not have been admitted." State *v.* Fitzgerald, 49 Iowa 260, 31 Am. Rep. 148.

The Law Presumes That the Influence of a Husband Over His Wife is such that she is not held criminally liable for unlawful acts done by her in his presence, unless there is evidence to rebut this presumption and to satisfy the jury that she was exercising a free volition and was guilty of an independent criminal act. State *v.* Kelly, 74 Iowa 589, 38 N. W. 503.

Where a Wife Acts in the Furtherance of a Combination to commit a felony in the presence of her husband, she will be presumed to have acted under his coercion. Uhl *v.* Com., 6 Gratt. (Va.) 706, which was a prosecution of husband for an attempt to burn a barn.

In Bibb *v.* State, 94 Ala. 31, 10 So. 506, the trial of a wife for murder under an indictment against her and her husband jointly, the evidence showed that she had held down the arms of the deceased from behind while her husband struck him on the head, telling her with an oath "to hold him up." It was held that the trial judge did not err in instructing the jury that "on the issue of guilty or not guilty they should not consider this defendant otherwise than as a *feme sole*," nor in refusing to charge them at the request of the defendant "that they must acquit her unless they believed that she acted willfully and voluntarily." The court said: "The presumption of the common law, that when the wife acts with her husband in the commission of a crime, she acts under his coercion, and consequently without guilty intent, is not allowed in all offenses, in the administration of the criminal law. 'It may not be positively settled,' as has been well observed, 'where the line of separation is; but for certain crimes the wife is responsible, although committed under the compulsion of her husband.'—1 Bennett & Heard Cr. Cases, 85. The exceptions engrafted on the general rule are based on the nature, grade and heinousness of the felony. Among these is murder. The rule that the law holds the wife answerable for murder, though committed in the presence of, or in company with, her husband, without any presumption that she acted under his coercion, and that she is punishable as much as if *sole*, is sustained by the great weight of authority."

In Com. *v.* Eagan, 103 Mass. 71, a prosecution of a married woman for an assault committed in the immediate presence of her husband, the defendant asked the trial judge to charge the jury that "the presumption was that she acted under the coercion and control of her husband and should be acquitted," which the court refused to do, but on the contrary charged the jury that if they were satisfied that she did the acts proved, of her own free will, free from the coercion or influence of her husband, she could be convicted. The court, in holding the action of the trial judge to be erroneous, said: "If there was evidence in the case to rebut the presumption in favor of the defendant, the court was justified in refusing to instruct the jury that she should be acquitted; but we think that the first part of the instruction requested should have been given. The instructions actually given would have been accurate if the court had also instructed the jury as to the presumption above stated, but by the refusal to do so the defendant was deprived of the benefit of this presumption as one of the elements proper for the consideration of the jury in determining her criminal liability."

Where a Wife Voluntarily Commits a Crime, the mere presence of her husband does not excuse her. If she commits a crime under the threats, commands or coercion of her husband she cannot be convicted of the crime, but the coercion of the husband must be made to appear from all the facts and circumstances and is not to be presumed merely from his presence. Freel *v.* State, 21 Ark. 212; Edwards *v.* State, 27 Ark. 493.

under his coercion or constraint. But the fact of coverture must be clearly established.[36]

Perjury by Wife. — Where a wife takes the stand on behalf of her husband, who is on trial for a criminal offense, and commits perjury, the rule that there is a presumption of coercion does not apply, and she is not exempt from the penalties imposed for that offense.[37]

(2.) Misdemeanors.— Formerly many of the authorities confined this presumption to cases of felony, but it is now extended to misdemeanors,[38] those offenses only being excepted which are more likely to be committed by women.[39]

36. The mere fact of cohabitation or reputation alone not being sufficient. Davis *v.* State, 15 Ohio 72, 45 Am. Dec. 559. *Compare* Rex *v.* Knight, 1 Car. & P. (Eng.) 116.

37. Com. *v.* Moore, 162 Mass. 441, 38 N. E. 1120, where the court said: "The testimony is in open court and is given under the solemnity of an oath. It is to be considered by the jury, but very little weight ought to be given to it if there is a presumption that it is given under coercion of her husband. The better rule would seem to be that where a wife is a witness under the [Massachusetts] statute and commits perjury she is not exempt from the penalties imposed for that offense."

38. State *v.* Williams, 65 N. C. 398; State *v.* Cleaves, 59 Me. 298, 8 Am. Rep. 422.

In Com. *v.* Pratt, 126 Mass. 462, a prosecution for the unlawful keeping of intoxicating liquors with intent to sell the same, it was held that if at the time the liquors were kept for sale by the defendant's wife the defendant actually aided her or assisted in such keeping, or if without actually and actively aiding his wife in such keeping was personally present and knew that his wife was so keeping liquors, the presumption of law is that the wife acted under the coercion of her husband, the defendant, and that he is guilty of the offense charged.

In State *v.* Boyle, 13 R. I. 537, wherein defendant was charged with having illegally sold intoxicating liquors, it appeared that the liquors were not sold by himself, but in his presence, by his wife. The defendant admitted that if the wife was prosecuted for the act the law would raise the presumption in her favor, but he contended that it would do so only out of favor for her, and that in a prosecution against the husband no such presumption arises, but it is incumbent upon the prosecution to prove his guilt in point of fact by positive testimony. The court, however, in overruling this contention said: "The common law presumes that when husband and wife are together they have virtually but one will between them, the will of the husband; and consequently, if she commits an offense in his presence it holds him *prima facie* responsible for it. On the defendant's theory, if husband and wife were jointly indicted for an offense committed by her in his presence, the jury, with the clearest evidence of the offense, might have to acquit her on the presumption that she acted under his coercion and him for want of positive proof that she so acted. We are of opinion that the law would not so frustrate itself, but that the presumption which would acquit her would likewise convict him. . . . The presumption is not very unreasonable even in this age of the world; for the husband knows or ought to know that, being a husband, he is to be presumed to have a husband's authority, and therefore, when he sees his wife committing a misdemeanor, he ought at the very least to express his disapprobation, unless she is acting in obedience to his will."

39. Com. *v.* Cheney, 114 Mass. 281. See also State *v.* Williams, 65 N. C. 398, when this exception was declared.

In Keeping a House of Ill-Fame in a building used, occupied and controlled by both husband and wife, she is not presumed to be acting under his coercion. State *v.* Jones, 53 W. Va. 613, 45 S. E. 916.

(3.) Cases Denying Presumption. — There are jurisdictions, however, in which it is denied that any such presumption of coercion exists.[40]

(4.) Act Committed Out of Presence of Husband. — There is no legal presumption that acts done by a wife in her husband's absence were done under his coercion or control.[41]

(5.) Presence of Husband Necessary. — On a prosecution of a married woman, in order to make out a defense that she was acting under the coercion of her husband, it must be shown that he was present at the time the offense was committed.[42]

To Establish the Fact of His Presence, however, it is not necessary to show that the act was done literally in his sight. If he were near enough for her to be under his immediate influence or control, although not in the same room, it is sufficient.[43]

40. State *v.* Hendricks, 32 Kan. 559, 4 Pac. 1050, where the court in speaking of the contrary rule said: "The presumption was probably right, when first adopted, for the state of society which then existed. But it cannot be right now under our present condition of society. And it is not the law. There was once a reason for the presumption; but that reason has long ago ceased to exist in Kansas; and when the reason for the presumption has ceased to exist, the presumption itself must also cease to exist."

In Georgia a statute provides that "A *feme covert,* or married woman, acting under the threats, command or coercion of her husband, shall not be found guilty of any crime or misdemeanor not punishable by death or perpetual imprisonment; and, with this exception, the husband shall be prosecuted as principal, and, if convicted, shall receive the punishment which would otherwise have been inflicted on the wife, if she had been found guilty; provided it appears, from all the facts and circumstances of the case, that violent threats, command and coercion were used." And in Bell *v.* State, 92 Ga. 49, 18 S. E. 186, it was held that, as to any offense, however small, in order for the wife to stand excused under the statute, it must appear that she was in fact coerced, or that he used violent threats, command or some equivalent means of coercion calculated to overpower her will and render her a passive instrument rather than a voluntary agent of crime.

41. Com. *v.* Butler, 1 Allen (Mass.) 4.

To authorize the conviction of a husband for the illegal act of his wife in selling liquors in his store in his absence, it must be shown beyond a reasonable doubt that her illegal act was done by his authority; and the fact that it was done by her as his clerk or agent without more is not sufficient. Seibert *v.* State, 40 Ala. 60.

42. Com. *v.* Munsey, 112 Mass. 287.

A wife is responsible for a crime committed by her husband's order if she is not within control or coercion at the time. Com. *v.* Feeney, 13 Allen (Mass.) 560.

The Mere Proximity of a Husband Not Actually Present when his wife commits a minor offense will not raise in her favor the presumption that she acted under his coercion. In such case the question is one of fact, although doubtless the fact of coercion might easily be inferred from proximity and perhaps ought to be inferred if there be circumstances showing concert of action. State *v.* Shee, 13 R. I. 535, which was a prosecution of a married woman for keeping and maintaining a common nuisance.

A Momentary Absence from the Room, or a momentary turning of his back, if he were on the premises and near at hand, might still leave her under his influence. Com. *v.* Munsey, 112 Mass. 287.

43. Com. *v.* Munsey, 112 Mass. 287.

c. *Rebuttal of Presumption. — Wife Acting Freely.* — This presumption of coercion or control is, however, not a conclusive presumption, but may be rebutted by proof that the wife acted voluntarily and without constraint;[44] as where it is shown that she acted against her husband's will.[45]

2. Personal Earnings of Wife. — In the absence of express statute to the contrary,[46] the presumption is that any services performed by the wife for a third person for a compensation are rendered on the husband's behalf.[47] And even under a statute enabling married women to hold in their own right property acquired by purchase

The mere fact that at the time a married woman made an unlawful sale of intoxicating liquors her husband was in an adjoining room sick in bed, and that the door between the two rooms was open, does not raise a conclusive presumption of law that she was acting under the immediate influence and control of her husband. Com. *v.* Gormley, 133 Mass. 580.

44. U. S. *v.* Terry, 42 Fed. 317; State *v.* Williams, 65 N. C. 398; Nolan *v.* Traber, 49 Md. 460, 33 Am. Rep. 277; Carleton *v.* Haywood, 49 N. H. 314; Edwards *v.* Wessinger, 65 S. C. 161, 43 S. E. 518, 95 Am. St. Rep. 789. See also State *v.* Cleaves, 59 Me. 298, 8 Am. Rep. 422.

It is a presumption of law that in cases within the rule where the act of the wife is done in the presence of her husband, it is done under the constraint and coercion of the husband, but such presumption is only *prima facie*. It may be rebutted, and when it is shown that she acted voluntarily, although the husband was present, she is liable to punishment as if she were a *feme sole*. Tabler *v.* State, 34 Ohio St. 127.

45. Nolan *v.* Traber, 49 Md. 460, 33 Am. Rep. 277; Carleton *v.* Haywood, 49 N. H. 314; Cassin *v.* Delany, 38 N. Y. 178; Edwards *v.* Wessinger, 65 S. C. 161, 43 S. E. 518, 95 Am. St. Rep. 789.

46. Under a Massachusetts Statute services rendered by a wife for a person other than her husband and children must, unless there is an express agreement on her part to the contrary, be presumed to be performed on her separate account. Seward *v.* Arms, 145 Mass. 195, 13 N. E. 487.

This Statute Declares a Conclusive Presumption of Law, which is rightly held to defeat the husband's claim for such services performed by the wife after the statute took effect, in the absence of all evidence of an express agreement under which he had previously acquired any rights, or which would bring the case within the exception of the statute. Williams *v.* Williams, 131 Mass. 533.

47. Plummer *v.* Trost, 81 Mo. 425.

In Fowle *v.* Tidd, 15 Gray (Mass.) 94, an action by a married woman to recover for personal services rendered to the defendant, it was held that the admission of deeds from him to her and from her to him as evidence that the services were rendered on her sole and separate account was not error.

In Morgan *v.* Bolles, 36 Conn. 175, the plaintiff, as trustee of his wife, claimed compensation for services of his wife rendered to his mother for some time previous to the mother's decease, with whom he and his wife lived; and it was held that in the absence of any evidence to the contrary it was to be presumed that the wife rendered the services in behalf of her husband. The court said: "The service of the wife presumptively belongs to the husband, and while she is living with him in the same house with his mother, service rendered to the mother would ordinarily be presumed to be rendered in behalf of the husband. It is incumbent, therefore, on the plaintiff to show that the services were rendered under such

or gift, the personal earnings of the wife are not drawn within its operation by implication.[48]

3. Wife as Surety for Husband. — A. PRESUMPTIONS AND BURDEN OF PROOF. — When an obligation otherwise enforceable is sought by the wife to be avoided on the ground that her relation thereto is as surety for her husband, the burden of proving that relation is on her.[49]

Whether or not she is surety is to be determined not from the form of the contract, nor from the basis of the transaction, but from

circumstances as indicated an intention that she should receive and have the benefit of the compensation paid for them." Here the circumstances all point the other way.

48. Plummer *v.* Trost, 81 Mo. 425. See also McDermott's Appeal, 106 Pa. St. 358, 51 Am. Rep. 526. *Compare* Turner *v.* Davenport, 63 N. J. Eq. 288, 49 Atl. 463.

In Neale *v.* Hermanns, 65 Md. 474, 5 Atl. 424, an action by a married woman by her husband as next friend to recover for personal earnings, which under a Maryland statute are secured to her sole and separate use, it was held that she had the burden of establishing that the services sued for were rendered by her as an independent person on her own account and not conjointly with her husband or for her husband's benefit.

Under the Alabama Statute providing that "the earnings of the wife are her separate property, but she is not entitled to compensation for services rendered to or for her husband or to or for the family," a married woman is entitled to recover the value of labor performed by her for another; but where her claim is based upon services rendered in connection with her minor children in making a crop, it is incumbent upon her to furnish the data from which the value of the services rendered by her individually can be ascertained, since she cannot recover for the product or labor of the minor children which belong to the father. Larkin *v.* Woosley, 109 Ala. 258, 19 So. 520.

The Husband May Relinquish the Wife's Earnings to Her by way of gift, where the rights of creditors do not intervene, thereby creating in her an equitable estate, but such relinquishment and gift will not be presumed from the fact that the parties lived separate and apart, where it is shown that their estrangement was caused by the husband's attempts to assert his marital rights in and to her property, the existence and amount of which she carefully concealed from his knowledge. Bolman *v.* Overall, 86 Ala. 168, 5 So. 455.

49. Pulliam *v.* Hicks, 132 Ala. 134, 31 So. 456. See also Smith *v.* Bond, 56 Neb. 529, 76 N. W. 1062. *Compare* Union Stock Yards Nat. Bank *v.* Coffman, 101 Iowa 594, 70 N. W. 693.

When a Married Women Executes Her Individual Promissory Note, secured by a mortgage on her separate property, she has the burden of proving that she signed as surety or grantor for her husband or some other person so as to bring her within the exceptive clause of the statute prohibiting her from entering into any contract of suretyship. Miller *v.* Shields, 124 Ind. 166, 24 N. E. 670, 8 L. R. A. 406, where the court said: "To hold that when a married woman executed her individual promissory note she is presumed to stand as surety for her husband or some other person, until the contrary is made to appear, would be to carry the doctrine of presumptions beyond the border line."

Where a Married Woman Is Sued Upon a Joint and Several Obligation which does not show upon its face that she occupies the position of surety, the burden of proving the suretyship is upon her. Reeves *v.* Morgan, 48 N. J. Eq. 415, 21 Atl. 1040.

the inquiry as to whether she received, in person or in estate, the benefit of the consideration upon which the contract rests.[50]

Where the Instrument Is on Its Face the Joint Obligation of the husband and wife, the fact that his name appears to have been subscribed first is of no significance.[51]

B. PAROL EVIDENCE. — Parol evidence is admissible to show whether or not the wife was surety for the husband.[52]

III. SEPARATE OWNERSHIP OF PROPERTY.

1. Presumptions and Burden of Proof. — A. PROPERTY PURCHASED BY WIFE DURING MARRIAGE. — a. *In General.* — If a married woman purchases property, the law, as a general rule, presumes that it was paid for with her husband's money,[53] and one who would

In Weathers *v.* Borders, 121 N. C. 387, 28 S. E. 524, it was held that a wife cannot subject her land or separate interest therein in any way except by a regular conveyance executed as required by statute, and that even then the intent to charge her separate estate must appear on the face of the instrument creating the liability.

In Zachary *v.* Perry, 130 N. C. 289, 41 S. E. 533, it was held that the acceptance by a husband and wife of a draft drawn by them directing the drawee to "charge the same to my account as a payment on the contract price for building a dwelling-house about two miles north of" a certain town, contained no express charge upon the land mentioned in it which belonged to the wife and could not be considered as a lien by way of mortgage, and was hence ineffectual to bind her separate estate.

Under the West Virginia Code 1891, ch. 66, § 12, it is held that in order to sustain a charge on the separate estate of a married woman when contested, it must appear that the debt is valid under that section, and the burden is upon the creditors to show this. Schamp *v.* Security Sav. & Loan Ass'n, 44 W. Va. 587, 28 S. E. 709.

50. Cook *v.* Buhrlage, 159 Ind. 162, 64 N. E. 603. *Compare* Darwin *v.* Moore, 58 S. C. 164, 36 S. E. 539, an action to enforce payment of a note given by a married woman, where it was held that all the law required to be shown at the time of the execution of the note was that it should appear that the contract was made with reference to her separate estate, and that when this was done it was not necessary to also show that the contract was beneficial to her separate estate.

51. Pulliam *v.* Hicks, 132 Ala. 134, 31 So. 456. See also Lunsford *v.* Harrison, 131 Ala. 263, 31 So. 24, when, however, the wife's name was stated first in the body of the note and the mortgage was signed first by her.

52. In Scofield *v.* Jones, 85 Ga. 816, 11 S. E. 1032, the court said: "How else could married women be hindered from doing by the execution of writings what the law disables them to do at all? No amount of writing and no form into which it can be moulded, whether of lease, promissory note or anything else, will bind a woman to pay her husband's debt. No device or subterfuge in which the creditor engages or participates, however numerous or solemn may be the writings used to cover and conceal it, will serve to circumvent the law, provided detection and exposure are within the resources of the law by the use of any evidence, written or oral, direct or circumstantial."

53. *Florida.* — Price *v.* Sanchez, 8 Fla. 136; Kahn *v.* Weinlander, 39 Fla. 210, 22 So. 653.

Missouri. — Crook *v.* Tull, 111 Mo. 283, 20 S. W. 8; Bucks *v.* Moore, 36 Mo. App. 529; Sloan *v.*

establish title in her has the burden of proving that the means were not furnished by her husband.[54]

As Against Existing Creditors of Her Husband, ownership by a wife

Torry, 78 Mo. 623; McFerran *v.* Kieney, 22 Mo. App. 554.

Pennsylvania. — Walker *v.* Reamy, 36 Pa. St. 410.

West Virginia. — Stocksdale *v.* Harris, 23 W. Va. 499; Harr *v.* Shaffer, 52 W. Va. 207, 43 S. E. 89.

See also Stanton *v.* Kirsch, 6 Wis. 338.

Contra. — McVey *v.* Green Bay & M. R. Co., 42 Wis. 532.

It is well settled that in order to enable a married woman to acquire and hold property against her husband's creditors she must make it clearly appear that the means of acquisition were her own, independent of her husband. Auble *v.* Mason, 35 Pa. St. 261.

In Mangum *v.* Finucane, 38 Miss. 354, a controversy between the wife and a creditor of her insolvent husband respecting the validity of her claim to property as belonging to her separate estate, wherein there was evidence tending to show that the property was purchased through the agency of the husband and with funds furnished by him and for his benefit, it was held error to charge the jury that the burden of proof was upon the creditor to show that the money used in the purchase came from the husband, and that the law presumed that the property belonged to the wife until the accompanying circumstances or other proof showed the contrary.

Mere Evidence That She Purchased It Is Not Sufficient to give her title — it must be satisfactorily shown that it was paid for with her own separate funds. In the absence of such evidence the presumption is violent that the husband furnished the means of payment. Keeney *v.* Good, 21 Pa. St. 349.

Where a married woman brings an action to enforce a chose in action, alleged to have been assigned to her by her husband, proof of the assignment is not admissible unless there is also proof that she had a separate estate out of which the consideration for the assignment was paid. Carpenter *v.* Tatro, 36 Wis. 297.

54. Clark *v.* Viles, 32 Me. 32; Bradford's Appeal, 29 Pa. St. 513; Harr *v.* Shafer, 52 W. Va. 207, 43 S. E. 89.

"Where property is alleged to have been purchased by a wife, or a conveyance made to her during coverture, the burden is upon her to prove distinctly that she paid for it with means not derived from her husband; and, in the absence of clear proof that it was not acquired with his means, the presumption is that it was acquired with his means, and it will be liable for his debts. But, on the other hand, if she furnish evidence clearly showing that it was acquired with her separate means, or did not come from her husband's means, it must be protected, as her separate estate, from his own acts seeking to make it liable to his creditors, as well as their acts." Walker *v.* Peck, 39 W. Va. 325, 19 S. E. 411.

A Wife's Ownership of Notes which are payable to her husband and have been transferred by him as collateral security for a debt of himself and wife without disclosing their true ownership, must be established by evidence clear, strong and convincing that they were hers at the time of the transfer. Sallinger *v.* Perry, 133 N. C. 35, 45 S. E. 360.

In Gates *v.* Brower, 9 N. Y. 205, 59 Am. Dec. 530, it was held that the mere fact that the plaintiff took the wife's note on the sale of the property did not furnish such conclusive evidence that the purchase was not in fact for the benefit of the husband as to be incapable of being overcome by other evidence.

Where the wife, surviving the husband, or her representative, after her death, claims money remaining in the homestead on the death of the husband, it is not enough to show that she once earned money, nor

of real or personal property must be established by clear and satisfactory evidence,[55] although the proof need not be so clear[56] as

that she received a portion from her father's estate, nor that her husband at times gave her money, without further identifying such sums and showing that the moneys in question are the same, or that the moneys so earned or received by the wife passed to the husband without a lawful consideration. It must appear that at the time of his death he was her debtor. Van Liew *v.* Galtra, 36 N. J. Eq. 251.

In North Carolina the wife may acquire separate property with her earnings by agreement with her husband, free from his control, but when she asserts such a right of property the burden is upon her to prove that fact. Grambling *v.* Dickey, 118 N. C. 986, 24 S. E. 671.

A Pennsylvania Statute (Act of May 4, 1855) provides that a married woman whose husband, through drunkenness and profligacy, neglects to provide for her and her children is entitled to all the rights and privileges of a *feme sole* trader. And in Ellison *v.* Anderson, 110 Pa. St. 486, 1 Atl. 539, a controversy between a wife and her husband's creditors as to the ownership of certain lands claimed by the creditors to belong to the husband, but which the wife claimed to have paid for out of her separate earnings, and in which she claimed that she was entitled to the rights and privileges of a *feme sole* trader under this statute, it was held that the burden of proof was upon her to show that she was thus entitled.

55. *Illinois.* — Kahn *v.* Wood, 82 Ill. 219.

Indiana. — Meredith *v.* Citizens' Nat. Bank, 92 Ind. 343.

Louisiana. — Phelps *v.* Rightor, 15 La. Ann. 33; Bird *v.* Duralde, 23 La. Ann. 319.

Maryland. — Myers *v.* King, 42 Md. 65.

North Carolina. — Sallinger *v.* Perry, 133 N. C. 35, 45 S. E. 360.

Pennsylvania. — Kingsbury *v.* Davidson, 112 Pa. St. 380, 4 Atl. 33; Gault *v.* Saffin, 44 Pa. St. 307.

Where a wife seeks by bill to enjoin a creditor of her husband from selling property, seized under a judgment and execution against her husband, upon the ground that it is her separate property, it is incumbent upon her to show whether it is her equitable separate estate or her legal separate estate, and if claimed by purchase she is held to full and direct proof that it was paid for with her money, and in the absence of this proof the property is presumed to be the property of her husband. Storrs *v.* Storrs, 23 Fla. 274, 2 So. 368.

In an action by a married woman to recover personal property, as her sole separate property, which had been seized under a writ of attachment against her husband by a creditor of the latter, the burden is upon her to make satisfactory proof that the property seized was her separate property, owned by her under the conditions required by the law relating to the separate property of married women to protect it from seizure and sale for the payment of her husband's debts. Kahn *v.* Wood, 82 Ill. 219.

On a controversy between a married woman and her husband's creditors in which she claims title to land purchased by her during coverture upon credit, it is incumbent upon her to show affirmatively, first, that she had a separate estate, and, second, that the purchase was made upon the credit of her separate estate. Lochman *v.* Brobst, 102 Pa. St. 481.

56. Tripner *v.* Abrahams, 47 Pa. St. 220. *Compare* Hay *v.* Martin (Pa.), 14 Atl. 333, *holding* that in order for a wife to establish a resulting trust in her favor in land, the title to which is in her husband, as against his creditors, on the ground that it was purchased by him at her direction and paid for with her money, the proof to that effect must be so clear, satisfactory and convincing that the jury can rely on it with reasonable certainty.

to exclude all doubt, a preponderance of the evidence being sufficient.[57]

The Fact That a Note Is Payable to a Married Woman raises the presumption that the money was due to her.[58]

b. *Community Property.* — **(1.) Generally.** — In those states in which the community property law prevails the rule is that all property acquired by either the husband or wife during marriage is presumed to be community property,[59] and one who asserts that

57. Myers *v.* King, 42 Md. 65, where articles of household furniture had been purchased by a husband in pursuance of an antecedent agreement with his wife that he should advance the money and she would reimburse him, which she afterward did, it was held that no higher degree of proof of such an agreement is required than in any other civil action.

58. Tooke *v.* Newman, 75 Ill. 215.

The fact that a note and mortgage, made payable to a woman, antedate her marriage, is of itself strong evidence that the legal and equitable title to the money is in her, and clear and convincing evidence is necessary in order to overcome this presumption. Smith *v.* Smith, 87 Ill. 111.

The fact that the money for which the note was given was loaned by her husband does not rebut that presumption. Tooke *v.* Newman, 75 Ill. 215.

59. *Louisiana.* — Huntington *v.* Legros, 18 La. Ann. 126; Pearson *v.* Recker, 15 La. Ann. 119; Succession of Pratt, 12 La. Ann. 457; Hanna *v.* Pritchard, 6 La. Ann. 730; Succession of Barry, 48 La. Ann. 1143, 20 So. 656; Jordy *v.* Muir, 51 La. Ann. 55, 25 So. 550.

Nevada. — Lake *v.* Bender, 18 Nev. 361, 4 Pac. 711.

New Mexico. — Brown *v.* Lockhart, 71 Pac. 1086.

Texas. — Parker *v.* Coop, 60 Tex. 111; Osborn *v.* Osborn, 62 Tex. 495; McKinney *v.* Nunn, 82 Tex. 44, 17 S. W. 516; Presidio Min. Co. *v.* Bullis, 68 Tex. 581, 4 S. W. 860.

Our whole system of marital rights is based upon the fact that acquisitions, either of the joint or separate labor or industry of the husband or wife, become common property; and as a general rule deducible from this principle, all property acquired by purchase or apparent onerous title, whether the conveyance be in the name of the husband or of the wife, or in the names of both, is *prima facie* presumed to belong to the community. Cooke *v.* Bremond, 27 Tex. 457, 86 Am. Dec. 626.

In Beigel *v.* Lang, 19 La. Ann. 112, an action by a wife on a promissory note in her favor, in which she asserted that her husband joined in the suit but did not show a separation of property between them or any stipulation against a community of acquests and gains, it was held that the court would not presume the authorization of the husband, but, on the contrary, would presume a community between them, and that the note on being acquired during their marriage was community property.

In Pior *v.* Giddens, 50 La. Ann. 216, 23 So. 337, a wife, owning by inheritance an undivided half of a plantation, purchased during the marriage, from her co-heirs, their interest, it was held that the interest so purchased fell into the community, unless shown to have been purchased for her separate account, with paraphernal funds.

Where a married woman not separate in property is engaged in trade, she is presumed, in the absence of evidence to the contrary, to trade on the funds of the community and the assets in her hands are those of the community. Succession of Manning, 107 La. 456, 31 So. 862.

Where a Note Is Payable to the Wife, the presumption is that it is community property subject to the disposition of the husband and to an action for its recovery by him, and

all or any portion thus acquired is the separate property of either spouse has the burden of proving that fact by clear and satisfactory evidence.[60] When community has been waived by the marriage contract between husband and wife, the law does not create the presumption that the property belongs to the husband.[61]

(2.) Rebuttal of Presumption. — (A.) GENERALLY. — This presumption, however, is not a conclusive one as between themselves and those

for his own benefit, or that of the community, without the consent of the wife asked or given. Wells *v.* Cockrum, 13 Tex. 127.

In Clift *v.* Clift, 72 Tex. 144, 10 S. W. 338, it was held that after the lapse of eight years from the death of the first wife, the presumption must be indulged that, in the absence of evidence to the contrary, goods acquired during the second marriage were community property.

In California, previous to the amendment of the Civil Code in 1899 (§ 164) the presumption was that property acquired by either spouse during marriage belonged to the community, in the absence of proof to the contrary. See Jackson *v.* Torrence, 83 Cal. 521, 23 Pac. 695; Ingersoll *v.* Trueblood, 40 Cal. 603; Smith *v.* Smith, 12 Cal. 216, 73 Am. Dec. 533; Meyer *v.* Kinzer, 12 Cal. 247, 73 Am. Dec. 538. But in that year section 164 of the Civil Code was amended by adding the provision that, "whenever property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." These presumptions are, however, only rules of evidence, which can be met and overcome by proofs, except where a right to property is involved which became vested in a third party before the amendment, in which case the presumption is said to be a rule of property as well as of evidence. Santa Cruz Rock Pav. Co. *v.* Lyons (Cal.), 43 Pac. 599. See also Jordan *v.* Fay, 98 Cal. 264, 33 Pac. 95, where it was held that § 164 of the Civil Code, as amended in 1899, providing that whenever any property is conveyed to a married woman the presumption is that the title is vested in her as her separate property, did not have the effect of changing this rule so as to disturb titles already vested at the time of its passage.

A Contract to Purchase is not a conveyance within the meaning of the California statute presuming that title is vested in a wife as her separate property when property is conveyed to her by an instrument in writing; it is from conveyances alone that such presumption arises. Peiser *v.* Bradbury, 138 Cal. 570, 72 Pac. 165.

60. *Louisiana.* — Sulstrang *v.* Bitz, 24 La. Ann. 295; Bachino *v.* Coste, 35 La. Ann. 570; Bass *v.* Larche, 7 La. Ann. 104; Succession of Lyons, 50 La. Ann. 50, 23 So. 117; Succession of Manning, 107 La. 456, 31 So. 862.

Nevada. — Lake *v.* Bender, 18 Nev. 361, 4 Pac. 711.

Texas. — Castro *v.* Illies, 22 Tex. 479, 73 Am. Dec. 277; Lott *v.* Keach, 5 Tex. 394.

So far as concerns third persons, such for example as creditors of the husband, it is incumbent upon the wife to prove the reality of her dower by other evidence than the acknowledgment of the husband, or a judgment of court rendered between them. Benoist *v.* Blanchard, 6 La. Ann. 789.

Where the wife in an action against her husband for a separation of property asserts that separate property acquired in her name during the existence of the community was bought with her paraphernal funds and is her separate property, the presumption of law is against her and she must rebut it by legal evidence to establish her title. De Sentmanat *v.* Soule, 33 La. Ann. 609.

61. Williams *v.* Hardy, 15 La. Ann. 286.

claiming under them with notice.[62] It may be rebutted by evidence showing that the purchase was made with the separate funds of the husband or wife;[63] but not by evidence of a direction of a husband to make out the deed in the name of the wife;[64] nor by the fact that a bond for title to the land in question had been executed before his marriage.[65]

In Favor of a Purchaser for Value without notice the presumption is conclusive.[66]

(B.) PAROL EVIDENCE. — For the purpose of rebutting this presumption, parol evidence is necessarily resorted to.[67]

62. Ingersoll *v.* Trueblood, 40 Cal. 603; Jackson *v.* Torrence, 83 Cal. 521, 23 Pac. 695; Smith *v.* Boquet, 27 Tex. 507; Huston *v.* Curl, 8 Tex. 239, 58 Am. Dec. 110; Higgins *v.* Johnson, 20 Tex. 389, 70 Am. Dec. 394.

"The import of deeds of purchase to either husband or wife is from necessity affected often by parol evidence. The presumption in favor of the community from such deeds may be rebutted by proof that the purchase was from the separate funds of either partner, and when made in the name of the wife, it may be shown to be for her benefit, not only from the advance by her of the purchase-money, but if the funds be advanced from the individual means of the husband, the presumption of gift arises, and if from the community funds, it may be proved that the husband intended a gift, and declaring such intention, ordered the deed in her name." Dunham *v.* Chatham, 21 Tex. 231, 73 Am. Dec. 228.

The presumption of law is that property purchased during marriage, whether in the name of either or both spouse, is community property. But when property is bought in the name of the wife she may rebut this presumption by showing that she purchased the property by the investment of her paraphernal funds which were administered by her separately and apart from her husband. In rebutting this presumption, however, the burden is upon her to prove, first, paraphernality of the funds; second, administration thereof separately and apart from her husband, and third, investment by her. Stauffer *v.* Morgan, 39 La. Ann. 632, 2 So. 98.

63. Property Acquired With Money of Children by Former Marriage. — The presumption as to community property purchased in the name of the husband will not be rebutted by proof that he acquired the property with the money of his children by a former marriage. Heirs of Murphy *v.* Jurey, 39 La. Ann. 785, 2 So. 575.

Solvency of Husband. — This presumption that property purchased during marriage is community property is not rebutted by proof that at the marriage the husband had much money and the wife nothing; that during the marriage relation the parties decreased in fortune, making nothing, without explicitly tracing the purchase-money or consideration to the separate property of the husband. Schmeltz *v.* Garey, 49 Tex. 49.

64. Parker *v.* Chance, 11 Tex. 513.

65. Hawley *v.* Geer (Tex.), 17 S. W. 914.

66. Oppenheimer *v.* Robinson, 87 Tex. 174, 27 S. W. 95. See also Cooke *v.* Bremond, 27 Tex. 457.

The Presumption, Under the California Statute, is conclusive only in favor of a purchaser or incumbrancer in good faith and for a valuable consideration. Peiser *v.* Bradbury, 138 Cal. 570, 72 Pac. 165.

67. Ingersoll *v.* Trueblood, 40 Cal. 603.

"This constant practice of resorting to parol evidence to establish the right of ownership in marital property acquired by purchase is an ar-

(C.) Surrounding Circumstances and Contemporaneous Declarations. It has been declared that the intention of the husband, whether to give the property to his wife or that it should become part of the common estate, is the subject of proof, like any other fact,[68] and that the surrounding circumstances and contemporaneous declarations of the husband may be taken into consideration, and must have more or less weight in determining his intention.[69]

(D.) Recitals. — The rule seems to be that, as against third persons, a recital in the marriage contract that the wife is possessed of paraphernal funds is not competent proof of that fact.[70]

gument for relaxing the strictness of the rule in relation to such property acquired by donation, and especially where the instrument, being joint to husband and wife, purports to give the property to the community." Dunham *v.* Chatham, 21 Tex. 231, 73 Am. Dec. 228.

As against an attaching creditor of her husband, the wife may show by parol evidence that land conveyed to her during marriage which was not specifically described as her separate property is in fact such and not community property. Sinsheimer *v.* Kahn, 6 Tex. Civ. App. 143, 24 S. W. 533.

Where a conveyance is made to a husband, or to his wife after his death under a contract of sale made by him during his lifetime, it is competent for the wife or any one claiming under her to show by parol evidence that the consideration was paid out of her separate estate. Ingersoll *v.* Trueblood, 40 Cal. 603.

In Potter *v.* Ahrens, 110 Cal. 674, 43 Pac. 388, where the issue was as to whether or not a wife had any interest in a certain business at the date of its sale, it appeared that she had assisted her husband in carrying on the business, that they were apparently conducting it together, and that the property in question had all been acquired during the community and with community funds; and it was held that these facts, in connection with the execution by the wife with her husband of the contract of sale, was evidence tending to establish her interest in the business.

68. See Presidio Min. Co. *v.* Bullis, 68 Tex. 581, 4 S. W. 860.

The presumption that land standing in the wife's name is community property may be overcome by proof that the husband in having the property put in her name intended it as a gift to her. Higgins *v.* Johnson, 20 Tex. 389, 70 Am. Dec. 394.

69. Presidio Min. Co. *v.* Bullis, 68 Tex. 581, 4 S. W. 860.

70. Block *v.* Melville, 10 La. Ann. 784, where the court said: "Whatever effect we might be disposed to give to acknowledgments contained in marriage contracts, when attacked by third parties, we think that a married woman who is acting aggressively for the purpose of setting aside and annulling the muniments of title with which others have been invested by her own act, should be held to full proof and to an affirmative showing of all the facts upon which she relies for success, and that a mere acknowledgment in a marriage contract is not as respects third parties, where rights are attacked, full proof of the fact so acknowledged." See also Durruty *v.* Musacchia, 42 La. Ann. 357, 7 So. 555; De Sentmanat *v.* Soule, 33 La. Ann. 609; Stephenson *v.* Chappell (Tex. Civ. App.), 36 S. W. 482. *Compare* Block *v.* Melville, 22 La. Ann. 147, where it was held that the recital in the contract of marriage that the wife brings into the marriage five thousand dollars, which sum is paid over to the intended husband in the presence of the notary and witnesses is *prima facie* proof of the paraphernal character of the fund, and the burden falls on the purchaser of property from her, claimed to be bought with such funds, that the property was actually bought with the funds furnished by the husband, and that said funds were fur-

(E.) Degree of Proof. — Where separate property of the husband was carried by him into the community formed by the marriage, became merged into it, and inured to its benefit, its value becomes an indebtedness due the husband by the community. No fixed rule or standard as to the extent or sufficiency of evidence necessary to establish a claim of that character can be formulated. Each case must rest on its own peculiar state of facts.[71]

B. Presumption From Transfers to Wife. — a. *Personal Property.* — The general rule is that when a wife sets up a gift of personal property from her husband, the burden is upon her to show the intention to give and the execution of such intention by actual delivery, by clear and incontrovertible evidence.[72]

The Mere Possession of the Property of the one by the other is not proof of gift; there must be shown some distinct and expressive act to transfer the property from the one to the other.[73]

The Earnings of a Wife belong to her husband save in certain exceptional cases specified by statute, and mere possession thereof by the wife affords no presumption of a gift thereof to her by her husband.[74]

b. *Real Property.* — **(1.) Generally.** — When a conveyance of prop-

nished by the husband to the injury of the purchaser.

71. Succession of Cormier, 52 La. Ann. 876, 27 So. 293.

72. George *v.* Spence, 2 Md. Ch. 353; Lane *v.* Lane, 76 Me. 521; Dilts *v.* Stevenson, 17 N. J. Eq. 407.

A husband may in equity make a valid gift of personal property to his wife where the rights of creditors do not interfere; but clear evidence of the intention of the husband to make such gift must be produced. Jennings *v.* Davis, 31 Conn. 134, where the only evidence of such intention was the fact that a bill of sale of furniture purchased was made out to the wife at the time of the purchase, but it was not shown that it was done by the direction of the husband or even with his knowledge, and it was held that the intention was not sufficiently established.

Where a gift of personal property to the wife during coverture is established, it is presumed, in the absence of proof to the contrary, to be a gift as her general and not her separate property. In a contest between creditors of the husband and creditors of the wife, it is incumbent upon the wife's creditors seeking to establish a separate estate in property acquired prior to 1845, to show that the gift was accompanied by some instrument or unequivocal declaration to the effect that it was to and for the separate use of the wife, free from the control of the husband. Alston *v.* Rowles, 13 Fla. 117.

73. Lane *v.* Lane, 76 Me. 521. The evidence relied upon in this case to prove a gift was that the wife had for a long time had the funds in her possession, dealing with them with her husband's approbation. The court, in considering this evidence, said: "Considering the confidential relations of husband and wife, the mere receipt of the funds of the one by the other from a third party, the naked fact being unsupported by other evidence, is not any proof whatever of a gift. A possession which is as consistent with agency as with gift must indicate agency instead of gift. Between husband and wife, his possession of her property is her possession, and her possession of his property is presumed to be his possession. There must be some clear and distinct act to transfer the title."

74. McDermott's Appeal, 106 Pa. St. 358, 51 Am. Rep. 526.

erty is made by a husband to his wife directly, or through a third person,[75] or where he purchases property with his own means and causes title thereto to be taken in his wife's name, the presumption is, not of a resulting trust, but that the purchase and conveyance were intended as a gift or advancement for his wife,[76] and if the husband asserts that in fact a resulting trust was intended, the burden is upon him to establish that fact by clear evidence.[77]

75. Wilder *v.* Brooks, 10 Minn. 50, 88 Am. Dec. 49; Veeder *v.* McKinley-Laning L. & T. Co., 61 Neb. 892, 86 N. W. 982; Doane *v.* Durham, 64 Neb. 135, 89 N. W. 640; Wilson *v.* Silkman, 97 Pa. St. 509.

Expenditures by a Husband in improving his wife's real property are presumed to be a gift. Selover *v.* Selover, 62 N. J. Eq. 761, 48 Atl. 522.

76. *Alabama.* — Kelly *v.* Karsner, 72 Ala. 106; Saunders *v.* Garrett, 33 Ala. 454.

Arkansas. — Ward *v.* Ward, 36 Ark. 586.

Illinois. — Duval *v.* Duval, 153 Ill. 49, 38 N. E. 944; Fizette *v.* Fizette, 146 Ill. 328, 34 N. E. 799.

Maine. — Stevens *v.* Stevens, 70 Me. 92.

Massachusetts. — Cormerais *v.* Wesselhoeft, 114 Mass. 550.

Michigan. — Hall *v.* Wortman, 123 Mich. 304, 82 N. W. 50.

Minnesota. — Wilder *v.* Brooks, 10 Minn. 50, 80 Am. Dec. 49.

Missouri. — Darrier *v.* Darrier, 58 Mo. 222; Richardson *v.* Lowry, 67 Mo. 411; Seibold *v.* Christman, 75 Mo. 308, *affirming* 7 Mo. App. 254; Schuster *v.* Schuster, 93 Mo. 438, 6 S. W. 259.

Nebraska. — Kobarg *v.* Greeder, 51 Neb. 365, 70 N. W. 921; Solomon *v.* Solomon, 92 N. W. 124.

New Jersey. — Lister *v.* Lister, 35 N. J. Eq. 49; Read *v.* Huff, 40 N. J. Eq. 229; Whitley *v.* Ogle, 47 N. J. Eq. 67, 20 Atl. 284; Leslie *v.* Leslie, 53 N. J. Eq. 275, 31 Atl. 170.

North Carolina. — Arrington *v.* Arrington, 114 N. C. 116, 19 S. E. 278.

Texas. — Coats *v.* Elliott, 23 Tex. 606; Higgins *v.* Johnson, 20 Tex. 389, 70 Am. Dec. 394; Smith *v.* Strahan, 16 Tex. 314, 67 Am. Dec. 22.

Vermont. — Bennett *v.* Camp, 54 Vt. 36.

"The husband had a right, if he chose, to give the property to his wife, although paid for entirely by himself, and his consent that she should receive the deed to herself would show his intention in that regard. And in the absence of any proof of such intent, if it should appear that the property was purchased with the money of the wife, whether her sole and separate estate or simply assets which the husband had the power to appropriate to his own use, we would not divest her of it. His consent should be presumed, and even without it the title would be where it justly belonged and should not be disturbed." Smith *v.* Smith, 50 Mo. 262.

In Farley *v.* Blood, 30 N. H. 354, it was held that where a husband buys real estate with his own money and causes the conveyance to be made to another, who thereupon gives a bond to convey the same, on request, to the wife of the purchaser, *prima facie* a trust results to the wife, upon the presumption that the husband intended the purchase as an advancement, but that such presumption might be repelled by evidence showing that he intended to limit her interest in the land to the term of her life.

77. Stevens *v.* Stevens, 70 Me. 92; Sing Bow *v.* Sing Bow (N. J.), 30 Atl. 867; Edgerly *v.* Edgerly, 112 Mass. 175. And see cases cited in the preceding note.

Where a purchaser of land causes the title to be placed in his wife's name, the presumption is that he intended the purchase and conveyance as a gift or advancement to her, and in order to rebut this presumption and show a resulting trust in the husband after the wife's death on a proceeding instituted for that purpose, the clearest and most satis-

(2.) Rebuttal of Presumption. — (A.) GENERALLY. — But this presumption may be rebutted by evidence that in fact a resulting trust was intended;[78] or that the husband subsequently exercised acts of dominion over the property of such a character as were inconsistent with ownership by the wife.[79]

(B.) ANTECEDENT OR CONTEMPORANEOUS ACTS AND DECLARATIONS. — And for this purpose antecedent or contemporaneous acts may be shown.[80]

(C.) SUBSEQUENT ACTS AND DECLARATIONS. — But this presumption

factory proof is required. Cohen *v.* Cohen, 1 App. D. C. 240.

In Besson *v.* Eveland, 26 N. J. Eq. 468, the court, in speaking of the question whether money used in the purchase of land by a husband was or was not the property of the wife, said: "Claims of this kind should always be regarded with a watchful suspicion, and when attempted to be asserted against creditors upon the evidence of the parties themselves uncorroborated by other proof, they should be rejected at once, unless their statements are so full, clear and convincing as to make the fairness and justice of the claim manifest. Any other course will encourage fraud and multiply the hazards of most business ventures."

The ordinary presumption that a conveyance of land by a husband to his wife is intended as a provision or settlement for her benefit is not rebutted where the evidence as to his intention is conflicting. Linker *v.* Linker, 32 N. J. Eq. 174, where the husband himself stated that he gave the title to his wife merely to satisfy her.

78. Smith *v.* Strahan, 16 Tex. 314, 67 Am. Dec. 622. See also Johnston *v.* Johnston, 138 Ill. 385, 27 N. E. 930.

In Darrier *v.* Darrier, 58 Mo. 222, an action by a husband against his wife to divest her of the title of certain lands alleged to have been taken in her name in contravention of his express instructions, it was held that whether the transaction was intended to be a provision for her was a question of pure intention and that it was proper to receive evidence to establish the design the plaintiff had in contemplation at the time of furnishing the purchase-money.

Whether a conveyance of land to a wife, bought with her husband's funds, is in fact an advancement of gift is a question of pure intention, and where the husband disclaims any such intention it is proper to receive evidence to establish the design which the husband had in contemplation at the time of furnishing the purchase-money. Eystra *v.* Capelle, 61 Mo. 578.

When the facts and circumstances tend to show that a gift was intended and that the husband used and dealt with the property as his own, the mere oral testimony of the husband and wife of a private understanding between themselves that the transaction was by them considered or intended as a loan and not a gift will not, as against the creditors of the insolvent husband, rebut the presumption of a gift. Horner *v.* Huffman, 52 W. Va. 40, 43 S. E. 132.

79. Gould *v.* Glass (Ga.), 47 S. E. 505.

80. Persons *v.* Persons, 25 N. J. Eq. 250; Goelz *v.* Goelz, 157 Ill. 33, 41 N. E. 756, where, however, the presumption of an intended settlement was held not to have been rebutted, especially in view of the fact that a considerable amount of the wife's money as well as the husband's went into making up the purchase-money for the lands in question.

In Smith *v.* Strahan, 25 Tex. 103, where land was purchased with the separate property of the husband and the conveyance taken in the name of the wife, it was held that the acts and declarations of the husband before the taking of the conveyance, having reference to it, and corresponding with his after acts, evidencing his intention and purpose respecting it, and the subsequent statements of the wife, in so far as they conduced to countervail the *prima facie* inference deducible from the fact of

of an advancement cannot be rebutted by evidence of subsequent declarations.[81]

(D.) Fraud. — It has been held that if fraud in any form characterizes the obtaining of title to land by a wife against the consent of her husband who paid the purchase-money, this of itself will rebut the presumption of an advancement and raise a trust in behalf of the husband.[82]

C. Presumption From Possession. — a. *In General.* — The general rule is that whether personal property is physically in the possession of the husband or the wife, the title is presumptively in the husband,[83] although there is authority in support of the contrary

taking the deed in her name, were admissible and proper to be submitted to the jury for their consideration.

81. Lister *v.* Lister, 35 N. J. Eq. 49; Smith *v.* Strahan, 16 Tex. 314, 67 Am. Dec. 622, *holding*, however, that the fact that the husband went immediately into possession after the purchase and always held and claimed the lands as his own would be evidence, although not conclusive, of his original intention that the purchase was in trust for himself and not an advancement.

82. Darrier *v.* Darrier, 58 Mo. 222.

83. Farrell *v.* Patterson, 43 Ill. 52; Com. *v.* Williams, 7 Gray (Mass.) 337; Burns *v.* Bangert, 16 Mo. App. 22; McClain *v.* Abshire, 63 Mo. App. 333; Rhoads *v.* Gordon, 38 Pa. St. 277; Topley *v.* Topley, 31 Pa. St. 328; Stanton *v.* Kirsch, 6 Wis. 338. See also Whiton *v.* Snyder, 88 N. Y. 299, where the court said: "It has long been the law that the possession of personal property draws with it a presumption of ownership. At common law, that presumption utterly failed in the case of a married woman, because as against her husband, asserting his marital rights, she could not own such property. (Bl. Com., Bk. 2, chap. 29, p. 435; Curtis *v.* Delaware, L. & W. R. R. Co., 74 N. Y. 122.) The marriage vested in the husband the right to reduce to his possession and ownership the wife's choses in action, and gave him the title to her personal chattels at once and absolutely. (Jaycox *v.* Caldwell, 51 N. Y. 398.) And this proceeded upon the ground, which was always more logical than true, that the very being and existence of the woman was suspended during the coverture, or entirely merged or incorporated in that of the husband. But unjust rules slowly give way before advancing civilization."

"Where the ownership of any chattel is in question, the general rule is that possession, long continued, exclusive, and accompanied by all customary acts of ownership, is evidence of title. It is indeed many times the only evidence of title which can be exhibited to chattel property. If I were put to the proof of my title to these law-books that surround me, I would scarcely know what to appeal to except my long-continued possession. And as money has no earmark, the difficulty of proving title to a particular fund, except by the fact of possession, is even greater than in respect of other forms of property. Yet when a married woman sets up an exclusive title to a sum of money, her possession, though evidence in her favor, is not of itself enough to establish her right. Such are the intimacy and the dependence of the relation she has voluntarily established with her husband, and she does so commonly act as his agent, that her possession of moneys, like that of a confidential clerk, must, in the absence of explanation, be accounted the husband's possession. The act of 1848 was not made to protect property to which she shows no other right than the possession, but rather property which was 'owned by or belonged' to her before marriage, or which '*accrued*' to her during coverture. Whether personal property

rule.[84] Possession of the separate property of the wife by the husband will not be presumed to be that of the husband, but that of the wife.[85]

b. *Reduction to Possession by Husband.* — **(1.) Rule at Common Law.** — At common law the receipt by a husband of his wife's money or choses in action was presumed to be a reduction of them to his possession, and this presumption could be overcome only by proof of a positive, clear, precise and consistent intention to the contrary existing at the time of his receiving them.[86]

(2.) Rule Under Statutes. — Since the enactment of the Married Woman's Act many of the courts hold that when a husband receives money or a chose in action belonging to his wife, the law does not presume a gift from her to him, but presumes that he received it for

found in her possession be such as was owned by her before the marriage, or accrued to her afterward, is a question of fact which the act of assembly does not decide, and which must be decided by a jury. There must be therefore evidence of ownership antecedent to the possession. Had she a separate estate before marriage, out of which the fund might have accrued? Has she acquired property since her marriage by gift, devise, settlement or other lawful means?" Black *v.* Nease, 37 Pa. St. 433. See also McDevitt *v.* Vial (Pa.), 11 Atl. 645.

Where a husband and wife are living together as such, the presumption of law, notwithstanding the Married Woman's Act, is that the goods, chattels and personal property in the house and in their joint possession are the property of the husband; and the facts that the husband is inefficient as a business man and the wife an energetic business woman, and that she may have him under such subjection and control that the funds arising from the business in which they are both engaged are usually placed in her custody, and that the purchases made are usually at her dictation and command, although pertinent to prove the ability of the wife and the worthlessness of the husband, do not have any effect whatever on the question of the right of property. Rice *v.* Sayles, 23 Ill. App. 189. See also Farrell *v.* Patterson, 43 Ill. 52.

84. Patterson *v.* Kicker, 72 Ala. 406; German Bank *v.* Himstedt, 42 Ark. 62; Oberfelder *v.* Kavanaugh, 29 Neb. 427, 45 N. W. 471. See also Booknau *v.* Clark, 58 Neb. 610, 79 N. W. 159; Farwell *v.* Cramer, 38 Neb. 61, 56 N. W. 716.

In Kansas it is held that where a wife exercises acts of ownership over personal property there is no presumption from such acts that the property belongs to her husband, but on the contrary if there is any presumption of ownership from such acts it is that the property belongs to the wife. McCarty *v.* Quimby, 12 Kan. 494.

85. Newbrick *v.* Dugan, 61 Ala. 251; Stewart *v.* Ball, 33 Mo. 154.

The mere possession by a husband of money which has accrued to his wife under and since the Pennsylvania statute of 1848 is no evidence that the title thereto has passed to him, but the presumption is that after it has been shown to have come by descent to her it continues hers, and a transmission of title to the husband must be shown by those who assert it, either by proof of a gift or a contract for value. Grabill *v.* Moyer, 45 Pa. St. 530.

86. See Moyer's Appeal, 77 Pa. St. 482.

In Jesser *v.* Armentrout, 100 Va. 666, 42 S. E. 681, it was held that in the case of a purchase by a husband, prior to the Virginia Married Woman's Act of 1876, of land with funds inherited by his wife from her father, the presumption was that the funds when received by him were his by virtue of his marital rights.

her use,[87] and one who claims that the husband appropriated it according to her direction, or that she gave it to him, has the

87. *Indiana.* — King *v.* King, 24 Ind. App. 598, 57 N. E. 275, 79 Am. St. Rep. 287.

Minnesota. — Chadbourn *v.* Williams, 45 Minn. 294, 47 N. W. 812.

New Jersey. — Black *v.* Black, 30 N. J. Eq. 215.

Pennsylvania. — Heath *v.* Slocum, 115 Pa. St. 549, 9 Atl. 259; Mellinger *v.* Bausman, 45 Pa. St. 522; Trimble *v.* Reis, 37 Pa. St. 448; Young's Estate, 65 Pa. St. 101.

"Whenever a husband acquires possession of the separate property of the wife, with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of evidence that she intended it as a gift to him. After it is once shown that property accrued to the wife by descent or otherwise, the presumption is that it continues hers until the contrary appears, and the burden is upon him who asserts it to be the property of the husband to prove the transmission of title to him by gift, or contract for value. And, while business transactions between husband and wife are to be scanned closely where the husband is insolvent, yet, in a controversy between her and her husband's creditors as to whether a right of property is in the husband or the wife, it should, in the present state of the law, be determined upon the fair preponderance of evidence as in other cases." Chadbourn *v.* Williams, 45 Minn. 294, 47 N. W. 812. See also Stickney *v.* Stickney, 131 U. S. 227.

In Hileman *v.* Hileman, 85 Ind. 1, a charge to the jury was sustained as follows: "The presumption of law under our statute is that the money and property of the wife that she has during her marriage acquired by descent, devise or gift, remains her separate property or money, even after her husband has taken possession of the same and assumed the management and control of it, and that he in good faith holds the same for her use and benefit; and before you can find the contrary in this case you must be satisfied by evidence sufficient to overcome that presumption that such money or property was allowed to pass into the hands of her husband with the intention to make a gift of the same to him." See also Denny *v.* Denny, 123 Ind. 240, 23 N. E. 519; Parrett *v.* Palmer, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479.

"The mere fact that a husband's hand received the money does not of itself in all cases raise a presumption of gift. It may or may not be sufficient for that purpose. If there is nothing in the case to show that the party stood in any other relation than that of husband the law will presume that it was as husband he received the money, and a gift will not be implied." *In re* Mahon's Estate, 202 Pa. St. 201, 51 Atl. 745.

Money Representing Proceeds of Insurance on the life of the wife's former husband which her present husband has received is presumed to have been received by him as her agent or trustee. Jackson *v.* Kraft, 186 Ill. 623, 58 N. E. 298.

The Law Presumes a Loan from the mere fact of a receipt of the wife's money by the husband, and this presumption can only be rebutted by proof of a gift, where a gift is asserted. Wormley's Estate, 137 Pa. St. 101, 20 Atl. 621. *Compare* Downs *v.* Miller, 95 Md. 602, 53 Atl. 445, where it is held that the relation of debtor and creditor is not created by the mere receipt and appropriation by the husband of moneys to which she had become entitled from the estates of deceased relatives.

Money received by a husband from his wife subsequent to the date of the act of congress of April 10, 1869, known as the Married Woman's Act, repayment of which is secured by him to her by deed of trust or mortgage, is presumptively her sole and separate estate within the meaning of that act. Hewett *v.* Burritt, 3 App. D. C. 229. Although prior to the passage of that act, where a husband gave a note secured by a

burden of proving that fact.[88] This is the rule in respect to the corpus or principal.[89] If, however, he receives interest or income and appropriates it with her knowledge and without objection, a gift will be presumed.[90] And even though such a presumption of gift in the case of a husband receiving his wife's separate funds might arise, it is entirely rebutted by proof of her repeated and express directions to invest the money for her own benefit in her own name.[91]

Contrary View. — On the other hand some of the courts hold that if a husband uses the capital funds of his wife's separate property

deed of trust for money so received by him, it was held that on a controversy between his creditors and his wife the burden was upon the wife to show that the money or property was her separate estate.

88. Patten *v.* Patten, 75 Ill. 446.

89. Principal Received for Purposes Beneficial to Husband.—Where a husband receives from his wife principal money belonging to her separate estate for the purpose of improving his own property or other purposes legally beneficial to him, the presumption, at least in a court of equity, is that the advance was a loan for which he is bound to account. Brady *v.* Brady (N. J. Eq.), 58 Atl. 931. And case cited in preceding notes.

90. Roper *v.* Roper, 29 Ala. 247; Newlin *v.* McAfee, 64 Ala. 357; Black *v.* Black, 30 N. J. Eq. 215. See also Bubb *v.* Bubb, 201 Pa. St. 212, 50 Atl. 759.

Permissible Use of Proceeds of Wife's Property. — In Ladd *v.* Smith, 107 Ala. 506, 18 So. 195, it is held that where a wife permits her husband to retain the proceeds of a sale of timber cut from lands belonging to her equitable separate estate without requiring from him an express promise to account, a presumption arises as between her and her husband's creditors that such proceeds constituted a gift from her to him.

In Denny *v.* Denny, 123 Ind. 240, 23 N. E. 519, the court said: "Where a husband, with the consent of his wife, is in the habit of receiving the income, profits, and dividends of her separate estate, and using them for the benefit of the family, it will be presumed that the wife consented and agreed that he should so receive and use them, and the law will not compel him to account. *In re* Jones, 6 Biss. 68; 2 Story, Eq. Jur., § 1396. A well-established distinction exists, however, when the husband receives and appropriates the *corpus* or principal of his wife's separate property. . . . On account of the confidential relations existing between husband and wife, the mere delivery by the latter to the former of money or property affords in any case very slight, if any, evidence of an intention on the part of the wife to surrender her right to her separate property, and bestow it as a gift upon her husband. Where, however, as in the present case, the wife never acquired the actual dominion over her money, the husband having collected and appropriated it to his own use before it ever came to her possession, the mere fact that she consented that he might collect and receive the money raises no presumption whatever that she intended to bestow it upon her husband. Mellinger *v.* Bausman, *supra.* In such a case, he becomes her agent or trustee, and must account, unless he affirmatively shows that the intention of his wife was to bestow her property upon him as a gift."

That a husband, as agent, receives moneys representing the income of his wife's estate does not prove or tend to prove that she objected to his receiving it at all, but if anything it proves that she was willing for him to receive it and did not object to his doing so. Faircloth *v.* Borden, 130 N. C. 263, 41 S. E. 381.

91. Stickney *v.* Stickney, 131 U. S. 227.

either for himself individually or for the support of his family with her knowledge and consent, a gift will be presumed in the absence of proof to the contrary,[92] and that if she asserts that he received it in trust for her, the burden is on her to prove that fact.[93]

Signing Receipts as Agent. — This presumption of gift, however, is overcome where it appears that the husband when receiving the money gave to the parties paying written receipts signed by himself in his name as attorney or agent for his wife.[94]

A Question of Fact. — In some cases, however, the circumstances are such that the question is not one to be governed by presumptions.[95]

2. Mode of Proof. — A. Direct Evidence. — Documentary Evidence. — Where the ownership of property in a husband or wife is merely a question of the introduction of documents evidencing the fact of ownership, such as deeds, bills of sale, and the like, the mode of proving ownership[96] is governed to a large extent by

92. Duval *v.* Duval, 153 Ill. 49, 38 N. E. 944; Reed *v.* Reed, 135 Ill. 482, 25 N. E. 1095; Orr *v.* Orr, 10 Ky. L. Rep. 755, 10 S. W. 640; Temple *v.* Williams, 39 N. C. 39. See also Latimer *v.* Glenn, 2 Bush (Ky.) 535.

93. Jacobs *v.* Hesler, 113 Mass. 157.

If a wife delivered or allowed her husband to receive money of hers belonging to her separate estate, the presumption is that it is a gift and not a loan, and especially as against his creditors she must establish by clear proof that it was a loan with promise of repayment. Bennett *v.* Bennett, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47.

To establish a resulting trust in favor of the wife who alleges the use of her money by her husband for the purchase of land with the understanding that the title should be taken in her name, when in fact the title was taken in that of the husband, the proof showing the truth of these facts must be clear and irrefragable. Hyden *v.* Hyden, 6 Baxt. (Tenn.) 406.

94. *In re* Mahon's Estate, 202 Pa. St. 201, 51 Atl. 745.

95. Whether a husband living with his wife as the head of a family upon a farm owned by her and held to her sole and separate use, taking the crops and carrying on the farm and having the general management of it, is the tenant or servant of his wife is a question of fact as to which there is no presumption of law changing the burden of proof. State *v.* Hayes, 59 N. H. 450.

"In determining the question of the intention of the wife to make a gift to the husband of a portion of her principal estate, each case depends upon its own facts, and in some cases, as in this one, the advantage to the husband and the disadvantage to the wife may be so great, if the transaction be claimed to be a gift, that a court of equity should enforce the principles applicable to confidential relations, and, in order to establish the gift as valid, should require the husband or his representatives to show that the wife was advised, either by counsel or otherwise, of her rights before making the gift, and that with full knowledge of the situation she made the advances for the purpose of improving her husband's property, as absolute gifts." Brady *v.* Brady (N. J. Eq.), 58 Atl. 931.

96. **A Deed of Gift from Wife to Husband** duly recorded, is admissible in evidence in favor of a third person who has loaned money on the faith of it, without affirmative proof that the deed was freely and voluntarily executed and not obtained by undue influence, persua-

the rules of evidence governing the use of documents in evidence, which are elsewhere treated in this work.[97]

Testimony of Husband. — It has been held that where a wife seeks to establish a resulting trust in her favor in land purchased with her funds, under an understanding with her husband that the title should be taken in her name, the husband's testimony is not competent on her behalf.[98]

B. Indirect Evidence. — The determination of the issue of separate ownership of property by a husband or wife is, however, usually one not merely of proof by paper title, but resort is necessarily had to other evidence.[99] Thus, where the validity of the wife's title to property bought by her during marriage is attacked and the property is claimed by the husband's creditors to be community property, the

sion or fraud. Hadden *v.* Larned, 87 Ga. 634, 13 S. E. 806, where the court said: "Section 2666 is in these words: 'A gift by any person just arriving at majority, or otherwise peculiarly subject to be affected by such influences, to his parent, guardian, trustee, attorney or other person standing in a similar relationship of confidence, shall be scrutinized with great jealousy, and upon the slightest evidence of persuasion or influence toward this object, shall be declared void, at the instance of the donor or his legal representative, at any time within five years after the making of such gift.' The rule of decision fairly deducible from these provisions of the code is that a gift from wife to husband is, in this state, *prima facie* pure; but that it is to be scrutinized with great jealousy, and will, at her instance, be declared void upon the slightest evidence of persuasion or influence used by him in its procurement. Did the code intend that such conveyances are to be treated as void, at any time within five years after their execution, without some evidence to impeach them, why should it require any evidence, even the slightest, to set them aside? Why not declare them subject to be set aside or held void, unless supported by evidence showing they were not the offspring of persuasion or influence? It seems to us clear that the code throws the weight of the legal presumption in favor of the gift and not against it."

A Written Assignment from Husband to Wife confers on her during coverture the equitable and beneficial interest, and at his death the legal title, and is therefore admissible as evidence to prove her title in a joint suit that has survived to her by reason of his death. Hunter *v.* Strider, 41 W. Va. 321, 23 S. E. 567.

97. See the articles "Documentary Evidence;" "Deeds;" "Private Writings."

98. Hyden *v.* Hyden, 6 Baxt. (Tenn.) 406. *Compare infra,* this article, "Husband or Wife as Witnesses."

99. The fact that through mistake or inadvertence the payees of a promissory note had indorsed it payable to the order of the husband, as agent, instead of to the wife, to whom it in fact belonged, does not prevent her from showing by parol her relation to and right of property in the note. Conger *v.* Nesbitt, 30 Minn. 436, 15 N. W. 875.

In Storey *v.* Walker, 64 Ga. 614, an action by a wife to recover from a creditor money received in payment of her husband's debt, knowing that it belonged to her, it was held competent for the defendants to show that the money was received in payment of the wife's debt; that although the goods in question were charged to the husband, yet the quantity sold to the wife and used on her property amounted to more than the sum received on the execution, and this after her consent to the transfer; and that the husband

wife may show by parol evidence that it was purchased with her separate funds.[1]

Parol Evidence is admissible to show that a gift, though joint to husband and wife on the face of the instrument, was intended to operate only as a gift to the wife.[2]

The Correctness of a Judgment of Separation of Property between husband and wife may, on an attack by a creditor of the husband as being invalid for fraud, be established by evidence *aliunde*.[3]

Circumstances Surrounding the Conveyance.— Although the paper title to the property may be in the husband, it has been held proper to

was insolvent and credit had been refused him.

In McClain *v.* Abshire, 63 Mo. App. 333, an action by a wife to recover personal property, held by the defendant under a lien given to him as landlord by the lease from the defendant to the husband, it was held that the lease constituted an important link in the chain of evidence tending to show that the defendant landlord acted under the claim of ownership made by the plaintiff's husband, and that the plaintiff was estopped to claim the property was not that of her husband.

"The question of the ownership of farming products, stock and tools on a farm owned by the wife and occupied by the family as a homestead and carried on by the husband, is not to be determined by presumptions or inferences as to whether the husband occupied as tenant, and hence as principal, or as servant of his wife, but upon the facts; and evidence of how the matter was understood and treated between the husband and wife would be relevant." Hill *v.* Chambers, 30 Mich. 422.

1. Succession of Pinard *v.* Holten, 30 La. Ann. 167, where the court said: "It is the proof of the fact, not any declaration of the fact, that she made the purchase for herself with her paraphernal funds that vests the title in her to the exclusion of the community, and that fact may be proven by any testimony which would be admissible in a judicial tribunal to establish any controverted fact." See also Edwards *v.* Edwards, 29 La. Ann. 597.

Compare Parsons *v.* Woodward, 73 Ala. 348, where a husband and wife sued jointly in ejectment, or instituted a statutory real action in the nature of ejectment, claiming title to properly under a deed which, on its face, created a statutory separate estate in the wife; it was held that they should not have been allowed, for the purpose of showing that they were entitled to a joint recovery, to prove by parol evidence that the purchase price of the property in question belonged to the wife's equitable separate estate. The court said that "in such an action as this, founded on documentary title, it is not permissible to aid the plaintiff's title by oral proof of an equity, unless the nature of the adversary claim is such that the *bona fides* with which such title was acquired can be or is in issue. And so, when the legal title is shown to be in one of two plaintiffs in an action for the recovery of land, it is not permissible to show, by parol proof of the consideration, that another may be joined as plaintiff."

In Bennethum *v.* Long (Pa.), 13 Atl. 776, an action by a married woman against an officer for unlawfully seizing property claimed by her as her separate estate under an execution against her husband, it was held that the petition of the wife asking to have her separate earnings secured to her as provided by statute was admissible on her behalf.

2. Dunham *v.* Chatham, 21 Tex. 231, 73 Am. Dec. 228.

3. Keller *v.* Vernon, 23 La. Ann. 164, *holding* that evidence tending to show that the husband had received from the wife funds derived by succession from the estate of a deceased relative prior to the judgment of separation was admissible for the purpose stated.

permit the wife to give in evidence all of the circumstances surrounding the conveyance, and the reason for taking the title in her husband's name.[4]

Actions With Respect to Property.— Upon an issue as to the ownership of certain personal property, the manner in which the property was treated by the spouses and their acts respecting it are relevant.[5]

Reduction to Possession. — Reduction into possession by the husband of his wife's personal property is not of itself a conversion, but is merely evidence thereof.[6]

Purchase Price Contributed by Friends. — Again, a wife may, in rebuttal of the presumption of ownership in her husband of property in the apparent possession of both of them, introduce written evidence that the property was purchased with funds given for her use.[7]

C. ADMISSIONS AND DECLARATIONS. — Where the issue is whether or not a conveyance to the wife of real property purchased by the husband with his own means was intended as a provision or to create a resulting trust, evidence of acts and declarations by the wife is competent to show the intention of the parties.[8]

Declarations of the Wife Herself in her own favor are admissible

4. Howe *v.* Yopst, 20 Ind. 409.

5. Fletcher *v.* Wakefield, 75 Vt. 257, 54 Atl. 1012, where the evidence in question was that the property had been insured by the wife in her name with the knowledge and acquiescence of the husband.

Listing for Taxation. — Evidence that a husband listed for taxation as his own, certain property claimed by his wife as her separate property, is not evidence against her on the question of title, unless authorized by or known to and acquiesced in by her. Miller *v.* Lathrop, 50 Minn. 91, 52 N. W. 274.

In DeVotie *v.* McGerr, 15 Colo. 467, 24 Pac. 923, 22 Am. St. Rep. 426, an action by the plaintiff to recover the value of certain property claimed by her as her separate property, and alleged to have been wrongfully seized by the defendants, it was held that the return of the property for assessment by the plaintiff's husband as his own was not evidence against the plaintiff's title, unless accompanied by evidence that such return was with her knowledge and consent.

6. Estate of Hinds, 5 Whart. (Pa.) 138, 34 Am. Dec. 542.

To effect a reduction to possession of a chose in action, however, there must be some act done by a husband evincing an intention to appropriate it to his own use, and accordingly recovery of judgment thereon in his own name is certainly *prima facie* evidence of such intention. Pierson *v.* Smith, 9 Ohio St. 554, 75 Am. Dec. 486. *Compare* Bond *v.* Conway, 11 Md. 512, where it was held that the fact that an action was instituted against the obligors on bonds executed to a wife during coverture by the executor of the husband proves that they were not reduced into possession by the husband at the time of his death.

7. Gillespie *v.* Miller, 37 Pa. St. 247, where it was held proper to permit the reception as evidence of such separate ownership by a married woman of a writing duly executed and recorded, in which a sister contributed money to be received, held and used expressly and solely for the purpose of "affording relief and support" for the family and in no manner for the interest of the husband "except to the extent of the maintenance to be allowed him for his services to be rendered."

8. Seibold *v.* Christman, 75 Mo. 308.

when accompanying some act in regard to the premises in controversy claimed by her, and as explanatory of the act, and to show that she claimed the entire estate to the knowledge of her husband.[9] But they are not admissible as against her husband in the absence of proof of knowledge thereof on his part.[10]

Admissions or Declarations by the Husband as to his wife's property, although he may be a nominal party to the action, are not admissible against the wife in the absence of proof of her knowledge or assent.[11] Nor can acts of the husband subsequent to the time at which the

9. Bennett *v.* Camp, 54 Vt. 36. Conversations between a vendor and a married woman at and shortly before the time he made a formal contract with her for the sale of the premises in dispute, under which contract he executed to her a bond for title and took her notes for the purchase-money, are admissible in evidence in her favor against creditors of the husband, if what was said would tend to show that she was not only the nominal but the real purchaser, and that certain payments subsequently made through her husband were made with her means, in pursuance of an understanding and arrangement which existed from the inception of the purchase. More especially is this true where the creditors contend that the notes of the husband, and not those of the wife, were given for the unpaid purchase-money, and where the signatures to the notes have been torn off previous to the trial, and the wife testifies that the signatures were her own and not those of her husband. New *v.* Driver, 89 Ga. 434, 15 S. E. 535.

10. On an issue as to whether or not certain moneys belonged to a married woman or her husband, her will in which she undertook to dispose of the money as her own is not admissible as against the husband. It is "nothing more or less than a declaration on her part that the money belonged to her;" to make it admissible it must appear that the husband with full knowledge acquiesced in or consented to such disposition on the part of his wife. Taylor *v.* Brown, 65 Md. 366, 4 Atl. 888.

11. Long *v.* Brown, 66 Ind. 160. In Wait *v.* Baldwin, 60 Mich. 622, 27 N. W. 697, a married woman conveyed a parcel of land, the timber upon which had been excepted in the deed to her, and it passed into the hands of third parties, who removed some of the timber, which was replevied by her grantor under the exception in his deed to her. On the trial of her replevin suit her husband, from whom she had been separated for several years, and who had no interest in the land or timber, and no privity or connection whatever with the title or covenants of her deed of the land, was allowed to testify to an alleged settlement made by him with the plaintiff by which plaintiff released all claim to the timber. There was no proof tending to show any right on his part to act for his wife or any other person in the matter, or that his action was ratified by her; and whatever was done was long after she had parted with all claim to the land. It was held that the court erred in receiving the testimony and in submitting it to the jury, the action of the husband being that of a stranger and volunteer.

In Coldwater Nat. Bank *v.* Buggie, 117 Mich. 416, 75 N. W. 1057, an action against a married woman wherein the issue was as to whether or not she was the owner of a business managed by her husband and conducted in his name with the addition of the abbreviation "and Co.," for whose debts it was sought to charge her, it was held that evidence of statements made by the husband to the effect that she was the owner of the property was not admissible as against her.

In State *ex rel.* Goldsoll *v.* Chatham Nat. Bank, 80 Mo. 626, a controversy between the wife and her

ownership in the wife was asserted, indicative of ownership in himself, be received as against her.[12]

Disclaimer of Interest. — Evidence of a disclaimer by the husband of any interest in the property has been held properly received as evidence tending to show that the property was the separate property of the wife.[13]

Mortgaging Property. — The mere fact that a husband has given a chattel mortgage on his wife's property does not tend to show that he owned it, in the absence of proof of her consent or knowledge that it was given for her.[14]

husband's creditors as to the ownership of certain property, the creditors had offered evidence to show that the husband had assessed the property in his own name, and also that he had insured the property in his own name. There was, however, no evidence tending to show that the wife had knowledge of or had consented to these acts. It was held that this evidence was not competent to prove that any part of her separate estate had been relinquished by her or conferred upon her husband, but that as to any gift or acquisition from which his marital rights were not excluded this evidence was competent to repel the establishment of a separate estate for the reason that no such estate could arise with respect to such property without his consent, and that this consent might be evidenced by acts and declarations as well as by express agreement.

12. In Montgomery *v.* Hickman, 62 Ind. 598, an action by the plaintiff to recover possession of certain corn, claimed by her, but which had been seized by the defendant under an execution against the plaintiff's husband, it was held that the defendant could not show that after the corn was taken from the defendant under a writ of replevin and turned over, the plaintiff's husband had taken charge of it, sold it in his own name, and received and appropriated the proceeds to his own use; that evidence of such "subsequent acts of the husband would not prove, nor tend to prove, that, at the time this suit was commenced, the appellee was not, or that her husband was, the owner of the corn in controversy."

13. In Charauleau *v.* Woffenden, 1 Ariz. 243, 25 Pac. 652, an action of ejectment by the grantees of a married woman to recover possession of the granted premises from her husband, it was held that evidence of a disclaimer by the husband of any interest in the property in controversy and of his determination never to return to it, and that when she was negotiating a sale of the property the husband was present and made no objection, nor questioned her right to the property as her separate estate, was competent as tending to show that the property was the wife's separate estate. The court said: "Was not his disclaimer of any interest in the property evidence tending to show that the property was the separate property of the wife? The husband has control of the common property, and, if these lands had been purchased with means from the common fund, would he not have known it, and would he have disclaimed any interest in them? Had the defendant paid for the property out of his own means, or out of the common funds, would he be likely to make such disclaimer? At any rate, such disclaimer was proper evidence to go to the jury, as tending to show that the property was the separate property of the wife."

14. Gavigan *v.* Scott, 51 Mich. 373, 16 N. W. 769. See also Miller *v.* Lathrop, 50 Minn. 91, 52 N. W. 274; DeVotie *v.* McGerr, 15 Colo. 467, 24 Pac. 923, 22 Am. St. Rep. 426.

IV. INTENTION OF WIFE TO CHARGE SEPARATE ESTATE.

1. Presumptions and Burden of Proof. — Although there is authority to the contrary,[15] the weight of authority is to the effect that when a married woman executes a written obligation for the payment of money, it will be presumed that she intended thereby to charge her separate estate, and a creditor seeking to enforce payment of such

15. Reid *v.* Stevens, 38 S. C. 519, 17 S. E. 358; Earley *v.* Law, 42 S. C. 330, 20 S. E. 136; Hodson *v.* Davis, 43 Ind. 258; Vogel *v.* Leichner, 102 Ind. 55, 1 N. E. 554; Jouchert *v.* Johnson, 108 Ind. 436, 9 N. E. 413. See also Cupp *v.* Campbell, 103 Ind. 213, 2 N. E. 565.

A married woman is not liable upon a guardian's bond executed by her as surety, where there is nothing expressed therein showing an intention to charge her separate estate. Gosman *v.* Cruger, 69 N. Y. 87, 25 Am. Rep. 141, *holding* also that the making of an affidavit on her part that she possessed enough estate to make her a sufficient surety does not incorporate into her contract an expression of intent to charge her separate estate.

In Nebraska the settled doctrine is that the signing of a written obligation to pay money by a married woman does not raise the presumption that she intended thereby to render her separate estate liable for its payment; nor that it was given with reference to her separate property, trade or business, or upon the faith and credit thereof; and to an action upon such obligation coverture is a complete defense, unless the plaintiff shall establish by a preponderance of the evidence that the note was made with reference to or upon the faith and credit of the wife's separate estate or business, or with an intention on her part to charge her separate estate with its payment. State Nat. Bank *v.* Smith, 55 Neb. 54, 75 N. W. 51; First Nat. Bank *v.* Grosshans, 54 Neb. 773, 75 N. W. 51; Stenger Benev. Ass'n *v.* Stenger, 54 Neb. 427, 74 N. W. 846; Grand Island Bkg. Co. *v.* Wright, 53 Neb. 574, 74 N. W. 82; Citizens State Bank *v.* Smout, 62 Neb. 223, 86 N. W. 1068; Farmers Bank *v.* Boyd (Neb.), 93 N. W. 676.

The New Jersey Court states the rule thus: "The general principle is that a married woman is enabled in equity to contract debts in regard to her separate estate, and that the estate will be subject in equity to the payment of such debts. In order to bind the separate estate, it must appear that the engagement was made in reference to and upon the faith and credit of the estate. But where a married woman, living apart from her husband, and having a separate estate, contracts debts, the court will impute to her the intention of dealing with her separate estate, unless the contrary is shown." Johnson *v.* Cummins, 16 N. J. Eq. 97, 84 Am. Dec. 142.

The general rule being that a married woman cannot make a contract or be sued, in cases where the provisions of the statute having reference to her own property do not apply, the burden of proof is upon him who seeks to charge her by reason of one of the exceptions by which she is entitled to make contracts as a *feme sole*. Kendall *v.* Jennison, 119 Mass. 251, where the question to be deceided was whether the husband of the defendant, when he left the state, intentionally and actually renounced his marital rights and duties, and so far deserted and abandoned his wife that she was thereafter entitled to make contracts as a *feme sole*.

Where no express charge upon her separate estate is created by a contract of a married woman, it must be made to appear that it was in or about a trade or business carried on by her, or that it was for the benefit of her separate estate. Nash *v.* Mitchell, 71 N. Y. 199, 27 Am. Rep. 38, *reversing* 8 Hun 471.

obligation does not have the burden of proving her intention to so charge her estate.[16]

2. Mode of Proof. — A. Direct Testimony of the Wife. — As in other cases of intent, where the issue is whether or not a married woman intended to bind her separate estate at the time of making the contract, she is a competent witness to testify directly as to her intention in that respect.[17]

B. Parol Evidence. — Where the instrument does not on its face show that the debt or contract was executed with reference to the

16. *Alabama.* — Ozley *v.* Ikelheimer, 26 Ala. 232; Vance *v.* Wells, 8 Ala. 399.

Connecticut. — Wells *v.* Thorman, 37 Conn. 318.

Kansas. — Deering *v.* Boyle, 8 Kan. 351.

Kentucky. — Bell *v.* Kellar, 13 B. Mon. 381; Cardwell *v.* Perry, 82 Ky. 129.

Michigan. — National Lumberman's Bank *v.* Miller, 131 Mich. 564, 91 N. W. 1024, 100 Am. St. Rep. 623.

Missouri. — Schafroth *v.* Ambs, 46 Mo. 114.

Ohio. — Phillips *v.* Graves, 20 Ohio St. 371; Avery *v.* Vansickle, 35 Ohio St. 270; Hershizer *v.* Florence, 39 Ohio St. 516; Williams *v.* Urmston, 35 Ohio St. 296, 35 Am. Rep. 611 (*overruling* Levi *v.* Earl, 30 Ohio St. 147; Rice *v.* Railroad, 32 Ohio St. 380).

Virginia. — Price *v.* Planters Nat. Bank, 92 Va. 468, 23 S. E. 887, 32 L. R. A. 214; Miller *v.* Miller, 92 Va. 510, 23 S. E. 891; Burnett *v.* Hawpe, 25 Gratt. 481.

"The wife must be regarded as charging her separate estate in the act of contracting an obligation, unless a contrary intention is evidenced by her contemporaneous writing. The charge is implied in the act of contracting the obligation. But if she, in writing, makes an express charge of the obligation upon other property, nothing is left to implication, and the implied charge does not arise. In this case she enjoined in an instrument expressly charging the note in controversy upon her homestead and the insurance thereon. This act of hers rebuts the implication which otherwise would have imposed it as a charge on her separate equitable estate." Seifert *v.* Jones, 84 Mo. 591.

"It is the well-settled law in this state, that if a married woman who is possessed of real estate, for her sole use, executes a promissory note, it will be presumed that she intended to charge her separate property with the payment thereof; for, unless such presumption should prevail, her act of executing the note would be altogether without meaning. And it makes no difference in point of principle that the instrument which she executes, and whereby she promises to pay a sum of money, does not assume the shape of a note of hand. Her intention to bind her separate estate will, in the absence of anything to the contrary, accompany her act, as well in the one case as the other. The power of a *feme covert* to charge her separate property is an inevitable sequence of the doctrine of courts of equity, that in respect to such property, she is a *feme sole*." De Baun *v.* Van Wagoner, 56 Mo. 347. See also Lincoln *v.* Rowe, 51 Mo. 571.

17. Union Stock Yards Nat. Bank *v.* Coffman, 101 Iowa 594, 70 N. W. 693. *Compare* Avery *v.* Vansickle, 35 Ohio St. 270, where it was held that in the case of a written contract the wife should not be permitted to testify that she had no intention to charge her separate estate. See also Hershizer *v.* Florence, 39 Ohio St. 576, where it was held that the presumption of intent in such case cannot be overcome by the testimony of the wife that such was not her intention; that unless there are circumstances surrounding the transaction showing a contrary intention, it is immaterial what her secret purpose was, and the presumption will prevail.

wife's separate estate, parol evidence is admissible on that question.[18]

V. MARITAL RELATION AS AFFECTING HUSBAND AND WIFE AS WITNESSES.

1. As Respects Their Competency. — A. STATEMENT OF RULES. a. *Common-Law Rule.* — (1.) **Generally.** — At common law the rule was that neither husband nor wife was a competent witness for or against the other,[19] subject however to certain exceptions to be hereafter noted.[20] And this rule prevailed in equity as well as in law.[21]

18. Pelzer *v.* Durham, 37 S. C. 354, 16 S. E. 46, where the court said: "It is also well settled that when a plaintiff brings his action to enforce a contract alleged to have been made by a married woman, the burden of proof is upon him to show that such contract was made with reference to her separate estate; but this may be shown by circumstantial evidence or inferences drawn from the circumstances, as well as by positive or direct evidence. For example, when a married woman applies for and obtains a loan of money, the natural inference is that she wants it for her own use, and so soon as she obtains the money it becomes a part of her separate estate, and her contract to return or repay the same is a contract as to her separate estate, which she is legally liable to perform unless such inference is rebutted by the facts and circumstances attending the transaction. It is therefore generally proper, as well as necessary, to inquire into the surrounding circumstances, where, as in this case, the papers do not show on their face that the contract was made with reference to the separate estate of the married woman."

19. *Alabama.* — State *v.* Neill, 6 Ala. 685; Walker *v.* Walker, 34 Ala. 469.

Arkansas. — Leach *v.* Fowler, 22 Ark. 143.

California. — Lisman *v.* Early, 12 Cal. 282.

Delaware. — Burton *v.* Wright, 2 Houst. 49.

Indiana. — Woolley *v.* Turner, 13 Ind. 253.

Kentucky. — Higdon *v.* Higdon, 6 J. J. Marsh. 48.

Louisiana. — Cull *v.* Herwig, 18 La. Ann. 315.

Missouri. — Joice *v.* Branson, 73 Mo. 28.

New Hampshire. — Blain *v.* Patterson, 47 N. H. 523.

New Jersey. — Trenton Bkg. Co. *v.* Woodruff, 2 N. J. Eq. 117.

New York. — Hosack *v.* Rogers, 8 Paige 229; Moffat *v.* Moffat, 10 Bosw. 468.

Ohio. — Bird *v.* Hueston, 10 Ohio St. 418.

Pennsylvania. —Snyder *v.* Snyder, 6 Binn. 483, 6 Am. Dec. 493.

South Carolina. — Terry *v.* Belcher, 1 Bail. 568.

Vermont. — Brown *v.* Burrington, 36 Vt. 40.

Virginia. — Fink *v.* Denny, 75 Va. 663; William & Mary College *v.* Powell, 12 Gratt. 372.

West Virginia. — Watkins *v.* Wortman, 19 W. Va. 78.

In Seaton *v.* Kendall, 171 Ill. 410, 49 N. E. 561, it was held that under the Illinois statute governing arbitration and award, a wife is not a competent witness for her husband on the hearing before the arbitrators. *Contra.* — Wade *v.* Powell, 31 Ga. 1.

A married woman cannot testify for her husband on a proceeding involving his interest in her property as a tenant by curtesy initiate. Ginter *v.* Breeden, 90 Va. 565, 19 S. E. 656.

20. See *infra* this section where the application of and exceptions to the rules herein stated are discussed.

21. Sedgwick *v.* Watkins, 1 Ves. Jr. (Eng.) 49; Bird *v.* Davis, 14 N.

The effect of this rule was that whenever either spouse was a party to the record, the other was not a competent witness.[22]

Spouse Interested Although Not a Party. — So, too, under the common-law rule where the interests of a spouse were directly involved, although not as a party to the record, the other was not a competent witness.[23] But when such former spouse is competent,[24] the other spouse is also competent.

Testimony of Spouse Contradicting or Criminating the Other. — Again, under the common-law rule where the interests of one spouse are directly involved, the other is not a competent witness to contradict or criminate the former, whether a party to the action or not.[25]

J. Eq. 467; City Bank *v.* Bangs, 4 Paige (N. Y.) 285; Stewart *v.* Stewart, 7 Johns. Ch. (N. Y.) 229. See also William & Mary College *v.* Powell, 12 Gratt. (Va.) 372.

22. *England.* — Woodgate *v.* Potts, 2 Car. & K. 457; Bentley *v.* Cooke, 3 Doug. 322.

Alabama. — Sadler *v.* Houston, 4 Port. 208.

Delaware. — Burton *v.* Wright, 2 Houst. 49.

Indiana. — Weikel *v.* Probasco, 7 Ind. 690.

Kentucky. — Tacket *v.* May, 3 Dana 79.

Louisiana. — Willis *v.* Kern, 21 La. Ann. 749.

Virginia. — Johnson *v.* Slater, 11 Gratt. 321.

In Lisman *v.* Early, 12 Cal. 282, an action to foreclose a mortgage given to the plaintiff's intestate during his lifetime, it was held that the husband of an heir of the deceased mortgagee was incompetent on the ground of interest.

In Statham *v.* Ferguson, 25 Gratt. (Va.) 28, wherein the plaintiff was an unmarried woman and the defendants were husbands and wives, the controversy being in relation to a transaction between them in which all were interested, it was held that as the husbands and wives were incompetent from their relation to each other to testify on their own behalf, the plaintiff was not a competent witness on her behalf.

Where a wife would not be competent if her husband was sued alone, the fact that she is joined with him as a party to the record does not render her competent. Russ *v.* Steamboat War Eagle, 14 Iowa 363.

23. Pyle *v.* Maulding, 7 J. J. Marsh. (Ky.) 202; Griffin *v.* Brown, 2 Pick. (Mass.) 303; Young *v.* Gilman, 46 N. H. 484; Labarre *v.* Wood, 54 Vt. 452; Banister *v.* Ovitt, 64 Vt. 580, 24 Atl. 1117; Farrell *v.* Ledwell, 21 Wis. 182.

24. Freeman *v.* Freeman, 62 Ill. 189.

25. Way *v.* Harriman, 126 Ill. 132, 18 N. E. 206; Kusch *v.* Kusch, 143 Ill. 353, 32 N. E. 267; Harrington *v.* Sedalia, 98 Mo. 583, 12 S. W. 342; Young *v.* Gilman, 46 N. H. 484; Southerland *v.* Ross, 140 Pa. St. 379, 21 Atl. 354; Banister *v.* Ovitt, 64 Vt. 580, 24 Atl. 1117; DeFarges *v.* Ryland, 87 Va. 404, 12 S. E. 805, 24 Am. St. Rep. 659.

Where a husband has been examined in a case his wife is not competent to discredit him by proving facts, the knowledge of which she acquired by reason of the marriage relation. Keaton *v.* McGwier, 24 Ga. 217.

In Westchester Fire Ins. Co. *v.* Foster, 90 Ill. 121, an action to recover on a fire insurance policy, wherein it was held that a married woman was properly prohibited from testifying in regard to declarations by her husband tending to show that he had caused the property to be burned. See also Fitch *v.* Hill, 11 Mass. 286.

Compare Cornelius *v.* State, 12 Ark. 782, where it was held that after a husband had been examined on behalf of the prosecution, his wife was a competent witness for

Collateral Proceedings. — In a collateral proceeding, however, in which the interests of the husband cannot be judicially affected, the testimony of the wife may be received, although its tendency is to criminate the husband.[26]

Husband's Liability Contingent. — Under the common-law rule, if the husband's liability is contingent only and he is not a party to the record, his wife is a competent witness.[27]

(2.) Basis for Rule. — The basis for this rule at common law excluding husband and wife as a witness for or against the other was not pecuniary interest, but was the marital relation itself.[28]

(3.) Reasons for Rule. — Various reasons were assigned for this rule of exclusion.[29] Among these were the supposed bias of affection;[30] "fear of sowing dissensions between man and wife," occasioning perjury, and the like.[31] The most usual reason, however, given for this rule of exclusion was partly identity of interest and partly the necessity of guarding the security and confidence of the

the defendant to show that her husband had testified under bias or prejudice against the defendant. The court said that if the wife had been introduced to contradict her husband under oath a doubt might have arisen as to her competency, as it would have been virtually to charge him with perjury, but such would not have been the effect in case she had been permitted to testify as asked.

26. Woods *v.* State, 76 Ala. 35, 52 Am. Rep. 314; Clubb *v.* State, 14 Tex. App. 192. See also State *v.* Dudley, 7 Wis. 664. And see *infra*, "Application of and Exceptions to the Rule of Exclusion — Spouses of Co-Parties."

A husband is not incompetent to testify as to the fact of marriage and incriminating circumstances, upon a criminal prosecution of another man for adultery with his wife. State *v.* West, 118 Wis. 469, 95 N. W. 521, 99 Am. St. Rep. 1002.

27. Griffin *v.* Brown, 2 Pick. (Mass.) 303; Dyer *v.* Homer, 22 Pick. (Mass.) 253.

Thus in Williams *v.* Johnson, 1 Peake (Eng.) 504, where the plaintiff sued for goods sold, the wife of another not a party to the record was held competent to prove that the plaintiff had sold the goods in question on the credit of the husband of the witness.

28. McDuffie *v.* Greenway, 24 Tex. 625; Trenton Bkg. Co. *v.* Woodruff, 2 N. J. Eq. 117.

The incompetency of a husband or wife to testify for or against each other in a criminal prosecution at the common law arose not from interest in the result of the suit, but was based upon considerations of public policy, growing out of the marital relation. Turpin *v.* State, 55 Md. 462. See also Stapleton *v.* Crofts, 83 E. C. L. 367, where the court said: "From the interest which the public have in the preservation of domestic peace and confidence between married persons."

29. According to Coke in his Commentary on Littleton in 1628, it was "resolved by the justices that a wife cannot be produced either for or against her husband, *quia sunt duae animae in carne una.*"

30. "From the intimate relation between husband and wife, and from the strong bias of feeling toward each other, the law has provided that neither shall be a witness in regard to any subject in which the other is interested." Johnston *v.* Slater, 11 Gratt. (Va.) 321.

31. Jackson *v.* State, 53 Ala. 472. "Considerations of public policy — the fear of sowing dissensions between man and wife, and of occasioning perjury, which Starkie alludes to as the reasons why a wife

marriage relation;[32] the objection of interest applying more particularly to their being witnesses in favor of each other,[33] and the objection of public policy applying to their being witnesses against each other.[34]

b. *Statutory Changes, Modifications, etc.* — **(1.) Generally.** — In most of the states, however, there are now statutes expressly regulating the competency of husband and wife as witnesses for or against each other.[35] There is, however, such lack of uniformity in these statutes that it is practically impossible to state any general rule which would embrace their provisions.

(2.) Spouse Testifying on His or Her Own Behalf. — Where a spouse is not merely a nominal, but is a substantial, party in interest in the

may not testify against her husband and *vice versa* — are equally satisfactory reasons why they should not be allowed to testify in each other's favor. It is to be feared that in some instances, if not in many, if it were understood that a wife could testify for her husband but not against him, where the husband has the misfortune to be litigious, and the still greater misfortune of being unprincipled, that the wife would find herself called upon, too often, to choose between her duty to her God and the requirements of, not to say her duty to, her husband; between violating the obligation of her oath, and incurring the displeasure of him whom she has promised to love, honor and obey." Kelley *v.* Proctor, 41 N. H. 139. See also Chase *v.* Pitman, 69 N. H. 423, 43 Atl. 617.

32. Robison *v.* Robison, 44 Ala. 227; Cotton *v.* State, 62 Ala. 12; Bennifield *v.* Hypres, 38 Ind. 498. And see other cases cited *supra,* in note 19, this subdivision.

33. The Reason Given by Blackstone why husband and wife are not to be admitted to be witnesses for each other is that it would contradict the maxim of law, "*Nemo in propria causa testis esse debet.*" 1 Black. Comm. 443. See also Merriam *v.* Hartford & N. R. Co., 20 Conn. 354, 52 Am. Dec. 344.

Compare Lucas *v.* Brooks, 18 Wall. (U. S.) 436, where it was declared that the objection to a wife testifying on behalf of her husband is not and never has been that she has any interest in the issue to which he is a party; that it rests solely upon public policy.

34. Robison *v.* Robison, 44 Ala. 227.

"It is a pervading principle of the law of evidence that a husband or wife cannot be a witness in a cause, civil or criminal, in which the other is a party; not for that other, because the law considers them as one person, and their interests as identical; nor against that other, on grounds of public policy, because of the mutual confidence subsisting between them, and for fear of sowing distrust and dissensions and of giving occasions to perjury." William & Mary College *v.* Powell, 12 Gratt. (Va.) 372.

"The incompetency of the husband or wife to testify where either was an interested party at the common law arose out of the unity of interest and of personal relations. This unity of interest may be removed, and yet, owing to the unity and confidential nature of their personal relations, the common-law rule in respect to competency remains on grounds of public policy." *In re* Holt's Will, 56 Minn. 33, 57 N. W. 219, 45 Am. St. Rep. 434, 22 L. R. A. 481.

35. The Constitutional Restrictions for the Protection of Vested Rights do not embrace legislation in respect to the competency of witnesses; and a statute making a husband or wife a competent witness for or against the other applies, therefore, to occurrences before as well as after its passage. Wilson *v.* Wilson, 86 Ind. 472.

action,[36] marriage is not a disqualification as to his or her interest in the cause,[37] notwithstanding the other spouse is also a party to the action.[38]

(3.) Spouses Testifying for or Against Each Other. — (A.) DISTINCTION BETWEEN DISABILITY AND PRIVILEGE. — The rule at common law made no apparent distinction between the incompetency of one spouse to

36. The Missouri Statute defining the competency of husband and wife to testify in their own behalf and for each other does not exclude the wife from testifying in a case in which she is a real party in interest. Scrutchfield *v.* Sauter, 119 Mo. 615, 24 S. W. 137. See also Brownlee *v.* Fenwick, 103 Mo. 420, 15 S. W. 611; Edmondson *v.* Moberly, 98 Mo. 523, 11 S. W. 990. The wife is a competent witness, whether her husband is joined as a party with her or not, but she is not a competent witness on behalf of her husband where her interest is not the subject of adjudication, but only a collateral circumstance. Layson *v.* Cooper, 174 Mo. 211, 73 S. W. 472, 97 Am. St. Rep. 545.

In Florida the statute authorizes the wife to be a witness only in a case where her husband is a party. It does not extend the same right to him in a case where she is a party. That they are both parties defendant does not alter the rule. He can testify to anything relating to his own defense, but he can not testify in support of any defense set up by his wife. Schnabel *v.* Bets, 23 Fla. 178, 1 So. 692.

37. In Powers *v.* Fletcher, 84 Ind. 154, an action by a married woman upon the promise of the defendant to pay a debt due to her from a firm consisting of the defendant and her husband, it was held that the plaintiff was a competent witness on her own behalf.

In Vermont a statutory exception exists so as to permit husband and wife to testify "when they are properly joined in the action as plaintiffs or defendants;" and in *In re* Hathaway's Will, 75 Vt. 137, 53 Atl. 996, where husband and wife were legatees under a will and were joined as proponents on an appeal from the judgment of the probate court establishing the will, it was held that the wife was properly joined by virtue of her own interest and could not be denied the privilege of testifying for herself, although she thereby testified for her husband also, who happened to have a similar interest.

38. St. Louis, I. M. & S. R. Co. *v.* Amos, 54 Ark. 159, 15 S. W. 362, an action by a husband and wife to recover damages for personal injuries to each of them wherein it was held that either was a competent witness in his or her own behalf, although under the Arkansas statute neither was a competent witness for or against the other. See also Klenk *v.* Knoble, 37 Ark. 298, an action against a husband and wife to foreclose a mortgage on a homestead, wherein the wife was permitted to testify as to the homestead character and use of the property, and that she was induced to sign the relinquishment of dower by the fraud and coercion of her husband, the court carefully excluding her testimony so far as it assisted the defense of her husband. Clouse *v.* Elliott, 71 Ind. 302; Sedgwick *v.* Tucker, 90 Ind. 271.

In Kelly *v.* Hale, 59 Ill. App. 568, it was held that a married woman who was a joint maker of the note sued on and a party defendant, was a competent witness on her own behalf.

Under the Indiana Statute of 1867, the fact that his wife also has an interest therein and is the husband's co-party, does not render him incompetent as a witness on his own behalf. Clouse *v.* Elliott, 71 Ind. 302.

In Wisconsin the only statutory exception to the common-law rule that husband and wife may not be witnesses for or against each other is when they are parties to the same action, and when such is the case

testify for or against the other as a matter of disability and the incompetency as a matter of privilege.[39] But many of the statutes, though perhaps not in so many words, do in effect make such a distinction,[40] at least where a spouse is offered as a witness against

they may testify as other witnesses, notwithstanding their interest in the suit and their marital relations. Strong *v.* Stevens Point, 62 Wis. 255, 22 N. W. 425, an action by a father as administrator to recover damages for the wrongful death of his minor son. The court said: "The father of the deceased is the administrator and the plaintiff. As administrator, he may testify, by the terms of the statute, because he is a party plaintiff; but as the father of the deceased and husband to his mother, he may not testify, because his wife is equally interested with him in the subject-matter of the suit. If, in such a case, the husband, as such, may testify as a witness for or against the interest of his wife in the same action, so should the wife be allowed to testify. The statute should have no such absurd construction, and was no doubt intended to qualify all persons who are the real parties in interest to become witnesses in the cause without excepting those who happen to be husband and wife. In cases where the husband and the wife are equally and exclusively interested in the subject-matter of the action, and the husband is allowed by the statute to testify as a witness for himself, the marital disqualification ceases."

39. Bentley *v.* Cooke, 3 Doug. (Eng.) 322; People *v.* Mercein, 8 Paige (N. Y.) 47. See also Tucker *v.* State, 71 Ala. 342.

In Clark *v.* Krause, 2 Mack. (D. C.) 559, it was held that a wife was not a competent witness to testify on the demand of the plaintiff as against her husband, even with her husband's consent.

40. Thus the California Statute, which is a fair representative of many of the statutes on this question, is as follows: "A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage, but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other." The Penal Code (§ 1322) provides that "Except with the consent of both, or in case of criminal violence upon one by the other, neither husband nor wife is a competent witness *for* or *against* the other in a criminal action or proceeding to which one or both are parties." People *v.* Langtree, 64 Cal. 256, 30 Pac. 813.

The Colorado Statute provides that: "A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent. (Gen. Stats. 1883, p. 1062, § 3649.) Dill *v.* People, 19 Colo. 469, 36 Pac. 229.

The Michigan Statute provides that a husband shall not be examined as a witness for or against his wife without her consent, except in certain cases. People *v.* Gordon, 100 Mich. 518, 59 N. W. 322.

Under the Minnesota Statute the only limitation upon the competency of either is found in section 10, which provides that neither party shall be examined without the consent of the other. They are not thereby made incompetent witnesses, nor are they to be classed as such, though their right to be examined is contingent upon the consent of that one for or against whom the witness may be offered. *In re* Holt's Will, 56 Minn. 33, 57 N. W. 219, 45 Am. St. Rep. 434, 22 L. R. A. 481, where the consent of the wife to her husband's testifying was manifested by her calling him as her own witness.

the other;[41] although even in the latter case the incompetency is sometimes still a matter of disability and not a matter of privilege.[42]

(B.) Spouses Testifying for Each Other. — (a.) *Generally.* — The competency of a husband and wife to testify for and on behalf of the other, even under the statutes, is a question as to which the cases are in conflict, not perhaps due so much to conflict of opinion as to the statutes themselves. Thus in some of the states it is held that where a husband is not a competent witness on account of interest, his wife is also incompetent on account of the identity of interest of husband and wife.[43] But the mere fact that a husband may be biased, but has no legal interest in the suit, does

41. A husband cannot be a witness against his wife without her consent in an action by her against a saloonkeeper for furnishing intoxicating liquors to her husband. Wood *v.* Lentz, 116 Mich. 275, 74 N. W. 462. And in Michigan Beef & Prov. Co. *v.* Coll, 116 Mich. 261, 74 N. W. 475, a bill filed to reach certain property held by the defendants as joint tenants under conveyance, it was held that the husband was not a competent witness against the wife without her consent.

42. Brock *v.* State, 44 Tex. Crim. 335, 71 S. W. 20, 100 Am. St. Rep. 859. See further *infra*, this subdivision, "As Witnesses Against Each Other."

43. Bitner *v.* Boome, 128 Pa. St. 567, 18 Atl. 404, applying the Pennsylvania statute to the effect that the removal of interest as a ground for disqualification does not apply to actions by or against personal representatives, etc. See also Myers *v.* Litts, 195 Pa. St. 595, 46 Atl. 131; McGrath *v.* Miller, 61 Ill. App. 497; Wollf *v.* Van Housen, 55 Ill. App. 295.

In Kusch *v.* Kusch, 143 Ill. 353, 32 N. E. 267, wherein the defendants were husband and wife, it was held that the wife, as to whom the case had been dismissed, was not a competent witness for and on behalf of her husband.

In Francis *v.* Roades, 146 Ill. 635, 35 N. E. 232, a proceeding to establish a resulting trust in favor of the plaintiff's mother in land which had been conveyed to her husband and of which he had been in actual possession for over forty years, it was held that the wife of one of the complainants was not a competent witness to testify on his behalf.

In Mitchinson *v.* Cross, 58 Ill. 366, an action for malicious prosecution, it was held that the plaintiff's wife was not a competent witness to testify on his behalf to facts showing a want of probable cause for the prosecution complained of.

In Woolverton *v.* Sumner, 53 Ill. App. 115, an action on a promissory note, it was held that the wife of the payee and assignor was not a competent witness to testify at the instance of the plaintiff. "Her husband was directly interested. His assignment of the note for value absolutely implied a warranty that it was genuine, and the witness was called to prove it was so."

A Virginia Statute provides that when one of the original parties to the transaction which is the subject of investigation is for any legal cause incompetent to testify, the other party thereto is also incompetent to testify in his own favor. Lindsay *v.* McCormick, 82 Va. 479, 5 S. E. 534 (an action against a wife on a bond executed by her husband as her trustee, *holding* the husband incompetent because of the interest of his wife); DeFarges *v.* Ryland, 87 Va. 404, 12 S. E. 805, 24 Am. St. Rep. 659 (an action to set aside a trust deed made by a husband for the benefit of his wife, *holding* the wife incompetent because of her husband's interest); Burton *v.* Mill, 78 Va. 468 (*holding* that where husband and wife are both parties and interested in the result of the action, neither is a competent witness); Witz *v.* Osburn, 83 Va. 227, 2 S. E. 33 (an action to set aside an ante-

not make his wife incompetent; that fact goes merely to her credit.[44] In other states, however, there are statutes expressly declaring, or at least are so construed, that a husband or wife may testify on behalf of the other, except in certain cases specifically enumerated.[45]

(b.) *Effect of Statute Removing Interest as Ground for Disqualification.* Some of the cases hold that as a result of the statute removing the incompetency arising from interest, there remains no legal obstacle to the admissibility of the testimony of one spouse for the other[46] to prove any fact which did not come to the witness' knowledge

nuptial marriage settlement as voluntary, *holding* that neither husband nor wife was competent to prove the agreement for the settlement, either upon their own offer or upon that of the creditor attacking the settlement); Jones *v.* Degge, 84 Va. 685, 5 S. E. 799 (an action against a husband and wife as joint makers of a promissory note, *holding* that neither was a competent witness, although no relief as against the husband was prayed for in the bill).

44. R. G. Gunning Co. *v.* Cusack, 50 Ill. App. 290.

45. **Under the Connecticut Statute** a wife is a competent witness for her husband on the trial of civil actions. Merriam *v.* Hartford R. R. Co., 20 Conn. 354, 52 Am. Dec. 344.

A Delaware Statute provides that "it shall and may be lawful for husband and wife to testify in all civil actions in which either or both are or may be parties to the suit." Nicholls *v.* Vinson, 9 Houst. (Del.) 274, 32 Atl. 225, an action against a married woman to recover for work and labor done by the plaintiff for her at the instance and request of her husband as her agent, wherein it was held that the husband was a competent witness.

Under the Georgia Code (§ 3854), husband and wife may testify for each other in civil cases. Watts *v.* Baker, 78 Ga. 622, 3 S. E. 773.

In Kentucky by statute (Civ. Code Proc., § 606) both husband and wife may testify in an action against a wrongdoer. Board of Internal Imp. *v.* Moore, 23 Ky. L. Rep. 1885, 66 S. W. 417.

By the Mississippi act of 1871, § 760, husband and wife are competent witnesses for each other in civil cases. And in Rushing *v.* Rushing, 52 Miss. 329, an action against husband and wife, it was held that this right was not destroyed by joining the husband for conformity in a suit where he has no interest; and that it was error to exclude the testimony of the husband to the effect that he neither had nor claimed any interest in the property in controversy.

In Roberts *v.* Porter, 78 Ind. 130, an action of replevin to recover personal property belonging to the plaintiff husband, it was held that his wife was not a competent witness on his behalf under the statute of 1867 in force at the time of trial, but the court said that under the Act of 1881 the rule would be otherwise.

In Little *v.* Ratliffe, 126 N. C. 262, 35 S. E. 469, an action of replevin for property which the plaintiff claimed to have bought from a third person, it was held that the testimony of such third person's wife, who was present at the time of the purchase, as to what took place at the time in the way of paying the purchase price, passing a receipt written by her, etc., was competent; that § 588 of the code made the witness competent, had the action been between her husband and the defendant, and that she was also competent under § 590 as she was not a party to the action and had no interest in it.

46. Strong *v.* Stevens Point, 62 Wis. 255, 22 N. W. 425. See also Barnes *v.* Martin, 15 Wis. 240, 82 Am. Dec. 670; Mercer *v.* State, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135; Stuhlmiller *v.* Ewing, 39 Miss. 447. *Compare* Dunlap *v.* Hearn, 37 Miss. 471 (to the effect that the statute removing interest as a disqualification did not operate to remove

through the marital relation.[47] The weight of authority, however, is to the contrary. Under such a statute it is generally held that the removal of objection on account of interest, but not removing the objection on the ground of public policy, to a wife's testifying against her husband when he is a party, she remains incompetent, and being incompetent to testify against him, she cannot be allowed, where he is a party, to testify for him.[48]

(C.) Spouses Testifying Against Each Other. — (a.) *Generally.* The incompetency of a husband or wife to testify against the other

the disability of a wife to testify for her husband, because the disability was based upon public policy and arose out of the sanctity of the marriage relation and the unity and identity of person, and not merely from interest).

In Chase *v.* Pitman, 69 N. H. 423, 43 Atl. 617, an action against a husband and wife on their joint and several promissory note wherein the husband had defaulted, it was held that he was a competent witness to testify on behalf of his wife to the effect that she was merely a surety on the note, provided his testimony did not violate the law against confidential communications.

A Wisconsin Statute provides that no person shall be disqualified as a witness in any action or proceeding, civil or criminal, by reason of his interest as a party or otherwise, and that every party shall be in every such case a competent witness except as otherwise provided therein; and in Snell *v.* Bray, 56 Wis. 156, 14 N. W. 14, where husband and wife had joined in an action affecting her separate property, it was contended that the clause "in every such case" in the statute meant "in every case in which the party is a party in interest," leaving intact, if the husband or wife be only a nominal party, the common-law rule that they are not competent witnesses for each other, but the court held that the words quoted simply meant "every such action or proceeding, civil or criminal," previously mentioned in the statute, and that accordingly the plaintiff husband was a competent witness in the action.

By the Pennsylvania Statute of 1869 removing interest or policy of law as a ground for excluding a witness, a wife was thereby rendered a competent witness to testify for her husband, except as therein expressly provided. Bitner *v.* Boome, 128 Pa. St. 567, 18 Atl. 404.

47. Gordon *v.* Tweedy, 71 Ala. 202.

48. *United States.* — Lucas *v.* Brook, 18 Wall. 436.

California. — Dawley *v.* Ayers, 23 Cal. 108.

Dakota. — United States *v.* Kan-Gi-Shun-Ca, 3 Dak. 106, 14 N. W. 437.

Florida. — Haworth *v.* Norris, 28 Fla. 763, 10 So. 18; Everett *v.* State, 33 Fla. 661, 15 So. 543.

Illinois. — Mitchinson *v.* Cross, 58 Ill. 366.

Indiana. — Stanley *v.* Stanton, 36 Ind. 445.

Maine. — McKeen *v.* Frost, 46 Me. 239.

Massachusetts. — Barber *v.* Goddard, 9 Gray 71; Kelly *v.* Drew, 12 Allen 107, 90 Am. Dec. 138.

New Hampshire. — Kelly *v.* Proctor, 41 N. H. 139.

New Jersey. — Bird *v.* Davis, 14 N. J. Eq. 467.

New York. — Parkhurst *v.* Bedell, 110 N. Y. 386, 10 N. E. 123, 6 Am. St. Rep. 384.

North Carolina. — Rice *v.* Keith, 63 N. C. 319.

Pennsylvania. — Appeal of Dellinger, 71 Pa. St. 425. *Compare* Yeager *v.* Weaver, 64 Pa. St. 425.

Texas. — Gee *v.* Scott, 48 Tex. 510, 26 Am. Rep. 331.

Vermont. — Cram *v.* Cram, 33 Vt. 15; Carr *v.* Cornell, 4 Vt. 116; Carpenter *v.* Moore, 43 Vt. 392.

West Virginia. — Proctor *v.* Hill, 10 W. Va. 59.

Compare Lincoln Ave. & Niles C. G. R. Co. *v.* Madaus, 102 Ill. 417,

is declared in most of the states by statute,[49] except as expressly provided therein. Not, however, in all cases on the ground of disability, but usually as a matter of privilege, inasmuch as the statutes very generally make the competency dependent upon the consent of the spouse against whom the other is offered as a witness.[50]

Spouse Not a Party to the Record. — Where the statute forbids husband or wife to testify against the other without consent, the fact that at the time of the trial the spouse offered is not a party to the record is held to be immaterial; indeed it is declared to be rather a

where a wife offered as a witness on behalf of the defendant corporation was excluded because her husband was a stockholder in the corporation, and as such interested in the result of the suit; but it was held that as the statute had removed the disqualification against her husband's testifying because of his interest, her incompetency in that respect was also removed.

The Illinois Statute, by § 1, removes the disqualification growing out of interest in the event of the suit as a party or otherwise, and by § 5 it provides that no husband or wife shall, by virtue of § 1 be competent to testify for or against each other except in the cases thereafter specified, and the courts of that state have held that neither husband nor wife can testify for or against the other except in cases pointed out by § 5.

Sun Accident Ass'n *v.* King, 53 Ill. App. 182, where it was held that where the plaintiff sues as administrator his wife is not a competent witness on his behalf, because "while he might not and probably would not be liable for the cost of the suit, yet he had a direct pecuniary interest in the result of the suit in that a recovery would swell the assets of the estate upon which he might be allowed a commission, and in that he would be one of the distributees of the estate."

In an action of slander the defendant's wife is not a competent witness on his behalf. Hawver *v.* Hawver, 78 Ill. 412, where the court said: "By the common law she was not a competent witness on behalf of her husband in such a case, and no statute of this state has removed the disability."

49. The Arkansas Statute provides that husband and wife are not competent to testify for or against each other, or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsisted or afterward. Spivey *v.* Platon, 29 Ark. 603, to the effect that the latter clause is but declaratory of a familiar and well-settled common-law rule of evidence. See also Beecher *v.* Brookfield, 33 Ark. 259; Collins *v.* Mack, 31 Ark. 684, *holding* this statute not to be in violation of the constitutional provision prohibiting any exclusion on the ground of interest.

50. *United States.* — Stickney *v.* Stickney, 131 U. S. 227.

California. — People *v.* Langtree, 64 Cal. 256, 30 Pac. 813.

Colorado. — Palmer *v.* Hanna, 6 Colo. 55; Dill *v.* People, 19 Colo. 469, 36 Pac. 229.

Florida. — A statute providing that in the trial of civil actions neither husband nor wife shall be excluded as witnesses where either of them is a party to the action pending does not conflict with another statute providing that the provisions of law as to competency of witnesses in civil actions shall obtain also in criminal cases, but they are to be construed in harmony as parts of one and the same body of statutory law enacted by the same legislative body at the same session; and accordingly the rule as to the competency of a husband or wife to testify for or against each other in civil cases applies with equal force to criminal cases. Everett *v.* State, 33 Fla. 661, 15 So. 543, where it was held that upon a criminal prosecution the defendant's wife was properly permitted to testify against him. See also Mercer *v.*

State, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135.

Georgia. — Knight *v.* State, 114 Ga. 48, 39 S. E. 928; Rivers *v.* State, 118 Ga. 42, 44 S. E. 859.

Illinois. — Mueller *v.* Rebhan, 94 Ill. 142; Mitchell *v.* McDougall, 62 Ill. 498.

Indiana. — **Since the Act of 1879** a husband or wife is a competent witness against the other in all civil actions or criminal prosecutions against them or either of them, except as to confidential communications; but in actions by the husband for the seduction of the wife she is not a competent witness. Hutchason *v.* State, 67 Ind. 449, a criminal prosecution wherein it was held proper to permit the defendant's wife to testify against him so long as she did not violate the rule against confidential communications.

Iowa. — Ward *v.* Dickson, 96 Iowa 708, 65 N. W. 997, to the effect that the Iowa statute cannot be so construed as to permit a husband to testify against his wife merely because his testimony is against himself also. See also Stephenson *v.* Cook, 64 Iowa 265, 20 N. W. 182.

Kansas. — The statute abrogates the common-law rule of disqualification to testify because of interest, and, except as limited by other statutes in *pari materia*, makes every person competent to give evidence in any case, and the further limitation as to husband and wife only prohibits them when not a party to the suit, from testifying for or against the other one who is a party; not to prohibit the one who is a party from testifying for or against the other one who is not. Roesner *v.* Darrah, 65 Kan. 599, 70 Pac. 597. See also Van Fleet *v.* Stout, 44 Kan. 523, 24 Pac. 960.

Louisiana. — Schoppel *v.* Daly, 112 La. 201, 36 So. 322.

Maine. — Bucknam *v.* Perkins, 55 Me. 490.

Maryland. — In Classen *v.* Classen, 57 Md. 510, a bill by a married woman to set aside a paper purporting to be a marriage contract which she alleged was never executed by her, the original of which had been lost, it was held that as this was a civil proceeding she was, under the Maryland Evidence Act of 1864, ch. 109 and its supplements, a competent witness to prove that she had never in fact executed the instrument, a record copy of which was produced.

Michigan. — People *v.* Isham, 109 Mich. 72, 67 N. W. 819.

Minnesota. — Evans *v.* Staalle, 88 Minn. 253, 92 N. W. 951.

Nebraska. — The Code of Civ. Proc. (§ 331) provides that with certain exceptions neither the husband nor the wife can be a witness against the other. Buckingham *v.* Roar, 45 Neb. 244, 63 N. W. 398. And in Lihs *v.* Lihs, 44 Neb. 143, 62 N. W. 457, an action against a son to rescind a deed alleged to have been executed by the plaintiff to the defendant on a condition, it is held that the plaintiff's wife was not a competent witness against him to disprove the fact of such condition subsequent as against his objection.

New Hampshire. — The common-law rule has been so far modified as to make husband and wife competent witnesses for or against each other in all matters, both civil and criminal, where no violation of marital confidence is involved. Noyes *v.* Marston, 70 N. H. 7, 47 Atl. 592.

New Jersey. — Schaab *v.* Schaab (N. J. Eq.), 57 Atl. 1090.

North Carolina. — The Code, § 588, "makes husband and wife competent and compellable witnesses in all cases except that in three cases named, i. e., in criminal actions, in any action for divorce on account of adultery, or action for criminal conversation — it is provided that the husband and wife shall not be competent or compellable 'to give evidence for or against the other.' Even in these excepted instances the statute makes either competent for or against the other to prove the fact of marriage; and § 1354, as to criminal actions, merely prohibits the wife or husband as a witness against the other, except in certain cases in which the wife is allowed to be a witness against the husband." Broom *v.* Broom, 130 N. C. 562, 41 S. E. 673, where the court, in construing the phrase "for or against each other," said that when given their natural signification they simply prevented either party proving a ground

of divorce against the other or for the other by his or her own testimony.

Pennsylvania. — A husband or wife is competent to testify against the other only in case of personal injuries inflicted by one upon the other and in certain cases in divorce; and the rule which excludes them does not depend upon the party criminated being a party to the record. Cornelius *v.* Hambay, 150 Pa. St. 359, 24 Atl. 515. See also Bitner *v.* Boone, 128 Pa. St. 567, 18 Atl. 404. But in Frack *v.* Gerber, 167 Pa. St. 316, 31 Atl. 640, an action against a copartnership for goods sold wherein one of the partners, a married woman, had allowed judgment to be entered against her by default, and the other partner defended on the ground that the goods in controversy had not been purchased by the partnership, but had been contributed by his partner as her share of the capital, it was held that as the wife was not a party to the issue on trial, and that a recovery against the other partner was in her interest and not against it, her husband was a competent witness for the plaintiff to show that the goods in question had been purchased by the copartnership.

In Pleasanton *v.* Nutt, 115 Pa. St. 266, 8 Atl. 63, replevin by a married woman against her husband's vendee, it was held that the plaintiff was not a competent witness to testify to her ownership because she was testifying against the interest of her husband, who, although he was not a party to the record, might through her testimony become liable for a breach of his implied warranty of title in the sale of the goods sold as his own to the defendant; and also that the husband was not a competent witness to deny her ownership at the time of the sale. See also Johnson *v.* Watson, 157 Pa. St. 454, 27 Atl. 772.

Rhode Island. — In Rose *v.* Mitchell, 21 R. I. 270, 43 Atl. 67, an action for alienating the affections of the plaintiff's wife, it was held that the exclusion of the wife's testimony to show that her husband had put her out of his house was proper under R. I. Gen. Laws, ch. 244, § 37, because so far as appears such testimony tended to incriminate the husband.

South Dakota. — Clark *v.* Evans, 6 S. D. 244, 60 N. W. 862, where it was held that the plain declaration of the South Dakota statute is that while the relation of husband and wife exists, neither can testify for or against the other, except by consent, and that after such relation is terminated, and the parties are no longer husband and wife, neither can, without the consent of the other, testify to communications made between them while such relation existed.

Tennessee. — Where husband and wife are parties to an action they are competent for and against each other, except as to facts acquired by virtue of their marital relation. Orr *v.* Cox, 3 Lea 617 (*overruling* all former cases in that state in conflict with the rule stated. At the time of the decision in that case the Act of 1879, which is merely in line with the rule stated, was not in force.)

Texas. — The wife of a defendant in a criminal prosecution is not a competent witness against him with or without his consent, except where the offense for which he is on trial is against her personally. Brock *v.* State, 44 Tex. Crim. 335, 71 S. W. 20, 100 Am. St. Rep. 859.

Utah. — *In re* Van Alstine's Estate, 26 Utah 193, 72 Pac. 942.

Vermont. — Wheeler *v.* Campbell, 68 Vt. 98, 34 Atl. 35.

Virginia. — The Virginia Act of March 3, 1898, "makes husband and wife competent witnesses for and against each other in civil cases, with certain exceptions, and the second section of the act provides that in criminal cases they shall be allowed to testify in behalf of each other, but neither shall be compelled to testify against the other. If either, however, be examined in any case as a witness in behalf of the other, the one so examined shall be deemed competent to testify in such case as well against as in behalf of such other," etc. Davis *v.* Com., 99 Va. 838, 38 S. E. 191.

Wisconsin. — The statute (Laws 1885, p. 288) provides that: "A husband shall not be examined as a

stronger reason why his or her testimony should not be received.[51]

(b.) *Exceptive Clauses Strictly Construed.* — Ordinarily the clauses in statutes excepting from the prohibition, and permitting a husband or wife to testify against the other in certain cases, are to be strictly construed, and in order to invoke the application of the exception it must appear that the case is clearly within the terms of the exception.[52]

witness for or against his wife, without her consent, nor a wife for or against her husband, without his consent, except in cases where the cause of action grows out of a personal wrong or injury done by one to the other." And in People *v.* Sebring, 66 Wis. 705, 33 N. W. 808, the court, in construing this statute, said: "It will be seen that it is the policy of the law to extend the right of the wife to bear testimony against the husband in cases of violation of her personal rights rather than to restrict them." See also Strong *v.* Stevens Point, 62 Wis. 255, 22 N. W. 425.

51. Lihs *v.* Lihs, 44 Neb. 143, 62 N. W. 457.

52. Huot *v.* Wise, 27 Minn. 68, 6 N. W. 425, where the court said that if the Minnesota statute merely laid down the rule disabling a spouse from testifying against the other, it might be urged that it was only a statutory adoption of the common-law rule, and that it adopted also the common-law application of the rule including the exceptions, but that in fact the statute prescribes the application and defines the limits of exception to the privilege allowed, and that accordingly a resort to the common-law rule to determine how far the rule shall prevail, and what cases shall be excepted from it, is not proper. See also Mathews *v.* Yerex, 48 Mich. 361, 12 N. W. 489; Carney *v.* Gleissner, 58 Wis. 674, 17 N. W. 398, where the court said: "The courts *ex necessitate* have made two other exceptions only: First, when either one is charged with personal violence upon the other, Mills *v.* U. S., 1 Pin. 73 (and) second, when one has acted as agent of the other within the scope of such employment. Birdsall *v.* Dunn, 16 Wis. 235. In all other cases the rule has been held by this court to be uniform in excluding them as witnesses for or against each other, as will appear by the cases cited in the brief of the learned counsel of the respondent, and many others. This court is not disposed to go further than the statute and necessity require in exposing the sacred private confidences, disrupting the tie, and breaking up the relations of husband and wife, and introducing strife, malevolence and discord into the married life."

Compare Van Fleet *v.* Stout, 44 Kan. 523, 24 Pac. 960, where the court said that the decisions of the courts of that state, following the spirit of the legislation of the state, have been in favor of lessening rather than extending the limitations as to the competency of husband and wife to testify for or against each other.

In Byrd *v.* State, 57 Miss. 243, 34 Am. Rep. 440, the court, in construing the Mississippi statute of 1871, to the effect that "husband and wife may be witnesses for each other in all criminal cases, but they shall not be required to testify against each other as witnesses for the prosecution, and nothing herein contained shall be so construed as to debar full cross-examination by the prosecution of any husband or wife of an accused party who may be placed on the stand for the defense," said: "The statute is in derogation of a very ancient and well-established rule of the common law, based, as we have above seen, in great part, upon grave reasons of public policy having reference to the preservation of the happiness of parties joined together in the marital relation. Statutes which are in derogation of the common law must be construed strictly, so as not to give them an operation and effect beyond the clearly expressed intention of the

(4.) Actions in Federal Courts. — It is held that the federal statute removing interest as a disqualification on the part of a witness has no application upon the trial of a cause in the federal court, so as to remove the disqualification of a wife on that ground, in a state where it is expressly enacted that one spouse is not a competent witness for or against the other, except in actions between them.[53] A territorial statute does not apply to a territorial court exercising federal jurisdiction.[54]

Personal Injury Actions. — But upon the trial of an action in a federal court by a husband and wife for personal injuries suffered by her, pending in a state where she is expressly made competent by statute as a witness on her own behalf in the same manner as if she were not married, it is proper to permit her to testify.[55]

c. *Who Are Spouses.* — **(1.) Generally.** — The rule of exclusion heretofore discussed, not only at common law, but under the statutes as well, applies only to those persons who fall within the definition of lawful husband and wife.[56]

Marriage to Suppress Testimony. — The rule excluding a wife as a witness against her husband applies, even though it appears that they entered into the marriage relation for the sole purpose of suppressing her testimony.[57]

(2.) Parties Living in Illicit Cohabitation. — The rule does not embrace parties who live in illicit cohabitation,[58] even under a promise

legislature. Hopkins *v.* Sandidge, 31 Miss. 668. Such statutes are to be construed with reference to the principles of the common law, and it is not to be presumed that the legislature intended to make any innovation on the common law further than the necessity of the case required."

53. Lucas *v.* Brooks, 18 Wall. (U. S.) 436, so holding under the West Virginia statute.

54. United States *v.* Kan-Gi-Shun-Ca, 3 Dak. 106, 14 N. W. 437, which was a criminal prosecution pending in a territorial court while exercising jurisdiction under the laws of congress, wherein the question was as to the competency of the defendant's wife as a witness on his behalf, the claim being made that the rule of the common law was abrogated by the provision of a territorial code which, by its reference to the Code of Civil Procedure, made the wife a competent witness for her husband. The court held that the criminal code was not intended to apply to territorial courts exercising federal jurisdiction.

55. Northwestern Union Packet Co. *v.* Clough, 20 Wall. (U. S.) 528.

56. Hampton *v.* State, 45 Ala. 82; Jackson *v.* State, 53 Ala. 472; Clarke *v.* People, 178 Ill. 37, 52 N. E. 857, a prosecution for forgery, wherein it was held that a woman to whom the defendant had been married at a time when he had a former wife living, from whom he had not been legally divorced, was not incompetent to testify against him.

57. United States *v.* White, 4 Utah 499, 11 Pac. 570, where the court, in answering the argument that to so hold would be contrary to public policy, said: "When the marriage ceremony was performed, no matter what the motive was, the witness became beyond all question the lawful wife of the defendant." See also Moore *v.* State (Tex. Crim.), 75 S. W. 497; Ridley *v.* Wellesley, 3 Car. & P. (Eng.) 558.

58. Flanagin *v.* State, 25 Ark. 92, where the court said: "The general rule which forbids the examination of the wife as a witness, where the husband is a party to the suit,

of marriage.[59] Nor does the rule embrace parties who are unmarried, although they may be living together and recognize each other as husband and wife.[60]

(3.) Second Wife of Bigamist. — On a prosecution for bigamy the defendant's second wife is not a competent witness against him so long as the fact of the first marriage is contested;[61] but when the first marriage is duly established by other evidence, or not controverted, the second wife may be admitted as a witness against the defendant.[62]

cannot be applied; because the relation of husband and wife is not shown to have existed between the parties. The bond of their union was illicit cohabitation, the witness occupying the attitude of a kept mistress only; and in such case it is well settled by the authorities that the one is a competent witness for or against the other."

See also Rickerstricker *v.* State, 31 Ark. 207, where the court said: "The rule which excludes the husband or wife, except in a case of particular necessity, as when, for instance, the wife would otherwise be exposed, without remedy, to personal injury, from being a witness for or against the other, has never been extended to any other than lawful marriages, or, at least, to such as are innocent in the eye of the law. Where the cohabitation is of an immoral character, as in the case of a kept mistress, the parties are competent witnesses for and against each other." Flanigan *v.* State, 25 Ark. 92.

59. If a woman cohabit with a man under his promise to marry her legally, but finding that he does not take legal steps to do so, quits him but again cohabits with him, she is not his wife, and is a competent witness on his trial for crime. Hill *v.* State, 41 Ga. 484, where the court said: "The exclusion of the wife of a party is based upon principles of public justice arising out of the sacredness of the domestic tie which cannot be considered applicable to one whose condition did not involve this relationship."

60. Dennis *v.* Crittenden, 42 N. Y. 542; Sims *v.* State, 30 Tex. App. 605, 18 S. W. 410.

61. In Kelly *v.* Drew, 12 Allen (Mass.) 107, 90 Am. Dec. 138, it was held that a woman who had remarried four years after separating from her first husband, from whom she had heard nothing for sixteen years after the second marriage, was not a competent witness against her second husband; that "the presumption of the wife's innocence in marrying again might well overcome any presumption that a man not heard from for four years before the second marriage, or for sixteen years afterward, was alive and her lawful husband when she married the second time; and that the court was justified in excluding her in the absence of proof that at the time of marrying the second time she had a lawful husband living."

Compare Salter *v.* State, 92 Ala. 68, 9 So. 550, a prosecution for bigamy, where it was held that the second woman, to whom the defendant was charged to have been married, was a competent witness for the prosecution to testify whether or not she was the wife of the defendant and whether she was the person whom he had married as charged. The court said that although she stated that she was the defendant's wife, it was "evident that she did not really occupy that relation if at the time of the alleged marriage to him he already had a wife who is still living and undivorced."

62. Johnson *v.* State, 61 Ga. 305; Lowery *v.* People, 172 Ill. 466, 50 N. E. 165; Miles *v.* United States, 103 U. S. 304.

See also Wrye *v.* State, 95 Ga. 466, 22 S. E. 273, where the evidence showed that the accused had a lawful wife who was still living when he had married another woman; and it was held that as the second marriage was void, it did not render the wo-

d. *Effect of Divorce or Death.* — It is immaterial, under the common-law rule, that the marital relation no longer exists when the party is offered as a witness, since the incompetency still remains, although the marriage may have been dissolved by death or divorce.[63]

Separation and Non-Cohabitation do not remove the disability under a statute prohibiting husband or wife from testifying against the other on prosecutions for offenses committed against other persons.[64] A divorced person is competent under a statute prohibiting husband or wife from testifying against each other.[65] Nor does a widow come within the terms of such a statute.[66]

B. Application of, and Exceptions to, the Rule of Exclusion. — a. *In General.* — It should perhaps be noted that the rules of law discussed in the following sections are stated with reference to the law as it now stands by virtue of the various statutes modifying or otherwise affecting the ancient common-law rule, and that accordingly very few of the old cases decided under the common law are cited, except from those states where the common law still prevails.

b. *Examination of Adverse Party.* — A statute permitting the examination of an adverse party does not qualify or modify the statute prohibiting the examination of one spouse for or against the other without the latter's consent.[67]

man incompetent to testify against him as a witness in a criminal case.

63. Aveson *v.* Lord Kinnaird, 6 East (Eng.) 188; Stein *v.* Bowman, 13 Pet. (U. S.) 209; Waddams *v.* Humphrey, 22 Ill. 661; McGuire *v.* Maloney, 1 B. Mon. (Ky.) 224; Williamson *v.* Morton, 2 Md. Ch. 94; Coffin *v.* Jones, 13 Pick. (Mass.) 441; William & Mary College *v.* Powell, 12 Gratt. (Va.) 372.

A wife, although separated by a partial divorce, cannot be a witness against her husband. Kemp *v.* Downham, 5 Har. (Del.) 417, which was an action of assumpsit against the husband for necessaries furnished to his, wife who had been divorced *a mensa et thoro.*

64. Johnson *v.* State, 27 Tex. App. 135, 11 S. W. 34.

65. Hitt *v.* Sterling-Goold Mfg. Co., 111 Iowa 458, 82 N. W. 919. See also Parcell *v.* McReynolds, 71 Iowa 623, 33 N. W. 139; Toovey *v.* Baxter, 59 Mo. App. 470; Clark *v.* Evans, 6 S. D. 244, 60 N. W. 862; *Ex parte* Fatheree, 34 Tex. Crim. 594, 31 S. W. 403.

66. The Iowa Statute providing that neither the husband nor the wife shall be a witness against the other in a civil case, unless it be brought by one against the other, contemplates the existence of the marriage relation at the time the husband or wife is offered as a witness. Accordingly a widow does not come within the purview of such a statute when offered as a witness on behalf of a claimant against the estate of her deceased husband. Parcell *v.* McReynolds, 71 Iowa 623, 33 N. W. 139.

67. Lloyd *v.* Simons, 90 Minn. 237, 95 N. W. 903, wherein it was held error to permit the plaintiffs to call and examine the defendant husband, as an adverse party, in respect of the interests of his wife in the premises in controversy, due objection having been made by her counsel to such examination.

In Danley *v.* Danley, 179 Pa. St. 170, 36 Atl. 225, an action upon a promissory note by a married woman against her husband and his brother as executors of the estate of their father, who was the maker of the note, it was held that where the plaintiff was called as for cross-examination in relation to a transaction which occurred in the life-

c. *Wife Competent For, When Competent Against, Husband.* An exception to the rule at common law was to the effect that when the wife might be called as a witness against her husband, she could be called as a witness on his behalf.[68]

d. *Spouse Appearing in Representative Capacity.* — Where a spouse appears in an action as next friend for a minor plaintiff, the other spouse is not the husband or wife of a party to the action within the meaning of a statute making husband and wife incompetent to testify for each other;[69] and the fact that the plaintiff in such an action is personally liable for the costs thereof is immaterial.[70] So, also, in an action by husband or wife in his or her representative capacity, the other spouse is a competent witness against the one so appearing, except as to communications by one to the other during marriage.[71]

e. *Adverse Party Appearing in Representative Capacity.* — In Illinois husband or wife cannot testify for or against each other,

time of the maker, she became competent to testify to all relevant matters, and that her competency was not affected by the fact that her husband was executor of the estate of the decedent and a defendant.

68. Tucker *v.* State, 71 Ala. 342. See also State *v.* Neill, 6 Ala. 685, which, like the case first cited, was a prosecution of the husband for an assault and battery upon the wife. The court said: "Considered upon principle we are unable to perceive any good reason why the wife in such case should be excluded. . . . But certainly the wife must know the fact better than any other person, and if willing to be examined ought to be permitted to testify." *Compare* Rex *v.* Serjeant, Ryan & M. 352, 21 E. C. L. 453, where it was declared that there is no distinction between admitting a wife for and against her husband; that the principle is exactly the same.

69. Belk *v.* Cooper, 34 Ill. App. 649.

In Collins *v.* Wilson, 18 Ky. L. Rep. 1049, 39 S. W. 33, an action by the plaintiff by her father as her next friend wherein the plaintiff had married pending the action, her husband having been made a party plaintiff, it was held that her father became thereby merely a nominal party in interest, and accordingly his wife was a competent witness to testify for the plaintiff.

Compare Bradley *v.* Kent, 7 Houst. (Del.) 372, 32 Atl. 286, an action in which a husband was sued as executor, wherein it was held that his wife was not a competent witness for him.

70. Potter *v.* Stamfli, 2 Kan. App. 788, 44 Pac. 46.

In St. Louis, I. M. & S. R. Co. *v.* Rexroad, 59 Ark. 180, 26 S. W. 1037, an action by a husband as next friend for the sole benefit of an infant child, it was held that his wife was a competent witness as he was merely the manager or conductor of the action, and that the fact that he was liable for costs did not disqualify her under the Arkansas statute providing that husband and wife shall be incompetent to testify for or against each other.

71. Gordon *v.* Sullivan, 116 Wis. 543, 93 N. W. 457; Strong *v.* Stevens Point, 62 Wis. 255, 22 N. W. 425. See also Leavitt *v.* Bangor, 41 Me. 458; Bonett *v.* Stowell, 37 Vt. 257; Van Fleet *v.* Stout, 44 Kan. 523, 24 Pac. 960, where the court said: "If the rule insisted upon by the plaintiff in error obtained, it would exclude the wife as a witness, when the husband, as the attorney general or other prosecuting officer, brought an action in his name in behalf of the state, or where he was a party as a receiver or sheriff, or in any other of the various representative capacities in which an action may be brought for or against him."

where the adverse party sues or defends as the personal representative of a deceased person.[72]

f. *Husband and Wife Jointly Interested.* — In the absence of any statute to the contrary, the rule is that when both husband and wife are interested in the result of the action, neither is a competent witness for or against the other,[73] although it is held that they may each testify on their own behalf.[74]

But sometimes a statute expressly provides that when husband and wife are joint parties and have a joint interest in the action they are competent witnesses[75] for each other.[76] But such a statute does not apply in a case where the joint interests have been terminated.[77]

72. Treleaven *v.* Dixon, 119 Ill. 548, 9 N. E. 189. See also Way *v.* Harriman, 126 Ill. 132, 18 N. E. 206; Shaw *v.* Schoonover, 130 Ill. 448, 22 N. E. 589; Stodder *v.* Hoffman, 158 Ill. 486, 41 N. E. 1082; Pyle *v.* Oustatt, 92 Ill. 209; Mueller *v.* Rebhan, 94 Ill. 142.

73. DeFarges *v.* Ryland, 87 Va. 404, 12 S. E. 805, 24 Am. St. Rep. 659. See also Chaslavka *v.* Mechalek (Iowa), 99 N. W. 154, where it was held that where husband and wife are joint parties to an action, the testimony of one of them is not admissible as against the other.

Contra. — Cameron *v.* Fay, 55 Tex. 58.

In Johnson *v.* Fry, 88 Va. 695, 12 S. E. 973, a joint action against a husband and wife, both of whom were parties in interest, it was held error to overrule the defendant's motion to exclude the plaintiff as a witness, the defendant husband being excluded on account of his wife's interests.

74. Albaugh *v.* James, 29 Ind. 398. See also Mousler *v.* Harding, 33 Ind. 176, 5 Am. Rep. 195 (a joint action against husband and wife for slander by the wife, *holding* each competent to testify for himself and herself); Maverick *v.* Eighth Ave. R. Co., 36 N. Y. 378.

75. Under the Indiana Statute of 1867 it is held that when husband and wife sue jointly or are sued jointly, and have separate interests, each is a competent witness although his or her testimony may benefit the other. Lafayette *v.* Larson, 73 Ind. 367.

76. As in Kansas. — Chicago, K. & W. R. Co. *v.* Anderson, 42 Kan. 297, 21 Pac. 1059, where it was held that when premises appropriated for the right of way by a railroad company are a part of the homestead occupied by the husband and wife as a residence, the title thereof being in the wife, both husband and wife may join in an appeal from the commissioners' award, and upon the trial of the appeal in the district court both are joint parties and have a joint interest in the action within the rule stated in the text.

In Vermont a statute (Acts 1886, Act No. 45) makes husband and wife competent witnesses in actions to which they are properly joined. Another statute (Acts 1884, Act No. 140) enables a wife to sue on actions arising out of property held to her separate use, and that for purposes of the act a gift to a wife from her husband is not held to her separate use. In Minard *v.* Currier, 67 Vt. 489, 32 Atl. 472, an action to recover damages to property which had been the subject of a gift from husband to wife, it was held that the husband was properly a party to the action so as to make him a competent witness under the statute first cited.

77. Jenkins *v.* Levis, 25 Kan. 479, which was originally an action against a husband and wife jointly, but which as against the husband had been terminated by a judgment rendered against him, wherein it was held that this judgment terminated the joint interest of the defendants, husband and wife, as joint parties to the action, and that accordingly the

g. *Spouse of Co-Party.* — The wife of one defendant is not a competent witness on behalf of another, where the defenses of both defendants are the same.[78]

h. *Husband and Wife as Opposing Parties.* — Where husband and wife have conflicting interests and are opposing parties, they are competent witnesses,[79] as for example, divorce suits.[80] This

defendant husband was not a competent witness for his wife.

78. Bartlett *v.* Clough, 94 Wis. 196, 68 N. W. 875. See also Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 65, *holding* that where two defendants are sued jointly and a joint answer and defense is made by them, the wife of one is not competent to testify to a matter sustaining the joint defense and which necessarily affects the right of her husband equally with that of his co-defendant.

The Wife of a Copartner is disqualified to the same extent in an action against the copartnership as she would be were the suit against her husband alone. McEwen *v.* Shannon, 64 Vt. 583, 25 Atl. 661.

The Wife of a Joint Maker of a Promissory Note is not a competent witness for the other maker in an action against the latter alone, wherein the controversy is whether or not her husband had paid the note, her husband being directly interested in the result of the action. Craig *v.* Miller, 133 Ill. 300, 24 N. E. 431, *affirming* 34 Ill. App. 325.

Compare Shields *v.* Ruddy, 2 Idaho 884, 28 Pac. 405, an action for conspiracy against two defendants, wherein it was held that under the Idaho statute the wife of one of the defendants might be examined as a witness for the plaintiff under instructions from the court that her testimony should only be considered as against the other defendant.

79. Estra *v.* Capelle, 61 Mo. 578. See also Anderson *v.* Snyder, 21 W. Va. 632, *holding*, however, that they are incompetent on a controversy between them and a third person, although they are nominally plaintiff and defendant.

Under a Maryland Statute (Acts 1864, ch. 109) a wife may testify against her husband in an action by him to set aside a marriage contract which affects her rights in his property. Classen *v.* Classen, 57 Md. 510.

A Woman Suing to Recover Damages for Deceit on the part of the defendant in defrauding her into a marriage with him is a competent witness. Morrill *v.* Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

A Wife as Creditor Against the Insolvent Estate of Her Husband may in the absence of other witnesses testify against him in support of her claim, and may testify to conversations which took place between herself and her husband with regard to her claim. Spitz's Appeal, 56 Conn. 184, 14 Atl. 776, 7 Am. St. Rep. 303.

80. Brown *v.* Brown, 38 Ark. 324; Cook *v.* Cook, 46 Ga. 308. See fully on this question the article "DIVORCE," Vol. IV.

In Costello *v.* Costello, 191 Pa. St. 379, 43 Atl. 240, an action for divorce, it was held proper under Act May 23, 1887, § 5, cl. c, for the defendant to call the libelant to testify as if under cross-examination. The court said: "The libelant is demanding a dissolution of the marriage bond, and the respondent is resisting it. Facts or circumstances relevant to the issue and within his knowledge may, if developed, defeat his purpose. In such case the concealment of them becomes essential to the success of his scheme, and he refrains from testifying. They may not show or tend to show the commission by him of a crime. For instance, if they showed that he admitted the respondent 'into conjugal society or embraces, after he knew of the criminal facts' which are the alleged ground of his application for a divorce, they would not have criminated him, but would have established a fact fatal to the further prosecution of his case. Moreover, the interest of the libelant is adverse

rule is not, however, recognized by all the courts, there being numerous cases to the contrary.[81]

i. *Husband or Wife Acting as Agent for the Other.* — (1.) **Generally.**— Not only is it held at the common law, but it is expressly provided by statute in several states,[82] that where a husband or wife acts as the agent for the other, he or she is a competent witness to testify concerning transactions in which he or she participated as such agent.[83] But this rule does not permit such agent to testify

to the interest of the respondent. They are obviously and certainly adverse parties in the proceeding prosecuted by the former and resisted by the latter."

81. Crabtree *v.* Dunn, 86 Va. 953, 11 S. E. 1053.

In Bassett *v.* Bassett, 9 Bush (Ky.) 696, an action to annul a marriage on the ground of force and duress, it was held that the Kentucky Testimony Act of 1872 did not authorize husband or wife to testify in cases in which they are antagonistic parties, and that accordingly the plaintiff was not a competent witness on his own behalf. The court said that the burden is on the plaintiff "to establish the force and duress complained of, and to make out a state of case authorizing the conclusion that he has not ratified the marriage by the exercise of any marital right since the removal of the alleged constraint. As yet he is to be regarded as the husband of the appellee, and so long as this legal presumption exists he cannot be allowed to testify against her. Public policy requires that a person shall not be allowed by his own oath to establish a state of facts authorizing or requiring the courts to annul a marriage to which he was a party, and in the celebration of which the requirements of the law were duly observed."

A man suing his wife to declare a trust in his favor in real estate, of which she is in possession, and to which she has the legal title, and to quiet the title thereto in himself, is not a competent witness. Reed *v.* Reed (Neb.), 98 N. W. 76.

In an action by a husband against his wife to compel her to specifically perform a written contract she had made with him to convey certain real estate, neither the husband nor the wife can testify one against the other in the case. Greene *v.* Greene, 42 Neb. 634, 60 N. W. 937, 47 Am. St. Rep. 724.

A Wife Suing Her Husband for Rent is not a competent witness. Skinner *v.* Skinner, 38 Neb. 756, 57 N. W. 534.

82. In Missouri a statute provides that where the action is connected with any business had with the husband, he is a competent witness on behalf of his wife; and in Turner *v.* Overall, 172 Mo. 271, 72 S. W. 644, it was held that where a wife seeks to set aside a deed of trust executed by herself and husband to secure the payment of her husband's debt, on the ground that the execution of the instrument was procured under duress, the husband in such case is a competent witness for his wife. See also College Hill Press Brick Wks. *v.* Thompson, 59 Mo. App. 98.

Under the Arkansas Statute allowing husband and wife to testify for each other in regard to any business transaction by one for the other in the capacity of agent, it has been held that in an action brought by a husband as agent for his wife, the latter may testify touching the matter of the agency, and the wife may testify on her own behalf. Gunter *v.* Earnest, 68 Ark. 180, 56 S. W. 876. See also American Express Co. *v.* Lankford, 1 Ind. Ter. 233, 39 S. W. 817. Previous to this statute the rule was otherwise. Watkins *v.* Turner, 34 Ark. 663.

83. *Alabama.* — Sumner *v.* Cooke, 51 Ala. 521.

Illinois. — Pain *v.* Farson, 179 Ill. 185, 53 N. E. 579.

Kansas. — Council Grove, O. C. & O. R. Co. *v.* Center, 42 Kan. 438, 22 Pac. 574.

against his or her principal.[84] A wife may testify to acts of agency

Louisiana. — Lehman *v.* Coulon, 105 La. 431, 29 So. 879.

Massachusetts. — Burke *v.* Savage, 13 Allen 408.

Missouri. — Chesley *v.* Chesley, 54 Mo. 347.

New Hampshire. — Clements *v.* Marston, 52 N. H. 31.

Pennsylvania. — Seip's Estate, 163 Pa. St. 423, 30 Atl. 226, 43 Am. St. Rep. 803.

Vermont. — Farrar *v.* Bell, 73 Vt. 342, 50 Atl. 1107.

Wisconsin. — Arndt *v.* Harshaw, 53 Wis. 269, 10 N. W. 399; Engmann *v.* Immel, 59 Wis. 249, 18 N. W. 182; Chunot *v.* Larson, 43 Wis. 536, 28 Am. Rep. 567.

Compare Seargent *v.* Seward, 31 Vt. 509.

In Smalley *v.* Appleton, 75 Wis. 18, 43 N. W. 826, an action by a wife to recover damages for personal injuries, her husband had testified that he was employed by her as her agent to serve the requisite notice of the injuries sustained on the proper officers to obtain certain pieces of real evidence from the scene of the accident, and it was held that he was properly permitted to testify to what he did as such agent.

A wife is a competent witness for her husband to testify to the terms of a contract, where the parties had no personal interview in making it, and she acted as the agent of both, first, in carrying the proposal to her husband from the other party, and of her husband in carrying his acceptance to such other party. In Martin *v.* Hurlburt, 60 Vt. 364, 14 Atl. 649, the court said: "Inasmuch as both the defendant and plaintiff must have participated in the transaction, the one in making the proposition and the other in accepting it, and as the wife was the sole instrument by which the proposition and its acceptance were conveyed, it follows that she must have been the agent of both in conveying the messages which concluded the contract, of the defendant to convey the proposition to her husband, and of the husband to convey his acceptance to the defendant."

In Peirce *v.* Bradford, 64 Vt. 219, 23 Atl. 637, where the issue was whether or not the defendant had paid the plaintiff a certain amount of money, the defendant testifying that he gave his wife money for that purpose, and that soon afterward he saw the plaintiff standing beside a table counting some money and heard him say "it is all right," it was held that the defendant's wife was a competent witness to testify that she put the money on the plaintiff's plate at the table from whence he took it with the remark stated. The court said the payment, if made by the wife, as the evidence tended to show, was clearly a business transaction conducted by her as her husband's agent, which would make her a competent witness on his behalf under the Vermont statute.

The husband is a competent witness for his wife to prove what disposition he has made of money belonging to her separate statutory estate. Robinson *v.* Robinson, 44 Ala. 227, where the court said: "The law has made him her trustee and invested him with the control of her property, of which she cannot divest him, except for good cause proven. He alone knows what disposition he has made of it. No confidence of the marriage relation is involved. A trustee is merely giving an account of what he has done with the funds of his trust. To deny this right to the wife would be to place her in a worse condition than all the balance of the world."

84. George Taylor Com. Co. *v.* Bell, 62 Ark. 26, 34 S. W. 80.

In Barnhart *v.* Grantham, 197 Pa. St. 502, 47 Atl. 866, an action to set aside a conveyance as fraudulent, wherein it was held proper to permit the plaintiff to call one of the defendants as for cross-examination as against the objection that he could not be called for cross-examination against his wife, his co-defendant, the testimony showing that he had been the acting agent for his wife in the whole transaction, and that whatever she did concerning the

done by her, although the action itself does not grow out of those acts.[85]

If a Transaction Consists of Several Parts, and the wife acts as agent only in respect to some particular part, she may be called to testify to such particular parts as were conducted by her as such agent.[86]

(2.) Proof of Agency. — In order to render a husband or wife competent to testify for the other, on the ground that he or she was agent for such other in respect to the matter testified to, his or her authority as such agent, and the scope of it, must be made to appear;[87] and whether the witness so acted in a given transaction

property was not only approved but prompted by him.

In Estey *v.* Fuller Implement Co., 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025, where the controversy was as to the *bona fides* of a transfer of the assets of a corporation to the wife of the principal stockholder which was claimed to have been made to her in good faith in payment of debts owing by the corporation to her, her husband was examined as a witness with reference to the transactions, and the only statement referring to his wife was that he was her agent; that she had some of the corporation's notes which had been taken by her in the course of business; that they were sold to her for money which she had loaned to the corporation on which to do business, and was fully cross-examined by her attorneys, and he was further examined as to the transactions had by him as agent for his wife, which was followed by further cross-examination. Upon her examination she repeatedly disclaimed any personal knowledge as to the transactions between her husband as her agent and the corporation, her answer uniformly being "ask my agent." It was held that under this state of the record it could not be said that the husband had been permitted to testify against his wife.

85. Poppers *v.* Miller, 14 Ill. App. 87, an action for malicious prosecution based on the alleged illegal arrest of the plaintiff for secreting mortgaged property, wherein the plaintiff claimed to have paid the mortgage indebtedness in full prior to her arrest, the defendant offered his wife, to whom the plaintiff claimed to have made certain payments, to disprove them, the plaintiff contending that the statute allowing a wife to testify in matters of business where the transaction was conducted by her as agent for her husband, applied only to cases where the cause of action grows out of a transaction conducted by the wife; and that that action did not grow out of any such action, but arose out of the husband's tort in wrongfully causing the plaintiff's arrest. The court said: "We do not think the statute is to be so limited. Its language is general and comprehensive, 'in all matters of business transactions, where the transaction was had and conducted by such married woman as the agent of her husband.' It places a married woman, when transacting business as agent for her husband, on the same footing, as respects her competency to testify as to the particular transaction, as if she were a *feme sole.* Suppose the entire business in making the loan, taking the mortgage and receiving such payments as were made, had been transacted by appellant's wife, as his agent, could it be justly claimed that because the transaction is drawn in question, in a collateral proceeding in which it becomes material to prove the facts, the wife may not be called as a witness? We think not. Such a construction would be in violation of the plain language of the statute."

86. Poppers *v.* Miller, 14 Ill. App. 87.

87. Goesel *v.* Davis, 100 Wis. 678, 76 N. W. 768, where the court said: "The rule allowing a wife or husband to testify to transactions in which the one acts as agent for the

other arises out of the necessities of the situation, and should be closely guarded on account of the temptation to false swearing which such a situation presents. Before such testimony should be allowed, the necessity for it, and all the circumstances requisite to bring it clearly within the exception to the general rule excluding the testimony of husband or wife, should be shown, and questions should then be so framed as to confine the evidence within its legitimate limits."

In Mitchell *v.* Hughes, 24 Ill. App. 308, where the controversy was as to a charge by the plaintiff against the defendant for boarding certain employees, it was held that testimony by the plaintiff's wife that she ran a hotel for her husband where such employees boarded, was sufficient proof of her agency in the conduct of her husband's business to make her a competent witness in his behalf as to that particular business.

Protecting Property in Absence of Husband. — In Fisher *v.* Conway, 21 Kan. 18, 30 Am. Rep. 419, it was held that whenever in the absence of the husband from his home, the wife acts in protection of property claimed by the husband and within the circle of the home, although without any express direction, she has acted as his agent and will be a competent witness to testify as to what she does and resists.

Placing Property in a Wife's Charge and Care during her husband's absence, with instructions not to allow it to be removed, is a business transaction and an agency on the part of the wife to act for her husband under his express directions during his absence and falls within the language of the statute making her a competent witness for her husband as to her acts as such agent. Sargeant *v.* Marshall, 38 Ill. App. 642.

In Bates *v.* Sabin, 64 Vt. 511, 24 Atl. 1013, where the defendant had directed his wife to pay the plaintiff for certain services, which she did in the presence of her husband, it was held that she was not a competent witness to that fact, for in making the payment she was not acting as her husband's agent. The court said: "The transaction must be regarded as having been conducted by himself. It cannot be said that this business was had with and conducted by his agent, when he was present and directed to be done just what was done. The statute clearly has reference to business transactions conducted by the wife as the agent of her husband, of which he has no personal knowledge."

In an action to recover the purchase price of goods claimed to have been sold to the defendant, but which he claims were sold to him on the credit of and to be paid for by a third person, the wife of the defendant is not a competent witness for her husband to testify that the goods were so furnished as claimed by him; and the mere fact that she was present when the goods were purchased and assisted in selecting them does not make her the agent for her husband so as to make her a competent witness. Trepp *v.* Barker, 78 Ill. 146.

In Poppers *v.* Wagner, 33 Ill. App. 113, an action of trespass to the plaintiff's property, it was urged that because the plaintiff's wife was alone at the time of the alleged trespass and in control of the property, she was a competent witness for her husband, but the court in holding to the contrary said: "She, as agent, conducted no business. Being a spectator conferred upon her no more the character of an agent as to the acts she witnessed than it would have done upon any other spectator; and the control of the furniture by her in the absence of her husband was a circumstance wholly extrinsic to and independent of the acts of the alleged trespasser. The acts were not a transaction had and conducted by her."

In Garretson *v.* Barnes, 42 Ill. App. 21, where the wife of one of the defendants was offered as a witness to testify generally in the case on behalf of a co-defendant, it was contended that she was competent generally because she was the agent of her husband in watching and caring for a dog which had bitten the plaintiff for which damages were sought, but it was held that she was

is to be determined by the court before the witness is permitted to testify.[88] And although there is authority to the contrary,[89] the weight of authority is that the fact of agency may in such case be established by the testimony of the spouse offered as a witness.[90]

(3.) Scope of Inquiry. — But the testimony of such spouse in this respect must be strictly confined to matters within the scope of his or her agency.[91]

not her husband's agent merely because she sometimes tied up the dog and watched him.

In Gifford *v.* Wilkins, 24 Ill. App. 367, an action on a note to which the defendant claimed a set-off for board furnished to the plaintiff's parents, it was held that the fact that the defendant's wife did the work in caring for the plaintiff's parents and kept his accounts did not make her his agent in making the contract for board so as to permit her to testify as to that contract.

88. Marsh *v.* Pugh, 43 Wis. 597, *holding* also that the proof of her agency should generally be elicited by direct interrogatories on that subject.

89. Sanborn *v.* Cole, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208.

90. Roberts *v.* Northwestern Nat. Ins. Co., 90 Wis. 210, 62 N. W. 1048; Paulsen *v.* Hall, 39 Kan. 365, 18 Pac. 225; Wichita & W. R. Co. *v.* Kuhn, 38 Kan. 104, 16 Pac. 75; Burke *v.* Savage, 13 Allen (Mass.) 408; Reed *v.* Peck, 163 Mo. 333, 63 S. W. 734, *affirming* a similar holding in Long *v.* Martin, 152 Mo. 668, 54 S. W. 473, and other previous cases, and overruling other previous cases to the contrary; Owen *v.* Cawley, 36 Barb. (N. Y.) 52, 22 How. Pr. 10.

See also American Express Co. *v.* Lankford, 1 Ind. Ter. 233, 39 S. W. 817, *applying* the Arkansas statute on this question, and *holding* that if under the statute it was competent for him to testify in behalf of his wife as to business transacted by him for her as her agent, it was competent for him to testify also that he acted in that capacity.

Under the Missouri Statute (Rev. Stat., § 8922) providing that "no married man shall be disqualified as a witness in any such civil suit or proceeding prosecuted in the name of or against his wife, whether he be joined with her, or not, as a party, when such suit or proceeding is based upon, grows out of, or is connected with, any matter of business or business transaction, where the transaction of business was had with, or was conducted by, such married man, as the agent of his wife," it is held that a husband is competent to prove his agency for his wife. Leete *v.* State Bank of St. Louis, 115 Mo. 184, 21 S. W. 788, *disapproving* of the rulings on this question in Williams *v.* Williams, 67 Mo. 661, and Wheeler *v.* Tinsley, 75 Mo. 458. See also Scrutchfield *v.* Sauter, 119 Mo. 615, 24 S. W. 137.

91. Goesel *v.* Davis, 100 Wis. 678, 76 N. W. 768; Trepp *v.* Barker, 78 Ill. 146; Hayes *v.* Parmalee, 79 Ill. 563; Council Grove, O. C. & O. R. Co. *v.* Center, 42 Kan. 438, 22 Pac. 574; Arndt *v.* Harshaw, 53 Wis. 269, 10 N. W. 399; Packard *v.* Reynolds, 100 Mass. 153; Flannery *v.* St. Louis, I. M. & S. R. Co., 44 Mo. App. 396. *Compare* Curry *v.* Stephens, 84 Mo. 442.

In Hazer *v.* Streich, 92 Wis. 505, 66 N. W. 720, where a wife who had been her husband's bookkeeper testified that she had read over an entry made by her in her husband's books in the presence of both parties embracing the terms of a contract between them, it was held that she could not then be asked if she could tell what the contract was; that she was only competent to testify as to those matters in which she acted as the agent of her husband, that although she had heard the contract made she had not made it nor taken any part in making it; that her only agency was to enter it on her husband's books.

In Reynolds *v.* Chynoweth, 68 Vt. 104, 34 Atl. 36, it was held that a husband who had acted as his wife's

j. *Actions Involving Separate Estates.* — (1.) Generally. — At common law the husband was not a competent witness either on behalf of or against his wife's interest in an action concerning her separate estate.[92] Nor does the common-law rule permit the wife to testify for the purpose of sustaining her husband's property rights to either real or personal property.[93]

Statutes. — In many of the states, however, statutes have been passed, the effect of which is that where the litigation concerns the wife's separate property they are competent witnesses for themselves and for each other.[94] And sometimes by express statute

agent in the leasing of a farm was properly permitted to testify as to the particulars in which the farm was not carried on in a husbandlike manner and according to the agreement of the lease and as to the nature and amount of damage which had thereby accrued to the plaintiff, all the matters to which he testified having reference to the very matters within the scope of his agency.

92. *England.* — Langley *v.* Fisher, 5 Beav. 443; Wyndham *v.* Chetwynd, 1 Burr. 424; Davis *v.* Dinwoody, 4 T. R. 678.

Alabama. — Wilson *v.* Sheppard, 28 Ala. 623; Hodges *v.* Branch Bank, 13 Ala. 455.

Arkansas. — Berlin *v.* Cantrell, 33 Ark. 611.

Georgia. — Cobb *v.* Edmondson, 30 Ga. 30.

Indiana. — Palmer *v.* Henderson, 20 Ind. 297.

Maine. — Dwelly *v.* Dwelly, 46 Me. 377.

Maryland. — Williamson *v.* Morton, 2 Md. Ch. 94.

New Jersey. — Trenton Bkg. Co. *v.* Woodruff, 2 N. J. Eq. 117; Marshman *v.* Conklin, 17 N. J. Eq. 282.

Virginia. — William & Mary College *v.* Powell, 12 Gratt. 372.

Contra. — Porter *v.* Allen, 54 Ga. 623; Grantham *v.* Payne, 77 Ala. 584.

In Hall *v.* Dargan, 4 Ala. 696, it was held that when a claim was interposed by a trustee, for the wife, as to the ownership of certain property seized as the property of her husband, the husband was not a competent witness to sustain her claim of ownership. The court said: "Husbands and wives can never be witnesses for or against each other, and it makes no difference in the principle that the interest of the wife is only equitable in consequence of the legal title being vested in a trustee."

93. Hayes *v.* Parmelee, 79 Ill. 563; Scott *v.* Rowland, 82 Va. 484, 4 S. E. 595. See also Smith *v.* Boston & M. R. Co., 44 N. H. 325.

94. *Colorado.* — Hanna *v.* Barker, 6 Colo. 303.

Florida. — A wife is a competent witness as to her own interests in an action brought in her own right by herself and her husband. Williams *v.* Jacksonville, T. & K. W. R. Co., 26 Fla. 533, 8 So. 446. *Compare* Storrs *v.* Storrs, 23 Fla. 274, 2 So. 368.

Illinois. — The statute provides that where the wife would, if unmarried, be plaintiff or defendant, and where the litigation shall be concerning her separate property, the husband may testify in her behalf. Stout *v.* Ellison, 15 Ill. App. 222; J. Oberman Brew. Co. *v.* Ohlerking, 33 Ill. App. 356; Pain *v.* Farson, 179 Ill. 185, 53 N. E. 579; Cassem *v.* Heustis, 201 Ill. 208, 66 N. E. 283. And in Johnson *v.* McGregor, 157 Ill. 350, 41 N. E. 558, *affirming* 55 Ill. App. 530, an action under an Illinois statute by a wife to recover treble the value of money or other valuable things lost at any time, or sitting in a game of chance, permitting any one to bring such an action after a certain time wherein the plaintiff sought to recover for moneys loaned by her husband, it was held that the plaintiff's husband was a competent witness on her behalf, the court said: "When the loser [her husband] did not sue within six months to recover the amount lost by him, and

either spouse may testify against the other as to the title of property in controversy between them, where each is a party to the record,[95] but only where they are parties to the action; for example, in an action of replevin by the husband to recover his wife's separate

bailee [the plaintiff] after the expiration of that period sued to recover the penalty, the right to the penalty became her personal and separate property, and the amount recovered she may hold free from his interference."

Massachusetts. — Fowle *v.* Tidd, 15 Gray 94.

Michigan. — Blanchard *v.* Moors, 85 Mich. 380, 48 N. W. 542.

Missouri. — McKee *v.* Spiro, 107 Mo. 452, 17 S. W. 1013. See also Brownlee *v.* Fenwick, 103 Mo. 420, 15 S. W. 611.

Wisconsin. — Snell *v.* Bray, 56 Wis. 156, 14 N. W. 14; Hackett *v.* Bonnell, 16 Wis. 496. See also Barnes *v.* Martin, 15 Wis. 240, 82 Am. Dec. 670.

Replevin of Property Claimed by Wife. — In McNail *v.* Ziegler, 68 Ill. 224, an action of replevin wherein the defendant claimed that the property did not belong to him but that it was his wife's separate property, it was held that the litigation was in the language of the Illinois statute "concerning her separate property" and that it was "important to her that she should be allowed to testify to protect it in order to avoid the expense and inconvenience of bringing an action in her own name to assert her right."

In Northern Line Packet Co. *v.* Shearer, 61 Ill. 263, where it was held that a wife was a competent witness in an action by her husband to recover the value of wearing apparel and ornaments belonging to her which had been lost by the defendant, as bailee, the court said that as at common law "her personal apparel and ornaments substantially belonged to, and the beneficial interest therein was vested in her, until deprived of it by a sale or gift by the husband, or subjected to payment of his debts on a failure of other assets. If, then, such was the common law, we must hold that, in this case, the wife was virtually the owner until divested by the husband exerting his power of selling or giving away this property, or it being subjected to the payment of his debts. She, then, was the owner within the meaning of the statute, and was thereby a competent witness."

95. In Michigan a statute provides that husband and wife may testify against each other as to the title of property in controversy between them where each is a party to the record, and in Dowling *v.* Dowling, 116 Mich. 346, 74 N. W. 523, an action to recover money the plaintiff claimed to have loaned to the defendant, her husband, it was held that the wife might testify in relation to business transactions with her husband. See also Hunt *v.* Eaton, 55 Mich. 362, 21 N. W. 429, which was an action by one as assignee of a married woman, to recover moneys alleged to have been loaned as part of her separate estate, and it was held that the action was one in which the title to the separate property of the wife was the subject-matter of controversy, in opposition to the claim or interest of the husband, so as to permit her to testify against her husband without his consent and in favor of the plaintiff.

Compare Blanchard *v.* Moors, 85 Mich. 380, 48 N. W. 542, *holding* that in an action by a judgment creditor of one of the spouses to set aside a conveyance from such spouse to the other as having been made in fraud of the rights of creditors, the interests of the spouses are not adverse within the meaning of this statute; and that accordingly the judgment debtor is not a competent witness as against his or her spouse to establish the fraudulent character of the conveyance. It was held, however, that the testimony of the grantee spouse was competent to sustain the *bona fides* of the conveyance.

In Louisiana, where husband and wife are joined as plaintiffs in a suit to enforce separate interests they may be witnesses for or against their separate interests therein.

property her testimony cannot be received against him without his consent.[96]

The Effect of a Married Woman's Act, enabling them to hold and sell property, sue and be sued, carry on business, etc., the same as though unmarried, is not to repeal a statute establishing the incompetency of a wife as a witness in certain cases.[97]

(2.) Personal Injuries. — Thus the right of action accruing to a married woman for personal injuries is property, and being the separate property of the wife falls within the exception of the statute permitting a husband or wife to testify for each other the same as other persons in cases involving the wife's separate property.[98]

(3.) Actions Against Personal Representatives, etc. — The competency of a husband, however, to testify on a controversy concerning his

Schoppel *v.* Daly, 112 La. 201, 36 So. 322. And in Kellar *v.* Vernon, 23 La. Ann. 164, an action by creditors of a husband to annul a judgment of a separation of property between the husband and wife, it was held that the wife was a competent witness to sustain the validity of her claims against the husband. The court said: "In this case, the contest is between the wife and a creditor who is attacking and seeking to annul her judgment of separation of property previously obtained against her husband. The husband and the wife were joined as defendants, and would seem to have separate interests. We think that, in the case presented, the wife should have been permitted to testify."

96. Carney *v.* Gleissner, 58 Wis. 674, 17 N. W. 398.

97. Skinner *v.* Skinner, 38 Neb. 756, 57 N. W. 534, where the court in so holding said that the Married Woman's Act has no reference to the right of a married woman to testify; that it does not define or attempt to define what shall be evidence nor who shall be competent witnesses in any case, but deals entirely with the rights of married women in respect to their separate property, trade, business and the like. See also Greene *v.* Greene, 42 Neb. 634, 60 N. W. 937, 47 Am. St. Rep. 724.

Compare Stickney *v.* Stickney, 131 U. S. 227, where the court in construing the U. S. Rev. Stats. relating to the District of Columbia, enabling married women to contract, etc., in relation to their separate property, held that so far as the wife's separate property is concerned she becomes as absolute an owner as though she were unmarried and that she should have the same protection, through her own evidence, as a *feme sole*. It was accordingly held proper to permit her, on an issue as to whether or not certain funds having come into her husband's hands were held by him as her agent or were his as a gift, to testify that she had directed him to invest such funds in her name.

98. Hawver *v.* Hawver, 78 Ill. 412, an action for slander, *holding* that as the plaintiff, who was a married woman, was entitled to bring suit in her own name as though she were unmarried her husband was a competent witness on her behalf.

The right of action for personal injuries to a wife is property — her property; she alone must sue for the recovery of damages for such injuries, and accordingly in such an action the litigation concerns her separate property and her husband is a competent witness for her under the Illinois statute. Rock Island *v.* Deis, 38 Ill. App. 409.

In Davenport *v.* Ryan, 81 Ill. 218, it was held that the right of action accruing to a wife for damages for injuries suffered by her from the sale of intoxicating liquors to her husband belonged exclusively to her, and that her husband was a competent witness to establish and maintain her right.

wife's separate property does not extend to an action against the representatives and devisees of a deceased person to set aside his will, although he is a party defendant to the action, where all the interest he has in the controversy is in favor of his wife and adverse to those claiming under the will.[99]

k. *Wife Appearing in Separate Right.* — In Kentucky a statute expressly provides that in actions which might have been brought by or against the wife as if she had been unmarried, either the husband or wife, but not both, may testify;[1] and it is held that in such case the wife has the right to waive her right to testify and have her husband testify in reference to the matters in controversy on her behalf, in which case he is competent to testify to every fact to which she would have been competent to testify had she been a witness.[2] The right of election, however, as to which spouse shall testify under such a statute is one belonging exclusively to the wife herself, and no party to the action, whether joined with or arrayed against her, can take from her the right to appear as a witness on her own behalf.[3] Nor, where the wife's deposition in such a case has been taken at the instance of the adverse party, can the statute be held to exclude the testimony of the husband taken on his or her behalf, as the case may be.[4] And where both spouses are not competent to testify, it is error to refuse to permit a husband to with-

Malicious Prosecution of Married Woman. — In Anderson *v.* Friend, 71 Ill. 475, an action for malicious prosecution where the plaintiff was a married woman and it was held proper to permit her husband to testify on her behalf, the court said: "The plaintiff here is authorized to bring suit in her own name just as if she were sole and unmarried, because under the law as it now stands she is entitled to the proceeds of whatever judgment she may recover as her separate property, free from the control or interference of her husband."

99. Pyle *v.* Pyle, 158 Ill. 289, 41 N. E. 999.

1. Covington *v.* Geyler, 93 Ky. 275, 19 S. W. 741, where it was held that to permit both husband and wife to testify in an action by them as joint owners of property for damages thereto would be in direct conflict with both the language and manifest meaning of the statute, for "while they have an equal and undivided interest in the lot, and the injury to the building thereon, of which they complain, affected them jointly and equally, still the testimony of either in this case would be testimony for the other."

2. Howard *v.* Tenney, 87 Ky. 52, 7 S. W. 547, which was an action to set aside a deed to the wife under a tax sale on the ground that the consideration therefor was paid with the husband's funds in fraud of the rights of his creditors.

3. Wise *v.* Foote, 81 Ky. 10, *holding* also that where the wife has been called upon by a party in interest with her to testify as in that case, another party in interest with her has no right to complain of the ruling of the court in admitting her testimony on the ground that he preferred her husband to testify.

4. Truitt *v.* Curd, 13 Ky. L. Rep. 118, 16 S. W. 364, an action by a judgment creditor to set aside a conveyance to the debtor's wife as in fraud of his rights, wherein the court said: "It would not be fair or in accord with the spirit and meaning of our statute to permit the adverse party to take the deposition of either husband or wife at his option and then claim that the evidence of the other was not competent for the

draw the deposition of his wife taken at his instance so as to make him a competent witness for himself.[5]

l. *Supplementary Proceedings, Garnishment, Etc.* — Except as expressly provided by statute to the contrary,[6] neither husband nor wife is a competent witness for an execution creditor in supplementary proceedings against the other, as to whether or not he or she has property or funds belonging to the other.[7] Nor, in a garnishment proceeding, can the wife of the principal defendant be examined against him as to transfers of property made to her by him.[8]

m. *Action to Set Aside Conveyance Between Spouses as Fraudulent.* — On a proceeding by a creditor to set aside a conveyance of land from husband to wife as fraudulent, the wife is a competent witness on her own behalf to prove the consideration for the con-

wife. This would often render the statute nugatory."

5. West View Sav. Bank & Bldg. Co. *v.* Zook, 17 Ky. L. Rep. 334, 30 S. W. 1016.

6. The Statute of Minnesota expressly excepts from the prohibition of a husband or wife testifying against each other without consent proceedings supplementary to execution. Wolford *v.* Farnham, 44 Minn. 159, 46 N. W. 295, *holding,* however, that this statute does not apply to an action by a judgment creditor to subject to the payment of his debt lands claimed to have been conveyed to the wife of the judgment debtor in fraud of creditors. The court said: "An ordinary civil action is not, whatever may be its purpose, a proceeding supplementary to execution, within the meaning of this statute. Such a proceeding is one established and regulated by statute, and is as well known by the designation here given as any statutory proceeding by the designation given it in the statute. An action may come after execution, may be even in aid of it, but it is not the proceeding referred to in the statute."

7. Aldous *v.* Olverson (S. D.), 93 N. W. 917. See also Blabon *v.* Gilchrist, 67 Wis. 38, 29 N. W. 220, where the court said: "The proceeding, so far as it is an adversary proceeding, is solely against the judgment debtor, and no issue can be tried by the commissioner between a third person and the plaintiff in the judgment as to the fact whether such third person has property in his hands belonging to the defendant. The husband is, therefore, not a competent witness in such proceeding against his wife, any more than he would be in any other action against her."

8. Berles *v.* Adsit, 102 Mich. 495, 60 N. W. 967.

Compare Thompson *v.* Silvers, 59 Iowa 670, 13 N. W. 854, where the court said: "It would not be contended, of course, if her answers had been unfavorable to the plaintiff, that they would have been testimony against her husband. The objection must be deemed to be predicated upon the theory that her answers might have been favorable to the plaintiff, and such as would have justified the court in charging her as garnishee. We have, then, to determine whether such a result would have been against the execution debtor's interest. To hold that it would be to hold that it is his interest to be allowed to conceal his property and thereby evade the payment of his just debts. Now the law, we think, does not recognize that such is his interest. The debtor ought to use all his property which is not exempt in the payment of his debts, and the law cannot recognize that to be his interest which is not right. We may assume, indeed, that the execution debtor desires that the garnishee should be charged if the facts are such as to justify it."

veyance and its good faith.[9] And some of the courts hold that the husband is a competent witness on her behalf.[10] Others hold that the wife is incompetent for her husband in such case.[11] but neither may be required to testify against the other as to facts sustaining the claim of fraud.[12]

9. Payne *v.* Miller, 103 Ill. 442.

On an issue as to the validity of a conveyance from husband to wife, the wife is properly permitted to testify that she paid for the property conveyed with her own money. Kelly *v.* William Sharp Saddlery Co., 99 Ga. 393, 27 S. E. 741.

In Norbeck *v.* Davis, 157 Pa. St. 399, 27 Atl. 712, a proceeding by an execution creditor to reach property claimed by both the debtor and his wife to belong to her, it was held that she was a competent witness as to her ownership since she was not interested against the husband within the meaning of the Pennsylvania statute rendering husband and wife incompetent where they offer to testify against each other.

In Berlin *v.* Cantrell, 33 Ark. 611, where a married woman interpleaded claiming property seized as her husband's in an action of replevin against him, it was held that she was a competent witness for herself on the trial of the interplea, but that her husband was not.

10. Fleming *v.* Weagley, 32 Ill. App. 183.

11. DeFarges *v.* Ryland, 87 Va. 404, 12 S. E. 805, a creditor's bill to set aside a deed of trust made by a husband for the benefit of his wife, where it was held that his interest rendered his wife incompetent as a witness on his behalf.

In Phipps *v.* Martin, 33 Ark. 207, the defendant called his wife as a witness in his behalf to prove by her that the property in controversy belonged to her while she lived with her father and when she married the defendant, but the court excluded her as incompetent, on the authority of Collins *v.* Mack, 31 Ark. 684.

12. Stephenson *v.* Cook, 64 Iowa 265, 20 N. W. 182; Virden *v.* Dwyer, 78 Miss. 763, 30 So. 45; Leach *v.* Shelby, 58 Miss. 681; Saffold *v.* Horne, 72 Miss. 470, 18 So. 433; Niland *v.* Kalish, 37 Neb. 47, 55 N. W. 295, where it was held that under the Nebraska statute a wife could not, without her husband's consent, be required to testify as to facts which it was claimed by the adverse party would show that a transfer of property from her husband to herself was fraudulent; nor could the husband under like circumstances be compelled to testify against his wife.

In Riggs *v.* Whitaker, 130 Mich. 327, 89 N. W. 954, an action by an assignee in bankruptcy to reach certain property standing in the name of the wife of the bankrupt alleged to have been transferred to her in fraud of his creditors, it was held that testimony of the husband given upon the trial of another action was not competent as against the wife.

Compare Evans *v.* Staalle, 88 Minn. 253, 92 N. W. 951, an action to enforce a resulting trust in favor of the plaintiff as a creditor of the defendant's husband, where the defendant was called by the plaintiff. This was objected to by her on the ground that she was the wife of the debtor, who had not consented that she might give evidence in the case. The objection was overruled, and the ruling was held correct. "The husband was not a party to the action, and the issues were between the plaintiff and defendant alone. She was called as a witness against herself, and not against her husband, who was not a necessary party to the action, and had no interest in the land." And in Leonard *v.* Green, 30 Minn. 496, 16 N. W. 399, an action against both husband and wife to enforce an alleged constructive trust in favor of a creditor, the purchase price having been paid, as claimed, by the husband, the plaintiff, for the purpose of making the wife a competent witness, moved to be allowed to dismiss the action as to the husband, and to amend his prayer for relief and ask for a sale of the inter-

n. *Actions for Personal Injuries to Wife.* — In an action to recover damages for personal injuries suffered by the wife, under some of the statutes it is held that although either may testify on his or her own behalf, neither is a competent witness for or against the other.[13] Under others, however, they are competent witnesses for each other,[14] so long as they are both parties to the record.[15]

o. *Criminal Conversation.* — In an action for criminal conversation the plaintiff's wife is not a competent witness for him[16] or

est of the wife in the property subject to the rights of her husband, which was allowed.

13. St. Louis, I. M. & S. R. Co. *v.* Amos, 54 Ark. 159, 15 S. W. 362.

In a personal injury action brought in the names of husband and wife, but in right of the wife, for recovery of damages for injuries sustained by her, the husband is a formal and not a real party, and is not competent to testify to matters adverse to the claim of his wife. Burrell Twp. *v.* Uncapher, 117 Pa. St. 353, 11 Atl. 619, 2 Am. St. Rep. 664.

In an action by husband and wife to recover damages for personal injuries to the wife, she being the substantial plaintiff in the action, the husband is not a competent witness on her behalf. Harrington *v.* Sedalia, 98 Mo. 583, 12 S. W. 342.

Compare Cramer *v.* Hurt, 154 Mo. 112, 55 S. W. 258, 77 Am. St. Rep. 752, where it was held that in an action for damages by a husband against a physician for causing an abortion upon her without the consent of her husband, in consequence of which her health is injured and he is deprived of her services with expenses entailed upon him for nursing and medical treatment, his wife is a competent witness for him on general grounds of public policy, the court stating that if it be known that a married woman is a competent witness for her husband in such case it might to some extent at least put a stop to such revolting and unnatural practices.

14. Kaime *v.* Omro, 49 Wis. 371, 5 N. W. 831. See also Barnes *v.* Martin, 15 Wis. 240, 82 Am. Dec. 670, where the court said: "The legislature obviously intended that the rights of the parties to testify in their own behalf should be reciprocal, which would not be the case were one to be excluded because his or her husband or wife happened also to be a necessary party. The legislature have made no such exceptions, and we cannot."

In Holmes *v.* Fond du Lac, 42 Wis. 282, an action by a husband and wife for personal injuries to the wife wherein the husband's claim for loss of services was joined, it was held that a general objection to the competency of the husband or wife as a witness was bad.

15. Hoverson *v.* Noker, 60 Wis. 571, 19 N. W. 382, 50 Am. Rep. 381.

16. Rea *v.* Tucker, 51 Ill. 110, 99 Am. Dec. 539; Reynolds *v.* Schaffer, 91 Mich. 494, 52 N. W. 15, 30 Am. St. Rep. 492; Mathews *v.* Yerex, 48 Mich. 361, 12 N. W. 489.

Contra. — Smith *v.* Meyers, 52 Neb. 70, 71 N. W. 1006, where the court said: "There is no statute in this state which forbids a wife from testifying for her husband in an action for criminal conversation, nor is it against public policy to permit her to do so. She is disqualified from being a witness against him in such an action, but the law allows her to testify in his favor." In Jacobson *v.* Siddal, 12 Or. 280, 7 Pac. 108, 53 Am. Rep. 364, an action for criminal conversation, it was held that either husband or wife were competent to testify to the fact of their marriage.

Under a New Jersey Statute a husband or wife is not compellable in any action or proceeding for divorce on account of adultery to give evidence for the other in any such action or proceeding, except to prove the fact of marriage. This statute is not a limitation on the right of either party to testify in any such action or proceeding. It in no way affects the competency of either as a wit-

against him.[17] And it is also held that the husband is not in such case a competent witness to testify to his wife's adultery.[18]

Actions Instituted by Husband or Wife in Consequence of Adultery. Some of the statutes make a husband or wife incompetent to testify in any action or proceeding instituted by him or her in consequence of adultery.[19]

The Clear Purpose of Such a Statute is to preserve with sacredness the confidences of the marriage state, and to render it impossible for either husband or wife to speculate upon the other's dishonor, relying upon his or her own testimony to make or support a case.[20]

p. *Seduction.* — In an action by a husband for seduction of his wife, the latter cannot testify for the defendant against her husband without his consent.[21]

q. *Alienating Affections.* — In an action by a husband to recover damages from the defendant for alienating his wife, the plaintiff's wife is not a competent witness for the defendant and against her husband without his consent;[22] and the mere fact that he testified

ness for or against the other. It simply prevents compulsion. Schaab *v.* Schaab (N. J. Eq.), 57 Atl. 1090.

17. Smith *v.* Meyers, 52 Neb. 70, 71 N. W. 1006.

In Groom *v.* Parables, 28 Ill. 152, an action for criminal conversation, it was held that the plaintiff's wife was not a competent witness to testify in favor of the defendant, that she was not a competent witness at common law and had not been made so by statute. See further on this question article "CRIMINAL CONVERSATION."

In an action for criminal conversation, statements of the plaintiff's wife of her relations with the defendant are not competent. She could not be a witness against her husband to contradict them. Dalton *v.* Dregge, 99 Mich. 250, 58 N. W. 57.

18. Cornelius *v.* Hambay, 150 Pa. St. 359, 24 Atl. 515.

19. As for example in Michigan. See Carter *v.* Hill, 81 Mich. 275, 45 N. W. 988.

Subsequent Divorce. — The prohibition in a statute to the effect that in an action by a husband or wife in consequence of adultery the husband and wife shall not be competent to testify is not removed by the fact of a divorce having been granted subsequently so as to permit the husband in an action for criminal conversation against the alleged paramour, to testify to the fact of adultery. Hanselman *v.* Dovel, 102 Mich. 505, 60 N. W. 978, 47 Am. St. Rep. 557.

20. Carter *v.* Hill, 81 Mich. 275, 45 N. W. 988, an action for criminal conversation where the precise question decided was that the plaintiff should not have been permitted to detail a conversation had with his fiancee a short time before his marriage, in the absence of the defendant, in which she said she would not marry the plaintiff unless he would consent that she should remain at the defendant's house while his wife was away to be treated by a physician, that she told him that defendant wanted her to stay, and that she did stay there two months after their marriage.

21. Speck *v.* Gray, 14 Wash. 589, 45 Pac. 143.

In Indiana a statute provides that the husband shall be a competent witness in an action for the seduction of his wife, but that she shall not be competent; and in Mainard *v.* Reider, 2 Ind. App. 115, 28 N. E. 196, it was held that in such an action the husband was properly permitted to testify to statements made by his wife to the defendant when all were present, concerning the seduction.

22. A Michigan Statute (§ 7546) provides that husband and wife cannot be witnesses against each other in an action for alienating the wife's

to the relations, feelings, conduct and demeanor of himself and wife toward each other, while it might amount to consent, certainly cannot be deemed to be his consent to the removal of the privilege extended to him in such a case.[23]

r. *Non-Access.* — No rule of evidence is better settled than that husband and wife are equally incompetent to prove the fact of non-access while they lived together.[24]

s. *Criminal Prosecutions.* — **(1.) Testifying for Spouse on Trial.** Certainly, under the ancient common-law rule, a wife was not a competent witness for or against her husband.[25] Although it was held that, within the rule that a wife may be called as a witness for

affections. Rice *v.* Rice, 104 Mich. 371, 62 N. W. 833. And in McKenzie *v.* Lautenschlager, 113 Mich. 171, 71 N. W. 489, an action of that kind, it was held that the husband should not have been permitted to testify to conversations between himself and his wife which did not occur in the presence of the defendants and the consent of the wife to his so testifying not being shown.

In Stanley *v.* Stanley, 27 Wash. 570, 68 Pac. 187, an action to recover damages for alienating the affections of the plaintiff's husband, it was held that the latter was not a competent witness against his wife to testify as to statements made by one of the defendants, his mother, that he would be disinherited if he and his wife were reunited.

23. Huot *v.* Wise, 27 Minn. 68, 6 N. W. 425.

24. Shuman *v.* Shuman, 83 Wis. 250, 53 N. W. 455; Watts *v.* Owens, 62 Wis. 512, 22 N. W. 720. See article "LEGITIMACY."

"The law is well settled that the wife, on the question of legitimacy of her children, is incompetent to give evidence of the non-access of her husband during the time in which they must have been begotten. This rule is founded on the very highest grounds of public policy, decency and morality. The presumption of the law is in such a case that the husband had access to the wife, and this presumption must be overcome by the clearest evidence that it was impossible for him, by reason of impotency or imbecility, or entire absence from the place where the wife was during such time, to have had access to the wife, or to be the father of the child. Testimony of the wife even *tending* to show such fact, or of any fact from which such non-access could be *inferred*, or of any collateral fact connected with this main fact, is to be most scrupulously kept out of the case; and such non-access and illegitimacy must be clearly proved by other testimony." Mink *v.* State, 60 Wis. 583, 19 N. W. 445, 50 Am. Rep. 386.

25. In Connecticut, before the great innovation upon the law of evidence was made, by the statute of 1848, it is conceded that, by the common law, and our own practice, the wife could not testify for her husband, either in civil or criminal cases, where he could not testify for himself. This was but the necessary result of the salutary common-law doctrine that the husband and wife were but one person or party; a doctrine, although somewhat obscured in modern times, yet not entirely repudiated as a legal maxim. The wife was considered as having a legal identity with her husband, in most respects, where such a principle would not lead to practical injustice, as it might affect her person or estate. Chiefly, on the ground of this intimate union, or identity, it was that the husband and the wife were excluded from testifying on behalf of each other. But in 1848 a statute was enacted that "no person should be disqualified, as a witness, in any proceeding at law, or equity, by reason of his interest in the event of the same, as a party or otherwise." This was adjudged to extend as well to proceedings in criminal as in civil cases; and accused parties on trial, as well as their wives, were

her husband when she is a competent witness against him, on a criminal prosecution of a husband for an offense committed on the person of his wife, she is a competent witness in his favor.[26] And in several of the states the rule still is that a wife is not a competent witness for her husband on his trial for a crime.[27] Nor does a statute permitting spouses to testify for each other "in any case" not involving a violation of marital confidence, the statute itself making mention of only civil actions, render the wife competent for her husband in a criminal prosecution.[28] Nor does a statute making defendants in criminal prosecutions competent witnesses on their own behalf change this rule.[29]

admitted to testify for each other. Upon experiment, however, this was found to result rather to the injury of, than to afford a privilege to, persons charged with crime; and accordingly in 1849 a statute was passed repealing so much of the statute of 1848 as authorized a party to any criminal proceeding to testify regarding the same, and in Lucas *v.* State, 23 Conn. 18, the effect of this repeal was held to be the restoration of the common law as it existed prior to 1848 in all respects and that accordingly husbands and wives sustained the same relation to each other as before, with the same capacities and incapacities as interested parties, and that on a criminal prosecution the wife of the defendant was not a competent witness in his behalf.

26. Rose *v.* Sergeant, Ryan & M. (Eng.), 354.

Tucker *v.* State, 71 Ala. 342, a prosecution of a husband for an assault and battery committed on his wife, wherein it was held that his wife was a competent witness on his behalf. See also State *v.* Neill, 6 Ala. 685.

In Clarke *v.* State, 117 Ala. 1, 23 So. 671, a prosecution charging the defendant with having murdered an infant child by the unlawful beating of the mother before its birth, it was held that the mother was a competent witness for her husband.

27. *Alabama.*— Clarke *v.* State, 117 Ala. 1, 23 So. 671; Lide *v.* State, 31 So. 953; Hussey *v.* State, 87 Ala. 121.

Delaware. — State *v.* Smith, 57 Atl. 368.

Georgia. — Rivers *v.* State, 118 Ga. 42, 44 S. E. 859; Knight *v.* State, 114 Ga. 48, 39 S. E. 928.

Tennessee. — Owen *v.* State, 89 Tenn. 698, 16 S. W. 114.

Wisconsin. — Miller *v.* State, 106 Wis. 156, 81 N. W. 1020.

In Donnelly *v.* State, 78 Ala. 453, a prosecution for larceny, where it was held that the defendant's wife was not a competent witness for him, the court held her inadmissibility to be based upon reasons of public and social policy and not to be affected in any manner by the statute authorizing defendants in criminal cases to be examined as witnesses on their own behalf. See also Birge *v.* State, 78 Ala. 435, a prosecution against two persons for living together in adultery, wherein it was held that the husband of the woman was not a competent witness for the man, both being on trial together under the plea of not guilty. The court said: "The principle stated above is eminently applicable to the offense charged in this case. The offense cannot be committed without the concurring, guilty participation of the two defendants. If one is guilty, the other must be, although one may be acquitted for defect of proof, while the other is convicted on testimony which tends to criminate only the one. A confession would be testimony of this class. Any testimony tending to exculpate one defendant must necessarily tend to exculpate the other. Positive testimony in favor of the one must, in the nature of things, be testimony in favor of the other."

28. State *v.* Moulton, 48 N. H. 485; Steen *v.* State, 20 Ohio St. 333. See also Schultz *v.* State, 32 Ohio St. 276.

29. State *v.* Straw, 50 N. H. 460. See also Gibson *v.* Com., 87 Pa. St. 253.

In other states this rule is repudiated, and the rule adopted that husband or wife of the defendant in a criminal prosecution shall be a competent witness for the defendant,[30] and there is even authority that a wife may be compelled to testify for her husband.[31]

(2.) Competency for Co-Defendant. — The wife of one of several defendants accused of a crime, alleged to have been jointly committed and for which they are jointly indicted and tried, is not a competent witness for any of his associates.[32] And it has been held that on such a joint trial the defendants' wives are not competent witnesses on their behalf.[33] But where the trials are separate the wife of a co-defendant not on trial is a competent witness for the defendant on trial,[34] provided, of course, her testimony does not in

30. In Florida a wife is permitted to testify for her husband in a criminal prosecution. Walker *v.* State, 34 Fla. 167, 16 So. 80, 43 Am. St. Rep. 186.

By the Missouri Statute "the common-law rule has been so far changed as to make the wife or husband a competent witness for the other when on trial for a criminal offense, at his or her discretion, but it is expressly provided by that section 'that no person on trial or examination, nor wife or husband of such person, shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf, or on behalf of a co-defendant,' etc." State *v.* Willis, 119 Mo. 485, 24 S. W. 1008.

In North Carolina, the Code, § 1353, provides that the husband or wife or the defendant in all criminal proceedings shall be a competent witness for the defendant. State *v.* Wiseman, 130 N. C. 726, 41 S. E. 884.

The Nebraska Statute (§ 331) provides that neither husband nor wife can in any case be a witness against the other except in a criminal proceeding for a crime committed by one against the other, but they may in all criminal prosecutions be witnesses for each other. Bohner *v.* Bohner, 46 Neb. 204, 64 N. W. 700, where the statute was applied.

31. In Dumas *v.* State, 14 Tex. App. 464, 46 Am. Rep. 241, a prosecution for bigamy where the defendant's first wife declined to be sworn and testify on his behalf, the court compelled her to be so sworn and testify, stating: "The wife is a competent witness on behalf of her husband on the trial of any criminal prosecution against him, bigamy or unlawful marriage not excepted. If competent to testify then, she can be forced to testify as any other witness may be."

32. Holley *v.* State, 105 Ala. 100, 17 So. 102; Childs *v.* State, 20 Ark. 26; Carr *v.* State, 42 Ark. 204; Com. *v.* Easland, 1 Mass. 15.

"The mere fact that the husband is a party to the record does not of itself exclude the wife as a witness on behalf of the other parties, but the rule of exclusion is only to be applied to cases in which the interest of the husband is to be affected by the testimony of the wife." Carr *v.* State, 42 Ark. 204, *overruling* Casey *v.* State, 37 Ark. 67; *reaffirming* Collier *v.* State, 20 Ark. 36.

In State *v.* Wiseman, 130 N. C. 726, 41 S. E. 884, which was a prosecution for fornication and adultery, the case having been dismissed as to the prosecuting witness' wife with whom the offense was charged to have been committed, it was held that the husband was a competent witness to testify for the prosecution.

33. State *v.* Sargood (Vt.), 58 Atl. 971.

34. *United States.* — United States *v.* Adatte, 6 Blatchf. 76.

Arkansas. — Carr *v.* State, 42 Ark. 204.

Delaware. — State *v.* Smith, 57 Atl. 368.

Kentucky. — Cornelius *v.* Com., 3 Metc. 481.

Maine. — State *v.* Worthing, 31 Me. 62.

any way infringe upon the existing rule excluding the testimony of a wife against her husband.[35]

Where two defendants jointly indicted elect to be tried jointly, making no reservation of the right to testify for each other as though they had severed and were tried separately, the wife of one of them is not a competent witness to testify in favor of the other defendant.[36]

If the Grounds of Defense Are Several and Distinct, and not dependent upon each other, the wife of one defendant may be admitted to testify for the other, but she is not a competent witness where her testimony concerns her husband and its direct effect is to aid him.[37]

(3.) Competency Against Co-Defendant. — Where several persons are tried together under a joint indictment, the wife of neither one of the defendants is a competent witness against a co-defendant of her husband, where her testimony in any way affects the interest of her husband.[38] Where, however, the husband is not a party to the record, whether by reason of failure to indict him or of the entering of a *nolle prosequi* against him,[39] or where he is not on trial, a

Missouri. — State *v.* Burnside, 37 Mo. 343.

South Carolina. — State *v.* Anthony, 1 McCord L. 285.

Tennessee. — Moffit *v.* State, 2 Humph. 99.

Compare. — Pullen *v.* People, 1 Dougl. (Mich.) 48.

35. In People *v.* Langtree, 64 Cal. 256, 30 Pac. 813, where the defendant and another were charged by separate information with the same offense, it was held that the wife of such other person was not a competent witness for the defendant on trial to testify to facts establishing the innocence of the defendant and implicating her husband.

36. Trowbridge *v.* State, 74 Ga. 431. See also Stephens *v.* State, 106 Ga. 116, 32 S. E. 13.

37. Gillespie *v.* People, 176 Ill. 238, 52 N. E. 250.

38. Woods *v.* State, 76 Ala. 35, 52 Am. Rep. 314; Cotton *v.* State, 62 Ala. 12; Rivers *v.* State, 118 Ga. 42, 44 S. E. 859.

39. Woods *v.* State, 76 Ala. 35, 52 Am. Rep. 314; State *v.* Briggs, 9 R. I. 361, 11 Am. Rep. 270; Moffit *v.* State, 2 Humph. (Tenn.) 99; State *v.* Bridgman, 49 Vt. 202, 24 Am. Rep. 124.

The Proceeding Then Becomes a Collateral One, in which the interests of the husband cannot be judicially affected. And, in such cases, where neither the husband nor the wife is a party defendant to the cause, so as to be directly interested, the testimony of either may be received, although its tendency is to criminate the other. The main reason is, that judgment of acquittal or conviction cannot be used in evidence against or in favor of the husband, or wife, as the case may be, in the event of their subsequent indictment and trial. It would be *res inter alios acta* as to them. Woods *v.* State, 76 Ala. 35, 52 Am. Rep. 314.

The wife of one of three defendants jointly indicted is a competent witness against the other two after the dismissal of the indictment against her husband. Ray *v.* Com., 12 Bush (Ky.) 397.

In Graff *v.* People, 108 Ill. App. 168, where several defendants had been jointly indicted, it was held proper to permit the wife of one of the defendants who had pleaded guilty to testify on rebuttal against the defendant on trial in corroboration of her husband's testimony. The court said that as her husband had pleaded guilty, the evidence of his wife could have no bearing upon the case so far as he was concerned.

In State *v.* Miller, 100 Mo. 606, 13 S. W. 832, a prosecution for murder

severance having been granted, the wife is a competent witness as against her husband's accomplice,[40] so long as her testimony does not infringe the rule prohibiting her from testifying against her husband,* or the rule excluding privileged communications.[41] And the state may sever for the very purpose of introducing the wife in such case.[42]

(4.) As Witness Against Spouse on Trial. — (A.) GENERALLY. — Nor, with the exceptions hereafter to be discussed, does either the common-law rule or the statutes permit a spouse of the defendant in a criminal prosecution to testify against such defendant,[43] the statutes,

where a co-defendant's wife was permitted to testify against the defendant, the court said that if she testified after her husband had pleaded guilty to the same crime charged against him in another indictment there could be no question as to her competency as a witness for the state, because the prosecution against her husband was then closed by his plea of guilty in the other case, and held that there could be no question in that particular case as to the competency and relevancy of her testimony respecting conversations she had overheard between her husband and the defendant.

40. *Alabama.* — Woods *v.* State, 76 Ala. 35, 52 Am. Rep. 314; Fincher *v.* State, 58 Ala. 215; Howell *v.* State, 58 Ala. 362.

Arkansas. — Carr *v.* State, 42 Ark. 204.

Florida. — Adams *v.* State, 28 Fla. 511, 10 So. 106.

Georgia. — Askea *v.* State, 75 Ga. 356; Williams *v.* State, 69 Ga. 11.

Iowa. — State *v.* Rainsbarger, 71 Iowa 746, 31 N. W. 865.

Tennessee. — Workman *v.* State, 4 Sneed 425.

Texas. — Bluman *v.* State, 33 Tex. Crim. 43, 26 S. W. 75, 21 S. W. 1027.

Virginia. — Smith *v.* Com., 90 Va. 759, 19 S. E. 843.

In Campbell *v.* State, 133 Ala. 158, 32 So. 635, a prosecution of a man and woman for adultery, it was held that the woman's husband was a competent witness for the prosecution to prove the charge against the man; that "testimony of the husband going to prove the unlawful cohabitation between his wife and the defendant, against the latter, could not, therefore, in any way tend to prove the guilt of the wife under the indictment against her."

While a wife, save as expressly provided by statute, is not a competent witness for or against her husband when he is on trial for a criminal offense she is not rendered incompetent to testify on the trial of one not her husband merely because the latter may be in jail under a commitment warrant charging him with the identical offense for which the defendant is being tried. Fuller *v.* State, 109 Ga. 809, 35 S. E. 298.

41. Rivers *v.* State, 118 Ga. 42, 44 S. E. 859.

42. Whitlow *v.* State, 74 Ga. 819.

43. Byrd *v.* State, 57 Miss. 243, 34 Am. Rep. 440.

In Texas neither husband nor wife can be compelled to testify against the other as defendant on trial for a crime, except when the offense is one committed by one upon the other. Brock *v.* State, 44 Tex. Crim. 335, 71 S. W. 20, 100 Am. St. Rep. 859.

In Turpin *v.* State, 55 Md. 462, where the defendant's wife was held not to be a competent witness against him, the court said, in speaking of the Maryland statute: "The words of the section in which '*the parties and their wives and husbands are declared to be competent and compellable to give evidence,*' in our opinion, apply only to civil suits, and have no reference to criminal prosecutions. This is apparent not only from the phraseology of this part of the law, where it speaks of '*the parties litigant*' and of '*persons in whose behalf any suit, action or other proceeding may be brought or defended,*' language only applicable to

however, as previously stated, generally making the matter dependent upon the consent of the accused spouse.[44]

(B.) Wrongs or Injuries Committed by One Upon the Other. — (a.) *Generally.* — Not only does the common law recognize as an exception to the general rule of exclusion,[45] but it is expressly enacted

civil suits, but also from the terms by which the parties themselves and their wives and husbands are made not only *competent* but *compellable* to testify, a provision which evidently was not intended to apply to criminal prosecutions. The *third* section was passed to prevent any possible misconstruction of the *first* section in this respect; and when by the Act of 1876 the third section was repealed, and the parties accused were *allowed* to testify in their own behalf, this last act had no other effect except so far as it related to the parties accused, making them *competent* to testify in their own behalf in criminal cases. By repealing the *third* section of the Act of 1864 the construction of the *first* section was not changed, and that section, properly construed, did not remove the incompetency of the wife, which existed at the common law, to testify in the case of a criminal prosecution against her husband."

In State *v.* Houston, 50 Iowa 512, a criminal prosecution wherein the defendant claimed that the indictment was void because his wife had been examined before the grand jury, the court said: "A witness, then, called before the grand jury is not necessarily against the defendant. It might be the defendant's privilege that his wife should be called. If, however, where a defendant's wife is called, and the facts of which she has knowledge are unfavorable to the husband, it would be proper for her to object to testifying, and we think she could not be compelled to testify against her objection. If she testified, and her testimony was unfavorable to her husband, so that it appeared that the indictment was found in whole or in part upon her testimony, possibly the indictment might be quashed upon that ground. But the defendant should judge whether her testimony was favorable or unfavorable before proceeding to trial, and move to quash if he thought there was ground for it. We think it too late to raise an objection of this kind after conviction."

44. State *v.* Geer, 48 Kan. 752, 30 Pac. 236; People *v.* Gordon, 100 Mich. 518, 59 N. W. 322.

In Georgia the rule is generally that in criminal cases neither husband nor wife may be compelled to testify as a witness against the other. Rivers *v.* State, 118 Ga. 42, 44 S. E. 859.

Under the Massachusetts Statute neither husband nor wife shall be compelled to be a witness on any trial upon an indictment, complaint or other criminal proceeding against the other.

Com. *v.* Moore, 162 Mass. 441, 38 N. E. 1120, where the court said that the statute by saying that a husband or wife shall not be compelled to testify apparently assumes that if he or she does testify it is as a voluntary witness.

Under the New Jersey Statute a husband or wife is not competent or compellable to give evidence against the other in any criminal action or proceeding except to prove the fact of marriage, and except as otherwise provided by statute. See Schaab *v.* Schaab (N. J. Eq.), 57 Atl. 1090.

45. Hanon *v.* State, 63 Md. 123, to the effect that on an indictment under the Maryland statute of 1882 against a husband for brutally assaulting and beating his wife, she is a competent witness to prove the marriage and the offense.

This Exception is Allowed from the Necessity of the Case "for the protection of the wife in her life and liberty and partly for the sake of public justice." This necessity was described in Bentley *v.* Cooke, 3 Doug. (Eng.) 422, to mean "not a general necessity as where no other witness can be had, but a particular necessity as where, for instance, the

by statute in many of the states[46] that husband or wife may be a competent witness against the other in support of an indictment against such other for corporal violence by the defendant upon the

wife would be otherwise exposed without remedy to personal injury or brutal treatment." See also Storrs *v.* Storrs, 23 Fla. 274, 2 So. 368.

"The exceptions which necessity soon forced upon the courts are based primarily on the idea that the protection of the person of the wife from actual violence and assault or cruel treatment by the husband, is of more practical importance than the legal assumption of unity, or the theoretical fears of domestic discord." State *v.* Dyer, 59 Me. 303.

"The necessity of permitting the wife to testify against her husband springs from the duty of protecting her person from violence, and the impunity with which from the privacy and close relations of married life assaults upon her might otherwise be perpetrated. In allowing her to testify, her disability of coverture is as much removed as if she were a *feme sole* or a stranger in the case, and she therefore has all the capacity any other witness would have. This being so, she is as competent to prove the marriage as any one else would be. It is not a fact arising from the confidential relations of the parties, but a fact in its very nature, notorious and public; and we perceive no reason why she cannot supply the proof of this essential link in the chain of facts necessary to be proved, as well as show the aggravated character of the assault." Hanon *v.* State, 63 Md. 123.

"By the common law a wife, in certain cases, may be a witness against her husband, without and against his consent or wishes. It was found, by sad experience, that the rule in its rigor and absoluteness failed to protect the wife from the assaults and cruelties of the husband committed in secret, or when no other person was a witness of the outrage. The rule was modified to give her protection against actual or threatened personal violence and injuries. The object and purpose of the exception measures the extent of it. In a given case the inquiry must be, what is the nature of the offense charged, and is it one implying personal violence to the wife. If so, she may be a witness, not only to obtain security for herself, but also when he is charged, by indictment, with an assault upon her." State *v.* Dyer, 59 Me. 303.

46. In Maine a statute passed in 1873 made the wife of a defendant on trial for a criminal offense a competent witness generally without reference to his consent, although previous to that time she was a competent witness only with his consent. State *v.* Black, 63 Me. 210, where the court said: "There is more reason that she should be compelled to testify against her husband in a criminal than in a civil cause. It might not accord with the good public policy to allow every litigant in civil suits, about matters however small, to have the right to search household secrets for the production of evidence. But the state should have all possible constitutional means to ferret out and punish crime."

In Michigan a statute (3 How. Ann. Stat. § 7546) provides that "a wife shall not be examined as a witness for or against her husband, without his consent, except in cases where the cause of action . . . grows out of the refusal or neglect to furnish the wife or children with suitable support, within the meaning of Act No. 136 of the Session Laws of 1883." In 1889 an act was passed entitled "An act relative to disorderly persons, and to repeal chapter fifty-three of the Compiled Laws of 1871, as amended by the several acts amendatory thereof," of which amendatory acts said Act No. 136 was one. And in People *v.* Malsch, 119 Mich. 112, 77 N. W. 638, 75 Am. St. Rep. 381, a prosecution for abandoning his wife without support, it is held that the wife is a competent witness against her husband.

witness.[47] And where this exception is recognized, her competency is not to be waived by her or affected by her desires or fears, and she may be compelled to testify against the objection both of herself and her husband.[48] The wife is not a competent witness to testify against her husband on a prosecution for a crime except where she is the immediate prosecutrix for some injury threatened or done to her person.[49]

Injury Not Always Confined to Corporal Violence. — At common law, this rule was applied only when the injury was for corporal violence.[50] In its application under the statutes, however, there is conflict in the cases as to whether or not it is merely declaratory of the common-law rule, and hence is to be confined strictly to cases of personal violence by one upon the other, or whether the term injury is to be used in a broader sense. Some of the courts hold as first stated,[51] and that the words "personal wrong or injury," "offense" and the like, which are very generally used in the statutes, are used in a restricted sense;[52] that although the legislature

47. *England.* — Heyn's Case, 2 Ves. & B. 182; Rex *v.* Doherty, 13 East 171.

United States. — U. S. *v.* Fitton, 4 Cranch C. C. 658, 25 Fed. Cas. No. 15,106.

Alabama. — Clarke *v.* State, 117 Ala. 1, 23 So. 671.

Georgia. — Stevens *v.* State, 76 Ga. 96.

Kentucky. — Turnbull *v.* Com., 79 Ky. 495; Com. *v.* Sapp, 90 Ky. 580, 14 S. W. 834.

Maine. — Soule's Case, 5 Me. 407,

Maryland. — Hanon *v.* State, 63 Md. 123.

Massachusetts. — Com. *v.* Murphy, 4 Allen 491; Com. *v.* Sparks, 7 Allen 535.

Michigan. — People *v.* Sebring, 66 Mich. 705, 33 N. W. 808.

Missouri. — State *v.* Pennington, 124 Mo. 388, 27 S. W. 1106.

New York. — People *v.* Green, 1 Denio 614.

North Carolina. — State *v.* Davidson, 77 N. C. 522.

Ohio. — Whipp *v.* State, 34 Ohio St. 87, 32 Am. Rep. 359.

South Carolina. — State *v.* Boyd, 2 Hill 288, 27 Am. Dec. 376; State *v.* Davis, 3 Brev. 3, 5 Am. Dec. 529.

Wisconsin. — Kraimer *v.* State, 117 Wis. 350, 93 N. W. 1097; Goodwin *v.* State, 114 Wis. 318, 90 N. W. 170.

48. Bramlette *v.* State, 21 Tex. App. 611, 2 S. W. 765, 57 Am. Rep. 622. See also Turner *v.* State, 60 Miss. 351, 45 Am. Rep. 412, where it was held that it was not the wife's privilege to testify or not in such a case as she might elect. It was clear that her husband could not assign for error the action of the court in compelling her to testify over her objection, or if the action of the court was error it was the privilege of the witness and not the legal right or immunity of her husband which was impaired.

49. State *v.* Willis, 119 Mo. 485, 24 S. W. 1008.

50. State *v.* Hussy, 44 N. C. 123; Williamson *v.* Morton, 2 Md. Ch. 94.

Vagrancy. — In Merriweather *v.* State, 81 Ala. 74, 1 So. 560, a prosecution for vagrancy, it was held error to permit the defendant's wife to testify against him.

Disorderly Conduct. — In People *v.* Crandon, 17 Hun (N. Y.) 490, it was held that a wife is not a competent witness against her husband on his prosecution for disorderly conduct.

51. Com. *v.* Sapp, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405; State *v.* Dyer, 59 Me. 313; Clarke *v.* State, 117 Ala. 1, 23 So. 671.

52. State *v.* Frey, 76 Minn. 526, 79 N. W. 518, 77 Am. St. Rep. 660, where the court said that the Minnesota statute as to the exception under discussion does not introduce a new rule nor extend an old one. See also State *v.* Armstrong, 4 Minn.

undoubtedly has the power to modify the common-law rule so as to permit husband or wife to testify against the other on a prosecution for a crime not involving the element of personal violence, yet that intention cannot be imputed but must be made clearly manifest by the statute itself.[53] Other courts, however, make no such limitation, and hold that the rule in its application is not to be confined merely to cases involving the element of personal violence.[54] This

251; Williamson *v.* Morton, 2 Md. Ch. 94.

"The language of the rule at common law was as broad as the language 'personal injury' in our statute, and that language meant, and was held to mean, violence, either actual or constructive, to the person, and by a long line of decisions the wife was not allowed to give testimony in prosecution for bigamy, or any other crime not involving personal violence or corporal injury to her. The words 'wrong' and 'injury' are often used the one for the other. An injury to the person is a wrong, and a constructive injury to the person is also a wrong. A wrong is defined to be an injury, and an injury as a wrong. A personal wrong or injury is an invasion of a personal right; it pertains to the person, the individual. A cause of action growing out of a personal wrong is one designed to protect or secure some individual right. The right, as well as the wrong, must pertain to the person. It must be one that is purely personal in its character, and in no sense can the exception here be said to embrace public wrongs, which are personal only in the sense that they wound the feelings or annoy or humiliate, but inflict no injury upon the person." People *v.* Quanstrom, 93 Mich. 254, 53 N. W. 165, 17 L. R. A. 723.

In Texas a statute providing that a husband and wife may be witnesses against each other in a criminal prosecution for "an offense committed by one against the other" has been construed to mean some act of personal violence by the one against the other. Baxter *v.* State, 34 Tex. Crim. 516, 31 S. W. 394, 52 Am. St. Rep. 720.

53. The statutes of Utah in one place provide that one spouse was competent to testify against the other on a criminal action for a crime committed by one against the other, and in another place (Comp. Laws 1888, § 5197) provide that "Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife are competent witnesses for or against each other, in a criminal action or proceeding to which one or both are parties." It was insisted in Bassett *v.* United States, 137 U. S. 496, *reversing* 5 Utah 131, 13 Pac. 237, which was a prosecution for polygamy, that a wife was undoubtedly a competent witness for the state against her husband, but the court in ruling against the contention in construing these statutes said: "An intention to make such a change should not lightly be imputed. It cannot be assumed that it is indifferent to sacred things, or that it means to lower the holy relations of husband and wife to the material plane of simple contract. So, before any departure from the rule affirmed through the ages of the common law — a rule having its solid foundation in the best interests of society — can be adjudged, the language declaring the legislative will should be so clear as to prevent doubt as to its intent and limit."

In United States *v.* White, 4 Utah 499, 11 Pac. 570, which was a prosecution for the crime of unlawful cohabitation with two women, it was said that one of the women not having been the lawful wife of the defendant at the time of the alleged offense of cohabitation there was no crime committed against her which might possibly make her a competent witness under the Utah statute.

54. Hills *v.* State, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155, where the court said that the Nebraska statute is not simply declaratory of the common law, that "to so hold

conflict, however, is perhaps not so much due to conflict of opinion as to the phrascology of the statutes themselves.

"Crime" Defined. — It has been held that since some private wrong or injury is included in every crime, the word "crime" as used in such a statute means the private wrong or injury included in such public crime.[55]

Acts Committed Before Marriage. — The exception created by a statute permitting a wife to testify against her husband in case of criminal violence by him upon her does not extend to acts committed before the marriage.[56]

(b.) *Abduction.* — Abduction and forcible marriage have been held to be an injury within the exception under discussion.[57]

(c.) *Abortion.* — Where a husband is being prosecuted criminally for violently producing an abortion upon his wife, she is a competent witness to testify against him.[58]

(d.) *Adultery.* — As to whether or not adultery by a married person is a crime against the other within the rule permitting a spouse to testify against another on the latter's criminal prosecution, the cases are in conflict. Some of the courts hold that it is such a crime.[59] On the other hand many of the courts hold that it is

would be to impute to the legislature a useless purpose since the common law was then in force, except where modified by statute."

55. Dill *v.* People, 19 Colo. 469, 36 Pac. 229, where the court said: "The word must have such meaning, or the statute is meaningless. It follows that a wife is competent to testify against her husband, in a criminal action or proceeding, whenever she is the individual particularly and directly injured or affected by the crime for which he is being prosecuted."

56. People *v.* Curiale, 137 Cal. 534, 70 Pac. 468, 59 L. R. A. 588.

57. Swendsen's Trial, 14 How. St. Tr. (Eng.) 559; Rex *v.* Wakefield, 2 Lew. Cr. Cas. (Eng.) 1; Barclay *v.* Com., 25 Ky. L. Rep. 463, 76 S. W. 4.

58. State *v.* Dyer, 59 Me. 303; Munyon *v.* State, 62 N. J. L. 1, 42 Atl. 577; Navarro *v.* State, 24 Tex. App. 378, 6 S. W. 542. *Compare* Miller *v.* State, 37 Tex. Crim. 575, 40 S. W. 313, where the wife was held privileged in the case of an abortion committed before marriage.

59. Lord *v.* State, 17 Neb. 526, 23 N. W. 507, where the court said: "The statute makes it an offense for a husband to desert his wife and live and cohabit with another woman. If the husband is prosecuted for the offense the prosecution certainly would be a criminal proceeding for a crime committed against the wife. The word 'crime' is frequently used to designate gross violations of law in distinction from misdemeanors; but in its broad sense it means any violation of law." See also Owens *v.* State, 32 Neb. 174, 49 N. W. 222; State *v.* Vollander, 57 Minn. 225, 58 N. W. 878, where the court said that as the penal code provides that a prosecution for adultery can be commenced only on the complaint of the husband or wife, save when insane, "if it be consistent with public policy that the injured party alone may institute the prosecution it cannot be inconsistent with it that he or she may support it against the paramour by testifying to the facts within his or her knowledge, and it would be strange if the party may make the complaint but may not give evidence in support of it." *Compare* State *v.* Armstrong, 4 Minn. 251.

In State *v.* Bennett, 31 Iowa 24, where it was held that a husband was a competent witness for the state on a prosecution of his wife for adultery on the ground that the adultery of the wife is a crime com-

not.[60] Sometimes the rule excluding the spouse in such a case is due to the fact that there is a statute expressly providing that a husband or wife is not a competent witness against the other in any action or proceeding instituted in consequence of the alleged adultery of such other,[61] except to prove the fact of marriage.[62]

mitted against the husband so as to render him under the Iowa statute a competent witness against her in a criminal prosecution for the offense, the court said: "The law so far regards the adultery of the wife as a crime against the husband, that, if he should discover her *flagrante delicto*, his homicide of her and her paramour would be lowered to the grade of manslaughter. . . . [The Iowa statute] which provides that no prosecution for adultery 'can be commenced but on complaint of the husband or wife, leads to the inference that the offense is rather a crime against the partner to the marital relation than against society in general. So long as the injured husband or wife suffers the wrong in silence, society, notwithstanding the injury to public morals, is without redress. The prosecution can be commenced only on complaint of the husband or wife. The only mode of commencing the prosecution is by becoming a prosecuting witness before the grand jury, or by filing an information before a committing magistrate. . . . It would be strange to permit her to be a witness to ground a prosecution, and not afterward to be a witness at the trial.'" See also State *v.* Hazen, 39 Iowa 648.

The Former Husband of a Woman Prosecuted for Adultery is a competent witness against her on her trial. State *v.* Russell, 90 Iowa 569, 58 N. W. 915, 28 L. R. A. 195, where the court said: "If the offense was committed, the husband had the right to commence the prosecution and the subsequent divorce and remarriage of the wife did not cancel the offense nor bar the prosecution for it; and that is true whether the crime be regarded as against the husband or as against the state," and held that the former husband's testimony was properly received.

60. Colton *v.* State, 62 Ala. 12; State *v.* Gardner, 1 Root (Conn.) 485; Com. *v.* Sparks, 7 Allen (Mass.) 534; McLean *v.* State, 32 Tex. Crim. 521, 24 S. W. 898; Crawford *v.* State, 98 Wis. 623, 74 N. W. 537, 67 Am. St. Rep. 829. *Compare* Roland *v.* State, 9 Tex. App. 277, 35 Am. Rep. 743.

In State *v.* Gardner, 1 Root (Conn.) 485, a prosecution for adultery, it was held that the husband of the woman with whom the offense was charged to have been committed was not a competent witness for the prosecution to prove the fact. The court said: "In a prosecution against the wife clearly the husband was not a competent witness, and in testifying to the criminality of her paramour he must necessarily testify to the criminality of his wife, and that further, he might be interested in laying a foundation by his testimony for a divorce."

61. As for example in Michigan. See People *v.* Imes, 110 Mich. 250, 68 N. W. 157; People *v.* Fowler, 104 Mich. 449, 62 N. W. 572.

The Husband of the Alleged Paramour is a competent witness to testify as to his marriage with her, but not to prove the fact of adultery. People *v.* Isham, 109 Mich. 72, 67 N. W. 819.

In Georgia the crime of adultery and fornication being one in which the woman is necessarily guilty as well as the man, it is held that the husband of the woman is not competent to prove the act of adultery and fornication, since the statute governing the competency of husband and wife expressly provides that "nothing herein contained shall apply to any action, suit or proceeding, or bill in any court of law or equity instituted in consequence of adultery;" and this statute is held to embrace both civil and criminal proceedings. Howard *v.* State, 94 Ga. 587, 20 S. E. 426.

62. State *v.* McDuffie, 107 N. C. 885, 12 S. E. 83.

(e.) *Assault and Battery.* — Assault and battery committed by one spouse upon the other is within the exception under discussion permitting husband or wife to testify against the other,[63] although some of the cases hold that the violence used must involve, or at least threaten, a lasting injury.[64]

(f.) *Assault With Intent to Murder.* — An assault by one spouse upon the other with intent to murder is a crime which renders the injured spouse competent to testify against the defendant.[65]

(g.) *Attempt to Poison.* — On a prosecution of a husband for attempting to poison his wife, the latter is a competent witness against him; and the fact that since the commission of the alleged offense she has been divorced from him is immaterial.[66]

(h.) *Bigamy.* — As to whether or not bigamy is a personal wrong or injury or crime within the exception under discussion which will permit the first and true wife to testify against her husband, the

63. Johnson *v.* State, 94 Ala. 53, 10 So. 427; State *v.* Harris (Del.), 58 Atl. 1042; State *v.* Davis, 3 Brev. (S. C.) 3, 5 Am. Dec. 529.

See also People *v.* Sebring, 66 Mich. 705, 33 N. W. 808, where the court said that if the wife could not complain of or be a witness against her husband in such case she might not infrequently be subjected to the most atrocious and brutal conduct from her husband without remedy. "Not only the ends of justice but public policy alike require that she should be at liberty to complain and prosecute as if she were a *feme sole* in criminal cases. The law will not allow the marriage relation to be so used as to protect the criminal or shield him from the just penalty for his crime."

Husband Whipping Wife. — On the prosecution of the defendant for whipping his wife, she is a competent witness against him. Stevens *v.* State, 76 Ga. 96.

64. State *v.* Hussey, 44 N. C. 123; State *v.* Davidson, 77 N. C. 522.

65. Turner *v.* State, 60 Miss. 351, 45 Am. Rep. 412; State *v.* Pennington, 124 Mo. 388, 27 S. W. 1106; Bramlette *v.* State, 21 Tex. App. 611, 2 S. W. 765, 57 Am. Rep. 622. See also State *v.* Parker, 42 La. Ann. 972, 8 So. 473.

Compare Turnbull *v.* Com., 79 Ky. 495, where the defendants were indicted for maliciously cutting and wounding the husband of one of them, it was held that under the Kentucky statute "neither husband nor wife shall be competent witnesses for or against each other," etc. The husband was not a competent witness against his wife inasmuch as there was nothing in the statute itself to indicate that it was intended to apply exclusively to civil actions, but that in fact the statute applied equally to criminal prosecutions.

66. Com. *v.* Sapp, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405. See also People *v.* Northrup, 50 Barb. (N. Y.) 147.

In Davis *v.* Com., 99 Va. 838, 38 S. E. 191, a prosecution under an indictment charging defendant with attempting to poison a well with intent to kill and injure a certain person "and other persons," it was held that the defendant's wife was a competent witness against him, as it was shown that she, in common with others, as defendant knew, was accustomed to drink water out of the well charged to have been poisoned. The court said: "Had the indictment charged the prisoner with poisoning the well in question with intent to kill and injure his wife, clearly she would have been a competent witness to testify on behalf of the commonwealth against the prisoner; and since the provision of § 3997 of the code applies to the case, the same rule as to the competency of the wife to testify governs as if the indictment named her as the person, or one of the persons, intended to be killed or injured by poisoning the well."

cases are in conflict. Some of the courts hold that it is not such an offense.[67] On the other hand other courts hold that bigamy is a crime against the first wife which will make her a competent witness against her husband on his prosecution,[68] to prove the marriage between her and the defendant.[69]

(i.) *Conspiracy to Injure Wife.* — Conspiracy by a husband with others to have his wife declared insane and confined in an asylum is within the terms of a statute making a wife or husband competent to testify "in any criminal proceeding against either for bodily injury or violence attempted, done or threatened upon the other."[70]

(j.) *Incest.* — Incest committed by a husband is held by some of the courts to be a crime committed against the wife within the con-

67. Williams *v.* State, 44 Ala. 24; Williams *v.* State, 67 Ga. 260; Lowery *v.* People, 172 Ill. 466, 50 N. E. 165, 64 Am. St. Rep. 50; Hiler *v.* People, 156 Ill. 511, 41 N. E. 181, 47 Am. St. Rep. 221; State *v.* Ulrich, 110 Mo. 350, 19 S. W. 656; Boyd *v.* State, 33 Tex. Crim. 470, 26 S. W. 1080. See also State *v.* McDavid, 15 La. Ann. 403.

See also People *v.* Quanstrom, 93 Mich. 254, 53 N. W. 165, 17 L. R. A. 723, where the court said: "Criminal statutes are not grounded in personal grievances, but in public injuries, and a prosecution for bigamy is not a cause of action growing out of a personal wrong or injury."

Polygamy. — In Bassett *v.* United States, 137 U. S. 496, *reversing* 5 Utah 131, 13 Pac. 237, the court said: "Is polygamy such a crime against the wife? That it is no wrong upon her person is conceded; and the common-law exception to the silence upon the lips of husband and wife was only broken, as we have noticed, in cases of assault of one upon the other. That it is humiliation and outrage to her is evident. If that is the test, what limit is imposed? Is the wife not humiliated, is not her respect and love for her husband outraged and betrayed, when he forgets his integrity as a man and violates any human or divine enactment? Is she less sensitive, is she less humiliated, when he commits murder, or robbery, or forgery, than when he commits polygamy or adultery? A true wife feels keenly any wrong of her husband, and her loyalty and reverence are wounded and humiliated by such conduct. But the question presented by this statute is not how much she feels or suffers, but whether the crime is one against her. Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife; and, as the statute speaks of crimes against her, it is simply an affirmation of the old, familiar and just common-law rule."

Compare United States *v.* Cutler, 5 Utah 608, 14 Pac. 145, where the precise point ruled was that an indictment on the ground of polygamy would not be quashed because found on the evidence of his wife. See also *Ex parte* Hendrickson, 6 Utah 3, 21 Pac. 396.

68. State *v.* Sloan, 55 Iowa 217, 7 N. W. 516; Hills *v.* State, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155, *holding* that bigamy is an offense against the wife and not merely against the marital relation.

69. State *v.* Hughes, 58 Iowa 165, 11 N. W. 706; State *v.* Melton, 120 N. C. 591, 26 S. E. 933.

70. Com. *v.* Spink, 137 Pa. St. 255, 20 Atl. 680, where the court said: "To carry out such a conspiracy, the arrest and imprisonment of the body of the wife was a contemplated and a necessary ingredient, and, as a matter of fact, personal violence was used in effecting the designs of the defendants. The language of the act is very broad, and includes 'any criminal proceeding' for bodily injury or violence, 'attempted, done or threatened.' In the present case, bodily violence was attempted, was done and was threatened by the defendants, who, it is true, invoked the

templation of the rule denying the privilege,[71] although there is authority to the contrary.[72]

(k.) *Indecent Assault Upon Daughter.* — An indecent assault upon a daughter is not a personal wrong or injury to the wife within the meaning of a statute making her a competent witness against her husband in a criminal prosecution therefor.[73]

(l.) *Larceny by Husband of Wife's Property.* — A wife is not a competent witness to testify against her husband on his prosecution for the alleged larceny by him of her property.[74]

forms of a legal proceeding to aid them, but the violent character of their acts was rather aggravated than mitigated by that consideration. The words of the act establishing the competency of the wife or husband are not limited to prosecutions for the immediate act of violence, but embrace 'any criminal proceeding' for such acts. A conspiracy to do an act of violence upon the body of another is a crime, and an indictment therefor is a criminal proceeding; and it may be quite as material, in the administration of criminal justice, to have the testimony of the injured party to the facts which tend to prove the conspiracy, as to the facts which tend to prove the direct act of personal violence. Moreover, the act embraces threats, as well as acts, and the element of actual violence is therefore not indispensable in considering the question of competency."

71. State *v.* Chambers, 87 Iowa 1, 53 N. W. 1090, 43 Am. St. Rep. 349, where the court said: "It is the fact of the marital relation that makes the act here charged constitute the aggravated crime of incest. Were it not for this relation these acts would constitute a much less grave offense. The crime charged is surely as much, if not more, a crime against the wife of the accused than would be the crime of adultery or bigamy." See also State *v.* Hurd, 101 Iowa 391, 70 N. W. 613.

In State *v.* Reynolds, 48 S. C. 384, 26 S. E. 679, a prosecution for incest, it was held that the defendant's wife was a competent and compellable witness against her husband, not on the theory that the crime was one committed against her, but because the statute made the husband or wife of any party or of any person on whose behalf the action was brought, prosecuted or defended, except as otherwise expressly stated, competent and compellable as witnesses the same as any other witness, and that the statute made this rule applicable to criminal as well as civil actions.

72. Compton *v.* State, 13 Tex. App. 271, 44 Am. Rep. 703; Baxter *v.* State, 34 Tex. Crim. 516, 31 S. W. 394, 52 Am. St. Rep. 720.

"Should we hold that the crime charged in this action was one against the wife, it would logically follow that the rape or murder of defendant's daughter would have been a crime against her within the meaning of the statute. To hold that a wife may testify for or against her husband, without his consent, in cases of incest, would be, in effect, to establish the rule that either husband or wife may testify for or against the other, without consent, in all actions wherein either is defendant; and such was manifestly not the legislative intent." State *v.* Burt (S. D.), 94 N. W. 409.

73. People *v.* Westbrook, 94 Mich. 629, 54 N. W. 486.

See also Brock *v.* State, 44 Tex. Crim. 335, 71 S. W. 20, 100 Am. St. Rep. 859, where the defendant was on trial for the offense of rape, charged to have been committed upon his daughter, it was held that the defendant's wife was not a competent witness against him; that "offenses against the daughter are not offenses against the wife."

74. Overton *v.* State, 43 Tex. 616, where the court in construing the Texas statute said: "This provision of the code cannot in our opinion be properly given so broad an interpretation as to permit husbands and wives to testify against each other in prosecutions for offenses charged against their property."

(m.) *Perjury.* — Willful and corrupt perjury by a husband consisting of making a false affidavit in an action of divorce by him against his wife has been held to be a crime against her within the contemplation of a statute making her a competent witness against him on a criminal proceeding for a crime committed by one spouse against the other, and renders her competent to testify against him on a subsequent criminal prosecution for such perjury.[75]

(n.) *Rape Before Marriage.* — A wife may not testify to a rape committed on her by a man she has since married.[76]

(o.) *Seduction.* — Some statutes expressly provide that a wife is a competent witness to testify against her husband where he has been indicted for her seduction and he married her for the purpose of suspending the prosecution.[77]

75. Dill *v.* People, 19 Colo. 469, 36 Pac. 229, where the court said: "The perjury committed in making such affidavit was a crime against the public; but if it was not also a crime against the wife, whose name and rights were assailed, where shall we look for the private wrong or injury included in such public crime? If not the wife, then what individual was particularly affected by such crime?"

Contra. — People *v.* Carpenter, 9 Barb. (N. Y.) 580.

Compare Selden *v.* State, 74 Wis. 271, 42 N. W. 218, 17 Am. St. Rep. 144, where the defendant was on trial for perjury by swearing falsely in a certain affidavit made to procure an order of publication of summons upon his wife in an action of divorce by him against her and as a witness on the trial of such action, and the court said that it was a case where the husband was on trial for a crime which did not involve any personal violence or injury against his wife.

76. People *v.* Curiale, 137 Cal. 534, 70 Pac. 468; State *v.* Frey, 76 Minn. 526, 79 N. W. 518.

Compare State *v.* Evans, 138 Mo. 116, 39 S. W. 462, 60 Am. St. Rep. 549, where the court said: "A wife is only admitted to testify concerning criminal injuries to herself as a wife, and not to a woman who at the time of the injury was not the wife."

Under the Iowa Statute a wife is not a competent witness against her husband on a prosecution against him for a rape committed upon her previous to marriage. State *v.* McKay, 122 Iowa 658, 98 N. W. 510. The court said: "There is no doubt that the witness was defendant's wife when she was called to give testimony against him, and that she was incompetent, under the statute quoted, unless it be found that this is a criminal prosecution for a crime committed by one against the other. This exception, taken from the statute, of course, means a crime of the husband against the wife, or the wife against the husband, while they occupy that relation. There cannot be a crime of one against the other unless the relation exists. In other words, a crime committed against one who is not at the time the spouse of the other is not a crime of husband against the wife, or of wife against the husband. This is so plain that no amount of reasoning can make it any clearer. When the crime charged in this case was committed, Ida Kraft was not defendant's wife, but when she was called as a witness she was."

Under the Michigan Statute a wife is not a competent witness, without her husband's consent, for the state on a prosecution of her husband for an alleged rape committed by him on her before marriage, where the marriage was not induced by the wrong. People *v.* Schoonmaker, 117 Mich. 190, 75 N. W. 439, 72 Am. St. Rep. 560.

77. As in Georgia, Acts of 1899, p. 42, amending § 388 of the Georgia Code.

The Application of Such a Statute must be limited to cases which fall

C. Exercise and Waiver of Privilege. — a. *The Fact of Consent.* —(1.) **Failure to Object.** — Mere omission on the part of counsel in the absence of his client to object to a husband or wife taking the stand as a witness against the other does not constitute a consent.[78]

(2.) Implied Consent. — The fact that a husband or wife calls his or her spouse as a witness for himself or herself has been held to be an implied if not an actual consent within the contemplation of the statutes.[79] Consent to one spouse testifying against the other will be presumed where the latter is present in court and makes no objection.[80] But not where the spouse against whom the witness is offered is not in fact present in court.[81] Refusal of a wife to consent to the examination of her husband by the adverse party, as a witness against her, does not preclude her from subsequently calling him on her own behalf.[82]

(3.) Cross-Examination of Spouse. — Where a spouse takes the witness-stand on his or her own behalf,[83] or on behalf of the other,[84] he or she is subject to the same rules governing cross-examination as any other witness, and the fact that she is the wife of the defend-

within the description given by the title of the statute, and hence does not reach a case where at the time of the marriage between the parties the alleged seducer had not been indicted for the offense, but was merely under arrest on a warrant charging him therewith. Barnett *v.* State, 117 Ga. 298, 43 S. E. 720, where the court said: "The act contemplates that in the cases to which it shall apply there shall be an indictment for seduction, marriage for the purpose of suspending the prosecution, a suspension of the prosecution and then a resumption, under the indictment, of the prosecution for failure of the accused to comply with his obligation under the statute."

78. Hubbell *v.* Grant, 39 Mich. 641.

79. Murphy *v.* Ganey, 23 Utah 633, 66 Pac. 190.

Compare Falk *v.* Wittram, 120 Cal. 479, 52 Pac. 707, where it was held that under the California statute the deposition of the plaintiff's wife was properly excluded since the statute makes no exception to the rule, even though the other spouse be insane and hence incapable of consent.

See also Blake *v.* Graves, 18 Iowa 312; Russ *v.* Steamboat War Eagle, 14 Iowa 363.

Consent that a wife may testify cannot be more emphatically shown than by her husband causing her to be sworn as a witness and examining her. Columbia & P. S. R. Co. *v.* Hawthorne, 3 Wash. Ter. 353, 19 Pac. 25.

80. Benson *v.* Morgan, 50 Mich. 77, 14 N. W. 705. See also Moore *v.* Foote, 34 Mich. 443; Osborn *v.* Osborn, 36 Mich. 49.

81. Hubbell *v.* Grant, 39 Mich. 643.

82. Wolford *v.* Farnham, 44 Minn. 159, 46 N. W. 295.

83. In such case, the other spouse completely waives the statutory privilege that one spouse shall not be examined as witness for or against the other spouse without his or her consent; and the witness may be cross-examined concerning any matter pertinent to the issue, regardless of the extent of the direct examination. National German-American Bank of St. Paul *v.* Lawrence, 77 Minn. 282, 80 N. W. 363, where the wife, having testified as a witness in her own behalf as to certain matters material to the issues on trial, it was held that the court erred in excluding, on cross-examination, a question which was both competent and proper cross-examination.

84. In Steinburg *v.* Meany, 53 Cal. 425, it was held that the examination of a husband by his wife on

ant on trial cannot upon such cross-examination shield her from any inquiry which might properly be made of any other witness.[85] But under the rule that cross-examination must be strictly confined to the matters testified to on the direct examination, it is error to permit the cross-examination of a wife on the criminal prosecution of her husband as to matters not gone into on her direct examination.[86]

b. *Inference From Refusal to Consent.* — The mere fact that a spouse refuses to consent to the examination of the other as a witness does not raise any presumption that the testimony if given would not have been favorable to the non-consenting spouse.[87]

c. *Inference From Omission to Call Spouse.* — And it is likewise error to permit the omission, by a husband, to call his wife as a witness on his behalf concerning matters supposed to be known by her, to be urged to the jury as a circumstance proper to be taken into consideration against him by them,[88] especially where the wife if called would not be a competent witness either for or against her

her behalf is to be deemed and taken as a consent on her part to his cross-examination by the adverse party in respect to any of the issues in the action.

85. People *v.* Gosch, 82 Mich. 22, 46 N. W. 101.

86. Johnson *v.* State, 28 Tex. App. 17, 11 S. W. 667. See also Washington *v.* State, 17 Tex. App. 197, where the court said that such a cross-examination "was indirectly causing her to testify against her husband." Hoover *v.* State, 35 Tex. Crim. 342, 33 S. W. 337; Bluman *v.* State, 33 Tex. Crim. 43, 21 S. W. 1027, 26 S. W. 75.

A spouse who offers himself as a witness on behalf of the other is subject to cross-examination the same as any other witness, limited only by the rule that the cross-examination is to pertain to matters only gone into on the examination in chief. Creamer *v.* State, 34 Tex. 173.

87. National German-American Bank *v.* Lawrence, 77 Minn. 282, 79 S. W. 1016. See also Moore *v.* State (Tex. Crim.), 75 S. W. 497.

88. Knowles *v.* People, 15 Mich. 413, where the court said: "If the omission to call a wife upon the stand is to be treated as warranting the conclusion that her testimony would be adverse, then the privilege is entirely destroyed, and she will have to be called at all events. The power of declining to call such a witness is not reserved to protect from awkward disclosures, but out of respect to the better feelings of humanity, which impel all right-minded persons to shrink from any needless exposure to the ordeal of a public examination, of persons who would be unnatural and unworthy if they did not feel a very strong bias in favor of their consorts. The law, in permitting husbands and wives to tesify on behalf of each other, cannot have contemplated that any moral coercion should enable otners to force them into the witness box."

In State *v.* Hatcher, 29 Or. 309, 44 Pac. 584, it was held reversible error to permit the prosecuting attorney to argue to the jury that failure of the defendant to call as a witness on his behalf, his wife, who was present at the homicide, justified the inference that she would, if called, have testified adversely to him.

Compare French *v.* Deane, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387, an action to recover damages for enticing away the plaintiff's wife, where it was held that the defendant was entitled to an instruction that the wife could not be called as a witness without her husband's consent, and that nothing unfavorable was to be inferred against the defendant from her failure to testify.

husband.[89] There is authority, however, holding that although no legal presumption is raised by refusing to call a wife when a competent witness for her husband, such refusal is a fact proper for the consideration of the jury.[90]

2. Communications Between Husband and Wife. — A. Rule of Exclusion Stated. — a. *At Common Law.* — At common law the rule was well settled that neither husband nor wife could testify to communications or conversations occurring between them during the existence of the marriage relation,[91] and neither can testify that the other did or did not mention a certain subject.[92]

89. Graves *v.* United States, 150 U. S. 118, where the court said: "The wife was not a competent witness either in behalf of or against her husband; if he had brought her into court neither he nor the government could have put her upon the stand, and he was under no obligation to produce her for the purpose assigned by the district attorney, that the witnesses for the government could see her and identify her as the woman who was said to have been with the defendant in the Indian country before the unknown man's remains or bones were found. Permission to make this comment was equivalent to saying to the jury that it was a circumstance against the accused that he had failed to produce his wife for identification, when, knowing that she could not be a witness, he was under no obligation to do so. The jury would be likely to draw the inference that she was prevented from testifying for her husband because her evidence might be damaging. It was in fact as if the court had charged the jury that it was a circumstance against him that he had failed to produce his wife in court."

90. Com. *v.* Weber, 167 Pa. St. 153, 31 Atl. 481. See also Mercer *v.* State, 17 Tex. App. 452.

In Richardson *v.* State, 44 Tex. Crim. 211, 70 S. W. 320, where the circumstances as detailed by the witnesses showed that if the defendant was innocent his wife would have been a material witness for him, it was held permissible for the state to comment on the fact that the defendant failed to introduce her on his behalf.

Compare People *v.* Hovey, 92 N. Y. 554, *holding* that where the defendant's wife, who was an eyewitness to the prosecution in question, is excluded on objection by her husband, the jury had a right to infer that her testimony would not have been favorable to him.

91. Beveridge *v.* Minter, 1 Car. & P. 364, 11 E. C. L. 421; Owen *v.* State, 78 Ala. 425, 56 Am. Rep. 40; Goelz *v.* Goelz, 157 Ill. 33, 41 N. E. 756; Robin *v.* King, 2 Leigh (Va.) 140.

No Rule of Law Is Better Established than that which forbids disclosures by husband or wife as witnesses of matters or conversations occurring between them during coverture. Henderson *v.* Chaires, 25 Fla. 26, 6 So. 164.

In People *v.* Marble, 38 Mich. 117, where a woman was on trial for murder committed in an attack by herself and others upon her husband and others, it appeared that the husband and wife had been living apart in great hostility, and that divorce proceedings were pending; it was held that the husband could testify to the facts of the murder because they had not come to his knowledge in the confidence of the marriage relation.

92. In Goodram *v.* State, 60 Ga. 509, a prosecution for assault and battery committed upon the person of another man's wife wherein she had testified on behalf of the state to the assault, it was held that her husband was not a competent witness to throw discredit on her evidence by proving that she delayed complaining to him when the opportunity to explain existed. That "her silence is within the reason and spirit of the rule that guards confidence between husband

b. *Under the Statutes.* — And in many of the states statutes have been enacted expressly recognizing this rule.[93]

Depositions. — The rule prohibiting communications between husband and wife and protects their respective communications from disclosure by either."

93. For cases citing and applying the various statutes of this character see:

Arkansas. — Spivey *v.* Platon, 29 Ark. 603.

California. — Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303; People *v.* Mullings, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223 (Cal. Code Civ. Proc. 1881).

Illinois. — Trepp *v.* Barker, 78 Ill. 146.

Kansas. — Chicago, K. & N. R. Co. *v.* Ellis, 52 Kan. 48, 34 Pac. 352; Van Zandt *v.* Schuyler, 2 Kan. App. 118, 43 Pac. 295.

Massachusetts. — French *v.* French, 14 Gray 186; Brown *v.* Wood, 121 Mass. 137; Raynes *v.* Bennett, 114 Mass. 424.

Minnesota. — Leonard *v.* Green, 30 Minn. 496, 16 N. W. 399.

Nebraska. — Buckingham *v.* Roar, 45 Neb. 244, 63 N. W. 398.

New Jersey. — Schaab *v.* Schaab, 57 Atl. 1090.

New York. — Marsh *v.* Potter, 30 Barb. 506.

North Carolina. — State *v.* Brittain, 117 N. C. 783, 23 S. E. 433.

South Carolina. — Moseley *v.* Eakin, 15 Rich. L. 324.

Tennessee. — Washington *v.* Bedford, 10 Lea 243; Phoenix F. & M. Ins. Co. *v.* Shoemaker, 95 Tenn. 72, 31 S. W. 270.

Virginia. — Davis *v.* Com., 99 Va. 838, 38 S. E. 191.

"The statute aims to protect all those private confidences which the relation of husband and wife holds as sacred, the disclosure of which might introduce strife, malevolence, and discord into the married life, and includes every communication between them other than such as involves the title to the separate property of either when it becomes necessary to resort to litigation to obtain, secure, or protect the rights of either to such separate property. No doubt society is interested in preserving the harmony of the marriage relations, and anything which tends to disrupt those relations is to be discountenanced." Hunt *v.* Eaton, 55 Mich. 362, 21 N. W. 429.

In Westchester Fire Ins. Co. *v.* Foster, 90 Ill. 121, an action on a fire insurance policy, it was held proper to refuse to permit a wife to testify to declarations by her husband showing that he had caused the property to be burned.

In Indiana the statute provides that the rules of evidence prescribed in civil cases, including the rule excluding confidential communications, applies in criminal cases, except that the party injured by the offense committed shall be a competent witness. And in Jordan *v.* State, 142 Ind. 422, 41 N. E. 817, where a wife was prosecuted for arson consisting of burning property of which her husband was a part owner, it was held that the husband was a party injured by the offense committed within the contemplation of this exception so as to render it proper for him to testify that prior to the burning his wife had declared to him her intention to burn the mill, and that after the fire she had told him that she did burn it.

In Com. *v.* Cleary, 152 Mass. 491, 25 N. E. 834, it was held that the defendant's offer to prove by his wife that he showed her that he was opposed to her owning and having intoxicating liquors, was held properly allowed so far as it related to acts, but that so far as it related to the effect of private conversations between the two, the only legal way of proving this was by proving the substance of the words spoken, and that as the defendant was not at liberty to prove the latter he could not prove the former.

In Sanborn *v.* Gale, 162 Mass. 412, 38 N. E. 710, an action for alienating the affections of the plaintiff's wife, it was held that a written confession by the wife to her husband of her guilty relations with the defend-

band and wife from being received in evidence applies in the case of a deposition given by the wife containing such testimony.[94]

Cross-Examination of Defendant in Criminal Prosecutions. — A defendant in a criminal case who has offered himself as a witness on his own behalf, and who has not testified in chief to any communications between his wife and himself, cannot, without his consent, be examined by the state as to such communications.[95]

Strict Construction of Statutes. — The tendency of the privilege ex-

ant was not competent for the plaintiff as against the defendant; that under the Massachusetts statute the plaintiff could not be allowed to testify as to a private conversation with his wife.

In Com. *v.* Hayes, 145 Mass. 289, 14 N. E. 151, a prosecution against a married woman for keeping and maintaining a tenement used for the illegal keeping and selling of intoxicating liquors, it was held that the defendant could not testify to conversations between herself and her husband, who managed her business as her agent, in which she had given him directions relating thereto. The court said: "If the defendant could not be allowed to testify that she gave directions to her husband relating to her business for the purpose of showing that they were given, she could not be allowed to testify that she gave them for the purpose of proving that she acted in good faith in giving them."

In Fuller *v.* Fuller, 177 Mass. 184, 58 N. E. 588, a divorce suit, it was held that the plaintiff husband was improperly permitted to testify to a conversation between himself and his wife in which he asked her to return home, to which she replied that she would not come and live with his family. That the fact that the conversation accompanied and explained the act of the wife in leaving her husband, and her mental attitude in that act, was not sufficient to take the conversation out of the operation of the rule established by the Massachusetts statute.

Confessions of Guilt of Adultery by a wife to her husband cannot be shown in an action by her husband against her paramour. Sanborn *v.* Gale, 162 Mass. 412, 38 N. E. 710, 26 L. R. A. 864; Higham *v.* Vanosdol, 101 Ind. 160; nor, in an action of libel, by charging the plaintiff with unchastity, can the defendant show by the plaintiff's husband, conversations between them from which it might be inferred that there existed an unlawful intimacy between her and another man. Warner *v.* Press Pub. Company, 132 N. Y. 181, 30 N. E. 393.

In Head *v.* Thompson, 77 Iowa 263, 42 Pac. 188, an action to foreclose a mortgage wherein the controversy was as to whether or not a deed from the defendants, husband and wife, had been given in satisfaction of the mortgage debt, it was held that testimony of the defendant wife as to what passed between herself and her husband before executing the deed violated the rule against confidential communications between husband and wife.

In Dye *v.* Davis, 65 Ind. 474, where it was claimed that a husband had forfeited his interest in his wife's estate by reason of his having abandoned her, it was held that whether or not he had in fact abandoned her could not be proved by his testimony as to conversations between them.

In State *v.* Halbert, 14 Wash. 306, 44 Pac. 538, a prosecution of the defendant for rape committed upon his daughter, it was held error to permit the defendant's wife to state what was said in a conversation between herself and her mother in the absence of the defendant on the morning following the alleged offense with reference to what he did and said during the previous night.

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

95. People *v.* Mullings, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223.

tending to communications between husband and wife being to prevent the full disclosure of the truth, it is accordingly held that a statute declaring the privilege is to be strictly construed.[96]

c. *Basis of Rule.* — The basis of this rule excluding communications or conversations between husband and wife during coverture is public policy and is wholly independent of any question of interest or identity.[97] And this same public policy is very generally recognized by the statutes.[98]

d. *Effect of Dissolution of Marriage Relation.* — (1.) **Death.** Both at common law and under the various statutes, this disability of husband and wife continues, as to such communications and conversations, even after the marital relation has been dissolved[99] by

96. Lloyd *v.* Pennie, 50 Fed. 4. See also Satterlee *v.* Bliss, 36 Cal. 508; Gower *v.* Emery, 18 Me. 82. *Compare* Com. *v.* Sapp, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405, where the court said: "The word 'communication,' therefore, as used in our statute, should be given a liberal construction. It should not be confined to a mere statement by the husband to the wife or *vice versa;* but should be construed to embrace all knowledge upon the part of the one or the other obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known to the party."

Any knowledge acquired by the wife on account of the trust confided to her by her husband, of any fact whatever, should be excluded; whether the husband told it to her out of his mouth or showed it to her in a letter, or pointed it out with his hand, or locked it up and gave her alone access to it by intrusting her with the key. Stanford *v.* Murphy, 63 Ga. 410.

97. People *v.* Mullings, 83 Cal. 138, 38 Pac. 229, 17 Am. St. Rep. 223; Rivers *v.* State, 118 Ga. 42, 44 S. E. 859; Goelz *v.* Goelz, 157 Ill. 33, 41 N. E. 756.

Statement of Rule. — Any confidential communication from husband to wife may not be divulged in any court, for the reason that the fact communicated was disclosed in the privacy of the marital relation and the peace of the household might be disturbed if it were divulged. Stanford *v.* Murphy, 63 Ga. 410, where it was held that the wife could not testify in respect to papers consigned to her care by her husband and kept exclusively by her under her own lock and key.

"**The Relation of Husband and Wife Is Confidential,** from unity of interest, and sometimes unity of person, as in case of a joint estate to them. The law requires and extorts this confidence, and it will protect it. Communications between them cannot be exposed to public view. The interest of the home, the parties, the children, and especially the peace and order of society, forbid it." State *v.* Brittain, 117 N. C. 783, 23 S. E. 433.

98. As for example, the Illinois statute expressly provides that nothing therein contained "shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits of causes between such husband and wife." Munford *v.* Miller, 7 Ill. App. 62. See also Maynard *v.* Vinton, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276.

99. *United States.* — Stein *v.* Bowman, 13 Pet. 209; Brooks *v.* Francis, 3 McArthur 109.

California. — Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303.

Delaware. — Gray *v.* Cole, 5 Har. 418.

death. Indeed, the fact of death is said rather to increase than lessen the force of the rule.[1]

(2.) Divorce. — Nor does dissolution of the marriage relation by divorce remove the privilege.[2] The reason for this rule of exclu-

Georgia. — McIntyre *v.* Meldrun, 40 Ga. 490; Jackson *v.* Jackson, 40 Ga. 150; Luigo *v.* State, 29 Ga. 470.

Illinois. — Goelz *v.* Goelz, 157 Ill. 33, 41 N. E. 756; Reeves *v.* Herr, 59 Ill. 81.

Indiana. — Stanley *v.* Montgomery, 102 Ind. 102, 26 N. E. 213; Noble *v.* Nithers, 36 Ind. 193.

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

Maine. — Walker *v.* Sanborn, 46 Me. 470.

Michigan. — Maynard *v.* Vinton, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276.

Missouri. — Spradling *v.* Conway, 51 Mo. 51; Herndon *v.* Triple Alliance, 45 Mo. App. 426.

Nebraska. — Buckingham *v.* Roar, 45 Neb. 244, 63 N. W. 398.

New York. — Keator *v.* Dimmick, 46 Barb. 158; Babcock *v.* Booth, 2 Hill 181, 38 Am. Dec. 578.

Pennsylvania. — Appeal of Robb, 98 Pa. St. 501.

Tennessee. — German *v.* German, 7 Cold. 180; Pillow *v.* Thomas, 1 Baxt. 120; Patton *v.* Wilson, 2 Lea 101.

Texas. — Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705.

Vermont. — Smith *v.* Potter, 27 Vt. 304, 65 Am. Dec. 198; Williams *v.* Baldwin, 7 Vt. 503.

Virginia. — Robin *v.* King, 2 Leigh 140; Marks *v.* Spencer, 81 Va. 751; Davis *v.* Com., 99 Va. 838, 38 S. E. 191.

Compare State *v.* Ryan, 30 La. Ann. 1176.

"This is necessary to the preservation of that perfect confidence and trust which should characterize and bless the relation of man and wife. Each must feel that the other is a safe and sacred depository of all secrets. And the protection which the law holds over the dead is the very source of greatest security to all the living." Luigo *v.* State, 29 Ga. 470. See also Maynard *v.* Vinton, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276, where the court, in speaking of death as not removing the privilege, said that, "If it could the policy of the law would be defeated. After the husband or wife has gone to the grave the survivor cannot be permitted to blacken the good name and bring disgrace upon the memory of the departed by dragging to life communications made in the confidence of marital relations, and to protect which the statute was enacted."

In Farmers Bank *v.* Cole, 5 Har. (Del.) 418, where the issue was as to the liability of the husband for rent, and it was attempted to prove by the widow that up to the time of his death he had occupied the premises in question, under an agreement to pay rent, as she had been informed by him, the court said: "Though the husband, if alive, might charge himself by his own admission in evidence by himself, or proved by another, policy protects him from such proof of the wife. If the witness had any knowledge of the relation of landlord and tenant, derived from any other source than the husband, she may prove it; but she will not be allowed to disclose the communication of her husband to her."

Compare Stuhlmuller *v.* Ewing, 39 Miss. 447, where it was held that the widow is a competent witness on behalf of the estate of her deceased husband, to prove a conversation between her husband in his lifetime and the opposing party in relation to the subject-matter of the suit.

1. Stein *v.* Bowman, 13 Pet. (U. S.) 209.

2. *California.* — People *v.* Mullings, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223.

Illinois. — Crose *v.* Rutledge, 81 Ill. 266.

Indiana. — Perry *v.* Randall, 83 Ind. 143.

sion does not apply to facts known to a surviving husband or wife independent of the previous existence of the marriage.[3]

B. APPLICATION OF THE RULE. — a. *Actions Between Spouses.* **(1.) Generally.** — Sometimes the statute confines the operation of this rule of exclusion to cases other than actions between husband and wife, expressly excepting actions between husband and wife.[4]

Kansas. — Anderson *v.* Anderson, 9 Kan. 112.

Kentucky. — Elswick *v.* Com., 13 Bush 155.

Massachusetts. — Dickerman *v.* Graves, 6 Cush. 308, 53 Am. Dec. 41.

Michigan: — Hitchcock *v.* Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474.

Missouri. — Schnabel *v.* Schnabel, 12 Mo. App. 587.

Pennsylvania. — Brock *v.* Brock, 116 Pa. St. 109, 9 Atl. 486.

In Criminal Cases the subsequent dissolution of the marriage relation by decree of divorce does not affect the rule excluding confidential communications between husband and wife. Owen *v.* State, 78 Ala. 425, 56 Am. Rep. 40, where it was held error to permit the defendant's wife to detail facts as to the conduct of the defendant on the night of the alleged offense and afterward, or during the time they were living together as husband and wife, some of which would not likely have come to her knowledge had it not been for the relationship of husband and wife. See also State *v.* Jolly, 20 N. C. 110, 32 Am. Dec. 656, where it was held that the husband, although divorced from his wife, was incompetent to prove criminal conduct on the wife's part. *Compare* Long *v.* State, 86 Ala. 36, 5 So. 443, a criminal prosecution, where the defendant's divorced wife was called to testify to matters which had occurred after the divorce. The court said: "The wife is not a competent witness in criminal cases, for or against the husband; and after death or divorce is incompetent to testify to any facts, information of which was obtained in the confidence and secrecy of the marital relation. But she is competent to testify to any matters which transpired subsequently to the divorce."

In State *v.* Raby, 121 N. C. 682, 28 S. E. 490, a prosecution of a man and woman for adultery, it was held that the divorced husband of the female defendant was not competent to testify to any act showing or tending to establish her adultery occurring during the time of their marriage.

In *Ex parte* Fatheree, 34 Tex. Crim. 594, 31 S. W. 403, where the defendant was charged with the murder of his daughter, it was held that statements made by the deceased to her mother, who had been divorced from him, were admissible, and that she might properly testify to such statements.

3. Elswick *v.* Com., 13 Bush (Ky.) 155. See also Dickerman *v.* Groves, 6 Cush. (Mass.) 308, *holding* that in an action by a husband for criminal conversation with a wife from whom he had subsequently been divorced, she was a competent witness to prove the charge laid in the husband's declaration.

A divorced wife is not a competent witness to prove a fact which must have come to her knowledge from its very nature during the existence of the marriage relation; although as to facts occurring after the divorce in which her former husband did not participate and which affected her and the party calling her only, she is a competent witness. "The reason of the rule for her exclusion has no application to such a state of case." Crose *v.* Rutledge, 81 Ill. 266.

4. As for example in Illinois a statute passed in 1874 (Goelz *v.* Goelz, 157 Ill. 33, 41 N. E. 756) where this statutory rule of exclusion was held to apply in an action by a husband to set aside a conveyance of land made to his wife during her lifetime, on the ground that the consideration therefor was furnished

(2.) **Divorce Suits.** — And it is held that a statute expressly making either party to a divorce suit a competent witness does not modify or repeal a statute re-enacting the common-law rule of exclusion.[5]

b. *Distinction Between Confidential and Non-Confidential Communications.* — (1.) **Generally.** — At common law there was formerly some question whether or not the privilege extended to communications between husband and wife which in their nature did not seem to be confidential, but the general rule was finally adopted that the privilege extended to all communications between husband and wife, although on subjects not confidential in their nature.[6]

Under the Statutes the cases are in conflict, not perhaps so much due to variety of opinion as to the wording of the statutes themselves. On the one hand some of the courts hold that the privilege extends to all communications,[7] except perhaps those which from

with funds belonging to him, which had been subsequently conveyed by her to her son who was the defendant in that action.

5. Castello *v.* Castello, 41 Ga. 613; Ayer *v.* Ayer, 28 Mo. App. 97; Miller *v.* Miller, 13 Mo. App. 591; Miller *v.* Miller, 14 Mo. App. 418. See also Vogel *v.* Vogel, 13 Mo. App. 588; Seitz *v.* Seitz, 170 Pa. St. 71, 32 Atl. 578; Briggs *v.* Briggs (R. I.), 26 Atl. 198. *Compare* Fowler *v.* Fowler, 33 N. Y. St. 746, 11 N. Y. Supp. 419.

6. O'Connor *v.* Marjoribanks, 4 Man. & G. (Eng.) 435; Dexter *v.* Booth, 2 Allen (Mass.) 559.

7. Newstrom *v.* St. Paul & D. R. Co., 61 Minn. 78, 63 N. W. 253, an action to recover damages for the wrongful death of the plaintiff's husband, wherein it was held proper to exclude testimony by the plaintiff as to statements made by the deceased in his lifetime concerning the bad or dangerous character of the place where he was killed. See also Leppla *v.* Minnesota Tribune Co., 35 Minn. 310, 29 N. W. 127, where the court said: "The word communication is used without qualification and in such limitation as that suggested [that the rule applied only to confidential communications] would be extremely difficult of application. It would introduce a separate issue in each case as to whether or not the communication was of a confidential character. To enable the court to judge as to its character the communication would have to be disclosed, and so the very mischief committed which was designed to be prevented. . . . By using the word communication without qualification or limitation in our statute we think it was the intention to adopt this rule." Campbell *v.* Chace, 12 R. I. 333, where the court said: "The word 'communication' is used broadly without qualification. The question is, whether it shall be qualified by construction, or whether the policy of the law does not demand for it the broadest interpretation."

The rule of exclusion is not confined to subjects which are confidential in their nature, but applies whenever a spouse is called upon to disclose any matter which came to his or her knowledge in consequence of the marriage relation. Reeves *v.* Herr, 59 Ill. 81, where the matter sought to be proved by the wife was a conversation between her husband and a third person, in her presence, and the court said: "The conversation in question, though not between the witness and her husband, but between him and the defendant, yet, as it occurred between them in the presence and hearing of the wife, we must regard that she came to the knowledge of it by means of her situation as wife, that she could not properly be admitted to testify concerning it against the representative of her husband, nor should she be admitted to testify in his favor."

their very nature were evidently intended to be communicated to others.[8] On the other hand other courts hold that the privilege is limited to communications which are confidential in their nature,[9] and that it does not extend to non-confidential communications;[10]

The California Statute on the subject of privileged communications between husband and wife is little more than a declaration of the common-law rule upon the subject, except that it sweeps away that embarrassing distinction by extending the privilege to "*any* communication made by one to the other during the marriage." People *v.* Mullings, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223, a prosecution for murder where the defendant's testimony consisted simply of answering the question whether or not he had killed the deceased, and it was held error to permit the prosecution on cross-examination to testify to conversations occurring between himself and wife, who was at the time of the trial divorced from him.

The Massachusetts Statute prohibiting husband or wife from testifying as to private conversations with each other is not confined to conversations upon subjects which are confidential in their nature, but it includes conversations between them relating to business done by one as agent of the other. Com. *v.* Hayes, 145 Mass. 289, 14 N. E. 151. *Compare* Com. *v.* Caponi, 155 Mass. 534, 30 N. E. 82, a prosecution for polygamy, where it was held that letters by the defendant to his second wife were competent against him; that it is "private conversations between husband and wife which the statute excludes, and not written communications."

Compare Waddle *v.* McWilliams, 21 Mo. App. 298, where the Missouri statute was construed to exclude what was said by another in conversation with the husband as well as to exclude what was done by that other in connection with the conversation, which might be explained by the conversation. See also Holman *v.* Bachus, 73 Mo. 49.

8. See *infra*, this section, as to conversations involving expected disclosure.

9. *In re* Van Alstine's Estate, 26 Utah 193, 72 Pac. 942. See also Hoyt *v.* Davis, 21 Mo. App. 235.

10. *Alabama.* — Liles *v.* State, 30 Ala. 24, 68 Am. Dec. 108; Gordon *v.* Tweedy, 71 Ala. 202. See also Chapman *v.* Holding, 60 Ala. 522.

Indiana. — Haugh *v.* Blythe, 20 Ind. 24.

Iowa. — State *v.* Middleham, 62 Iowa 150, 17 N. W. 446; Roumans *v.* Hay, 12 Iowa 270.

Kentucky. — Elswick *v.* Com., 13 Bush 155.

Mississippi. — Stuhlmuller *v.* Ewing, 39 Miss. 447.

North Carolina. — Norris *v.* Stewart, 105 N. C. 455, 10 S. E. 912, 18 Am. St. Rep. 917.

West Virginia. — Pickens *v.* Knisely, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622.

Wisconsin. — Crook *v.* Henry, 25 Wis. 569.

In Parkhurst *v.* Berdell, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. Rep. 384, an action by a widow to compel an accounting for moneys and securities which the defendant had appropriated to his own use, it was held that the testimony of the defendant's wife as to private conversations with him concerning the plaintiff's securities taken by him, his obligation to her therefor, and his promise to secure her were not confidential communications prohibited by the New York statute. The court said: "What are confidential communications within the meaning of the statute? Clearly not all communications made between husband and wife when alone. If such had been the meaning it would have been so provided in general and simple terms. They are such communications as are expressly made confidential or such as are of a confidential nature or induced by the marital relation. The conversations with her husband testified to by Mrs. Berdell cannot be excluded by the application of any of these tests.

nor to information imparted by acts or acquired by observation,[11]

They were ordinary conversations relating to matters of business which there is no reason to suppose he would have been unwilling to hold in the presence of any person."

In Rudd *v.* Rounds, 64 Vt. 432, 25 Atl. 438, an action for alienating the affections of the plaintiff's wife, it was held that testimony that the plaintiff had invited his wife to go to a certain place with him, that she declined and afterward went with the defendant, did not involve a matter of marital confidence. "Such invitations between husband and wife usually are given and declined publicly. They are not usually secret, but are open communications. They neither require nor are inspired by marital confidence."

Conversations between a husband and wife as to his appointment as her agent and in regard to transactions conducted by him as such agent, are not confidential communications within the meaning of the Indiana statute. Schmied *v.* Frank, 86 Ind. 250.

11. Spivey *v.* Platon, 29 Ark. 603.

In re Van Alstine's Estate, 26 Utah 193, 72 Pac. 942, a proceeding to probate the will of a decedent wherein it was held that the testimony of the divorced wife of the decedent as to his mental condition during their marriage relation when he was under the influence of liquor did not fall within the rule excluding confidential communications. The court said: "Knowledge of the deceased husband's habits and mental condition was obtained by his wife by observation, and not from anything communicated to her in confidence by her husband."

In Stanley *v.* Stanley, 112 Ind. 143, 13 N. E. 261, the wife of a deceased husband, as a witness, after referring to an occasion when he visited her, was asked as to his condition, to which she testified that he was intoxicated, and it was held that his condition in this respect, unless it appeared to have been specially confided to her in the absence of others, was not to be regarded as in the nature of a confidential communication.

In Giddings *v.* Iowa State Sav. Bank, 104 Iowa 676, 74 N. W. 21, it was held that the testimony of a wife as to threats made by the officers of a bank against her husband which he had communicated to her, did not contravene the Iowa statute forbidding husband and wife from divulging confidential communications.

In Walker *v.* Sanborn, 46 Me. 470, an action by an executor, the widow of the plaintiff's intestate was called to testify to an agreement made in her presence between her husband and the defendant, and it was held that as the facts as to which she was called to testify did not come to her knowledge through any communication from her husband, but by her happening to be present at the time, her testimony was competent.

In Sage *v.* State, 127 Ind. 15, 26 N. E. 667, it was held that permitting the state to prove as a fact that the defendant and his wife were in a room by themselves after his arrest for the crime charged did not violate the rule protecting communications between husband and wife.

In Polson *v.* State, 137 Ind. 519, 35 N. E. 907, it was held that permitting the defendant's wife to testify that he had communicated to her a loathsome disease was not a breach of the rule against confidential communications. "Such conduct on his part was a gross breach of his duty as a husband, and he could not, therefore, shield himself from exposure in a court of justice, where such fact became material evidence in a cause, on the ground that it was a confidential communication."

A divorced husband is a competent witness against his wife as to such facts as came to his knowledge during their marriage by means equally accessible to other persons, and not disclosed to him in conversation with her. Bigelow *v.* Sickles, 75 Wis. 427, 44 N. W. 761.

as for example, whether or not a spouse exhibited signs of insanity,[12] the physical condition of a spouse at a particular time,[13] the manner in which one spouse conducted himself or herself toward the other, and the like.[14]

(2.) Acts or Conduct as Constituting Communication. — The communication need not necessarily be expressed in words, but may consist of acts or conduct.[15]

(3.) Conversations in Regard to Business Transactions. — So, also, it is held that the privilege does not extend to conversations between

12. United States *v.* Guiteau, 1 Mack. (U. S.) 498. *Compare* Brewer *v.* Ferguson, 11 Humph. (Tenn.) 565.

13. In an action for personal injuries, the admission of testimony of the plaintiff's wife as to his physical condition after the injuries and his expressions of pain and suffering does not involve any violation of marital confidence. Stack *v.* Portsmouth, 52 N. H. 221.

14. In Yowell *v.* Vaughn, 85 Mo. App. 206, where the defendant was charged with having alienated the affections of the plaintiff's wife and persuading her to sue for and obtain a divorce, it was held that the divorced wife was properly permitted to testify as to her husband's conduct toward her during the time she had lived with him; that "to strike or abuse his wife or use violence toward her person has never yet been held to be confidential communications."

In Smith *v.* Smith, 77 Ind. 80, a divorce suit, it was held proper to permit the plaintiff to testify in relation to her conduct as the wife of the defendant and to his habits of intoxication, and his abusive treatment of her.

In Rose *v.* Mitchell, 21 R. I. 270, 43 Atl. 67, an action for alienating the affections of the plaintiff's wife, it was held that the exclusion of testimony of the plaintiff's wife of language used by him to her, tending to show unkind treatment, was proper under R. I. Gen. Laws, c. 244, § 37.

In Wright *v.* Wright, 114 Iowa 748, 87 N. W. 709, 55 L. R. A. 261, an action by a wife against her husband's father for support under a contract providing therefor in case of non-support by the husband, it was held that testimony by the wife as to the manner in which her husband treated her from the time of their marriage to the time of the alleged abandonment, and in which she related certain declarations and conversations between them, did not fall within the terms of the Iowa statute providing that, "neither husband nor wife can be examined in any case as to any communications made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communications made while the marriage relation subsisted."

15. Perry *v.* Randall, 83 Ind. 143, an action to recover money belonging to plaintiff which was alleged to have been found by the defendant, wherein it was held that the defendant's acts in relation to the plaintiff's lost money, done in the presence of his wife during the marriage and in response to her questions or suggestions, were confidential communications to her by her husband, the defendant, within the meaning of the rule, although no spoken words were testified to by her. The court said: "Their interview was private and confidential; and the acts of the appellant in the presence of his wife in relation to appellee's lost money were such a communication by him to her that she was not a competent witness under the statute to testify in regard to his actions without his consent." See also *infra* this section as to information imparted by acts or obtained by observation.

husband and wife in regard to business transactions;[16] as for example, communications concerning contracts between husband and wife in relation to the separate property of either, the title to which is in litigation,[17] or within the scope of an agency existing between husband and wife, are not privileged.[18] Sometimes by express statutory provision husband or wife were allowed to testify as to

16. Sackman *v.* Thomas, 24 Wash. 660, 64 Pac. 819, where it was held that the testimony of a married woman that the property in controversy had been purchased in part with money given to her by her husband, was not privileged. See also Spittz's Appeal, 56 Conn. 184, 14 Atl. 776; Rea *v.* Jaffray, 82 Iowa 231, 48 N. W. 78, a contest over the validity of a claim by a wife against her husband's insolvent estate for borrowed money, wherein it was held that conversations between her and her husband tending to show the contracts under which the claimed indebtedness existed, were competent. Schaffner *v.* Reuter, 37 Barb. (N. Y.) 44.

The admission in evidence of a letter from a husband to his wife instructing her to purchase certain lands for him and in his name, he furnishing the purchase price, does not violate the rule against the disclosure of confidential communications between husband and wife. Darrier *v.* Darrier, 58 Mo. 222.

"A communication made by a husband to his wife respecting trust property which it is their joint duty to carefully preserve and surrender to the lawful owner when lawfully entitled to it, is not confidential within the meaning of the statute relieving husband and wife from obligation to disclose any confidential communication made by one to the other during coverture." Wood *v.* Chetwood, 27 N. J. Eq. 311.

17. Hunt *v.* Eaton, 55 Mich. 362, 21 N. W. 429, so holding, providing the parties to the record are within the excepted cases mentioned in the Michigan statute. See also Peiffer *v.* Lytle, 58 Pa. St. 386, where a father had advanced money to pay for land purchased by his daughter, but conveyed to her husband, and it was held that evidence as to a verbal promise by the husband to his wife to secure the advancement and its proceeds and subsequent sums received by him of his wife's property was a simple statement of facts and did not involve a breach of marital confidence.

In Seabrook *v.* Brady, 47 Ga. 650, an action by an administrator *de bonus non* to recover property of his intestate sold by his predecessor as his own upon which there was a charge in favor of the latter's wife, which the defendants claimed she had relinquished, it was held that the wife was a competent witness, notwithstanding the death of her husband, to testify as to acts and declarations of her husband at the time the deed was signed; that there was no privileged communication revealed which the law prohibits.

In *In re* Buckman's Will, 64 Vt. 313, 24 Atl. 252, 33 Am. St. Rep. 930, it was held that testimony of a husband, who was contesting his wife's will, concerning an agreement or understanding between them relative to her respective interests in certain real estate devised by her will to other persons was proper because "that was not a matter in which she treated with him in marital confidence when they were alone, but was purely a business transaction had and done between them in the presence of witnesses evidently called as such, which precludes the idea of marital confidence."

18. Robison *v.* Robison, 44 Ala. 227; Taylor *v.* Duesterberg, 109 Ind. 165, 9 N. E. 907; Schmidt *v.* Frank, 86 Ind. 250; Curry *v.* Stephens, 84 Mo. 442; Chaunot *v.* Larson, 43 Wis. 536, 28 Am. Rep. 567. See also Southwick *v.* Southwick, 49 N. Y. 510.

conversations between them relating to business done as agent for the other.[19]

(4.) Negotiations for Conveyance Between Husband and Wife. — Negotiations between a husband and wife which resulted in the conveyance of land from him to her are not confidential communications between them so as to be inadmissible on a subsequent contest between them and the husband's creditors as to the validity of the transfer.[20]

(5.) Transfers. — The transfer of a claim from one spouse to the other is not a communication within the rule excluding confidential communications between husband and wife.[21]

(6.) Delivery of Deed. — The delivery of a deed from one spouse to the other is not a privileged communication.[22]

(7.) Genuineness of Handwriting. — Testimony of a husband that certain letters were in his wife's handwriting is not testimony as to a communication, but as to a fact.[23]

c. *Communications in Perpetration of Fraud.* — Communications between husband and wife while they are engaged in perpetrating a fraud are not privileged.[24]

19. As for example under the Massachusetts statute. Com. *v.* Hayes, 145 Mass. 289, 14 N. E. 151. See also *infra,* this article, where the distinction between confidential and non-confidential communications is discussed.

20. Beitman *v.* Hopkins, 109 Ind. 177, 9 N. E. 720.

21. Hanks *v.* Van Gardner, 59 Iowa 179, 13 N. W. 103.

22. Poulson *v.* Stanley, 122 Cal. 655, 55 Pac. 605, 68 Am. St. Rep. 73; Hutchinson *v.* Hutchinson, 16 Colo. 349, 26 Pac. 814.

In Carpenter *v.* Dane, 10 Ind. 125, an action of the heirs of the obligee to enforce performance of a bond to convey land, the original of which had been destroyed and a new one executed in its place to the widow and heirs, and it was alleged that the obligor had fraudulently procured the destruction of the original bond and substituted the new one, different in its terms. The widow had released her interest to the heirs and it was held that her testimony as to the execution, delivery, destruction and contents of the lost bond did not come within the rule excluding privileged communications.

23. Holtz *v.* Dick, 42 Ohio St. 23, 51 Am. Rep. 791.

See also Benson *v.* United States, 146 U. S. 325, where the wife was held to have been properly permitted to testify for the government as to certain letters that they were in the handwriting of her husband and had been received by her through the mails; that her testimony was in reference to a subordinate matter — merely the identification of certain papers.

24. Beitman *v.* Hopkins, 109 Ind. 177, 9 N. E. 720.

Where a husband is made the conduit and mouthpiece of the fraud of others, and in furtherance of that fraud prevails upon his wife to sign a note and incumber her property, a court of equity, in the absence of other evidence, in order to unearth that fraud and expose it in all its details will, from the necessity of the case and upon a familiar common-law principle respecting evidence of fraud, permit both husband and wife to testify as to the conversations had between them in regard to the transaction. Moeckel *v.* Heim, 134 Mo. 576, 36 S. W. 226. See also Henry *v.* Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580, an action by a husband and wife to restrain the defendants from selling under a deed of trust the property of the wife on the ground that the transaction was induced by fraud;

d. *Conversations Before Marriage.* — A husband is a competent witness to testify to transactions and conversations occurring before marriage.[25]

e. *Conversations in Presence or Hearing of Third Person.* — Conversations between husband and wife, or admissions by one to the other, in the presence of a third person, are not privileged, and can be testified to by hearer.[26] And it has been held that a conversation between husband and wife might be testified to by a concealed listener who overheard it.[27] It is held, however, that a wife is not

where it was held that the husband and wife were properly permitted to testify in relation to conversations between them as to the transaction, on the ground that such conversations were part of the *res gestae,* and also on the ground of fraud; Hach *v.* Rollins, 158 Mo. 182, 59 S. W. 232, where it was held that a wife was not an incompetent witness by reason of her coverture to testify as to fraud perpetrated by her husband upon her in the transfer by him of property promised by him to be given to her.

Compare Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303, where on an issue as to the fraudulent character *vel non* of a conveyance by husband to wife, it is held that the wife could not be examined as a witness as to what her husband told her at the time of the conveyance as to his purpose in making it.

25. Mueller *v.* Ribhan, 94 Ill. 419; Otis *v.* Spencer, 102 Ill. 622, 40 Am. Rep. 617.

Testimony of a husband on the prosecution of a man for fornication and adultery with the wife of the former to facts which occurred before their marriage, does not come within the rule excluding communications between husband and wife. State *v.* Wiseman, 130 N. C. 726, 41 S. E. 884.

In Collins *v.* Mack, 31 Ark. 684, an action to recover damages for breach of marriage promise, it was held error to permit the husband of the plaintiff to testify as to matters that occurred previous to his marriage with her.

26. Gannon *v.* People, 127 Ill. 507, 21 N. E. 525; Fay *v.* Guynon, 131 Mass. 31; Allison *v.* Barrow, Coldw. (Tenn.) 414, 91 Am. Dec. 291; State *v.* Gray, 55 Kan. 135, 39 Pac. 1050, where the court said: "The law merely seals their mouths as to communications that have passed between them. Whatever is said in the presence and hearing of third persons has none of the characteristics or attributes of a confidential communication. There is no secrecy about it. It is then published to the witnesses, who are in no sense parties to the conjugal relation." See also Phoenix F. & M. Ins. Co. *v.* Shoemaker, 95 Tenn. 72, 31 S. W. 270. *Compare* Jacobs *v.* Hesler, 113 Mass. 157, where it was held that a conversation between husband and wife had in the presence of no other persons except their family of young children, who are not shown to have taken any part in or paid any attention to the conversation, must therefore be deemed incompetent evidence, as a private conversation between husband and wife. Campbell *v.* Chace, 12 R. I. 333.

On an issue as to whether or not the deed of a married woman, absolute on its face, was intended as a mortgage, her husband is a competent witness to testify as to what took place between her and the grantee under the deed at the time of its execution. Brickle *v.* Leach, 55 S. C. 510, 33 S. E. 720.

In Freeman *v.* Freeman, 62 Ill. 189, an action against a personal representative, it was held that the husband of an heir and distributee, as well as such heir and distributee herself, was a competent witness for the defendant to prove certain conversations and transactions between the plaintiff and the decedent material to the issue.

27. Rex *v.* Simons, 6 Car. & P. 540, 25 E. C. L. 565; Lyon *v.* Prouty,

a competent witness to prove what was said in a conversation by another person with her husband, nor to prove any act done in connection with such conversation and which might be explained thereby.[28]

f. *Conversation Involving Expectation of Disclosure.* — A communication made between husband and wife under circumstances which involve an expectation that they will be disclosed are not confidential.[29]

g. *Letters.* — **(1.) Generally.** — The general rule is that letters between husband and wife are not to be received against the other.[30] This privilege, however, can be invoked only while the communication remains within their custody and control, or while it remains within the custody and control of their agents or representatives, and just so far as it remains within the custody and control of themselves or their agents or representatives;[31] and accordingly it

154 Mass. 488, 28 N. E. 908; Com. *v.* Griffin, 110 Mass. 181; People *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830; Wheeler *v.* Campbell, 68 Vt. 98, 34 Atl. 35; State *v.* Centre, 35 Vt. 378; Knight *v.* State, 114 Ga. 48, 39 S. E. 928, where the court said: "If they are unsuccessful in keeping secret that which they intended each other shall so regard, the mere fact that they did so intend will not render incompetent the testimony of an outsider." See also Wilkerson *v.* State, 91 Ga. 729, 17 S. E. 990, 44 Am. St. Rep. 63; Nolen *v.* Harden, 43 Ark. 307, 51 Am. Rep. 563. *Compare* Westerman *v.* Westerman, 25 Ohio St. 500; Sessions *v.* Trevitt, 39 Ohio St. 259.

28. McFadin *v.* Catron, 120 Mo. 252, 25 S. W. 506.

29. Hagerman *v.* Wigent, 108 Mich. 192, 65 N. W. 756, where it was held proper to permit a husband to testify that his deceased wife had intrusted him with the custody of property to be delivered to certain persons after her death. See also Wells *v.* Tucker, 3 Binn. (Pa.) 366; Caldwell *v.* Stuart, 2 Bail. (S. C.) 574; Gaskill *v.* King, 34 N. C. 211.

30. State *v.* Ulrich, 110 Mo. 350, 19 S. W. 656. See also Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705; Brown *v.* Brown, 53 Mo. App. 453, where the court said: "We see no reason why a communication which a husband or wife cannot testify to should not apply as forcibly to a letter as to a conversation. There can be no reason for distinguishing between what is spoken by the tongue and written by the hand. Either is a communication, as that term is understood in the law on this subject, and the law should prevent the uncovering of either. Husband and wife should be as free to write to each other as they are to talk together. No motive of policy can apply to the one mode of communication that is not equally applicable to the other."

A letter written in the presence of her husband by the wife to her alleged paramour during an altercation with her husband as to the alleged intimacy existing, but which was never received by such paramour, and which the husband secured possession of, is as essentially a confidential communication between husband and wife, until disclosed by one or the other, as though the same words had been uttered by her in his presence, and cannot be received in evidence on behalf of the husband in a subsequent action of criminal conversation by him against such alleged paramour. Smith *v.* Merrill, 75 Wis. 461, 44 N. W. 759.

31. State *v.* Buffington, 20 Kan. 599, 27 Am. Rep. 193; Lloyd *v.* Pennie, 50 Fed. 4.

Compare Wilkerson *v.* State, 91 Ga. 729, 17 S. E. 990, 44 Am. St.

is held that communications between husband and wife are not privileged in the hands of third persons,[32] provided, however, the circumstances under which they came into the hands of such third persons were not in effect a violation of marital confidence.[33]

(2.) Envelopes and Addresses. — And it has been held that in the case of written communications between husband and wife, the

Rep. 63, where it was held that under the Georgia code, which declares that from public policy, communications between husband and wife are excluded as evidence, a letter written by the husband to the wife and received by her, which indicates the state of his feelings toward a third person and toward herself in relation to that person, is not admissible in evidence in behalf of such third person on his trial for the homicide of the husband, although the wife voluntarily parted with the possession of a letter by turning it over to the accused before the homicide and the latter has had possession and control of it ever since.

32. People *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830. See also State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89; State *v.* Buffington, 20 Kan. 599, 27 Am. Rep. 193; Lloyd *v.* Pennie, 50 Fed. 4, where letters from a husband to his wife in the custody of her administrator, both husband and wife being dead, were held not to be privileged, especially in view of the language of the California statute declaring the privilege.

In State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89, a prosecution for murder, the defendant did not call his wife as a witness, and she was not a witness on the trial. The state offered sundry letters written by him to her, which the state claimed contained admissions inconsistent with the claims of the defendant as to his unconsciousness at the time of the homicide and as to his unsoundness of mind. To the introduction of any of these letters the defendant objected on the ground that all the letters were confidential communications between husband and wife, and as such, she not being a witness in the case, could not be used in evidence against the husband. It is not shown how the state obtained the letters, or any of them, or that they had ever been in the possession of the wife; but the court overruled the objection and admitted all the letters in evidence. In sustaining the action of the trial judge, the court said: "In this ruling the court violated no rule of evidence. The question was not whether the husband or wife could have been compelled to produce this evidence, but whether, when the letters fell into the hands of a third person, the sacred shield of privilege went with them. We think not. 1 Greenl. Ev., § 254*a*. The fact that the communications in this case were written places them on no higher ground than if they were merely oral. And as to the latter, it is well settled that conversations between husband and wife are not privileged so as to prevent a third person who overheard them from testifying."

In Bowman *v.* Patrick, 32 Fed. 368, a motion was made to suppress certain exhibits consisting of letters written by one of the defendants to his wife, on the ground that they were privileged. The wife had died pending proceedings for a divorce, and one who professed to be her personal representative obtained possession of these letters, and without any requirement of his office, but in a mere spirit of hostility to the husband, delivered them to the opposite side, not as a party to the action, but as a mere volunteer in the production of the letters, and it was held that under the circumstances in which the letters got into other hands they should not have been used as evidence.

33. Selden *v.* State, 74 Wis. 271, 42 N. W. 218, 17 Am. St. Rep. 144, where it was held that letters from a husband to his wife, which the latter had placed in the hands of her

privilege exists not merely to the letter itself, but to every part of the letter, including the envelope and address.[34]

C. Waiver of Privilege. — The privilege in respect of communications between husband and wife is the privilege of the person making the communication, and can only be waived by him or her personally, and his or her personal representative has no right to waive it even in the interest of their estate.[35] And where a spouse voluntarily discloses a part of a conversation between himself and his wife he may be compelled to disclose the remainder of the conversation.[36]

attorney, were confidential, and the attorney had no right to produce them in evidence against the husband.

See also Wilkerson *v.* State, 91 Ga. 729, 17 S. W. 990, 44 Am. St. Rep. 63, where the defendant was on trial for the murder of a man with whose wife he was alleged to have maintained illicit intercourse, and it was held that a letter written by the deceased to his wife intimating that he knew of the relations existing between her and the defendant, and also threatening the latter, and which she had voluntarily delivered to the defendant some time before the homicide, was privileged. The court said: "The law for reasons of its own desires that all communications between husband and wife shall be absolutely free and untrammeled, and that each may say or write whatsoever he or she pleases to the other with the absolute assurance that the one receiving the communication will neither be compelled nor permitted to disclose it."

In Scott *v.* Com., 94 Ky. 511, 23 S. W. 219, 42 Am. St. Rep. 371, wherein a letter which the defendant, while confined in jail, had written to his wife, and on cross-examination as a witness for himself admitted that he wrote the letter and identified it, and which was procured from his wife by a brother of the deceased for whose murder he was on trial, and thus came into possession of the prosecuting attorney, the court said: "Whether given up by her voluntarily or obtained against her will, it was a disclosure of what had been written by her husband in the privacy and confidence of the marital relation, and the use of it against the husband was just as much against the policy of the law, because as fully within the reason for it, as would have been a disclosure of what he had said to her in confidence and privacy of the married relation."

34. Selden *v.* State, 74 Wis. 271, 42 N. W. 218, 17 Am. St. Rep. 144.

35. Maynard *v.* Vinton, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276.

See also Blake *v.* Graves, 18 Iowa 312, where the court said: "When the husband or wife is called to be examined in a case where one or the other is a party as to communications made by one to the other while married, who waives the prohibition, the husband or wife or the opposite party? Not the opposite party surely."

36. State *v.* Turner, 36 S. C. 534, 15 S. E. 602. See also Southwick *v.* Southwick, 2 Sweeney (N. Y.) 234, 9 Abb. Pr. (N. S.) 109, *reversed* on other points, 49 N. Y. 510.

HYPOTHETICAL QUESTIONS. — See Expert and Opinion Evidence.

IDENTITY.

By Edward W. Tuttle.

Scope Note. — This article excludes the consideration of parol evidence,[1] and also of circumstantial evidence used merely to identify the actor in a particular transaction, where the question is merely who did the act.[2] It includes any evidence offered to show that a given person or thing is or is not the same person or thing appearing at another time.

I. PERSONS.

1. Opinion. — Any witness may give his opinion as to the identity of a person whom he has seen, provided he has some knowledge of or acquaintance with the person with whom he identifies the person seen by him.[3] So also he may testify that he recognized a person seen by him on one occasion as the same person seen by him on a previous occasion.[4]

1. See articles "AMBIGUITY," "PAROL EVIDENCE."

2. See articles "CIRCUMSTANTIAL EVIDENCE," "HOMICIDE," "LARCENY" and other similar articles.

3. *California.* — Holland *v.* Zollner, 102 Cal. 633, 36 Pac. 930, 39 Pac. 231.

Florida. — Roberson *v.* State, 40 Fla. 509, 24 So. 474.

Massachusetts. — Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770; Com. *v.* Cunningham, 104 Mass. 545.

Missouri. — State *v.* Powers, 130 Mo. 475, 32 S. W. 984; State *v.* Hopkirk, 84 Mo. 278.

New Hampshire. — State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533.

New York. — Brotherton *v.* People, 75 N. Y. 159.

North Carolina. — State *v.* Lytle, 117 N. C. 799, 23 S. E. 476.

Oregon. — See State *v.* Welch, 33 Or. 33, 54 Pac. 213.

Tennessee. — Woodward *v.* State, 4 Baxt. 322.

Utah. — People *v.* Hopt, 4 Utah 247, 9 Pac. 407.

Virginia. — Hopper *v.* Com., 6 Gratt. 684.

Washington. — Sears *v.* Seattle, C. S. W. R. Co., 6 Wash. 227, 33 Pac. 389, 1081, per Anders, J.

West Virginia. — State *v.* Harr, 38 W. Va. 58, 17 S. E. 794.

"Personal identity, like handwriting, is matter of opinion or belief, founded on facts which may be, and frequently are, inexplicable and incommunicable to a stranger; and therefore, as to such a fact, opinion is competent evidence." Gentry *v.* McMinnis, 3 Dana (Ky.) 382.

4. A witness may testify that he saw and recognized the defendant after his arrest as the same person whom he saw commit the offense. Yarbrough *v.* State, 105 Ala. 43, 16 So. 758. *Citing* Beavers *v.* State, 103 Ala. 36, 15 So. 616.

Experience of Witness. — In support of his opinion as to the identity of a particular person the witness may testify as to his practice and experience in identifying persons.[5]

2. Identity of Name. — A. GENERALLY. — Identity of name is always some evidence of identity of person,[6] but the courts are not entirely agreed as to the evidentiary force of this circumstance. It is frequently said that identity of person is presumed from identity of name.[7] This rule, however, cannot be generally applied without

5. In Price *v.* United States, 14 App. D. C. 391, a detective who had testified that he recognized the defendant as the person seen by him during the commission of the crime was held properly allowed to testify that he had had twenty years of experience in the detection and arrest of criminals.

6. Greenshields *v.* Crawford, 9 M. & W. (Eng.) 314.

In Sewall *v.* Evans, 4 Ad. & E. 626, 45 E. C. L. 626, the identity of the defendant's name with the name signed to the bill of exchange sued upon was held sufficient proof of their identity. The court suggests that other evidence might be rendered necessary "by particular circumstances, as, for instance, length of time since the name was signed. . . . If the name were only John Smith, which is a very frequent occurrence, there might not be much ground for drawing the conclusion." The cases of Whitelocke *v.* Musgrove, 1 C. & M. (Eng.) 511, and Jones *v.* Jones, 9 M. & W. (Eng.) 75, are distinguished.

Heirship. — Evidence as to identity of the claimant's name, "John Brown," with that of the survivor, coupled with other circumstances, held sufficient to establish heirship. Cuddy *v.* Brown, 78 Ill. 415.

The Identity of the Christian and Middle Name of a Woman is some evidence of identity of person where there are other circumstances going to show that the last name had been changed by marriage. Chamblee *v.* Tarbox, 27 Tex. 139, 84 Am. Dec. 614.

7. *Alabama.* — Givens *v.* Tidmore, 8 Ala. 745; Moog *v.* Benedicks, 49 Ala. 512; Wilson *v.* Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768.

Arkansas. — McNamee *v.* United States, 11 Ark. 148. See Driver *v.* Lanier, 66 Ark. 126, 49 S. W. 816.

California. — People *v.* Rolfe, 61 Cal. 540.

Florida. — Hogans *v.* Carruth, 18 Fla. 587.

Georgia. — Clark *v.* Pearson, 53 Ga. 496; Mullery *v.* Hamilton, 71 Ga. 720, 51 Am. Rep. 288.

Michigan. — Howard *v.* Rockwell, 1 Dougl. 315.

Missouri. — Long *v.* McDow, 87 Mo. 197. See La Riviere *v.* La Riviere, 77 Mo. 512; Gitt *v.* Watson, 18 Mo. 274; Hoyt *v.* Davis, 21 Mo. App. 235.

Montana. — Stapleton *v.* Pease, 2 Mont. 550.

New York. — People *v.* Snyder, 41 N. Y. 397; Lawrence *v.* Farley, 24 Hun 293, 9 Abb. N. C. 371.

Pennsylvania. — Hamsher *v.* Kline, 57 Pa. St. 397.

Tennessee. — Tharp *v.* Dunlap, 4 Heisk. 674.

Texas. — McNeil *v.* O'Connor, 79 Tex. 227, 14 S. W. 1058; Batcheller *v.* Besancon, 19 Tex. Civ. App. 137, 47 S. W. 296.

Two certificates for lands under the act disposing of vacant lands of the commonwealth, granted in the same name, will be presumed to have been granted to the same person until the contrary is shown. Cates *v.* Loftus, 3 A. K. Marsh. (Ky.) 202.

Mortgagee and Notary of Same Name. — In Lee *v.* Murphy, 119 Cal. 364, 5 Pac. 549, 955, it was held that where the name of the mortgagee and that of the notary who took the acknowledgment to the mortgage were the same, the presumption of identity applied and was sufficient to charge a purchaser with notice of this fact.

Action Against Stockholder in Corporation. — Where "Henry N. Stone

regard to the circumstances of the case.[8] It is a rule of convenience, and the presumption being a weak one is overcome by a stronger contrary presumption, such as the presumption of innocence or of the regularity of judicial or official action.[9] Some cases hold that a legal presumption never arises from identity of name, but that

of Boston," a shareholder in a corporation, is sued on a judgment against the corporation and it appears that the certificate of organization of the corporation was signed by "Henry N. Stone of Boston," the defendant is presumed to be the same person who signed the certificate in the absence of contrary evidence. Grindle *v.* Stone, 78 Me. 176.

Service of Process. — Where the record shows the service of a subpoena upon "Christian Heaston" this is *prima facie* evidence of a service upon the defendant, whose name is the same. Wire *v.* Heaston, 5 Ind. 539.

In Separate Counts of Indictment. The identity of the name of the accused person in two separate counts of an indictment raises a presumption of identity of person. Dunn *v.* State, 58 Neb. 807, 79 N. W. 719.

Party to Marriage. — For the purpose of rendering competent as a witness in behalf of the defendant, the woman with whom he was living, testimony by a justice of the peace that he had previously solemnized a marriage between the defendant and one Mary Cavender, was held sufficient, although the witness could not identify the Mary Cavender produced in court as the woman whom he had married to the defendant, the presumption of identity of person from identity of name being sufficient. State *v.* Moore, 61 Mo. 276.

8. Reason for Rule. — Where the record shows that a suit was brought by M. W. Kales against M. W. Kales, administrator, identity of person will not be presumed from the identity of name where it would result in invalidating the judgment. "An examination of authorities will show that this rule of evidence is not one of universal application; that it grew out of the general presumption in favor of the validity of contracts, regularity of land titles, and the integrity of records; that whenever its effect would be to negative these general presumptions, the reason of the rule ceasing to exist, the rule itself becomes inoperative." Bryan *v.* Kales, 3 Ariz. 423, 31 Pac. 517, *distinguishing* Garwood *v.* Garwood, 29 Cal. 515.

When Contrary Circumstances Appear. — No Presumption. — Stevenson *v.* Murray, 87 Ala. 442, 6 So. 301.

9. See People *v.* Cline, 44 Mich. 290, 6 N. W. 671; Corey *v.* Moore, 86 Va. 721, 11 S. E. 114.

Attorney and Judge of Same Name. On appeal the court will not presume that the judge below, "Hon. J. D. Thompson," was the same person as one of the attorneys of record, "J. D. Thompson." Ellsworth *v.* Moore, 5 Iowa 486.

The fact that the name of the commissioner in chancery appointed to execute the decree of foreclosure is identical with that of the complainant's solicitor is not sufficient evidence of identity of person to require the setting aside of the decree after it had been executed. Dow *v.* Seely, 29 Ill. 495.

Plaintiff and Judge of Same Name. The fact that the record discloses that James Prescott was the plaintiff and Hon. James Prescott the judge before whom the case was tried does not raise a presumption that the plaintiff and judge were the same person. Prescott *v.* Tufts, 7 Mass. 209.

Judge and Surety on Bond of Same Name. — Where the name of the county judge who approves a conservator's bond and that of the surety are the same, it will not be presumed that they were the same person for the purpose of rendering the bond void. Richardson *v.* Dugger, 85 Ill. 495.

the question is one of fact for the jury in every case.[10] In other cases it is held that there must be some additional element of evidence as to the circumstances of time and place before mere identity of name is entitled to any weight.[11]

In Corroboration of identity of name it is competent to show that

Party and Officer of Same Name. There is no presumption that John King, a party to the suit, is the same person as John F. King, the sheriff whose deputy served the process. Howard *v.* Lock, 15 Ky. L. Rep. 154, 22 S. W. 332. To the same effect, Waller *v.* Edmonds, 47 Tex. 468.

Identity of the Name of a Witness With That of an Interested Party is not sufficient evidence of identity of person to exclude the witness' testimony without a further showing. Jones *v.* Chappell, 5 Mon. (Ky.) 422.

Petit and Grand Jurors of Same Name. — The fact that the names of two petit jurors are the same as those of two grand jurors does not of itself show that they are the same persons. Wickersham *v.* People, 2 Ill. 128.

On a Prosecution for Adultery a certificate of marriage between a person of defendant's name and another person, although admissible, is not sufficient evidence to prove the defendant's marriage, there being no presumption of identity of person from the identity of name in such case. Wedgwood's Case, 8 Me. 75.

Name of Party or Attorney and of Notary Taking Affidavit the Same Name. — It will not be presumed that an affidavit of service of summons was made before a party to the action from the mere fact that the name of the plaintiff and the name of the justice of the peace before whom it was made were identical. Dorente *v.* Sullivan, 7 Cal. 279.

Where a judgment was entered by a clerk in vacation upon an affidavit made before R. S. McIlduff, the fact that the attorneys for the plaintiff were "McIlduff & Torrance" does not sufficiently show that the McIlduff before whom the affidavit was taken was the same person who acted as attorney, there being nothing to show the Christian name of such attorney, and all presumptions being in favor of a judgment. Bradley *v.* Claudon, 45 Ill. App. 326.

Party to Deed and Subscribing Witness of Same Name. — No Presumption of Identity. — Jackson *v.* Christman, 4 Wend. (N. Y.) 277.

10. Freeman *v.* Loftis, 51 N. C. 524; Toole *v.* Peterson, 31 N. C. 180. See also Atchison *v.* M'Culloch, 5 Watts (Pa.) 13.

11. **Remoteness.** — In Sitler *v.* Gehr, 105 Pa. St. 577, 601, 51 Am. Rep. 207, it was held that after the lapse of 140 years there could be no presumption of identity of person from identity of name. "Mere identity of name must be accompanied with some circumstances of time or place before we can attach any value to it as affecting rights of property. It is true there are some authorities which hold that identity of name is *prima facie* evidence of identity of person. So much was said by Justice Sharwood in McConeghy *v.* Kirk, 18 P. F. Smith 203. That this is the ordinary rule may be conceded, but it does not apply where the transaction is remote. The true rule is believed to be that laid down by Chief Justice Gibson in Sailor *v.* Hertzogg, 2 Barr 182, where he says: 'Identity of name is ordinarily, but not always, *prima facie* evidence of personal identity. The authorities on the subject may be consulted in Sewall *v.* Evans, 4 Ad. & El. (N. S.) 626, from which Lord Denham and other judges of the Queen's Bench conclude that identity of name is something from which an inference may be drawn, unless the name was a very common one or the transaction remote; and the reason given for casting the *onus* on the party who denies is that disproof can be readily had by calling the person whose identity is denied into court. The name in this instance is not a very common one, but after more than a quarter of a century there ought certainly to be some preliminary evidence, however small.'"

only one person or family of that name resided in the same vicinity.[12]

B. When Other Persons of Same Name. — It is sometimes said that when it appears that there are other persons of the same name in the same locality, the presumption of identity of person cannot be indulged;[13] so also when the name is a very common one.[14] Such circumstances would of course weaken the presumption or inference arising from identity of name, but are not generally regarded as sufficient to rebut the presumption or to destroy the evidentiary value of identity of name.[15]

C. Names on Promissory Note. — The identity of the names of the payee and indorser of a promissory note warrants a presumption that they are the same person.[16] But the identity of two names signed as makers of a note raises no presumption of identity of person.[17]

D. Person Alleged to Have Done an Act and Actor of Same Name. — When a person is charged with doing a particular act, his identity with a person of the same name[18] shown to have done the

Names on Petition. — There is No Presumption that a person who testified that he did not sign a petition for the relocation of the county seat is the person of the same name whose signature purports to be attached to the petition, where the inquiry involves the canvass of all the voters of the county without regard to townships or voting precincts. Mode *v.* Beasley, 143 Ind. 306, 42 N. E. 727.

12. Savery *v.* Moore, 71 Ala. 236.

13. Garrett *v.* State, 76 Ala. 18; Jones *v.* Parker, 20 N. H. 31.

In Jones *v.* Jones, 9 M. & W. (Eng.) 75, the fact that the name of the maker of the note sued upon and of the party sued was Hugh Jones was held insufficient evidence of their identity, it appearing that there were several persons of the same name. The court relies upon Whitelocke *v.* Musgrove, 1 C. & M. (Eng.) 511, and *distinguishes* or *disapproves* Page *v.* Mann, M. & M. 79, 22 E. C. L. 256.

14. Wilson *v.* Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768. See also Sewall *v.* Evans, 4 Ad. & E. 626, 45 E. C. L. 626.

15. Jackson *v.* Cody, 9 Cow. (N. Y.) 140.

The fact that there may be other persons of the same name, even when the name is John Smith, is not sufficient to destroy the presumption. Flournoy *v.* Warden, 17 Mo. 435. See also Cuddy *v.* Brown, 78 Ill. 415, and other cases involving this question and herein cited.

16. Hunt *v.* Stewart, 7 Ala. 525. See also article "Bills and Notes."

Where the payees in a note were J. J. & J. P. Kirk and the indorsement was "John J. Kirk," it was held that there was a presumption that the indorser was one of the payees, on the ground that identity of name is *prima facie* identity of person. McConeghy *v.* Kirk, 68 Pa. St. 200.

17. Jones *v.* Jones, 9 M. & W. (Eng.) 75.

18. "Generally speaking it will be considered sufficient *prima facie* evidence to show that a person bearing the same name as the party to the suit did the act with which it is sought to affect such party." Aultman *v.* Timm, 93 Ind. 158, *quoting* 2 Phil. Ev. 508.

In Stapleton *v.* Pease, 2 Mont. 550, where it appeared that a declaratory statement relating to a mining claim had been made under oath before William Peck, county recorder, it was contended that there was no proof that the William Peck who testified as to his signature was William Peck the county recorder, but

act will be presumed in the absence of contrary evidence, though the contrary has been held.[19]

E. Plaintiff and Defendant of Same Name. — There is no presumption from the identity of name of the plaintiff and defendant that they are the same person,[20] though it has been held to the contrary.[21]

F. Deceased in Prosecution for Homicide. — The rule that identity of person is presumed from identity of name applies to proof of the identity of the deceased in a prosecution for homicide.[22]

G. Record of Conviction. — When a record of conviction for crime is offered in evidence it will be presumed that the convicted person and the person against whom such record is sought to be used, whether party[23] or witness[24] are the same from the identity of their names.

H. Judgment. — In an action upon a judgment, the identity of the defendant's name with that of the judgment debtor is *prima facie* evidence of identity of person.[25] The same rule holds good when a former judgment is pleaded as a defense.[26]

I. Names in Chain of Title. — Where the same name appears successively as grantee and grantor in a chain of conveyances, it will be presumed in the absence of evidence to the contrary that the

the court held that the identity of names was sufficient *prima facie* evidence of identity of person.

19. Robards *v.* Wolfe, 1 Dana (Ky.) 155. See also Jones *v.* Jones, 9 M. & W. (Eng.) 75.

20. Wilson *v.* Benedict, 90 Mo. 208, 2 S. W. 283; Allin *v.* Chadburne, 1 Dana (Ky.) 68, 25 Am. Dec. 121. See also Suttles *v.* Whitlock, 4 Mon. (Ky.) 451.

21. Sweetland *v.* Porter, 43 W. Va. 189, 27 S. E. 352. This was an action on a sheriff's official bond by L. A. Sweetland and J. S. Sweetland, partners, against the sheriff and his sureties, J. S. Sweetland being one of the sureties and a defendant to the action. The action was held properly dismissed because it appeared that the same party was both plaintiff and defendant. "In the writ J. S. Sweetland is named as plaintiff and J. S. Sweetland as defendant. In the declaration John S. Sweetland is named as plaintiff and J. S. Sweetland as defendant. In the absence of proof to the contrary the presumption must be that the plaintiff, John S. Sweetland in the declaration, is the identical person named by the initials, only, in the writ as plaintiff, and that the defendant J. S. Sweetland is identical with the plaintiff J. S. Sweetland. Travenner *v.* Barrett, 21 W. Va. 656, 689."

22. State *v.* Kilgore, 70 Mo. 546.

23. The Record of the Previous Conviction of a person of the same name as the defendant, with an alias added, is admissible without further evidence of identity. State *v.* Kelsoe, 76 Mo. 505, *affirming* 11 Mo. App. 91.

24. The Record of Conviction of a Person of the Same Name as the Witness is admissible to impeach the latter without further proof of identity. Bayha *v.* Mumford, 58 Kan. 445, 49 Pac. 601.

25. Douglas *v.* Dakin, 46 Cal. 49; Ritchie *v.* Carpenter, 2 Wash. 512, 28 Pac. 380. See also Hamber *v.* Roberts, 7 M. G. & S. 861, 62 E. C. L. 861; Garwood *v.* Garwood, 29 Cal. 515.

Action Upon a Foreign Judgment. Green *v.* Heritage, 63 N. J. L. 455, 43 Atl. 698; Hatcher *v.* Rocheleau, 18 N. Y. 86; Campbell *v.* Wallace, 46 Mich. 320, 9 N. W. 432; Thompson *v.* Manrow, 1 Cal. 428; Hesketh *v.* Ward, 17 U. C. C. P. 190.

26. Agate *v.* Richards, 5 Bosw. (N. Y.) 456.

name represents the same person,[27] even though a different residence is recited in each deed;[28] and the same rule applies when a party to the action has the same name as a party to an offered deed.[29] In some cases such identity of name is held to be sufficient evidence to go to the jury;[30] but not sufficient to raise a presumption.[31] In one jurisdiction the evidentiary value of such identity of name in

27. *California.* — Mott *v.* Smith, 16 Cal. 533.

Illinois. — Brown *v.* Metz, 33 Ill. 339, 85 Am. Dec. 277.

Iowa. — Gilman *v.* Sheets, 78 Iowa 499, 43 N. W. 299.

Michigan. — Eames *v.* McGregor, 43 Mich. 313, 5 N. W. 408; Goodell *v.* Hibbard, 32 Mich. 47.

Missouri. — Geer *v.* Missouri Lumb. & Min. Co., 134 Mo. 85, 34 S. W. 1099, 56 Am. St. Rep. 489; Flournoy *v.* Warden, 17 Mo. 435.

Nebraska. — Rupert *v.* Penner, 35 Neb. 587, 53 N. W. 598.

New York. — Jackson *v.* King, 5 Cow. 237, 15 Am. Dec. 468; Jackson *v.* Goes, 13 Johns. 518, 7 Am. Dec. 399; Jackson *v.* Cody, 9 Cow. 140.

Texas. — See Smith *v.* Davis (Tex. Civ. App.), 47 S. W. 101; Yarbrough *v.* Johnson, 12 Tex. Civ. App. 95, 34 S. W. 310; Robertson *v.* DuBose, 76 Tex. 1, 13 S. W. 330; Grant *v.* Searcy (Tex. Civ. App.), 35 S. W. 861. See also article "Deeds," Vol. IV.

"In tracing titles identity of names is *prima facie* evidence of identity of persons. Stebbins *v.* Duncan, 108 U. S. 32, 47.

Where the plaintiffs claimed through Arthur B. Morris of New York and relied on a deed to Arthur B. Morris, whose place of residence was not mentioned in the deed, the property being located in Minneapolis, it was held that the identity of name was sufficient identity of person. "Very slight evidence may be sufficient to overcome the presumption of identity of person which identity of name raises, so as to put upon the party claiming such identity the necessity of further proof; but until there is something to raise a doubt upon it, it is ordinarily sufficient." Morris *v.* McClary, 43 Minn. 346, 46 N. W. 238.

28. Carleton *v.* Townsend, 28 Cal. 219; Tillotson *v.* Webber, 96 Mich. 144, 55 N. W. 837.

29. Ward *v.* Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151.

30. Atchison *v.* McCulloch, 5 Watts (Pa.) 13; Brown *v.* Livingstone, 29 U. C. Q. B. 520.

31. Toole *v.* Peterson, 31 N. C. 180.

In Freeman *v.* Loftis, 51 N. C. 524, it was held that there was no presumption that Joseph Smith, through whom the plaintiff claimed, and Joseph Smith in whom title had been shown, were the same person merely because of the identity of name. The question of identity was one for the jury, to be judged from the identity of name, the residence of the parties, and other circumstances. "The law lays down no rule on the subject, and, as is evident in respect to so common a name, can lay down none."

In Mooers *v.* Bunker, 29 N. H. 420, it appeared that one of the persons who had been joined as a party plaintiff and through whom the other plaintiffs claimed title had not been heard of for ten years. It was held that the identity of this party's name with that of the person in whom title had been shown was insufficient to raise a presumption of identity of person. "It is not often a matter of controversy whether the identity of the plaintiff is established because the doubt, if any arises, can generally be readily removed. But if a question is made a jury is not at liberty to presume that a person even of so peculiar a name as Timothy Mooers is the same person as the man of the same name who is shown to be entitled to a particular estate." *Citing* Berkeley Peerage Case, 4 Camp. 401.

such cases is said to depend upon whether the question of identity is seriously controverted.[32]

J. Variance in Spelling or Initial. — The effect which a variance in the spelling or the initials of the names has upon the inference or presumption of identity depends to some extent on the nature and circumstances of the case. There can be no presumption of identity where the names are materially different,[33] but where the variance is largely a matter of spelling and the names are *idem sonans,* or nearly so, a presumption of identity of person may still be warranted.[34]

Opinion. — A witness cannot give his opinion that two similar names which are spelled differently represent the same person, although he may state the facts which might warrant such an inference.[35]

K. Abbreviation of Christian Name. — The fact that in one

32. "Similarity of name is held to be sufficient to establish identity of the person when there is no evidence to the contrary, and no suspicion cast upon the transaction by the evidence; but in case the identity is controverted, then similarity of name alone is not sufficient to establish such identity. Robertson *v.* Du Bose, 76 Tex. 1. It depends upon the issue made by the evidence as to whether or not the similarity of name is sufficient. McNeil *v.* O'Connor, 79 Tex. 229; Fleming *v.* Giboney, 81 Tex. 427. If the issue is that the deed was not executed by the *person* in question, then the identity of the person is put in direct issue, and if evidence be introduced tending to prove that the person who executed the deed was not the person in question, similarity of name alone will not be sufficient to establish the fact. If the issue be that a given person did not *sign the deed,* then similarity of name is sufficient to connect the links in the chain of title." Jester *v.* Steiner, 86 Tex. 415, 25 S. W. 411.

33. Kennedy *v.* Merriam, 70 Ill. 228. See Green *v.* Fisher (Tex. Civ. App.), 45 S. W. 429; McMinn *v.* Whelan, 27 Cal. 300.

There is no presumption that R. P. O'Neil is the same person as Rev. P. O'Neil. Burford *v.* McCue, 53 Pa. St. 427.

Where "William G. Brackett" was one of several defendants, on appeal by "Willard G. Bracket," there is no presumption from the similarity of names that the persons were the same, where there is a motion to dismiss the appeal for failure to give proper notice to co-parties not appealing. Lilly *v.* Somerville, 142 Ind. 298, 40 N. E. 1088.

34. Gross *v.* Village of Crossdale, 177 Ill. 248, 52 N. E. 372. See also Adie *v.* Com., 25 Gratt (Va.) 712.

A grant of land to "Thomas Braddy" is competent and sufficient evidence of title in Thomas Brady. Dickerson *v.* Brady, 23 Ga. 161.

The fact that one name is Van Nortwick and the other Van Nortrick does not overcome the presumption, the difference in sound being inappreciable. Mallory *v.* Riggs, 76 Iowa 748, 39 N. W. 886.

In Fleming *v.* Giboney, 81 Tex. 422, 17 S. W. 13, the difference in spelling between "Goboney" and "Gibney" was held not sufficient to overcome the presumption, the words being *idem sonans.*

Where it appeared that "William Patterson" was the grantee in a patent to the premises in controversy, and the plaintiff claimed through a conveyance which purported to be from "William Patterson" but was signed "Petterson," who was described in the same manner as in the patent, it was held that the variance in spelling was not sufficient to overcome the presumption of identity. Jackson *v.* Cody, 9 Cow. (N. Y.) 140.

35. Templeton *v.* Luckett, 75 Fed. 254.

of the names the Christian name is abbreviated and only the initial appears, is ordinarily not sufficient to destroy the presumption of identity arising from identity of name,[36] though it is held to the contrary.[37]

L. Variance in Middle Initial. — While ordinarily a variance in the middle initial will not destroy the presumption, yet it has been held that where the title to property is in question, such a variance is fatal.[38]

36. Paxton *v.* Ross, 89 Iowa 661, 57 N. W. 428; Veasey *v.* Brigman, 93 Ala. 548, 9 So. 728, 13 L. R. A. 541; State *v.* Bradford, 79 Mo. App. 346.

See Smith *v.* Cisson, 1 Colo. 29.

J. J. Kirk and John J. Kirk appearing respectively as payee and indorser are presumptively the same person. McConeghy *v.* Kirk, 68 Pa. St. 200.

Although only the initial of the Christian name appears in a deed and the full name appears in the record, the person named is presumptively the same. Mosely *v.* Reily, 126 Mo. 124, 28 S. W. 895.

37. In an action by Henry V. Libhart on a judgment in favor of H. V. Libhart, there is no presumption of the plaintiff's identity with the person named in the judgment. There is no legal presumption "that where the family name and initials are the same, there is identity of person." And the fact that such judgment was received in evidence by consent does not preclude the defendant from raising this point, since proof of the judgment was only one of the steps necessary to make out a case, and should have been followed up by proof of identity of parties. Bennett *v.* Libhart, 27 Mich. 489.

In People *ex rel.* Haines *v.* Smith, 45 N. Y. 772, where the question in issue was legality and sufficiency of a petition of taxpayers for the issue of municipal bonds in aid of a railroad, the court, while conceding the rule to be that identity of name raises a presumption of identity of person, held that where the initial only of the Christian name appeared on the petition there was no presumption of the identity of the signer with the person named on the tax roll of the same surname, but whose Christian name, though commencing with the same letter, appeared in full. *Citing* People *v.* Ferguson, 8 Cow. (N. Y.) 102, and *distinguishing* People *v.* Pease, 27 N. Y. 45.

38. Variance in Middle Initial. Where the middle initial in the name of the grantor on one conveyance and of the grantee in a preceding conveyance of the same property was different, it was held that the presumption was sufficiently overcome. "But while, under many circumstances, it has been held that a middle initial in the name of a person will not be deemed a material part of his name, it is a matter of common knowledge that very many, and perhaps at this day most, persons bear a double, or more than one, Christian name, and that in the writing of the name one of these is very commonly indicated merely by its initial letter. The use of such initials, in addition to a fully written Christian name, is the most common means by which in all the affairs of life, persons bearing names otherwise the same are distinguished. In judicial proceedings involving and determining questions of title this should not be ignored. . . . 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 other-

M. Insertion or Abbreviation of Middle Name. — The fact that the middle name appears in full in one name and only by the initial in the other does not destroy the presumption,[39] nor does the fact that one name contains a middle initial and the other does not.[40]

N. Addition of Suffix. — The addition of a suffix to one or two otherwise identical names does not destroy the presumption of identity of person.[41]

O. Father and Son of Same Name. — Where a father and son have the same name, the use of the name *prima facie* refers to the father.[42]

3. When Names Are Different. — In support of the contention that two different names really represented one and the same person, it is competent to show that such person has changed his name and passed under both names.[43]

4. Physical Characteristics and Dress. — Evidence as to the physical characteristics and dress of a person seen by the witness is competent on the question of his identity,[44] except when they in no way tend to differentiate or distinguish him from others.[45]

5. Answering to Name. — The statement of one person addressed

wise 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." Ambs *v.* Chicago, St. P., M. & O. R. Co., 44 Minn. 266, 46 N. W. 321.

39. Liscomb *v.* Eldredge, 26 R. I. 335, 38 Atl. 1052.

40. Phillips *v.* Evans, 64 Mo. 17; Hunt *v.* Stewart, 7 Ala. 525; Gross *v.* Village of Grossdale, 177 Ill. 248, 52 N. E. 372.

41. The Addition of the Suffix Jr. Clark *v.* Groce, 16 Tex. Civ. App. 453, 41 S. W. 668.

42. Padgett *v.* Lawrence, 10 Paige Ch. (N. Y.) 170, 40 Am. Dec. 232. See also Lepiot *v.* Browne, Holt 41; *s. c.* 6 Mod. 198; People *v.* Collins, 7 Johns. (N. Y.) 549; Kincaid *v.* Howe, 10 Mass. 203.

"The plaintiff made out a *prima facie* case by availing himself of the presumption of law that the father and not the son was intended by the deed from French." Graves *v.* Colwell, 90 Ill. 612.

On the trial of an indictment against L. W., where it appeared that there was a father and son of the same name, but that the latter used the suffix Jr. and was known and distinguished thereby from his father, evidence as to the conduct of L. W., Jr., was held inadmissible; the use of the name L. W. *prima facie* indicating the father and not the son. State *v.* Vittum, 9 N. H. 519.

Citing the following English cases: Lepiot *v.* Browne, 1 Salk. 7; Sweeting *v.* Fowler, 1 Stark. 106; Wilson *v.* Stubbs, Hobart 330; Rex *v.* Bailey, 7 Car. & P. 364. But see King *v.* Peace, 3 Barn. & Ald. 579.

43. Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525.

44. Johnson *v.* Com., 115 Pa. St. 369, 9 Atl. 78; People *v.* Burt, 51 App. Div. 106, 64 N. Y. Supp. 417; Com. *v.* Campbell, 155 Mass. 537, 30 N. E. 72. See also *infra* this article, "Deceased Person."

Similarity in Size Competent. Angley *v.* State, 35 Tex. Crim. 427, 34 S. W. 116.

45. Where There is Nothing Unusual about the height or size of the defendant, testimony of witnesses that they met a man about the size and height of the defendant near the scene of the crime, at about the time it was committed, is not competent as affirmative evidence of

to another by a certain name and acquiesced in by the latter, is competent evidence of his identity.[46]

6. Conduct and Declarations. — The previous conduct,[47] representations[48] and declarations[49] of a person whose identity is in question are competent if made *ante litem motam.* The declarations of a person under such circumstances as to his name, past history and family connections are not hearsay, but are admissible for the purpose of determining his identity,[50] although they are not

identification. People *v.* Gotshall, 123 Mich. 474, 82 N. W. 274.

46. Garrett *v.* State, 76 Ala. 18; Howard *v.* Holbrook, 9 Bosw. (N. Y.) 237, 23 How. Pr. 64. See Fanning *v.* Lent, 3 E. D. Smith (N. Y.) 206.

Admission of Identity. — Com. *v.* Gay, 162 Mass. 458, 38 N. E. 1121.

Res Gestae. — Testimony that during an alleged unlawful sale of intoxicating liquor the witness had heard the seller addressed by the defendant's name is competent as part of the *res gestae.* People *v.* Stanley, 101 Mich. 93, 59 N. W. 498.

47. Miller *v.* State, 130 Ala. 1, 30 So. 379; Bulkeley *v.* Butler, 2 B. & C. 434, 9 E. C. L. 133.

48. Bulkeley *v.* Butler, 2 B. & C. 434, 9 E. C. L. 133.

49. Hintze *v.* Krabbenschmidt (Tex. Civ. App.), 44 S. W. 38. See Sargent *v.* Lawrence, 16 Tex. Civ. App. 540, 40 S. W. 1075; Hardy *v.* Harbin, 154 U. S. 598; Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760.

Where the question at issue is the identity of a particular person with the legatee named in a will, this fact may be proved by the declarations and statements of such person, who has since died, and by evidence as to his appearance, the name he bore, the account he gave of himself and family, and his connections and associations. Mullery *v.* Hamilton, 71 Ga. 720, 51 Am. Rep. 288.

Upon the issue as to whether the plaintiff's uncle, "John Palms," was the grantee of the same name in a grant of land, the previous declarations of plaintiff's uncle to the effect that he had been in Texas, where the land was located, and had acquired property there, held properly admitted upon the issue of identity. Schott *v.* Pellerim (Tex. Civ. App.), 43 S. W. 944. To the same effect see Brown *v.* Brown (Tex. Civ. App.), 36 S. W. 918; Minor *v.* Lumpkin (Tex. Civ. App.), 29 S. W. 799, in which for the same purpose the deceased's diary was held competent.

Previous statements of the defendant in a criminal prosecution as to his name and identity are competent. State *v.* Ellwood, 17 R. I. 763, 24 Atl. 782.

Declarations of Others. — See Red River Cattle Co. *v.* Wallace (Tex. Civ. App.), 33 S. W. 301; The Lovat Peerage, L. R. 10 App. Cas. 763; and article "PEDIGREE."

50. "Such statements made by a party before any controversy had arisen in his ordinary intercourse with those by whom he is surrounded, occurring naturally as part of his daily life and conduct, and being the means by which people generally learn and act upon his identity and antecedents, afford circumstantial evidence tending to show who he is. They are of a character not inherently different from his statement as to his name, etc. Evidence of a somewhat similar character has been admitted in a number of Texas cases. Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525; McNeil *v.* O'Connor, 79 Tex. 227, 14 S. W. 1058; Hickman *v.* Gillum, 66 Tex. 314, 1 S. W. 339; Baker *v.* McFarland, 77 Tex. 294, 13 S. W. 1042; Chamblee *v.* Tarbox, 27 Tex. 139; Odom *v.* Woodward, 74 Tex. 41, 11 S. W. 925. In these cases the parties who made the declarations were dead before the trial, but that

evidence of the truth of the facts stated, and would not be competent to establish his pedigree.[51]

Dying Declaration. — A dying declaration may be competent evidence, in a prosecution for homicide, of the identity of the declarant's assailant,[52] but it is subject to the same rules that govern the testimony of a witness to identity.[53]

7. Habits. — As evidence that two apparently different individuals are really one and the same person, it is competent to show a habit common to both.[54] So also to identify human remains it is competent to show any habits of the alleged deceased which would tend to show his identity with the remains found.[55]

8. Recognition of Person's Walk. — It has been held that there is no error in admitting the testimony of a witness that he knew and recognized a particular person by his walk.[56]

9. Identification by Voice. — Voice is a competent means of

fact is not thought by the court to affect their admissibility for the limited purpose just explained." Nehring *v.* McMurrian, 94 Tex. 45, 57 S. W. 943. See also Jackson *v.* Etz, 5 Cow. (N. Y.) 314.

51. In Nehring *v.* McMurrian (Tex. Civ. App.), 45 S. W. 1032, where such evidence was held competent, the court says: "The issue raised by this evidence was one of identity and not of pedigree. If the purpose had been to establish the pedigree by the evidence of this witness, it would not have been admissible, but here the object was to identify the Frank Conrad known to this witness as the Frank Conrad whom the plaintiffs claim had previously disappeared. . . . Similarity of names is some evidence of identity. . . . And on the question of identity it is admissible to show the name the person bore, his personal appearance, conversations, and the account he gave of himself and his family connections and associations. . . . And the information that is furnished upon this subject need not come from a source which is related to or familiar with the family history of the person who has disappeared. What knowledge may be possessed by strangers upon this subject is admissible." On a rehearing in the same court (46 S. W. 369) this part of the opinion was reversed, but on appeal to the supreme court the first opinion was approved, 94 Tex. 45, 57 S. W. 943. (See preceding note.)

52. State *v.* Kessler, 15 Utah 142, 49 Pac. 293; State *v.* Foot You, 24 Or. 61, 35 Pac. 537; Walker *v.* State, 139 Ala. 56, 35 So. 1011. See article "Dying Declarations."

53. People *v.* Wasson, 65 Cal. 538, 4 Pac. 555.

54. Habit of Becoming Intoxicated. — On the question as to whether W. and G. were the same person, it was held competent to show that they both had the same habit of becoming intoxicated. "The habit is common to many, and alone would have little weight. But habits are a means of identification, though with strength in proportion to their peculiarity." Udderzook *v.* Com., 76 Pa. St. 340.

55. For the purpose of identifying charred remains as those of the alleged deceased, it is competent to show that the latter habitually wore hairpins like those found among the remains. State *v.* Williams, 52 N. C. 446, 78 Am. Dec. 248.

56. Beale *v.* Posey, 72 Ala. 323, in which case the court said: "The point of objection is that it was mere matter of opinion. So far as that may be true, it is of opinion formed from observation, dependent for his value upon the opportunities of observation, and like the recognition of the human voice, incapable of higher evidence." See also State *v.* Hopkirk, 84 Mo. 278.

identification if the witness has any previous acquaintance with the voice of the person identified.[57] It is sufficient that the witness has heard such person's voice but once previous to the time in question.[58]

Sufficiency of Identification by Voice in Criminal Case. — While the defendant may be sufficiently identified by his voice as the perpetrator of the crime charged, yet the testimony should be positive, and should be based upon some peculiarity, or a sufficient previous knowledge by the witness.[59]

10. Documents and Articles in Possession of Person. — The documents, papers and other articles in the possession of a person are competent evidence of his identity.[60]

57. Pritchett *v.* Johnson (Neb.), 97 N. W. 223; State *v.* Hopkirk, 84 Mo. 278; State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224; Com. *v.* Williams, 105 Mass. 62; Com. *v.* Hayes, 138 Mass. 185; Patton *v.* State, 117 Ga. 230, 43 S. E. 533. *Citing* Andrews *v.* Com., 100 Va. 801, 40 S. E. 935; Givens *v.* State, 35 Tex. Crim. 563, 34 S. W. 626.

Illustration by Person Identified. Where a witness has testified that he recognized a person by the peculiarity of his voice, it is not permissible for such person, who is unsworn, to give an illustration in open court of his natural voice. Com. *v.* Scott, 123 Mass. 222, 25 Am. Rep. 81.

Declarations of Person Recognized Only by Voice. — A witness may testify to the declarations or statements of a person, although he recognized him solely by his voice. State *v.* Howard, 92 N. C. 772; Deal *v.* State, 140 Ind. 354, 39 N. E. 930.

A witness may testify as to conversations held with the defendant through the soil-pipes of the prison where defendant was confined, though his only means of recognition was the defendant's voice. Brown *v.* Com., 76 Pa. St. 319.

Showing Mistake by Witness in Identifying Another. — Where a witness bases his recognition of a person upon the latter's voice, it is not competent to show that the witness had mistaken the voice of another person on another occasion, unless it also appears that the conditions were the same in both instances. State *v.* Hurst, 23 Mont. 484, 59 Pac. 911.

58. Com. *v.* Williams, 105 Mass. 62.

Where the witness knew defendant by sight and had heard him speak only once, his opinion that the person whom he heard speak during the commission of the crime was the defendant was held properly admitted. Com. *v.* Hayes, 138 Mass. 185.

59. Com. *v.* Williams, 105 Mass. 63; Andrews *v.* Com., 100 Va. 801, 40 S. E. 935; Givens *v.* State, 35 Tex. Crim. 563, 34 S. W. 626; Com. *v.* Hayes, 138 Mass. 185.

In Patton *v.* State, 117 Ga. 230, 43 S. E. 533, the evidence identifying the defendant as the guilty party consisted mainly of the testimony of a witness who had only heard the accused speak twice, some months previous to the homicide. The defendant, at the time of the killing, was seventy-five yards distant, and the witness was unable to understand a question addressed to him. He testified that he "thought he recognized" the defendant's voice. This evidence was held insufficient identification.

60. Bulkeley *v.* Butler, 2 B. & C. 434, 9 E. C. L. 133, in which a letter of introduction in the possession of the indorser of the bill sued upon was held competent evidence to show his identity with the payee therein named. See also State *v.* McDaniel, 39 Or. 161, 65 Pac. 520, and this article "Deceased Person — Document Found on Body."

11. Pointing by Witness. — A witness may point out the person to whose identity he is testifying.[61]

12. Identification of Deceased Person and Remains or Body. — A. GENERALLY. — Where the question in issue is the identity of a dead body or certain remains, it is competent to show the similarity of physical characteristics of and marks upon the body and the alleged deceased.[62] So also the similarity of wearing apparel and articles found on or near the remains to those known to have been in the possession of the deceased, may be shown.[63] In disproof that the body found is that of the person alleged to have been murdered it is competent to show that the latter has been seen alive subsequent to the homicide.[64]

B. DOCUMENTS FOUND ON BODY. — The papers or documents found on the body or in the possession of the deceased are competent evidence of identity.[65]

61. Com. *v.* Whitman, 121 Mass. 361. See also Sylvester *v.* State, 71 Ala. 17; State *v.* Johnson, 67 N. C. 55.

62. State *v.* Jones, 153 Mo. 457, 55 S. W. 80; State *v.* Dickson, 78 Mo. 438; Gray *v.* Com., 101 Pa. St. 380, 47 Am. Rep. 733; *citing* McCulloch *v.* State, 48 Ind. 109. See McGill *v.* State, 25 Tex. App. 499, 8 S. W. 661; Lancaster *v.* State, 91 Tenn. 267, 18 S. W. 777.

Peculiarities of Teeth, Hair, and Shape of Head and Face. — State *v.* Smith, 9 Wash. 341, 37 Pac. 491.

In Linsday *v.* People, 63 N. Y. 143, for the purpose of identifying the body found as that of the alleged deceased, it was held competent to show the "color of the hair and sidewhiskers of the deceased, the measure of the body found, and the stature of the deceased, the evidence of the dentist of the extraction of certain teeth of Colvin (deceased) and peculiar marks upon those remaining, and the absence of the same teeth from the jaw found, and the presence of the same marks upon other teeth in the jaw."

63. State *v.* Martin, 47 S. C. 67, 25 S. E. 113; Thornton *v.* State, 113 Ala. 43, 21 So. 356, 59 Am. St. Rep. 97; Taylor *v.* State, 35 Tex. 97; State *v.* Dickson, 78 Mo. 438; *citing* State *v.* Williams, 52 N. C. 446, 78 Am. Dec. 248. See Kugadt *v.* State, 38 Tex. Crim. 681, 44 S. W. 989; State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743.

A person well acquainted with the deceased may identity certain buttons and articles of clothing found on the scene of the homicide as part of the deceased's clothing. Newell *v.* State, 115 Ala. 54, 22 So. 572.

A St. Joseph's cord found on the body of the deceased was held properly admitted as a means of identification, it appearing that the person alleged to have been killed had at one time worn such a cord. So also, pieces of a shirt taken from the body were held properly admitted in connection with testimony of deceased's sister that they were similar to a shirt she had given her brother. State *v.* Novak, 109 Iowa 717, 79 N. W. 465.

64. In Rebuttal of Such Evidence testimony that there was a person strongly resembling deceased going about at the time of his disappearance is not competent. Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

65. In Bryant's Estate, 176 Pa. St. 309, 35 N. E. 571, a certificate of citizenship, a photograph of himself, and affidavits as to his ownership of a vessel, found in the trunk of a deceased person after his death, were held properly admitted as evidence of his identity, and in the opinion of the appellate court constituted very strong evidence. "The papers, especially the certificate, are the only safe

C. Opinion. — A witness sufficiently acquainted with the alleged deceased may give his opinion as to whether certain remains are those of the deceased, although they are mutilated and decomposed.[66] But it has been held to the contrary.[67] The opinions of experts who have examined the remains, as to the age, size, sex, etc., are also competent on the question of identity.[68]

D. Identity of Deceased no Part of Corpus Delicti. — The identity of the deceased with the remains or body found is no part of the *corpus delicti* in a prosecution for homicide, and may be sufficiently proved by circumstantial evidence, even where direct evidence is required to establish the *corpus delicti*.[69]

13. Compelling Disclosure of Identity. — For purposes of identification the court may compel any person appearing before it to remove

foundation for the whole case. Everything is more or less dependent on conjecture and inference, but these are the property and the acts of the man whose identity is in issue. He at least knew the truth and these are his own testimony as to his own identity."

Memoranda and Papers Found in Valise of Deceased held properly admitted. Campbell *v.* State, 8 Tex. App. 84.

66. In Keith *v.* State, 157 Ind. 376, 61 N. E. 716, it was held that the father and relatives of the alleged deceased were properly allowed to give their opinion that a body taken from the water, where it had been for several weeks, was that of the deceased. "The hair and nails were gone; the skull fractured in many places; the eyes were deeply sunken; the nose somewhat mutilated; the flesh somewhat decomposed; the skin somewhat discolored. But there was the whole body, contour, size, age, shape of head and face, tapering fingers, double ankles, birthmark, a certain front tooth decayed; beyond all, that indefinable impression produced by the *ensemble*. To those witnesses, parent, relative, neighbor, there was no inability to recognize."

Identifying Skull and Jawbone. A witness familiar with the deceased and his physical characteristics may state his belief and the grounds of it, that a skull and jawbone are those of the alleged deceased, it appearing that there are peculiarities in the jaw and teeth. Gray *v.* Com., 101 Pa. St. 380, 47 Am. Rep. 733. See People *v.* Barker, 60 Mich. 277, 27 N. W. 539.

67. Where the question in issue was whether a body found five months after the murder was that of the alleged deceased, and the witness had testified to all the points of resemblance between the two, his opinion that the body found was that of the deceased was excluded. The court says: "Ordinarily, the question of identity is one of fact, and a witness may be asked whether he knows a particular individual, and, if so, whether he is the person indicated; but the question put to this witness is not the ordinary one of identity. It calls for an opinion relative to a body which, if that of the deceased, had been submerged in salt water for upward of five months, and had undergone many changes. The witness can only state a conclusion drawn from the points of resemblance mentioned by him. The jury have heard his statements, and it is for them, and not the witness, to decide whether the body was that of the deceased." People *v.* Wilson, 3 Park. Crim. (N. Y.) 199.

68. Wilson *v.* State, 41 Tex. 320.

69. People *v.* Palmer, 109 N. Y. 110, 16 N. E. 529, *citing* and *discussing* numerous authorities. See also Laughlin *v.* Com., 18 Ky. L. Rep. 640, 37 S. W. 590; Campbell *v.* People, 159 Ill. 9, 42 N. E. 123, 50 Am. St. Rep. 134.

any disguise or artificial covering of those portions of the body ordinarily left exposed.[70]

II. ANIMALS.

1. Generally. — Animals may be identified by their physical characteristics,[71] and by the opinion of a competent witness.[72]

2. Brands. — Evidence as to the brands upon live stock is admissible for purposes of identification, although such brands have not been recorded as required by statute.[73]

III. IDENTIFICATION OF THING.

1. Generally. — Opinion evidence as to the identity of an inanimate object or thing is competent.[74] Any circumstances which are

70. Rice *v.* Rice (N. J. Eq.), 19 Atl. 736, in which the court compelled a party to the action to remove a veil. The opinion contains a discussion of this power in both civil and criminal cases, and distinguishes those cases involving a defendant's privilege against self-incrimination in a criminal prosecution, for a discussion of which, see article "PRIVILEGE."

Producing in Court a Person Whose Identity is in Question. See Attorney Gen. *v.* Fadden, 1 Price (Eng. Exch.) 403.

71. See De Armond *v.* Neasmith, 32 Mich. 231; Crumes *v.* State, 28 Tex. App. 516, 13 S. W. 868, 19 Am. St. Rep. 853.

72. Com. *v.* Sturtivant, 117 Mass. 122, 133, 19 Am. Rep. 401; Com. *v.* Johnson, 150 Mass. 54, 22 N. E. 82; Turner *v.* McFee, 61 Ala. 468.

The owner of an alleged stolen cow may give his opinion that a cow's head found two or three weeks after the larceny was the head of the stolen cow. Osgood *v.* State (Tex. Crim.), 49 S. W. 94.

Identity of Horse. — Opinion Based on Noise Made by Its Feet. See Com. *v.* Best, 180 Mass. 492, 62 N. E. 748.

73. Brooke *v.* People, 23 Colo. 375, 48 Pac. 502; Chesnut *v.* People, 21 Colo. 512, 42 Pac. 656; Rema *v.* State, 52 Neb. 375, 72 N. W. 474. See Hester *v.* State, 15 Tex. App. 567; Keith *v.* Tilford, 12 Neb. 271, 11 N. W. 315. See also article "ANIMALS."

Expert Opinion as to Identity of Disfigured Brand, Competent. Askew *v.* People, 23 Colo. 446, 48 Pac. 524.

74. Altman *v.* Young, 38 Mich. 410; State *v.* Hopkirk, 84 Mo. 278; Wiggins *v.* Henson, 68 Ga. 819. This was an action in trover for a bale of cotton. It was held that the plaintiff was properly permitted to state that he believed that the cotton was his because he had traced it to the defendant's possession, because it was wet and nappy and had stains of mud upon it, and also because the weight of the cotton agreed with the number of pounds missed from the bale. See also Jupitz *v.* People, 34 Ill. 516; State *v.* Babb, 76 Mo. 501; King *v.* New York C. & H. R. R. Co., 72 N. Y. 607; Com. *v.* O'Brien, 134 Mass. 198; Morrissey *v.* People, 11 Mich. 327.

Opinion as to Identity of Dam. McLeod *v.* Lee, 17 Nev. 103, 28 Pac. 124.

Identification of Wagon by Rattle. In Com. *v.* Best, 180 Mass. 492, 62 N. E. 748, it was held that a witness was properly allowed to identify a wagon by its familiar rattle, although he did not see it at the time in question.

In Support of the Opinion or Belief of a witness who has testified to the identity of a chattel, he may be asked whether or not he has any doubt as

relevant to this issue may be proved.[75] Evidence as to marks upon an object is competent for purposes of identification.[76]

The Opinion of Experts as to the identity of a chattel is sometimes admissible.[77]

2. Document. — A document or instrument in writing may be identified by peculiar marks upon or alterations in it,[78] as well as by the handwriting.[79] A witness may identify it as one previously seen by him, although he is unable to read.[80]

3. Hair. — Opinion evidence as to the identity of certain human hair not founded upon observations or experiments requiring special

to its identity. King *v.* New York C. & H. R. R. Co., 72 N. Y. 607.

75. Color. — For the purpose of identifying an alleged check which had been chewed into a wad, a blank check is admissible to show that they were of the same color. People *v.* Considine, 105 Mich. 149, 63 N. W. 196.

Receipt Given for a Note. — Where the identity and ownership of a certain promissory note were in issue, and one of the claimants contended that it was a note which he had put into the hands of a certain person for collection, the exclusion of such person's receipt describing the note given to him was held error on the ground that it was competent evidence to identity the note in question as belonging to the claimant. Hall *v.* Stancell, 3 Tex. 400.

Previous Offer to Sell. — An action on an account stated for goods sold where the identity of the articles sold is in dispute, and where it appears that an offer shortly previous to sell the same articles was made to a third person, evidence of this offer is admissible to identify the goods sold. Sager *v.* Tupper, 38 Mich. 258.

76. State *v.* Hills, 10 Cush. (Mass.) 530.

The Similarity of Laundry Marks on clothing found in a satchel with those found on the clothing in deceased's trunk is competent to identify the contents of the satchel as deceased's property. State *v.* Lucey, 24 Mont. 295, 61 Pac. 994.

Identification of Pistol by Number. — Clay *v.* State (Tex. Crim.), 69 S. W. 413.

77. Com. *v.* Choate, 105 Mass. 451.

Expert Opinion as to Identity of Watch. — Ruhe *v.* Abren, 1 N. M. 247.

Identity of Partially Disfigured Brand. — Testimony of Experts Competent. — Askew *v.* People, 23 Colo. 446, 48 Pac. 524.

78. People *v.* Schooley, 149 N. Y. 99, 43 N. E. 536. See also Johnson *v.* Morgan, 7 Ad. & E. (Eng.) 237; Com. *v.* Miller, 3 Cush. (Mass.) 243, 251; Shelden *v.* Warner, 45 Mich. 638, 8 N. W. 529; Southwick *v.* Stevens, 10 Johns. (N. Y.) 443.

Identification by Document. — See *supra,* this article, "Persons."

79. See article "HANDWRITING."

80. An Attesting Witness Who Made His Mark on a will may testify that the instrument produced is the one which he signed, and that the mark thereon is the one so made by him. Thompson *v.* Davitte, 59 Ga. 472.

Identity of Document. — Illiterate Witness. — "The mere fact that a witness cannot read does not necessarily render him incompetent to testify to the identity of a written paper. He still has the size, form, color and general appearance of the paper, the color of the ink, and the size and general characteristics or appearance of the writing, to go by. For example, one might be allowed to testify to the identity of a paper written in Greek, Hebrew, Sanscrit or Egyptian hieroglyphics, although unable to read a word of either language." Com. *v.* Meserve, 154 Mass. 64, 27 N. E. 997.

skill has been held inadmissible.[81] On the other hand, it has been held that the opinion of a non-expert as to the identity of certain horse hair is competent.[82]

4. Footprints. — To establish the identity of the person or animal making certain footprints or tracks, it is competent to show the results of comparative measurements.[83] A competent witness may also describe the characteristics and peculiarities of the tracks in question, and the shoes, feet or tracks of the person alleged to have made them.[84] The witness need not be an expert.[85] But while such a witness may testify that the tracks were similar to[86] or corre-

81. Knoll *v.* State, 55 Wis. 249, 12 N. W. 369, 42 Am. Rep. 704. This was a prosecution for murder. A medical expert testified that he had examined the hair which was found upon a certain wheelbarrow, and that he had compared it with other hair taken from the skull of the decedent, and "that the hair was precisely the same in every respect, in length, magnitude, color, and in every other respect, so that any person could have told it as well as himself," and that as the result of such comparison he should say that the hair from the wheelbarrow was the same as that from the head of the decedent. It was held that such evidence was inadmissible. The court said: "The witness reached this conclusion, as we understand his testimony, not from any scientific tests, or peculiarities in the structure of the hair which an examination by a microscope would disclose, but from the length, magnitude, color, or those obvious marks and resemblances which one person of good vision would observe as readily as another. The comparison made required no peculiar skill nor scientific knowledge. It was no more in the province of an expert than of an ordinary person to make it. It related to a matter of common observation. The jury were as competent to make the comparison from the description given of the hair, and draw the conclusion whether it came from the head of the same person, as was the witness. The opinion of the witness as to the fact that the hair came from the head of the same person was not admissible on the ground that the inquiry related to a scientific subject — one which required peculiar knowledge or previous study and experience to give information about. But it related to a matter within the observation, judgment and knowledge of any ordinary man; for the resemblance relied upon in making the comparison, as the length, magnitude and color of the hair, were as open to the observation of the jury, or the jury could draw their inference from these resemblances as well as any one. The witness, then, could not testify to his opinion on the ground that the subject-matter of the inquiry related to a scientific subject, and was expert testimony."

82. Identity of Horse Hair. — In Crumes *v.* State, 28 Tex. App. 516, 13 S. W. 868, 19 Am. St. Rep. 853, a witness was held properly allowed to give his opinion that hair found on a fence was from a horse which the evidence showed defendant was riding on the night of the offense.

83. People *v.* McCurdy, 68 Cal. 576, 10 Pac. 207.

A witness may state as a collective fact that the measurements of certain tracks were the same. Gilmore *v.* State, 99 Ala. 154, 13 So. 536.

84. State *v.* Green, 40 S. C. 328, 18 S. E. 93, 42 Am. St. Rep. 872.

85. State *v.* Reitz, 83 N. C. 634.

86. Hester *v.* State (Tex. Crim.), 51 S. W. 932; Rippey *v.* State, 29 Tex. App. 37, 14 S. W. 448.

A witness may state that two sets of tracks appeared to be alike or to have been made by the same shoe. State *v.* Moelchen, 53 Iowa 310, 5 N. W. 186.

In James *v.* State, 104 Ala. 20, 16 So. 94, where the tracks were

sponded with[87] the shoes, feet or other tracks of the person alleged to have made them, he cannot state his opinion that certain tracks or sets of tracks were made by a particular person,[88] though it seems to have been held to the contrary.[89]

In Rebuttal any facts are competent which tend to show that the tracks were not[90] or could not have been made[91] by the person suspected of having made them. An accused person may prove his willingness and desire to have a comparison made.[92]

marked by certain physical peculiarities, a witness was asked the following question: "What was the similarity between the tracks at the forks of the road and at the seed-room door?" In holding that this question was unobjectionable, the court said: "We think in cases of this kind, where many, and often indescribable, peculiarities and characteristics are to be considered in ascertaining the identity of a thing, a witness who saw these peculiarities and had the means of forming a correct conclusion may testify to the identity, as a collective fact." See also cases in the following notes.

87. Clark *v.* State (Tex. Crim.), 26 S. W. 68; State *v.* Morris, 84 N. C. 756; Crumes *v.* State, 28 Tex. App. 516, 13 S. W. 868, 19 Am. St. Rep. 853; Clark *v.* State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; Murphy *v.* People, 63 N. Y. 590; Blackman *v.* State, 80 Ga. 785, 7 S. E. 626; Com. *v.* Pope, 103 Mass. 440, in which the witness who had examined the boots of the defendant and the footprints near the scene of the crime was held properly allowed to testify that he thought that the boots would fit the footprints and were of the same size.

A Witness Who Has Applied Shoes to Tracks may state that they correspond to each other, this being a matter of fact and not of opinion. Young *v.* State, 68 Ala. 569; McLain *v.* State, 30 Tex. App. 482, 17 S. W. 1092, 28 Am. St. Rep. 934. See also State *v.* Graham, 74 N. C. 646, 21 Am. Rep. 493.

A witness who has measured tracks may state that they "corresponded," but he cannot be asked whether a particular shoe "would have made" such a track as the one in question. Rusby *v.* State, 77 Ala. 66.

A witness cannot state that the tracks measured by him "corresponded in his opinion" with the track of the defendant. Livingston *v.* State, 105 Ala. 127, 16 So. 801.

88. Hodge *v.* State, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145; Terry *v.* State, 118 Ala. 79, 23 So. 776; Riley *v.* State, 88 Ala. 193, 7 So. 149; Collins *v.* Com., 15 Ky. L. Rep. 691, 25 S. W. 743; Hester *v.* State (Tex. Crim.), 51 S. W. 932; State *v.* Green, 40 S. C. 328, 18 S. E. 933, 42 Am. St. Rep. 872; Bluitt *v.* State, 12 Tex. App. 39, 41 Am. Rep. 666.

89. State *v.* Reitz, 83 N. C. 634; State *v.* Millmeier, 102 Iowa 692, 72 N. W. 275. *Citing* Crumes *v.* State, 28 Tex. App. 516, 13 S. W. 868, 19 Am. St. Rep. 853; State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

Wagon Tracks. — In State *v.* Folwell, 14 Kan. 105, a witness who was familiar with the peculiarities of the defendant's wagon and the tracks made by it, was held properly allowed to testify that certain wagon tracks which he had measured and examined carefully were made by the defendant's wagon.

90. Lipes *v.* State, 15 Lea (Tenn.) 125, 54 Am. Rep. 402.

91. Where the tracks leading from the scene of the crime have been traced to the defendant's house, it is error to exclude evidence on his behalf that he had not worn or possessed any shoes or boots capable of making such footprints. Stone *v.* State, 12 Tex. App. 219.

92. The defendant may show his willingness, when accused, to put his foot and shoe in the tracks, and his request that the horse tracks should be measured and compared with the

IV. TESTS.

An actual test of the witness' ability to identify a particular person may be made in court,[93] but evidence as to a test of the witness' ability made previous to the trial is not admissible.[94]

V. PHOTOGRAPHS.

Properly authenticated photographs are admissible for purposes of identification.[95]

VI. TRAILING BY BLOODHOUNDS.

Whether trailing by bloodhounds is competent evidence of identity the courts are not agreed. Such evidence has been held incompetent in one jurisdiction, because too uncertain and unreliable.[96] In others it has been held competent under certain circumstances,[97] and with certain limitations. It must appear that the dog in question not only belongs to a species capable of following a trail by scent, but also that it has been specially trained[98] and tested in following the

feet and tracks of his horse. Bouldin *v.* State, 8 Tex. App. 332.

93. People *v.* Wilson, 141 N. Y. 185, 36 N. E. 230.

Test in Court. — Where the accused and his brother were sitting together in the bar of the court, it was held proper for counsel for the accused to require the witness to point out which of the two committed the assault upon her. Senior *v.* State, 97 Ga. 185, 22 S. E. 404.

94. Murphy *v.* State (Tex. Crim.), 51 S. W. 940. But see this article, "Extrajudicial Identification."

95. *United States.* — Wilson *v.* United States, 162 U. S. 613.

Alabama. — Malachi *v.* State, 89 Ala. 134, 8 So. 104.

California. — People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

Michigan. — People *v.* Carey, 125 Mich. 535, 84 N. W. 1086.

Nebraska. — Marion *v.* State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825.

New York. — People *v.* Fish, 125 N. Y. 136, 26 N. E. 319.

Pennsylvania. — Udderzook *v.* Com., 76 Pa. St. 340.

Rhode Island. — State *v.* Ellwood, 17 R. I. 763, 24 Atl. 782.

Utah. — State *v.* McCoy, 15 Utah, 136, 49 Pac. 420.

See more fully the article "PHOTOGRAPHS."

96. Brott *v.* State (Neb.), 97 N. W. 593.

97. In Hodge *v.* State, 98 Ala. 10, 13 So. 385, 39 Am. St. Rep. 17, it was held competent to prove that shortly after the commission of the homicide a dog trained to follow human tracks was put upon the trail leading from the scene of the homicide and followed it to the house of the defendant, in connection with the testimony of other witnesses that they followed the same tracks to the same house.

98. Allen *v.* Com. (Ky.), 82 S. W. 589.

Limitations on Such Evidence. "It is difficult to lay down a general rule as to the introduction of testimony of this kind. It is matter of common knowledge, of which courts are authorized to take notice, that dogs of some varieties (as the bloodhound, foxhound, pointer and setter) are remarkable for the acuteness of their sense of smell, and for their power of discrimination between the track they are first laid on and others which may cross it; but it is also matter of common knowledge that all dogs do not possess this power in the same degree, and that some dogs

track of human beings. It must also be shown that the track followed was probably that of the person sought to be identified.[99]

VII. WITNESS NEED NOT TESTIFY POSITIVELY.

The testimony of a witness if founded on his own knowledge and observation is not incompetent merely because he is not positive in his statements. He may state his impression, belief or best knowledge on the subject.[1]

of purest pedigree prove worthless upon trial. . . . After a careful consideration of this case by the whole court, we think it may be safely laid down that, in order to make such testimony competent, even when it is shown that the dog is of pure blood, and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicated to have been made by him. When so indicated, testimony as to trailing by a bloodhound may be permitted to go to the jury for what it is worth, as one of the circumstances which may tend to connect the defendant with the crime of which he is accused. When not so indicated, the trial court should exclude the entire testimony in that regard from the jury." Pedigo *v.* Com., 19 Ky. L. Rep. 1723, 44 S. W. 143.

In Parker *v.* State (Tex. Crim.), 80 S. W. 1008, such evidence was held admissible when supported by the testimony of a witness that it was a bloodhound kept for the purpose of tracking people; that he knew from his own experience with it that it was trained and reliable in this respect, and that if put upon the track of a human being he would follow and keep to the same track until he reached its destination, and would follow no other track. The court quotes extensively and approvingly from Pedigo *v.* Com., 103 Ky. 41, 44 S. W. 143, 82 Am. St. Rep. 566, 42 L. R. A. 432, as to the necessity of showing both the dog's natural characteristics and his special training in tracking human beings, and the further showing that it was started upon the track at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicated to have been made by him.

Rebuttal. — Actions of Other Dogs of Same Breed. — Evidence that two bloodhounds of the same breed as those used to track the supposed criminal, and trained by the same man, when put upon the trail of a human being left it to follow the trail of a sheep, was held inadmissible because too uncertain to determine the reliability of the dogs used. Simpson *v.* State, 111 Ala. 6, 20 So. 572.

99. State *v.* Moore, 129 N. C. 494, 39 S. E. 626; Pedigo *v.* Com., 19 Ky. L. Rep. 1723, 44 S. W. 143.

1. *United States.* — See White *v.* Van Horn, 159 U. S. 3.

Alabama. — Thornton *v.* State, 113 Ala. 43, 21 So. 356, 59 Am. St. Rep. 97; Mitchell *v.* State, 94 Ala. 68, 10 So. 518.

Arkansas. — Trulock *v.* State, 70 Ark. 558, 69 S. W. 677.

California. — People *v.* Young, 102 Cal. 411, 36 Pac. 770.

Georgia. — Thompson *v.* Davitte, 59 Ga. 472.

VIII. IDENTIFICATION FROM DESCRIPTION OR OTHER TESTIMONY.

While testimony as to identity based upon a hearsay description is incompetent,[2] such testimony or opinion may be competent when based upon other evidence in the case.[3]

IX. BASIS OF OPINION.

The opinion of a witness to identity is not competent when

Iowa. — State *v.* Seymore, 94 Iowa 699, 63 N. W. 661.

Missouri. — State *v.* Reed, 89 Mo. 168, 1 S. W. 225; State *v.* Howard, 118 Mo. 127, 24 S. W. 41; State *v.* Babb, 76 Mo. 501; State *v.* Cushenberry, 157 Mo. 168, 56 S. W. 737.

New York. — People *v.* Whigham, 1 Wheel. Crim. 115. *Contra,* People *v.* Williams, 29 Hun 522.

North Carolina. — Beverly *v.* Williams, 20 N. C. 236; State *v.* Lytle, 117 N. C. 799, 23 S. E. 476, *distinguishing* State *v.* Thorp, 72 N. C. 186.

Texas. — Dupree *v.* State (Tex. Crim.), 37 S. W. 739; Tate *v.* State, 35 Tex. Crim. 231, 33 S. W. 121. But see Phoenix Ins. Co. *v.* Padgitt (Tex. Civ. App.), 42 S. W. 800.

Testimony by a witness that "he took" persons seen by him to be the same parties whom he had previously seen, held competent. Brooks *v.* State (Tex. Crim.), 37 S. W. 739.

In State *v.* Hopkirk, 84 Mo. 278, testimony of a witness that "she judged" that the tall man she had seen on the night of the murder was the defendant, was held properly admitted.

The testimony of a witness that he met a person "whom he took" to be the defendant, was held sufficiently certain to warrant its admission. Alanis *v.* State (Tex. Crim.), 81 S. W. 709.

A witness testifying to the identity of the deceased person in a murder case may state to the "best of my impression it was the body of the deceased," and "I saw a body that I took to be the body of deceased." State *v.* Dickson, 78 Mo. 438.

"Belief." — People *v.* Rolfe, 61 Cal. 540.

"Best of His Knowledge and Belief." — Kent *v.* State, 94 Ga. 703, 19 S. E. 885; State *v.* McDaniel, 39 Or. 161, 65 Pac. 520.

"Best Opinion." — Thornton *v.* State, 113 Ala. 43, 21 So. 356.

"Impression" of the witness. People *v.* Stanley, 101 Mich. 93, 59 N. W. 498. *Citing* Long *v.* State, 95 Ind. 481; State *v.* Harr, 38 W. Va. 58, 17 S. E. 794.

"Best Judgment." — Kastner *v.* State, 58 Neb. 767, 79 N. W. 713.

Sufficiency in Criminal Case. Testimony of witnesses as to their "belief" that defendant is the person whom they saw commit the homicide is sufficient proof of his identity. State *v.* Howard, 118 Mo. 127, 24 S. W. 41.

So in Com. *v.* Cunningham, 104 Mass. 545, testimony of witnesses that the prisoner "resembled" a man whom they had seen was held sufficient evidence of identification to sustain a verdict.

2. A witness cannot state that the description given him by the person who saw the act committed tallied with the person charged with the commission of the act. Chilton *v.* State, 105 Ala. 98, 16 So. 797. See also this article, "Basis of Opinion."

3. A witness may state that he recognized the defendant in a previous trial, at which he was a witness, as a person from whom he had purchased certain coins, when this testimony is followed by evidence identifying the defendant in the case on trial as the defendant in the trial testified to by the witness. Brown *v.* Com., 76 Pa. St. 319.

A witness who found a mutilated and badly-disfigured body was held

founded on hearsay.[4] Thus, the opinion of a witness as to the identity of a person seen by him on a particular occasion is only competent when based upon observations, or the recollections of observations made at the time in question.[5] In support of his opinion as to identity a witness may detail the facts upon which he bases his opinion,[6] and the peculiar circumstances fixing the

properly permitted to testify that the face resembled a photograph produced in court and proved to be a likeness of the alleged deceased for whose murder the defendant was on trial, although the witness had never before seen the person whose body he found. Udderzook *v.* Com., 76 Pa. St. 340.

In Taylor *v.* State, 35 Tex. 97, where the identity of the deceased was in question, and there was evidence minutely describing the body found, the father of the alleged deceased who had listened to the testimony, testified without objection that it was a description of the body of his son.

4. Hopt *v.* Utah, 110 U. S. 574; Darden *v.* Neuse, 107 N. C. 437, 12 S. E. 46; State *v.* Lytle, 117 N. C. 799, 23 S. E. 476; People *v.* Stanley, 101 Mich. 93, 59 N. W. 498. See Crane *v.* State, 111 Ala. 45, 20 So. 590. But see Edmanson *v.* Andrews, 35 Ill. App. 223; Chrisman-Sawyer Banking Co. *v.* Strahorn-Hutton-Evans Com. Co., 80 Mo. App. 438.

A witness cannot identify an object as being the one in question from a description previously given him by another person. Reed *v.* State, 66 Ark. 110, 49 S. W. 350; Lewis *v.* State, 62 Ark. 494, 36 S. W. 689.

A witness cannot identify goods stolen by their resemblance to samples of such goods shown to him previous to his finding the alleged stolen goods. Crane *v.* State, 111 Ala. 45, 20 So. 590.

An officer who arrested defendant cannot testify that he acted upon the description given him by persons who had seen the party who committed the crime. Mallory *v.* State, 37 Tex. Crim. 482, 26 S. W. 751; Com. *v.* Fagan, 108 Mass. 471.

Testimony by a witness that he saw one W. and "a man they said was James M. Quimby, together at a barn," was held not objectionable as hearsay, the witness evidently meaning a man who went by such name. Willis *v.* Quimby, 31 N. H. 485.

5. Woodward *v.* State, 4 Baxt. (Tenn.) 322, in which the opinion of the witness as to the identity of a person who ran past him on a particular occasion was held inadmissible, where it appeared to be based on his subsequent knowledge. "The opinion or belief must be based upon . . . knowledge. It is not necessary that it should be formed at the time the person sought to be identified was seen by the witness, but when formed it must be the result of the recollection of the person seen and of the facts connected with the seeing, but not from information derived from others."

Where the question in issue was the identity of an engine which was the alleged cause of a fire, the testimony of a witness who saw the engine when it passed the place where the fire started that he believed it was engine No. 44, was held properly excluded because it appeared that his conclusion was based not upon his view of the engine and his impressions gained at the time, but upon his previous and subsequent knowledge that engine No. 44 commonly passed the place in question at that time, and that her engineer was on the engine which he saw, and also because the railroad dispatcher refused to deny that it was engine No. 44. Smith *v.* Northern Pac. R. Co., 3 N. D. 555, 58 N. W. 345.

6. State *v* Kaiser, 124 Mo. 651, 28 S. W. 182; Murphy *v.* State (Tex. Crim.), 51 S. W. 940. See Nite *v.* State, 41 Tex. Crim. 340, 54 S. W. 763.

For the purpose of identifying the car from which he had fallen, the plaintiff in an action for personal injuries may state that a new hand-

impression upon his mind.[7] The witness may be questioned on either direct or cross-examination as to the character and extent of his acquaintance with the person or thing identified.[8]

X. EXTRAJUDICIAL IDENTIFICATION.

An identification made out of court by a witness or other person cannot ordinarily be shown, because hearsay.[9] It has been held, however, that a witness who has previously identified a document may testify to such fact, in connection with other evidence showing that the document produced is the same as the one previously identified.[10]

hold had been put upon the car to replace the one which gave way and caused him to fall, although such evidence is incompetent on the question of negligence. Missouri, K. & T. R. Co. *v.* Rose, 19 Tex. Civ. App. 470, 49 S. W. 133.

A witness who has identified a watch found upon one person as the property of another may testify as to the extent and nature of his acquaintance with the latter person, for the purpose of giving additional weight to his testimony. People *v.* Rohl, 138 N. Y. 616, 33 N. E. 933.

7. A witness who has testified to the identity of a person seen by him on a particular occasion may give in evidence the circumstances and facts which called his attention specially to such person's identity. State *v.* Becton, 7 Baxt. (Tenn.) 138.

In support of his testimony as to the identity of the person to whom he had sold poison, a witness was held properly allowed to state that sales of the kind were not very common, and that he had but three boxes of the poison sold on hand at the time. Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770.

8. State *v.* Bartlett, 55 Me. 200; Olive *v.* State, 11 Neb. 1, 7 N. W. 444.

9. Murphy *v.* State (Tex. Crim.), 51 S. W. 940. But see State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

The testimony of a detective, on a prosecution for robbery, that the prosecuting witness on the morning after the robbery identified the photograph of the defendant in the rogues' gallery as one of the parties engaged in the crime against him, was held properly excluded as hearsay. State *v.* Houghton, 43 Or. 125, 71 Pac. 982.

Testimony of an officer as to the description of the culprit given him by the prosecuting witness previous to the arrest is inadmissible because hearsay. People *v.* Johnson, 91 Cal. 265, 27 Pac. 663; People *v.* McNamara, 94 Cal. 509, 29 Pac. 953. So also is the statement of the prosecuting witness to an officer as to who committed the assault upon him. O'Toole *v.* State, 105 Wis. 18, 80 N. W. 915.

10. In Jackson *v.* Thompson, 6 Cow. (N. Y.) 178, the subscribing witness to a will offered in evidence could not see to read because of his age, and therefore could not testify to his signature, but he testified that some years previous he had seen the will in the surrogate's office, and that he then read and recognized his signature as genuine. As to the identity of the will produced on the trial with that which the witness had seen in the surrogate's office there was no dispute. This was held sufficient to warrant the introduction of the will in evidence. See also Brown *v.* Com., 76 Pa. St. 319, and the following English cases: R. *v.* Burke, 2 Cox C. C. 295; Bailie's Case, 21 How. St. Tr. 319; R. *v.* Blackburn, 6 Cox C. C. 338; Annesley *v.* Angelsea, 17 How. St. Tr. 1139, 1195.

XI. DECLARATIONS IDENTIFYING TIME AND PLACE.

For the purpose of identifying a particular time or place, declarations otherwise hearsay, made at the time or place in question, may be admissible.[11]

XII. HEARSAY STATEMENTS IN CORROBORATION.

The previous hearsay statements of the witness to identity are not admissible in corroboration of his testimony.[12]

XIII. REBUTTAL.

In rebuttal any facts or circumstances are competent which tend to disprove the attempted identification or show a mistake of identity.[13]

11. Earle *v.* Earle, 11 Allen (Mass.) 1. See also:

Georgia. — Barrow *v.* State, 80 Ga. 191, 5 S. E. 64.

Iowa. — State *v.* Dunn, 109 Iowa 750, 80 N. W. 1068; Stewart *v.* Anderson, 111 Iowa 329, 82 N. W. 770.

Massachusetts. — Com. *v.* Sullivan, 123 Mass. 221; Whitney *v.* Houghton, 125 Mass. 451.

Michigan. — People *v.* Mead, 50 Mich. 229, 15 N. W. 95.

Rhode Island. — Agulino *v.* Railroad Co., 21 R. I. 263, 43 Atl. 63.

Vermont. — State *v.* Young, 67 Vt. 450, 32 Atl. 251; Hill *v.* North, 34 Vt. 604; Wilkins *v.* Metcalf, 71 Vt. 103, 41 Atl. 1035.

12. Chilton *v.* State, 105 Ala. 98, 16 So. 797. But see this article, "Extrajudicial Identification."

13. Cooper *v.* State, 23 Tex. 331.

In White *v.* Com., 80 Ky. 480, defendant was charged with stealing certain bonds. A witness testified to having purchased the bonds in Cincinnati from a person whose personal appearance corresponded with that of the defendant. The testimony of a witness who was well acquainted with the defendant was offered in rebuttal, to the effect that, at the time of the sale of the bonds in Cincinnati, the witness was there, and that he met a person who so strongly resembled the defendant that he believed the person to be the defendant, until very close inspection showed him his mistake. The exclusion of this evidence was held error.

In rebuttal of testimony of a witness that he saw the defendant in a particular place at a particular time doing certain acts, it is competent to show as evidence of a mistake in identity that another person was seen at the same place at the same time under similar circumstances doing a similar act. State *v.* Witham, 72 Me. 531.

On a prosecution for the illegal selling of liquor to show that a witness was mistaken as to the identity of the place where he purchased the liquor, it was held competent for the defendant to show that in his saloon there were no pool or billiard tables which had been described by the witness, but that in two other saloons near by there were such tables. Benson *v.* State, 39 Tex. Crim. 56, 44 S. W. 167, 1091.

Expert Opinion as to Impossibility of Forming Correct Conclusion. Where the head of the deceased, preserved in alcohol, had been introduced in evidence and identified by several witnesses, the opinion of experts that on account of the changes which must necessarily occur in such a case, it was not possible for any one to identify the head, was held properly excluded as invading the province of the jury. State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753. But where a witness has stated that his opinion as to the identity of certain chattels is based upon their color and quality, it is competent for a witness experienced in such matters to give his opinion that a person could not identify goods from color and quality alone. Buchanan *v.* State, 109 Ala. 7, 19 So. 410.


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