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PREFACE

Encyclopedias of law have justified themselves to the profession. Questions of evidence are continually arising in practice, requiring quick and accurate solution — not the theories of authors are needed, but the *law* as fixed by the courts of final resort. To search out and arrange in compact form these fixed rules, from encyclopedias of general law and digests, requires time and patience as well as access to a very complete library.

This work is intended to present these rules, with the decided cases, in such form that they shall be ready for instant use when wanted. The aim is to present *all* the law of evidence, so that the practitioner may here find help on the most difficult and obscure questions, and find it readily. The system of cross references and catch lines in large type, to be found in the notes as well as the text, will aid the seeker in quickly and easily finding the precise point for which he is searching. Instead of giving long lists of cases upon general propositions, we have differentiated the authorities; thus enabling the lawyer to turn to the precise question, or the very subdivision of the general subject which he has in hand.

We shall bring citations down, as nearly as practicable, to the date of publication, and shall make a point of citing the late and latest cases; and shall cite not only the official reports but also the National Reporters System, the American Decisions, American Reports, American State Reports, and Lawyers' Reports Annotated.

The limits of this work cannot be precisely determined by definition of the word "evidence" but must be fixed by the use and wont of lawyers in investigating matters in litigation. The effort will be made to include all for which a lawyer would naturally examine books on evidence, and to exclude all for which he would more naturally turn to others.

EDGAR W. CAMP.

LOS ANGELES, CAL., JANUARY 23, 1903.

TABLE OF TITLES.

ABANDONMENT.

By Lewis R. Works.

CROSS-REFERENCES.

Adverse Possession;
Bills of Particulars;
Contracts; Copyright;
Dedication; Divorce;
Easements; Eminent Domain; Estoppel; Execution;
Factors;
Highways; Homestead;
Insurance;
Liens;
Patents; Prescription;
Trade Marks and Trade Names;
Waiver.

I. DEFINITION.

Abandonment is the actual leaving of property with a final relinquishment of all claim thereto and without conveyance or gift to any particular person or persons.

II. WHAT MAY BE ABANDONED.

Personal property generally is susceptible of abandonment.[1] Easements and servitudes may be abandoned, those acquired by prescription being so lost by mere non-user,[2] while in the case of

1. McGoon *v.* Ankeny, 11 Ill. 558; Haslam *v.* Lockwood, 37 Conn. 500, 9 Am. Rep. 350.
2. Robie *v.* Sedgwick, 35 Barb. (N. Y.) 319; Dikes *v.* Miller, 24 Tex. 417, 424; Farrar *v.* Cooper, 34 Me. 394, 399; French *v.* Braintree Mfg. Co., 23 Pick. (Mass.) 216, 221; Smyles *v.* Hastings, 22 N. Y. 217, 224; Jewett *v.* Jewett, 16 Barb. (N. Y.) 150, 157; Canny *v.* Andrews, 123 Mass. 155.

those acquired by deed, further evidence of intent to abandon is necessary.[3] Tailings from mines[4] and patent rights to inventions[5] may be abandoned, as may also mining claims[6] and water rights.[7] Highways may be abandoned by cities, counties and other bodies politic.[8]

Inchoate claims, equitable titles or possessory rights to real property and the rights acquired therein by settlers under the public land laws previous to patent are the subject of abandonment,[9] and

3. *United States.* — Townsend *v.* Mich. Cent. Ry. Co., 101 Fed. 757.

Idaho.—Welch *v.* Garrett (Idaho), 51 Pac. 405.

Illinois.—Kuechen *v.* Voltz, 110 Ill. 264.

Iowa.—Noll *v.* Dubuque B. & M. R. R. Co., 32 Iowa 66.

Kansas.—Edgerton *v.* McMullan, 55 Kan. 90, 39 Pac. 1021.

Kentucky.—Curran *v.* Louisville, 83 Ky. 628.

Massachusetts.—Barnes *v.* Lloyd, 112 Mass. 224; Arnold *v.* Stevens, 24 Pick. 106, 35 Am. Dec. 305; Butterfield *v.* Reed, 160 Mass. 361, 35 N. E. 1128.

Michigan. — Day *v.* Walden, 46 Mich. 575, 10 N. W. 26; Lathrop *v.* Elsner, 93 Mich. 599, 53 N. W. 791.

New Jersey. — Riehle *v.* Heulings, 38 N. J. Eq. 20; Dill *v.* School Board, 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 276.

New York.—Longendyck *v.* Anderson, 59 How. Pr. 1; Marshall *v.* Wenninger, 20 Misc. 527, 46 N. Y. Supp. 670; Welsh *v.* Taylor, 19 N. Y. St. 735, 2 N. Y. Supp. 815; Valentine *v.* Schreiber, 73 N. Y. St. 838, 38 N. Y. Supp. 417; Smiles *v.* Hastings, 24 Barb. 44; Smyles *v.* Hastings, 22 N. Y. 217.

As to Different Kinds of Easements.—"'There is a material distinction between an easement acquired by prescription, and one created by deed.'" (Angell on Watercourses, Ed. of 1850, p. 269, § 252.) This writer says, "An easement, to become extinguished by *disuse*, must have been acquired by *use*; and the doctrine of extinction by *non-user* does not apply to servitudes or easements created by *deed*. In the one case, mere *disuse* is sufficient; but in the latter there must not only be disuse by the owner of the land dominant, but there must be an actual *adverse user* by the owner of the land servient." Jewett *v.* Jewett, 16 Barb. (N. Y.) 150, 157.

4. Dougherty *v.* Creary, 30 Cal. 290, 89 Am. Dec. 116.

5. Pennock *v.* Dialogue, 2 Pet. 1, 16; Planing Machine Co. *v.* Keith, 101 U. S. 479; Bell *v.* Daniels, 1 Bond 212, 1 Fish. Pat. Cas. 372, Merw. Pat. Inv. 616, 3 Fed. Cas. No. 1247; Pitts *v.* Hall, 2 Blatchf. 229, 19 Fed. Cas. No. 11,192.

6. Weill *v.* Lucerne Min. Co., 11 Nev. 200; Richardson *v.* McNulty, 24 Cal. 339; Depuy *v.* Williams, 26 Cal. 309; Harkrader *v.* Carroll, 76 Fed. 474.

7. Dodge *v.* Marden, 7 Or. 456; Hewitt *v.* Story, 51 Fed. 101; North Am. E. Co. *v.* Adams, 104 Fed. 404; Utt *v.* Frey, 106 Cal. 392, 39 Pac. 807.

8. Los Angeles *v.* Cohn, 101 Cal. 373, 35 Pac. 1002; Town of Derby *v.* Alling, 40 Conn. 410, 436; Hutto *v.* Tindall, 6 Rich. Law (S. C.) 396; Jeffersonville M. & I. R. R. Co. *v.* O'Connor, 37 Ind. 95; Larson *v.* Fitzgerald, 87 Iowa 402, 54 N. W. 441; Hewes *v.* Village of Crete, 175 Ill. 348, 51 N. E. 696.

9. *United States.* — Carroll *v.* Price, 81 Fed. 137.

Alabama.—Louisville & N. R. Co. *v.* Philyaw, 88 Ala. 264, 6 So. 837.

California.—Gluckauf *v.* Reed, 22 Cal. 468; Ferris *v.* Coover, 10 Cal. 589.

Kentucky.—Smith *v.* Morrow, 7 J. J. Marsh. 442.

Maine.—Hamilton *v.* Paine, 17 Me. 219; Schwartz *v.* Kuhn, 10 Me. 274, 25 Am. Dec. 239.

Mississippi.—Harper *v.* Tapley, 35 Miss. 506.

Pennsylvania.—Mayor *v.* Riddle, 25 Pa. St. 259; Gibson *v.* Robbins, 9

sometimes even the perfected title to real property may be so surrendered,[10] although the general rule is to the contrary[11] even where the title has arisen merely by adverse possession.[12]

III. ELEMENTS.

1. The Act.—To establish an abandonment, there must first be shown an actual, complete and voluntary leaving, relinquishment or surrender of possession by the owner.[13]

Must be Voluntary.—Hence, where one is ousted from the possession of property, he can not be charged with abandonment,[14] nor can he be where he is prevented from using or occupying by injunction or other judicial order,[15] as the relinquishment is not

Watts 156; Philips *v.* Shaffer, 5 Serg. & R. 215.

South Carolina.—Garlington *v.* Copeland, 32 S. C. 57, 10 S. E. 616.

Texas.—Sideck *v.* Duran, 67 Tex. 256, 3 S. W. 264; Hollingsworth *v.* Holshousen, 17 Tex. 41; Dikes *v.* Miller, 24 Tex. 417.

10. Fine *v.* St. Louis Public Schools, 30 Mo. 166, 175; Clark *v.* Hammerle, 36 Mo. 620, 639; Landes *v.* Perkins, 12 Mo. 238, 256; Dikes *v.* Miller, 24 Tex. 417, 424.

11. Hummel *v.* Cumberland Val. R. Co., 175 Pa. St. 537, 34 Atl. 848; Robie *v.* Sedgwick, 35 Barb. (N. Y.) 319, 329; Mayor *v.* Riddle, 25 Pa. St. 259, 263; Davenport *v.* Turpin, 43 Cal. 597, 602; Ferris *v.* Coover, 10 Cal. 589, 631.

12. School Dist. *v.* Benson, 31 Me. 381, 52 Am. Dec. 618.

13. *United States.*—Dawson *v.* Daniel, 2 Flip. 305, 7 Fed. Cas. No. 3669; Integral Quicksilver M. Co. *v.* Altoona Quicksilver M. Co., 75 Fed. 379; Harkrader *v.* Carroll, 76 Fed. 474.

California.—Judson *v.* Malloy, 40 Cal. 299; Richardson *v.* McNulty, 24 Cal. 339; Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Bell *v.* Bed Rock T. & M. Co., 36 Cal. 214; Utt *v.* Frey, 106 Cal. 392, 39 Pac. 807.

Connecticut.—Stevens *v.* Norfolk, 42 Conn. 377.

Maine.—Livermore *v.* White, 74 Me. 452, 43 Am. Dec. 600.

Missouri.—Clark *v.* Hammerle, 36 Mo. 620; Page *v.* Scheibel, 11 Mo. 167; Landes *v.* Perkins, 12 Mo. 238; Fine *v.* St. Louis Public Schools, 30 Mo. 166; Hickman *v.* Link, 116 Mo. 123, 22 S. W. 472.

Montana.—Gassert *v.* Noyes, 18 Mont. 216, 44 Pac. 959.

Oregon.—Dodge *v.* Marden, 7 Or. 456.

Pennsylvania.—Miller *v.* Cresson, 5 Watts & S. 284.

Tennessee.—Breedlove *v.* Stump, 11 Tenn. 257; Masson *v.* Anderson, 3 Baxt. 290.

Texas.—McMillan *v.* Warner, 38 Tex. 410.

14. Wrongful Ouster.—Cook *v.* McCord, 9 Okla. 200, 60 Pac. 497.

Ousted From Property.—"If the plaintiff was rightfully in possession of the mine, and seeking to hold it, and the time had not expired within which he was allowed to do the work and perfect his location, and if during this time the defendant wrongfully intruded upon his possession, and ousted him from the mine, then the plaintiff could not be charged with abandonment. Abandonment can not be charged against the locator of a claim if, while in his possession, his claim has been seized by another, who holds the possession of it adversely to him." Lockhart *v.* Wills, 9 N. M. 263, 50 Pac. 318, 321.

15. Cook *v.* McCord, 9 Okla. 200, 60 Pac. 497.

Dispossessed Under Order of Court. "From 1889 to 1891, inclusive, the waters of Blackfoot River were involved in litigation, and the court appointed a water master, who shut the water off from the ditch in question, and refused to permit the water to be used by plaintiff during said

voluntary in either case. The same rule holds where one is forced to relinquish the possession of property by stress of weather or by other circumstances over which he has no control;[16] but abandonment may result where one is compelled to desert property by a superior force, and, either at the time of or after the act, relinquishes all intention to return or to reclaim.[17]

2. The Intent.—Coupled with the leaving, there must be present in the mind of the abandoner an unequivocal intent not to make further claim to the thing or right abandoned.[18]

litigation. . . . The non-user of the ditch, or any part thereof, during that portion of the time that its use was prevented by circumstances over which the plaintiff had no control, is not evidence of abandonment of, or intention to abandon, such ditch." Welch *v.* Garrett (Idaho), 51 Pac. 405.

16. Livermore *v.* White, 74 Me. 452, 43 Am. Dec. 600; Whitwell *v.* Wells, 24 Pick. (Mass.) 25; Wyman *v.* Hurlburt, 12 Ohio 81, 40 Am. Dec. 461.

17. See *post*, note 27.

18. *England.*—Moore *v.* Rawson, 3 Barn. & C. 332, 5 Dowl. & Ry. 234, 3 L. J. K. B. 32, 27 Rev. Rep. 375; Liggins *v.* Inge, 7 Bing. 682, 33 Rev. Rep. 615.

United States.—Paine *v.* Griffiths, 86 Fed. 452; Harkrader *v.* Carroll, 76 Fed. 474; Integral Quicksilver M. Co. *v.* Altoona Q. M. Co., 75 Fed. 379.

California.—Richardson *v.* McNulty, 24 Cal. 339, 345; Judson *v.* Malloy, 40 Cal. 299, 309; Morenhaut *v.* Wilson, 52 Cal. 263; Keane *v.* Cannovan, 21 Cal. 291, 303, 82 Am. Dec. 738; St. John *v.* Kidd, 26 Cal. 263, 272; Davis *v.* Perley, 30 Cal. 630; Sweetland *v.* Hill, 9 Cal. 556; Moon *v.* Rollins, 36 Cal. 333, 95 Am. Dec. 181; Bell *v.* Bed Rock T. & M. Co., 36 Cal. 214; Smith *v.* Cushing, 41 Cal. 97; Marquart *v.* Bradford, 43 Cal. 526; Sweeney *v.* Reilly, 42 Cal. 402; Dougherty *v.* Creary, 30 Cal. 290, 89 Am. Dec. 116; Myers *v.* Spooner, 55 Cal. 257, 260; Stone *v.* Geyser Q. M. Co., 52 Cal. 315; Jones *v.* Jackson, 9 Cal. 237, 245; Utt *v.* Frey, 106 Cal. 392, 39 Pac. 807.

Connecticut.—Stevens *v.* Norfolk, 42 Conn. 377, 384; Haslem *v.* Lockwood, 37 Conn. 500, 9 Am. Rep. 350.

Illinois.—McNeil *v.* Chicago City Ry. Co., 61 Ill. 150; McGoon *v.* Ankeny, 11 Ill. 558.

Kentucky.—Kercheval *v.* Ambler, 4 Dana 166; Speed *v.* Ripperdan, 1 Litt. 189.

Maine.—Livermore *v.* White, 74 Me. 452, 43 Am. Dec. 600; Pratt *v.* Sweetser, 68 Me. 344; Ross *v.* Gould, 5 Greenl. 204.

Massachusetts.—Howard *v.* Fessenden, 14 Allen 124; Dyer *v.* Sanford, 9 Metc. 395, 43 Am. Dec. 399; Canny *v.* Andrews, 123 Mass. 155.

Mississippi.—Hicks *v.* Steigleman, 49 Miss. 377, 385.

Montana.—Sloan *v.* Glancy, 19 Mont. 70, 47 Pac. 334.

Missouri.—Hickman *v.* Link, 116 Mo. 123, 22 S. W. 472; Fine *v.* St. Louis Public Schools, 30 Mo. 166, 175; Page *v.* Scheibel, 11 Mo. 167, 184; Tayon *v.* Ladew, 33 Mo. 205, 208; Clarke *v.* Hammerle, 36 Mo. 620, 639; Landes *v.* Perkins, 12 Mo. 238, 257.

Nevada.—Mallett *v.* Uncle Sam M. Co., 1 Nev. 188, 204, 90 Am. Dec. 484; Oreamuno *v.* Uncle Sam M. Co., 1 Nev. 215; Weill *v.* Lucerne M. Co., 11 Nev. 209, 212.

New York.—Wiggins *v.* McCleary, 49 N. Y. 346.

Oregon.—Dodge *v.* Marden, 7 Or. 456, 460.

Pennsylvania.—McLaughlin *v.* Maybury, 4 Yeates 534; Muler *v.* Cresson, 5 Watts & S. 284.

South Carolina.—Parkins *v.* Dunham, 3 Strob. Law 224, 228; Polson *v.* Ingram, 22 S. C. 541, 546.

Texas.—Sideek *v.* Duran, 67 Tex. 256, 3 S. W. 264; McMillan *v.* Warner, 38 Tex. 410, 414.

Is Principal Element.—The question of intent is the principal subject of inquiry in abandonment cases.[19]

A. What Does and Does Not Show.—What will or will not show an intent to abandon must be determined upon the circumstances of each particular case. The statement of fixed rules on the subject is next to impossible, but a few may be ventured.

Failure to Use not Enough—Exception.—The mere failure to use property, in whole or in part, or to exercise a right, does not alone show an intent to abandon,[20] unless the non-user continue for so great a length of time as to raise the presumption of such an intent under the rules laid down below.[21]

Evidence of Failure to Use Competent.—But a failure to use may be shown in evidence in connection with other circumstances going to establish the intent.[22]

19. Sweeney *v.* Reilly, 42 Cal. 402, 407; McMillan *v.* Warner, 38 Tex. 410, 414; Crain *v.* Fox, 16 Barb. (N. Y.) 184; City of Cleveland *v.* Cleveland C., C. & St. L. Ry. Co., 93 Fed. 113, 122; Townsend *v.* Michigan Cent. R. Co., 101 Fed. 757, 761; Raritan W. P. Co. *v.* Veghte, 21 N. J. Eq. 463, 479.

Intent Paramount Question.—"In determining whether one has abandoned his property or rights, the intention is the first and paramount object of inquiry; for there can be no strict abandonment of property without the intention to do so." Mallett *v.* Uncle Sam M. Co., 1 Nev. 188, 204, 90 Am. Dec. 484.

20. Sloan *v.* Glancy, 19 Mont. 70, 47 Pac. 334; Turner *v.* Cole, 31 Or. 154, 49 Pac. 971; McNamara *v.* Minneapolis St. P. etc. Ry. Co., 95 Mich. 545, 55 N. W. 440; City of Madison *v.* Mayers, 97 Wis. 399, 73 N. W. 43, 65 Am. St. Rep. 127, 40 L. R. A. 635; Brown *v.* Hiatt, 16 Ind. App. 340, 45 N. E. 481.

Failure to Use Highway.—"When first laid out, there appears to have been a very poor and dilapidated fence along or near the section line and center of said highway, and that the travel sometimes was through and on the west side of it, and the part of the highway on the east side of said fence has been constantly used when necessary, ever since it was laid out, as the main traveled way out to and upon the highway with which it is connected at the north end. But the contention in respect to such user is that, inasmuch as the west half of such highway has not been used, at least that part of it has ceased to be a highway by non-user and abandonment. Upon the same ground all parts of any highway not actually traveled, or kept suitable for travel, would cease to be parts of such highway, and might be treated as abandoned. This would be placing highways on too narrow ground to be of much use to the public, and make them liable to abandonment by willful encroachment. We think there was sufficient evidence that the highway has been worked and traveled as such when necessary, during all the time since it was laid out; and that there has been no abandonment of it by the public." Moore *v.* Roberts, 64 Wis. 538, 25 N. W. 564.

21. See *post*, note 36.

22. Non-User Evidence of Intent. "From 1871 to 1875, according to the proofs, each of the three ditches constructed in 1870 and 1871 was neglected, and probably used but little during one or more of the seasons; but we cannot say that the evidence sufficiently establishes an intention to abandon either of them, or the right to water acquired thereby. A failure to use for a time is competent evidence on the question of abandonment; and if such non-user continued for an unreasonable period, it may fairly create a presumption of intention to abandon; but this presumption is not conclusive, and may be overcome by other

Effect of Failure to Pay Taxes.—An intent to abandon real property is not shown by a failure to pay taxes assessed against it, disconnected from other circumstances.[23]

Removal from House.—The mere removal from a house does not show an intent to abandon the ownership of it.[24]

Gradual Escape from Possession.—Where parts of property of a movable nature are allowed by the owner to escape from him day by day, an abandonment of those parts may result, but such an abandonment for past days does not show an intent to abandon for the future and the escapement may be stopped.[25]

Property Derelict.—It is the general rule that property is not abandoned, in a legal sense, when it is left derelict, or is jettisoned at sea;[26] but when at the time or after the property is relinquished, the owner gives up all hope of, or intent to reclaim it, an abandonment will result.[27]

satisfactory proofs." Seiber *v.* Frink, 7 Colo. 148, 2 Pac. 901.

23. Mayor *v.* Riddle, 25 Pa. St. 259.

Non-Payment of Taxes.—"Title to another man's property cannot be acquired by the payment of the taxes thereon. And the payment of the taxes by the occupant in the present case for a portion of the time he was in possession was not of itself, disconnected from other circumstances, evidence that the owner had abandoned the property." Keane *v.* Cannovan, 21 Cal. 219, 303, 82 Am. Dec. 738.

24. Removal from House, Effect of.—"As tenant in common, Fessenden could lawfully occupy or authorize another to occupy any part of the land. His permission to Day to occupy with his buildings that portion of the land which they covered gave him all the rights of a tenant at will; at least until the other tenants in common should actually enter upon him. The mere fact of moving out of the house, preparatory to a sale and removal of the buildings, cannot be regarded as an abandonment of his rights. If it were so, it would be difficult to see how a tenant at will could ever exercise his right of removal of a dwelling-house, except by moving his family in the building." Howard *v.* Fessenden, 14 Allen (Mass.) 124, 126.

25. Escape of Tailings.—"So long as the miners of the basin and the Blue Point Mining Company abandoned the water and tailings which passed from their mining grounds, the Cheek and Ackley Flume Company had the right to take and appropriate the same to its own use, and upon the passage of the water and earth through that flume, the Side Hill Flume had the right to take and appropriate what so passed through the Cheek and Ackley Flume to its own use; but the respective rights of these flume companies was contingent and dependent on the fact of continual abandonment of the waters and tailings by the mining company to whom the same belonged. If those owning and working the mining ground elected to abandon their property at a particular point and for a particular length of time, it did not therefore become obligatory upon them to continue to do so." Dougherty *v.* Creary, 30 Cal. 290, 298, 89 Am. Dec. 116.

26. See *ante*, note 16.

27. Where Hope Of and Intention To Reclaim Abandoned.—"It is found, by the jury, that when the vessel was raised, and the money in question converted by the defendants, the vessel and money were derelict property, and abandoned by the owner. Perhaps, if the term derelict only were used by the jury, there would be more difficulty in the case; for if used in its strict maritime sense, it would not imply that the owner was divested of all right in

Where One Acts Ignorantly.—Where one acts in ignorance of, or under mistake as to his rights in the ownership of property, his acts can show no intent to abandon.[28]

3. In Whose Favor May Be Made.— It is one of the essentials of abandonment that the thing abandoned is subject to occupancy by the first comer. Therefore, if the evidence shows that it was delivered to a particular individual in such way that he may hold and own it by virtue of the transfer, no abandonment is shown, but a gift, sale, or conveyance.[29]

the property: 7 Am. Jur. 30, 32. But when the jury find the vessel and money were, also, abandoned by the owner, we suppose they intend to be understood that all hope, expectation, and intention to recover the property were utterly and entirely relinquished; and such the judges, who tried the cause, believe was the evidence given on the trial; and, in case of property, thus derelict and abandoned, either on the high seas or anywhere else, it belongs to the first finder who reduces it to possession." Wyman *v.* Hurlburt, 12 Ohio, 81, 40 Am. Dec. 461.

28. Ross *v.* Gould, 5 Greenl. (Me.) 204.

Acting Under Mistake.—"The contract of 1820 gave Williams a right to demand the conveyance of seventy-five acres, upon completing sales of the residue of the original tracts sold to him in January, 1818. Much the larger portion of these tracts had been then sold, so that Williams had paid the greater portion of the consideration for the seventy-five acres. He continued, up to 1825, assiduous to effect a sale of the residue, upon the terms agreed on; but he was unsuccessful. At that time, Champion, by conveying to Goodrich, put an end to the contract, and disabled Williams from performing that portion of it that remained unperformed. Williams' subsequent assertion that he did not look to the land, but to Champion, for damages, we are satisfied was made under a mistake as to what were his rights. Nothing in the case sustains the idea of abandonment. Whilst the contract existed, he sought to perform it. When the other party put an end to it, Williams still asserted his rights under it, though not in the form he now asserts them. There is no pretense to sustain the position of a voluntary abandonment." Williams *v.* Champion, 6 Ohio 169.

29. McLeran *v.* Benton, 43 Cal. 467.

Can Not Be to Particular Individual.—"Admitting the interest of plaintiff in the premises such as could be divested by abandonment, there can be no such thing as abandonment in favor of a particular individual, or for a consideration. Such act would be a gift or sale. An abandonment is 'the relinquishment of a right, the giving up of something to which we are entitled.'" (Bouv.)

"Abandonment must be made by the owner, without being pressed by any duty, necessity, or utility to himself, but simply because he desires no longer to possess the thing; and further, it must be made without any desire that any other person shall acquire the same: for if it were made for a consideration it would be a sale or barter, and if without consideration, but with an intention that some other person should become the possessor, it would be a gift. (Ib.)

"Stephens transferred the possession to Hunter for the consideration of six hundred dollars: this fact is entirely inconsistent with the idea of abandonment." Stephens *v.* Mansfield, 11 Cal. 363.

"The next error assigned is as to an instruction given by the court, in the following words, viz: 'The abandonment must also be made without any desire that any particular person should acquire the property, for if such desire exist, the transaction might be construed a gift.' . . . The sentence above quoted

IV. QUESTION, HOW DETERMINED.

1. Nature of Question.— One of Fact.—It has usually been held that the question of abandonment is one of fact for the jury,[30]

appears to be based upon the authority of Stephens *v.* Mansfield, 11 Cal. 365. . . . In that case the court held that 'admitting the interest of the plaintiff in the premises such as could be divested by abandonment, there can be no such thing as abandonment in favor of a particular individual or for a consideration. Such act would be a gift or sale.' . . . If the gift be complete—that is to say, if the thing given be delivered, and accepted by the donee, a transfer is the result, which transfer as much precludes the idea of abandonment as a transfer resulting from a sale. No question of abandonment can arise where a transfer has been had by the act of two parties. To an abandonment of the character involved in this and all similar cases, there can be but one party. . . . By the act of occupancy, the plaintiff made it his, and manifested his intention to do so. Once his, it continues his until he manifests his intention to part with it in some manner known to the law. He may sell it, or give it to another or transfer it in any other mode authorized by law (thereby preserving the continuity of possession), or he may abandon it. In doing the latter he must leave it free to the occupation of the next comer, whoever he may be, without any intention to repossess or reclaim it for himself in any event, and regardless and indifferent as to what may become of it in the future. When this is done, a vacancy in the possession is created, and the land reverts to its former condition, and becomes once more *publici juris*, and then, and not until then, an abandonment has taken place. There can be no abandonment except where the right abates, and ceases to exist. If it be continued in another, by any of the modes known to the law for the transfer of property, there has been no abandonment, for the right, first acquired by the occupancy still exists, although vested in another, and the continuity of possession remains unbroken. But the occupant cannot continue his right in another by the mere act of volition; nor is his right kept alive by a mere desire that it may become vested in a particular person. Such a volition or desire does not amount to a gift for there can be no gift without an acceptance. If the wish or desire is expressed to the person in whose behalf it is entertained, and thereupon he occupies the land, a gift is the result, and the transfer is made complete — and not otherwise. The mere wishes and desires of the occupant are only effectual to preserve the right in himself, and not to transmit it to another; and the case of Stephens *v.* Mansfield, so far as it can be fairly construed to go beyond the views here expressed, is not law.

"From what has been said, it follows that the charge in question, so far as it instructs the jury that there can be no abandonment where the transaction amounts to a gift, is correct, but that it is erroneous so far as it instructs them that leaving the claim, with a desire that a particular person may acquire it, might be construed to be a gift. The error is in the definition of a gift, rather than in that of an abandonment." Richardson *v.* McNulty, 24 Cal. 339.

30. *United States.*—Integral Quicksilver M. Co. *v.* Altoona Quicksilver M. Co., 75 Fed. 379; North Am. E. Co. *v.* Adams, 104 Fed. 404.

California. — Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Davis *v.* Butler, 6 Cal. 510; Roberts *v.* Unger, 30 Cal. 676; Myers *v.* Spooner, 55 Cal. 257.

Connecticut.—Russell *v.* Davis, 38 Conn. 562; Town of Derby *v.* Alling, 40 Conn. 410, 436.

Illinois.—McGoon *v.* Ankeny 11 Ill. 558.

Kentucky.—Kercheval *v.* Ambler, 1 Dana, 166.

Maine.—Schwartz *v.* Kuhn, 10 Me. 274, 25 Am. Dec. 239.

although other authorities pronounce it a mixed question of law and fact[31] under certain circumstances.

When a Question of Law.—But it has been said that the question may sometimes resolve itself into one of law for the court.[32] It is safe to say, however, that the doctrine that it is a question of law only applies to cases in which the act of relinquishment and the subsequent acts and declarations of the party are so positive and unequivocal as to leave no room for doubt as to his intent.[33]

Massachusetts.—Hatch *v.* Dwight, 17 Mass. 289, 297, 9 Am. Dec. 145.

Missouri.—Clark *v.* Hammerle, 36 Mo. 620, 639; Landes *v.* Perkins, 12 Mo. 238, 256; Barada *v.* Blumenthal, 20 Mo. 162; Page *v.* Scheibel, 11 Mo. 167, 182.

Nevada.—Weill *v.* Lucerne M. Co., 11 Nev. 200, 212.

New York.—Wiggins *v.* McCleary, 49 N. Y. 346.

Pennsylvania. — McLaughlin *v.* Maybury, 4 Yeates 534, 538; Wilson *v.* Watterson, 4 Pa. St. 214; Goodman *v.* Losey, 3 Watts & S. 526; Philips *v.* Shaffer, 5 Serg. & R. 215, 218; Sample *v.* Robb, 16 Pa. St. 305, 320.

South Carolina.—Parkins *v.* Dunham, 3 Strob. Law 224; Polson *v.* Ingram, 22 S. C. 541, 546.

Texas. — Hollingsworth *v.* Holshousen, 17 Tex. 41, 49; Simpson *v.* McLemore, 8 Tex. 448.

Vermont.—Patchin *v.* Stroud, 28 Vt. 394.

Is a Question of Fact for the Jury.—"Abandonment is a question for the consideration of the jury, and depends upon the intention, which is to be ascertained from circumstances." Fine *v.* St. Louis Public Schools, 30 Mo. 166, 175.

"The fact that the orator has done no act upon the lot for nearly 13 years next before the defendant's entry does not of itself, and as a matter of law, constitute an abandonment of the possession he had formerly had. Whether a prior possession has been abandoned or not is a question of fact, to be determined from the circumstances of the case." Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866.

31. Oreamuno *v.* Uncle Sam M. Co., 1 Nev. 215.

Mixed Question of Law and Fact. "I would also say that wherever the question of abandonment is made upon a lapse of time less than seven years, accompanied by circumstances from which it might be inferred that the party intended to abandon, that it was a mixed question of fact and law to be submitted to the jury. It is certainly the law that a party may abandon at any time, within seven years if he chooses, and wherever he has relinquished the possession of the land within less than seven years, it would become a matter of contention then to be settled by the jury." Brentlinger *v.* Hutchinson, 1 Watts (Pa.) 46, 52.

32. Paine *v.* Griffiths, 86 Fed. 452; Wilson *v.* Watterson, 4 Pa. St. 214; Goodman *v.* Losey, 3 Watts & S. (Pa.) 526; Forster *v.* McDivit, 5 Watts & S. (Pa.) 359; Gibson *v.* Robbins, 9 Watts (Pa.) 156; Watson *v.* Gilday, 11 Serg. & R. (Pa.) 337; Sample *v.* Robb, 16 Pa. St. 305.

"Some cases may be so strongly and indelibly marked, either by continuous absence, and suffering the improvement to return to its wild state, or by the declarations and acts of the party, as to justify the court in deciding as matter of law upon the question." Heath *v.* Biddle, 9 Pa. St. 273.

33. Not Where There Is Doubt. "We cannot say that the evidence of abandonment was so flagrant as to justify the court in pronouncing it such. In all cases when the circumstances leave room for doubt, the jury is the proper tribunal to decide: Forster *v.* McDivit, 5 W. & S. 359; and in Wilson *v.* Watterson, 4 Barr 219, it is observed, by the judge who delivered the opinion of the court, 'Some cases may be so strongly and indelibly marked, either by continu-

Failure to Perfect Inchoate Right.—Where it is incumbent on a party, as by statute, to take steps to perfect an inchoate right within a reasonable time, it has been held that, after the expiration of such time, the court may declare an abandonment as matter of law, irrespective of the real intent of the party.[34]

2. Burden of Proof.—The burden of proving an abandonment is on him who alleges it.[35]

3. Presumptions.—Lapse of Time.—It has frequently been held that the court or jury may presume an intent to abandon from the

ous absence, and suffering the improvement to return to its wild state, or by the declarations and acts of the party, as to justify the court in deciding as a matter of law on the question; yet in a majority of the cases which occur, there is such a mixture of motive, intent and circumstances, as to make it a matter properly referable to the jury:' and the facts and circumstances disclosed by the evidence in the present case, afforded precisely the exigencies indicating the jury as the proper forum in the two decisions referred to." Heath *v.* Biddle, 9 Pa. St. 273.

34. Failure to Prosecute Actual Settlement.—"It may be proper enough in deciding the question whether or not an improvement upon land has been prosecuted with due diligence from its commencement to an actual settlement, to have reference to the ability of the party making it, and the adverse circumstances he may have had to encounter in order to effect it, yet still the law will not indulge him with an unreasonable time for this purpose. If he be unable to effect it within a reasonable time, he ought not to undertake it; and it will avail him nothing after having commenced his improvement without the ability or means of completing it, when he is compelled to quit it on such account, to say that he intends holding on to it, and to resume the work and perfect it as soon as he shall become able to do so; for, if he could, in this way prevent the state from disposing of the land for five or six years, he and his heirs might upon the same plea, and perhaps with truth too, do it for a century. Abandonment is not always a question of intention, and, therefore, a matter of fact to be left exclusively to the jury, without any controlling instruction from the court as the court would seem to have thought it was in this case.

"Because when more than a reasonable time has elapsed for completing the settlement without its being done, after making a proper allowance for all delay occasioned by what the law may deem a sufficient excuse or cause for it, and the facts are not controverted, the law will pronounce the neglect or the failure of the party to perfect his settlement an abandonment, whatever his intention in regard to it may have been. Intention will amount to nothing in such case without acts. The will cannot be taken for the deed; for a settlement, in order to make it effectual, must not have the smallest case of abandonment about it." Atchison *v.* McCulloch, 5 Watts (Pa.) 13.

35. Oreamuno *v.* Uncle Sam M. Co., 1 Nev. 215; Moon *v.* Rollins, 36 Cal. 333, 95 Am. Dec. 181; Hall *v.* Lincoln, 10 Colo. App. 360, 50 Pac. 1047; Providence Gold M. Co. *v.* Burke, (Ariz.) 57 Pac. 641; Hicks *v.* Steigleman, 49 Miss. 377.

On Whom Burden Rests.—"The question of abandonment is one of fact and intention. Ceasing to cultivate a lot in the common fields and a removal elsewhere do not make an abandonment; but, to constitute an abandonment by a party, it must be shown that he quitted the property with the intention of no further claiming the same, and the burden of showing the abandonment rests upon the one who asserts it.

"These instructions properly stated the question to the jury in accordance with previous decisions by this court." Tayon *v.* Ladew, 33 Mo. 205.

lapse of a great length of time after the relinquishment without a claim of ownership being made or acts of ownership exercised.[36]

Not Conclusive.—But this presumption is not conclusive and may be rebutted by proof of a contrary intent.[37]

Does Mere Lapse of Time Create Presumption.—It has sometimes been held that the lapse of time alone furnishes no presumption of intent to abandon, either conclusive or disputable.[38]

36. *United States.* — Paine *v.* Griffiths, 86 Fed. 452.

Arkansas.—Eads *v.* Brazelton, 22 Ark. 499, 79 Am. Dec. 88.

California. — Keane *v.* Cannovan, 21 Cal. 291, 303, 82 Am. Dec. 738.

Connecticut.—Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149, 173; Town of Derby *v.* Alling, 40 Conn. 410.

Indiana. — Jeffersonville M. & I. R. R. Co. *v.* O'Connor, 37 Ind. 95.

Maine.—Farrar *v.* Cooper, 34 Me. 394; Pratt *v.* Sweetser, 68 Me. 344.

Massachusetts.—French *v.* Braintree Mfg. Co., 23 Pick. 216, 222.

New York.—Robie *v.* Sedgwick, 35 Barb. 319, 329; Miller *v.* Garlock, 8 Barb. 153, 155; Corning *v.* Gould, 16 Wend. 531, 535.

Pennsylvania.—Clemmins *v.* Gottshall, 4 Yeates 330; Cluggage *v.* Duncan, 1 Serg. & R. 109, 120; Wilson *v.* Watterson, 4 Pa. St. 214, 219; Brentlinger *v.* Hutchinson, 1 Watts 46; Gibson *v.* Robbins, 9 Watts 156; Philadelphia & Reading R. R. Co., *v.* Obert, 109 Pa. St. 193, 1 Atl. 398.

Texas.—Tiebout *v.* Millican, 61 Tex. 514.

What Sufficient to Create Presumption.—"Whether the rule as to the time after which courts will presume abandonment of a settlement upon vacant land be taken from Brentlinger *v.* Hutchinson, 1 Watts 46, or from any of the other cases cited and commented on by Mr. Justice Thompson in Whitcomb *v.* Hoyt, 6 Casey 409, it is past all doubt that time enough had elapsed in this case to raise the legal presumption. Smith the settler went out of possession in October, 1850, and no effort was made to regain it till his alienee, Grant, instituted this ejectment on the 21st of January, 1861. Here were ten years and more of non claim—time enough to justify the court in pronouncing the settlement abandoned, unless the mode of losing the possession is to distinguish the case from the general rule. The peculiarity of the case is that the settler did not go out voluntarily, but was put out by a writ of *habere facias possessionem*, founded on a judgment of ejectment, which Allison and Orr recovered against him in 1848. Does this excuse an inactivity of ten years? We think not." Grant *v.* Allison, 43 Pa. St. 427, 430.

37. Clemmins *v.* Gottshall, 4 Yeates (Pa.) 330; Grant *v.* Allison, 43 Pa. St. 427; Farrar *v.* Cooper, 34 Me. 394, 400; Pratt *v.* Sweetser, 68 Me. 344.

How Rebutted.—"Where a dam and mill have been erected and put in operation, so that the statute privilege has attached to it, an entire and continued disuse of the dam for mill purposes, for the term of twenty years, is strong *prima facie* evidence of ceasing to use the privilege for an unreasonable time, by which the privilege is lost to the owner, and unless rebutted by clear, strong and satisfactory proof of explanatory circumstances, must be taken to be conclusive. If the rebuilding of the dam or mill have been commenced, but destroyed by fire or flood or other casualty, if definite arrangements have been made to rebuild, in good faith, but are defeated by causes over which the parties have no control, these might well be deemed proof of a proper character tending to rebut such presumption of unreasonable delay." French *v.* The Braintree Mfg. Co., 23 Pick. (Mass.) 216, 222.

38. Cravens *v.* Moore, 61 Mo. 178; Cassert *v.* Noyes, 18 Mont. 216, 44 Pac. 959.

No Presumption.—"The fact that the orator had done no act upon the lot for nearly 13 years next before

Of Easement by Non-Use.—A presumption of the abandonment by non-user of an easement not acquired by deed will be indulged after twenty years, but not before,[39] and the time has sometimes been fixed at twenty-one years.[40]

Theory of Cases.—These cases proceed upon the theory that the time for loss of an easement by non-user should be the same in length as the time necessary to acquire it by use and enjoyment. This seems to be the general rule, both as to private and to public easements, as of highway, and has been put in statutory form in some of the states.[41]

the defendant's entry does not of itself, and as matter of law, constitute an abandonment of the possession he had formerly had." Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866, 868.

39. French *v.* Braintree Mfg. Co., 23 Pick. (Mass.) 216; Farrar *v.* Cooper, 34 Me. 394; Williams *v.* Nelson, 23 Pick. (Mass.) 141, 34 Am. Dec. 45; Emerson *v.* Wiley, 10 Pick. (Mass.) 310.

After Twenty Years.—"But it is contended on the part of the defendants that if the plaintiffs, or their predecessors in office, ever had the title as claimed, they have lost it, by abandoning the premises, and permitting others to occupy and use them, for other purposes, and in hostility to their claim of title. This doctrine of abandonment, or non-user, applies, as I understand it, only to easements, claimed by one in the land of another, and in no respect to the title of the land itself. And in case of easements, the general doctrine seems to be well settled, that the right is not extinguished short of an entire abandonment for the period of twenty years." Robie *v.* Sedgwick, 35 Barb. 319, 329.

40. Twenty-one Years Elsewhere. "The defendant further contends that the plaintiff even though originally entitled had lost his right by non-user for twenty years; and assigns for error that the judge charged that the presumption to defeat such right does not arise from a non-user for a less period than twenty-one years.

"In this position we think the court below was right, and that the rule on the subject in Pennsylvania is founded in the analogy to our act of limitations of 1785, in relation to lands, which fixes the period of twenty-one years; in the same manner as in England the rule is established by analogy to their statute of limitations of 21 Jac. 1, c. 16, relating to lands there. There are undoubtedly to be found scattered through our reports *dicta* of some of the judges of this court at variance with this doctrine; but these expressions have been used in cases where the exact time is not material in the cause, and it was not therefore necessary to be precise in language." Dyer *v.* Depui, 5 Whart. (Pa.) 584, 597.

41. Loss by Non-User Under Statute.—"An act entitled 'An act concerning roads in the county of Butte,' approved March 20, 1874, (St. 1874, p. 503,) provides that all roads used as such in the county of Butte for a period of five years shall be public highways. The public, having used the strip of land in question as a public way for five years prior to the passage of that act, acquired the right to use the same as a public way. Bolger *v.* Foss, 65 Cal. 250, 3 Pac. Rep. 871; Gloster *v.* Wade, 21 Pac. Rep. 6. 'By taking or 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.' Pol. Code, Sec. 2631. 'The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired,' (Civ. Code, Sec. 806), and is extinguished, 'when the servitude was acquired by en-

4. What Should go to the Jury.—All the acts and declarations of the party against whom an abandonment is claimed, going to establish an intent to abandon, should go to the jury, and he should be allowed to rebut by proving all facts and circumstances tending to show a contrary intent.[42]

joyment, by the disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment,' (Id. Sec. 811). These provisions are part of chapter 3, pt. 2, tit. 2, of the Civil Code, which relates to private easements and servitudes; but they are made applicable to a public easement of the character in question by section 2631 of the Political Code, *supra*. 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. In this respect public highways are placed upon the same plane with private rights of way. The period by which the public acquired the right to the use of the right of way in question was fixed at five years by the act of 1874. This action was brought on February 11, 1888, and the use by the public of the right of way, as such, was not discontinued until 1884, therefore the period of non-user was less than five years, and insufficient to support a presumption of an abandonment by operation of law." McRose *v.* Bottyer, 81 Cal. 122, 22 Pac. 393.

42. Moon *v.* Rollins, 36 Cal. 333, 95 Am. Dec. 181; Bliss *v.* Ellsworth, 36 Cal. 310; Integral Quicksilver M. Co. *v.* Altoona Quicksilver M. Co., 75 Fed. 379; Lockhart *v.* Wills, 9 N. M. 263, 50 Pac. 318; Davis *v.* Perley, 30 Cal. 630.

Wide Range to Be Allowed. "We think, however, that the court erred in excluding the evidence offered by the plaintiff upon the question of abandonment. The fact that he was inexperienced in farming and relied upon the advice of Crane and Lando, and that they advised him to allow the land to lie fallow, would tend at least to explain why the plaintiff did not cultivate the land. It may have been entitled to but little weight as evidence, but if it was competent, and we think it was, he was entitled to its benefit. So also in regard to his efforts to procure the passage of the act to prevent the re-entering of parties dispossessed by legal process. If he could connect these efforts with the facts of this case, he was entitled to prove them as tending to rebut the alleged abandonment. Upon a question of abandonment, as on a question of fraud, a wide range should be allowed, for it is generally from facts and circumstances that the truth is to be discovered, and both parties should be allowed to prove any fact or circumstance from which any aid for the solution of the question can be derived." Wilson *v.* Cleaveland, 30 Cal. 192, 201.

ABATEMENT.

By Frank S. Adams.

SCOPE OF SUBJECT.

This article includes only the rules of evidence applicable to trials of issues raised by pleas in abatement on the ground of another action pending. It does not include evidence on pleas to the jurisdiction or pleas of infancy, or other want of capacity to sue or be sued.

I. BURDEN OF PROOF.

A Plea in Abatement Tenders an Issue of Fact.—It is an affirmative plea and the matters set forth on which the party relies to sustain such plea must be proved like any other issue in the case.[1]

1. Sheppard *v.* Graves, 14 How. (U. S.) 505; Gilmer *v.* City of Grand Rapids, 16 Fed. 708.

A Question For the Jury.—"The plea in abatement tendered an issue of fact and should have been determined by the jury." Hart, Wiggin & Co. *v.* Kanady, 33 Tex. 720.

New Matter Deemed to Be Controverted.—"The new matter in the answer under the practice act, is deemed to be controverted, and in this case, the new matter set up in abatement raised an issue. The issue must be tried and the facts found, before the answer can be assumed to be true." People *v.* De la Guerra, 24 Cal. 73.

In Federal Courts.—Although in the courts of the United States it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet wherever jurisdiction is averred in the pleadings, in conformity with the laws creating those courts, it must be taken *prima facie* as existing, and it is incumbent on him who would impeach that jurisdiction for causes *de hors* the pleading to allege and prove such causes. Sheppard *v.* Graves, 14 How. (U. S.) 505;

Burden on Defendant.—The burden of proof on a plea in abatement is always on the defendant.[2]

Evidence Personal to Pleader.—A plea to the jurisdiction of the court is held to be a personal privilege and evidence tending to support such plea cannot inure to the benefit of a co-defendant who has failed to plead in abatement.[3]

II. ORDER OF PROOF.

Where a plea in abatement is joined by the answer with other matters which go directly to the merits of the cause, the evidence upon the plea in abatement should be first in the order of proof.[4]

D'Wolf *v.* Rabaud, 1 Pet. (U. S.) 476; Wickliffe *v.* Owings, 17 How. (U. S.) 47; Jones *v.* League, 18 How. (U. S.) 76.

The necessity for such allegation and the burden of sustaining it by proof both rest upon the party taking the exception. Conard *v.* Atl. Ins. Co., 1 Pet. (U. S.) 386; D'Wolf *v.* Rabaud, 1 Pet. (U. S.) 476; Sheppard *v.* Graves, 14 How. (U. S.) 505.

2. Woodward *v.* Stark, 4 S. D. 588, 57 N. W. 496; Kuteman *v.* Page, 3 Willson Civ. Cas. Ct. App. (Tex.) 164; Graves *v.* First Nat. Bank, 77 Tex. 555, 14 S. W. 163.

Burden on the Pleader.—"Pleas in abatement must be proved and the *onus probandi* is upon him who pleads them." Hart, Wiggin & Co. *v.* Kanady, 33 Tex. 720.

To Prove Want of Jurisdiction. "It is not enough that the alleged ground of jurisdiction is denied by plea in abatement; the plea must be followed up and sustained by proof, or it will be unavailing. The burden of sustaining the plea was upon defendant. The evidence must have shown that the jurisdictional ground relied upon did not exist." Hopson *v.* Caswell, 13 Tex. Civ. App. 492, 36 S. W. 312.

To Prove Residence.—In Robertson *v.* Ephraim, 18 Tex. 118, it was held that where the complaint alleged the defendant to be a resident of a certain county and the plea in abatement averred residence of defendant in another county, the presumption from the petition was that the court had jurisdiction; that the presumption of jurisdiction could be rebutted by allegation and proof, and the defendant having alleged a sufficient cause to impeach the jurisdiction, was, under the rules of evidence, bound to prove it. That the burden of proof must be on defendant who alleges facts which negative the jurisdiction.

3. Craig *v.* Cummings, 6 Fed. Cas. No. 3331; Cooper *v.* Gordon, 6 Fed. Cas. No. 3195; Harrison *v.* Urann, 11 Fed. Cas. No. 6146; Moore *v.* Smith, 41 Ky. (2 B. Mon.) 340.

4. Order of Proof.—"In an action of ejectment where, in addition to the defense of abatement by reason of the pendency of a former action, defendant relies upon other defenses which go directly to the merits of the cause, it is better practice for the trial court to require defendant to present his evidence upon his plea in abatement at the opening of his defense." Leonard *v.* Flynn, 89 Cal. 535, 26 Pac. 1097, 23 Am. St. Rep. 500; Blackwell *v.* Dibbrell, 103 N. C. 270, 9 S. E. 192.

Value of Subject of Controversy. "The objection to the jurisdiction of the justice, on the ground of excess in the value of the subject of controversy, was properly made by the answer, and that should have been first determined before he proceeded to hear the merits of the case." Small *v.* Gwinn, 6 Cal. 447.

III. PROOF UNDER PLEA OF ANOTHER ACTION PENDING.

1. Vexatiousness of Second Action.—It has been held that in order to sustain a plea of another action pending it is necessary to show that the latter suit was in fact vexatious and unnecessary.[5]

2. Pendency of Former Action.—A. MUST BE SHOWN PENDING. The action pleaded in abatement must be shown to be actually pending at the time of the trial,[6] but it has been held sufficient to show

5. *California.*—Reynolds *v.* Harris, 9 Cal. 338; Thompson *v.* Lyon, 14 Cal. 39; Dyer *v.* Scalmanini, 69 Cal. 637, 11 Pac. 327.

Connecticut.—Durand *v.* Carrington, 1 Root 355; Ward *v.* Curtiss, 18 Conn. 290; Quinebaug Bank *v.* Tarbox, 20 Conn. 510.

Georgia.—Gilmore *v.* Georgia Ry. & Banking Co., 93 Ga. 482, 21 S. E. 50.

Illinois.—Phillips *v.* Quick, 68 Ill. 324.

Mississippi.—Griffin *v.* Board of Miss. Levee Com'rs, 71 Miss. 767, 15 So. 107.

Missouri.—State *v.* Dougherty, 45 Mo. 294.

New York.—Compton *v.* Green, 9 How. Pr. 228.

Texas.—Langham *v.* Thomason, 5 Tex. 127.

Vermont.—Downer *v.* Garland, 21 Vt. 362.

Reason and Source of the Rule. In Downer *v.* Garland, 21 Vt. 362, the court said: "This doctrine is founded upon the supposition, that the second suit is unnecessary, oppressive and vexatious. This being the reason for the adoption of the rule, there would seem to be no propriety in extending and applying it to cases where the reason does not exist. . . . Hence it is that courts in modern times have somewhat modified the rule, and, instead of regarding the second suit as necessarily vexatious, have gone into the inquiry of whether, in fact, it was vexatious."

Where Prior Suit Is Ineffectual. "The general rule that the pendency of another suit between the same parties on the same cause of action and for the same relief may be pleaded in abatement of a subsequent suit, is subject to many exceptions and limitations. The rule rests upon the right of everyone to be protected from unnecessary and vexatious litigation." Griffin *v.* Board of Miss. Levee Com'rs., 71 Miss. 767, 15 So. 107.

Where Prior Suit Is for Part of Same Matter.—Where, on plea in abatement to the entire action, that another suit, for the same cause of action, was pending at the time of suit brought, the proof shows that the first suit is only for *part of the same matter* sued for in the second suit, the plea fails. Thompson *v.* Lyon, 14 Cal. 39.

Want of Jurisdiction in Prior Suit.—Where a judgment rendered in lower court was reversed for want of jurisdiction and the second action was commenced in the circuit court before the prior suit was finally disposed of; *held*, that the former suit being a nullity, the plaintiff was at liberty, at any time after it was commenced, to bring another action for the same cause, and that the plea of another action pending could not be sustained. Phillips *v.* Quick, 68 Ill. 324.

But see Napier *v.* Foster, 80 Ala. 379, wherein it is held that a pending suit, although fatally defective, and subsequently dismissed on that account, will defeat a second suit on the same cause of action, brought before the dismissal of the first.

Test of Vexatiousness.—When a recovery in one suit would answer the purposes of a recovery in both, the prosecution of two suits is vexatious, and the second will be abated if the court can ascertain which is the second, and if it cannot, both will abate. Dengler *v.* Hays, 63 N. J. Law 16, 42 Atl. 775.

6. *Arkansas.*—Grider *v.* Apperson, 32 Ark. 332.

California.—Dyer *v.* Scalmanini, 69 Cal. 637, 11 Pac. 327; Moore *v.*

that the action pleaded in abatement was pending at the time the second suit was commenced.[7]

B. Must Be Prior Action.—It must be shown that the action pleaded in abatement was, in fact, commenced prior to the commencement of the action in which the plea was made.[8]

Hopkins, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248; Balfour Guthrie Inv. Co. *v.* Woodworth, 124 Cal. 169, 56 Pac. 891.

Colorado.—Craig *v.* Smith, 10 Colo. 220, 15 Pac. 337; Yentzer *v.* Thayer, 10 Colo. 63, 14 Pac. 53, 3 Am. St. Rep. 563.

Georgia.—Rumph *v.* Truelove, 66 Ga. 480; Gilmore *v.* Georgia Ry. & Banking Co., 93 Ga. 482, 21 S. E. 50.

Indiana.—Morris *v.* State, 101 Ind 560.

Iowa.—Ball *v.* Koekuk etc. Ry. Co., 71 Iowa 306, 32 N. W. 354; Moorman *v.* Gibbs, 75 Iowa 537, 39 N. W. 832; Rush *v.* Frost, 49 Iowa 183.

Kentucky.—Adams *v.* Gardiner, 13 B. Mon. 197; Wilson *v.* Milliken, 19 Ky. Law 1843, 44 S. W. 660, 42 L. R. A. 449.

Louisiana.—Schmidt *v.* Braunn, 10 La. Ann. 26; Clark *v.* Comford, 45 La. Ann. 502, 12 So. 763.

Maryland.—Leavitt *v.* Mowe, 54 Md. 613; Lewis *v.* Higgins, 52 Md 614.

Minnesota.—Nichols *v.* Bank, 45 Minn. 102, 47 N. W. 462; Page *v* Mitchell, 37 Minn. 368, 34 N. W. 896.

Missouri.—Warder *v.* Henry, 117 Mo. 530, 27 S. W. 776.

New Hampshire.—Gamsby *v.* Ray. 52 N. H. 513.

New York.—Crossman *v.* Universal Rubber Co., 131 N. Y. 636, 30 N. E. 225; Averill *v.* Patterson, 10 How. Pr. 85; Porter *v.* Kingsbury, 77 N. Y. 164; Lord *v.* Ostrander, 43 Barb. 337; Hyatt *v.* Ingalls, 124 N. Y. 93, 26 N. E. 285.

Pennsylvania. — Findlay *v.* Keim, 62 Pa. St. 112.

Rhode Island.—Banigan *v.* Woonsocket Rubber Co., 22 R. I. 93, 46 Atl. 183.

Texas.—Trawick *v.* Martin Brown Co., 74 Tex. 522, 12 S. W. 216; Payne *v.* Benham, 16 Tex. 364.

Virginia.—Williamson *v.* Paxton, 18 Gratt. 475.

Dismissal on Demurrer.—The plea in abatement cannot be sustained where it is shown that the complaint in the first suit was dismissed on demurrer. Burnett *v.* S. Ry. Co., 62 S. C. 281, 40 S. E. 679.

No Presumption That Suit Commenced Is Still Pending.—"The effective part of such a plea is that the action is still pending. This must be affirmatively proved. The evidence offered would have simply proved that such an action had been commenced, but while law suits are sometimes very protracted, yet we apprehend that there is no presumption of law that a suit once begun is still pending, until the contrary appears." Phelps, Adm'r., etc. *v.* Winona & St. Paul Ry. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867.

Contra. — When the defendant showed the issuing of a writ for the same cause of action, he proved *prima facie*, at least, the pendency of a suit; and it then *devolved on the plaintiff* to prove, by competent testimony, that the suit had been disposed of and was no longer pending. Fowler *v.* Byrd, (Hempst. 213) 9 Fed. Cas. No. 4999a.

Former Action Pending During Appeal.—The plea is sustained by proof that an appeal has been taken from a judgment in the former action which has not been dismissed nor finally determined. Fisk *v.* Atkinson, 71 Cal. 452, 10 Pac. 374; Merritt *v.* Richey, 100 Ind. 416; Walker *v.* Heller, 73 Ind. 46; Bond *v.* White, 24 Kan. 45; Althen *v.* Tarbox, 48 Minn. 18, 50 N. W. 1018, 31 Am. St. Rep. 616.

7. Lee *v.* Hefley, 21 Ind. 98; Porter *v.* Kingsbury, 77 N. Y. 164.

8. *United States.* — Renner *v.* Marshall, 1 Wheat. 215.

Alabama.—Humphries *v.* Dawson, 38 Ala. 199.

C. How Pendency Shown.—a. *Record Evidence.*—It has been uniformly held that the proper evidence to sustain the allegation of another action pending, when pleaded in abatement of a subsequent action, at law or in equity, is the record of the proceedings of the court in which the former action is being conducted, or a duly authenticated copy or transcript thereof.[9]

b. *Parol Evidence.*—**(1.) Record Unobtainable.**—When the record of the court in which the former action is alleged to be pending cannot be obtained by reason of its having been lost or destroyed, parol evidence is admissible to establish the pendency of the prior action.[10]

(2.) Record Insufficient.—Parol evidence is admissible on the part of both plaintiff and defendant where it cannot be determined from an inspection of the complaints in the two actions whether the same cause of action is set forth in each.[11]

Illinois.—Blumenthal *v.* Taylor, 44 Ill. App. 139.

Indiana.—Tippecanoe Co. *v.* Lafayette etc. Ry. Co., 50 Ind. 85, 119.

Kansas.—Rizer *v.* Gillpatrick, 16 Kan. 564.

Massachusetts.—Webster *v.* Randall, 19 Pick. 13; Hooton *v.* Holt, 139 Mass. 54, 29 N. E. 221.

Michigan.—Callanan *v.* Port Huron etc. Ry. Co., 61 Mich. 15, 27 N. W. 718.

New York.—Middlebrook *v.* Travis, 68 Hun 155, 22 N. Y. Supp. 672; Welch *v.* Sage, 47 N. Y. 143, 7 Am. Rep. 423.

Wisconsin.—Wood *v.* Lake, 13 Wis. 94.

Actions Commenced at Same Time.—If two suits be instituted at the same time, by the same plaintiff, or persons suing in the same right, against the same defendant, on the same cause of action, the pendency of each may be pleaded in abatement of the other. Dengler *v.* Hays, 63 N. J. Law 16, 42 Atl. 775.

9. Bond *v.* White, 24 Kan. 15; Smiley *v.* Dewey, 17 Ohio, 156; Walker *v.* Heller, 73 Ind. 46.

Record on Appeal.—Where a plea in abatement was interposed it was held that as it did not appear that the record of the proceedings in the suit pleaded in abatement were offered in evidence in the lower court, or if so offered were not presented in the bill of exceptions, the plea could not be sustained. Craig *v.* Smith, 10 Colo. 220, 15 Pac. 337.

Record Must Be Introduced. *Judicial Notice Not Taken.* Where the pleadings in the former case alleged to be pending were attached to the answer, but the original record was not offered in evidence. *Held*, that in the trial of one case the court can no more take judicial notice of the record in another case in the same court, without its formal introduction in evidence, than if it were a record in another court. People *v.* De La Guerra, 24 Cal. 73; Bond *v.* White, 24 Kan. 45.

"The records of courts cannot be proved by affidavits nor can an affidavit be made to take the place or serve the purpose of an answer in abatement or in bar." Kellogg *v.* Sutherland, 38 Ind. 154.

10. Where Record Lost.—Suggett *v.* Bank of Kentucky, 38 Ky. (8 Dana) 201; Tolle *v.* Alley (Ky.), 24 S. W. 113.

See also, "Records," and "Best and Secondary Evidence."

Papers Destroyed by Plaintiff.—Where upon plea in abatement, that former suit had been commenced and levy made, for the same cause of action, and the papers had been destroyed by plaintiff the evidence of the parties who issued the attachment in both cases held admissible. Dean *v.* Massey, 7 Ala. 601.

11. Davis *v.* Dunklee, 9 N. H. 545.

D. The Parties to the Two Actions.—a. *Identity of Parties.* In order to sustain the plea of another action pending for the same cause of action it must appear that the parties to both actions are the same,[12] or that the parties to the second action are privy to the

Where the complaint in the first suit stated a cause of action for money had and received and in the second suit contained an additional count on an account stated, the court said: "If we should hold that these two actions cannot have been brought for the same things because the declaration contains an additional count on an account stated between the same parties, it would seem to be almost equivalent to holding that the declarations in the two suits must be copies of each other, for the count on an account stated is not necessarily for a cause of action different from the money had and received, though it may be; and whether it is or not would be a matter of fact to be tried by the jury, if issue had been taken upon the averment." Bain *v.* Bain, 10 U. C. Q. B. 572.

Right to Show That the Actions Are Not for Same Cause.—The pendency of another action is a fact outside the record, which the plaintiff has a right to dispute. It would ordinarily be settled by the production of the record in the other case; but the plaintiff has the right to dispute the existence of any such record, or, admitting its existence, to reply and prove, as answer to defendant's plea, that the cause of action, though by the record apparently the same, was not so in fact. Foye *v.* Patch, 132 Mass. 105.

Causes of Action Concealed by Complaints.—"A plaintiff cannot bring two suits, for the same cause of action, by framing his pleadings in each suit in such general terms that the specific facts do not appear but that each suit discloses on the face of the pleadings filed, a different cause of action, and then object to testimony *aliunde* on the part of defendant showing that the suit in one case is for the same cause of action as the other and insist that this question shall be determined by a comparison of the complaints. The law no more permits a plaintiff to have two suits against a defendant for the same cause than it permits him to have two judgments. Therefore there is equal necessity for parol testimony as a defense against the former as against the latter wrong." Damon *v.* Denny, 54 Conn. 253, 7 Atl. 409.

12. *United States.* — Hacker *v.* Stevens, 4 McLean 535, 11 Fed. Cas. No. 5887; Taylor *v.* Royal Saxon, 1 Wall. Jr. 311, 23 Fed. Cas. No. 13,803; Brooks v. Mills Co., 4 Dill. 524, 4 Fed. Cas. No. 1,955.

Alabama.—Foster *v.* Napier, 73 Ala. 595; Davis *v.* Petrinovich, 112 Ala. 654, 21 So. 344, 36 L. R. A. 615.

Arkansas.—Bourland *v.* Nixon, 27 Ark. 315.

California.—Kerns *v.* McKean, 65 Cal. 411, 4 Pac. 404; Heilbron *v.* Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183; Calaveras Co. *v.* Brockway, 30 Cal. 325.

Connecticut.—Beach *v.* Norton, 8 Conn. 71; Hatch *v.* Spofford, 22 Conn. 485, 58 Am. Dec. 433; La Croix *v.* Fairfield Co., 50 Conn. 321, 47 Am. Rep. 648.

Georgia.—Rogers *v.* Hoskins, 15 Ga. 270.

Indiana. — Paxton *v.* Vincennes Mfg. Co., 20 Ind. App. 253, 50 N. E. 583; Loyd *v.* Reynolds, 29 Ind. 299; Dawson *v.* Vaughan, 42 Ind. 395; Bryan *v.* Scholl, 109 Ind. 367, 10 N. E. 107; Board etc. *v.* Railroad Co., 50 Ind. 85; Commissioners etc. *v.* Holman, 34 Ind. 256; Merritt *v.* Richey, 100 Ind. 416.

Kansas.—Mullen *v.* Mullock, 22 Kan. 598.

Kentucky.—Adams *v.* Gardiner, 13 B. Mon. 197.

Louisiana.—Ingram *v.* Richardson, 2 La. Ann. 839; Hacket *v.* Lenares, 16 La. Ann. 204; State *v.* Kreider, 21 La. Ann. 482.

Maine.—Cumberland Co. *v.* Central etc. Tow Boat Co., 90 Me. 95, 37 Atl. 867, 60 Am. St. Rep. 246.

Nebraska.—Richardson *v.* Opelt, 60 Neb. 180, 82 N. W. 377; McReady

parties to the action pleaded in abatement in their relation to the subject matter of the actions.[13]

b. *Reversal of Parties.*—It must be shown that both actions were commenced by the same plaintiff. The rule does not extend to cases where the parties to the two actions are reversed.[14]

Exceptions to Rule.—This rule, however, has been held not to apply

v. Rogers, 1 Neb. 124, 93 Am. Dec. 333.

New Hampshire. — Bennett *v.* Chase, 21 N. H. 570; Parker *v.* Colcord, 2 N. H. 36; Gamsby *v.* Ray, 52 N. H. 513.

New Jersey.—Dengler *v.* Hays, 63 N. J. Law 16, 42 Atl. 775.

New York.—Dawley *v.* Brown, 65 Barb. 107; Middlebrook *v.* Travis, 68 Hun 155, 22 N. Y. Supp. 672; Smith *v.* St. Francis Xavier College, 61 N. Y. Super. Ct. 363, 20 N. Y. Supp. 533.

North Carolina. — Redfearn *v.* Austin, 88 N. C. 413; Blackwell Durham Tobacco Co. *v.* McElwee, 94 N. C. 425.

Pennsylvania.—Streaper *v.* Fisher, 1 Rawle 155, 18 Am. Dec. 604.

Tennessee.—Morley *v.* Power, 5 Lea 691.

Texas.—Langham *v.* Thomason, 5 Tex. 127.

Second Suit By Assignee. — Thus where in a suit by A. against the sheriff to recover possession of certain goods taken under a writ of attachment against B., the assignee of the insolvent B., intervenes in which A. is necessarily made a party defendant, a subsequent suit by the assignee against A. for the fraudulent conversion of the same goods will not be abated by reason of the former suit in intervention by the assignee against A. and the sheriff. Hall *v.* Susskind, 109 Cal. 203, 41 Pac. 1012; Egan *v.* Laemmle, 54 N. Y. St. 789, 25 N. Y. Supp. 330; Langham *v.* Thomason, 5 Tex. 127; Dawley *v.* Brown, 65 Barb. (N. Y.) 107.

Suit By One Creditor For All. "A pending creditors' bill filed to reach property fraudulently conveyed by a debtor, in the name of one creditor on behalf of all other creditors who may see proper to come in and make themselves parties, will not preclude other creditors from proceeding in like manner by original bill. . . . If some of the parties complainant to the second bill filed were complainants to the first bill the objection should have been directed to such parties and not to the whole bill." Maxwell *v.* Peters Shoe Co., 109 Ala. 371, 19 So. 412; Hall *v.* Improvement Co., 104 Ala. 577, 16 So. 439, 53 Am. St. Rep. 87.

13. Richardson *v.* Opelt, 60 Neb. 180, 82 N. W. 377; Morley *v.* Power, 5 Lea (Tenn.) 691; Watson *v.* Jones, 13 Wall. (U. S.) 679, 20 L. Ed. 666; Holloway *v.* Holloway, 103 Mo. 274, 15 S. W. 536; Gardner *v.* Clark, 21 N. Y. 399; Beach *v.* Norton, 8 Conn. 71; Tippecanoe County *v.* Lafayette Ry. Co., 50 Ind. 85, 118; Crane *v.* Larsen, 15 Or. 345, 15 Pac. 326.

Similarity of Parties and Cause. "When the pendency of a suit is set up to defeat another, the case must be the same. There must be the same parties, or at least such as represent the same interest, there must be the same rights asserted, and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties." Watson *v.* Jones, 13 Wall. (U. S.) 679.

14. *Alabama.*—Hall *v.* Holcombe, 26 Ala. 720.

California.—O'Connor *v.* Blake, 29 Cal. 312; Ayres *v.* Bensley, 32 Cal. 620; Felch *v.* Beaudry, 40 Cal. 439; Walsworth *v.* Johnson, 41 Cal. 61.

Illinois.—Tompkins *v.* Gerry, 43 Ill. App. 255.

Iowa.—Pratt *v.* Howard, 109 Iowa, 504, 80 N. W. 546.

in cases of accounting where the items of the account may be separated and sued upon separately,[15] or to cases where the first suit affords a full, plain and adequate remedy to the defendant in such suit.[16]

c. *Defendant in Different Capacities.*—It must be shown that the defendant is sued in the same capacity in each suit.[17]

E. Subject Matter, Including Relief Sought.—The subject matter and relief sought must be shown to be the same in both actions.[18]

Kentucky.—Johnson *v.* Robertson, 20 Ky. Law 135, 45 S. W. 523.

New York.—Welch *v.* Sage, 47 N. Y. 143, 7 Am. Rep. 423.

Wisconsin.—Wood *v.* Lake, 13 Wis. 94.

The very foundation of such a defense is the maxim, "*Nemo debet bis vexari,*" etc.; and manifestly this can have no application when the first suit is brought, not by, but against, the person who is the plaintiff in the second action." Walsworth *v.* Johnson, 41 Cal. 61.

Contra.—In Crane *v.* Larsen, 15 Or. 345, 15 Pac., 326, it was held that if the issues in the two suits were the same a plea of another action was good in abatement although the parties, plaintiff and defendant, in the two actions were reversed.

15. Coubrough *v.* Adams, 70 Cal. 374, 11 Pac. 634; Maloy *v.* Associated Lace Makers, 30 N. Y. St. 153, 8 N. Y. Supp. 815.

16. Pratt *v.* Howard, 109 Iowa 504, 80 N. W. 546; Colt *v.* Partridge, 7 Metc. (Mass.) 570.

Where Defendant Has Complete Defense in First Suit.—In a suit brought against a railway company for the recovery of a fine imposed for the removal of a switch, the railway company, after answering in this action, brought suit to enjoin the plaintiff from proceeding in the first suit on the ground of the alleged unconstitutionality of the act under which the commission was proceeding. *Lis pendens* was pleaded, and the court held that, while there might be some difference in the relief sought, the cases were not very materially different. If the remedy was not as complete for the defendant in the first suit, it was because it did not wish to make it so. It was bound to exhaust the possibilities of its defense before resorting to another suit. Parties can not, by not pleading part of their defense, proceed in the second suit with the object of preventing further proceedings in the first suit. Kansas City S. Ry. Co. *v.* Railroad Commission of Louisiana, 106 La. 583, 31 So. 130.

17. Capacity of Defendant. Where the suit pleaded in abatement was against Robert Watson, James Watson and John Watson, partners, doing business as R. & J. Watson, as endorser of certain promissory notes passed by it to the plaintiff, and the second suit was against James Watson alone, and the declaration charged his liability, on these same notes, as arising from his having fraudulently and without authority, endorsed the firm name thereon and so passed them to the plaintiff, it was held that it was apparent from an inspection of the records in the two cases that the parties defendant were not the same. In the one case the action was against a firm on a joint or firm endorsement; in the other the action was against James Watson alone, and upon a several liability in which the partnership had no interest, and could involve it in no responsibility. Blackburn *v.* Watson, 85 Pa. St. 241.

18. *United States.* — Pierce *v.* Feagans, 39 Fed. 587; Langstraat *v.* Nelson, 40 Fed. 783; Sharon *v.* Hill, 22 Fed. 28.

Alabama.—Hall *v.* Holcombe, 26 Ala. 720; Foster *v.* Napier, 73 Ala. 595.

Arkansas.—Bourland *v.* Nixon, 27 Ark. 315.

California. — Heilbron *v.* Fowler Switch Canal Co., 75 Cal. 426, 17

Pac. 535, 7 Am. St. Rep. 183; Ayres *v.* Bensley, 32 Cal. 620; Henry *v.* Everts, 30 Cal. 425; Caleveras Co. *v.* Brockway, 30 Cal. 325; Hall *v.* Susskind, 109 Cal. 203, 41 Pac. 1012; Vance *v.* Olinger, 27 Cal. 358; Coburn *v.* Pacific Lumber Co., 46 Cal. 31.

Connecticut.—La Croix *v.* Fairfield Co., 50 Conn. 321, 47 Am. Rep. 648.

Indiana.—Bryan *v.* Scholl, 109 Ind. 367, 10 N. E. 107; Paxton *v.* Vincennes Mfg. Co., 20 Ind. App. 253, 50 N. E. 583.

Iowa.—Jones *v.* Brandt, 59 Iowa 332, 10 N. W. 854; Osburn *v.* Cloud, 23 Iowa 104, 92 Am. Dec. 413.

Kansas.—Mullen *v.* Mullock, 22 Kan. 598; Snow *v.* Hudson, 56 Kan. 378, 43 Pac. 260.

Kentucky.—Johnson *v.* Robertson, 20 Ky. Law 135, 45 S. W. 523; Goff *v.* Wilborn, 15 Ky. Law 614, 24 S. W. 871; Mattingly *v.* Elder, 19 Ky. Law 1645, 44 S. W. 215; Flint *v.* Spurr, 17 B. Mon. 499.

Louisiana.—Pacific Express Co. *v.* Haven, 41 La. Ann. 811, 6 So. 650; Hacket *v.* Lenares, 16 La. Ann. 204; Carre *v.* New Orleans, 41 La. Ann. 996, 6 So. 893; State *v.* Kreider, 21 La. Ann. 482; Ingram *v.* Richardson, 2 La. Ann. 839.

Massachusetts.—Cobb *v.* Fogg, 166 Mass. 466, 44 N. E. 534.

Michigan.—Eaton *v.* Eaton, 68 Mich. 158, 36 N. W. 50.

Minnesota.—Mathews *v.* Hennepin Co. Sav. Bank, 44 Minn. 442, 46 N. W. 913; Coles *v.* Yorks, 31 Minn. 213, 17 N. W. 341.

Missouri.—Carroll *v.* Campbell, 110 Mo. 557, 19 S. W. 809; State *v.* Dougherty, 45 Mo. 294.

Nebraska.—McReady *v.* Rogers, 1 Neb. 124, 93 Am. Dec. 333.

New York.—Hyatt *v.* Ingalls, 124 N. Y. 93, 26 N. E. 285; Maloy *v.* Associated Lace-Makers Co., 30 N. Y. St. 153, 8 N. Y. Supp. 815; Raven *v.* Smith, 53 N. Y. St. 857, 24 N. Y. Supp. 600; Mandeville *v.* Avery, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678; Pullman *v.* Alley, 53 N. Y. 637; Dawley *v.* Brown, 65 Barb. 107.

North Carolina.—Propst *v.* Mathis, 115 N. C. 526, 20 S. E. 710; Redfearn *v.* Austin, 88 N. C. 413.

Pennsylvania.—Hessenbruch *v.* Markle, 194 Pa. St. 581, 45 Atl. 669.

Tennessee.—Parmelee *v.* Tennessee etc. R. Co., 13 Lea 600.

Texas.—Payne *v.* Benham, 16 Tex. 364.

Wisconsin.—Koch *v.* Peters, 97 Wis. 492, 73 N. W. 25.

Actions for the Possession of Real Property.—An action in ejectment cannot be maintained during the pendency of a prior action in equity between the same parties, in which plaintiff alleges that defendant wrongfully withholds possession of the same property from the plaintiff, and asks to enjoin the defendant from excluding the plaintiff therefrom. Shaughnessy *v.* St. Andrew's Church of Tecumseh, (Neb.) 89 N. W. 263.

ABBREVIATIONS.

By Henry S. Van Dyke.

I. DEFINITION.

An abbreviation is the shortened form of a word, obtained by the omission of one or more letters or syllables from the middle or end of the word.[1] An abbreviation of a word also may be formed by the use of one or more letters not found in the word abbreviated.[2] Figures and symbols are treated as abbreviations,[3] as well as shortened expressions of phrases.[4]

1. Bouv. Law Dict.
2. Frowd *v.* Stillard, 4 Car. & P. 51, 19 Eng. C. L. 268; Ullman *v.* Babcock, 63 Tex. 68.
3. Wilson *v.* Frisbie, 57 Ga. 269; Jaqua *v.* Witham etc. Co., 106 Ind. 545, 7 N. E. 314; Hunt *v.* Smith, 9 Kan. 137; Maurin *v.* Lyon, 69 Minn. 257, 72 N. W. 72, 65 Am. St. Rep. 568; Fulenwider *v.* Fulenwider, 53 Mo. 439.
4. Penn. To. Co. *v.* Leman, 109 Ga. 428, 34 S. E. 679; Weaver *v.* McElhenon, 13 Mo. 89; Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; McKee *v.* De Witt, 12 App. Div. 617, 43 N. Y. Supp. 132. *Compare* also Whart. on Contracts, § 639.

II. IN GENERAL.

There are two modes by which an abbreviation is available in evidence: (1) Judicial Notice, and (2) Extrinsic Evidence.[5]

It would seem in general that an abbreviation is admissible in evidence wherever its fully formed expression would be (though not to contradict fully formed expressions), unless it appears that the party sought to be affected by it was ignorant of its meaning.[6]

The generally accepted exceptions are found in civil transactions *in invitum*, in criminal proceedings, in mandatory legal formulae, and, in general, in transactions *inter partes* where the abbreviation is a technical or peculiar one and the party affected is not shown to have understood it.[7]

III. JUDICIAL NOTICE.

A court or jury may notice without proof the meaning of such abbreviations, even in formal writings, as are in common use and the meaning of which is unambiguous, universal, and not technical.[8]

A court, however, in cases where it would be allowed by law to judicially notice abbreviations, may require extrinsic proof;[9] or it

5. All of these cases cited in this article refer to written abbreviations. Though oral abbreviations are possible, the rules applicable to their admissibility in evidence are not treated for want of adjudged cases.

6. Jaqua *v.* Witham etc. Co., 106 Ind. 545, 7 N. E. 314; Barton *v.* Anderson, 104 Ind. 578, 4 N. E. 420; 1 Green. Ev., §§ 282, 283; Whart. Ev., §§ 954, 962 and 1003; Best Ev., pp. 232, 262; Reissner *v.* Oxley, 80 Ind. 580; Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130.

7. See particular subjects in this article, *post* notes Nos. 16, 19, 20, 22, 37 and 39.

8. Chamberlayne's Best on Ev., Internat. Ed., '93-'94, p. 255, citing Moseley *v.* Mastin, 37 Ala. 216; Stephen *v.* State, 11 Ga. 225; State *v.* Liquors, 73 Me. 278; Grennan *v.* McGregor, 78 Cal. 258, 20 Pac. 559; Weaver *v.* McElhenon, 13 Mo. 89; Kile *v.* Yellowhead, 80 Ill. 208.

Customary Abbreviations of Christian Names.—Brown *v.* Piper, 91 U. S. 37. The statement of the rule of law on the point cited is *obiter* in this case, but it has been frequently quoted as authority.

Initials in Pleadings.—See *post* judicial proceedings affecting land, notes 31 and 32; judicial process notes 34, 35 and 36.

"A. D.," Arabic Figures, Roman Numerals.—U. S. *v.* Reichert, 32 Fed. 142.

Usual Abbreviation for Name of a State in a Note.—Burroughs *v.* Wilson, 59 Ind. 536.

Contra.—Ellis *v.* Park, 8 Tex. 205, citing Andrews *v.* Hoxie, 5 Tex. 171, and other Texas cases.

Russell *v.* Martin, 15 Tex. 238, citing only Texas cases. These Texas cases seem to have been followed nowhere else. See criticism in 89 Am. Dec. 692, Note.

"Christy" Signed to a Note. Weaver *v.* McElhenon, 13 Mo. 89; See also Gordon's Lessee *v.* Holiday, 1 Wash. (U. S. C. C.) 285, 10 Fed. Cas. No. 5,610; Fenton *v.* Perkins, 3 Mo. 144; Birch *v.* Rogers, 3 Mo. 227.

"Acct." in Indorsement on Note. Heaton *v.* Ainley, 108 Iowa 112, 78 N. W. 708.

"Settled at Market 72 3-4," in Indorsement of Contract. — Storey *v.* Salomon, 6 Daly (N. Y.) 531, 540, citing Dana *v.* Fiedler, 12 N. Y. 40, 46, 62 Am. Dec. 130.

9. Hulbert *v.* Carver, 37 Barb. (N. Y.) 62. *Compare* Abbott's Trial Brief on the Facts, p. 2.

may satisfy itself by refreshing its memory by resorting to any means deemed proper.[10]

1. Informal Writings, Memoranda etc.—Informal writings being merely provisional, are not subject to so strict a rule as formal writings.[11]

2. Writings Affecting Land.—A. Deeds, Mortgages, Etc.— In a suit to foreclose a mortgage, the court cannot judicially notice the identity of an initial with a Christian name.[12]

B. Judicial Proceedings Affecting Land.— Judicial notice will be taken of an ordinary abbreviation of a Christian name;[13] and of the recognized abbreviations and figures ordinarily employed in describing lands originally granted by U. S. patent.[14] On the other hand, a court cannot take judicial notice of the meaning of

10. Brown *v.* Piper, 91 U. S. 37.

11. Whart. Ev. §§ 926, 1064, 1068 and 1070. See foot-note 30, *post.*

"C. O. D" on Express Package. U. S. Co. *v.* Keefer, 59 Ind. 263; State *v.* Liquors, &c., 73 Me. 278, citing 1 Whart. Ev., p. 330, and Best Ev., p. 351.

"C. O. D." in a Letter.— McNichol *v.* Pac. Ex. Co., 12 Mo. App. 401, citing Fagin *v.* Connoly, 25 Mo. 94, 69 Am. Dec. 450; and Edwards *v.* Smith, 63 Mo. 119, 127. Specifically, the case cited holds that the jury and not the court must notice the meaning of the abbreviation quoted.

In Attorney's Bill Abbreviations Commonly Used by Attorneys.—The abbreviations were: "Drawg. Declon. ffo. 15," "Instrons. for case," "Attg. you in long confce," "Preparing Afft." Frowd *v.* Stillard, 4 Car. & P. 51, citing Reynolds *v.* Caswell, 4 Taunt. 193, where the following abbreviations were judicially noticed in an attorney's bill: "Instrons. for declaration, ffo. 18," "Pd.", "Serjt.", "Atty.", "Lres" &c.

"I. O. U."— Lemere *v.* Elliott, 30 L. J. Ex. 350, 6 H. & N. 656.

12. Paris *v.* Lewis, 85 Ill. 597; Andrews *v.* Wynn, 4 S. D. 40, 54 N. W. 1047.

The Court says, that a court cannot take judicial notice that Edward H. Andrews and E. H. Andrews are one and the same person, or that E. H. is not the full Christian name of a person. Gardner *v.* McClure, 6 Minn. 250 (Gill. 167); Nelson *v.* Highland, 13 Cal. 75; Maxw. Code Pl. 75. The difficulty with the complaint in the case at bar is that one Edward H. Andrews brings the suit to recover on a note and mortgage apparently made to one E. H. Andrews, and that it is nowhere alleged in the Complaint that Edward H. and E. H. are one and the same person, or that the note and mortgage were made, executed and delivered to the plaintiff; in other words, there is nothing in the complaint to show that the plaintiff is entitled to maintain the action. An allegation that the plaintiff Edward H. was E. H. to whom the note and mortgage were made, would cure the defect.

13. Goodell *v.* Hall, 112 Ga. 435, 37 S. E. 725, where the court took judicial notice that "Eliza" in an application for a homestead meant "Elizabeth," the Christian name of a claimant against sale on foreclosure.

14. Jordan Ditching, etc. Ass'n. *v.* Wagoner, 33 Ind. 50, a suit to enforce a lien for benefits assessed to defendant's land, the abbreviations occurring in the assessment; and Frazer *v.* State, 106 Ind. 471, 7 N. E. 203, a suit on a drainage assessment, the abbreviation occurring in the assessment. *Compare* 89 Am. Dec. 692, note; *compare* Paris *v.* Lewis, 85 Ill. 597. But see, for rule as to extrinsic evidence on similar abbreviations, Division IV., *post.*

printers' marks in an advertised notice in foreclosure proceedings.[15] It has even been held that a court would take judicial notice that certain abbreviations in an assessment on land were not in common use, and therefore could not be proved by extrinsic evidence.[16]

3. Judicial Process, etc. — A. In Civil Cases. — Courts have taken judicial notice of many common abbreviations in process and other papers used in judicial proceedings;[17] but where, in proceedings to perpetuate testimony, initials were used for a railroad company's name, the court could not judicially notice their meaning.[18]

B. In Criminal Cases.—The courts are perhaps less liberal in taking judicial notice of abbreviations in criminal proceedings than in civil cases.[19]

15. The printer's marks were "Oct. 3, 41." Johnson *v.* Robertson, 31 Md. 476.

16. Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328; Powers *v.* Larabee, 2 N. D. 141, 49 N. W. 724; Keith *v.* Hayden, 26 Minn. 212, 2 N. W. 495; Tidd *v.* Rines, 26 Minn. 201, 2 N. W. 497.

17. **"Adm'r." in a Complaint.** Mosley's "Adm'r." *v.* Mastin, 37 Ala. 216.

"N. P." in a Notarial Certificate. Rowley *v.* Berrian, 12 Ill. (2 Peck.) 198.

"Supt." in an Affidavit.— So. Mo. Land Co. *v.* Jeffries, 40 Mo. App. 360.

Numerals and Dollar Mark in a Petition. — Fulenwider *v.* Fulenwider, 53 Mo. 439, citing Murrill *v.* Handy, 17 Mo. 406, where a note had the abbreviation "sum of fifty-two 25-100."

Abbreviations in Commissioner's Report.— Hunt *v.* Smith, 9 Kan. 137. The court took judicial notice that, in a commissioner's report assessing damages in condemnation proceedings, the figures "1,100.00" meant money, U. S. money, and of the usual units, i. e. dollars.

Abbreviations in Declaration. Rice *v.* Buchanan, &c., 1 W. L. J. 395. (Ohio '44.) The abbreviation was "thous." for "thousands."

18. The petition filed in court prior to taking testimony gave defendant's name as "C. B. & Q. R. R. Co." A paper was filed with cross interrogatories attached, signed "C. B. & Q. R. R. Co." *Held,* that the court could not take judicial notice, when the deposition was subsequently offered, that said initials meant "Chicago, Burlington & Quincy Railroad Company." Accola *v.* Chicago, B. & Q. R. Co., 70 Iowa 185, 30 N. W. 503.

U. S. Land Survey Abbreviations. Kile *v.* Yellowhead, 80 Ill. 208. The abbreviations were the usual ones in the U. S. Government land-surveys, excepting the abbreviation "E. W. ½ S." used in the plat of the road. The court says: "We believe that the practice of using initials for this purpose in conveyances, levies of executions, judicial sales, surveys, assessments for taxes, etc., etc., has been very general, from the first organization of our State Government, and that any person would as readily comprehend their meaning as if the words they represented were written in full." After a comparison of the description of the road as given in the complaint, in the petition for the location, etc., in the order establishing the road, and the plat of the road, the court concludes "that the initials 'E. W. ½ S.', in the connection in which they are used, may be reasonably construed to mean, 'east and west halves of section.'"

19. **Meaning of "Wm." in Indictment.** — Henry *v.* Armitage, 12 L. R., 12 Q. B. Div. 257; S. C., 50 L. T. R. N. S. 4.

Abbreviations in Christian Names of Grand Jurors.—Stephen *v.* State, 11 Ga. 225, citing Studstill *v.* State, 7 Ga. 2; Minor *v.* State, 63 Ga. 318.

4. Political Proceedings, Elections, etc.—In general an abbreviation of a candidate's name in a ballot must be unmistakable on its face to be judicially noticed.[20]

IV. EXTRINSIC EVIDENCE.

In general, where technical abbreviations are used in a particular business, unintelligible to persons unacquainted with such business, and their construction by a court is necessary, the rule is that they may be explained by extrinsic evidence, unless the explanation is

Figures Without Dollar Sign. State *v.* Ring, 29 Minn. 78, 11 N. W. 233, citing State *v.* Mims, 26 Minn. 183, 2 N. W. 494, 683, and distinguishing Tidd *v.* Rines, 26 Minn. 201, 2 N. W. 497.

U. S. Land-Survey Abbreviations in Indictment.—U. S. *v.* Reichert, 32 Fed. 142. The indictment was for filing a fraudulent claim for U. S. land. The court, per Field, J., says: "An indictment is to be read to the accused unless the reading is waived. The language should therefore be so plain that one of ordinary intelligence can understand its meaning. For that purpose, common words are to be used as descriptive of the matters. Abbreviations of words employed by men of science or in the arts will not answer, without full explanation of their meaning in ordinary language. . . . (But) the initials here have reference to the public lands as marked on the public surveys; they are signs used in a particular department of public business, and are not matters of general and universal knowledge by all speakers of the English language. The same objection applies to the initials S. B. M., supposed to denote San Bernardino meridian. There is no averment except in this way that the land alleged to have been surveyed lies in the State of California."

Abbreviations in Warrant of Arrest.—Vivian *v.* State, 16 Tex. Crim. App. 262. The bail bond recited that accused had been arrested by virtue of a warrant issued by "J. R. Sweeten, J. P. Pr. No. 1, D. C." *Held*, that the court was not authorized to presume that the initials "D. C." signified "Dimmit County," nor that "Carrizo Springs" are in Dimmit County, and that therefore the motion to set aside the judgment should have prevailed.

Variance in First Initial of Person's Name.—English *v.* State, 30 Tex. App. 470, 18 S. W. 94. The indictment was for forgery, setting out *in hacc verba* an instrument signed "R. M. Lewis," but alleging that the act purports to be the act of "M. R. Lewis." *Held*, that the variance as to the middle initial was immaterial, as the middle name is not recognized by common law as part of the name, but that the variance as to the first initial was fatal.

20. People *v.* Tisdale, 1 Doug. (Mich.) 59, where it was held that a ballot for "J. A. Dyer" did not show, upon its face, that it was intended for the candidate "James A. Dyer." In People v. Pease, 27 N. Y. 45, 64, 84 Am. Dec. 242, in which Moses M. Smith was a candidate, Selden, J., says: "According to well settled rules, the board of canvassers erred in refusing to allow to the relator the nineteen votes given for "Moses Smith" and "M. M. Smith."

The case of People *v.* Tisdale, *supra*, was, however, followed in People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141, though the majority of the court expressed the opinion that it was erroneous in principle, but had been too long (for 25 years) the settled law of the state to be disturbed, unless by the legislature. *Compare* Cooley on Cons. Lims., pp. 765 and 766. See also "Extrinsic Evidence on Abbreviations," *post*, foot-note 78.

inconsistent with fully expressed terms of a written instrument involved.[21]

As to abbreviations claimed to be customary and *general,* it would seem that they cannot be proved extrinsically where the court or jury cannot judicially notice them,[22] unless it is proved that the party to be affected actually understood and so used them.[23] The extrinsic evidence may be written as well as oral.[24]

1. Wills.—There seems no doubt that abbreviations in a will may always be explained, where the explanation does not conflict with the unambiguous terms, and that any evidence thereof, other than direct evidence of the expressed intention of the testator, is admissible.[25]

21. Collender *v.* Dinsmore, 55 N. Y. 200, 206, 14 Am. Rep. 224, citing Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130, a leading case; Barton *v.* Anderson, 104 Ind. 578, 4 N. E. 420; Jaqua *v.* Witham, etc. Co., 106 Ind. 545, 7 N. E. 314; Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328; 1 Greenl. Ev., § 282; Whart. Ev., § 1003; Best Ev., p. 232. *Compare* Abbott's Trial Brief on Facts, § 4.

22. Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328. The court said (p. 118): "If it be true that the symbol writing is, as alleged by the answer, used in describing land, and 'generally understood' by the taxpayers and the people of North Dakota and throughout the western states, the judges and courts of such states are bound to judicially note the existence of such usage. To borrow the words of Chief Justice Caton, 'courts will not pretend to be more ignorant than the rest of mankind.'" It was there held that extrinsic evidence was inadmissible to explain the abbreviations in question, i. e., certain abbreviations used in tax proceedings such as are often used in United States Government Surveys.

23. Jaqua *v.* Witham, etc. Co., 106 Ind. 545, 7 N. E. 314, 1 Greenl. Ev. § 283; Whart. Ev., §§ 954, 962; Reissner *v.* Oxley, 80 Ind. 580.

24. State *v.* Collins, 68 N. H. 29, 44 Atl. 495, a proceeding to abate a liquor nuisance. A blank application for a U. S. liquor license explaining certain abbreviations was held admissible to explain the same abbreviations used in the record of a revenue collector.

25. Peculiar Abbreviations. Schouler on Wills, 2 Ed. § 582, states the rule generally that "any obscure terms common to a calling with which the testator was familiar, or his shorthand, cipher, or other peculiar modes of expression, may be explained by the evidence of others competent to enlighten the court, and his symbolic writing thus reduced to its rational and consistent meaning." Kell *v.* Charman, 23 Beav. 195, is cited, where the testator, a jeweler, used the private price-marks of his business; and the letters "i x x" were explained to mean £100. Also Lord Abinger's language in Hiscocks *v.* Hiscocks, 5 M. & W. 363: "The testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of extrinsic evidence to show the sense in which he used them, in like manner as if his will were written in cipher or in a foreign language. The habits of the testator must be receivable as evidence to explain the meaning of his will." *Compare* also, Goblet *v.* Beechey, 3 Sim. 24 (Reversed in 2 Russ. & M. 624); Scott *v.* Neeves, 77 Wis. 305, 45 N. W. 421; Abbot *v.* Massie, 3 Ves. Jr. 148.

2. Contracts. — A. Formal Writings. — Abbreviations have been explained in a bill of lading;[26] in contracts to buy, to sell, to buy and sell, options, etc.;[27] in negotiable instruments;[28] in an insurance policy.[29]

B. Informal Writings.— Informal writings, where they may be considered as merely provisional contracts, are freely explained as to abbreviations.[30]

26. Mouton *v.* Louisville & N. R. Co. (Ala.), 29 So. 602. This was an action against a carrier for failure to deliver goods. The words "K. D." and "released" were explained as being technical terms.

27. Berry *v.* Kowalsky, (Cal.), 27 Pac. 286; Maurin *v.* Lyon, 69 Minn. 257, 72 N. W. 72, 65 Am. St. Rep. 568; Earl Fruit Co. *v.* McKinney, 65 Mo. App. 220, 2 Mo. App. 1274, explaining "f. o. b."; Dana *v.* Fiedler, 12 N. Y. 40, 46, 62 Am. Dec. 130, (a leading case); Storey *v.* Salomon, 6 Daly (N. Y.) 531; Silverman *v.* Clark, 96 N. Y. 522; Ottman Co. v. Martin, 16 Misc. 490, 38 N. Y. Supp. 966, which case should be compared with 96 N. Y., 524 *supra;* McKee *v.* DeWitt, 12 App. Div. 617, 43 N. Y. Supp. 132; White v. McMillan, 114 N. C. 349, 19 S. E. 234; Mercer Co. *v.* McKee's Adm'r., 77 Pa. St. 170; Ullman *v.* Babcock, 63 Tex. 68.

The Limits of Explanation.— In Silberman *v.* Clark, 96 N. Y. 522, the court draws the line as to where extrinsic explanation of a contract containing an abbreviation must stop. It says, p. 523: "In this contract, after the letters *f. o. b.* are explained and understood, there is nothing ambiguous. There is no latent ambiguity which needs explanation. All the language has a meaning, and hence there is no room, under the rules of law, for parol evidence. The meaning of the language used cannot be changed or varied by the proof of any custom, and hence there was no error in this case upon the trial in excluding such proof."

28. Comstock *v.* Savage, 27 Conn. 184; First Nat. Bank *v.* Fricke, 75 Mo. 178, 42 Am. Rep. 397; Palmer *v.* Stephens, 1 Denio (N. Y.) 471, citing Merchants' Bank *v.* Spicer, 6 Wend. (N. Y.) 443; Brown *v.* Butchers', etc. Bank, 6 Hill 443, 41 Am. Dec. 755; Williamson *v.* Johnson, 1 Barn. & C. 146; Bank *v.* Flanders, 4 N. H. 239, 247-8; (see also 12 J. B. Moore, 219; 1 Camp. 513, 2 Mood & R. 221, and Add. on Contr. 46 N.); Hulbert *v.* Carver, 37 Barb. 62; Robinson *v.* Kanawha Bank, 44 Ohio St. 441, 8 N. E. 583, 58 Am. Rep. 829, where the extrinsic evidence was admitted by the trial court, the appellate court not passing on its admissibility as being immaterial; and F. & M. Bank *v.* Day, 13 Vt. 36.

29. Nelson *v.* Sun Ins. Co., 71 N. Y. 453. The abbreviation was the technical phrase "port-risk." The parties to the contract were familiar with its usage.

30. Lockett *v.* Nicklin, 2 Ex. 93; Palmer, *in re*, 21 Ch. D. 47; Amonett *v.* Montague, 63 Mo. 201; Sharp *v.* Radebaugh, 70 Ind. 547; Adams *v.* Sullivan, 100 Ind. 8; Bennett *v.* Frary, 55 Tex. 145; Walters *v.* Van Derveer, 17 Kan. 425; Whart. on Contr. § 639. *Compare* also Baker on Sales, § 459, citing Salmon Falls Mfg. Co. *v.* Goddard, 14 How. (U. S.) 446; Scovill *v.* Griffiths, 2 Kern. (N. Y.) 509; Spencer *v.* Babcock, 22 Barb. 326; Fish *v.* Hubbard's Adm'rs., 21 Wend. (N. Y.) 657.

"I. O. U." —The letters "I. O. U." constitute a valid acknowledgement of a debt due. Kinney *v.* Flynn, 2 R. I. 319; and a written "I. O. U." is presumptive evidence of an account stated; Fesenmayer *v.* Adcock, 16 M. & W. 449; Curtis *v.* Richards, 1 Scott (N. R.) 155; Gould *v.* Coombes, 1 C. B. 543.

Cipher Telegram.—Wilson *v.* Frisbie, 57 Ga. 269.

Memorandum of Contract.— Wil-

3. Writings Affecting Land. — A. Deeds, Etc. — Abbreviations in contracts to convey land may be explained;[31] and in a deed.[32]

B. In Taxation Proceedings. — Some courts have admitted evidence to explain abbreviations in assessments and tax deeds;[33] other courts have rejected such evidence.[34]

son *v.* Coleman, 81 Ga. 297, 6 S. E. 693.

Order for Goods.—Penn. To. Co. *v.* Leman, 109 Ga. 428, 34 S. E. 679.

By Letter.—Jaqua *v.* Witham Co., 106 Ind. 545, 7 N. E. 314.

Extracts From Records. — Converse *v.* Wead, 142 Ill. 132, 31 N. E. 314.

Agreement to Furnish Materials. Walrath *v.* Whittekind, 26 Kan. 482.

Telegram Containing Technical Terms.— W. U. Tel. Co. *v.* Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515.

Express Receipt. — Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Dec. 224, reversing 64 Barb. 457, and citing Magnin *v.* Dinsmore, 56 N. Y. 168; Kirkland *v.* Dinsmore, 62 N. Y. 171; Taft *v.* Schwamb, 80 Ill. 289.

Abbreviations in Bank Book. — Wingate *v.* Mec. Bank, 10 Pa. St. (10 Barr) 104.

Bill of Parcels. — George *v.* Joy, 19 N. H. 544.

Memorandum of Agreement to Deliver. — Dana *v.* Fielder, 2 Kern. (N. Y.) 40, 62 Am. Dec. 130.

Order Blank Filled In.— Coates, etc. *v.* Early, 46 S. C. 220, 24 S. E. 305.

31. Abbreviated Description of Land.— Richards *v.* Snider, 11 Or. 107, 3 Pac. 177. This was a suit to specifically enforce performance of a contract to convey land in which the only description of the land was "lot 8, sec. 19, 4 N., 35 E." The complaint alleged the meaning of said abbreviations and location of said land as to county and state. Plaintiff had also held possession of the land until ejected by one of the defendants. The court, p. 190, said: "It is not, however, a case of patent ambiguity, even with the description thus limited. Lot 8, in section 19, is a definite and particular tract of land under the general system of surveys adopted by the United States, and of which the courts will take judicial notice. The intention of the parties to contract with reference to this particular tract and no other, is equally certain. There is no uncertainty as to this intention on the face of the written agreement. It is clearly a case admitting of the identification of the subject of the contract by proof of extrinsic facts. Dougherty *v.* Purdy, 18 Ill. 206; Wilson *v.* Smith, 50 Tex. 365; Clark *v.* Powers, 45 Ill. 283. The possession alone taken under the circumstances alleged, should be held a sufficient identification. Purinton *v.* N. Ill. R. Co., 46 Ill. 297; Parkhurst *v.* Van Cortland, 14 Johns. 15, 7 Am. Dec. 427.

32. Abbreviation of Grantee's Name. — Aultman, etc. Taylor Mfg. Co. *v.* Richardson, 7 Neb. 1, was a suit to foreclose a mortgage. The court held that where the grantee's name is abbreviated in a mortgage, it may be explained extrinsically, citing Staak *v.* Sigelkow, 12 Wis. 250.

33. Sufficient Description of Land. Barton *v.* Anderson, 104 Ind. 578, 4 N. E. 420, citing 1 Greenl. Ev., § 282; Whart. Ev., § 1003. A purchaser on tax sale was allowed to prove the meaning of "120 ft. Washt. St. S. W. cor. out. 66," in a tax duplicate.

34. Insufficient Description of Land. — Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328, a leading case reviewing the question thoroughly, and particularly citing Powers *v.* Larabee, 2 N. D. 141, 49 N. W. 724; and Keith *v.* Hayden, 26 Minn. 212, 2 N. W. 495, where, however, no extrinsic evidence seems to have been considered. Tidd *v.* Rines, 26 Minn. 201, 2 N. W. 497; Griffin *v.* Creppin, 60 Me. 270; *Compare* Glass *v.*

4. Judicial Process, etc.— A. In Civil Cases.— In suits not involving property abbreviations may be explained, as in proceedings to abate a nuisance.[35] Abbreviations, even in an action involving property, have been judicially noticed.[36] However, in an action on a judgment, it was held inadmissible to explain abbreviations in a justice's docket.[37]

B. In Criminal Cases.—Where an instrument in writing is involved in a criminal action, abbreviations therein may be explained.[38]

5. Political Proceedings, Elections, Etc. — The rules as to admissibility of extrinsic evidence to explain abbreviations on ballots vary according to the character of the election laws of the court's jurisdiction. The weight of authority is in favor of allowing explanation of the meaning of an abbreviation, where the election law is not mandatory to the contrary.[39]

6. Miscellaneous Matters. — It is admissible to explain an abbreviation in a record of the finding by a board of supervisors.[40] In an action for breaking a close, a surveyor's mark on a tree was explained.[41]

Gilbert, 58 Pa. St. 266. *Compare* Lowe *v.* Ekey, 82 Mo. 286 where certain abbreviations used in the description of land in the tax deed and anterior proceedings in the case were held insufficient.

35. State *v.* Collins, 68 N. H. 299, 44 Atl. 495.

36. Davis *v.* Harnbell, (Tex.) 124 S. W. 972.

37. Rood *v.* School Dist. No. 7, 1 Doug. (Mich.) 502.

38. In U. S. *v.* Hardyman, 13 Pet. 176; Hite *v.* State, 17 Tenn. (9 Yerg.) 357, defendant was indicted for receiving certain specified treasury notes, set out in the indictment. There was a variance between the counts and the notes, one of which provided for interest at "M" per centum. The court said: "We think under the circumstances of the case, that parol proof may be received, to show the meaning and effect of the letter M, as inserted in the body of the note."

39. People *v.* Ferguson, 8 Cow. (N. Y.) 102; People *v.* Seaman, 5 Denio (N. Y.) 409; People *v.* Cook, 14 Barb. (N. Y.) 259, and 8 N. Y. 67; Atty. Gen. *v.* Ely, 4 Wis. 438. *Compare* Clark *v.* Co. Examiners, 126 Mass. 282.

In Atty. Gen. *v.* Ely, 4 Wis. 438, votes for "D. M. Carpenter," "M. D. Carpenter," "M. T. Carpenter," and "Carpenter" were counted for Matthew H. Carpenter. State *v.* Elwood, 12 Wis. 615; People *v.* Pease, 27 N. Y. 45, 84 Am. Dec. 242, per Denio, Ch. J.; Talkington *v.* Turner, 71 Ill. 234; Clark v. Robinson, 88 Ill. 498; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; State *v.* Williams, 95 Mo. 159, 8 S. W. 415; State *v.* Gates, 43 Conn. 533. In Wimmer *v.* Eaton, 72 Iowa 374, 34 N. W. 170, 2 Am. St. Rep. 250, ballots for F. W. were counted for E. W., who was a regular candidate, there being no one eligible or running named F. W.

To the contrary, People *v.* Tisdale, 1 Doug. (Mich.) 59; People *v.* Higgins, 3 Mich. 233, 61 Am. Dec. 491; and People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

40. Cameron *v.* Fellows, 109 Iowa 534, 80 N. W. 567.

41. Knox *v.* Clark, 123 Mass. 216, 216.

ABDUCTION.

By Willoughby Rodman.

I. AS A CRIME.

1. The Case of the Prosecution.— A. Matters Essential to Conviction.— a. *Taking Against Will, or With Certain Intent.* **(1.) Proving Taking or Detention.** — Where defendant is charged with taking or detaining a female against her will,[1] such taking or detaining is shown by proof of force,[2] threats,[3] deceit or false representations,[4] arts, allurements, or persuasion,[5] the use of drugs or intoxicants,[6] detaining an insane woman for purpose of carnal knowledge,[7] taking liberties with a sleeping woman.[8]

1. Schnicker *v.* People, 88 N. Y. 192.

2. Schnicker *v.* People, 88 N. Y. 192; People *v.* Seeley, 37 Hun (N. Y.) 190; State *v.* Bussey, 58 Kan. 679, 50 Pac. 891; State *v.* Jamison, 38 Minn. 21, 35 N. W. 712; State *v.* Chisenhall, 106 N. C. 676, 11 S. E. 518; Scruggs *v.* State, 90 Tenn. 81, 15 S. W. 1074; Carpenter *v.* People, 8 Barb. (N. Y.) 603; State *v.* Keith, 47 Minn. 559, 50 N. W. 691.

3. Russ. Crimes (9th Ed.) p. 942.

4. Beyer *v.* People, 86 N. Y. 369; In People *v.* De Leon, 109 N. Y. 226, 16 N. E. 46, 4 Am. St. Rep. 444, defendant was indicted for "kidnapping," but the facts of the case and the language used by the court make the decision applicable to this discussion.

5. **Arts.**—A taking against the will of the female is established by proof of the employment of any allurements or arts which naturally tend to induce her to submit her will to that of the defendant or to leave her natural or legal custodian. Slocum *v.* People, 90 Ill. 274; People *v.* Seeley, 37 Hun (N. Y.) 190; State *v.* Johnson, 115 Mo. 480, 22 S. W. 463.

6. South *v.* State, 97 Tenn. 496, 37 S. W. 210.

7. **Insane Woman.** — Higgins *v.* Com., 94 Ky. 54, 21 S. W. 231. This is upon the theory that any act done to an insane woman which is not done in kindness, or for her benefit, is done against her will.

Defendant To Be Shown Cognizant of Insanity.—In Beaven *v.* Com., (Ky.) 30 S. W. 968, it is held, in discussing certain instructions, that when it is shown that the female in question was insane, it must also be shown that the defendant knew, or had reason to know, her mental condition.

8. **Sleeping Woman.** — Couch *v.* Com., (Ky.) 29 S. W. 29.

In Malone *v.* Com., 91 Ky. 307, 15 S. W. 856, the evidence showed that the defendant entered the room

(A.) Circumstances Showing That Taking Was Against Will. Evidence may be offered of facts which occurred prior to, concurrently with and subsequent to the taking, which show, or tend to show that the female was acting under the influence of force, threats, deceit, false representations or persuasion.[9]

The female may testify as to her reason for being in the society of defendant, and may give evidence of acts or language on his part which show that he induced her to accompany him by the exercise of menace, fraud, deceit or persuasion.[10]

(2.) Proving Intent. — (A.) Intent Must Be Shown. — When intent to perform an inhibited act, other than the taking, is an essential ingredient of the offense, the prosecution must prove, not only a taking against the will of the female, but that the taking was done with intent to perform the other act.[11] For methods of proving intent see the article "Intent." But certain facts which have been held to be evidence of intent in abduction cases are cited here.[12] Proof of the commission of the other act does not

of a young girl while she was sleeping; and without waking her, pulled up the bedclothes, disarranged her garments, and took liberties with her person. *Held*, that the evidence showed an intent to take or detain her against her will for the purpose of carnal knowledge.

9. Schnicker *v.* People, 88 N. Y. 192. In this case the court says: "In this case the precautions taken to prevent the prosecutrix leaving the house, and the restraint put upon her, through her fears, by the suggestion that, if she left the house, she would be arrested, justified the jury in finding that she was taken by the prisoner against her will. The girl was young, in a strange land, unacquainted with the surroundings, and the conduct of the prisoner, under the circumstances in which the prosecutrix was placed, naturally operated as potentially in restraining her actions and overcoming her will, as if actual physical violence had been used."

See also Respublica *v.* Hevice, 2 Yeates, (Pa.) 114.

10. Reason For Accompanying Defendant.—Beyer *v.* People, 86 N. Y. 369; People *v.* Seeley 37 Hun (N. Y.) 100; Slocum *v.* People, 90 Ill. 274; People *v.* DeLeon, 100 N. Y. 226, 16 N. E. 46, 4 Am. St. Rep. 444.

In Schnicker *v.* People, 88 N. Y. 192, the court says: "The prosecutrix was properly allowed to state why she went to the prisoner's house. It was competent for the people to show that she went to the house for an innocent purpose, and not for the purpose of prostitution."

11. Intent Must Be Proved. State *v.* Gibson, 111 Mo. 92, 19 S. W. 980; State *v.* Jamison, 38 Minn. 21, 35 N. W. 712.

12. Intent To Defile Inferred From Defilement. — The house was a house of prostitution. The prisoner plied the prosecutrix daily with solicitation that she should have illicit intercourse with men. When persuasion failed, the prisoner resorted to the compulsion of fear, and finally the prosecutrix was defiled by force. This evidence was held amply sufficient to establish the intent specified in the statute. Schnicker *v.* People, 88 N. Y. 192.

From Taking to House of Prostitution.—"When a girl is surreptitiously taken from her mother's roof by a prostitute and those who keep company with her, and conducted to a house of prostitution, the fair and reasonable inference is, that she is taken there for the purpose of prostitution." People *v.* Marshall, 59 Cal. 386; see also State *v.* Chisenhall, 106 N. C. 676, 11 S. E. 518;

establish the intent.[13]

Intent Inferred From Act. — But is admissible as tending to show the intent.[14]

Proof That Attempt Succeeded Unnecessary. — When the statute is directed against taking with inhibited intent, the intent being established, it is not necessary to show that defendant accomplished his purpose.[15]

(B.) Specific Intent. — Specific intent must be proved. The evidence for the prosecution must establish the specific intent charged in the indictment. To show an intent to commit another unlawful act, even of similar nature to that referred to, is not sufficient.[16]

Brown *v.* State, 72 Md. 468, 20 Atl. 186.

Intercourse Between Defendant and Prosecutrix, Prior to Taking. Evidence of acts of sexual intercourse between defendant and prosecutrix prior to the taking is admissible to show defendant's intent in the taking. People *v.* Carrier, 46 Mich. 442, 9 N. W. 487; People *v.* Wah Lee Mon, 37 N. Y. St. 283, 13 N. Y. Supp. 767.

Acts Subsequent to Taking May Show Intent.—State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149; State *v.* Johnson, 115 Mo. 480, 22 S. W. 463; Henderson *v.* People, 124 Ill. 607, 17 N. E. 68, 7 Am. St. Rep. 391.

Attempt to Conceal Prosecutrix. State *v.* Gibson, 111 Mo. 92, 19 S. W. 980.

Acts Done Outside Jurisdiction of Court.—People *v.* Wah Lee Mon, 37 N. Y. St. 283, 13 N. Y. Supp. 767.

But Not Immoral Acts With Other Females.—People *v.* Gibson, 21 N. Y. St. 59, 4 N. Y. Supp. 170.

Unchastity of Prosecutrix as Bearing on Intent.—Brown *v.* State, 72 Md. 468, 20 Atl. 186.

That defendant was told prosecutrix was a prostitute and that he supposed she was may be shown by him to rebut intent. Beaven *v.* Com., (Ky.) 30 S. W. 968.

13. Intent Not Presumed From Act. — People *v.* Plath, 100 N. Y. 590, 53 Am. Rep. 236; State *v.* Gibson, 111 Mo. 92, 19 S. W. 980; State *v.* Jamison, 38 Minn. 21, 35 N. W. 712; Lawson Presumptive Ev. p. 472. In Cochran *v.* State, 91 Ga. 763, 18 S. E. 16, defendant was indicted under a statute which provided that any one maliciously or fraudulently leading or taking away a child under eighteen years of age from its parents or guardians, or against his, her or their wills, shall be guilty of kidnapping. The evidence showed that defendant went with a girl under eighteen to a licensing office, obtained a marriage license, and married the girl. There was no proof of fraud or force practiced or exerted upon the girl or her parents; and no proof of malice. *Held,* that the evidence did not sustain a conviction.

14. State *v.* Keith, 47 Minn. 559, 50 N. W. 691. See also Beyer *v.* People, 86 N. Y. 369.

15. State *v.* Rorebeck, 158 Mo. 130, 59 S. W. 67; Payner *v.* Com. (Ky.) 19 S. W. 927; Slocum *v.* People, 90 Ill. 274; State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149; State *v.* Keith, 47 Minn. 559, 50 N. W. 691.

"The *gravamen* of the offense is the purpose or intent with which the enticing or abduction is done; and hence the offense, if committed at all, is complete the moment the subject of the crime is removed beyond the power and control of her parents, or others having lawful charge of her, whether any illicit intercourse takes place or not." Henderson *v.* People, 124 Ill. 607, 17 N. E. 68, 7 Am. St. Rep. 391.

16. Specific Intent. — State *v.* Stoyell, 54 Me. 24, 89 Am. Dec. 716. In this case, which is the leading American case on the subjects of

(C.) Whose Intent Material. — (a.) *Intent of Defendant Alone Material.* — In prosecution under statute directed against taking female with inhibited intent, it is the intent of defendant which is material, the intent of the female being immaterial.[17]

(b.) *Knowledge of Female Immaterial.*— It is also immaterial that defendant's intent was not disclosed to the female.[18]

(D.) Consent, When Immaterial. — When the gist of the offense is the abduction of an infant, or the taking of a female under designated age, for purposes of prostitution or concubinage, it is immaterial that the taking was with the consent of the infant,[19] or the female.[20]

b. *Taking Female Under Designated Age for Certain Purpose.* **(1.) Prostitution.—Unnecessary to Show Particular Man.**—In prosecution under a statute against compelling or procuring a female to have

specific intent and taking for purpose of prostitution, defendant was indicted under a statute which provided that "whoever fraudulently and deceitfully entices or takes away an unmarried female from her father's house, or wherever else she may be found, for the purpose of prostitution, at a house of ill fame, assignation or elsewhere, and whosoever aids," etc. The evidence showed that the defendant, by representing to prosecutrix that he wished to take her for a drive, induced her to accompany him to a town not far from her home. On arriving at the town they went to a hotel, were assigned a room, where, after producing a condition of partial intoxication in prosecutrix, defendant had intercourse with her. That night they drove to her father's house, but did not enter, going, instead to another hotel, where they again had intercourse.

Defendant was convicted. The appellate court held that the evidence did not sustain the judgment of conviction; that it did not show any intent to cause prosecutrix to become a prostitute.

See also State *v.* Gibson, 108 Mo. 575, 18 S. W. 1109; People *v.* Roderigas, 49 Cal. 9; State *v.* Rorebeck, 158 Mo. 130, 59 S. W. 67; People *v.* Parshall, 6 Park. Crim. (N. Y.) 129; People *v.* Plath, 100 N. Y. 590, 53 Am. Rep. 236; Carpenter *v.* People, 8 Barb. (N. Y.) 603; State *v.* Ruhl, 8 Iowa 447.

Proof of Intent to Seduce Not Sufficient.—Evidence showing an attempt to commit seduction does not warrant conviction under an indictment which charges defendant with taking away female with intent to compel her to be defiled. People *v.* Parshall, 6 Park. Crim. (N. Y.) 129.

But in People *v.* Cummons, 56 Mich. 544, 23 N. W. 215, it was held that a conviction for enticing female under designated age, for purposes of prostitution, was sustained by evidence that defendant enticed the female to his photographic rooms, showed her lewd pictures, paid her small sums of money, and at various times had sexual intercourse with her.

17. Defendant's Intent Controls. Slocum *v.* People, 90 Ill. 274; State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149.

18. Knowledge of Female Immaterial.—Slocum *v.* People, 90 Ill. 274; Ex Parte Estrado, 88 Cal. 316, 26 Pac. 209.

19. Thwentt *v.* State, 74 Ga. 821; Tucker *v.* State, 8 Lea (Tenn.) 633; 1 Russ. Crimes, (9th Ed.) p. 953.

20. Consent of Female Immaterial.—State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149; State *v.* Chisenhall, 106 N. C. 676, 11 S. E. 518; State *v.* Bussey, 58 Kan. 679, 50 Pac. 891; State *v.* Stone, 106 Mo., 16 S. W. 890; Scruggs *v.* State, 90 Tenn. 81, 15 S. W. 1074; South *v.* State, 97 Tenn. 496, 37 S. W. 210.

sexual intercourse with men other than the person so procuring or compelling her, it is not necessary to show that defendant's purpose was to compel prosecutrix to have intercourse with any particular man. It will be sufficient if the evidence shows that defendant's purpose was to procure or compel her to have intercourse with another, or with others, than himself.[21]

(A.) Character of House. — In prosecution under statute against inveigling or enticing a female into a house of ill-fame or of assignation, or elsewhere, for the purposes of prostitution, it is necessary to show that the place to which the female was taken was a place of character similar to that of houses of ill-fame or of assignation.[22]

(B.) Character of House As Showing Purpose or Intent. —In prosecution for taking female for purpose of prostitution, character of house may be considered as showing defendant's purpose or intent.[23]

(2.) Concubinage. — (A.) Acts Necessary to Constitute.—To establish a taking for the purposes of concubinage, no given number of acts of intercourse is necessary.[24]

(B.) Number of Acts As Showing Purpose. — But it is proper to show the number of acts which took place, and the number may be considered, in connection with other facts, and circumstances proved, in determining whether or not defendant's purpose was habitual cohabitation with the female.[25]

21. Stevens *v.* State, 112 Ind. 433, 14 N. E. 251.

22. In State *v.* McCrum, 38 Minn. 154, 36 N. W. 102, it was shown that defendant enticed prosecutrix into a dwelling house, and there had intercourse with her. *Held,* that to sustain a conviction, it should have been shown that the house was a place where prostitution of the character common at houses of ill-fame was practiced. See also Miller *v.* State, 121 Ind. 294, 23 N. E. 94. But see People *v.* Cummons, 56 Mich. 544, 23 N. W. 215. See also Reg. *v.* McNamara, 20 O. R. (Can.) 489.

23. Brown *v.* State, 72 Md. 468, 20 Atl. 186.

Held, that facts that defendant kept a bawdy-house and that prosecutrix was brought there, were *prima facie* evidence that prosecutrix was taken there for purpose of prostitution. Also held that defendant, to rebut this *prima facie* case, might prove that prosecutrix was permitted at her own request, to remain in the house, for the purpose of securing employment on the day after her arrival. Also, that while in the house, prosecutrix did not have sexual intercourse.

In State *v.* Ruhl, 8 Iowa 447, it is stated that if it be proven that defendant took prosecutrix to a house of ill-fame, prostitution, or other place where she would be in the society alone of lewd and lascivious persons, a conviction might be supported, upon the principle that prostitution of the female might be regarded as almost necessarily to follow, every person being presumed to intend the natural, necessary and even probable consequences of his act.

See also State *v.* Chisenhall, 106 N. C. 676, 11 S. E. 518; Reg. *v.* McNamara, 20 O. R. (Can.) 489.

24. U. S. *v.* Zes Cloya, 35 Fed. 493; State *v.* Feasel, 74 Mo. 524.

Single Act Held Sufficient.—State *v.* Feasel, 74 Mo. 524.

25. U. S. *v.* Zes Cloya, 35 Fed. 493.

In State *v.* Feasel, 74 Mo. 524, it was held that cohabitation for a single night with a female under the age prescribed by the statute is

(C.) Previous Chastity Material. — Previous chastity of the female must be proved.[26]

(3.) Carnal Knowledge. — Under some statutes the offense is committed by taking a female under designated age for purpose of sexual intercourse.[27]

c. *Taking Minor From Parent or Guardian Without His Consent.*

(1.) Taking From Custody. — (A.) What Constitutes — An actual forcible removal from parent's custody need not be shown.[28] It suffices to prove any act which deprives the parent of the custody or possession of his child.[29]

sufficient to sustain a conviction for taking for purposes of concubinage. The question arose upon an exception to a certain instruction in which the court instructed the jury that if defendant took the female from her father for the purpose of concubinage, that is, for the purpose of cohabiting with her as man and wife in sexual intercourse for any length of time, even for a single night, without the authority of a valid marriage, the jury would find defendant guilty.

Single Act Not Sufficient.—State *v.* Feasel, 74 Mo. 524, is overruled by State *v.* Gibson, 111 Mo. 92, 19 S. W. 980, which is itself approved by State *v.* Johnson, 115 Mo. 480, 22 S. W. 463, and State *v.* Wilkinson, 121 Mo. 485, 26 S. W. 366.

But State *v.* Feasel, 74 Mo. 524, is approved in State *v.* Overstreet, 43 Kan. 299, 23 Pac. 572. Although in the Overstreet case the court held that there was evidence of other than one night's cohabitation which showed defendant's intent.

26. Previous Chastity.—In State *v.* Gibson, 111 Mo. 92, 19 S. W. 980, defendant was indicted under a statute directed against taking female under the age of eighteen for purpose of concubinage. The court held that, while the statute in question did not, in terms, require that the female should have been of previous chaste character, such a requirement was necessarily included in a definition of the offense.

Contra.—State *v.* Johnson, 115 Mo. 480, 22 S. W. 463.

27. Huff *v.* Commonwealth, (Ky.) 37 S. W. 1046; People *v.* Seeley, 37 Hun (N. Y.) 190; People *v.* Sheppard, 44 Hun (N. Y.) 565.

As to method of proving age *see* the article, "Age."

28. Force Not Necessary.—Roscoe Crim. Ev., 7th Am. Ed., p. 263; citing Rex *v.* Booth, 12 Cox Crim. Cas., 231 and Reg. *v.* Handley, 1 F. & F. 648; Russ. Crimes, 9th Ed. 954.

29. Acts Which Constitute Taking From Custody.—Where A. went at night to house of B., and held a ladder for F., B.'s minor daughter, to descend, and then eloped with and married her, it was held that there was a taking of the girl from the possession of her father, although F. herself proposed the use of the ladder. Roscoe Crim. Ev., 7th Am. Ed., citing Rex. *v.* Robins, 1 Car. & K. 456.

So when defendant persuaded a girl to meet him secretly, and then took her away. Roscoe Crim. Ev. 7th Am. Ed., p. 263, citing Reg. *v.* Manktelow, 1 Dears. C. C. 159, where a girl has left home without any inducements offered her by defendant, and come to defendant, if he avails himself of her having left to induce her not to return, he is guilty of an unlawful taking. Roscoe Crim. Ev. 7th Am. Ed., p. 263, citing Rex. *v.* Olifier, 10 Cox Crim. Cas. 402.

Defendant being related to the father of a girl, and frequently invited to the house, induced the girl to elope with and secretly marry him, using no inducements or seduction other than the ordinary blandishments of a lover. *Held* that, father's non-consent being shown, de-

(a.) *Fraud.* — Defendant takes the child from the custody of its parent when he entices it away by the use of false representations.[30] But it is held that the force or fraud must be exercised or practiced against the minor, and that evidence showing the exercise of force or the practice of fraud against the parent or guardian is not sufficient to sustain an indictment.[31]

(b.) *Bad Intent Immaterial.* — It is immaterial that defendant was not actuated by bad intent in the taking.[32]

Intent. — The only intent necessary to be proven, is an intent to deprive a parent of his child.[33]

(c.) *Intent Inferred.* —An intent to abduct may be inferred from evidence of solicitations made to minor by defendant, or from preparations made by him.[34]

(d.) *Ignorance of Minority Immaterial.* — Testimony that a minor who was taken away told defendant that she was over designated age, and that he believed her, is irrelevant.[35]

(B.) Actual Removal Necessary. — **Custody.** — Before an unlawful taking can be shown, it must be established that the minor was in the custody or charge of his parent or guardian,[36] and was actually

fendant was guilty of abduction. R. *v.* Twisleton, 1 Lev. 257 as cited at p. 246 of Roscoe Crim. Ev. See Reg. *v.* Burrell, L. & C. 354.

Acts Which Do Not Constitute Taking.—Defendant does not take a girl out of the possession of her father, where he finds her on the street, produces partial intoxication, and has intercourse with her. Reg. *v.* Green, 3 F. & F. 274.

30. 1 Russ. Crimes, 9th Ed. pp. 952, 955.

Contra.—But in Reg. *v.* Meadows, 1 Car. & K. 399, it was held that inducing a girl to go with defendant by his representing that his mother needed a servant, and would pay her a certain sum as wages, and then taking her away with himself, did not constitute a taking from the possession or against the will of her father. This case is doubted in case of Reg. *v.* Manktelow, 6 Cox. Crim. Cas. 143.

31. Reg. *v.* Barnett, 15 Cox Crim. Cas. 658.

Cantra.—Reg. *v.* Hopkins, 1 Car. & M. 254, where it is held that offense is committed when consent of parent is obtained by fraud.

32. Roscoe Crim. Ev., 7th Am. Ed., p. 264, citing Rex *v.* Booth, 12 Cox Crim. Cas. 231. See also 1 Russ. Crimes, 9th Ed., p. 955.

But in Reg. *v.* Tinkler, 1 F. & F. 513, it was held that when the evidence showed that defendant, who had taken a girl from the custody of a person with whom she had been placed by an elder sister, believed he had a right to the custody of the child, she being a sister of his deceased wife, defendant having promised the child's father on his dying bed that he would take care of her, abduction was not committed, no improper motive appearing.

33. Roscoe Crim. Ev., 7th Am. Ed., p. 264, citing Rex. *v.* Timmins, 8 Cox Crim. Cas. 401.

34. Roscoe Crim. Ev., 7th Am. Ed., 264.

35. State *v.* Ruhl, 8 Iowa 447; Reg. *v.* Prince, L. R. 2 C. C. R. 154; 1 Whart. Crim. Law. §88.

36. Custody Must Be Shown. Reg. *v.* Miller, 13 Cox Crim. Cas. 179. In this case the evidence showed that a girl working as a servant had had various meetings with defendant. While going to visit her father, she called on defendant. She had leave to remain with her father from Sunday till Monday night. She left her father's

removed therefrom.[37]

(a.) *Constructive Custody Sufficient.* — But it is sufficient if it be shown that the minor was constructively in the custody of his parent or guardian.[38]

(b.) *Constructive Service Sufficient.* — And where it must be shown that services were rendered by the minor, constructive service is sufficient.[39]

(c.) *Who Entitled to Custody.* — It is sufficient to show that the minor lived with the guardian of his estate in the absence of his father and with the consent of the mother; and the letters of guardianship of estate are admissible in evidence.[40]

(d.) *Distance Removed or Time of Detention Immaterial.* — It is not necessary to show that the female was taken any given distance from the person entitled to her custody;[41] or that she was detained any given time.[42]

house Sunday; but, instead of returning to service, met defendant and spent Sunday night with him; and remained with him till Thursday, when her father accidently met her and returned her to her employer. The girl testified that she might have returned to her master's at any time after Monday night; also that she never intended to stray away till Monday night. *Held*, that abduction was not committed as girl was not in the custody of her father.

See also Reg. *v.* Green, 3 F. & F. 274, in which it was held that the girl was not in charge of her father.

See also Reg. *v.* Hinkers, 10 Cox Crim. Cas. 246.

Defendant's Knowledge of Custody. See Reg. *v.* Hilbert, 11 Cox Crim. Cas. 246, in which it is held that the offense is not committed unless defendant knew that the girl was under the care of her father, or had reason for believing that she was.

37. Actual Removal. — Slocum *v.* People, 90 Ill. 274.

38. Constructive Custody Sufficient.—Possession of parent continues until put an end to by defendant's taking the female into his own possession. Reg. *v.* Manktelow, 1 Dears. C. C. 159; and Rex *v.* Kipps, 4 Cox Crim. Cas. 167.

See also Russ. Crimes, (9th Ed.) p. 954; 2 Whart. Crim. Law (9th Ed.) § 1765; State *v.* Round, 82 Mo. 679.

If, in prosecution for abduction, the evidence shows that there was an intention on the girl's part to return home, she is still in the constructive custody of her father. Roscoe Crim. Ev. (7th. Am. Ed.) p. 263, citing Rex. *v.* Mycock, 12 Cox Crim. Cas. 28.

"Surely a father to protect his child ought not to be obliged to keep his arms clasped constantly around her waist." Bish. Stat. Crimes, § 636.

In State *v.* Round, 82 Mo. 679, a girl had gone with consent of her father, who lived in Missouri, to visit an uncle in Iowa. Defendant, by false representations, induced the girl to leave her uncle's house with him. They drove into Missouri, where they had sexual intercourse. *Held*, that the girl was taken from her father's custody.

39. Gandy *v.* State, 81 Ala. 68, 1 So. 35, holding that it is presumed that the services of the minor are lawfully due to the parent as long as the child remains in the family and under the control of the parent.

40. People *v.* Carrier, 46 Mich. 442, 9. N. W. 487. As to custody, see State *v.* Ruhl, 8 Iowa 447.

41. Slocum *v.* People, 90 Ill. 274; 1 Russ. Crimes, (9th Ed.) p. 956; South *v.* State, 97 Tenn. 496, 37 S. W. 210.

42. State *v.* Round, 82 Mo. 679; Slocum *v.* People, 90 Ill. 274; South *v.* State, 97 Tenn. 496, 37 S. W. 210; Roscoe Crim. Ev. (7th Am. Ed.)

(e.) *Parental Control Lost.* — Under indictment for forcibly, maliciously or fraudulently taking or enticing away from its parent a child under designated age, defendant may show that the control of the child had passed from the parent and vested in a guardian, the presumption of parental control being disputable.[43]

(2.) Non-Consent of Parent or Guardian. — To establish an unlawful taking of a minor, it must be shown that the taking was done without the consent of the parent or guardian.

(A.) Non-Consent Presumed. — Want of consent of parent will be presumed, if it appears that had his consent been asked, he would have refused it.[44]

(B.) Consent Obtained by Fraud. — If the evidence show that parents' consent to removal was obtained by fraud, the offense is committed.[45]

(C.) Defendant's Knowledge of Non-Consent Immaterial. — In prosecutions for taking away minor female without the consent of her parent or guardian, it is immaterial whether or not defendant was notified of parent's unwillingness to surrender the custody of his child.[46]

(D.) Father's Treatment Immaterial. — Defendant will not be permitted to show that the father treated the girl harshly.[47]

(E.) Consent Immaterial. —In prosecution for taking female under designated age for purpose of prostitution, evidence as to the father's consent is immaterial.[48]

p. 263, citing Reg. *v.* Timmins; 8 Cox Crim. Cas. 401. See also 1 Russ. Crimes (9th Ed.) 956.

43. Parental Control Lost. Pruitt *v.* State, 102 Ga. 688, 29 S. E. 437.

44. Roscoe Crim. Ev. (7th Am. Ed.) p. 264, citing Reg. *v.* Handley, 1 F. & F. 648.

Acquiescence.—In Reg. *v.* Primelt, 1 F. & F. 50, defendant met a young girl at a dance house, took her away and had intercourse with her. *Held* that the taking was not against the consent of her mother, when the evidence showed that the mother knew of the girl's habit of being out late at night and visiting dance houses, and permitted her to do so.

See also 1 Russ. Crimes (9th Ed.) p. 958; Bish. Stat. Crimes § 635.

45. Consent By Fraud.—Reg. *v.* Hopkins, 1 Car. & M. 254. In this case defendant represented to a mother that he would give her daughter employment, if she should be permitted to go with him. The father, on being informed of this statement, consented to the girl's going with defendant.

Defendant did not take the girl to the place to which he had promised to take her, but kept her with him, and occupied the same bed with her.

The father testified that he let the girl go, relying upon defendant's representations. *Held*, that the taking was unlawful, on the ground that consent obtained by fraud is no consent.

See also Roscoe Crim. Ev. (7th Am. Ed.) p. 263; Russ. Crimes (9th Ed.) p. 951.

46. Gravett *v.* State, 74 Ga. 191.

47. Gravett *v.* State, 74 Ga. 191. In this case defendant offered to prove that the father was harsh in his treatment of the girl taken away, for the purpose of showing that she left home voluntarily to avoid such treatment. *Held*, that the testimony was properly excluded.

48. State *v.* Chisenhall, 106 N. C.

Assisting Mother in Taking Child From Parent. — In prosecution under statute against taking child under designated age, with intent to conceal it from its parent, evidence that defendant simply assisted the mother in taking the child from the father is not sufficient to sustain conviction.[49]

d. *Previous Chaste Character of Female.* — Under some statutes the offense of taking a female for certain prohibited purposes is not complete unless it be shown that the female was of chaste character previous to the taking.

(1.) Chastity Prior to Taking.—To secure conviction under statutes directed against taking away a female of previous chaste character for the purposes of prostitution or concubinage, the state must prove that up to the time of the commission of the offense, she had been chaste and pure in character, conduct and principle.[51]

(2.) Chastity Must Be Proved. — Chastity must be proved by positive evidence.[52]

(A.) Presumption of Innocence Insufficient. — The fact of chastity is not established by applying in favor of the female the presumption of innocence.[53]

676, 11 S. E. 518; State *v.* Jamison, 38 Minn. 21, 35 N. W. 712.

But in Brown *v.* State, 72 Md. 468, 20 Atl. 186, it was held that defendant might show that prosecutrix went with defendant with her mother's consent.

49. State *v.* Angel, 42 Kan. 216, 21 Pac. 1075. In this case the evidence showed that the mother of an infant took it away from the father, and that defendant aided and assisted her. *Held*, that such evidence would not sustain a conviction. The decision proceeded upon the theory that under the Constitution of Kansas the mother's right to the child was equal with that of the father; that, consequently, she had a right to remove the child, and could not be prosecuted for so doing; and that defendant, in assisting her in a lawful act, committed no offense.

50. Previous.—In such connection the word "Previous" refers to a period terminating immediately previous to the commencement of the guilty conduct of defendant. Carpenter *v.* People, 8 Barb. (N. Y.) 603.

Reformation.—If the female had fallen once, but had reformed, she might be the subject of the offense. *Id.*

51. Character, Not Reputation. This means actual personal virtue, chaste *character*, not a reputation for chastity. Carpenter *v.* People, 8 Barb. (N. Y.) 603; Kauffman *v.* People, 11 Hun (N. Y.) 82, 87; Slocum *v.* People, 90 Ill. 274, 281; Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177.

Previous Chastity.—On the subject of previous chastity, and the proof necessary to establish it, see Slocum *v.* People, 90 Ill. 274, 281; Lyons *v.* State, 52 Ind. 426; Crozier *v.* People, 1 Park. Crim. (N. Y.) 453.

52. Chastity Must Be Proved. People *v.* Roderigas, 49 Cal. 9; Com. *v.* Whittaker, 113 Mass. 224; Kauffman *v.* People, 11 Hun (N. Y.) 82.

53. Presumption of Innocence. In Com. *v.* Whittaker, 113 Mass. 224, it is held that the presumption of innocence, which the law indulges in favor of the female, will not so far overcome the presumption of innocence in favor of defendant, as to dispense with proof of chastity.

Contra.—Slocum *v.* People, 90 Ill. 274. In this case the court uses this language:

"It is argued that Miss Templeton was not a female of chaste life and conversation, and therefore the

(B.) SHOWN BY CIRCUMSTANCES.— Evidence may be offered of circumstances which raise presumption of chastity.[54]

(3.) Unnecessary, When. —(A.) WHEN FORCE IS EMPLOYED.—In prosecution under statute directed against taking any woman against her will, and by force compelling her to be defiled, evidence of previous chastity of the female is not required.[55]

(B.) FEMALE UNDER DESIGNATED AGE.— So when prosecution is for taking a female under a designated age for the purpose of prostitution.[56]

(4.) Unchastity As Defense. — When the rule requires proof of previous chastity, defendant may show, as a defense, that previous to the time of the alleged taking, the female was unchaste, and may offer evidence of a single act of illicit intercourse on the part of prosecutrix.[57]

statutory crime was not committed. We admit that this clause requires that she shall possess actual personal virtue as distinguished from a good reputation. The presumption of law is, that her previous life and conversation were chaste, and the onus was upon the defendants to show otherwise."

To same effect is Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652.

54. Presumption of Chastity Created by Circumstances.—Slocum *v.* People, 90 Ill. 274; Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652.

Among the circumstances competent to be shown for the purpose of raising presumption of chastity, is the fact that an unmarried female was at the time of the act in question residing with her parents or guardian; that she was living in a respectable household, or by proof of any circumstances consistent with and the usual concomitants of chaste female character. People *v.* Roderigas, 49 Cal. 9.

In Andre *v.* State, 5 Iowa 389, 68 Am. Dec. 708, it is held that, to show that female was unchaste it is not necessary that it be shown that she had had sexual intercourse. Unchastity may be established by proof of lewd, indecent and lascivious conduct.

55. Taking by Force.—Kauffman *v.* People, 11 Hun (N. Y.) 82.

56. Female Under Designated Age. — Kauffman *v.* People, 11 Hun (N. Y.) 82; People *v.* Demousset, 71 Cal. 611, 12 Pac. 788. In the case last cited defendant was indicted under a statute making it an offense to take a female under the age of eighteen years from the person entitled to her custody, without his consent, for the purposes of prostitution. It was held that evidence, that prior to the alleged taking, prosecutrix had had intercourse with a number of men, was immaterial. See also People *v.* Dolan, 96 Cal. 315, 31 Pac. 107; State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149.

In People *v.* Demoussett, 71 Cal. 611, 12 Pac. 788, and People *v.* Dolan, 96 Cal. 315, 31 Pac. 107, the prosecutions were under § 267, Penal Code of California, which is directed against taking a female under the age of eighteen from her parents for purposes of prostitution; while in People *v.* Roderigas, 49 Cal. 9, prosecution was under § 266, which provides that any one taking a female of previous chaste character, under the age of eighteen, for purpose of prostitution, is punishable, etc.

57. Unchastity As Defense. In Lyons *v.* State, 52 Ind. 426, the court held that it was error to exclude defendant's offer to prove acts of illicit intercourse on the part of prosecutrix, and that it was proper to permit the defendant to show a single act of illicit intercourse on her part. Crozier *v.* People, 1 Park. Crim. (N. Y.) 453.

(5.) Unchastity After Taking Immaterial.—Defendant's evidence as to unchastity of prosecutrix is limited to time preceding the taking; and evidence of subsequent acts of unchastity is incompetent.[58]

B. Burden of Proof. — The burden of proof is, of course, upon the prosecution to establish every element of the offense. See "Burden of Proof."

C. Evidence for Prosecution. — **Witnesses.** — a. *Female Taken.* — The female who was taken may testify as to the taking, as to defendant's conduct,[59] as to his statements to her, as to her reason for being in his society,[60] or as to statements made to her, or in her presence by accomplice of defendant.[61]

(1.) Wife Witness For or Against Husband. — In prosecution for taking a female and marrying her by force, the female taken may testify against defendant,[62] especially when marriage is disputed.[63] She may also testify for him.[64]

(2.) Corroboration. — (A.) When Required. — A conviction may be had upon the uncorroborated testimony of the female, unless the statute under which prosecution is conducted requires corroborating testimony.[65]

(B.) Scope and Nature of Evidence. — When corroborative testi-

58. Unchastity After Taking. Scruggs *v.* State, 90 Tenn. 81, 15 S. W. 1074. See also Slocum *v.* People, 90 Ill. 274. In this case the court held that defendant was estopped to rely upon circumstances showing lewd life and character of female after commission of the offense, it being shown that defendant's inducements caused her to lead a life of prostitution.

59. Beyer *v.* People, 86 N. Y. 369; Schnicker *v.* People, 88 N. Y. 192.

60. People *v.* Seely, 37 Hun 190; Slocum *v.* People, 90 Ill. 274; People *v.* DeLeon, 109 N. Y. 226, 16 N. E. 46, 4 Am. St. Rep. 444.

61. People *v.* Brown, 71 Hun 601, 24 N. Y. Supp. 1111.

62. Wife Competent Against Husband.—The common law inhibition against a wife's testifying against her husband applies only in case of a valid marriage. Therefore, in prosecution for forcibly marrying a woman, she may testify against defendant, as there was no marriage between them, she being wife *de facto* only, and not *de jure*. State *v.* Gordon, 46 N. J. Law 432; Respublica *v.* Hevice, 2 Yeates (Pa.) 114; 2 Stark. Ev., p. 711; 1 Greenl. (14th Ed.), § 343.

See the article "Husband and Wife."

Rule Questioned.—But if the woman freely and without constraint cohabits with defendant a considerable time after the marriage, it is questionable if she may be a witness against him. 1 Russ. Crimes (9th Ed.), 949; 2 Stark. Ev., p. 711.

63. In State *v.* Gordon, 46 N. J. Law 432, it is held that in cases of abduction where the female is called as a witness by the State and defendant objects on the ground that she is his wife, it is proper to examine the woman on her *voir dire*, and if she denies the marriage and so states the facts as to the alleged marriage as to leave the fact of marriage questionable, then the State should be permitted to examine in chief. A different question, it is said, would be presented if on *voir dire* she admitted herself defendant's wife.

64. Wife Competent for Husband. 1 Russ. Crimes (9th Ed.) p. 949, citing Perry's case, Bristol 1794. See also 2 Stark. Ev., p. 711.

65. State *v.* Stone, 106 Mo. 1, 16 S. W. 890.

mony is required, it must show the existence of every fact which constitutes an ingredient of the offense.[66]

But it is not required that corroborative evidence shall be in itself sufficient to convict defendant.[67]

(C.) May Be by Circumstances. — But, when corroborative testimony is required, it may be supplied by proof of circumstances which raise a presumption as to the existence or non-existence of material facts.[68]

66. Corroboration Must Extend to Every Point.—In People *v.* Plath, 100 N. Y. 590, 53 Am. Rep. 236, the court uses this language:

"It was essential to the support of this conviction that the people show, not only a taking by the defendant within the meaning of the statute, but also that such taking was for the purpose of prostitution. (Penal Code, § 282, as amended by § 2, chap. 46, Laws of 1884.) If the evidence establishes only a taking and fails to show that it was for the prohibited purpose, it is insufficient to sustain the conviction, and so proof of the fact that the person of the female was used for purposes of prostitution without proof of the abduction, would not bring the accused within the condemnation of the statute. It is elementary, when a specific intent is required to make an act an offense, that the doing of the act does not raise a presumption that it was done with the specific intent. (Lawson on Presumptive Evidence, 472.)"

See also State *v.* Keith, 47 Minn. 550, 50 N. W. 691.

For a full statement of the rules as to Corroboration, see that article.

67. State *v.* Keith, 47 Minn. 559, 50 N. W. 691.

68. Corroboration by Circumstances.—People *v.* Plath, 100 N. Y. 590, 53 Am. Rep. 236; State *v.* Shean, 32 Iowa 88; Andre *v.* State, 5 Iowa 389, 68 Am. Dec. 708.

As an example of circumstances held insufficient to corroborate prosecutrix, see People *v.* Plath, 100 N. Y. 590.

See also People *v.* Wah Lee Mon, 37 N. Y. St. 283, 13 N. Y. Supp. 767. In this case the court held that prosecutrix was corroborated by the circumstances that she did come with defendant to the place where the offense was committed; that they had had previous acquaintance; that at defendant's solicitation she entered a cab; that defendant gave the cabman a false address; that, when arrested, defendant made false statements as to the relations between himself and prosecutrix, and as to his object in inducing her to enter the cab with him.

In State *v.* Keith, 47 Minn. 559, 50 N. W. 691, it was held proper to permit a physician to testify that eight months after the date of the alleged offense, he examined prosecutrix, and to state the condition of her person, and his opinion that the ascertained condition resulted from sexual intercourse.

But in People *v.* Betsinger, 49 N. Y. St. 597, 21 N. Y. Supp. 136, it was held that the evidence of physicians who made an examination of prosecutrix four years after the date of the alleged offense, during which they found certain physical conditions which would indicate that prosecutrix had had sexual intercourse, was not admissible.

In Crozier *v.* People, 1 Park. Crim. (N. Y.) 453, it was held that a charge to the jury that evidence as to illicit intercourse was supported by the fact that prosecutrix gave birth to a child, and that defendant was a regular visitor, was proper, when the evidence showed that prosecutrix had given birth to a child, that defendant was a regular visitor, that he proposed marriage, that he admitted his engagement, that he was alone with her late at night, and that angry words passed between them when defendant was about to marry another.

(D.) By Defendant. — The female may be corroborated by the testimony of the defendant,[69] or by letters written to her by him,[70] or by his confession.[71]

b. *Parent or Guardian As Witness.* — When statute is directed against taking female under a designated age from the custody of her parent or guardian, the parent or guardian may testify as to her age;[72] as to his non-consent;[73] or as to statement of other parent, showing non-consent;[74] or as to his efforts to prevent the girl's leaving home;[75] or as to his efforts to find her;[76] or to induce her to return home;[77] or as to her habits.[78]

2. Defendant's Evidence.—A. Non-Criminal Intent.—Defendant may offer evidence showing the existence of circumstances inconsistent with a criminal intent, and consistent with lawful conduct and intent on his part.[79]

69. Corroboration by Testimony of Defendant.—People *v.* Wah Lee Mon, 37 N. Y. St. 283, 13 N. Y. Supp. 767.

70. Letters of Defendant.—Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652.

71. Confession of Defendant. Andre *v.* State, 5 Iowa 389.

72. Age.—Hermann *v.* State, 73 Wis. 248, 41 N. W. 171, 9 Am. St. Rep. 789.

As to mode of Proving Age, see Article "Age."

73. Non Consent.—Reg. *v.* Hopkins, 1 Car. & M. 254; State *v.* Stone, 106 Mo. 1, 16 S. W. 890.

74. Statement of Other Parent. State *v.* Chisenhall, 106 N. C. 676, 11 S. E. 518.

75. Efforts to Prevent Departure. Gravett *v.* State, 74 Ga. 191. In this case it was held proper to permit the father to show that he kept the window of the girl's room nailed up.

76. Efforts to Find.—State *v.* Stone, 106 Mo. 1, 16 S. W. 890.

77. Efforts to Induce Return. State *v.* Bobbst, 131 Mo. 328, 32 S. W. 1149.

78. Habits of Girl.—People *v.* Dolan, 96 Cal. 315, 31 Pac. 107, where it was held that evidence as to the habits of the girl in not being at home at night could not be admitted to impeach the testimony of her father who had testified that it was her habit to be in at night.

79. Beaven *v.* Com., (Ky.) 30 S. W. 968. In this case defendant was indicted for detaining a woman against her will for purpose of carnal knowledge. *Held,* that it was proper to permit defendant to show that the place where the alleged detention occurred there were a number of lewd women plying their vocation, and that defendant was told that prosecutrix was of that class.

Consent of Parent. — *Purpose Other Than That Charged.* — In Brown *v.* State, 72 Md. 468, 20 Atl. 186, defendant was indicted for taking female under designated age for purpose of prostitution at bawdy-house kept by defendant. *Held,* that defendant might show that prosecutrix came to defendant's house with the consent of her mother, and was permitted to remain over night at her own request, in order that she might seek employment the next day; and, as evidence as to the intent, defendant might show that, while in de endant's house, prosecutrix did not have intercourse. A judgment of conviction was reversed for error in excluding such evidence.

Silence of Prosecutrix.— When prosecutrix testifies that during several months defendant had attempted to have intercourse with her, it is proper to permit defendant to ask her why she had not sooner made known his conduct. Cargill *v.* Com., (Ky.), 13 S. W. 916.

B. Unchastity of Prosecutrix. — In prosecution for taking female of previous chaste character for purpose of prostitution, defendant may show that, previous to the taking, prosecutrix was not of chaste character.[80]

C. Parental Control Lost. — In prosecution under indictment for forcibly or fraudulently removing a child from its parent, defendant may show that control of the child has passed from the father and rested in a guardian.[81]

Defendant's Ignorance of Age Inadmissible. — In prosecution for taking female under designated age, evidence that defendant did not know her to be under the designated age, is inadmissible.[82]

Evidence of Harsh Treatment Inadmissible. — In such case, evidence that the father of the female treated his family harshly is not admissible.[83]

D. Character of Relatives Immaterial. — Evidence of lewd or immoral character of mother or sisters of prosecutrix is incompetent.[84] So as to evidence that the home where prosecutrix lived with her mother was a house of ill-fame.[85]

II. AS A CIVIL ACTION.

Definition. — Abduction in its civil sense, consists in taking away a wife, husband, child or ward from the husband, wife, parent or guardian, against his or her will.[86]

80. Unchastity of Prosecutrix. Lyons *v.* State, 52 Ind. 426; Crozier *v.* People, 1 Park. Crim. (N. Y.) 453.

Unchastity of Prosecutrix As Illustrative of Defendant's Intent. In prosecution for taking female under designated age for purpose of prostitution, defendant may show that prior to taking, the girl was given to indiscriminate intercourse, such evidence having a natural bearing upon the question whether she was enticed away, or went of her own accord and with the knowledge of her parents. Brown *v.* State, 72 Md. 468, 20 Atl. 186.

81. Pruitt *v.* State, 102 Ga. 688, 29 S. E. 437.

82. In Riley *v.* State, (Miss.), 18 So. 117, the court says: "One who entices away a female for the purpose of debauching her, is not relieved by the fact that he did not know her to be within the age named in the statute. It is the fact that she was that controls and fixes the offense."

People *v.* Dolan, 96 Cal. 315, 31 Pac. 107. See also, Tores *v.* State, (Tex. App.), 63 S. W. 880; Roscoe Crim. Ev., 7 Am. Ed., p. 263, citing Rex *v.* Mycock, 12 Cox Crim. Cas. 28, and Rex. *v.* Booth, 12 Cox Crim. Cas. 231; Russ. Crimes (9th Ed.), p. 953; State *v.* Johnson, 115 Mo. 480, 22 S. W. 463; Bish. Stat. Crimes, §§ 630, 632.

Ignorance As Defense. — But on the question of ignorance of age as a defense and as to admissibility of statements of female as to her age, in case where statute provides that under certain circumstances, ignorance of facts constitutes a defense, see Mason *v.* State, (Tex.), 14 S. W. 71.

83. Evidence As to Treatment of Family. — Gravett *v.* State, 74 Ga. 191.

84. Scruggs *v.* State, 90 Tenn. 81, 15 S. W. 1074.

85. Kenyon *v.* People, 26 N. Y. 203, 84 Am. Dec. 177. Defendant in this case was indicted for seduction.

86. The common law definition of abduction, considered as a cause of action, is: Taking away a man's

For Abduction of Spouse, see "Alienating Affections."

1. Abduction of Minor. — A. Plaintiff's Case. — a. *Ultimate Facts.* — **(1.) Custody.** — In action for damages for taking minor child or ward, plaintiff must introduce evidence showing that at the time of the alleged taking the child was in plaintiff's custody,[87] and rendered service to plaintiff.[88]

(2.) Taking Against Consent. — Plaintiff must also show that the minor was taken[89] against plaintiff's consent.

(A.) Fraud. — When a parent is induced by fraud or deceit to part with the custody of his child, the child is taken from him against his consent.[90]

(B.) Circumstantial Evidence Sufficient.[91] —But evidence of acts similar to that alleged is not admissible.[92]

wife, child, ward or servant without his consent. Black. Bouv. Law Dict.

87. Custody.—Wodell *v.* Coggeshall, 2 Metc. (Mass.) 89, 35 Am. Dec. 391.

88. Loss of Service.— Magee *v.* Holland, 3 Dutch. (N. J.) 86, 72 Am. Dec. 341; Caughey *v.* Smith, 47 N. Y. 244. But service may be inferred from fact that minor resided with plaintiff at time of taking.

In Caughey *v.* Smith, *supra,* plaintiff sued defendant for enticing away plaintiff's minor son, and causing him to enlist as a soldier. Defendant contended, among other matters, that plaintiff consented to the enlistment. Defendant offered evidence to show that plaintiff had taken out letters of administration; and had, as administrator, received bounty money due his son; also that he had collected arrears of pay due the son. *Held,* that the evidence was not material, as such acts did not show an abandonment of service, or ratification of contract, as plaintiff received the bounty and arrears of pay, not as father but as administrator.

89. When Force An Element. In action of trespass *vi et armis,* plaintiff must show that the taking was by force, or that defendant knew that the person taken was a minor. Somboy *v.* Loring, 2 Cranch. C. C. 318, 22 Fed. Cas. No. 13,168.

90. Consent Obtained by Fraud. Kreag *v.* Anthus, 2 Ind. App. 482, 28 N. E. 773. In this case plaintiff permitted his daughter to go to defendant's house to work as a servant, defendant being plaintiff's nephew. Defendant seduced the girl while she was at his house. All the evidence is not shown by the report, but the appellate court held it to be sufficient to justify the jury in finding that plaintiff's consent to his daughter's being at defendant's home was obtained by fraud; and held that, under these circumstances, consent so obtained was not inconsistent with plaintiff's claim of abduction. The court says: "Consent obtained by fraud is, in law, no consent."

See also Lawyer *v.* Fritcher, 130 N. Y. 239, 29 N. E. 267, 14 L. R. A. 700.

91. Circumstantial Evidence.—In Kreag *v.* Anthus, 2 Ind. App. 482, 28 N. E. 773, the court also says: "Because of the nature of the charge, and the difficulty of obtaining direct evidence in this class of cases juries are awarded a wide latitude in making deductions from suspicious conduct and circumstances."

As to defendant's knowledge of minor's obligation of service, see note 94, *post.*

92. Evidence of Similar Acts Inadmissible.—In action for enticing plaintiff's apprentices, evidence that the defendant had enticed away and employed apprentices of other persons, is not admissible. Stuart *v.* Simpson, 1 Wend. (N. Y.) 376.

(3.) Defendant's Knowledge of Minority and Obligation of Service. Plaintiff must also show that when the taking occurred, defendant knew that the person taken was a minor,[93] and that the person taken owed service to plaintiff.[94]

(4.) Damages. — (A.) EXPENSE OF SEARCH. — In action for damages caused by abduction of minor child, plaintiff may prove the amount of money expended by him in his efforts to regain possession;[95] plaintiff may show in aggravation that defendant connived at seduction of minor,[96] and the mental suffering of the minor.[97]

(B.) MENTAL SUFFERING OF PLAINTIFF.—Evidence of damage caused to plaintiff by mental suffering, distinct from and in addition to that which shows the nature and extent of the principal injury, is not admissible.[98]

93. Knowledge of Minority. Caughey *v.* Smith, 47 N. Y. 244; Stuart *v.* Simpson, 1 Wend. (N. Y.) 376; Cutting *v.* Seabury, 1 Sprague 522, 6 Fed. Cas. No. 3521.

In action against ship owners for shipping minor son of plaintiff as a sailor on defendant's vessel, if it be shown that the employees of the owner knew, or had reason to know, that the person taken was a minor, this knowledge is imputable to the owners. The Platina, 3 Ware (U. S. Dist.) 180, 21 Law Rep. 397, 19 Fed. Cas. No. 11,210. In such action exemplary damage cannot be recovered, unless it be shown that the owners had knowledge of facts of minority and taking. Sherwood *v.* Hall, 3 Sum. 127, 21 Fed. Cas. No. 12,777.

When father sues in action of trespass *vi et armis* for taking away minor son, it is necessary to prove either actual force, or knowledge on part of defendant that the young man was under age. Somboy *v.* Loring, 2 Cranch. C. C. 318, 22 Fed. Cas. No. 13,168. This case was decided for defendant on demurrer to evidence.

94. Knowledge of Obligation of Service.—Caughey *v.* Smith, 47 N. Y. 244. In this case it was held that defendant's knowledge that the person taken was a minor and that his father was living, was sufficient to charge him with notice of father's right to service.

In Stuart *v.* Simpson, 1 Wend. (N. Y.) 376, plaintiff sued defendant for enticing away his apprentices. *Held,* that plaintiff must prove that defendant knew the apprentices to be such. Also held that the circumstances that the boys were youthful in appearance, and had mahogany dust on their clothes (plaintiff being a cabinet maker) were not sufficient to warrant the jury in finding that defendant knew the boys to be apprentices.

95. Expense As Damage.—Rice *v.* Nickerson, 9 Allen (Mass.) 478, 85 Am. Dec. 777; Magee *v.* Holland, 3 Dutch. (N. J.) 86, 72 Am. Dec. 341.

96. Seduction As Element of Damage.—Bradley *v.* Shafer, 46 N. Y. St. 462, 19 N. Y. Supp. 640. In this case defendant was sued for damages caused by enticing away the minor daughter of plaintiff. The evidence showed that the girl was, by defendant, enticed—almost coerced—to defendant's house, and was there seduced by defendant's son; that defendant prevented her return home; that defendant knew that her son was having intercourse with the girl in her house, and that defendant left the two together there for days at a time. It was held that the jury might, in determining the amount of damages, take the seduction into consideration, on the theory that defendant connived at and aided in the seduction.

97. Suffering of Minor.—Brown *v.* Crockett, 8 La. Ann. 30.

98. While, in an action for damages, caused by enticing away a minor daughter, plaintiff is entitled

B. Defendant's Case. — a. *Minor Not in Plaintiff's Custody.* Defendant may show that, at the time of the alleged taking, the minor was not in plaintiff's custody.[99]

b. *Abandonment of Service.* — Or that the father had abandoned the service of the minor.[1]

c. *Belief That Minor Left With Consent.* — Defendant may show that he believed that the minor had left home with his father's consent.[2]

d. *Voluntary Leaving by Minor,* or that the minor voluntarily left his father, and that defendant had not employed him until after he had left.[3]

e. *Proper Motives.* — Defendant may show that he received the minor into his house from motives of hospitality, or that he might return him to his father.[4]

Assisting Mother to Take Child From Father. — Evidence that defendant assisted the mother of minors in removing them from their father, who was entitled to their custody, is not admissible except in mitigation of damages.[5]

to recover damages for the mental suffering inflicted upon him by the act of defendant, evidence of such suffering, distinct from and in addition to the evidence which shows the nature and extent of the principal injury is not admissible. Stowe *v.* Heywood, 7 Allen (Mass.) 118.

99. Minor Not in Custody.—Defendant may show that the child resided with its mother, who was living apart from her husband. Wodell *v.* Coggeshall, 2 Metc. (Mass.) 89, 35 Am. Dec. 391. See also Caughey *v.* Smith, 47 N. Y. 244.

1. Abandonment of Service. Caughey *v.* Smith, 47 N. Y. 244; Butterfield *v.* Ashley, 6 Cush. (Mass.) 249; Butterfield *v.* Ashley, 2 Gray (Mass.) 254.

Shown by Circumstances.—Emancipation, or abandonment of service may be shown by circumstances. Everett *v.* Sherfey, 1 Iowa 356.

In action for shipping minor as a sailor, and carrying him beyond seas, although the evidence shows that for some time prior to the taking the minor had not been a member of his father's family, but had lived apart and supported himself, plaintiff may recover, unless it appear that he had abandoned all claim to the child. Steele *v.* Thacher, 1 Ware. 85, 22 Fed. Cas. No. 13,348.

2. Belief of Defendant. — Butterfield *v.* Ashley, 2 Gray (Mass.) 254; Butterfield *v.* Ashley, 6 Cush. (Mass.) 249; Caughey *v.* Smith, 47 N. Y. 244.

3. Voluntary Leaving by Minor. Butterfield *v.* Ashley, 2 Gray (Mass.) 254.

4. Hospitality.—Sargent *v.* Mathewson, 38 N. H. 54.

5. Assisting Mother. — Magee *v.* Holland, 3 Dutch. (N. J.) 86, 72 Am. Dec. 341. In this case the mother of three minor children had deserted them and her husband. Two years after the desertion, she and her brother seized the children and carried them to her house. The husband sued the brother for damages. Defendant offered to prove that he had simply acted in aid of the mother. Held, that such evidence was not admissible for any purpose, except in mitigation of damages.

In Rice *v.* Nickerson, 9 Allen (Mass.) 478, 85 Am. Dec. 777, it was held that evidence that defendant took the children away at the instigation of their mother was properly excluded, no claim for damages being made on account of malice or oppression.

Good Treatment of Minors After Taking Immaterial. — In such action evidence that while the minors were in the custody of their mother, at whose instigation they were taken by defendant, they were well treated, is immaterial.[6]

f. *Statements of Minor.* — Defendant may show statements of the minor to the effect that his father permitted him to leave. But statements of a minor of a desire to go with his mother, who had caused him to be abducted are immaterial, when the father's right to custody has been proved.[7] Statements of minor made while being taken from defendant's custody are not admissible,[8] nor statements of minor that she would not leave defendant's house — a bawdy-house — until she had received the money she had earned while there.[9]

g. *Mitigation of Damages.* — **Necessaries Supplied to Minor.** — In action against shipowners for shipping minor son of plaintiff as a sailor on defendant's vessel, the court may, in determining the amount of damages, take into consideration the amount of clothing and other necessaries furnished to the minor during the voyage, and evidence as to the amount so furnished is admissible.[10]

6. **Treatment After Abduction.** In Magee *v.* Holland, 3 Dutch. (N. J. 86, 72 Am. Dec. 341, the court also held that evidence that the mother provided well for the children while they were in her care was properly excluded, on the ground that the action was for damages caused to the father by the taking, and not for any injury done to the children.

Statements of Minor.—Declarations of the minor, made at the inception of the arrangement between himself and defendant, are competent as part of the transaction. Caughey *v.* Smith, 47 N. Y. 244, 257.

Such declarations are competent as showing the *animus* of defendant.

7. **Statements of Desire.**—Rice *v.* Nickerson, 9 Allen (Mass.) 478, 85 Am. Dec. 777.

8. **Statements During Removal.** Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 679.

9. Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 679.

10. **Necessaries Supplied to Minor.** The Platina, 3 Ware. 180, 21 Law Rep. 397, 19 Fed. Cas. No. 11,210. The ruling in this case seems to have been based upon the ground that the boy was, when shipped, nearly of full age; that at the end of the voyage the father did not have or make any objection to the nature of the employment, but seemed disappointed that the wages had been paid to the boy, and not to himself. The action was for loss of service and violation of paternal rights.

ABETTING.—See Accessories, Aiders and Abettors.

ABILITY.—See Capacity.

ABODE.—See Domicile.

ABORTION.

By R. K. Wood.

CROSS-REFERENCES.

Accomplices; Admissions;
Books;
Corroboration;
Declarations; Dying Declarations;
Experts;
Hearsay; Homicide;
Intent;
Mental and Physical State; Motive;
Presumptions;
Res Gestae.

I. INTENT.

1. Generally. — For the method of proving intent generally, reference should be made to the article "INTENT," and to the prosecutions for abortion cited below.[1]

2. Other Offenses. — To establish intent, it may be shown that defendant has committed other abortions on the same[2] or even another woman.[3]

3. Knowledge of Nature of Means Used. — Defendant's knowledge of the nature of the means employed need not be shown,[4] but the nature of the means used may be material as tending to show intent.[5]

1. Defendant's Oral Admissions. People *v.* Sessions, 58 Mich. 594, 26 N. W. 291; Com. *v.* Holmes, 103 Mass. 440; Hays *v.* State, 40 Md. 633; Watson *v.* State, 9 Tex. App. 237; Dougherty *v.* People, 1 Colo. 514; Jones *v.* State, 70 Md. 326, 17 Atl. 89, 14 Am. St. Rep. 362.

Defendant's Written Admissions. 1 Greenl. on Ev., §§ 229, 254.

Iowa. — State *v.* Moothart, 109 Iowa 130, 80 N. W. 301.

Maryland.—Lamb *v.* State, 66 Md. 285, 7 Atl. 399; Jones *v.* State, 70 Md. 326, 17 Atl. 89, 14 Am. St. Rep. 362.

Massachusetts.—Com. *v.* Barrows, 176 Mass. 17, 56 N. E. 830, 79 Am. St. Rep. 296.

Intent Presumed From Use Of Means.—State *v.* Thurman, 66 Iowa 693, 24 N. W. 511.

Presumption That Natural Result of Act is Intended Where Death Follows Abortion.—1 Bish. on Crim. Law, § 327.

Act Committed to Shield Woman from Exposure.—If the intent existed, it may not be proved in defense that the purpose was to shield the woman or the defendant from exposure. Com. *v.* Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396; State *v.* Thurman, 66 Iowa 693, 24 N. W. 511; Reg. *v.* West, 2 Car. & K. 784; Com. *v.* Keeper, 2 Ashm. (Pa.) 227; State *v.* Moore, 25 Iowa 128, 95 Am. Dec. 776; Com. *v.* Wood, 11 Gray (Mass.) 85. But see State v. Emerich, 13 Mo. App. 492.

2. Lamb *v.* State, 66 Md. 285, 7 Atl. 399.

3. People *v.* Sessions, 58 Mich. 594, 26 N. W. 291; Maine *v.* People, 9 Hun (N. Y.) 113; Whart. Crim. Ev. §§ 32 to 38.

4. State *v.* Owens, 22 Minn. 238; State *v.* Slagle, 83 N. C. 630.

5. State *v.* Crews, 128 N. C. 581, 38 S. E. 293; Carter *v.* State, 2 Ind. 617; Hunter *v.* State, 38 Tex. Crim. App. 61, 41 S. W. 602.

4. Intent to Kill Child. — Intent to kill the child need not be shown.[6]

5. Coercion, to Show Want Of. — A. Generally. — **Coercion, As Proving Want of Intent.** — Any evidence of coercion is admissible in defense.[7]

B. Presumption of Coercion of Wife by Husband. — But the mere fact that the husband was present at the time of the commission of the offense is *prima facie* evidence only of coercion by him.[8] And an offer by a woman (made in absence of her husband) to produce an abortion tends to disprove coercion.[9]

It has been said that the fact of the abortion raises no presumption that it was performed with the consent of the woman.[10]

II. MOTIVE.

1. Relations of Defendant and Woman. — As to proof of motive generally, see the article on that topic. To establish motive, it may be shown that defendant got the woman with child,[11] or had illicit intercourse with her.[12]

2. Desire to Save From Exposure. — Motive As Defense. Desire to shield the woman or himself from exposure cannot be proved in defense.[13]

3. Compliance With Woman's Request. — Nor can the woman's consent to the abortion.[14]

4. To Save Life. — A. Necessity for Operation. — But it may be shown that the motive was to save the woman's life.[15]

6. Com. *v.* Snow, 116 Mass. 47.

7. Coercion by Husband.—Tabler *v.* State, 34 Ohio St. 127.

8. Marshall *v.* Oakes, 51 Me. 308; Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380; Tabler *v.* State, 34 Ohio St. 127.

9. Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380.

10. Com. *v.* Reid, 8 Phila. (Pa.) 385.

11. Scott *v.* People, 141 Ill. 195, 30 N. E. 329; State *v.* McLeod, 136 Mo. 109, 37 S. W. 828.

12. People *v.* Josselyn, 39 Cal. 393.

If defendant seeks to show that another than he is father of the child, such other may testify that he has had no intercourse with the woman. Dunn *v.* People, 29 N. Y. 523, 86 Am. Dec. 319.

13. Com. *v.* Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396; State *v.* Thurman, 66 Iowa 693, 24 N. W. 511; Reg. *v.* West, 2 Car. & K. 784; Com. *v.* Keeper, 2 Ashm. (Pa.) 227; State *v.* Moore, 25 Iowa 128; 95 Am. Dec. 776; Com. *v.* Wood, 11 Gray (Mass.) 85. But see State *v.* Emerich, 13 Mo. App. 492.

14. Com. *v.* Wood, 11 Gray (Mass.) 85; State *v.* Dickinson, 41 Wis. 299; Com. *v.* Snow, 116 Mass. 47; State *v.* Moore, 25 Iowa 128, 95 Am. Dec. 776.

Nor does a fatal variance exist, between an allegation that the offense was committed with force and violence, and evidence that it was done with the consent of the woman. People *v.* Abbott, 116 Mich. 263, 74 N. W. 529.

15. 3 Whart. and Stille's Med. Juris., § 96; Weed *v.* People, 56 N. Y. 628; Beasley *v.* People, 89 Ill. 571; State *v.* Rupe, 41 Tex. 33; State *v.* Schuerman, 70 Mo. App. 518.

a. *Generally.* — In establishing such motive, it must be shown that it was apparently necessary to cause the abortion in order to save the mother's life.[16]

b. *Physician's Advice.* — Such necessity may be shown without proving that a physician advised the abortion.[17] Indeed, the physician's advice is not evidence of such necessity except as provided by statute.[18] When evidence of such advice is competent, the burden of proving it is on defendant.[19]

B. Burden of Proof As to Necessity. — It has been held that the state must in the first instance prove the non-existence of this motive by showing that the abortion was not necessary;[20] otherwise in New York.[21] Some courts have said that there is a presumption that no such necessity exists, and that the prosecution may rest upon such presumption in the absence of evidence to the contrary.[22]

III. OPPORTUNITIES AND FACILITIES FOR THE CRIME.

It may be shown that the defendant visited the woman;[23] that the

16. Beasley *v.* People, 89 Ill. 571; State *v.* Rupe, 41 Tex. 33; State *v.* Schuerman, 70 Mo. App. 518.

17. State *v.* Fitzporter, 93 Mo. 390, 6 S. W. 223.

18. State *v.* Fitzporter, 93 Mo. 390, 6 S. W. 223; State *v.* Meek, 70 Mo. 355, 35 Am. Rep. 427; Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380.

19. Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380; Moody *v.* State, 17 Ohio St. 110; State *v.* Meek, 70 Mo. 355, 35 Am. Rep. 427.

20. Moody *v.* State, 17 Ohio St. 110; State *v.* Clements, 15 Or. 237, 14 Pac. 410; State *v.* Glass, 5 Or. 73; State *v.* Meek, 70 Mo. 355, 35 Am. Rep. 427; State *v.* Aiken, 109 Iowa 643, 80 N. W. 1073; State *v.* Lee, 69 Conn. 186, 37 Atl. 75.

State Must Prove This Beyond a Reasonable Doubt.—Howard *v.* People, 185 Ill. 552, 57 N. E. 441.

"Every presumption is in favor of defendant's innocence, and, if the facts shown are capable of explanation on any reasonable hypothesis in favor of innocence, there can be no rightful conviction." State *v.* Aiken, 109 Iowa 643, 80 N. W. 1073.

21. Bradford *v.* People, 20 Hun (N. Y.) 300; People *v.* McGonegal, 10 N. Y. Cr. 141, 17 N. Y. Supp. 147. But see People *v.* Meyers, 5 N. Y. Crim. 120.

22. State *v.* Lee, 69 Conn. 186, 37 Atl. 75; Moody *v.* State, 17 Ohio St. 110; State *v.* Meek, 70 Mo. 355, 35 Am. Rep. 427; People *v.* McGonegal, 10 N. Y. Cr. 141, 17 N. Y. Supp. 147; State *v.* Schuerman, 70 Mo. App. 518.

There being no evidence to the contrary, the presumption that the abortion was not necessary to save the woman's life will satisfy the burden. State *v.* Lee, 69 Conn. 186, 37 Atl. 75.

The woman's threats of committing suicide unless relieved of the child do not constitute such necessity. Hatchard *v.* State, 79 Wis. 357, 48 N. W. 380.

"The presumption as to sanity is founded upon the common experience that sanity is the general rule, insanity the comparatively rare exception, and that what is common in general prevails in the particular case. We think it equally a matter of common experience that the ability to bear and bring forth children is the rule, and that the necessity of procuring an abortion or miscarriage in order to save the life of mother or child is the rare exception; that the presumption is against such necessity." State *v.* Lee, 69 Conn. 186, 37 Atl. 75.

23. People *v.* McDowell, 63 Mich. 220, 30 N. W. 68; Com. *v.* Mit-

place of the commission of the offense was a house of ill-fame;[24] that he had facilities for producing abortion;[25] that he furnished the same to the woman.[26]

IV. OTHER ABORTIONS AND ATTEMPTS BY DEFENDANT.

Except as stated above under "Intent," evidence is not admissible of the commission of a similar offense, amounting to another separate transaction.[27]

V. THE MEANS USED.

1. Proof of Nature Of. — Statutory provisions excepted,[28] it is not necessary to prove either the kind of substance administered or that it was capable of producing miscarriage.[29] But where it is necessary to establish the nature of the means employed, the state has the burden of proof to show their noxious character.[30]

2. Defendant's Knowledge of Nature Of. —Defendant's knowledge of the nature of the means used need not be shown.[31]

3. Administration Of. — Defendant's personal administration need not be shown in a prosecution for counselling or advising an

chell, 6 Pa. Super. Ct. 369; People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616.

24. Hays *v.* State, 40 Md. 633.

25. People *v.* Sessions, 58 Mich. 594, 26 N. W. 291; Moore *v.* State, 37 Tex. Crim. App. 552, 40 S. W. 287; Com. *v.* Brown, 121 Mass. 69; Com. *v.* Blair, 126 Mass. 40; People *v.* Vedder, 34 Hun (N. Y.) 280.

26. State *v.* Forsythe, 78 Iowa 595, 43 N. W. 548.

"Presumptions resting on antecedent preparations are not presumptions of law, but merely inferences of fact, as to which it is the judge's duty, not to declare a positive rule, but simply to notice the processes of reasoning by which a just conclusion may be reached. Evidence of preparation is always admissible for the prosecution; evidence to explain it is always admissible for the defense."

27. Baker *v.* People, 105 Ill. 452; Crichton *v.* People, 1 Abb. Dec. (N. Y.) 467.

"When offered simply for the purpose of proving his commission of the offense on trial, evidence of his participation, either in act or design, in commission or in preparation, in other independent crimes, cannot be received." Whart. Crim. Ev., § 30.

The testimony of a druggist that he refused to prepare an abortifacient prescription made by a certain doctor and presented by a woman who subsequently died of an abortion, was held inadmissible. State *v.* Gunn, 106 Iowa 120, 76 N. W. 510.

28. State v. Gedicke, 43 N. J. Law, 86; Williams *v.* State (Tex. App.), 19 S. W. 897.

29. *Colorado.*—Dougherty *v.* People, 1 Colo. 514.

Indiana. — State *v.* Vawter, 7 Blackf. 592.

Iowa.—State *v.* Fitzgerald, 49 Iowa 260, 31 Am. Rep. 148.

North Carolina.—State *v.* Crews, 128 N. C. 581, 38 S. E. 293.

Texas.—Watson *v.* State, 9 Tex. App. 237.

West Virginia.—State *v.* Lilly, 47 W. Va. 496, 35 S. E. 837.

30. State *v.* Gedicke, 43 N. J. Law 86.

31. State *v.* Owens, 22 Minn. 238; State *v.* Slagle, 83 N. C. 630.

But Such Knowledge May Be Important On the Matter of Intent. Weed *v.* People, 56 N. Y. 628; Slattery *v.* People, 76 Ill. 217.

Under an English statute making it criminal to administer "any

abortion,[32] or that he procured the means;[33] mailing the drug used is evidence of an administering.[34]

VI. PREGNANCY.

1. Generally. — Under statutory indictments for procuring or attempting to procure an abortion, pregnancy of the woman need not be proved;[35] and where death from the abortion is the *gravamen* of the offense, the rule is the same in Maine,[36] but in Idaho and Iowa it is otherwise.[37]

2. Quickening. — In most states quickening need not be proved.[38]

VII. MISCARRIAGE.

Where under the statute the use of means with the intent to

medicine or *other thing*" with intent to procure an abortion, it was held, this intent being shown, that the nature of the thing need not be in evidence, though it were but "a bit of bread." Rex *v.* Coe, 6 Car. & P. 403, 25 Eng. C. L. 403.

In citing this decision, Mr. Bishop says: "Yet, should the prisoner know it to be incapable of producing the result, plainly he would not commit the crime; because he could not have the required evil intent." 1 Crim. Law, § 769. *Compare* Id. § 753.

32. McCaughey *v.* State, 156 Ind. 41, 59 N. E. 169; State *v.* Morrow, 40 S. C. 221, 18 S. E. 853; Jones *v.* State, 70 Md. 326, 17 Atl. 89, 14 Am. St. Rep. 362.

But under a statute denouncing the selling or causing to be sold medicines for procuring an abortion, it was held not sufficient to show that the accused advised and solicited the taking of such medicines, without showing that the woman took the same. Lamb *v.* State, 67 Md. 524, 10 Atl. 208. (But see dissenting opinion, Lamb *v.* State, 67 Md. 524, 10 Atl. 298; and State *v.* Murphy, 27 N. J. Law 112.)

33. State *v.* Crews, 128 N. C. 581, 38 S. E. 293.

34. State *v.* Moothart, 109 Iowa 130, 80 N. W. 301.

35. Reg. *v.* Goodhall, 1 Den. C. C. 187; Eggart *v.* State, 40 Fla. 527, 25 So. 144; Com. *v.* Taylor, 132 Mass. 261; Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471; State *v.* Fitzgerald, 49 Iowa 260, 31 Am. Rep. 148; Wilson *v.* Com., 22 Ky. L. Rep. 251, 60 S. W. 400.

But where the terms of an English statute were "the miscarriage of any woman then being sick with child," evidence of the pregnancy was held essential. Rex *v.* Scudder, 1 Moody 216.

Canada.—Pregnancy is immaterial where crime charged is using instrument with intent to procure abortion. Reg. *v.* Andrews, 12 O. R. 184.

36. State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578; Smith *v.* State, 33 Me. 48, 54 Am. Dec. 607.

37. State *v.* Stewart, 52 Iowa 284, 3 N. W. 99; State *v.* Alcorn, (Idaho) 64 Pac. 1014, but in this case the indictment alleged that deceased was pregnant.

38. State *v.* Alcorn (Idaho) 64 Pac. 1014; State *v.* Slagle, 83 N. C. 630; Com. *v.* Wood, 11 Gray (Mass.) 85; Mills *v.* Com., 13 Pa. St. 631; Smith *v.* State, 33 Me. 48, 54 Am. Dec. 607; State *v.* Murphy, 27 N. J. Law 112. (See Lamb *v.* State, 67 Md. 524, 10 Atl. 298, the dissenting opinion of Alvey, C. J.)

To Be Proved in Manslaughter From Abortion.—State *v.* Reed, 45 Ark. 333; Hatfield *v.* Gano, 15 Iowa 177; Evans *v.* People, 49 N. Y. 86.

Must Be Proved At Common Law. *Idaho.* — State *v.* Alcorn, (Idaho) 64 Pac. 1014.

produce the abortion is the offense, it is not necessary to prove that in fact there was any resulting miscarriage.[39]

VIII. SUBSEQUENT CONDITION OF WOMAN.

The condition of the woman — health and spirits — after the time of the supposed commission of the offense may be shown to prove the offense,[40] and to show the attitude of the woman toward the defendant and the probability of his guilt.[41]

IX. DEATH.

1. Of Woman. — This need not be proved,[42] but may be given in evidence in aggravation of the offense,[43] and as part of the history of the case.[44]

2. Of Child. — Proof of the death of the child is not required.[45] But under some statutes it may be necessary to show that the foetus had not lost its vitality at the time the abortion was induced.[46]

X. ADVISING AN ABORTION.

Under statutes making advice to commit an abortion an offense,

Iowa.—Abrams *v.* Foshee, 3 Iowa 274, 66 Am. Dec. 77.

Kentucky.—Mitchell *v.* Com., 78 Ky. 204, 39 Am. Dec. 227.

Massachusetts.—Com. *v.* Bangs, 9 Mass. 387; Com. *v.* Parker, 9 Metc. 263, 43 Am. Dec. 396.

New Jersey.—State *v.* Cooper, 22 N. J. Law 52, 51 Am. Dec. 248.

New York.—Evans *v.* People, 49 N. Y. 86.

Ohio.—Wilson *v.* State, 2 Ohio St. 319.

39. *Colorado.*—Dougherty *v.* People, 1 Colo. 514.

Iowa.—State *v.* Moothart, 109 Iowa 130, 80 N. W. 301.

Kentucky.—Wilson *v.* Com. 22 Ky. Law 1251, 60 S. W. 400.

Maine.—Smith *v.* State, 33 Me. 48, 54 Am. Dec. 607.

Minnesota. — State *v.* Owens, 22 Minn. 238.

New Jersey.—State *v.* Murphy, 27 N. J. Law 112.

South Carolina.—State *v.* Morrow, 40 S. C. 221, 18 S. E. 853.

Texas.—Willingham *v.* State, 33 Tex. Crim. App. 98, 25 S. W. 424.

Otherwise At Common Law. — Com. *v.* Bangs, 9 Mass. 387.

40. People *v.* Olmstead, 30 Mich. 431; State *v.* Lee, 69 Conn. 186, 37 Atl. 75; Com. *v.* Wood, 11 Gray (Mass.) 85; Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471; Com. *v.* Fenno, 134 Mass. 217.

41. Howard *v.* People, 185 Ill. 552, 57 N. E. 441; State *v.* Lee, 69 Conn. 186, 37 Atl. 75.

42. Com. *v.* Thompson, 108 Mass. 461.

43. Com. *v.* Adams, 127 Mass. 15; Railing *v.* Com., 110 Pa. St. 100, 1 Atl. 314.

44. People *v.* Van Zile, 73 Hun 534, 26 N. Y. Supp. 390. (*See* HOMICIDE.)

45. Reg. *v.* West, 2 Car. & K. 784; Com. *v.* Snow, 116 Mass. 47. But see Mitchell *v.* Com. 78 Ky. 204, 39 Am. Dec. 227.

46. Com. *v.* Wood, 11 Gray (Mass.) 85, where the prosecution was under a statute incriminating one who sought the miscarriage of a woman "then pregnant with child;" but under a statute, making an offender of one who thus sought the miscarriage of "any woman," it was held inadmissible as a defense to show that the foetus had lost its

it need not be shown that the advice was acted upon,[47] but under a statute making it an offense to provide the means with an intent to procure an abortion, proof of the mere advice will not sustain a conviction in the absence of proof that the advice was acted upon.[48]

XI. VARIANCE.

It is sufficient to establish the essential elements of the offense and not necessary to prove every fact as laid in the indictment;[49] thus it is not a fatal variance if the evidence shows commission by means and in a manner cognate but not identical with those alleged;[50] in a charge against two, the guilt of one only may be shown.[51] Time is immaterial.[52]

XII. COMPETENCY OF EVIDENCE.

1. The Woman As a Witness. — The woman on whom the abortion was produced, although consenting, is a competent witness,[53] and is a competent witness against her husband;[54] but the fact that

vitality. Com. *v.* Surles, 165 Mass. 59, 42 N. E. 502; State *v.* Howard, 32 Vt. 380.

47. State *v.* Murphy, 27 N. J. Law 112; Eggert *v.* State, 40 Fla. 527, 25 So. 144.

Contrary Rule in New York.— People *v.* Phelps, 133 N. Y. 267, 30 N. E. 1012.

48. Lamb *v.* State, 67 Md. 524, 10 Atl. 208; Cochran *v.* People, 175 Ill. 28, 51 N. E. 845.

49. Scott *v.* People, 141 Ill. 195, 30 N. E. 329; State *v.* Lilly, 47 W. Va. 496, 35 S. E. 837; Rhodes *v.* State, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429; King *v.* State, 35 Tex. Crim. App. 472, 34 S. W. 282.

50. Enough to Show Offense Consummated in Pursuance of Intent. *England.*—Rex *v.* Philips, 3 Camp. 73.

Colorado.—Dougherty *v.* People, 1 Colo. 514.

Illinois.—Scott *v.* People, 141 Ill. 195, 30 N. E. 329.

Maine.—State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578.

Massachusetts.—Com. *v.* Corkin, 136 Mass. 429.

Missouri.—State *v.* Dean, 85 Mo. App. 473.

New York.—Crichton *v.* People, 1 Abb. Dec. 467.

Ohio.—Tabler *v.* State, 34 Ohio St. 127.

Pennsylvania.—Railing *v.* Com. 110 Pa. St. 100, 1 Atl. 314.

South Carolina.—State *v.* Morrow, 40 S. C. 221, 18 S. E. 853.

Texas.—Moore *v.* State, 37 Tex. Crim. App. 552, 40 S. W. 287.

Commission By Cognate Means. State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578; Moore *v.* State, 37 Tex. Crim. App. 552, 40 S. W. 287. People *v.* Abbott, 116 Mich. 263, 74 N. W. 529; Crichton *v.* People, 1 Abb. Dec. (N. Y.) 467.

51. Baker *v.* People, 105 Ill. 452.

52. Com. *v.* Snow, 116 Mass. 47; Cook *v.* People, 177 Ill. 146, 52 N. E. 273.

53. *California.*— People *v.* Josselyn, 39 Cal. 393.

Colorado.—Solander *v.* People, 2 Colo. 48.

Maine. — State *v.* Dyer, 59 Me. 303.

Massachusetts.—Com. *v.* Wood, 11 Gray 85.

New York.—People *v.* Costello, 1 Denio 83; Frazer *v.* People, 54 Barb. 306.

Rhode Island.—State *v.* Briggs, 9 R. I. 361, 11 Am. Rep. 270.

54. State *v.* Moore, 25 Iowa 128, 95 Am. Dec. 776; State *v.* Dyer, 59

she is a consenting party may be considered as affecting her credibility,[55] rendering corroboration appropriate;[56] and some statutes require such corroboration.[57] In the absence of a statute denouncing the attempt of a woman to procure her own miscarriage, she is not regarded as an accomplice, even where her consent is shown.[58] Even where she is an accomplice, her uncorroborated evidence may

Me. 303; Navarro *v.* State, 24 Tex. App. 378, 6 S. W. 542.

"The rule of exclusion, it is well known, is based upon the unity in view of the law of husband and wife, and the idea that her testimony would tend to destroy domestic peace, and introduce discord, animosity and confusion. 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.

But under the Texas Criminal Code, Art. 775, forbidding husband and wife to testify against each other, "except in a criminal prosecution for an offense committed by one against the other," a wife's testimony is inadmissible against her husband on his trial for an abortion committed on her prior to their marriage. Miller *v.* State, 37 Tex. Crim. App. 575, 40 S. W. 313.

55. Com. *v.* Brown, 121 Mass. 69; Watson *v.* State, 9 Tex. App. 237; Frazer *v.* People, 54 Barb. (N. Y.) 306; Com. *v.* Wood, 11 Gray (Mass.) 85.

"Assuming her not to be indictable, still, on an indictment against the guilty party, her testimony is open to special observation, and perhaps it ought to be confirmed." 1 Bish. on Crim. Proc., § 1173.

In State *v.* Moothart, 109 Iowa 130, 80 N. W. 301, it was held that, where "the jury was sufficiently instructed as to rules for determining the credibility of witnesses, and the weight to be given to their testimony," there was no error in failing specifically to tell the jury that the testimony of the woman is to some extent discredited because she was a willing accomplice.

56. Watson *v.* State, 9 Tex. App. 237; Com. *v.* Drake, 124 Mass. 21.

57. State *v.* Crook, 16 Utah 212, 51 Pac. 1091; People *v.* Josselyn, 39 Cal. 393; State *v.* Owens, 22 Minn. 238; Wandell *v.* State, (Tex. Crim. App.), 25 S. W. 27.

58. Woman's Testimony Sufficient.—People *v.* Costello, 1 Denio 83; Dunn *v.* People, 29 N. Y. 523, 86 Am. Dec. 319; Com. *v.* Boynton, 116 Mass. 343.

Not Accomplice Unless Made So By Statute.—As in England, see Bish. Stat. Crimes, § 749; Reg. *v.* Cramp, 14 Cox C. C. 390.

Woman Regarded As Victim Rather Than Accomplice.—*California.*—People *v.* Josselyn, 39 Cal. 393.

Colorado.—Solander *v.* People, 2 Colo. 48.

Kentucky.—Peoples *v.* Com., 87 Ky. 487, 9 S. W. 509.

Massachusetts.—Com. *v.* Wood, 11 Gray 85; Com. *v.* Boynton, 116 Mass. 343; Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471.

Minnesota.—State *v.* Owens, 22 Minn. 238; State *v.* Pearce, 56 Minn. 226, 57 N. W. 652.

New Jersey.—State *v.* Hyer, 39 N. J. Law 598.

New York.—Dunn *v.* People, 29 N .Y. 523, 86 Am. Dec. 319; People *v.* Vedder, 34 Hun 280; People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616. See Frazer *v.* People, 54 Barb. 306.

Texas.—Miller *v.* State, 37 Tex. Crim. App. 575, 40 S. W. 313; Hunter *v.* State, 38 Tex. Crim. App. 61, 41 S. W. 602; Willingham *v.* State, 33 Tex. Crim. App. 98, 25 S. W. 424.

May Be Accomplice by Rule of Statute.—Fixmer *v.* People, 153 Ill. 123, 38 N. E. 667; State *v.* McCoy, 52 Ohio St. 157, 39 N. E. 316.

suffice to sustain a conviction.[59] As to corroboration generally, see that article.

2. Opinion Evidence. — A. EXPERTS. — The physician who has examined the alleged victim of an abortion may give his opinion as to whether or not the offense has been committed,[60] and as to the

59. Accomplice's Evidence Sufficient.—Reg. *v.* Boyes, 1 B. & S. 311, 101 Eng. C. L. 309; Dunn *v.* People, 29 N. Y. 523, 86 Am. Dec. 319; State *v.* Hyer, 39 N. J. Law 598.

"It is a question for the jury, who are to pass upon the credibility of an accomplice, as they must upon that of every other witness. His statements are to be received with great caution, and the court should always so advise; but, after all, if his testimony carries conviction to the mind of the jury and they are fully convinced of its truth, they should give the same effect to such testimony as should be allowed to that of an unimpeached witness, who is in no respect implicated in the offense. Such testimony will authorize a conviction in any case." People *v.* Costello, 1 Denio (N. Y.) 83.

"The legal competency of accomplices as witnesses is clearly established. Indeed, it is said to be the policy of the law to invite such persons to come forward and expose undiscovered participants in their guilt. (Jordaine *v.* Lashbrooke, 7 T. R. 609.) Yet, tainted as they are with confessed criminality, and testifying, as they often do, under the strong motive of hope of favor or pardon, it is but natural to withhold from them that faith in their testimony which we accord to the upright, disinterested, and innocent. It was reasonable that courts should regard their testimony with suspicion, and look carefully into the secret motives that might actuate bad minds to draw in and victimize the innocent; and, consequently, there has grown up in the courts a settled practice quite universal, and entitled in its observance almost to the reverence of law, to advise jurors, in the strongest cautionary terms, not to convict defendants on such testimony, unless they can find corroboration in the testimony of other and unsuspected witnesses, upon such material circumstances as tend directly to establish the guilt of the accused. And quite frequently do the courts, in their discretion, direct juries to acquit and set aside verdicts founded on the testimony of uncorroborated accomplices. But I think it may be asserted as the law that, when the jury acting upon such testimony, he being a legal witness, find a verdict of guilty, it is a lawful verdict, and cannot be disturbed on error." State *v.* Hyer, 39 N. J. Law 598.

Character of Corroborating Evidence.—Reg. *v.* Boyes, 1 B. & S. 311, 101 Eng. C. L. 309; Com. *v.* Drake, 124 Mass. 21; Frazer *v.* People, 54 Barb. (N. Y.) 306; People *v.* Vedder, 34 Hun (N. Y.) 280.

60. State *v.* Glass, 5 Or. 73; State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578; People *v.* Sessions, 58 Mich. 594, 26 N. W. 291.

Hypothetical Questions to Expert. Howard *v.* People, 185 Ill. 552, 57 N. E. 441; Cook *v.* People, 177 Ill. 146, 52 N. E. 273; People *v.* Aiken, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512; People *v.* Sessions, 58 Mich. 594, 26 N. W. 291.

A physician testifying as an expert that he has discovered no traces of abortion in a certain case, may properly be asked whether such traces would exist under certain circumstances, even though no proof of such circumstances has been offered, as the evidence of having discovered no traces might mislead the jury into believing that was proof of no crime's having been committed. Bathrick *v.* Detroit P. & T. Co., 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63.

But a question is inadmissible, which asks of a physician called as a witness, in reference to certain testimony of another, if on hearing such testimony he would lose faith

manner in which it was produced.[61] His opinion based upon the woman's narration at the time of the examination is inadmissible.[62]

As to Pregnancy. — After examination of the woman the physician may give his opinion as to her pregnancy.[63]

B. NON-EXPERTS. — Persons not expert can not testify to an opinion whether or not an abortion had been attempted or consummated.[64]

3. Medical Books. — As to the use of medical works in prosecutions for abortions, *see* the article on "BOOKS."

4. Declarations. — A. RES GESTAE. — As part of a continuing transaction, the contemporary actions of the defendant and of the woman may be shown;[65] their correspondence;[66] the condition of her person and immediate surroundings;[67] the fact that the defendant was her seducer;[68] but these facts must be ancillary to the identical crime charged, or they are inadmissible.[69]

in the character of any person who had theretofore in such respect stood high in his esteem. Beasley *v.* People, 89 Ill. 571.

61. State *v.* Wood, 53 N. H. 484; State *v.* Glass, 5 Or. 73; State *v.* Slagle, 83 N. C. 630; Hauk *v.* State, 148 Ind. 238, 46 N. E. 127; People *v.* Sessions, 58 Mich. 594, 26 N. W. 291.

The opinion of a medical expert as to what substance had been administered the woman is admissible, though he has made no chemical analysis. State *v.* Slagle, 83 N. C. 630.

62. People *v.* Murphy, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661.

63. May State His Reasons for Such Belief.—State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578; State *v.* Gedicke, 43 N. J. Law 86.

64. People *v.* Olmstead, 30 Mich. 431; Navarro *v.* State, 24 Tex. App. 378, 6 S. W. 542; King *v.* State, 35 Tex. Crim. 472, 34 S. W. 282.

"When a claimed result becomes so remote that conclusion and deduction are necessary to connect it with a cause, then the non-expert witness may only state physical facts and symptoms experienced, leaving the conclusion from them to the jury;" hence, a woman's testimony that an abortion had been produced on her by a kick, was held inadmissible. Navarro *v.* State, 24 Tex. App. 378, 6 S. W. 542.

65. All Attending Circumstances May Be Shown.—Whart. Crim. Ev., § 24.

The Actions of the Defendant. *Illinois.*—Cook *v.* People, 177 Ill. 146, 52 N. E. 273; Cochran *v.* People, 175 Ill. 28, 51 N. E. 845; Howard *v.* People, 185 Ill. 552, 57 N. E. 441.

Iowa.—State *v.* Montgomery, 71 Iowa, 630, 33 N. W. 143.

Massachusetts.—Com. *v.* Adams, 127 Mass. 15; Com. *v.* Thompson, 108 Mass. 461.

Missouri.— State *v.* McLeod, 136 Mo. 109, 37 S. W. 828.

New York.—People *v.* Van Zile, 73 Hun 534, 26 N. Y. Supp. 390; Frazer *v.* People, 54 Barb. 306.

Texas.—Hunter *v.* State, 38 Tex. Crim. App. 61, 41 S. W. 602.

The Actions of the Woman. Com. *v.* Drake, 124 Mass. 21; Howard *v.* People, 185 Ill. 552, 57 N. E. 441; Moore *v.* State, 37 Tex. Crim. App. 552, 40 S. W. 287; State *v.* Dickinson, 41 Wis. 299; Cook *v.* People, 177 Ill. 146, 52 N. E. 273; People *v.* Van Zile, 73 Hun 534, 26 N. Y. Supp. 390.

66. Hays *v.* State, 40 Md. 633; State *v.* Moothart, 109 Iowa 130, 80 N. W. 301.

67. People *v.* Olmstead, 30 Mich. 431; Com. *v.* Wood, 11 Gray (Mass.) 85.

68. State *v.* McLeod, 136 Mo. 109, 37 S. W. 828; State *v.* Montgomery, 71 Iowa 630, 33 N. W. 143; Cook *v.* People, 177 Ill. 146, 52 N. E. 273; Cochran *v.* People, 175 Ill. 28, 51 N. E. 845.

69. Com. *v.* Hersey, 2 Allen

B. Other Declarations. — a. *Generally.* — Declarations of the woman may be admissible under the rules of *res gestae*,[70] for which reference must be made to the article on that subject. Except as admissible under the rules of *res gestae*, statements by the woman are hearsay, especially if made in the absence of the accused.[71] Her declarations as to the purpose of a visit to the defendant made at the time of her departure may be admissible where the fact of the visit is material to the issues.[72] The declarations of the woman indicative of present pain and suffering are admissible for the purpose of showing physical condition,[73] and so may be her statements touching her pregnancy, whether made to her physician[74] or to others;[75] but as to the general method of proof of mental and physical states, *see* the article on "Mental and Physical States."

(Mass.) 173; People *v.* Abbott, 116 Mich. 263, 74 N. W. 529.

Evidence of a conversation two years previous to the offense, in which defendant sought information on the subject of procuring an abortion was excluded. Com. *v.* Hersey, 2 Allen (Mass.) 173.

70. *Colorado.*—Solander *v.* People, 2 Colo. 48.

Idaho.—State *v.* Alcorn, (Idaho), 64 Pac. 1014.

Maryland.—Jones *v.* State, 70 Md. 326, 17 Atl. 89, 14 Am. St. Rep. 362.

Massachusetts.—Com. *v.* Brown, 121 Mass. 69; Com. *v.* Fenno, 134 Mass. 217.

Vermont.—State *v.* Howard, 32 Vt. 380.

Wisconsin.—State *v.* Dickinson, 41 Wis. 299.

71. *Illinois.*—Siebert *v.* People, 143 Ill. 571, 32 N. E. 431; Howard *v.* People, 185 Ill. 552, 57 N. E. 441.

Indiana.—Hauk *v.* State, 148 Ind. 238, 46 N. E. 127.

Kansas.—State *v.* Young, 55 Kan. 349, 40 Pac. 659.

Maryland.—Hays *v.* State, 40 Md. 633.

Massachusetts.—Com. *v.* Leach, 156 Mass. 99, 30 N. E. 163; Com. *v.* Felch, 132 Mass. 22.

Michigan.—People *v.* Aiken, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512.

New Hampshire.—Com. *v.* Wood, 53 N. H. 484.

New York.—People *v.* Davis, 56 N. Y. 95; Maine *v.* People, 9 Hun 113; People *v.* Murphy, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661.

Oregon.—State *v.* Clements, 15 Or. 237, 14 Pac. 410.

So a statement by the deceased that she was pregnant by a person other than defendant, and that, if such person did not procure her miscarriage, she would perform the operation herself, was held inadmissible. Com. *v.* Felch, 132 Mass. 22.

And statements of the woman, made in the absence of the defendant after her return from his office, as to the fact and manner of what took place there, together with her statement that defendant then gave her a medicine she exhibited and told her how to take it, were excluded as no part of the *res gestae*. People *v.* Davis, 56 N. Y. 95.

So were statements of the woman that she had operated on herself, when made prior to the time of the alleged offense. Hauk *v.* State, 148 Ind. 238, 46 N. E. 127.

72. State *v.* Howard, 32 Vt. 380; Solander *v.* People, 2 Colo. 48; State *v.* Dickinson, 41 Wis. 299; State *v.* Power, 24 Wash. 34, 63 Pac. 1112; State *v.* Alcorn, (Idaho,) 64 Pac. 1014.

73. People *v.* Aiken, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512; Com. *v.* Leach, 156 Mass. 99, 30 N. E. 163; Rhodes *v.* State, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429; State *v.* Glass, 5 Or. 73; State *v.* Gedicke, 43 N. J. Law 86.

74. State *v.* Gedicke, 43 N. J. Law 86; People *v.* Josselyn, 39 Cal. 393; State *v.* Alcorn, (Idaho,) 64 Pac. 1014.

75. State *v.* Glass, 5 Or. 73.

b. *Dying Declarations.* — As to the admissibility of dying declarations in general, see the article on that subject. In prosecutions for abortion such declarations are not admissible[76] unless otherwise provided by statute.[77]

76. *England.*—Rex. *v.* Lloyd, 4 Car. & P. 233, 19 Eng. C. L. 491; Rex *v.* Hutchinson, 2 Barn. & C. 608.

Georgia.—Wooten *v.* Wilkins, 39 Ga. 223, 99 Am. Dec. 456.

Massachusetts.—Com. *v.* Homer, 153 Mass. 343, 26 N. E. 872.

New Jersey.—State *v.* Meyer, 64 N. J. Law 382, 45 Atl. 779.

New York.—People *v.* Davis, 56 N. Y. 95; Wilson *v.* Boerem, 15 Johns. 286.

Ohio.—State *v.* Harper, 35 Ohio St. 78, 35 Am. Rep. 596.

Pennsylvania.—Railing *v.* Com., 110 Pa. St. 100, 1 Atl. 314.

See "DECLARATIONS, DYING DECLARATIONS."

"The court also erred in receiving proof of the declarations of the deceased made after she had abandoned all hopes of life. Such evidence is admissible, in cases of homicide, only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. (1 Greenl. Ev., § 156, and cases cited in note; Wilson *v.* Boerem, 15 J. R., 286.) This is the settled rule, and it is unnecessary to discuss the reasons upon which it is founded. Applying the rule to this case, the declarations were not admissible. The charge against the prisoner was not homicide in any degree. The crime charged against him is that of persuading the deceased to submit to the use of an instrument upon her person, and to take drugs with intent to produce her miscarriage — in consequence of which the death of the child, and her own, were produced. The death of the deceased was not a necessary ingredient of the crime; that of the child was sufficient to make the offense a felony. The act alleged to have been perpetrated by the prisoner was a crime under the third section of the statute, in the absence of the death of the mother or child. Such death only increased the degree of the crime and the punishment to be inflicted." People *v.* Davis, 56 N. Y. 95, 103.

77. Com. *v.* Homer, 153 Mass. 343, 26 N. E. 872; Maine *v.* People, 9 Hun (N. Y.) 113.

Apparent Conflict. — But in Clark *v.* People, 16 Colo. 511, 27 Pac. 724, the dying declaration of the female was held to be admissible for the defendant, and the court does not put this on the ground of any statute.

ABSTRACTS OF TITLE.

By Edgar W. Camp.

CROSS-REFERENCES.

Best and Secondary Evidence;
Records;
Title.

I. IN ABSENCE OF STATUTE.

1. General Rule. — An abstract of title is not competent evidence of conveyances in the absence of a statute permitting its introduction.[1]

2. As Secondary Evidence. — It has been held that in so far as an abstract can be proved to be copies of conveyances, it may be used as secondary evidence under the rules for secondary evidence of writings.[2]

1. Reed *v.* Banks, 10 U. C. C. P. (Can.) 202; People *v.* Wemple, 67 Hun 495, 22 N. Y. Supp. 497; Hartley *v.* James, 50 N. Y. 38; Kane *v.* Rippey, 22 Or. 296, 23 Pac. 180.

"Without some proof that the laws of Indiana recognize such instruments (abstracts of title), we are somewhat at a loss to understand how they can show title." Weeks *v.* Downing, 30 Mich. 4.

In Pennsylvania, it has been held that if the rules of court require plaintiff in ejectment to file an abstract of his title, he may introduce such abstract in evidence. Hart *v.* McGrew, (Pa. St.), 11 Atl. 617. See also Kane *v.* Rippey, 22 Or. 296, 23 Pac. 180.

When No Objection Is Made to an abstract when offered, it may be considered, or if it be objected to only as to one matter therein stated, it may be examined and considered in respect to all other matters. Reed *v.* Banks, 10 U. C. C. P. (Can.) 202.

2. Halsey *v.* Blood, 29 Pa. St. 319.

3. In Ex Parte Proceedings. — In the United States, an abstract may sometimes be used in *ex parte* proceedings.[3]

4. By Stipulation. — It may be used by stipulation.[4]

5. Against One Furnishing It. — It may be used against the one who furnished it.[5]

II. STATUTORY PROVISIONS.

1. Generally. — Many of the states have statutes permitting the use of abstracts in evidence.[6]

3. People *v.* Wemple, 67 Hun 495, 22 N. Y. Supp. 497.

4. Weeks *v.* Downing, 30 Mich. 4.

Stipulation That Abstract Is Correct Sufficient to Admit. — In the case of Garrett *v.* Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L. R. A. 321, an attorney endorsed upon an abstract and signed a stipulation that the abstract showed the true condition of the lands therein described, but did not stipulate that the abstract might be used in evidence. The court, however, held that the abstract was admissible on the ground that whatever is true may, if relevant, be received in evidence. The truth of the abstract being admitted plaintiff had a right to use it as evidence, without the further agreement of the defendant that he might do so.

5. Abstract Furnished By Vendor Admissible Against Him.—In an action to rescind a contract to purchase, the vendee may put in evidence the abstract furnished by the vendor to show what title the vendor claimed to have. Hartley *v.* James, 50 N. Y. 38.

Abstract Furnished In An Action Under Statute.—Where a party has been required, under statute, to file an abstract of his title, such abstract may be put in evidence against him, e. g. to show that he claimed under a certain deed. Wichita Land & Cattle Co. *v.* Ward, 1 Tex. Civ. App. 307, 21 S. W. 128; Evans *v.* Foster, 79 Tex. 48, 15 S. W. 170.

6. Generally Admissible by Statute.—*Indiana.*—By order of court, Rev. Stat. '94, § 366.

Michigan. — Comp. Laws, '97, §§ 3244, 3413.

Nebraska. — After notice, Stats. '99, § 4158.

New Mexico.—Comp. Laws, '97, § 3934.

In Actions by Ejectment.—*Alabama.*— After notice, C. C. '96, § 1531.

Georgia. — Code, '95, § 4963; see also § 4927.

Iowa.—Ann. Code, '97, § 4188.

Mississippi.—Ann. Code, § 1652.

In Action for Partition.—*California.*—C. C. P. §§ 799, 800.

Iowa.—Ann. Code, '97, § 4242.

Montana.—After notice, C. C. P. §§ 1397, 1398.

North Dakota.—After notice, Rev. Codes, '95, § 5841.

South Dakota.—Ann. Stats. '99, §§ 6639, 6640.

Utah. — Rev. Stats. '98, §§ 3569, 3570.

Wisconsin.—Rev. Stats. page 2166.

Under "Quieting Title Act."—Ontario: *Re* Cummings 8 P. R. 473, holding that abstract must be brought down to date of certificate of title before certificate can issue. *Re* Morse 8 P. R. 477, holding that abstract can be dispensed with on proper showing.

Where Original Records Are Lost. *Illinois.* — Ann. Stats. Chap. 30, §§ 36-38, Chap. 116, § 28.

Mississippi.—Ann. Code, § 2792.

Ohio.—Bates' Ann. Stats. § 5339c.

Texas.—Rev. Stats. '95, Art. 2313; applies to records lost prior to 1876.

Wisconsin.—Rev. Stats. § 661n.

Nebraska.—In the case of Gate City Abstract Co. *v.* Post, 55 Neb. 742, 76 N. W. 471, the court referred to the Act of 1887, Chap. 64 the second section of which provides that abstracts prepared by bonded abstracters shall be received in all courts as *prima facie* evidence of the existence of the record of deeds, mortgages and other instruments or liens affecting the real estate men-

In Illinois, the statute is known as the "Burnt Records Act," and was enacted soon after the Chicago fire. This act has been referred to in many cases in that state.[7]

2. Construction.—It is held that such acts are highly remedial, and therefore to be liberally construed.[8]

3. Preliminary Proof. — Thus, it is held, that an abstract of the record may be used to prove the contents of a deed actually recorded, although not so acknowledged as to be entitled to record.[9]

But it must appear that the records are destroyed;[10] the convey-

tioned in the abstract and that such record is as described in the abstract. The third section requires one who desires to use an abstract in evidence at a trial to serve a copy thereof on his adversary at least three days before the trial. The court remarks that such abstracts may be used as evidence in an action to enforce the specific performance of a contract, and in every other form of action in which the validity of the title or the existence or non-existence of liens or encumbrances are questions directly or collaterally involved; that the right to use an abstract as evidence is not limited to the person to whom it is issued; anyone may use it.

7. Richley *v.* Farrell, 69 Ill. 264; Russell *v.* Mandell, 73 Ill. 136; King *v.* Worthington, 73 Ill. 161; Smith *v.* Stevens, 82 Ill. 554; Miller *v.* Shaw, 103 Ill. 277; Compton *v.* Randolph, 104 Ill. 555; Heinsen *v.* Lamb, 117 Ill. 549, 7 N. E. 75; Converse *v.* Wead, 142 Ill. 132, 31 N. E. 314; Chicago & A. R. Co. *v.* Keegan, 152 Ill. 413, 39 N. E. 33; Walton *v.* Follansbee, 165 Ill. 480, 46 N. E. 459; Cooney *v.* A. Booth Packing Co., 169 Ill. 370, 48 N. E. 406.

8. Smith *v.* Stevens, 82 Ill. 554. In that case, it was held that such abstracts are admissible under the statute, even against one in possession unless his possession is adverse and has so continued for twenty years.

See also, Heinsen *v.* Lamb, 117 Ill. 549, 7 N. E. 75; Chicago & A. R. Co. *v.* Keegan, 152 Ill. 413, 39 N. E. 33.

Illustration.—In the case of Sauers *v.* Giddings, 90 Mich. 50, 51 N. W. 265, the court had under consideration an Act of 1865 (p. 667) being an Act to declare certain abstracts of the county of Kent to be public records, which provides that such abstracts shall be a public record and be *prima facie* evidence in all courts of the state, and in all suits and proceedings of the matters therein stated and have the same virtue and effect as by *present provisions of law* the records of the office of the Register of Deeds possess. It was held that under this statute such an abstract could be used to prove a deed by an administrator and by proving such deed, establish *prima facie* the regularity of all proceedings required by law anterior to such deeds, although the Act making an administrator's deed *prima facie* evidence of his authority was not enacted until two years after the law above referred to. The court held that the abstract under the Act of 1865 had the same effect and virtue as the records themselves would have possessed at the time of the trial in the absence of that law.

9. Heinsen *v.* Lamb, 117 Ill. 549, 7 N. E. 75, *but not so under the Texas statute* for the case of Robins *v.* Ginocchio, (Tex. Civ. App.), 33 S. W. 747, holds that the abstract can have no greater effect than a certified copy, and that since a copy of a deed showing no acknowledgement would not show due record, and would not be sufficient as proof of a deed under the statute allowing proof by certified copy of record, therefore an abstract showing no acknowledgement is likewise insufficient.

10. Walton *v.* Follansbee, 165 Ill. 480, 46 N. E. 459; Chicago & A. R. Co. *v.* Keegan, 152 Ill. 413, 39 N. E. 33; Heinsen *v.* Lamb, 117 Ill. 549,

ance destroyed or lost;[11] and, that the abstract was made in ordinary course of business,[12] before the destruction of the records.[13]

4. Copies of Abstracts. — A letter-press copy of a lost abstract cannot be used.[14]

5. Explanation of Abstracts. — Whenever used in evidence, an abstract may be supplemented by an explanation of abbreviations and signs shown upon it,[15] but not by evidence of the abstracter's methods and habits to which no reference is made on the abstract itself.[16]

7 N. E. 75; Russell *v.* Mandell, 73 Ill. 136; Robins *v.* Ginocchio, (Tex. Civ. App.), 33 S. W. 747.

11. Chicago & A. R. Co. *v.* Keegan, 152 Ill. 413, 39 N. E. 33; Russell *v.* Mandell, 73 Ill. 136.

12. Russell *v.* Mandell, 73 Ill. 136; Heinsen *v.* Lamb, 117 Ill. 549, 7 N. E. 75.

Presumption as to Ordinary Course of Business.—It will be presumed that an abstract shown to be in the handwriting of an abstracter was made in ordinary course of business. Chicago & A. R. Co. *v.* Keegan, 152 Ill. 413, 39 N. E. 33; Cooney *v.* A. Booth Packing Co., 169 Ill. 370, 48 N. E. 406.

In the last case, it was proved that the abstract was in the writing "that was in vogue in the office" of the abstracters whose work it purported to be.

It also appeared that it had been for more than thirty years in possession of owners of part of the premises mentioned in the abstract.

13. Russell *v.* Mandell, 73 Ill. 136; Heinsen *v.* Lamb, 117 Ill. 549, 7 N. E. 75.

It will be presumed that an abstract was made at the time it bears date. Chicago & A. R. Co. *v.* Keegan, 152 Ill. 413, 39 N. E. 33.

14. In King *v.* Worthington, 73 Ill. 161, it is held that a letterpress copy of an abstract taken from an abstract made before the destruction of the records, is not competent evidence under the "Burnt Records Act;" that that act only admits the abstracts themselves, and not copies thereof, no matter how made.

Copy of Letterpress Copy. — In Compton *v.* Randolph, 104 Ill. 555, the ruling in King *v.* Worthington was approved, and it was also held that a copy of the letterpress copy could not be admitted.

JJ. Dickey and Sheldon dissented, being of opinion that the letterpress copy was competent secondary evidence, the abstract having been destroyed.

15. Converse *v.* Wead, 142 Ill. 132, 31 N. E. 314.

Offered Under Stipulation.—If abstracts are introduced in evidence under a stipulation not determining the effect to be given them, they are not sufficient to establish title if they are unintelligible without explanation of abbreviations and signs used in them. Weeks *v.* Downing, 30 Mich. 4.

16. In Robins *v.* Ginocchio, (Tex. Civ. App.), 33 S. W. 747, it is held that, no fact can be taken to be established which is not shown by data or memoranda expressed upon the abstract. The form of abstract used contained no space for an entry concerning acknowledgments and there was testimony that the practice was to make no mention of the acknowledgment in the abstract except where the acknowledgment was irregular, in which case it was noted under a space left in the abstract form for "remarks," but there was nothing upon the face of the abstract to show that where the acknowledgments were regular in form no mention was made of them. If there had been such a memorandum upon the abstract it might be claimed the regularity of the acknowledgment was shown by the abstract itself, but the testimony of the witness to supply a fact not in any way shown upon the abstract was inadmissible.

6. Waiver of Objections. — Objections for want of preliminary proof to let in an abstract should be made when it is offered.[17]

7. Introducing Part of Abstract. — A party may introduce part of an abstract, but his adversary may then introduce the remainder.[18]

17. Robins *v.* Ginocchio, (Tex. Civ. App.), 33 S. W. 717; Reed *v.* Banks, 10 U. C. C. P. (Can.) 202.

18. Heinsen *v.* Lamb, 117 Ill. 549, 7 N. E. 75.

ABUTTING OWNERS.—See Adjoining Land Owners; Highways; Eminent Domain.

ACCEPTANCE.—See Bills and Notes; Contracts; Insurance; Indictment; Gifts; Wills; Statute of Frauds.

ACCESS.—See Husband and Wife; Bastardy; Legitimacy.

ACCESSION.—See Confusion of Goods.

ACCESSORIES, AIDERS AND ABETTORS.

By W. L. Campbell,

CROSS-REFERENCES.

Accomplices;
Corroboration;
Intent.

I. ACCESSORIES BEFORE THE FACT.

1. Guilt of Principal. — A. Necessity of Establishing. — a. *Generally.* — Before conviction of the accessory it is necessary to prove the offense of the principal.[1]

1. *California.*— People *v.* Collins, 53 Cal. 185.
Florida.—Bowen *v.* State, 25 Fla. 645, 6 So. 459.
Georgia.—Edwards *v.* State, 80 Ga. 127, 4 S. E. 268.
Kentucky.— Tully *v.* Com., 11 Bush. 154.
Pennsylvania.—Buck *v.* Com., 107 Pa. St. 486; Stoops *v.* Com., 7 Serg. & R. 491, 10 Am. Dec. 482.
Texas.—Poston *v.* State, 12 Tex. App. 408; Armstrong *v.* State, 33 Tex. App. 417, 26 S. W. 829.
Virginia.—Hatchett *v.* Com., 75 Va. 925.

b. *Commission of Act by Principal.* — The felony must also be shown to have been committed by or through the principal, and not by another operating upon independent lines, so that there is no privity between him and the accessory.[2]

c. *Principal's Guilty Intent.* — To prove the offense of the principal it is necessary to establish not only his criminal acts that go to make up the felony, but also the criminal intention on his part.[3]

Wisconsin.—Ogden *v.* State, 12 Wis. 532, 78 Am. Dec. 754.

2. Act of Independent Criminals. In Ogden *v.* State, 12 Wis. 532, 78 Am. Dec. 754, the court said: "In order to establish the guilt of Ogden, it was first incumbent on the prosecutor to prove the guilt of Wright as alleged in the indictment. This done he must prove that Ogden previously procured, hired, advised or commanded Wright to commit the felony. . . . For however clear it may have appeared that Ogden counseled and advised Wright to commit the offense, yet if Wright never did so in point of fact, and the barn was set on fire by some one else, or by other means, then Ogden was innocent of the crime with the commission of which he stood charged.

Principal Uncertain or Unknown. In State *v.* Jones, 7 Nev. 408, it is held that while there must be a principal with whom the accessory should be shown to be connected, it is not necessary that he be identified, and his guilt proven. The evidence tended to show that the horses were stolen either by the man Jackson or Big Ben, which of the two did not satisfactorily appear. The court instructed that "the defendant might be found guilty regardless of the guilt or innocence of Big Ben." And this instruction was held to be correct.

In Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320, there was considerable evidence that the bomb by which Degan was killed was thrown by an unknown person, but some one in privity with, and acting in furtherance of the objects of the conspiracy. The court held, that proof of a crime committed by an unknown principal was sufficient to charge the accessory if the principal is charged in one count of the indictment to be unknown.

3. Detectives.—People *v.* Collins, 53 Cal. 185; Com. *v.* Hollister, 157 Pa. St. 13, 27 Atl. 386; State *v.* Douglass, 44 Kan. 618, 26 Pac. 476; People *v.* Noelke, 29 Hun (N. Y.) 461.

In People *v.* Collins, 53 Cal. 185, the court said: "If Parnell entered the building and took the money with no intention of stealing it, but only in pursuance of a previously arranged plan between him and the Sheriff, intended solely to entrap the defendant into the apparent commission of a crime, it is clear that no burglary was committed, there being no felonious intent in entering the building or taking the money. If the act of Parnell amounted to burglary, the Sheriff who counseled and advised it was privy to the offense; but no one would seriously contend, on the foregoing facts, that the Sheriff was guilty of burglary. The evidence for the prosecution showed that no burglary was committed by Parnell, for want of a felonious intent, and the defendant could not have been privy to a burglary unless one was committed."

Innocent Actor.—Com. *v.* Hill, 11 Mass. 136; Reg. *v.* Clifford, 2 Car. & K. 902, 61 Eng. C. L. 201; Adams *v.* People, 1 Comstock (N. Y.) 173; Collins *v.* State, 3 Heisk. (Tenn.) 11, 4 Blk. Com. 35; Gregory *v.* State, 26 Ohio St. 510, 20 Am. Rep. 774.

In Reg. *v.* Clifford, 2 Car. & K. 902, 61 Eng. C. L. 201, A. by letter desired B., an innocent agent, to write the name W. S. to a receipt on a postoffice order, it was held that B. being an innocent agent, was not a principal.

In Gregory *v.* State, 26 Ohio St. 510, 20 Am. Rep. 774, by the fraudulent procurement of another, an in-

d. *That Act Was a Felony.* — The evidence must show the commission of a felony.[4]

e. *That it Was in Terms of Advice.* — If the crime proved is not shown to have been committed within the terms of the advice or encouragement, it will not authorize a conviction of one as accessory.[5]

B. Modes of Proof on Question of Principal's Guilt. — a. *Evidence of Guilt Generally.* — The general rule for the purpose of establishing the guilt of the principal on the trial of the accessory, is, that any evidence is admissible which would be admissible against the principal himself were he on trial.[6]

nocent agent signed the name of one who could not read to a note, he intending to have it signed to another paper. It was held that the party who fraudulently procured the signing was guilty as forger and not accessory.

4. *United States*—U. S. *v.* Sykes, 58 Fed. 1000; U. S. *v.* Gooding, 12 Wheat. 460; U. S. *v.* Mills, 7 Pet. 138.

England.—Reg. *v.* Tracy, 6 Mod. 30.

Arkansas.—Hubbard *v.* State, 10 Ark. 378.

Georgia.—Kinnebrew *v.* State, 80 Ga. 232, 5 S. E. 56.

Illinois.—Stevens *v.* State, 67 Ill. 587.

Massachusetts.—Com. *v.* Gannett, 1 Allen 17, 79 Am. Dec. 693; Brown *v.* Perkins, 1 Allen 89; Com. *v.* Willard, 39 Mass. (22 Pick.) 476.

Mississippi.—Williams *v.* State, 20 Miss. 58.

New York.—People *v.* Erwin, 4 Denio 129; Lowenstein *v.* People, 54 Barb. 299.

North Carolina.—State *v.* Check, 13 Ired. 114; State *v.* Jones, 83 N. C. 605, 35 Am. Rep. 586.

South Carolina.—State *v.* Westfield, 1 Bailey 132.

Texas.—Dunman *v.* State, 1 Tex. App. 593.

No Accessories Before the Fact in Manslaughter.—1 Hale P. C. 616; Adams *v.* State, 65 Ind. 565; People *v.* Newberry, 20 Cal. 439; Stipp *v.* State, 11 Ind. 62; State *v.* Bogue, 52 Kan. 79, 34 Pac. 410.

Nor in Treason.—4 Blk. Com. 36.

5. When Within Terms of Encouragement.—Com. *v.* Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705; Butler *v.* People, 125 Ill. 641, 18 N. E. 338, 8 Am. St. Rep. 423, 1 L. R. A. 211; State *v.* Lucas, 55 Iowa 321, 7 N. W. 583; State *v.* Lucas, 57 Iowa 501, 10 N. W. 868; Huling *v.* State, 17 Ohio St. 583; People *v.* Knapp, 26 Mich. 112; Watts *v.* State, 5 W. Va. 532; State *v.* Davis, 87 N. C. 514; People *v.* Keefer, 65 Cal. 232, 3 Pac. 818.

Independent Crime.— People *v.* Knapp, 26 Mich. 112.

In Watts v. State, 5 W. Va. 532, one incited another to break open and rob a dwelling house, and while so doing the principal committed a rape. It was held that the person inciting the burglary and robbery could not be convicted as accessory to the rape, and that evidence in regard to a rape so committed was inadmissible, it being a distinct substantive offense, and a total and substantial departure from the crime instructed.

In People v. Keefer, 65 Cal. 232, 3 Pac. 818, there was some evidence that the defendant was not personally present, but had advised the party who actually committed the murder, to follow and tie the Chinaman, and that this was not for the purpose of robbery or other felony. On that theory the court held the defendant not guilty as accessory to the murder.

6. Evidence Competent on Trial of Principal Competent to Prove His Guilt on Trial of Accessory. *United States.*—U. S. *v.* Hartwell, 3 Cliff. 221, 26 Fed. Cas. No. 15,318.

Arkansas.—Vaughan *v.* State, 57 Ark. 1, 20 S. W. 588.

b. *Record of Conviction.* — The record of the principal's conviction is competent, but as to the guilt of the principal, it is only *prima facie* evidence.[7]

Georgia.—Smith *v.* State, 46 Ga. 298; Groves *v.* State, 76 Ga. 808.

New Hampshire.—State *v.* Rand, 33 N. H. 216.

New Mexico. — Territory *v.* Dwenger, 2 N. M. 73.

North Carolina.—State *v.* Duncan, 6 Ired. 98.

Pennsylvania.—Buck *v.* Com., 107 Pa. St. 486.

Tennessee.—Self *v.* State, 65 Tenn. (6 Baxt.) 244; Hensley *v.* State, 9 Humph. 243.

Texas.—Simms *v.* State, 10 Tex. App. 131; Armstrong *v.* State, 33 Tex. Crim. App. 417, 26 S. W. 829.

In Arnold *v.* State, 9 Tex. App. 435, it is held that, "it is not necessary that the principal should be first convicted, nor that he be put on trial with the accomplice; but to convict the accomplice, the guilt of the principal must be shown. It being then necessary for the State to show the guilt of the principals, all legal evidence of whatever character is admissible. Therefore, motives, threats and confessions of the principals, and, in fact, evidence from every legal source is competent."

In Buck *v.* Com., 107 Pa. St. 486, it was held that on the trial of an accessory, the State could show that sandbags and revolvers were found on the principal, when arrested; that it being necessary to prove the principal's guilt, the testimony that would have been admissible against him was admissible against the accessory.

Confessions of Principal Not Admissible.— Casey *v.* State, 37 Ark. 67; Ogden *v.* State, 12 Wis. 532, 78 Am. Dec. 754; State *v.* Rand, 33 N. H. 216; Rex *v.* Appleby, 3 Stark. 33.

In Vaughan *v.* State, 57 Ark. 1, 20 S. W. 588, a witness was permitted to make the statement: "Hamilton showed us where he got over the fence and where he stood at the time of the shooting." Hamilton was charged as principal and the appellant as accessory. The Supreme Court held the evidence inadmissible, and said: "In general, any evidence tending to prove the guilt of the principal is admissible to prove the fact on the trial of one charged as accessory. 2 Bish. Crim. Proc. § 13. Confessions of the principal seem to be an exception to the rule, at least, where the principal can be called as a witness to the fact. 2 Bish. Crim. Proc. § 13; 1 Russ. Crimes, 43; 1 Roscoe Crim. Ev., 53; Reg. *v.* Hansill, 3 Cox Crim. Cas. 597. Hamilton was called as a witness in this case, and testified fully to his own guilt. The statement made to the witness, Berry, set out above, was an indirect confession. It was made after the event, and not at a time so near, as to be regarded as of the *res gestae*. It was, according to the authorities, only hearsay as against Vaughan."

Confessions of Principal Admissible.—The following cases hold that confessions of the principal are admissible to prove his guilt on the trial of the accessory: U. S. *v.* Hartwell, 3 Cliff. 221, 26 Fed. Cas. No. 15,318; Smith *v.* State, 46 Ga. 298; Groves *v.* State, 76 Ga. 808; Martin *v.* State, 95 Ga. 478, 20 S. E. 271; Lynes *v.* State, 36 Miss. 617; Territory *v.* Dwenger, 2 N. M. 73; Crook *v.* State, 27 Tex. App. 198, 11 S. W. 444; Bluman *v.* State, 33 Tex. Crim. 43, 21 S. W. 1027; Morrow *v.* State, 14 Lea (Tenn.) 475; Self *v.* State, 65 Tenn. (6 Baxt.) 244.

7. Record of Conviction Is Evidence.—State *v.* Duncan, 26 N. C. (6 Ired.) 236; West *v.* State, 27 Tex. App. 472, 11 S. W. 482.

In Keithler *v.* State, 18 Miss. (10 Smedes & M.) 192, the record of the conviction of the principal was read to the jury on trial of the accessory. It was objected to, but the report does not state on what grounds, and the objection was overruled. The supreme court said: "That the record of the conviction of the principal is evidence against the accessory, will surely not be doubted. It was evidence to prove the conviction of Silas and all the legal consequences, though of course

c. *Evidence of Non-Guilt Generally.* — As the record of the principal's conviction, while conclusive as to him, is only *prima facie* evidence of his guilt as against the accessory, such accessory may introduce any evidence tending to show that the principal was not, in fact, guilty, or ought not to have been convicted.[8]

d. *Acquittal of Principal.* — When the principal has been regularly tried and acquitted in a court having jurisdiction, proof of such acquittal is a complete defense to the accessory, although he may have advised and encouraged the felony, and the principal may, in fact, be guilty.[9]

not evidence of the fact of the guilt of the prisoner."

In Baxter *v.* People, 7 Ill. (2 Gilm.) 578, on the trial of the accessory, the record of the principal's conviction was introduced without stating the object for which it was introduced. It was objected to by the defendant, but it does not appear from the report upon what grounds.

Conclusive As to Fact of Conviction.—In Anderson *v.* State, 63 Ga. 675, the record of the principal's conviction was held on the trial of an accessory after the fact to be conclusive evidence of his conviction, but only *prima facie* evidence of his guilt.

In State *v.* Chittem, 13 N. C. (2 Dev.) 49, it is held that the record of the conviction of a felon is conclusive evidence of the conviction of the principal, but *prima facie* evidence of his guilt.

Only Prima Facie Evidence of Conviction.—In Levy *v.* People, 80 N. Y. 327, the court holds that, "the record showing the conviction of the principal is proof sufficient *prima facie* of that fact; and proof that he was convicted is proof *prima facie* that he was properly convicted."

Prima Facie Evidence of Principal's Guilt.—State *v.* Crank, 2 Bailey (S. C.) 66, 23 Am. Dec. 117; Rex *v.* Baldwin, 3 Camp. 265; Rex *v.* Smith, 1 Leach C. C. 288; Studstill *v.* State, 7 Ga. 2; State *v.* Mosley, 31 Kan. 355, 2 Pac. 782; Anderson *v.* State, 63 Ga. 675; Com. *v.* Knapp, 27 Mass. (10 Pick.) 477, 20 Am. Dec. 534; State *v.* Gleim, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294; Levy *v.* People, 80 N. Y. 327; State *v.* Chittem 13 N. C. (2 Dev.) 49; People *v.* Buckland, 13 Wend. (N. Y.) 592; State *v.* Sims, 2 Bailey (S. C.) 29; People *v.* Gray, 25 Wend. (N. Y.) 465; Lynes *v.* State, 36 Miss. 617; State *v.* Duncan, 26 N. C. (6 Ired.) 236.

8. Accessory May Show Principal Not Guilty.—State v. Crank, 2 Bailey (S. C.) 66, 23 Am. Dec. 117; Levy *v.* People, 80 N. Y. 327.

In State *v.* Sims, 2 Bailey (S. C.) 29, the court said: "It seems to have been thought formerly that the record of the conviction of the principal was conclusive evidence of his guilt on the trial of the accessory; but this opinion is most satisfactorily combated by Foster, C. L. 365, and it is now well understood that it is only *prima facie* evidence, and may be rebutted on the trial of accessory, by showing that he was not guilty, or that the offense was not committed."

In Com. *v.* Knapp, 10 Pick. (Mass.) 477, the court said: "The verdict is to be taken as *prima facie* evidence of the guilt of J. Francis Knapp. It may be rebutted by showing that there was no murder, or that Francis was not in a situation where he could take a part as principal. We can not stop the evidence offered *in limine*. The prisoner has the burden of proof. He must show the jury that Francis ought not to have been convicted. He is not to make the propriety of the conviction questionable merely. He must prove it to have been clearly wrong."

9. Acquittal of Principal Acquits Accessory.—Johns *v.* State, 19 Ind. 421, 81 Am. Dec. 408; Ray *v.* State,

2. Acts of Accessory. — A. Proof of the Advice. — a. *Must Be Shown To Have Been Given and Communicated.* — It must be proved that the accessory's advice or encouragement was given and actually communicated to the principal.[10]

b. *But Not That Principal Would Not Have Acted Without It.* But it need not be proved that the crime would not have been committed without it.[11]

c. *Advice Must Have Been Positive.* — The evidence must show some positive advice or encouragement from the accessory to procure the commission of the crime by the principal. Proof of mere passive acquiescence is not sufficient.[12]

d. *Need Not Have Been by Words.* — But it is sufficient to prove any word, sign or act, communicated to the principal for the purpose of bringing about or encouraging the commission of the crime.[13]

B. Intent in Giving Advice. — a. *Must Appear From the Evi-*

13 Neb. 55, 13 N. W. 2; U. S. *v.* Crane, 4 McLean 317, 25 Fed. Cas. No. 14,888; Bowen *v.* State, 25 Fla. 645, 6 So. 459.

In McCarty *v.* State, 44 Ind. 214, 15 Am. Rep. 232, the defendant was found guilty of being accessory before the fact, but before the judgment, the principal was tried and acquitted. The statute provided that an accessory "may be indicted and convicted before or after the principal offender. The supreme court held that there is no authority, either in the principles of the common law or under the statute for proceeding to final conviction of the accessory if at any time before such final conviction the principal has been tried and acquitted."

10. Must Be Communicated to Principal.—Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320.

11. Guilt of Accessory Not Dependent on Whether Felony Would Have Been Committed Without His Advice.—State *v.* Tally, 102 Ala. 25, 15 So. 722.

In Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320, it was held that, "although the defendants may have spoken and also published their views, advocating force to effect a social revolution, that dynamite should be used in resisting the law, etc., and although such language might cause persons to desire to carry out the advice given, yet the bomb may have been thrown by some one unfamiliar with, and unprompted by the teachings of defendants, or any of them. Therefore the jury must be satisfied beyond all reasonable doubt, that the person throwing said bomb was acting as the result of the teaching or encouragement of defendants."

12. Mere Passive Acquiescence. In 1 Hale P. C. 616, the author says: "That which makes an accessory before is command, counsel, abetment or procurement by one to another, to commit a felony, when the commander or counselor is absent at the time of the felony committed, for if he be present he is principal. And therefore words that sound in bare permission make not an accessory as if A. says he will kill J. S. and B. says: 'You may do your pleasure, for me,' this makes not B. accessory."

13. Advice or Encouragement May Be by Words, Acts or Signs. Brennan *v.* People, 15 Ill. 511; McKee *v.* State, 111 Ind. 378, 12 N. E. 510.

In Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320, newspaper articles and public speeches were held to be good evidence against the defendants, and properly introduced, not because they gave general advice to commit murder, but because they advised and encouraged a particular class in Chi-

dence. — The circumstances attending the advice or encouragement may satisfactorily prove the intention, but it must be proved, not merely assumed, and unless the jury are satisfied on this point from the evidence in the case, they ought not to convict.[14]

b. *Criminal Effect Must Be Intended.* — Deliberately using words or signs, or doing anything which actually has the effect to encourage another in the commission of a felony, or to procure him to commit it, is not alone sufficient to charge one as accessory. The jury must be satisfied from the evidence, that he intended his words or acts to have the effect, or be taken in the sense that would tend to bring about the commission of the crime.[15]

c. *The Specific Crime Need Not Be Intended.* — Within reasonable limits the accessory is considered as having contemplated the

cago, to wit: the members of the international groups, and such other working men as could be persuaded to join them, to arm themselves with guns, revolvers and dynamite, and kill another particular class in Chicago, to wit, the police, at a particular time, about May 1, 1886, there being evidence in the record tending to show that the death of Degan occurred during the prosecution of a conspiracy planned by members of the international groups, who read these articles and heard these speeches.

14. Prosecution Must Prove Criminal Intent.—Hicks *v.* U. S., 150 U. S. 140; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320; Com. *v.* Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705; State *v.* Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54.

15. Person Giving Advice, etc., Must Intend Criminal Effect. State *v.* Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320; Com. *v.* Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705.

In Hicks *v.* U. S., 150 U. S. 140, it is said: "The acts or words of encouragement and abetting must have been used by the accused with the intention of encouraging and abetting Rowe. So far as the instruction goes, the words may have been used for a different purpose, and yet have had the actual effect of inciting Rowe to commit the murderous act. Hicks indeed testified that the expressions used by him were intended to dissuade Rowe from shooting. But the jury were left to find Hicks guilty as principal, because the effect of his words may have had the result of encouraging Rowe to shoot, regardless of Hicks' intention. . . . Hicks, no doubt, intended to use the words he did use, but did he thereby intend that they were to be understood by Rowe as an encouragement to act?"

In State *v.* Hickam, 95 Mo. 322, 8 S. W. 252, 6 Am. St. Rep. 54, which was a prosecution for an assault to kill, and several parties were indicted as accessories, it was held that malice and intent to kill being essential elements of the offense with which the defendant was charged, it devolved upon the state to prove them the same as any other facts in the case necessary to establish guilt. And as to the accessories, it was held that neither of them could properly be convicted of the offense charged in the indictment, unless the jury found either that there was a common purpose in the minds of Samuel Hickam and such defendants to kill Davenport, and the shooting was done in the attempted accomplishment of such common purpose, or that such shooting was done by Samuel Hickam in the attempted accomplishment of a purpose in his mind to kill Davenport, of which said defendant had knowledge, and that they did some act in furtherance of the attempted accomplishment of such purpose.

consequences of attempts to carry out his own suggestions or of any encouragement given by him in the commission of a crime, and if the proof shows that the crime was accomplished in a manner or under circumstances differing from those suggested, or that there was no suggestion of time, place or manner, it will make no difference so long as the act is shown to be in furtherance of the common design.[16]

C. JURISDICTION.—On the trial of the accessory it must be proved that the advice or encouragement was within the jurisdiction of the court, and the jurisdiction is not necessarily in the place where the felony was committed, for, if there is a difference, and the accessory is indicted where the felony is committed, evidence showing advice or encouragement in another jurisdiction will not justify his conviction.[17]

16. When Guilty, Though Crime Committed Not Intended.—U. S. *v.* Ross, 1 Gall. 624, 27 Fed. Cas. No. 16,196; State *v.* Nash, 7 Iowa 347; People *v.* Pool, 27 Cal. 572; State *v.* Shelledy, 8 Iowa 477.

In Wynn *v.* State, 63 Miss. 260, the defendant, Wynn, loaned to Atkinson the pistol with which he shot and killed McPherson. Just before the shooting, he shouted "Shoot him," and just after the first shot was fired, he shouted, "Shoot him again." There was evidence that Wynn intended that Johnson, and not McPherson, should be killed. It was held that he was guilty, even if this was true.

In State *v.* Davis, 87 N. C. 514, where A. instigates B. to rob C., and B. murders C. in carrying out the robbery, A is held to be an accessory before the fact to the murder.

In People *v.* Vasquez, 49 Cal. 560, it is held, "no defense to a party associated with others in, and engaged in a robbery that he did not propose or intend to take life in its perpetration, or that he forbade his associates to kill, or that he disapproved or regretted that any person was thus slain by his associates. If the homicide in question was committed by one of his associates engaged in the robbery in furtherance of their common purpose to rob, he is as accountable as though his own hand had intentionally given the fatal blow."

In Stephens *v.* State, 42 Ohio St. 150, where two persons burglarized a house and committed a robbery, and while so doing, murdered the person robbed, it was held that another person who did not enter the house was responsible for the killing, and equally guilty with the others, although he had not previously agreed that life should be taken in the attempt to rob, if he was associated with them in the robbery, and was engaged in furtherance of the common purpose, and the killing was done in the execution of the common purpose, and was a natural and probable result of the attempt to rob.

Not Guilty of Independent Crime. State *v.* May, 142 Mo. 135, 43 S. W. 637; People *v.* Keefer, 65 Cal. 232, 3 Pac. 818; State *v.* Lucas, 55 Iowa 321, 7 N. W. 583.

In Saunder's Case, Plow. 475, A. counseled B. to poison C.; B. gave C. a poisoned apple. C. handed the apple to D., who ate it in B.'s presence and died. It was held that A. was not an accessory to the murder of D.

In Watts *v.* State, 5 W. Va. 532, one incited another to break open and rob a dwelling house. While so doing, the principal committed a rape. It was held that the person inciting the burglary and robbery could not be convicted as accessory to the rape, because there was a total and substantial departure from the crime intended.

17. Crime of Accessory In Another State.—State *v.* Chapin, 17

D. Repentance of Accessory. — Until the felony is actually committed, the offense of the accessory is incomplete, and he may prove in his defense that before the actual perpetration of the felony, he, in good faith, withdrew the advice and encouragement given, and endeavored to prevent the crime. But in such case, to make the repentance a good defense, he must prove that the principal was notified by him, and actually received the notice of such repentance.[18]

Innocent Intent. — The defendant may show that the advice or encouragement given by him was without the criminal intent necessary to constitute him an accessory before the fact.[19]

II. ACCESSORY AFTER THE FACT.

1. The State's Case. — A. Principal's Guilt Must Be Shown. Before the accessory after the fact can be convicted, it must be proved that the felony in respect of which he is charged as such accessory has been committed by the principal.[20]

Ark. 561, 65 Am. Dec. 452; Johns *v.* State, 19 Ind. 421, 81 Am. Dec. 408; People *v.* Adams, 3 Denio (N. Y.) 190, 45 Am. Dec. 468; State *v.* Wyckoff, 31 N. J. Law 65.

Where Jurisdiction in Different Counties by Statute.—In State *v.* Moore, 26 N. H. 448, 59 Am. Dec. 354, the court said: "There is no doubt that by the provisions of the revised statutes, Chapter 225, Section 2, the English law is so far altered that if the commission of a crime be procured in one county in this state, to be committed in another, and the same be actually committed in the other by the principal offender, the accessory may be tried in either county.

18. Repentance and Notice. — 3 Greenl. Ev. 45; Sessions *v.* State, 37 Tex. Crim. App. 58, 38 S. W. 605.

In 1 Hale P. C. 618, the author says: "A. commands B. to kill C. but before the execution thereof, A. repents and countermands B. and yet B. proceeds in the execution thereof. A. is not accessory, for his consent continues not, and he gave timely countermand to B. Co. P. C. Chap. 7, p. 51 Plow. Com. 474, Saunder's Case; but if A. had repented, yet if B. had not been actually countermanded before the fact committed, A. had been accessory."

In Pinkard *v.* State, 30 Ga. 757, it was held error to refuse to charge in a criminal trial that "if the jury believed that the defendant agreed with certain persons to commit a crime, yet, if they believed that he abandoned the purpose, and went off and did not participate in the crime, they must find him not guilty."

19. Circumstances Tending to Prove Innocent Intent.—In Bedell *v.* Chase, 34 N. Y. 386, in reply to proof tending to establish a fraudulent design on the part of vendors, the court permitted evidence that the entire proceeds of the sale were immediately applied to payment of debts of the firm. The supreme court held that this was not error, and that it was also legitimate to permit the examination of plaintiffs as to their intention in making the purchase.

20. Evidence Must Establish Principal's Guilt.—Holmes *v.* Com., 25 Pa. St. 221; Poston *v.* State, 12 Tex. App. 408; Simmons *v.* State, 4 Ga. 465; Wren *v.* Com., 26 Gratt. (Va.) 952; Harrel *v.* State, 39 Miss. 702, 80 Am. Dec. 95; Edwards *v.* State, 80 Ga. 127, 4 S. E. 268; Hatchett *v.* Com., 75 Va. 925.

Degree of Proof Required. — In Poston *v.* State, 12 Tex. App. 408, it was held that the guilt of the principal must be established with the same degree of certainty as if he were on trial; and that the court

B. Accessory's Knowledge of Principal's Guilt Must Be Shown. — It must be proved that the defendant knew when he rendered the assistance or harbored the felon, that the felony had been committed and that the person so aided was the felon.[21]

C. Positive Assistance by Accessory Must Be Shown. — a. *Generally.* — It must be proved that the defendant did some positive act in receiving, relieving, comforting or assisting the princi-

must charge the law in regard to the offense against the principal on the trial of the accessory, as fully as if such principal was on trial.

Proof Where There Are Several Principals.—In Stoops *v.* Com., 7 Serg. & R. (Pa.) 491, 10 Am. Dec. 482, it is held that if one be charged as accessory to a felony committed by several, some of whom only are convicted and others not proceeded against to conviction or outlawry, he may be arraigned and tried as accessory to such as have been convicted, but, if he be tried, convicted and sentenced as accessory to all without his consent, it is error.

In Edwards *v.* State, 80 Ga. 127, 4 S. E. 268, it was held that one could not be convicted as accessory after the fact where the alleged principal had been acquitted, because at the time of the offense he was so young that the statute did not permit his conviction. In that case, Edwards was charged as accessory to two principals; one the infant, the other had escaped.

Evidence Must Show That Felony Was Completed.—4 Blk. Com. 38; 2 Hawk 320; 3 Greenl. Ev. § 47; 1 Hale P. C. 618.

In Harrel *v.* State, 39 Miss. 702, 80 Am. Dec. 95, the defendant was indicted as accessory after the fact to a murder. The evidence adduced on the trial rendered it highly probable, if not certain, that the aid and assistance were in point of fact, given after the mortal blow was dealt, but before the death of the party whose life had been assailed. But the death occurred within a short time thereafter. The supreme court held that until the death, the felony alleged in the indictment and in respect to which the plaintiff in error was charged as accessory after the fact was not consummated — that in order to fix the guilt of the party charged as accessory after the fact, it is essential that such felony should be complete. Until such felony has been consummated, any assistance rendered to a party in order to enable him to escape the consequences of his crime, will not make the person affording such assistance guilty as accessory after the fact.

21. Guilty Knowledge Must Be Proved.—Street *v.* State, 39 Tex. Crim. App. 134, 45 S. W. 577; Loyd *v.* State, 42 Ga. 221; State *v.* Davis, 14 R. I. 281; State *v.* Douglas, 3 Ohio Dec. 340; Rex *v.* Greenacre, 8 Car. & P. 35.

In Wren *v.* Com., 26 Gratt. (Va.) 952, it is held that knowledge of the commission of the felony must be brought home to the accused, and is always a question for the jury.

In State *v.* Empey, 79 Iowa 460, 44 N. W. 707, the court instructed the jury, "if you find that after the commission of said act, defendant aided, abetted or assisted said Watkins in the disposition of said property, then he will be guilty; if you fail to so find, then you will find the defendant not guilty." The supreme court said: "The last sentence of the instruction is plainly erroneous, in holding that assistance in the disposition of stolen property will render one guilty. Surely, assistance in disposing of property without the knowledge that it was stolen, will not be the ground of charging one, either as principal or accessory: knowledge of the crime is essential to constitute an accessory after the fact."

What Is Proof of Knowledge. State *v.* Douglass, 3 Ohio Dec. 540.

In Wren *v.* Com., 26 Gratt. (Va.) 952, it was held that an accessory after the fact must have notice express or implied.

pal to effect his escape. Mere passive acquiescence is not sufficient.[22]

b. *Character of Assistance.* — The evidence must show that after the commission of the crime assistance was given by the defendant to the felon of such a character as would tend to facilitate his personal escape from arrest, trial or punishment.[23]

In Rex *v.* Burridge, 3 Vere Williams 439, 497, the attainder of the felon is held not in itself notice to all persons in the same county, and neither in justice nor in reason does it create an absolute presumption of notice, though it may be evidence to go to a jury.

In Tully *v.* Com., 13 Bush (Ky.) 142, it is held "sufficient that appellant had good reason to believe Osborn was guilty of the murder charged, and was fleeing from justice, to render aid or comfort given him unlawful. It was not necessary to prove he had actual knowledge of the facts."

22. Positive Acts of Assistance Must Be Proved.—State *v.* Hann, 40 N. J. Law 228; People *v.* Dunn, 7 N. Y. Crim. 173, 6 N. Y. Supp. 805; People *v.* Garnett, 129 Cal. 364, 61 Pac. 1114; Street *v.* State, 39 Tex. Crim. App. 134, 45 S. W. 577.

In Reg. *v.* Chapple, 9 Car. & P. 355, various persons charged with the offense of harboring the felons had been found possessed of various sums of money derived from the disposal of the property stolen, but it did not appear that they had received any of the stolen property itself, or had done any act to assist the felons personally. It was held that the offense charged was not made out by the evidence, as there was no act shown to have been done by the defendants to assist the felons personally.

Concealing Knowledge.—Carroll *v.* State, 45 Ark. 539; State *v.* Hann, 40 N. J. Law 228; Noftsinger *v.* State, 7 Tex. App. 301; Wren *v.* Com. 26 Gratt. (Va.) 952.

23. What Is Assistance Generally. Chitister *v.* State, 33 Tex. Crim. App. 635, 28 S. W. 683; State *v.* Stanley, 48 Iowa 221; White *v.* People, 81 Ill. 333; Wren *v.* Com. 26 Gratt. (Va.) 952.

Sufficient If It Avoids Present Arrest or Punishment.—Blakely *v.* State, 24 Tex. App. 616, 7 S. W. 233, 5 Am. St. Rep. 912; Gatlin *v.* State, 40 Tex. Crim. App. 116, 49 S. W. 87.

In Blakely *v.* State, 24 Tex. App. 616, 7 S. W. 233, the defendant was indicted as accessory after the fact. The evidence showed that Duffen was killed by May, in the presence of the defendant and two other witnesses. There was evidence that after the homicide, May and the defendant had a private conversation, and then May mounted his horse and rode off. When he was gone, the defendant told the other two witnesses that they must swear before the coroner's jury to a state of facts which he then and there detailed. Acting upon these suggestions and through fear of May and defendant, the two witnesses did, at the coroner's inquest swear, as did the defendant, to the fabricated statement devised by him.

The supreme court held that aid rendered to the felon in this way was sufficient. "It certainly aided him," said the court, "to the extent that he was not arrested and punished for the crime until the perjury was discovered, and but for this discovery the aid which defendant attempted to give him, would have proved effectual in affording him complete immunity from apprehension, trial and punishment."

Witness Accepting Bribe. — In Chitister *v.* State, 33 Tex. Crim. App. 635, 28 S. W. 683, it was held that where a witness accepted property to secure his departure from the state in order to be rid of his testimony against a felon, it did not, of itself, constitute him an accessory after the fact, but that he must have concealed the accused or given him some aid, so that he may have evaded

D. Accessory's Intent. — It must be shown that the assistance of whatever kind, given by the defendant to the principal felon,

an arrest or trial, or the execution of his sentence.

Averting Suspicion, Taking Care of Families, etc.—In State *v.* Stanley, 48 Iowa 221, averting suspicion against the parties, agreeing to or taking care of their families while absent, and other similar acts, are held sufficient.

Relieving a Felon With Clothes, Food, etc.—*From Charity.*—In 4 Blk. Com. 38, the author says: "To relieve a felon in jail with clothes or other necessaries is no offense, for the crime imputable to this species of accessories is the hindrance to public justice by assisting the felon to escape the vengeance of the law."

Intention Must Be to Aid in Escaping From Arrest, Conviction or Punishment.—State v. Reed, 85 Mo. 194; Melton *v.* State, 43 Ark. 367; Carroll *v.* State, 45 Ark. 539; Hearn *v.* State (Fla.), 29 So. 433.

In Gatlin *v.* State, 40 Tex. Crim. App. 116, 49 S. W. 87, it is held that it is not essential that the aid rendered the criminal shall be of a character to enable him to effect his personal escape or concealment, but it is sufficient if it enables him to evade present arrest and prosecution.

Contrary Rule.—In People *v.* Pedro, 19 Misc. 300, 43 N. Y. Supp. 44, the court having instructed the jury that "there is only one element of doubt in the case . . . and that is this: Whether or not this defendant, on the day named in the indictment was at Sheepshead Bay with the intention merely to relieve his friend, honestly, who was in trouble, or whether he was there to shield a person who had committed a crime against the laws, and to aid him to escape from justice," the supreme court said of this portion of the charge: "It is also to be noted that the words 'to shield a person who had committed a crime against the laws, and to aid him to escape from justice' is not a correct definition of the crime charged. It conveys to the jury the idea that if the defendant had used any means to shield Fino, and enable him to escape justice, he was guilty of being an accessory. But this is far from being the law. One cannot be found guilty as an accessory to a felony, except upon proof that he gave personal assistance to the felon, with intent to enable him to physically get away; such as to conceal him, to furnish him with a horse, and the like. Whart. Crim. Law, § 241; People *v.* Dunn, 53 Hun 381, 6 N. Y. Supp. 805. That he endeavored to get the complainant to fail to identify, or to forget, or not to prosecute, or suborned witnesses, or the like, does not make out the crime."

Aid After Felon Has Escaped in Foreign Country.—In People *v.* Dunn, 53 Hun 381, 6 N. Y. Supp. 805, it was claimed that several witnesses produced on behalf of the state were accessories, and therefore, accomplices whose testimony required corroboration. The supreme court said. "To constitute an accessory, it is not sufficient to assist the prisoner to elude punishment, because failing to prosecute or preventing the attendance of witnesses would produce that result. But to constitute the offense, one must help the principal to elude or evade capture. None of the witnesses referred to were cognizant of the crime until long after its commission and until the defendant was secure from capture by his escape to a foreign country. None except his wife rendered any aid or assistance to him, except so far as they intervened or assisted in negotiating for a compromise with the bank."

Aid Must Be An Act; Not Mere Words.—A mother, to shield her husband, advised her daughter to testify falsely as to the paternity of the daughter's child. The court said that no overt act was done by the mother, nothing more than mere words, and that she was not an accessory after the fact. State *v.* Doty, 57 Kan. 835, 48 Pac. 145.

was so given with the criminal intent of aiding him to escape arrest, conviction or punishment.[24]

2. Defense. — A. Principal's Acquittal. — Proof of the principal's acquittal operates under the common law as a complete defense of the accessory, but, by statute in several of the states, the rule has been changed or modified.[25]

24. In Wren *v.* Com., 26 Grant (Va.) 952, the court said: "The true test (says Bish. § 634) whether what he did was after the fact is to consider whether what he did was done by way of personal help to his principal with the view of enabling his principal to elude punishment, the kind of help rendered appearing to be unimportant."

In State *v.* Fry, 40 Kan. 311, 19 Pac. 742, the evidence tended to show that the defendant knew of the principal's crime, and on account of that knowledge, went to the principal's office, for the purpose of securing himself in some business transactions. It was held that if the defendant went into the principal's office for any legitimate object, and in accomplishing that object, incidentally stated to the principal that a warrant was about to issue for his arrest, but without any intention of enabling the principal to escape, that would not render the defendant guilty, even if the principal, because of such information, accomplished his escape. To constitute this offense, there must always be a guilty intent.

Double Intent.—In State *v.* Reed, 85 Mo. 194, it is held that while the aid must be with intent and in order that the felon may escape, or avoid arrest, trial, conviction, or punishment, yet, if he has the guilty intent necessary to constitute the offense, and also some other intent, it will be sufficient.

Anxiety for Personal Safety.—In Melton *v.* State, 43 Ark. 367, and in Carroll *v.* State, 45 Ark. 539, it is held that concealment of crime from anxiety for personal safety is not sufficient to constitute one accessory after the fact.

25. Acquittal a Complete Defense. Ray *v.* State, 13 Neb. 55, 13 N. W. 2; Bowen *v.* State, 25 Fla. 645, 6 So. 459; McCarthy *v.* State, 44 Ind. 214, 15 Am. Rep. 232; State *v.* Ludwick, Phill. (N. C.) 401; State *v.* Jones, 101 N. C. 719, 8 S. E. 147; Johns *v.* State, 19 Ind. 421, 81 Am. Dec. 408.

In U. S. *v.* Crane, 4 McLean, 317, 25 Fed. Cas. No. 14,888, it was charged that P. stole the United States mail, and that the defendant furnished assistance to P., and feloniously afforded and furnished comfort and assistance by keeping and secreting the money taken from the stolen mail. P had been acquitted on a count for stealing mail containing bank notes, etc., and the court held, that if the accessory is charged with stealing bank notes, the principal must be convicted of stealing from the mail bank notes. It is not sufficient to show that he did, in fact, steal them, but if found, he must be convicted of stealing them, before the accessory can be punished.

When Acquittal No Bar.—Reg. *v.* Pulham, 9 Car. & P. 280; Reg. *v.* Hughes, Bell Crim. Cas. 242; People *v.* Bearss, 10 Cal. 68; People *v.* Newberry, 20 Cal. 439; State *v.* Bogue, 52 Kan. 79, 34 Pac. 410; State *v.* Patterson, 52 Kan. 335, 34 Pac. 784; People *v.* Kief, 126 N. Y. 661, 27 N. E. 556; Noland *v.* State, 19 Ohio 131; Evans *v.* State, 24 Ohio St. 458; State *v.* Mosley, 31 Kan. 355, 2 Pac. 782; State *v.* Cassady, 12 Kan. 550; State *v.* Jones, 7 Nev. 408; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320.

Effect of Statutory Provision. State *v.* Bogue, 52 Kan. 79, 34 Pac. 410; State *v.* Patterson, 52 Kan. 335, 34 Pac. 784; People *v.* Bearss, 10 Cal. 68; People *v.* Newberry, 20 Cal. 439; Evans *v.* State, 24 Ohio St. 458; Noland *v.* State, 19 Ohio 131.

In People *v.* Kief, 126 N. Y. 661, 27 N. E. 556, it is held that it was not error to reject the record of a principal's acquittal. The court said: "With the change effected by the

B. Relationship As Defense. — Under the common law, proof that the person who assisted the felon to escape was his wife at the time of such assistance, was a complete defense, but the exemption did not extend to any other of the felon's relatives. Now, by statutes in many of the states, it includes various other members of the family.[26]

C. Duress. — Proof that the defendant, in whatever assistance he may have given the principal, was acting from motives of personal safety, and not from any desire to aid him in his escape, is competent evidence for the defense.[27]

Penal Code, the distinction between principal and accessory has disappeared, and it is, therefore, immaterial whether one jointly indicted has been acquitted or not, the question of one defendant's guilt can not turn upon the establishment of the other's guilt; it is an independent issue to be tried out alone. Because of the changed conditions brought about by the Penal Code provision, reasoning upon previous practice is useless. At present, defendant must go to the jury upon such competent and relevant evidence as tends to prove his guilt and quite irrespectively of the extrinsic and irrelevant fact that one or more defendants jointly charged as accomplices have been acquitted upon their separate trials."

26. The Common Law Rule.— 4 Blk. Com. 38; 2 Hawk. P. C. 320; 1 Hale P. C. 621.

Relationship As a Defense Under State Statutes.— State *v.* Jones, 3 Wash. 175, 28 Pac. 254; Moore *v.* State, 40 Tex. Crim. App. 389, 51 S. W. 1108; State *v.* Davis, 14 R. I. 281.

In Edmonson *v.* State, 51 Ark. 115, 10 S. W. 21, the defendant was convicted of robbing the safe in the County Treasurer's office. Landers, another of the robbers, was a witness against him, and the prosecution introduced his wife for the purpose of corroboration. On the objection that she was an accessory after the fact, and as such an accomplice could not corroborate another accomplice, it was held that she was not an accessory after the fact.

In Arkansas, an "accessory after the fact," as defined by the statute, is a person who, after full knowledge that a crime has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of a crime, provided that persons standing to the accused, in the relation of parent, child, brother, sister, husband or wife, shall not be deemed accessories after the fact, unless to resist the lawful arrest of such offenders. The wife in concealing the husband also concealed the other felon. The Supreme Court said: "Whatever else may be the intent of the statute, it is certain it does not compel a wife to become an informer against her husband. He was *particeps criminis* with Edmonson in the case. If the evidence of his guilt was so interwoven with that of Edmonson's criminality that she could not inform against one without implicating the other, the statute would not visit her with the criminality of the offense for failing to do so. Her concealment of the crime would not, in that event, be attributed to the intent to shield Edmonson, which was necessary to make her an accomplice."

27. In Melton *v.* State, 43 Ark. 367, a witness was a member of an unlawful organization called the Southern Brotherhood, or Ku Klux, and as such assisted in whipping a person who was afterwards murdered by order of the organization. He was present when the death was resolved upon, but opposed it, and did nothing to further the execution of the plot. After the commission of the murder, he concealed it. This was done from motives of anxiety for his own safety, and not from any design to shield the guilty parties. It was held that these facts did not make him an accessory after the fact.

III. AIDERS AND ABETTORS.

1. Proof of Presence. — A. Necessity Of. — Aiders and abettors, called accessories at the fact by ancient common law writers, and now more generally known as principals in the second degree, cannot be convicted as such without proof of legal presence at the commission of the offense.[28]

Where Presence Not Required. — In states where the common law distinction between principals in the first and second degrees, and accessories before the fact has been abolished, it is held, that proof of presence, either actual or constructive, is unnecessary.[29]

B. May Be a Constructive Presence. — But proof of such facts as make out what the law calls a constructive presence will be sufficient.[30]

What Is Constructive Presence. — A constructive presence so as to make one who is aiding and abetting a principal in the crime will be established by proof showing that he acted at one and the same time, for the consummation of the crime, and was so situated as to be able to give aid with a view to insure the success of the common enterprise.[31]

28. Presence Necessary. — *England.*—Reg. *v.* Cuddy, 1 Car. & K. 210.

Arkansas.—Smith *v.* State, 37 Ark. 274.

Kentucky.—Able *v.* Com., 68 Ky. (5 Bush) 698.

Texas.—Little *v.* State, 35 Tex. Crim. App. 96, 31 S. W. 677; Truitt *v.* State, 8 Tex. App. 148.

Vermont.—State *v.* Valwell, 66 Vt. 558, 29 Atl. 1018.

Wisconsin.—Connaughty *v.* State, 1 Wis. 143; Ogden *v.* State, 12 Wis. 532, 78 Am. Dec. 754; Miller *v.* State, 25 Wis. 384.

In State *v.* Snell, 46 Wis. 524, 1 N. W. 225, the court said: "Persons whose will contributes to a felony committed by another as principal, while themselves too far away to aid in the felonious act, are accessories before the fact. Bish. Crim. Law § 673. Connaughty *v.* State, 1 Wis. 143. When such persons are not actually or constructively present, aiding or abetting in the commission of the felony, or in the conspiracy to commit it, they are not chargeable as principals, but only of the substantive offense of being accessories, if guilty of any offense."

29. *Alabama.*—Raiford *v.* State, 59 Ala. 106; Jolly *v.* State, 94 Ala. 19, 10 So. 606; Griffith *v.* State, 90 Ala. 583, 8 So. 812.

California.— People *v.* Newberry, 20 Cal. 439; People *v.* Bearss, 10 Cal. 68; People *v.* Rozelle, 78 Cal. 84, 20 Pac. 36; People *v.* Outeveras, 48 Cal. 19.

Illinois.—Baxter *v.* People, 8 Ill. (3 Gilm.) 368.

Iowa.— State *v.* Comstock, 46 Iowa 265.

Missouri.—State *v.* Fredericks, 85 Mo. 145; State *v.* Schuchmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842.

New York.—People *v.* Winant, 24 Misc. 361, 53 N. Y. Supp. 695.

Oregon.—State *v.* Steves, 29 Or. 85, 43 Pac. 947; State *v.* Branton, 33 Or. 533, 56 Pac. 267.

30. Actual Presence Not Necessary.— *Alabama.*— State *v.* Tally, 102 Ala. 25, 15 So. 722.

Indiana.—Tate *v.* State 6 Blackf. 111.

Louisiana.—State *v.* Donglass, 34 La. Ann. 523; State *v.* Poynier, 36 La. Ann. 572.

Missouri.—Green *v.* State, 13 Mo. 382.

New York.—McCarney *v.* People, 83 N. Y. 408, 38 Am. Rep. 456.

Ohio.—State *v.* Town, Wright 75.

Texas.—Colter *v.* State, 37 Tex. App. 284, 39 S. W. 576.

Virginia.—Dull *v.* Com. 25 Gratt. 965.

31. *United States.*—U. S. *v.* Har-

2. Proof of Aiding. — A. Generally. — But mere presence will not alone justify a conviction as an aider and abettor, but it must be proved that there is, either actual substantive aid, or a previous

ries, 2 Bond 311, 26 Fed. Cas. No. 15,309.

Alabama.—State *v.* Tally, 102 Ala. 25, 15 So. 722.

Indiana.—Tate *v.* State, 6 Blackf. 111.

Louisiana.—State *v.* Douglass, 34 La. Ann. 523; State *v.* Poynier, 36 La. Ann. 572.

Massachusetts.—Com. *v.* Knapp, 9 Pick. 495, 20 Am. Dec. 491.

Mississippi.—Hogsett *v.* State, 40 Miss. 522.

Missouri.—Green *v.* State, 13 Mo. 382.

Nevada.—State *v.* Hamilton, 13 Nev. 386.

New York.—McCarney *v.* People, 83 N. Y. 408, 38 Am. Rep. 456.

Ohio.—Breese *v.* State, 12 Ohio St. 146, 80 Am. Dec. 340.

Vermont.—State *v.* Valwell, 66 Vt. 558, 29 Atl. 1018.

Virginia.—Uhl *v.* Com., 6 Gratt. 706; Dull *v.* Com., 25 Gratt. 965.

In Com. *v.* Lucas, 2 Allen (Mass.) 170, court said that it was sufficient to hold a party as principal if it was proved that he acted with another in pursuance of a common design; that they acted at one and the same time for the fulfillment of the same preconcerted end, and that the former was so situated as to be able to furnish aid to his associate in the common enterprise.

When Part of Criminal Transaction Is at Distance.— In State *v.* Tally, 102 Ala. 25, 15 So. 722, it appeared that defendant sent a message from one town to another to prevent delivery of another message by which a victim would have been warned and would have escaped, and defendant was held constructively present where his message was delivered and the murder committed.

In McCarney *v.* People, 83 N. Y. 408, 38 Am. Rep. 456, defendant was not shown to have been present at the house where the property was taken nor in the immediate vicinity, but it was shown that he had a part in planning the theft, spying out the premises, learning the ways of the keeper. It was held that this was sufficient to go to the jury as evidence of aiding and abetting; that constructive presence was made out when it was shown that defendant acted with another with a common purpose; that he acted at the same time with the other for the fulfillment of the same end, and was so situated as to be able to give aid; and that waiting and watching at a convenient distance is sufficient, as if he be placed where he may learn the whereabouts and movements of the custodian of the property and be prepared to lure him away, or retard him, or give warning of his approach.

In Berry *v.* State, 4 Tex. App. 492, the court said that where there are several acts constituting one crime, each act done by a different person in the absence of the rest, but in the common design, all are jointly principals.

In State *v.* Hamilton, 13 Nev. 386, a party built a fire on top of a mountain in Eureka county which could be seen by his confederate in Nye county, thirty or forty miles distant, and was the signal agreed on to tell when the Wells Fargo & Co. treasure left Eureka. It was held that he was an aider and abettor in an attempt to rob the stage in Nye county and not an accessory.

In U. S. *v.* Harries, 2 Bond 311, 26 Fed. Cas. No. 15,309, it was held that where parties who were owners or interested in whiskey, though not personally present when the same was illegally removed, yet with intent to evade the tax aided in or took part in the means by which the spirits were removed, as by hiring the canal boat for the purpose, giving orders and directions for the removal, etc., they are so connected with the offense as to be constructively present.

Near Enough to Render Aid. Com. *v.* Knapp, 9 Pick. (Mass.) 495, 20 Am. Dec. 491; State *v.* Walker, 98 Mo. 95, 9 S. W. 646; Dull *v.* Com., 25 Gratt. (Va.) 965;

understanding with the principal, or knowledge on his part that the party is there for the purpose of aid and encouragement.[32]

Persons Present and Aiding Principal. — In the following cases it is held that all persons who are present either actually or constructively at the place where the crime is committed, and are either aiding, abetting, assisting or advising its commission, or are present for such purpose, are principals in the crime.[33]

State *v.* Pearson, 119 N. C. 871, 26 S. E. 117; Anderson *v.* State, 147 Ind. 445, 46 N. E. 901.

In Tate *v.* State, 6 Blackf. (Ind.) 111, the court said: "If, with the intention of giving assistance, a person should be near enough to afford it should it be needed, he is, in construction of law, present aiding and abetting."

32. Mere Presence Not Sufficient. In Reg. *v.* Young, 8 Car. & P. 644, a prosecution for dueling, it was said concerning persons present, not principals or seconds, that the question was whether they gave aid and assistance by countenance and encouragement; that mere presence was not enough but advice or assistance or going to the place to encourage and forward the conflict even if they said or did nothing, would sustain a conviction.

United States.—U. S. *v.* Neverson, 1 Mackey 152.

Alabama.—State *v.* Tally, 102 Ala. 25, 15 So. 722.

California.—People *v.* Ah Ping, 27 Cal. 489.

Iowa. — State *v.* Farr, 33 Iowa 553.

Kentucky.—Ward *v.* Com., 77 Ky. (14 Bush) 233.

North Carolina.—State *v.* Hildreth, 9 Ired. 440, 51 Am. Dec. 369.

Texas.—Tittle *v.* State, 35 Tex. Crim. App. 96, 31 S. W. 677.

Virginia.—Kemp *v.* Com., 80 Va. 443; Reynolds *v.* Com., 33 Gratt. 834.

Washington.—State *v.* Klein, 19 Wash. 368, 53 Pac. 364.

Presence Without Interference to Prevent Crime.—Ward *v.* Com., 77 Ky. 233; People *v.* Ah Ping, 27 Cal. 489; People *v.* Woodard, 45 Cal. 293, 13 Am. Rep. 176; State *v.* Hildreth, 9 Ired. (N. C.) 440, 51 Am. Dec. 369; Brown *v.* Perkins, 1 Allen (Mass.) 89.

Presence and Constrained Sanction of Crime.—Butler *v.* Com., 63 Ky. (2 Duvall) 435.

Mental Approval Not Sufficient. In State *v.* Wolf, (Iowa) 84 N. W. 536, the court said: "It has never been held so far as we are advised, that mere presence at the scene of crime constitutes aiding and abetting . . . Nor is it sufficient in addition thereto that the person present mentally approves what is done."

Mere Presence Where There Is Previous Conspiracy.—In Leslie *v.* State, (Tex. Crim. App.), 57 S. W. 659, it is held that where defendant has previously agreed with the principal to kill deceased, and is present at the time of killing, in pursuance of the conspiracy he would be guilty although he may have done no act. That under certain circumstances mere presence at the place where the crime is committed may be a sufficient act of encouragement.

Must Be Both Aiding and Abetting.—People *v.* Compton, 123 Cal. 403, 56 Pac. 44; People *v.* Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; White *v.* People, 81 Ill. 333. *See* Connaughty *v.* State, 1 Wis. 143.

In Lawrence *v.* State, 68 Ga. 289, it is held error to charge that aiding or abetting is sufficient.

33. *United States.*—U. S. *v.* Wilson, Baldw. 78, 28 Fed. Cas. No. 16,730; U. S. *v.* Snyder, 14 Fed. 554; U. S. *v.* Hughes, 34 Fed. 732; U. S. *v.* Boyd, 45 Fed. 851.

Alabama.—Amos *v.* State, 83 Ala. 1, 3 So. 749, 3 Am. St. Rep. 682.

Connecticut.—State *v.* Wilson, 30 Conn. 500.

Georgia. — Hawkins *v.* State, 13 Ga. 322, 58 Am. Dec. 517.

Illinois.—Brennan *v.* People, 15 Ill. (5 Peck) 511.

Indiana.—Williams *v.* State, 47 Ind. 568.

B. Assisting in Unlawful Act. — One may be guilty of mur-

Kansas.—State *v.* Shenkle, 36 Kan. 43, 12 Pac. 309.

Louisiana.—State *v.* Ellis, 12 La. Ann. 390; State *v.* Littell, 45 La. Ann. 655, 12 So. 750.

Massachusetts.—Com. *v.* Stevens, 10 Mass. 181.

Michigan.—People *v.* Repke, 103 Mich. 459, 61 N. W. 861.

Mississippi.—McCarty *v.* State, 4 Cushm. 299.

Missouri.—State *v.* Nelson, 98 Mo. 414, 11 S. W. 997; State *v.* Miller, 100 Mo. 606, 13 S. W. 832; State *v.* Crab, 121 Mo. 554, 26 S. W. 548; State *v.* Brown, 104 Mo. 365, 16 S. W. 406.

Nebraska.—Hill *v.* State, 42 Neb. 503, 60 N. W. 916.

Nevada.—State *v.* Squaires, 2 Nev. 226.

New Hampshire. — State *v.* McGregor, 41 N. H. 407.

New Jersey.—State *v.* Hess, (N. J.) 47 Atl. 806.

North Carolina.—State *v.* Gaston, 73 N. C. 93, 21 Am. Rep. 459.

Ohio.—Warden *v.* State, 24 Ohio St. 143.

South Carolina.—State *v.* Fley, 2 Brev. 338, 4 Am. Dec. 583.

Texas.—Dunman *v.* State, 1 Tex. App. 593; Mills *v.* State, 13 Tex. App. 487.

Mere Presence for the Purpose of Aid Without Principal's Knowledge. In State *v.* Tally, 102 Ala. 25, 15 So. 722, the court said that mere presence for the purpose of rendering aid, is not aid, in the substantive sense; nor is it aid in the original sense of abetting, nor abetting in any sense, unless at the very least, the principal knew of the presence with intent to aid of such person; for manifestly in such case, the only aid possible would be the incitement and encouragement of the fact that another was present for the purpose of assistance and with the intent to assist if necessary; and the fact of presence and purpose to aid, could not incite, encourage or embolden the principal, unless he knew of the existence of that fact.

Watching to Prevent Surprise, etc. *Arkansas.* — Thomas *v.* State, 43 Ark. 149.

Indiana.—Doan *v.* State, 26 Ind. 495.

Massachusetts.—Com. *v.* Knapp, 9 Pick. 495, 20 Am. Dec. 491.

Michigan.—People *v.* Repke, 103 Mich. 459, 61 N. W. 861.

New York.—McCarney *v.* People, 83 N. Y. 408, 38 Am. Rep. 456; People *v.* Boujet, 2 Park. Crim. 11.

Ohio.—Stephens *v.* State, 42 Ohio St. 150; Hess *v.* State, 5 Ohio (5 Ham.) 5, 22 Am. Dec. 767; State *v.* Town, Wright 75.

Texas.—Selvidge *v.* State, 30 Tex. 60; Earp *v.* State, (Tex.), 13 S. W. 888.

In McCarney *v.* People, 83 N. Y. 408, 38 Am. Rep. 456, the court said: "A waiting and watching at convenient distance is enough."

In Selvidge *v.* State, 30 Tex. 60, it was held that if defendants did not remove stolen horses from the lot of the owner but were near enough to keep watch and were actually acting with those who went for and took possession of the horses, they were guilty as principal.

When Knowledge by Principal Essential.— In State *v.* Tally, 102 Ala. 25, 15 So. 722, four men went in pursuit of a man to murder him. A warning dispatch was sent. If this dispatch had been delivered in time it might have aided the man to get away. But another person not connected by the evidence with the original plot to murder, but who had the same motive for murder as the others, having found out the contents of the message, and for the purpose of enabling the pursuers to succeed, sent a message to the operator where the first message was to be delivered, in consequence of which the first was not delivered, and the man was murdered. It was held that there was such aid as made the sender of the second message guilty as an aider and abettor, although the principals did not know of the assistance so given.

In Jordan *v.* State, 81 Ala. 20, 1 So. 577, it was held that in order to convict the defendant as an aider and abettor the jury should be satisfied beyond a reasonable doubt, that there was either a previous understanding

der, although he neither took part in the killing nor assented to any arrangement having for its object the death of the person murdered. It is sufficient to prove that he combined with those committing the deed, to do an unlawful act, as to beat or rob the person, who was killed in the attempt to carry out the common purpose.[34]

C. Aiding in One of Several Acts Constituting One Crime. A crime may consist of many acts which must all be committed in order to complete the offense; evidence that defendant was present, consenting to the commission of the offense and doing any one act which is either an ingredient in the crime or immediately connected with or leading to its commission, is sufficient for his conviction as a principal.[35]

3. Criminal Intent of Aider. — It is not sufficient to prove that assistance was actually given by the defendant to the principal, but it must be proved that such assistance was given with intent to aid in commission of the crime.[36]

4. Proof Must Show Crime Committed. — The evidence must not only show that the principal did the criminal act, but that it was

to kill or injure the deceased, or that he had knowledge of the intent or design of his brother or of facts from which such knowledge may be inferred.

Where There Is Actual Aid No Previous Agreement Required. People *v.* Jamarillo, 57 Cal. 111.

34. Brennan *v.* People, 15 Ill. 511.

35. U. S. *v.* Wilson, Baldw. 78, 28 Fed. Cas. No. 16,730; Com. *v.* Lowrey, 158 Mass. 18, 32 N. E. 940.

Aid or Assistance By One Incapable of Committing the Crime. U. S. *v.* Snyder, 8 Fed. 805 and 14 Fed. 554; State *v.* Sprague, 4 R. I. 257; Boggus *v.* State, 34 Ga. 275; State *v.* Comstock, 46 Iowa 265.

36. An Individual Criminal Intent Necessary.—People *v.* Leith, 52 Cal. 251; State *v.* Farr, 33 Iowa 553; State *v.* Maloy, 44 Iowa 104; Ward *v.* Com., 77 Ky. (14 Bush) 233.

In Leslie *v.* State, (Tex. Crim. App.), 57 S. W. 659, it is held that every defendant on a trial for homicide is to be judged according to his own intent, and where he is a principal in the second degree, he is not to be tried solely according to the intent of his own principal in the first degree, but is to be tried according to the intent with which he may have participated. It is held that it must be proved that the principal in the second degree of his malice aforethought, etc. was present aiding, etc.; that the doctrine which everywhere pervades our criminal law, that a defendant is to be judged according to his own intent should never be ignored, especially in a capital case.

Detectives.—State *v.* Douglass, 44 Kan. 618, 26 Pac. 476; Allen *v.* State, 40 Ala. 334, 91 Am. Dec. 477; Speiden *v.* State, 3 Tex. App. 156, 30 Am. Rep. 126; Reg. *v.* Johnson, 41 Eng. C. L. 123; State *v.* Jansen, 22 Kan. 498.

Aiding Detective or Decoy.—In Allen *v.* State, 40 Ala. 334, 91 Am. Dec. 477, the proof showed that the prisoners proposed to a servant a plan for robbing his employer's office by night. The servant disclosed the plan to his master, who then furnished the servant with keys, and the servant and prisoner went together to the office; the servant opened the door with the key, and they both entered and were at once arrested. It was held the prisoner could not be convicted of burglary, because whatever was done was done by his supposed accomplice, who had no criminal intent.

In Savage *v.* State, 18 Fla. 909, it is held that in order to convict of murder in the first degree, it should be shown that the person aiding and abetting knew or believed the principal intended to kill, or that the

done by him with such intent, or in such way, as to make it a crime.[37]

5. Record of Principal's Conviction or Acquittal Irrelevant. —The facts constituting one an aider and abettor, are proved as the same facts are proved in any other criminal prosecution. There is no such relation of dependence as exists in the case of accessories before and after the fact; but, the defendant is tried without any regard to the trial of his principal, and the record, either of conviction or acquittal of such principal, is not competent evidence on the trial of an aider and abettor.[38]

person aiding and abetting acted on a premeditated design to take life.

37. Crime Committed Need Not Be in Pursuance of Intent Common to All.—Where the statute authorizes the conviction of one who shall have aided, counseled, advised or encouraged another in an offense, it need not be shown that the one aiding, etc. must have done so in pursuance of an understanding or intent common to any or all the participants. Howard *v.* Com., 96 Ky. 19, 27 S. W. 854.

In State *v.* Douglass, 44 Kan. 618, 26 Pac. 476, it is held that proof that one who acted in the employ of a railroad company for the purpose of entrapping another into the commission of a crime, placed an obstruction on the track, with an understanding that another agent of the company would come along and remove it, did not show a crime committed by the person so placing the obstruction, and that though another consented to the act with the criminal intention that it should wreck the train, yet, he was not guilty as an aider and abettor. The law does not make the consenting to a thing which is innocent in itself an offense, although the person consenting thereto may have believed the thing to be an offense.

38. Acquittal of Principal Not Competent Evidence. — State *v.* Ricker, 29 Me. 84; State *v.* Phillips, 24 Mo. 475; State *v.* Jones, 7 Nev. 408; People *v.* Buckland, 13 Wend. (N. Y.) 592.

In State *v.* Ross, 29 Mo. 32, the record of the acquittal of one charged as principal in the first degree, is held to be inadmissible as evidence on trial of aider and abettor.

In State *v.* Whitt, 113 N. C. 716, 18 S. E. 715, it is held that one may be convicted of murder in the second degree, though the person who did the killing has been acquitted.

ACCIDENT.—See Death; Insurance; Negligence.

ACCIDENT INSURANCE.—See Insurance.

ACCOMMODATION PAPER.—See Bill and Notes.

ACCOMPLICES.

By W. L. Campbell.

CROSS-REFERENCES.

Accessories;
Corroboration;
Intent; Impeachment.

I. GENERAL CLASSIFICATION.

An accomplice in the law of evidence signifies a witness who is implicated in the crime about which he testifies.[1]

There are two classes of accomplices: (1) Where the witness testifies under a promise of immunity from punishment; (2) where he testifies as an ordinary witness.

II. TESTIFYING UNDER PROMISE.

1. Acceptance of the Witness. —A. Must Be Accepted.—Where the accomplice testifies under a promise his testimony is not received as of course, like that of other witnesses, but he must be accepted.[2]

B. Modern Practice As To. — a. *A Continuation of Common Law.* — The modern practice of using accomplices as witnesses for the state, with a promise of immunity, is a continuation of the common law, where accomplices were generally witnesses for the crown, who, having confessed their own guilt, were permitted to testify against those associated with them in the same crime.[3]

1. A fuller discussion of the meaning of the word accomplice, and what constitutes an accomplice, will be found in Part III, Subdivision 2, where, being treated as ordinary witnesses, the character is not assumed at the outset, but left to be decided by the court or jury.

2. Wight *v.* Rindskopf, 43 Wis. 344; People *v.* Whipple, 9 Cow. (N. Y.) 707; Lindsay *v.* People, 63 N. Y. 143.

3. **Whence Derived.** — The common law on the subject is derived from the ancient doctrine of approvement which Lord Hale in his Pleas of the Crown speaks of as having been already long disused. 3 Russ. on Crimes (9th Ed.) 596. But in Illinois this obsolete usage was so far recognized that a statute was passed expressly providing that "An approver shall not give evidence." Myers *v.* People, 26 Ill. 173. In Gray *v.* People, 26 Ill. 344, the court said:

"By the common law, approvement is said to be a species of confession, and incident to the arraignment of a prisoner indicted for treason or felony, who confesses the fact before plea pleaded, and appeals or accuses others, his accomplices, in the same crime, in order to obtain his own pardon. In this case he is called an approver, or prover, *probator*, and the party appealed or accused is called the appellee. Such approvement can only be in capital offense, and it is, as it were, equivalent to an indictment, since the appellee is equally called upon to answer it. 4 Blackstone's Com. 267.

"This course of admitting approvements has been long disused, and is now more a matter of curiosity than use, and it is strange that the legislature should have turned their attention to it. Porter was in no sense an approver. He was not indicted with Gray and Van Allen. He was an accomplice,

b. *Promise to the Witness.* —This testimony was upon a promise, express or implied, that the witness should secure immunity from punishment by faithful compliance with the terms on which his evidence was obtained.[4]

c. *Terms of the Promise.* — The terms were to tell the truth in his testimony about the crime and all persons concerned in it so far as he knew, as well of himself as of others.[5]

d. *Authority of Public Prosecutor.* — Some authorities hold that if the public prosecutor sees fit to enter a *nolle prosequi* as to an accomplice, for the purpose of using him as a witness against

and, being such, turned state's evidence, no doubt with the hope of escaping a prosecution. The evidence of such persons is, in general, admissible against the prisoner on trial."

4. Compliance With Terms Necessary. — Com. *v.* Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; People *v.* Whipple, 9 Cow. (N. Y.) 707; Whiskey Cases, 99 U. S. 594; Rex *v.* Rudd, 1 Leach 115.

Nature of Right Acquired. — If they did this to the satisfaction of the court they secured equitable rights to recommendation for pardon. These rights were not pardons and a witness might even be indicted, tried and punished afterwards and could not plead the right so acquired to save himself from prosecution, conviction and execution of sentence. Whiskey Cases, U. S. *v.* Ford, 99 U. S. 594.

Where No Pardoning Power Exists Before Conviction. — In New Jersey where the pardoning power did not exist until the conviction of the offender, the court in State *v.* Graham, 41 N. J. Law 18, 32 Am. Rep. 174 said:

"I think it has been quite a common practice in this state for the court to assent to the abandonment of indictments against accomplices who have been witnesses; indeed, I do not know of any instance in which a recommendation to mercy has ever been sent to the pardoning power in behalf of a criminal who had been used as a witness, at the instance of the state, a circumstance which shows conclusively that it has been the prevailing mode either to let the indictment drop, or for the court, with the assent of the prisoner, so to adjust its sentence as to supersede the necessity of a recommendation for a remission of the sentence of the law."

Continuance to Apply for Pardon. He might obtain a continuance for the purpose of giving him time to apply for a pardon and thus secure exemption from punishment. *Ex parte* Wells, 18 How. (U. S.) 307; Whiskey Cases, U. S. *v.* Ford, 99 U. S. 594.

5. Should Not Promise to Testify Against Defendant. — In State *v.* Miller, 100 Mo. 606, 13 S. W. 832, Mortimer agreed with the prosecuting attorney, that if that official would accept a plea from him of murder in the second degree, and would also *nolle* several indictments pending against him, that then he would "testify against Miller." The court said: "I do not believe that such a bargain as this to testify against the life of another should receive any countenance, or sanction in a court of justice, or that in the circumstances mentioned, Mortimer should have been admitted as a witness in the cause."

Necessary to Confess Guilt. — In *Ex parte* Bird, 2 Gilm. (Va.) 134, a person accused of the crime of murder, and jointly indicted with others for that offense, was not put on his trial but was used by the state's attorney as a witness on the trial of the others, who were convicted and executed. In giving his testimony he did not, in any way admit that he participated in the commission of the murder, neither did it appear in his petition by him filed that he was guilty or had been convicted of any crime. *Held* that he was not in condition to avail him-

another person concerned in the crime, it should be permitted as a matter of course.[6]

e. *Motion and Order of Court.*— **(1.) Statement of Public Prosecutor.** But other authorities hold that there should be a positive order of the court made upon the motion of the public prosecutor,[7] and that he should state, on making such motion, in substance, that he has investigated the facts of the case, and believes from such investigation, that the evidence of the accomplice is necessary to conviction, and will probably result in the conviction of the defendant.[8]

self of the privileges of an accomplice.

6. Cases Holding Plenary Authority in Public Prosecutor. — Runnels *v.* State, 28 Ark. 121; U. S. *v.* Hartwell, 26 Fed. Cas. No. 15,319.

In Whiskey Cases, U. S. *v.* Ford, 99 U. S. 594, the court says: "But the course of proceeding in the courts of many of the states is quite different from that just described, the rule being that the court will not advise the attorney-general how he shall conduct a criminal prosecution. Consequently it is regarded as the province of the public prosecutor and not of the court to determine whether or not an accomplice, who is willing to criminate himself and his associates in guilt, shall be called and examined for the state.

"Of all others, the prosecutor is best qualified to determine that question, as he alone is supposed to know what other evidence can be adduced to prove the criminal charge. Applications of the kind are not always to be granted, and in order to acquire the information necessary to determine the question, the public prosecutor will grant the accomplice an interview, with the understanding that any communication he may make to the prosecutor will be strictly confidential. Interviews for the purpose mentioned are for mutual explanation, and do not absolutely commit either party; but if the accomplice is subsequently called and examined, he is equally entitled to a recommendation for executive clemency. Promise of pardon is never given in such an interview, nor any inducement held out beyond what the beforementioned usage and practice of the courts allow.

"Prosecutors in such a case should explain to the accomplice that he is not obliged to criminate himself, and inform him just what he may reasonably expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of his associates. When he fulfills those conditions he is equitably entitled to a pardon, and the prosecutor, and the court if need be, when fully informed of the facts, will join in such a recommendation."

See also the following Texas cases where it seems that the prosecuting officer acted after consultation with the court, but without an order of the court. Bowden *v.* State, 1 Tex. Crim. App. 137; Hardin *v.* State, 12 Tex. Crim. App. 186; Camron *v.* State, 32 Tex. Crim. App. 180, 22 S. W. 682, 40 Am. St. Rep. 763.

7. People *v.* Whipple, 9 Cow. (N. Y.) 707; *Ex parte* Bird, 2 Gilm. (Va.) 134; Rex *v.* Brunton, R. & R. 454; Ray *v.* State, 1 Greene (Iowa) 316, 48 Am. Dec. 379.

8. Judicial Discretion.—Admitting an accomplice to testify against his associates involves a selection between two or more persons, one of whom is guilty by his own confession, and is an exercise of judicial discretion. People *v.* Whipple, 9 Cow. (N. Y.) 707.

Implied Promise Although Accomplice More Guilty Than Was Supposed. — If the court admits an accomplice and he testifies as agreed there is an implied promise, although the evidence shows the accomplice to be more guilty than was supposed. U. S. *v.* Hinz, 35 Fed. 272.

Order Necessary. — The court, in Wight *v.* Rindskopf, 43 Wis. 344, takes the ground that the ad-

(2.) When Order Should Be Made. — And the court should not make an order unless it appears that the ends of public justice will be best subserved in that way.[9]

2. Evidence Accepted From Necessity. — The evidence obtained from the testimony of such witnesses is now universally looked upon

mission of an accomplice as a witness for the government upon an implied promise of pardon in any case is not at the pleasure of the public prosecutor, but rests in the judicial discretion of the court, and says:

"In a proper case, it is doubtless the duty of a public prosecutor to move for leave to use the accomplice as a witness. But there his discretion stops. And though courts must necessarily trust largely in such cases, to the view of the public prosecutor, yet they do not lightly give leave; and are always presumed to exercise their own judgment in view of all the circumstances. A public prosecutor may propose to an accomplice to become a witness for the prosecution; but an agreement to use him as a witness, upon any condition, without the sanction of the court, is a usurpation of authority, an abuse of official character and a fraud upon the court."

The following cases also hold that an order of court is necessary. Keech *v.* State, 15 Fla. 591; State *v.* Cook, 20 La. Ann. 145; People *v.* Lohman, 2 Barb. (N. Y.) 216; State *v.* Copperburg, 2 Strob. (S. C.) 273. In Whitney *v.* State, 53 Neb. 287, 73 N. W. 696, where a special counsel had made an agreement with the accomplice, and he had performed his part of the agreement and testified in behalf of the State against one Mills, the court said:

"The decided weight of authority sustains the doctrine that an agreement to turn state's evidence, made with the prosecuting officer alone, without the court's advice or consent, affords the defendant no protection in the event he is placed on trial in violation of the agreement."

9. Accomplice Not Usually Accepted where more deeply involved in crime than principal. U. S. *v.* Hinz, 35 Fed. 272; People *v.* Whipple, 9 Cow. (N. Y.) 707.

Discretion of Court Not Always Governed by question whether accomplice more or less guilty. U. S. *v.* Hinz, 35 Fed. 272.

In Lindsay *v.* People, 63 N. Y. 143, the court said:

"It is next objected that Vader, the confessed accomplice in the murder, was not a competent witness for the prosecution. The objection is made to rest upon the ground that the witness was a principal, at least equally guilty with the accused in the commission of the offense charged. It was in the discretion of the court of Oyer and Terminer to refuse the application of the district attorney to enter a *nolle prosequi* of the indictment against Vader, and thus deprive The People of his evidence, but the exercise of that discretion is not reviewable upon error. Accomplices may in all cases, by the permission of the court, be used by the government as witnesses in bringing their confederates and associates to punishment, and whether more or less guilty does not affect their competency, but the extent of their guilt, and the nature of their offence go to their credit with the jury. The rule contended for by counsel for the accused would exclude all guilty parties, except accessories before or after the fact, or those who act under some duress, or by the direction or under the influence of others."

In People *v.* Whipple, 9 Cow. (N. Y.) 707, where a wife was indicted for murdering her husband, and Strang, who originated the plot to murder, and himself actually fired the fatal shot, and had been convicted of the crime, was before judgment offered as an accomplice against her, the court rejected the offer and refused to receive his testimony.

as coming from a polluted source. They are nowhere received but from necessity and policy.[10]

3. Character As an Accomplice Assumed at Outset. — Where a witness is accepted as an accomplice, and permitted to testify under a promise, his character is assumed at the outset, and as against the state, he is conclusively presumed to be an accomplice at every stage of the case whether so in fact or not.[11]

4. Examination. —A. Refusing to Criminate Self.—*a. Before Testifying.* — Although the accomplice has before the trial admitted his guilt, yet he may on the stand refuse to criminate himself, but in that event he forfeits his claim for immunity.[12]

10. Not Now Favored. — *United States.*—U. S. *v.* Lancaster, 2 McLean, 431, 26 Fed. Cas. No. 15,556; U. S. *v.* Henry, 4 Wash. 428, 26 Fed. Cas. No. 15,351; U. S. *v.* Troax, 3 McLean 224, 28 Fed. Cas. No. 16,540; U. S. *v.* Smith, 2 Bond 323, 27 Fed. Cas. No. 16,322.

Alabama.—Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95; Marler *v.* State, 68 Ala. 580.

Colorado.—Solander *v.* People, 2 Colo. 48.

Connecticut.—State *v.* Shields, 45 Conn. 256.

Illinois.—Gray *v.* People, 26 Ill. 344; Earll *v.* People, 73 Ill. 329.

Indiana.—Johnson *v.* State, 2 Ind. 652; Ayers *v.* State, 88 Ind. 275.

Iowa.—Ray *v.* State, 1 Greene 316, 48 Am. Dec. 379.

Louisiana.—State *v.* Cook, 20 La. Ann. 145.

Maine.—Moulton *v.* Moulton, 13 Me. 110; Sinclair *v.* Jackson, 47 Me. 102, 74 Am. Dec. 476.

Montana.—Territory *v.* Corbett, 3 Mont. 50.

New York.—People *v.* Costello, 1 Denio 83; People *v.* Lohman, 2 Barb. 216.

Ohio.—Noland *v.* State, 19 Ohio 131.

In People *v.* Whipple, 9 Cow. (N. Y.) 707, the court said: "The evidence of accomplices has at all times been admitted, either from a principle of public policy, or from judicial necessity, or from both. They are, no doubt, requisite as witnesses in particular cases; but it has been well observed, that in a regular system of administrative justice, they are liable to great objections. 'The law,' says one of the ablest and most useful modern writers upon criminal jurisprudence, 'confesses its weakness, by calling in the assistance of those by whom it has been broken. It offers a premium to treachery and destroys the last virtue which clings to the degraded transgressor. On the other hand, it tends to prevent any extensive agreement among atrocious criminals, makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate."

Has Been Favored in England. In Ray *v.* State, 1 Greene (Iowa) 316, 48 Am. Dec. 379, it is said that courts in England have in some instances regarded this class of accomplices with favor.

11. Admission of Character Conclusive. — In Com. *v.* Desmond, 5 Gray (Mass.) 80, the court says: "The bill of exceptions shows that the counsel for the Commonwealth assumed and claimed that Healy, the witness, was an accomplice. He was offered as such, and from the facts reported it would seem rightly. But whether this were so or not the admission of the fact in court by the district attorney for the purposes of the trial was, as against the government, conclusive evidence of such fact."

12. Forfeits Right. — In U. S. *v.* Hinz, 35 Fed. 272, the accomplice, Hinz, having testified fully before the grand jury, afterwards refused to go on the stand as a witness, and by so doing compelled the prosecuting attorney to seek other evidence and grant immunity to another conspirator. By this action it was held that he forfeited all right equitable

b. *After Testifying.* — But if he testifies to his own guilt on the examination in chief, the privilege is no longer of any value, and he can not claim it on cross-examination.[13]

c. *As to Other Crimes* — As the implied promise concerning the pardon does not extend to other crimes than that for which the defendant is on trial, the accomplice does not forfeit his right under such promise by refusing to testify as to his own guilt of other crimes.[14]

5. Corroboration. — A. When Not Required. — a. *Accomplice Not Without Credit.* — Although the accomplice being guilty is in a measure an impeached witness, yet he is not for that reason alone wholly without credit.[15]

or otherwise, to immunity or leniency.

Statements Elsewhere Do Not Waive Privilege. — In Overend *v.* San Francisco Superior Court, 131 Cal. 280, 63 Pac. 372, the court said: "It appears that the trial court based its judgments of contempt largely upon the ground that the witness had without objection, testified at the preliminary examination of Minnie Campbell, and for that reason had waived his right to refuse to testify at the trial upon the ground that his evidence would tend to convict him of a felony. The position of the court in this regard is untenable. The question of waiving the privilege is discussed and decided in Temple *v.* Com., 75 Va. 896, and Cullen's Case, 24 Gratt. 624. It is said in those cases that the witnesses' statements have nothing to do with the question."

13. *Minnesota.* — State *v.* Nichols, 29 Minn. 357, 13 N. W. 153.

Mississippi. — Jones *v.* State, 65 Miss. 179, 3 So. 379.

New Hampshire. — Amherst *v.* Hollis, 9 N. H. 107.

New York. — People *v.* Lohman, 2 Barb. 216.

Cannot Refuse to Answer. — In Foster *v.* People, 18 Mich. 266, where the question was whether the accomplice, after voluntarily undertaking to explain the transactions connected with the larceny, and the disposition of the property involved in the charge on trial, and after answering fully the direct questioning of the prosecution, and unequivocally criminating himself to the extent of complete legal guilt of larceny of that property, can then refuse to answer further and be protected against further disclosures relating to the same transactions, the court holding that he could not be so protected, said:

"It would certainly lead to most startling results if an accomplice, who has made out a clear showing of a prisoner's guilt, and has, in doing so, criminated himself to an equal degree, could refuse to have his veracity, or fairness, or bias, or corruption, tested by a cross-examination, and yet be allowed to stand before court and jury on the same footing with any other witness who has been perfectly candid, but who may have been convicted of a similar felony. . . .

"Accordingly, where a witness has voluntarily answered as to material criminating facts, it is held with uniformity that he cannot then stop short and refuse further explanation, but must disclose fully what he has attempted to relate. This view is adopted by the text writers, and is very well explained in several of the authorities, where the principle is laid down and enforced."

14. When May Claim His Privilege. — In Pitcher *v.* People, 16 Mich. 142, the court said: "No man can be made a witness to testify to his own crimes except by his own consent; and consent to testify as to one transaction does not entitle either the government or the defense to make the examination inquisitorial, and thereby obtain evidence which might be used against him in future prosecutions."

15. Extent of Credit. — In State

b. *In Absence of Statute.* — Where there is no statute on the subject, a conviction on the uncorroborated testimony of an accomplice is valid.[16]

c. *Statutes Requiring Corroboration.* — By statute in some states, the common law rule that a defendant can be legally convicted on the uncorroborated testimony of an accomplice has been changed.[17]

B. JUDGE ADVISING JURY. — *a. Common Law.*—While admitting that a verdict of guilty, based upon the uncorroborated testimony of an accomplice is valid, yet courts have always looked upon such evidence with distrust, and have from a very early time usually advised the jury, that unless the accomplice is corroborated it is safer to acquit.[18]

v. Wolcott, 21 Conn. 272, the court said: "The testimony of an accomplice is admissible and, of course, to some extent, is presumed to be credible. The law would not admit proof which it had decided *a priori* should not be believed when admitted." Craft *v.* State, 3 Kan. 450; People *v.* Costello, 1 Denio (N. Y.) 83; People *v.* Lee, 2 Utah 441.

16. Conviction Held Valid. *England.* — Rex. *v.* Boyes, 1 B. & S. 311, 101 Eng. C. L. 309.

Illinois. — Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474.

Missouri. — State *v.* Crab, 121 Mo. 554, 26 S. W. 548; State *v.* Harkins, 100 Mo. 666, 13 S. W. 830; State *v.* Jackson, 106 Mo. 174, 17 S. W. 301.

New York. — People *v.* Costello, 1 Denio 83; Dunn *v.* People, 29 N. Y. 523, 86 Am. Dec. 319; Haskins *v.* People, 16 N. Y. 344; People *v.* Haynes, 38 How. Pr. 369.

No Positive Rule for Corroboration at Common Law. — *Canada.* — Reg. *v.* Fellowes, 19 U. C. Q. B. 48.

United States.—U. S. *v.* Flemming, 18 Fed. 907; Steinhau *v.* U. S., 2 Paine 168, 22 Fed. Cas. No. 13,355; U. S. *v.* McKee, 3 Dill. 546, 26 Fed. Cas. No. 15,685.

Arkansas.—McKenzie *v.* State, 24 Ark. 636.

California.—People *v.* Garnett, 29 Cal. 622.

Colorado.—Solander *v.* People, 2 Colo. 48.

Connecticut.—State *v.* Wolcott, 21 Conn. 272; State *v.* Stebbins, 29 Conn. 463, 79 Am. Dec. 223; State *v.* Williamson, 42 Conn. 261.

Florida.—Sumpter *v.* State, 11 Fla. 247.

Georgia.—Parsons *v.* State, 43 Ga. 197; Phillips *v.* State, 34 Ga. 502.

Illinois.—Collins *v.* State, 98 Ill. 584, 38 Am. Rep. 105; Earll *v.* People, 73 Ill. 329; Gray *v.* People, 26 Ill. 344; Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474.

Indiana.—Johnson *v.* State, 2 Ind. 652; Ayers *v.* State, 88 Ind. 275; Stocking *v.* State, 7 Ind. 326.

Iowa.—State *v.* Schlagel, 19 Iowa 169.

Louisiana.—State *v.* Cook, 20 La. Ann. 145.

Maine.—State *v.* Litchfield, 58 Me. 267.

Michigan.—Foster *v.* People, 18 Mich. 266.

Mississippi. — Dick *v.* State, 30 Miss. 593.

Missouri.—State *v.* Watson, 31 Mo. 361.

Nebraska.—State *v.* Sneff, 22 Neb. 481, 35 N. W. 219.

New York.—People *v.* Haynes, 55 Barb. 450.

Ohio.—Lee *v.* State, 21 Ohio St. 151.

South Carolina.—State *v.* Brown, 3 Strob. 508.

Texas.—Lopez v. State, 34 Tex. 133.

Vermont.—State *v.* Potter, 42 Vt 495.

17. People *v.* Ames, 39 Cal. 403; People *v.* Melvane, 39 Cal. 614; People *v.* Cloonan, 50 Cal. 449; People *v.* Farrell, 30 Cal. 316; People *v.* Smith, 98 Cal. 218, 33 Pac. 58; Moses *v.* State, 58 Ala. 117; Smith *v.* State, 59 Ala. 104; Lumpkin *v.* State, 68 Ala. 56; Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95.

18. Practice Generally Observed.

b. *General Practice in Absence of Statutes* — The general practice now, where the subject is not regulated by statute, is to advise the jury not to convict unless the testimony is corroborated.[19]

c. *Discretion of Court.* — But the authorities are not uniform as to how far the giving of the advice is in the discretion of the court.[20]

In Reg. *v.* Farler, 8 Car. & P. 106, 34 Eng. C. L. 314, Lord Abinger, C. B., said: "It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material circumstance." State *v.* Potter, 42 Vt. 495; Collins *v.* People, 98 Ill. 584, 38 Am. Rep. 105.

19. Omission to Advise an Omission of Duty. — In Solander *v.* People, 2 Colo. 48, the court said: "Courts will in their discretion advise a jury not to convict of a felony upon the testimony of an accomplice alone and without corroboration, and it is now so generally the practice to give them such advice that its omission would be regarded as an omission of duty on the part of the judge." Com. *v.* Bosworth, 22 Pick. (Mass.) 397. See also State *v.* Coldman, (N. J.,) 47 Atl. 641; State *v.* Concannon, (Wash.,) 69 Pac. 534; Smith *v.* State (Wyo.,) 67 Pac. 977; Reg. *v.* Beckwith, 8 U. C. C. P. (Can.) 274.

20. Regardless of Request. Other cases hold that advising the jury is altogether in the discretion of the court whether requested or not.

Colorado.—Solander *v.* State, 2 Colo. 48; Wisdom *v.* People, 11 Colo. 170, 17 Pac. 519.

Connecticut.—State *v.* Maney, 54 Conn. 178, 6 Atl. 401.

Florida.—Keecher *v.* State, 15 Fla. 591.

Illinois.—Collins *v.* People, 98 Ill. 584, 38 Am. Rep. 105; Earll *v.* People, 73 Ill. 329.

Indiana. — Stocking *v.* State, 7 Ind. 326.

Massachusetts.—Com. *v.* Larrabee, 99 Mass. 413; Com. *v.* Clune, 162 Mass. 206, 38 N. E. 435; Com. *v.* Savory, 10 Cush. 535.

Minnesota.—State *v.* McCartey, 17 Minn. 76.

Mississippi.—George *v.* State, 39 Miss. 570; Strawhern *v.* State, 37 Miss. 422; Lee *v.* State, 51 Miss. 566; White *v.* State, 52 Miss. 216; Fitzcock *v.* State, 52 Miss. 923.

Nebraska.—Carroll *v.* State, 5 Neb. 31.

New York.—Lindsay *v.* People, 63 N. Y. 143; People *v.* Costello, 1 Denio 83.

Ohio.—Allen *v.* State, 10 Ohio St. 288; Brown *v.* State, 18 Ohio St. 497.

Vermont.—State *v.* Potter, 42 Vt. 495.

West Virginia. — State *v.* Betsall, 11 W. Va. 703.

Request Not Necessary. — Cases in which it is held that advice or instruction is necessary whether requested or not, and the neglect to give it, reversible error.

Connecticut.—State *v.* Stebbins, 29 Conn. 463, 79 Am. Dec. 223.

Iowa. — Ray *v.* State, 1 Greene 316, 48 Am. Dec. 379.

Massachusetts.—Com. *v.* Bosworth, 22 Pick. 397.

Missouri.—State *v.* Jones, 64 Mo. 391.

Texas.—Parr *v.* State, 36 Tex. Crim. App. 493, 38 S. W. 180; Winn *v.* State, 15 Tex. App. 169; Howell *v.* State, 16 Tex. App. 93; Stone *v.* State, 22 Tex. App. 185, 2 S. W. 585; Boren *v.* State, 23 Tex. App. 28, 4 S. W. 463; Boyd *v.* State, 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908; Wicks *v.* State, 28 Tex. App. 448, 13 S. W. 748; Owens *v.* State, (Tex. Crim. App.,) 20 S. W. 558; Stewart *v.* State, 35 Tex. Crim. App. 174, 32 S. W. 766, 60 Am. St. Rep. 35; Martin *v.* State, 36 Tex. Crim. App. 632, 36 S. W. 587; Coburn *v.* State, 36 Tex. Crim. App. 257, 36 S. W. 442; Brown *v.* State, (Tex. Crim. App.,) 20 S. W. 924; White *v.* State (Tex. Crim. App.,) 62 S. W. 749.

Rule Stated. — In State *v.* Jackson, 106 Mo. 174, 17 S. W. 301, the trial court instructed the jury that

d. *Verdict of Guilty Notwithstanding Advice.* — Such charge is in the nature of advice, and the jury may nevertheless render a verdict of guilty.[21]

C. JURY MISLED. — Even in jurisdictions where a jury may render a verdict upon the uncorroborated testimony of an accomplice, if they have been or may have been led to believe that such testimony has been corroborated when the evidence is not legally sufficient for that purpose, a verdict of guilty will be set aside.[22]

D. INSTRUCTIONS UNDER STATUTE. — Where by statute it has become necessary to the validity of the verdict that the testimony of the accomplice should be corroborated, the charge of the court constitutes an instruction and not mere advice, and must be followed.[23]

the defendant could not be convicted on the testimony of the accomplice without corroboration, and the court stated the true rule to be that "a conviction can be had upon the testimony of an accomplice, if the jury, after being duly cautioned by the court, is fully satisfied that his testimony is true." State *v.* Koplan, (Mo.,) 66 S. W. 967.

Duty of Court to Give Caution. The court *reversing* judgment of conviction in Parr *v.* State, 36 Tex. Crim. App. 493, 38 S. W. 180, says: "Regardless of any exceptions taken at the time, if there was testimony tending to show that any of the witnesses upon whom the state relied for a conviction, were accomplices, it was the duty of the court to give in charge to the jury the rule governing accomplices." See Winn *v.* State, 15 Tex. App. 169; Howell *v.* State, 16 Tex. App. 93; Stone *v.* State, 22 Tex. App. 185, 2 S. W. 585; Bowen *v.* State, 23 Tex. App. 28, 4 S. W. 463.

Duty to Advise Upon Request. In other cases it is held that if the court refuses to give the advise upon being requesed to do so, it is reversible error. Hoyt *v.* People, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 239; Sullivan *v.* State, 75 Wis. 659, 44 N. W. 647.

21. It Is a Question for the Jury. People *v.* Haynes, 38 How. Pr. (N. Y.) 369; State *v.* Litchfield, 58 Me. 267; People *v.* Costello, 1 Denio (N. Y.) 83; Com. *v.* Bosworth, 22 Pick. (Mass.) 397; People *v.* Hare, 57 Mich. 505, 24 N. W. 843; State *v.* Harras, (Wash.,) 65 Pac. 774; Myers *v.* State, (Fla.,) 31 So. 275.

22. Evidence Improperly Admitted. — In Com. *v.* Holmes, 127 Mass. 424, 34 Am. Rep. 391, it was said: "The decision in Commonwealth *v.* Bosworth, 22 Pick. 397, has for forty years been treated as settling that, if evidence is admitted for the purpose of so far corroborating the testimony of an accomplice as to make it safe for a jury to convict, which is not legally to be considered as corroborative in that sense, the error may be revised by bill of exceptions. Com. *v.* Desmond, 5 Gray 80; Com. *v.* Savory, 10 Cush. 535, 538; Com. *v.* Larrahee, 99 Mass. 413, 416."

23. Must Be Followed. — People *v.* Bonney, 98 Cal. 278, 33 Pac. 98; Craft *v.* Com., 80 Ky. 349.

Under What Circumstances Instructions Should Be Given. — *California.*—In People *v.* O'Brien, 96 Cal. 171, 31 Pac. 45, it was held not proper to give the instruction where the witness is for the defense.

In People *v.* Bonney, 98 Cal. 278, 33 Pac. 98, where the witness was for the people, it was held a proper occasion for the instruction when the crime can only be established by means of the testimony of an accomplice. People *v.* Strybe, (Cal.,) 36 Pac. 3.

Kentucky.—In Craft *v.* Com., 80 Ky. 349, it is held the duty of the court to instruct the jury to acquit when there are no corroborating circumstances. The testimony of an accomplice cannot be considered

E. What Is Corroboration. — a. *Definition.* — Legal corroboration, when applied to accomplices, consists of independent evidence, tending to support their testimony.[24]

b. *One Accomplice Cannot Corroborate Another.* — Such facts cannot be established by other accomplices[25] unless they are so

as a factor in the problem of guilt or innocence, until the jury first determines that the other evidence heard proves the existence of corroborative facts. If the evidence claimed to be corroborative does not tend, when its truth is admitted, to this end, it is the duty of the court to exclude it; but by its admission the court does not pass upon its truth, and the court should instruct for, by failure to do so, the jury is permitted to consider the evidence of an accomplice as they would any other evidence.

In Taylor *v.* Com., 10 Ky. Law 169, 8 S. W. 461, where a conviction was had principally, if not wholly, upon the testimony of an acknowledged accomplice, the court instructed that a conviction cannot be had upon testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, but did not instruct, as required by § 241 of the Criminal Code that "the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof." It was held that the defendant was entitled to an instruction given in the language of the Code.

Smith *v.* State, 42 Tex. 394; Boren *v.* State, 23 Tex. App. 28, 4 S. W. 463; Roach *v.* State, 4 Tex. App. 46; Irvin *v.* State, 1 Tex. App. 301; Davis *v.* State, 2 Tex. App. 588; Coffelt *v.* State, 19 Tex. App. 436. *Held,* that instruction on this subject must be given where applicable whether asked or not. Brace *v.* State, (Tex. Crim. App.,) 62 S. W. 1067.

24. In People *v.* Elliott, 5 N. Y. Crim. 204, it is said that "to sufficiently corroborate the testimony of the accomplice there should be some fact testified to entirely independent of the accomplice's evidence which, taken by itself, leads to the inference not only that a crime has been committed, but that the defendant is implicated in it." State *v.* McLain, 159 Mo. 340, 60 S. W. 736; Com. *v.* Holmes, 127 Mass. 424, 34 Am. Rep. 391. See *re* Monteith, 10 Ont. (Can.) 529.

25. **Testimony of Accomplice Must Be Corroborated.** — In Johnson *v.* State, 4 Greene (Iowa) 65, the court said: "It is just as necessary that the corroborating witness should be strengthened and confirmed as that the principal one should be, and however abundant their kind of testimony, the accomplice first called in is still uncorroborated, and his testimony entitled to no credit. The law regards accomplices in cases of felony, when called to testify, as impeached witnesses, and hence their testimony is of no effect unless confirmed by other testimony. As one impeached witness cannot support the testimony of a witness previously impeached, it follows that one accomplice cannot be a witness to corroborate the testimony of another accomplice in the same crime." State *v.* Williamson, 42 Conn. 261; Porter *v.* Com., 22 Ky. Law 1657, 61 S. W. 16; Howard *v.* Com., 22 Ky. Law 1845, 61 S. W. 756; Powers *v.* Com., 22 Ky. Law 1807, 61 S. W. 735, 53 L. R. A. 245.

Court Should Instruct. — In Whitlow *v.* State, (Tex. Crim. App.,) 8 S. W. 865, the defendant asked the court to instruct that, "if the jury believed that either or all the Kyle witnesses were accomplices in the commission of the offense charged, they cannot corroborate each other; and though their testimony may agree, yet if they are accomplices, such corroboration is not sufficient. It was held that the court erred in refusing to give the instruction.

In McConnell *v.* State, (Tex. App.,) 18 S. W. 645, the conviction was reversed because the trial court omitted to instruct the jury that one

situated as to negative the idea of collusion.[26]

c. *Not Aided by Testimony of Accomplice.* — The corroborative evidence must of itself, and without the aid of the testimony of the accomplice, tend in some degree to connect the defendant with the commission of the offense; and independent evidence merely consistent with the main story is not sufficient corroboration if it requires any part of the accomplice's testimony to make it tend to connect the defendant with the crime.[27]

d. *Need Not Be Sufficient to Convict.* — It need not of itself be sufficient to establish his guilt.[28]

e. *What Is Sufficient.* — There must be some evidence, which of itself, and without aid from the accomplice's testimony, tends to connect the defendant with the offense committed.[29]

accomplice could not corroborate another.

26. Circumstances Negative Connivance.—In Reg. *v.* Aylmer, 1 Craw. & Dix (Irish) Crim., Bush., C. J., said: "If in this case there could have been no communication between the approvers, the testimony of one of them might be brought forward to support the testimony of the other. This was done in the case of the Wild Goose Lodge, where the approvers had been confined in separate gaols so that there could have been no communication between them."

27. Facts Stated By Accomplices Will Not Help Corroboration. — Hannahan *v.* State, 7 Tex. App. 664.

In Chambers *v.* State, (Tex. Crim. App.,) 44 S. W. 495, the court says: "It makes not the slightest difference how thorough the corroboration of the accomplice may be in regard to facts related by him, yet unless there is some proof, independent of his testimony, tending to connect the defendant with the commission of the crime, there is no sufficient corroboration."

28. Malachi *v.* State, 89 Ala. 134, 8 So. 104; Vaughan *v.* State, 58 Ark. 353, 24 S. W. 885; Williams *v.* State, 69 Ga. 11; Watson *v.* State, 9 Tex. Crim. App. 237; State *v.* Clements, 82 Minn. 434, 85 N. W. 229; Chapman *v.* State, 112 Ga. 56, 37 S. E. 102; State *v.* Stevenson (Mont.), 67 Pac. 1001.

In Malachi *v.* State, 89 Ala. 134, 8 So. 104, the court said, "that the finding of an overcoat belonging to a murdered man in the hands of the defendant more than three months after the homicide was not sufficient evidence to convict, but it is sufficient to meet the requirements of the statute as to corroboration. It is not required that of itself it should establish the guilt of the accused: to require that would be to render the testimony of the accomplice unnecessary and redundant."

29. *Canada.*—Reg. *v* Fellowes, 19 U. C. Q. B. (Can.) 48.

Alabama. — Malachi *v.* State, 89 Ala. 134, 8 So. 104.

Georgia.—Chapman *v.* State, 112 Ga. 56, 37 S. E. 102.

Iowa.—State *v.* Allen, 57 Iowa 431, 10 N. W. 805; State *v.* Hennessy, 55 Iowa 299, 7 N. W. 641.

Minnesota.—State *v.* Clements, 82 Minn. 434, 85 N. W. 229; State *v.* Lawlor, 28 Minn. 216, 9 N. W. 678.

Missouri.—State *v.* Koplan, (Mo.,) 66 S. W. 967.

Montana. — State *v.* Stevenson, (Mont.) 67 Pac. 1001.

New York.—People *v.* Elliott, 106 N. Y. 288, 12 N. E. 602; People *v.* Ogle, 104 N. Y. 511, 11 N. E. 53; People *v.* Plath, 100 N. Y. 590, 3 N. E. 790; People *v.* Everhardt, 104 N. Y. 591, 11 N. E. 62; People *v.* Butler, 62 App. Div. 508, 71 N. Y. Supp 129.

In Malachi *v.* State, 89 Ala. 134, 8 So. 104, possession, three months after a murder, of an overcoat claimed to have belonged to a murdered man, was relied upon as corroborative evidence. The court said: "If the only testimony against the

f. *As to Non-Essential Matters.* — Evidence which merely shows that the testimony of the accomplice is consistent with the truth in regard to matters not essential, and unconnected with the body of the crime, is not corroboration.[30]

g. *The Corpus Delicti.* — The law requires corroboration as to the circumstances of the crime tending to show that a crime was actually committed.[31]

defendant was the finding of the overcoat in his possession more than three months after the homicide, we should think it wholly insufficient to justify his conviction of the murder. That is not, however, the form in which the question comes before us. It is offered not as sole evidence of guilt, but as corroboration of the testimony of Elzy, the accomplice." It was therefore held that the evidence was properly submitted to the jury as corroboration.

In People *v.* Ogle, 104 N. Y. 511, 11 N. E. 53, the court was asked to charge in relation to the acts necessary for the corroboration of an accomplice, "that they must be inconsistent with the innocence of the defendant, and which exclude every hypothesis but that of guilt." The court refused and counsel excepted. In this the court was clearly right. There is not and never was any such rule as to corroboration. The whole law of evidence will be searched in vain for it. The authorities cited by prisoners' counsel maintain no such rule. The rule is stated in one of them (People *v.* Plath, 100 N. Y. 590, 3 N. E. 790,) and is wholly different from the request herein made. It only requires a corroboration as to some material fact which goes to prove the prisoner was connected with the crime." People *v.* Ardell, (Cal.,) 66 Pac. 970; State *v.* Jones, (Iowa,) 88 N. W. 196.

30. Must Relate to Matters Material to the Issue. — Frazer *v.* People, 54 Barb. (N. Y.) 306; People *v.* Plath, 100 N. Y. 590, 3 N. E. 790; People *v.* Josselyn, 39 Cal. 393; Com. *v.* Holmes, 127 Mass. 424, 34 Am. Rep. 391; Com. *v.* Bosworth, 22 Pick. (Mass.) 397.

Must Corroborate Material Matter. The court, in Com. *v.* Bosworth, 22 Pick. (Mass.) 397, said: "We think the rule is, that the corroborative evidence must relate to some portion of the testimony which is material to the issue. To prove that an accomplice had told the truth in relation to irrelevant and immaterial matters which were known to everybody, would have no tendency to confirm his testimony involving the guilt of the party on trial. If this were the case, every witness, not incompetent for the want of understanding, could always furnish materials for the corroboration of his own testimony.

"The inquiry of the accomplice by the defendant's counsel, whether he had been offered a reward or promised an indemnity, were relevant questions, and the answers to them became material evidence. We are therefore inclined to think, that the testimony in confirmation of these answers was admissible. But this can scarcely be brought within the line; and we are of opinion, that the testimony of the sheriff and jailer, as to the location of the rooms in the jail and the situation of the prisoners, etc., falls on the other side of the line. We cannot perceive how the circumstance that the witness told the truth about these public and common objects, concerning which he knew that proof was at hand, has any tendency to confirm the material parts of his testimony, involving the guilt of the defendant."

But in Com. *v.* Holmes, 127 Mass. 424, 3 N. E. 790, the opinion in Com. *v.* Bosworth, 22 Pick. (Mass.) 397, is criticised, and it is said that the evidence confirming the accomplices' answer as to reward and indemnity was not corroboration at all, but the general rule stated as to corroborative evidence is not questioned.

31. Must Tend to Prove That Crime Was Committed. — Marler *v.* State, 68 Ala. 580 and 67 Ala. 55, 42

h. *Corroboration As to Defendant.*—**(1.) As to Particular Defendant.** It is not sufficient corroboration to prove that the crime was committed in the manner described by the accomplice, but his testimony must be corroborated as to the particular defendant.[32]

Am. Rep. 95; Crowell *v.* State, 24 Tex. App. 404, 6 S. W. 318; Coleman *v.* State, 44 Tex. 109; Davis *v.* State, 2 Tex. App. 588; State *v.* Calahan, 47 La. Ann. 444, 17 So. 50.

Must Corroborate as to Corpus Delicti. — In Crowell *v.* State, 24 Tex. App. 404, 6 S. W. 318, there was no evidence proving the *corpus delicti* except the testimony of an accomplice. The court said: "It is only from the testimony of this accomplice that we are informed that the animal killed by defendant was one of Carrington's cattle, and not the defendant's own property. Can such testimony support a conviction? We think not. Our view of the statute relating to accomplice testimony is that, where the *corpus delicti* of the offense is proved alone by accomplice testimony, such testimony must be corroborated by other evidence tending to establish the commission of the offense, and the defendant's connection with the commission of the same. It will not suffice to corroborate such testimony to the extent only of connecting the defendant with the commission of an act alleged to be an offense." State *v.* Koplan, (Mo.), 66 S. W. 967; State *v.* Stevenson, (Mont.), 67 Pac. 1001; Smith *v.* State, (Wyo.), 67 Pac. 977.

32. Evidence to Connect Defendant. — *Arkansas.* — Polk *v.* State, 36 Ark. 117; Scott *v.* State, 63 Ark. 310, 38 S. W. 339.

California. — People *v.* Cloonan, 50 Cal. 449.

Oregon. — State *v.* Odell, 8 Or. 30.

Texas. — Smith *v.* State, 27 Tex. App. 196, 11 S. W. 113; Gillian *v.* State, 3 Tex. App. 132; Davis *v.* State, 2 Tex. App. 588; Harper *v.* State, 11 Tex. App. 1; Welden *v.* State, 10 Tex. App. 400.

Instruction as to Connecting Defendant With Offense. — Watson *v.* State, 9 Tex. App. 237; Crowell *v.* State, 24 Tex. App. 404, 6 S. W. 318; Conway *v.* State, 33 Tex. Crim. App. 327, 26 S. W. 401; Beach *v.* State, (Tex. App.), 12 S. W. 868; People *v.* Clough, 73 Cal. 348, 15 Pac. 5; People *v.* Eckert, 16 Cal. 110; State *v.* Odell, 8 Or. 30; Wright *v.* State, 43 Tex. 170; Dill *v.* State, 1 Tex. App. 278; Davis *v.* State, 2 Tex. App. 588; Cohea *v.* State, 11 Tex. App. 622; Clapp *v.* State, 94 Tenn. 186, 30 S. W. 214.

Must Identify the Accused With the Crime. — In State *v.* Miller, 100 Mo. 606, 13 S. W. 832, the court said: "Corroboration should go to the extent of identifying the person of the prisoner against whom the accomplice speaks. The object of the rule which requires that the testimony in corroboration of that of the accomplice should go to the extent mentioned is that the danger may be guarded against of an accomplice relating the circumstances of the criminal transaction truly, except that he substitutes the name of the accomplice for his own; thus practicing a fraud upon the triers of the issues, as well as upon the prisoner."

Where There Is More Than One Defendant. — In Dill *v.* State, 1 Tex. App. 278, where two were indicted and tried together, the court said: "When an accomplice speaks as to the guilt of two or more persons, and his testimony is confirmed as to one or more of them, and not as to all, the jury would not be authorized to act on his testimony alone as to the prisoner in respect of whom he is not confirmed. At the same time we do not think it would be proper for the court to instruct the jury that, if the testimony of the accomplice was confirmed as to one or more, and not to all, they should acquit all the defendants."

Connecting Defendant With One of a Series of Acts. — In Com. *v.* Hayes, 140 Mass. 366, 5 N. E. 264, where a conspiracy was formed and carried out to steal goods in neighboring counties and carry them to Boston to be disposed of, evidence that the defendant took part in the

(2.) Must Connect Him With Crime. — It is not sufficient for this purpose merely to connect the defendant with the accomplice, or other person participating in the crime, but evidence, independent of the testimony of the accomplice, must tend to connect him with the crime itself, and not simply with its perpetrators.[33]

(3.) Association With Criminals. — But the fact of being thus associated, together with other slight circumstances, thus connecting the defendant with the transaction, may afford sufficient corroboration.[34]

original larcenies in another county, it was held, tended to connect him with the crime committed in Boston. The transaction of stealing the goods and disposing of them in Boston was a single connected one.

33. Connecting Defendant With Particeps Criminis Not Sufficient. Fort *v.* State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163; Smith *v.* Com., 13 Ky. Law 369, 17 S. W. 182; State *v.* Odell, 8 Or. 30; Wright *v.* State, 43 Tex. 170; People *v.* Larsen, (Cal.), 34 Pac. 514; State *v.* Mikesell, 70 Iowa 176, 30 N. W. 474.

Must Tend to Show Connection of Accused With Crime. — Wright *v.* State, 43 Tex. 170, held that "the evidence must not only connect the prisoner and the accomplice together, but must show that the prisoner was engaged in the transaction which forms the subject matter of the charge under investigation."

Must Corroborate Testimony of Participation in Crime.—In Gillian *v.* State, 3 Tex. App. 132, which was a prosecution for breaking jail and releasing prisoners, the court said: "There is evidence going to show that the defendant was in the town that night, and that the next morning he was seen a few miles beyond the town, traveling in company with one of the released prisoners. It is further in proof that he was arrested in an adjoining county in company with this same prisoner, and that, when arrested, he was passing under an assumed name. It is admitted that these may be, and are, suspicious facts, but still they do not corroborate the material testimony of the accomplice, to wit: that the defendant was present at the time and place, aiding, assisting, and participating in breaking open the jail and rescuing the prisoners. Wright *v.* State, 43 Tex. 170; Bavara *v.* State, 42 Tex. 263; Williams & Smith *v.* State, 42 Tex. 392; Bruton *v.* State, 21 Tex. 348; Rice & Dill *v.* State, 1 Tex. Ct. App. 278; Eliza Davis *v.* State, 2 Tex. Ct. App. 588."

Insufficient Corroboration. — In State *v.* Willis, 9 Iowa 582, the ourt said: "The corroborating evidence in this case tended merely to show that an offense had been committed, and the manner and circumstances of its commission; but had no tendency to connect the defendant therewith, unless it should be held sufficient to convict a man of burglary that he is seen drunk and in company with a burglar at or near the time and place when and where a burglary is committed. However well founded a suspicion this may justly authorize, we do not think it affords the corroborating testimony contemplated by the statute." Howard *v.* Com., 22 Ky. Law 1845, 61 S. W. 756; State *v.* McLain, 159 Mo. 340, 60 S. W. 736.

34. Association With Accomplice a Circumstance. — State *v.* Russell, 90 Iowa 493, 58 N. W. 890; People *v.* Mayhew, 150 N. Y. 346, 44 N. E. 971; Looman *v.* State, (Tex. Crim. App.), 39 S. W. 571.

In State *v.* Townsend, 19 Or. 213, 23 Pac. 968, where a cow was stolen, and the defendant and accomplice were seen together at the time and place where the theft occurred (it being a place unusual for the defendant), and defendant was introduced by the accomplice under an assumed name. The court referred to the case of State *v.* Odell, 8 Or. 30, where it was held that proof of presence in the same town was not sufficient corroboration.

F. Must More Than Raise Suspicion. — The corroborating evidence may be sufficient although by itself slight,[35] but it is not sufficient if it merely tends to raise a suspicion of guilt.[36]

G. By Proof of Intention. — Proof of intention on the part of the defendant to commit the crime would sufficiently connect him with it, to corroborate the testimony of the accomplice.[37]

H. By Circumstantial Evidence. — It is a sufficient corroboration if circumstances, established by competent evidence, independent of the accomplice, tend to connect the defendant with the crime.[38]

I. By Proving Possession of Stolen Property. — a. *When*

35. Slight Evidence Sufficient. People *v.* Ames, 39 Cal. 403; State *v.* Schlagel, 19 Iowa 169; State *v.* Maney, 54 Conn. 178, 6 Atl. 401.

In People *v.* Melvane, 39 Cal. 614, it is held that "the corroborating evidence may be but slight, and entitled to but little consideration; nevertheless the requirements of the statute are fulfilled if there is any corroborating evidence, which of itself, tends to connect the accused with the commission of the offense."

Any Independent Evidence Is Sufficient. — In People *v.* Clough, 73 Cal. 348, 15 Pac. 5, the court said: "If there is *any* independent evidence tending to prove said connection of the defendant with the crime, the supreme court will not be justified in directing an acquittal."

In People *v.* McLean, 84 Cal. 480, 24 Pac. 32, a case of arson, an accomplice swore that he set the fire by direction of the defendant. The corroborating circumstances were, that there was a difficulty between the defendant and the owner of the cabin concerning the land upon which it stood. They had angry interviews, and once the defendant was roughly handled by an employee of the owner's. Defendant made contradictory statements concerning his whereabouts on the night of the fire. There was evidence tending to show that he took measures to get the accomplice to leave the country, and wrote to his mother to "keep Bill out of the way for a while till the trouble blows over," although the letters did not state what the trouble was. The court held the circumstances evidence tending to show the defendant's guilty connection with the burning, and although more is wanted by way of corroboration than merely to raise a suspicion, yet the corroborative evidence is sufficient, if, of itself it tends to connect the defendant with the commission of the offense, although it is slight and, when standing by itself, entitled to but little consideration.

36. Mere Suspicion Not Sufficient. People *v.* Koening, 99 Cal. 574, 34 Pac. 263; People *v.* Smith, 98 Cal. 218, 33 Pac. 58; People *v.* Plath, 100 N. Y. 590, 3 N. E. 790.

In People *v.* Thompson, 50 Cal. 481, the court, referring to the case of People *v.* Ames, 39 Cal. 403, said: "We did not intend to lay down the rule that if the corroborating evidence sufficed to raise merely a *suspicion* of the defendant's guilt and nothing more, that it would be a sufficient corroboration within the meaning of section IV."

37. People *v.* Davis, 21 Wend. (N. Y.) 309.

In People *v.* Josselyn, 39 Cal. 393, the court holds that corroboration is not required in respect to every material fact, but only in respect to some of the material facts which constitute an element in the crime alleged; and that an essential element in the crime is a criminal intent, that any testimony in addition to that of the accomplice, tending to show such intent, would be sufficient corroboration.

38. Specific Facts Sworn to by Accomplice Need Not be Corroborated. Bonner *v.* State, 107 Ala. 97, 18 So. 226; State *v.* Thornton, 26 Iowa 79; Fort *v.* State, 52 Ark. 180, 11 S. W. 950, 20 Am. St. Rep. 163; Com. *v.* Savory, 10 Cush. (Mass.) 535; State *v.* Chauvet, 111 Iowa 678, 83 N. W. 717, 51 L. R. A. 630; Malachi *v.* State, 89 Ala. 134, 8 So. 104.

Sufficient. — The testimony of an accomplice may be corroborated by proof of the possession of stolen property.[39]

b. *Explanation of Possession.* — But such evidence must be sufficient to do more than create a mere suspicion of guilt when taken in connection with all explanatory facts.[40]

J. Defendant's Conduct As Corroboration. — A defendant may himself furnish corroborating evidence of an accomplice's

39. Ford *v.* State, 70 Ga. 722; Pritchett *v.* State, 92 Ga. 33, 18 S. E. 350; Com. *v.* Savory, 10 Cush. (Mass.) 535; Jernigan *v.* State, 10 Tex. App. 546; Buchanan *v.* State, (Tex. Crim. App.), 24 S. W. 895; People *v.* Cleveland, 49 Cal. 577.

Sufficient Corroboration. — In People *v.* Grandell, 75 Cal. 301, 17 Pac. 214, where the owner missed his steer and shortly afterwards its hide and some entrails were found buried in the defendant's back yard, it was held sufficient corroboration of an accomplice.

In Roberts *v.* State, 80 Ga. 772, 6 S. E. 587, on an indictment for stealing a hog, an accomplice testified to the killing of the hog and division of the meat. On a search warrant meat, supposed to be of the lost hog, was found at the house of each of the defendants. *Held,* sufficient corroboration.

Possession of Stolen Goods Sufficient. — Boswell *v.* State, 92 Ga. 581, 17 S. E. 805, held that after proof of *corpus delicti,* the testimony of an accomplice is sufficiently corroborated to authorize a conviction for burglary by other evidence showing that two days after the burglary was committed the accused was in possession of goods which were in the house when burglarized, the possession not having been satisfactorily explained.

40. Explanation of Possession. If the evidence introduced to show such possession also satisfactorily explains it so as to leave nothing but a mere suspicion of crime, it will not amount to corroboration. People *v.* Ah Ki, 20 Cal. 177.

Naked Possession Not Sufficient for Conviction. — In Clackner *v.* State, 33 Ind. 412, the court held that facts much short of giving a reasonable account of how the accused came by them, will rebut the presumption arising from the possession of stolen goods, and quotes with approval note 183, p. 634, Cowen and Hills' Notes to Phillips on Evidence, that "the presumption arising from the possession, or other circumstances, may of course be explained away or repelled by opposing circumstances. The better opinion seems to be that the presumption arising from possession alone is completely removed by good character alone, of the prisoner. The possession may also be accompanied with circumstances (such as unsuspicious conduct) repelling the presumption."

In Smith *v.* State, 58 Ind. 340, the court holds it necessary for the prosecutor to add the proof of other circumstances indicative of guilt, in order to render the naked possession of the thing available toward a conviction. Citing Curtis *v.* State, 6 Cold. (Tenn.) 9; State *v.* Brady, 27 Iowa 126; State *v.* Creson, 38 Mo. 372; State *v.* Merrick, 19 Me. 398; State *v.* Floyd, 15 Mo. 349; Smathers *v.* State, 46 Ind. 447; Turbeville *v.* State, 42 Ind. 490.

In People *v.* Chambers, 18 Cal. 382, the court says: "There are many cases in which an explanation would be impossible; and in such cases to throw the burden of explanation upon the accused would be to slam the door of justice in his face. We think the true rule upon the subject is that laid down by Greenleaf: 'It is necessary,' says he, 'for the prosecutor to add the proof of other circumstances indicative of guilt in order to render the naked possession of the thing available toward a conviction.'"

testimony as by his threats;[41] his contradictory or false statements.[42]

K. Confessions and Admissions As Corroboration. — a. *Confessions.* — Extra judicial confessions are sufficient for corroboration of the testimony of an accomplice.[43]

b. *Admissions.* — Admissions made by a defendant which tend strongly to connect him with the crime for which he is on trial are sufficient corroboration.[44]

III. TESTIFYING AS ORDINARY WITNESS.

1. Character Not Assumed at Outset. — Where the accomplice testifies as an ordinary witness, his character as an accomplice is

41. Threats. — Com. *v.* Holmes, 127 Mass. 424, 34 Am. Rep. 391.

In Com. *v.* Chase, 147 Mass. 597, 18 N. E. 565, the prosecution relied mainly on the testimony of an accomplice, but there was other evidence of threats made by the defendant. While these threats, to injure and to revenge themselves, connected with evidence of taunts showing malice and ill will were numerous, they were not the same as those testified to by the accomplice. They were held admissible as independent evidence, having a tendency to show that defendants were the guilty parties. *Citing* Com. *v.* Goodwin, 14 Gray (Mass.) 55. Proof of motive and intent to commit a crime which there was evidence to show had been committed, would legitimately tend to strengthen the belief in the statement of the accomplice that they had committed it.

42. Contradictory and False Statements. — In U. S. *v.* Randall, Deady 524, 27 Fed. Cas. No. 16,118, it is held that false and contradictory statements by the defendant about the material circumstances of the crime with which he is charged are badges of guilt. People *v.* Conroy, 97 N. Y. 62.

In Com. *v.* Chase, 147 Mass. 597, 18 N. E. 565, the court instructed the jury that if they believed the evidence that the defendants, at the time of their arrest, denied that the Coats boy was with them on Sunday, the day of the fire, this would be a legal corroboration of the accomplice. This ruling was made in connection with the fact that at the trial the defendants had both testified that the Coats boy was with them on Sunday. The court said: "The circumstance that the accomplice was with the defendants on that day was of the utmost importance. If he was not, his story was necessarily false. Their original denial, showing that they were seeking to maintain by falsehood a defense to the charge made against them, bore directly on the question of their guilt, and tended to prove it. Whether the mere fact that the boy was with them on that day, if that were all, would corroborate his testimony, we need not consider. Their denial that he was there, and the subsequent proof of its falsity were facts of importance."

43. Extra Judicial Confessions. Patterson *v.* Com., 86 Ky. 313, 5 S. W. 387; same case on second appeal, 5 S. W. 765; Snoddy *v.* State, 75 Ala. 23.

44. Admissions Sufficient Corroboration. — People *v.* Cleveland, 49 Cal. 577; State *v.* Chauvet, 111 Iowa 687, 83 N. W. 717, 51 L. R. A. 630; People *v.* Davis, (Cal.), 67 Pac. 59.

In State *v.* Hennessy, 55 Iowa 299, 7 N. W. 641, the court sustained an instruction that "admissions made by the defendant to Detective Smith, and other admissions made to Moran, and to the deputy sheriff, Bathan, are competent evidence, and if you find that they tend to connect the defendant with the commission of the offense, then the accomplices are corroborated."

not assumed at the outset, as in the preceding class,[45] but must be established on the trial.[46]

A. When a Question for the Court. — The proof showing that the witness is an accomplice, may be furnished by the witness himself, or it may be established by other proof, and whether he is such an accomplice will be a question for the court or jury according to the circumstances of the case. If all the facts are admitted it is for the court.[47]

B. When for the Jury. — a. *When it Depends on Evidence.* But if it depends at all upon the evidence, the question is for the jury under proper instructions from the court.[48]

45. Assumed as to Preceding Class. — Barrara *v.* State, 42 Tex. 260; Com. *v.* Desond, 5 Gray (Mass.) 80.

46. U. S. *v.* Neverson, 1 Mackey (D. C.) 152; State *v.* Schlagel, 19 Iowa 169; People *v.* Curlee, 53 Cal. 604.

47. People *v.* Sternburg, 111 Cal. 3, 43 Pac. 198; Webb *v.* State, (Tex. Crim. App.), 60 S. W. 961; Carroll *v.* State, (Tex. Crim. App.), 62 S. W. 1061.

Where Court May Determine. In State *v.* Carr, 28 Or. 389, 42 Pac. 215, the court said: "We understand the rule to be that where there is any conflict in the testimony as to whether a witness is or is not an accomplice, the issue must be submitted to the jury under proper instructions of the court; but where the facts are all admitted, and no issue thereon is raised by the evidence, it then becomes a question of law for the court as to the effect of the uncontradicted testimony."

When Is Question of Law. Armstrong *v.* State, 33 Tex. Crim. App. 417, 26 S. W. 829.

Better Practice to Leave Question to Jury. — In Bell *v.* State, 39 Tex. Crim. App. 677, 47 S. W. 1010, the court said: "It is usual with judges, where the matter of witness's being an accomplice, does not appear to be controverted, to instruct the jury that such a witness is an accomplice. In our view much the better practice in all cases is to instruct the jury what it takes to constitute an accomplice, and then leave them free to find whether or not such person is an accomplice."

48. When All the Facts Not Admitted a Question for the Jury. Washington *v.* State, 58 Ala. 355; People *v.* Bolanger, 71 Cal. 17, 11 Pac. 799; State *v.* Schlagel, 19 Iowa 169; Herring *v.* State (Tex. Crim. App.), 42 S. W. 301; Hankins *v.* State (Tex. Crim. App.), 47 S. W. 992; Com. *v.* Ford, 111 Mass. 394; State *v.* Carr, 28 Or. 389, 42 Pac. 215; White *v.* State (Tex. Crim. App.), 62 S. W. 749.

Slightest Evidence Makes Question for Jury. — When it is not admitted that a witness is or is not an accomplice, and there is any evidence on the subject however slight, it should be weighed by the jury. In such case the court should not instruct either that the witness is or is not an accomplice. Hankins *v.* State (Tex. Crim. App.), 47 S. W. 992; Ransom *v.* State (Tex. Crim. App.), 49 S. W. 582; Preston *v.* State, 40 Tex. Crim. App. 72, 48 S. W. 581; Bell *v.* State, 39 Tex. Crim. App. 677, 47 S. W. 1010; State *v.* Carr, 28 Or. 389, 42 Pac. 215; People *v.* Sansome, 98 Cal. 235, 33 Pac. 202; Dill *v.* State, 1 Tex. App. 278.

In Rios *v.* State (Tex. Crim. App.), 48 S. W. 505, it is said that under no circumstances would the court be justified in assuming in the charge that a witness was an accomplice, unless it be placed beyond cavil or question, or be an admitted fact.

Should Not Instruct That Witness Is Not An Accomplice. — People *v.* Bolanger, 71 Cal. 17, 11 Pac. 799; People *v.* Curlee, 53 Cal. 604; Preston *v.* State, 40 Tex. Crim. App. 72, 48 S. W. 581.

Duty of Court to Instruct. — Whenever that question is involved in the evidence, it is the duty of the court to give the jury proper instructions as to what constitutes an accomplice.[49]

b. *What Evidence Sufficient.* — To establish that a witness is an accomplice, proof beyond a reasonable doubt is not required.[50]

2. What Constitutes an Accomplice. — A. Common Law Definition. — The word "accomplice" means simply a participator in crime, and at common law it included all the *particeps criminis,* whether principals in the first or second degree, or accessories before or after the fact.[51]

B. Other Definitions. — In some jurisdictions the term "accomplice" is held to include only principals in the crime; and in others only those equally concerned in a felony.[52]

C. Who Are Accomplices. — a. *Intention Necessary.* — Since there can be no participation in a crime either as principal or accessory without a criminal intent, without such intent a witness is not an accomplice so as to require corroboration.[53]

49. *Alabama.* — Washington *v.* State, 58 Ala. 355.

California. — People *v.* Bolanger, 71 Cal. 17, 11 Pac. 799; People *v.* Curlee, 53 Cal. 604; People *v.* Kraker, 72 Cal. 459, 14 Pac. 196; 1 Am. St. Rep. 65.

Iowa.—State *v.* Schlagel, 19 Iowa 169.

Massachusetts.—Com. *v.* Ford, 111 Mass. 394; Com. *v.* Elliot, 110 Mass. 104.

Oregon. — State *v.* Carr, 28 Or. 389, 42 Pac. 215.

Texas. — Bell *v.* State, 39 Tex. Crim. App. 677, 47 S. W. 1010; Guyer *v.* State (Tex. Crim. App.), 36 S. W. 450; Roach *v.* State, 4 Tex. App. 46; Miller *v.* State, 4 Tex. App. 251; Ballew *v.* State (Tex. Crim. App.), 34 S. W. 616; Herring *v.* State (Tex. Crim. App.), 42 S. W. 301; Hankins *v.* State (Tex. Crim. App.), 47 S. W. 992.

When Want of Full Definition Not Ground for Reversal. — In Crass *v.* State, 31 Tex. Crim. App. 312, 20 S. W. 579, it was held that where the defendant neither requested a special instruction nor excepted to the charge given in relation to accomplice's testimony and the evidence left it very doubtful whether the defendant had an accomplice, the judgment would not be reversed because the word accomplice was not fully defined in the broad sense used in the article relating to accomplice's testimony.

50. Childress *v.* State, 86 Ala. 77, 5 So. 775; State *v.* Smith, 102 Iowa 656, 72 N. W. 279; Com. *v.* Ford, 111 Mass. 394.

51. Russ. Crimes (9th Am. Ed.) 49; 4 Blk. Com. 27; Johnson *v.* State, 2 Ind. 652; Hudspeth *v.* State, 50 Ark. 534, 9 S. W. 1; Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474; State *v.* Roberts, 15 Or. 187, 13 Pac. 896.

52. People *v.* Smith, 28 Hun (N. Y.) 626; Harris *v.* State, 7 Lea (Tenn.) 124.

In People *v.* Bolanger, 71 Cal. 17, 11 Pac. 799, the court holding that a feigned accomplice does not require corroboration approves the definition of an accomplice in Whart. Crim. Ev. 440.

Purchaser of Stolen Goods. — One who buys stolen cattle from the thief, knowing they were so stolen, is an accomplice. Crawford *v.* State (Tex. Crim. App.), 34 S. W. 927.

53. Who Are Accomplices Within Rules of Evidence Generally.

United States.—U. S. *v.* Henry, 4 Wash. 428, 26 Fed. Cas. No. 15,351.

Illinois.—Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474.

Iowa.—State *v.* Reader, 60 Iowa 527, 15 N. W. 423; State *v.* Ean, 90 Iowa 534, 58 N. W. 898.

Kentucky.—Sizemore *v.* Com. 10 Ky. Law 1, 6 S. W. 123; Thompson

b. *Knowledge and Concealment.* — Even knowledge or concealment or both, will not make one an accomplice in the absence of criminal intent.[54]

c. *Independent Crime.* — Unless the witness' criminal intention relates directly to the crime for which the defendant is on trial, the witness is not an accomplice, although guilty as principal or accessory in an independent crime of the same character.[55]

v. Com., 16 Ky. Law 168, 26 S. W. 1100.

Massachusetts.—Com. *v.* Ford, 111 Mass. 394; Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471.

Minnesota.—State *v.* Quinlan, 40 Minn. 55, 41 N. W. 299.

New Mexico.—Territory *v.* Baker, 4 N. M. 117, 13 Pac. 30.

New Jersey.—State *v.* Goldman, 65 N. J. Law 394, 47 Atl. 641.

New York. — People *v.* McGuire, 135 N. Y. 639, 32 N. E. 146.

Texas.—Irvin *v.* State, 1 Tex. App. 301; Nourse *v.* State, 2 Tex. App. 304; Davis *v.* State, 2 Tex. App. 588; Ortis *v.* State, 18 Tex. App. 282; Hornsberger *v.* State, 19 Tex. App. 335; Anderson *v.* State, 20 Tex. App. 312; Hines *v.* State, 27 Tex. App. 104, 10 S. W. 448; Riley *v.* State, 27 Tex. App. 606, 11 S. W. 642; Aldrich *v.* State, 29 Tex. App. 394, 16 S. W. 251; Johnson *v.* State, (Tex. Crim. App.), 24 S. W. 285.

Duress. — U. S. *v.* Henry, 4 Wash. 428, 26 Fed. Cas. No. 15,351; Beal *v.* State, 72 Ga. 200; Smith *v.* State, 108 Ala. 1, 19 So. 306, 54 Am. St. Rep. 140; Burnes *v.* State, 89 Ga. 527, 15 S. E. 748.

In Mullinix *v.* State (Tex. Crim. App.), 26 S. W. 504, the defendant forced his daughter to have criminal intercourse with him. On his trial for incest it was held that she was not an accomplice so as to require her testimony to be corroborated. But in cases where the act is voluntary on both sides the female is held to be an accomplice. State *v.* Jarvis, 18 Or. 360, 23 Pac. 251; Blanchette *v.* State, 29 Tex. App. 46, 14 S. W. 392; Dodson *v.* State, 24 Tex. App. 514, 6 S. W. 548; Mercer *v.* State, 17 Tex. App. 452; Freeman *v.* State, 11 Tex. App. 92, 40 Am. Rep. 787; Caesar *v.* State (Tex. Crim. App.), 29 S. W. 785; Ratliff *v.* State (Tex. Crim. App.), 60 S W. 666; Soloman *v.* State, 113 Ga. 182, 38 S. E. 332.

One Acting Under Compulsion. In People *v.* Miller, 66 Cal. 468, 6 Pac. 99, a thirteen year old boy, who took part in the commission of a felony under threats and coercion of another, was held not to be an accomplice and his testimony was held sufficient to sustain a conviction without corroboration.

54. *Arkansas.* — Melton *v.* State, 43 Ark. 367; Green *v.* State, 51 Ark. 189, 10 S. W. 266.

Georgia.—Lowery *v.* State, 72 Ga. 649; Allen *v.* State, 74 Ga. 769.

New York. — People *v.* Ricker, 51 Hun 643, 4 N. Y. Supp. 70; People *v.* McGonegal, 62 Hun 622, 17 N. Y. Supp. 147. People *v.* McGonegal, 136 N. Y. 62, 32 N. E. 616.

Oregon. — State *v.* Roberts, 15 Or. 187, 13 Pac. 896.

Tennessee. — Harris *v.* State, 7 Lea 124.

Texas. — Rhodes *v.* State, 11 Tex. App. 563; Norton *v.* State (Tex. App.), 12 S. W. 407; Clumney *v.* State, 28 Tex. App. 87, 12 S. W. 491; McKenzie *v.* State (Tex. Crim. App.), 32 S. W. 543; Noftsinger *v.* State, 7 Tex. App. 301; Rucker *v.* State, 7 Tex. App. 549; Smith *v.* State, 23 Tex. App. 357, 5 S. W. 219, 59 Am. Rep. 773; Elizando *v.* State, 31 Tex. Crim. App. 237, 20 S. W. 560; Alford *v.* State, 31 Tex. Crim. App. 299, 20 S. W. 553.

55. What Are Independent Crimes Generally. — *England.* — Rex *v.* Hargrave, 5 Car. & P. 170, 24 Eng. C. L. 260.

Alabama. — Ash *v.* State, 81 Ala. 76, 1 So. 558; Bass *v.* State, 37 Ala. 469; Smith *v.* State, 37 Ala. 472; Bird *v.* State, 36 Ala. 279.

Georgia. — Roberts *v.* State, 55 Ga. 220.

Iowa. — State *v.* Hayden, 45 Iowa 11.

d. *Participation in Moral Offenses Only.* — It is not sufficient to show that the witness has participated in the moral offense imputed to the defendant, but, to constitute him an accomplice, it is necessary to show such participation in the crime imputed to the defendant, that he might himself be charged, either as principal or accessory.[56]

New York. — People *v.* Cook, 5 Park. Crim. 351; People *v.* Dunn, 53 Hun 381, 6 N. Y. Supp. 805.

Oregon. — State *v.* Light, 17 Or. 358, 21 Pac. 132.

Texas. — Crutchfield *v.* State, 7 Tex. App. 65; Peeler *v.* State, 3 Tex. App. 533; Stone *v.* State, 3 Tex. App. 675.

Betting at Games. — In Dandron *v.* State, 33 Ala. 350; Bird *v.* State, 36 Ala. 278 and State *v.* Light, 17 Or. 358, 21 Pac. 132, it is held that a participant in a game of cards is an accomplice of his adversary.

In Smith *v.* State, 37 Ala. 472, and Bass *v.* State, 37 Ala. 469, it is held that spectators present and occasionally taking a hand to help out unskillful players, but not interested in the bets are not accomplices.

Escape of Prisoners. — Ash *v.* State, 81 Ala. 76, 1 So. 558; Hillian *v.* State, 50 Ark. 523, 8 S. W. 834; People *v.* Dunn, 53 Hun 381, 6 N. Y. Supp. 805.

In Peeler *v.* State, 3 Tex. App. 533, which was an indictment for conveying tools into the jail to enable prisoners to escape, a witness, who was a prisoner in the jail at the time of the alleged offense, was held not to be an accomplice.

Guilty Receipt of Stolen Property. Roberts *v.* State, 55 Ga. 220; People *v.* Cook, 5 Park. Crim. (N. Y.) 351; Crutchfield *v.* State, 7 Tex. App. 65.

Receiving Stolen Goods. — In State *v.* Hayden, 45 Iowa 11, the principal witness on the part of the state testified that defendant confessed the crime to him, and that after such confession he received from the defendant some of the stolen property and concealed it. On the trial for burglary the court instructed that "the mere fact that Mowry received the stolen property, knowing the same to have been stolen did not make him an accomplice." This instruction was held to be correct.

In Harris *v.* State, 7 Lea (Tenn.) 124, two witnesses testified that on the evening of the robbery for which the defendant was on trial, he proposed to them to commit the robbery, and they refused and supposed he was in jest, but that night he returned and said he had robbed the man and got $250, and that subsequently he gave to each of the witnesses thirty dollars. *Held* that they were not accomplices, State *v.* Jones (Iowa), 88 N. W. 196.

Perjury and Subornation of Perjury. — In U. S. *v.* Thompson, 31 Fed. 331, the defendant was indicted for procuring the witness to commit perjury in taking an oath to support an application for land under the timber culture act. It was held that the person solicited to commit perjury, and who did commit perjury under solicitation, is not an accomplice so as to require his testimony to be corroborated in order to convict the defendant of subornation of perjury.

In People *v.* Evans, 40 N. Y. 1, which was a prosecution for subornation of perjury, the witness who committed the perjury was held to be an accomplice and corroboration was held necessary.

In Blakely *v.* State, 24 Tex. App. 616, 7 S. W. 233, 5 Am. St. Rep. 912, where the evidence to prove the accused an accessory was the testimony of two witnesses who claimed to have been induced by him to swear falsely to prevent the arrest and trial of the principal. It was held that such witnesses were accomplices.

56. Miscarriage, Woman Taking Means For. — In the following cases it is held that the woman taking means for, or submitting to an operation in order to procure a miscarriage, is not an accomplice although partaking of the moral guilt, because she could not herself be in-

e. *Accessories After the Fact.* — At common law accessories after the fact were accomplices. In some of the states such accessories are held to be accomplices, and in others not.[57]

3. Admission to Testify. — A. Not Discretionary With Court. The doctrine that the admission of an accomplice to testify on behalf of the state, is in the discretion of the court, and confined to cases where there is an express or implied promise of immunity from punishment.[58]

B. At Discretion of Party Calling. — The accomplice may be used as an ordinary witness either for the state, or for the defense.[59]

4. Corroboration. — A. When Called by Defendant. — Where the accomplice is a witness for the defendant his testimony does not require corroboration unless the conviction of another defendant is based upon it.[60]

dicted for the offense. Com. *v.* Wood, 11 Gray (Mass.) 85; Com. *v.* Boynton, 116 Mass. 343; Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471; State *v.* Owens, 22 Minn. 238; Dunn *v.* People, 29 N. Y. 523, 86 Am. Dec. 319; People *v.* Vedder, 98 N. Y. 630; State *v.* Hyer, 39 N. J. Law 598; Watson *v.* State, 9 Tex. App. 237; Com. *v.* Brown, 121 Mass. 69.

57. **Held to be Accomplices.** — In the following cases accessories after the fact are held to be accomplices. Polk *v.* State, 36 Ark. 117; Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330.

In Chumby *v.* State, 28 Tex. App. 87, 12 S. W. 491, a witness for the state testified that he was employed by the owner of an animal to look after and water it; that he found it in defendant's possession; that defendant told him he intended to appropriate it; that the owner offered a reward for the return of the animal; and that witness did not inform him that defendant had the animal until, a year afterward, when having been arrested for another theft, he made terms with the state to turn informer. *Held* that the testimony of the witness must be treated as accomplice testimony.

Held Not Accomplices. — The following cases hold that accessories after the fact are not accomplices. Lowery *v.* State, 72 Ga. 649; State *v.* Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; McKenzie *v.* State, 24 Ark. 636.

In People *v.* Chadwick, 7 Utah 134, 25 Pac. 737, it is held that accessories after the fact are not accomplices, but this is by virtue of the statute of Utah.

In State *v.* Umble, 115 Mo. 452, 22 S. W. 378, it is held that an accessory after the fact is not an accomplice whose testimony needs corroboration.

58. **To be Treated as Any Other Witness.** — In Territory *v.* Corbett, 3 Mont. 50, an accomplice in a case of incestuous cohabitation was called and examined as an ordinary witness. One of the grounds on motion for a new trial was error in allowing the accomplice to testify until the district attorney had complied with the common law usage of asking permission of the court to dismiss the charge against her, and the privilege of introducing her. The court held that she was to be treated as any other witness save that her credibility may be affected by the fact that she is charged with the same offense as the person against whom she testifies.

59. Territory *v.* Corbett, 3 Mont. 50.

60. Josef *v.* State, 34 Tex. Crim. App. 446, 30 S. W. 1067; People *v.* O'Brien, 96 Cal. 171, 31 Pac. 45; People *v.* Bonney, 98 Cal. 278, 33 Pac. 98.

In U. S. *v.* Sykes, 58 Fed. 1000, which was a case for removing unstamped whiskey, a witness intro-

duced by defendant confessed himself to be a confederate in the crime. The witness testified that his father (the defendant) had given him instructions to purchase tax paid whiskey, and that his father did not know that the whiskey had been put in unstamped casks. The court held that his testimony ought to be corroborated.

ACCORD AND SATISFACTION.

By Edgar W. Camp.

CROSS-REFERENCES.

Compromise and Settlement;
Receipt and Release.

1. WHERE RELIED ON AS A DEFENSE.

1. Under What Pleas Evidence of Is Admissible. — Under what pleas evidence of accord and satisfaction is admissible is rather a question of pleading. At common law such evidence was admitted under the general issue in assumpsit,[1] in case,[2] in debt on simple

1. Chitty Pl., vol. I, p. 513; Phillips' Ev., vol. III, p. 131; Burge *v.* Dishman, 5 Blackf. (Ind.) 272; Bank *v.* Kimberlands, 16 W. Va. 555; Chappell *v.* Phillips, Wright (Ohio) 372; Stewart *v.* Saybrook, Wright (Ohio) 374.

2. Chitty Pl., vol. I, p. 527; Phillips' Ev., vol. III, p. 250; Lane *v.* Applegate, 1 Stark. 97, 18 Rev. Rep. 750.

contract,[3] but not in debt on a specialty,[4] in covenant,[5] nor in trespass *vi et armis*.[6]

It is not admissible under a plea of payment.[7]

Generally under codes of procedure and practice acts, proof of accord and satisfaction is admissible only when specially pleaded.[8]

2. Burden of Proof. — The defendant has the burden of proof.[9] But if the plaintiff admits the truth of the plea and seeks to avoid it for fraud or otherwise, the burden is on him,[10] and when the

3. Chitty Pl., vol. I, p. 517; Page *v.* Prentice, 7 Blackf. (Ind.) 322.

4. Chitty Pl., vol. I, pp. 518 and 520, distinguishing however between cases where the specialty is only inducement, matter of fact the foundation, and those in whom the specialty itself is the foundation. In the former, as in debt for rent due on indenture of lease, accord and satisfaction could be proved under the general issue, in the latter not.

Where in an action on a specialty the defendant pleads "*nil debit*" he may prove accord and satisfaction, but not where his plea is "*non est factum*." Bailey v. Cowles, 86 Ill. 333; Phillips' Ev., vol. III, p. 148.

5. Chitty Pl., vol. I, p. 523; Saunders Pl. & Ev., vol. I, p. 23.

6. Chitty Pl., vol. I, p. 545; Phillips *v.* Kelly, 29 Ala. 628; Kenyon *v.* Sutherland, 8 Ill. (3 Gilm.) 99; Longstreet *v.* Ketcham, 1 N. J. Law 170; Doe *v.* Lee, 4 Taunt. 459; Bird *v.* Randall, 3 Burr. 1345.

7. Hamilton *v.* Coons, 5 Dana (Ky.) 317; Wallace *v.* Chandler, 16 Ark. 651; Smith *v.* Elrod, 122 Ala. 269, 24 So. 994; Friermuth *v.* McKee, 86 Mo. App. 64.

The Contrary was suggested in Bank *v.* Kimberlands, 16 W. Va. 555, and in Ligon *v.* Dunn, 6 Ired. Law (N. C.) 133, facts which might under a different system of pleading have sustained a plea of accord and satisfaction were admitted to prove payment.

8. Ingram *v.* Hilton. & D. L. Co., 108 Ga. 194, 33 S. E. 961; Coles *v.* Soulsby, 21 Cal. 47; Parker *v.* Lowell, 11 Gray (Mass.) 353; Covell *v.* Carpenter (R. I.), 51 Atl. 425; Randall *v.* Brodhead, 60 App. Div. 567, 70 N. Y. Supp. 43; Brown *v.* Jones, 17 U. C. Q. B. (Can.) 50.

Waiver by Failure to Object.—But in some cases it has been held that if evidence of accord and satisfaction offered under a plea that would not admit such evidence, is let in without objection, this shows that the alleged accord and satisfaction is treated as an issue in the case, and the objection will be deemed to have been waived, and the case treated as though the evidence had been admitted under a proper pleading. Berdell *v.* Bissell, 6 Colo. 162, Niggli *v.* Foehry, 64 N. Y. St. 658, 31 N. Y. Supp. 931.

In Vermont, evidence of accord and satisfaction is admissible under the general issue, provided defendant gives notice of intention to prove the special matter of defense. Seaver *v.* Wilder, 68 Vt. 423, 35 Atl. 351.

9. Rosenfeld *v.* New, 32 N. Y. St. 301, 10 N. Y. Supp. 232; Simmons *v.* Oullahan, 75 Cal. 508, 17 Pac. 543; McDavitt *v.* McNay, 78 Ill. App. 396; Board *v.* Durnell, (Colo. Ct. App.), 66 Pac. 1073; Noe *v.* Christie, 51 N. Y. 270; Johnson *v.* Collins, 20 Ala. 435; Oilwell Supply Co. *v.* Wolfe, 127 Mo. 616, 30 S. W. 145.

To Prove Payment of Notes Given. If it appears that notes were to be accepted in satisfaction only when paid, the defendant has the burden of showing payment. Dolson *v.* Arnold, 10 How. Pr. 528; Dickenson *v.* Burr, 7 Ark. (7 Eng.) 31; American *v.* Rimpart, 75 Ill. 228; Board of Com's of La Plata County *v.* Durnell, (Colo.), 66 Pac. 1073; Weldon *v.* Voughan, 5 S. C. R. (Can.) 35.

On burden of proof, generally see that Title.

10. Helling *v.* United Order of Honor, 29 Mo. App. 309. See *infra*, action brought to set aside accord and satisfaction. Haist *v.* Grand Trunk R. R. Co., 22 A. R. (Ont.) 504.

plaintiff in making out his own case shows that an accord was made, he has the burden of showing that there was no satisfaction.[11]

3. Necessity of Proving Satisfaction As Well As Accord. — It is necessary to prove the satisfaction as well as the accord.[12]

Evidence of readiness to perform,[13] or of tender of performance

11. A suit was brought on promissory notes, which had memoranda endorsed, showing a compromise settlement at fifty per cent., and payments made on the compromise. The plaintiff offered these notes in evidence. The plaintiff claimed that there had been a default in the performance of the compromise, which gave them the right to sue upon the notes, but did not explain what the terms were that had not been complied with, or what the default was, or that they had not assented to the delay. It was held that the plaintiffs were bound to go far enough to make out a *prima facie* case against the accord which their own evidence disclosed. Browning *v.* Crouse, 43 Mich. 489, 5 N. W. 664.

12. *Canada.*—Thomas *v.* Mallory, 6 U. C. Q. B. 521; Balsam *v.* Robinson, 19 U. C. C. P. 263; Macfarlane *v.* Ryan, 24 U. C. Q. B. 474.

United States.—Way *v.* Russell, 33 Fed. 5.

Alabama. — Cobb *v.* Malone, 86 Ala. 571, 6 So. 6; Smith *v.* Elrod, 122 Ala. 269, 24 So. 994.

California.—Simmons *v.* Oullahan, 75 Cal. 508, 17 Pac. 543; Hogan *v.* Burns, (Cal.), 33 Pac. 631; Holton *v.* Noble, 83 Cal. 7, 23 Pac. 58.

Connecticut.—Francis *v.* Deming, 59 Conn. 108, 21 Atl. 1006.

Florida.—Sanford *v.* Abrams, 24 Fla. 181, 2 So. 373.

Illinois.—Jacobs *v.* Marks, 183 Ill. 533, 56 N. E. 154.

Indiana.—Anderson *v.* Scholey 114 Ind. 553, 17 N. E. 125; Eichholtz *v.* Taylor, 88 Ind. 38.

Iowa.—Ogilvie *v.* Hallam, 58 Iowa 714, 12 N. W. 730; Bradley *v.* Palen, 78 Iowa 126, 42 N. W. 623.

Maine.—Burgess *v.* Denison, 79 Me. 266, 9 Atl. 726.

Massachusetts.—Hermann *v.* Orcutt, 152 Mass. 405, 25 N. E. 735; Dooley *v.* Potter, 146 Mass. 148, 15 N. E. 499.

Missouri.—Goff *v.* Mulholland, 28 Mo. 397.

New York.—Mitchell *v.* Hawley, 4 Denio 414, 47 Am. Dec. 260; Bank *v.* DeGrauw, 23 Wend. 342, 35 Am. Dec. 569.

Pennsylvania.—Hosler *v.* Hursh, 151 Pa. St. 415, 25 Atl. 52.

Rhode Island. — Clarke *v.* Hawkins, 5 R. I. 219.

Utah.—Whitney *v.* Richards 17 Utah 226, 53 Pac. 1122.

Vermont.—Rising *v.* Cummings, 47 Vt. 347.

Washington.—Rogers *v.* Spokane, 9 Wash. 168, 37 Pac. 300.

In Burgess *v.* Denison, etc. Co., 79 Me. 266, 9 Atl. 726, the plaintiff had a claim for labor. Defendants contended that plaintiff had agreed to take a deed in satisfaction. It appeared that defendants obtained the deed from the grantor, but had not delivered it, expecting plaintiff to call for it. It was held that this was insufficient to establish the defense of accord and satisfaction; that nothing short of the actual delivery of the deed would suffice. Martin Alexander Lumber Co. *v.* Johnson (Ark.), 66 S. W. 921; Arnett *v.* Smith, (N. D.), 88 N. W. 1037.

13. Hearn *v.* Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472; Blackburn *v.* Ormsby, 41 Pa. St. 97.

Attempt to Perform.—Francis *v.* Deming, 59 Conn. 108, 21 Atl. 1006. The defendant showed an agreement to compromise on payment of certain money and the delivery of a release, and that he went to the office of the plaintiff's attorney ready to pay the money and deliver the release, but that the attorney was sick at home, and that afterwards and after the present suit was brought the money had been actually tendered to the attorney. It was held that the answer setting up these facts stated no defense, although the proceeding was in equity. The court held the rule in equity to be the same in that instance as at law. Berdew *v.* Tillma, (Neb.), 88 N. W.

of the terms of the accord, will not suffice.[14]

4. What Evidence Admissible. — A. Generally. — To determine generally what is admissible to sustain or defeat a plea of accord and satisfaction, recourse must be had to the general rules of relevancy and competency.[15]

B. In Cases of Liquidated Demands. — But certain facts are so often relied on as to require mention. In most jurisdictions mere payment of part of a liquidated demand can never be shown to prove an accord and satisfaction,[16] yet payment at an earlier time,[17]

123; Ross *v.* Heron, 12 U. C. Q. B. (Can.) 407.

14. *New York.*—Noe *v.* Christie, 51 N. Y. 270; Day *v.* Roth, 18 N. Y. 448; Bank *v.* DeGrauw, 23 Wend. 342, 35 Am. Dec. 569.

Pennsylvania.—Hosler *v.* Hursh, 151 Pa. St. 415, 25 Atl. 52.

Rhode Island. — Clarke *v.* Hawkins, 5 R. I. 219.

South Dakota.—Carpenter *v.* Chicago Co., 7 S. D. 584, 64 N. W. 1120.

Texas.—Bank *v.* Curtis, (Tex.), 36 S. W. 911.

Contra.—Bradshaw *v.* Davis, 12 Tex. 336.

15. Illustration.—The fact of a debtor's insolvency is not evidence of consideration for agreement to accept in full payment of part of a debt. Pearson *v.* Thomason, 15 Ala. 700, 50 Am. Dec. 159.

And *compare* Bryant *v.* Gale, 5 Vt. 416; Coit *v.* Houston, 3 Johns. Cas. 243.

16. *United States.* — Fire Ins. Ass'n. *v.* Wickham, 141 U. S. 564, 12 Sup. Ct. 84.

Arkansas.—Reynolds *v.* Reynolds, 55 Ark. 369, 18 S. W. 377.

Illinois.—Hayes *v.* Massachusetts Co., 125 Ill. 626, 18 N. E. 322.

Indiana.—Miller *v.* Eldridge, 126 Ind. 461, 27 N. E. 132.

Kansas.—St. Louis & Ry. Co. *v.* Davis, 35 Kan. 464, 11 Pac. 421.

Michigan. — Leeson *v.* Anderson, 99 Mich. 247, 58 N. W. 72, 41 Am. St. Rep. 597.

Missouri.—Wetmore *v.* Crouch, 150 Mo. 671, 51 S. W. 738.

Nebraska.—McIntosh *v.* Johnson, 51 Neb. 33, 70 N. W. 522.

New Jersey.—Murphy *v.* Kastner, 50 N. J. Eq. 214, 24 Atl. 564.

New York.—Allison *v.* Abendroth, 108 N. Y. 470, 15 N. E. 606; Evers *v.* Ostherman, 37 Misc. 163, 74 N. Y. Supp. 874; Eames & B. Co. *v.* Prosser, 157 N. Y. 289, 50 N. E. 980.

Pennsylvania.—Com. *v.* Cummins, 155 Pa. St. 30, 25 Atl. 996.

Texas.—Bowdon *v.* Robinson, 4 Tex. Civ. App. 626, 23 S. W. 816.

Vermont.—Bowker *v.* Harris, 30 Vt. 424.

Virginia.—Smith *v.* Chilton, 84 Va. 840, 6 S. E. 142.

The Rule Is Modified or Abrogated by Statute in Alabama (*see* Hodges *v.* Implement Co. (Ala.) 26 So. 490); California (*see* Dobinson *v.* McDonald, 92 Cal. 33, 27 Pac. 1098); Georgia, Maine, North Carolina (*see* Kerr *v.* Sanders, 122 N. C. 635, 29 S. E. 943); Tennessee and Virginia; Holmes *v.* McDonnell, 12 U. C. Q. B. (Can.) 469.

17. Hutton *v.* Stoddart, 83 Ind. 539; Boyd *v.* Moats, 75 Iowa 151, 39 N. W. 237; Schweider *v.* Lang, 29 Minn. 254, 13 N. W. 33; Miller *v.* Bldg. Ass'n, 50 Pa. St. 32; Kirchoff *v.* Voss, 67 Tex. 320, 3 S. W. 548.

Prepayment of Loss Under Policy of Insurance.—In the case of Fire Insurance Association *v.* Wickham, 141 U. S. 564, 12 Sup. Ct. 84, an insurance company paid a part of the amount due on a policy five days after the loss, which was fifty-five days before any money was due under the terms of the policy. The court admitted that payment might be evidence of an accord and satisfaction, but that the question was a proper one for the jury to pass upon after having submitted to them all the facts and circumstances of the payment; that the mere fact of prepayment would not conclusively show an accord and satisfaction. Martin Alexander Lumber Co. *v.* Johnson (Ark.), 66 S. W. 924.

or at a different place than that specified in the contract,[18] or by transfer of property other than money,[19] or by giving new security,[20]

18. Pope *v.* Tunstall, 2 Ark. 209; Fenwick *v.* Phillips, 3 Metc. (Ky.) 87; McKenzie *v.* Culbreth, 66 N. C. 534; Smith *v.* Brown, 12 N. C. 580.

In Jaffray *v.* Davis, 124 N. Y. 164, 20 N. E. 351, it is said in argument that payment of less than the whole debt made at a different place from that stipulated may be shown to prove accord and satisfaction if received in full, citing Jones *v.* Bullitt, 2 Litt. (Ky.) 49; Ricketts *v.* Hall, 2 Bush. (Ky.) 249; Smith *v.* Brown, 3 Hawks (N. C.) 580; Jones *v.* Perkins, 29 Miss. 139, 64 Am. Dec. 136; Schweider *v.* Lang, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202.

19. Gavin *v.* Annan, 2 Cal. 494; Savage *v.* Everwan, 70 Pa. St. 315, 10 Am. Rep. 676; Watkinson *v.* Ingoldsby, 5 Johns. (N. Y.) 386; Hasted *v.* Dodge (Iowa), 35 N. W. 462; Ridlon *v.* Davis, 51 Vt. 457; Christie *v.* Craige, 20 Pa. St. 430.

Value or Character of Consideration Not Material.—In Traphagen *v.* Vorhees, 44 N. J. Eq. 21, 12 Atl. 895, the court said if the testatrix gave the receipt that was offered in acceptance of accord and satisfaction under a promise to the defendant that the services theretofore rendered and those which he should thereafter render should be considered as an equivalent for the mortgage debt, and on her death operate to discharge the debt, there could be no doubt that her promise had the support of a sufficient consideration to give it legal efficiency, that as to the adequacy or sufficiency of the consideration, the testatrix had a right to be her own judge; that a purely technical consideration of very trifling value in comparison with the amount of the debt, would be held sufficient where there was no undue influence, imposition or fraud.

In Thurber *v.* Sprague, 17 R. I. 634, 24 Atl. 48, a father, as trustee for his son, had invested certain moneys, and the son after coming of age, demanded the moneys, and the father said that he had made it up to his son many times over; that if the son was not satisfied and wanted the money, $500, he should take it and go, but that if he remained with the father, the father did not wish to hear of it again. The son made no reply, but continued to live with his father and received money and support until the latter's death. It was held that this established an accord and satisfaction, the son having understood that by continuing to receive support, he waived his claim to the money.

In Neal *v.* Handley, 116 Ill. 418, 6 N. E. 45, 56 Am. Rep. 784, evidence was given that $100 and a cow were taken in satisfaction of a judgment. It was apparent that $100 and the value of the cow amounted to less than the judgment. The court held that the doctrine that payment of a less sum cannot be pleaded in satisfaction of a larger sum was confined to the payment of money merely, and quoted Pinnel's case, 30 Coke 238, as follows: "It was resolved by the whole court that payment of a lesser sum on the debt in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum, but the gift of a horse, hawk or robe, etc., in satisfaction is good, for it shall be that a horse, hawk or robe, etc., might be more beneficial to the plaintiff than the money in respect of some circumstances, or otherwise the plaintiff would not have accepted of it in satisfaction."

20. Schmidt *v.* Ludwig, 26 Minn. 85, 1 N. W. 803. *Compare* Kemmerer's Appeal, 102 Pa. 558.

Giving Security for Part of the Debt.—In Jaffray *v.* Davis, 124 N. Y. 164, 26 N. E. 351, the court cites LePage *v.* McCrea, 1 Wend. 164; Boyd *v.* Hitchcock, 20 Johns. 76, 11 Am. Dec. 247, on the proposition that giving further security, though for a less sum than the debt, and acceptance of it in full of all demands make a valid accord and satisfaction, and that if a debtor gives his creditor a note indorsed by a third party for a less sum than the debt, no matter how much less, but in full

or even in some cases new evidence of debt may be shown to establish accord and satisfaction,[21] and a compromise between an insolvent and his creditors may be given in evidence by him to show accord and satisfaction.[22]

satisfaction of the debt, and which is received as such, that is a good accord and satisfaction, citing also Varney *v.* Conery, 77 Me. 527, 1 Atl. 683; Stewart *v.* Hanson, 7 U. C. C. P. (Can.) 168; Hanscombe v. Macdonald, 4 U. C. C. P. (Can.) 190.

Agreement to Pay Delinquent Taxes on Mortgaged Premises.— In Day *v.* Gardner, 42 N. J. Eq. 199, 7 Atl. 365, it appeared that one Rollins had two mortgages against the defendant bearing 7 per cent. interest; that there were some five years' back taxes unpaid on the mortgaged premises, and that Rollins made an agreement with the defendant that if the latter would pay up the taxes the mortgaged debt would be reduced from $900 to $500, and the rate of interest from 7 to 6 per cent. per annum. Debtor performed ber part of the agreement. It was held that the payment of the taxes removing liens prior to the mortgage gave the mortgagee additional or better security, and was a substantial benefit, and that therefore the facts could be given in evidence of an accord and satisfaction.

Agreement Made Under Mistake As to Party's Liability. — In Allison *v.* Abendroth, 108 N. Y. 470, 15 N. E. 606, defendant was at the time of the compromise believed to be a special partner, and not liable to the plaintiffs; that under that impression he gave, and the plaintiffs accepted his notes in satisfaction of a claim against the partnership. The notes were for 25 per cent. of the claim, and were afterwards paid. It was held that these facts established an accord and satisfaction. The fact that the settlement was made under a misapprehension as to the liability of the defendant made no difference; that had the defendant been a general partner, the acceptance of the notes under the same agreement would have been satisfaction.

21. Allison *v.* Abendroth, 10[illegible] N. Y. 470, 15 N. E. 606; Mason *v.* Wickersham, 4 W. and S. (Pa.) 100; Booth *v.* Smith, 3 Wend. 66. *Compare* Hooker *v.* Hyde, 61 Wis. 204, 21 N. W. 52. Thomas *v.* Mallory, 6 U. C. Q. B. (Can.) 521; Clark *v.* Ring, 13 U. C. Q. B. (Can.) 185.

In Jaffray *v.* Davis, 124 N. Y. 164, 26 N. E. 351, the facts were that defendants owed plaintiffs about $7700, and delivered their (defendants') notes amounting to about $3400, secured by a chattel mortgage, which notes and mortgage were received by plaintiffs under an agreement to accept them in full satisfaction of the indebtedness. The notes were paid, and these facts were submitted as establishing an accord and satisfaction. The court cited Goddard *v.* O'Brien, 9 Q. B., Div. 37, to the effect that A. being indebted to B. in £125, gave B. a check (presumptively negotiable) for £100, payable on demand, which B. accepted in satisfaction, and it was held by the English court that it was a good satisfaction; Huddleston B. approving the opinion in Sibree *v.* Tripp, 15 M. & W. 26, that a negotiable security may operate, if so given and taken, in satisfaction of a debt of a greater amount. The circumstance of negotiability making it a different thing, more advantageous than the original debt, which was not negotiable. Loomer *v.* Marker, 11 U. C. Q. B. (Can.) 16.

22. Pontious *v.* Durflinger, 59 Ind. 27; Murray *v.* Snow, 37 Iowa 410; Steinman *v.* Magnus, 11 East 390. *Compare* Allen *v.* Roosevelt, 14 Wend. 100; Wheeler *v.* Wheeler, 11 Vt. 60.

In Paddleford *v.* Thacher, 48 Vt. 574, it was stated to be the rule, after a consideration of the English authorities, that an agreement by all of one's creditors to forbear or discharge, is a sufficient consideration to support the promise of each to do so, and especially after the agreement has been fully executed by the payment by the debtor of the stipulated sum as a discharge by the

C. In Cases of Unliquidated Demands. — **Conditional Offer.** Where the sum due is unliquidated or disputed, and the debtor tenders a sum with notice that it is tendered in full payment and satisfaction of the demand, and the creditor takes the proffered sum; these facts establish an accord and satisfaction even though the creditor asserts and at the receipt of the payment asserted that he did not accept the same in full but only on account.[23] But the offer must be expressly made upon condition that it be accepted in full.[24] Any suggestion of further negotiation permits the creditor

creditors of their debts. Brunskill *v.* Metcalfe, 2 U. C. C. P. (Can.) 431.

Not Necessary That Agreement Include All the Creditors.—In Laird *v.* Campbell, 92 Pa. 470, an agreement was entered into reading, "We the undersigned, creditors of William W. Laird." It was insisted that this meant all the creditors, and that the agreement not having been executed by all, was not binding upon any. The court held that an agreement for composition between a debtor and his creditors was good, although all the creditors were not included, and that if it was intended not to be binding unless all the creditors did come in, the agreement should so state in express terms.

23. *United States.*— Fire Ins. *v.* Wickham, 141 U. S. 564, 12 Sup. Ct. 84; Savage *v.* U. S. 92 U. S. 382.

Connecticut.—Potter *v.* Douglass, 44 Conn. 541.

Indiana.—Talbott *v.* English, 156 Ind. 299, 59 N. E. 857; Hutton *v.* Stodard, 83 Ind. 539.

Iowa.—Keck *v.* Ins. Co., 89 Iowa 200, 56 N. W. 438; Brick *v.* County of Plymouth, 63 Iowa 462, 19 N. W. 304.

Michigan.—Tanner *v.* Miller, 108 Mich. 58, 65 N. W. 664, 62 Am. St. Rep. 687.

Minnesota.—Truax *v.* Miller, 48 Minn. 62, 50 N. W. 935; Marion *v.* Heimbach, 62 Minn. 214, 64 N. W. 386.

Nebraska.—Treat *v.* Price, 47 Neb. 875, 66 N. W. 834.

New York.—King *v.* Dorman, 26 Misc. 133, 55 N. Y. Supp. 876; Reynolds *v.* Empire L. Co., 66 N. Y. St. 712, 33 N. Y. Supp. 111; Hills *v.* Sommer, 25 N. Y. St. 1003, 6 N. Y. Supp. 469; Logan *v* Davidson 18 App. Div. 353, 45 N. Y. Supp. 961; Nassoiy *v.* Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; Looby *v.* West Troy, 24 Hun 78; Davenport *v.* Wheeler, 7 Cow. 231; Eames V. B. Co. *v.* Prosser, 157 N. Y. 289, 51 N. E. 986; Cleveland *v.* Toby, 36 Misc. 319, 73 N. Y. Supp. 544.

Vermont.—Preston *v.* Grant, 34 Vt. 201; McDaniels *v.* Bank, 29 Vt. 230, 70 Am. Dec. 406.

Contra. — Perin *v.* Cathcart (Iowa), 89 N. W. 12.

Leaving Thing Offered With Third Person To Be Delivered.— In the case of McDaniels *v.* Lapham, 21 Vt. 222, the court approved the case of McGlynn *v.* Billings, 16 Vt. 329, and stated that case as follows: Plaintiff and defendant met for the purpose of making a settlement, and having examined their accounts, they disagreed as to the balance due to the plaintiff from the defendant. The defendant then drew an order in favor of the plaintiff upon a third person for the sum he admitted to be due, and offered it to the plaintiff as his balance due. The plaintiff refused to receive the order, and claimed a larger sum as being the amount the defendant owed him. The defendant then gave the order to one H, who was present, and directed H to deliver the order to plaintiff when he would receive it, as the balance due to him. Plaintiff subsequently took the order from H, but at the same time declared that he did not receive it in full, and brought suit to recover the balance. The court held that the acceptance of the order operated as a full discharge of all claims, although he expressly declared he did not so receive it.

24. Payment Construed in Light of Preceding Negotiations.— In the

case of Sanford *v.* Abrams, 24 Fla. 18, 2 So. 373, there was considerable correspondence over a disputed account. Finally plaintiff submitted a proposition, that defendant should pay $2000 and receipt certain bills. Defendant offered $2000, and plaintiff telegraphed, "Deposit $2000 with A and all right." This money was deposited and was accepted, but the plaintiff claimed that he did not understand that it was in full of all demands. The court said that receipt and acceptance of the money was only referable to the object and purpose of the negotiation, viz., a settlement in full.

Where Claims Are Made Against Municipal Corporations, and allowed for a less sum than that demanded, the acceptance of the sum allowed is evidence of an accord and satisfaction; thus in Brick *v.* Co. of Plymouth, 63 Iowa 462, 19 N. W. 304, a claim was made against a county for $907. The supervisors allowed the sum of $318, rejecting the balance. The amount was paid to the plaintiff who received it and knew that the balance had been rejected. It was held that he could not maintain suit for the balance. The payment of a part allowed was to be considered satisfaction for the entire sum, the court referring to and approving Wapello Co. *v.* Sinnaman, 1 Greene 413. See also Advertiser and Tribune Co. *v.* Detroit, 43 Mich. 116, 5 N. W. 72; Perry *v.* Cheboygan, 55 Mich. 250, 21 N. W. 333; People *v.* Supervisors, 43 N. Y. St. 77, 17 N. Y. Supp. 314.

Plaintiff Must Be Informed That Allowance Made Is in Full.—If he does not know this when he accepts payment of smaller amount he may still sue the municipality for the balance. Board *v.* Durnell, (Colo. App.), 66 Pac. 1073.

Agreement With County Proved by Oral Testimony.—Where no record of it appears on the minutes of the County Board, and plaintiff accepted the sum agreed upon. Green *v.* Lancaster Co., 61 Neb. 473, 85 N. W. 439.

Estoppel to Deny Regularity of Action of County.—One who accepts a sum paid by a county in compromise of a claim cannot be permitted to prove that the meeting at which the compromise was made was not regularly held. Green *v.* Lancaster Co., 61 Neb. 473, 85 N. W. 439.

This Rule As to Claims Against Municipalities Not Applicable to liquidated demands. Pease *v.* Com. Council, 126 Mich. 436, 85 N. W. 1082.

In Fuller *v.* Kemp, 138 N. Y. 231, 33 N. E. 1034, plaintiff sent an itemized bill for $675. Defendant wrote acknowledging receipt, saying that there must be some mistake, asking for a corrected bill. Plaintiff sent an itemized bill for the same amount. Defendant wrote inclosing check for $400, stating that the same was in full satisfaction; that he trusted that plaintiff would view the matter as he did. Plaintiff cashed the check, and again sent his bill, showing a credit of $400. Defendant wrote calling attention to the condition on which he had forwarded the check; that he did not recognize plaintiff's right to retain the amount, and repudiate the condition; asking for receipt in full, or return of the money. To this the plaintiff made no reply. The court said that had the defendant remained silent, it might have been presumed that he assented to the use which plaintiff had made of the check, and would have become bound to pay the balance.

It would seem, however, that such demand is only necessary where it appears that the creditor did not understand that the offer was conditioned on its acceptance in full. Towslee *v.* Healey, 39 Vt. 522; Potter *v.* Douglass, 44 Conn. 541; Nassoiy *v.* Tomlinson, 48 N. Y. St. 182, 20 N. Y. Supp. 384; Miller *v.* Holden, 18 Vt. 337; Talbott *v.* English, 156 Ind. 299, 59 N. E. 857; Curran *v.* Rummel, 118 Mass. 482; Talbott *v.* English, 156 Ind. 299, 59 N. E. 857; Graham *v.* Howell, 50 Ga. 203; Gassett *v.* Andover, 21 Vt. 342; Brigham *v.* Dana, 29 Vt. 1; Fulton *v.* Monona Co., 47 Iowa 622; Tanner *v.* Merrill, 108 Mich. 58, 65 N. W. 664.

Knowledge of the Condition of the Offer To Be Shown.—It must appear that the creditor knows or ought to have known that the offer was so conditioned. Board *v.* Dur-

to credit the amount offered on account and sue for the balance claimed by him.[25]

nell (Colo. App.), 66 Pac. 1073; Talbott *v.* English, 156 Ind. 299, 59 N. E. 857; Preston *v.* Grant, 34 Vt. 201; Springfield, etc., Ry. Co. *v.* Allen, 46 Ark. 217; Bull *v.* Bull, 43 Conn. 455; Hilliard *v.* Noyes, 58 N. H. 312.

In Donohue *v.* Woodbury, 6 Cush. (Mass.) 148, 52 Am. Dec. 777, the evidence for defendant was that the attorney for the defendant made a tender to the attorney for the plaintiff of a certain sum "as and for the claim of plaintiff against defendant," and that plaintiff's attorney took the money and made no reply. The attorney for the plaintiff said he had not heard the words quoted, nor any equivalent words. Chief Justice Shaw said: "It was the duty of the agent before receiving the money to know what was said and what was the purpose expressed, and if the words were so spoken that with ordinary care he might have heard them, and through carelessness or inattention he failed to do so, the acceptance was binding as an assent to its terms."

In the case of Gassett *v.* Andover, 21 Vt. 342, after the suit had been begun, the defendant tendered $14 in full. Plaintiff received it, protesting that it was not enough, but that he would take it and give credit. It did not appear that the defendant expressed any dissent to this, and it was suggested that it might therefore be inferred that defendant assented to its acceptance in part payment, and not in full.

25. Fuller *v.* Kemp, 16 N. Y. Supp. 158; this principle was not controverted, but a different interpretation of the correspondence was taken on the appeal of this case. See 138 N. Y. 231, 33 N. E. 1034; Bratt *v.* Scott, 44 N. Y. St. 727, 18 N. Y. Supp. 507.

Illustrations. — In Pottlitzer *v.* Wesson, Ind. App., 35 N. E. 1030, the defendant sent a check by letter saying that it was in settlement for a certain car of goods, enclosing also an invoice showing account of sales and saying: "We trust the same will prove satisfactory, and to hear from you again." The plaintiffs at once wrote that they had placed the amount of the check to defendant's credit, and had placed in the hands of a collecting agency, their claim for the balance. The defendant never replied to this letter. The court held that the letter and invoice sent with the check did not amount to an unconditional offer to be accepted in full, or not at all, and referred to the case of Curran *v.* Rummell, 118 Mass. 482, where a check sent "in settlement of your account," was regarded as not amounting to an unconditional offer, so that the creditor was not bound to treat it other than as a part payment by the debtor to be applied in reduction of the debt only, and distinguished the case of Hutton *v.* Stoddart, 83 Ind. 539, where the letter containing the check expressly required that it be returned, if not accepted in full.

In Van Dyke *v.* Wilder, 66 Vt. 579, 29 Atl. 1016, there was a disputed account between the parties, and the defendants wrote enclosing a check and saying: "We claim this to be in full settlement of account, but admit that you do not allow the claim." The plaintiff retained the check, but it was held the facts were not evidence of an accord and satisfaction. There was no declaration in the defendant's letter that if the plaintiff retained the check it must be in full satisfaction.

In Boston Rubber Co. *v.* Peerless Wringer Co., 58 Vt. 551, 5 Atl. 407, there was a disputed account between the parties, and the defendant sent a statement with a note for the admitted balance, the statement closing with the following: "Trusting you will find this correct and satisfactory, we remain, etc." It was held that this did not indicate an unequivocal requirement that the note he accepted in full or not at all. There was no condition that if accepted it should be in satisfaction.

When one having a single cause of action for unliquidated damages demands and receives a certain sum, there is a presumption that the demand and payment were made in accord and satisfaction of the entire cause of action.[26]

D. Written Agreements. — If the agreement of accord and satisfaction was in writing, the writing must be produced or its absence explained.[27] But when the agreement itself was not in writing, but was consummated by the execution and delivery of a written obligation, such writing need not be produced or accounted for in proving the plea.[28]

E. Lapse of Time. — Lapse of time before commencement of action is a circumstance corroborating other evidence of accord and satisfaction.[29]

F. Discontinuance. — A discontinuance or dismissal of a former action for the same cause of action on payment of costs by defendant, is *prima facie* evidence in the second action of an accord and satisfaction.[30]

Pusheck *v.* Francis E. Willard U. T. H. Ass'n., 94 Ill. App. 192; Dougherty *v.* Herndon (Tex.), 65 S. W. 891; Green *v.* Lancaster Co., 61 Neb. 473, 85 N. W. 439.

26. Hinkle *v.* Minneapolis, etc. Ry. Co., 31 Minn. 434, 18 N. W. 275. Hinkle had been injured by defendant's negligence and made a demand for $91.25, covering doctor's bill and loss of time, and this amount was paid. The court said that it was to be presumed that plaintiff knew when he received this money, that he had received the injury now complained of, and that although there was no express agreement that the money should be paid in full satisfaction, yet that was the inference to be drawn from the facts; that the cause of action being one and entire, no other construction could be put upon the acts of the parties. Lane v. Kingsmill, 6 U. C. Q. B. (Can.) 579.

27. American *v.* Rimpert, 75 Ill. 228.

28. In A. P. Brantley Co. *v.* Lee, 106 Ga. 313, 32 S. E. 101, Lee testified that defendants had executed their notes and delivered them to the plaintiff in satisfaction of the demands sued upon. It was held upon the authority of Fisher *v.* George S. Jones Co., 93 Ga. 717, 21 S. E. 152, that this parol evidence was competent without producing or accounting for the notes. But in the same case it was held error to permit a witness to say that notes for a certain amount — naming it — were given in satisfaction because this testimony went into the contents of the notes, but it was suggested that probably the error was harmless. *Compare* American v. Rimpert, 75 Ill. 228.

29. Ketchem *v.* Gulick (N. J. Eq.), 20 Atl. 487; Abbott *v.* Wilmot, 22 Vt. 437.

Lapse of Time Alone does not sustain the plea of accord and satisfaction. Austin *v.* Moore, 7 Metc. (Mass.) 116; but sec, Jenkins *v.* Hopkins, 9 Pick. 543.

30. Dana *v.* Taylor, 150 Mass. 25, 22 N. E. 65. Williams was appointed assignee of Taylor, and as such brought an action on the same cause of action set out in the present case. In the former action on petition of the plaintiff, leave had been granted by the court to compromise, the defendant paying costs, and it appeared that he had paid the costs. It was held that if he paid the costs under the agreement that in consideration of such payment the assignee would give up the right to claim, and not again sue upon it; that would be sufficient proof of accord and satisfaction. But see Car-

G. Receipt in Full. — A receipt in full supports the plea.[31]

5. Rebutting Evidence Of. — Plaintiff may rebut defendant's evidence of an accord and satisfaction with evidence that the compromise was obtained by mistake or fraud.[32]

6. Variance. — Defendant will not be permitted to prove an accord and satisfaction other than that pleaded.[33]

7. Sufficiency and Submission to Jury. — Only a preponderance of evidence is required to sustain the plea.[34]

If the evidence is not conflicting and only one inference can reasonably be drawn from it, the question is of law and not for the jury.[35] Otherwise the inference of fact is to be drawn by the

ter *v.* Wilson, 2 Dev. & B. (N. C.) 276, and Bond *v.* McNider, 3 Ired. Law (N. C.) 440.

31. Grumley *v.* Webb, 48 Mo. 562; Serat *v.* Smith, 40 N. Y. St. 45, 15 N. Y. S. 330; Treat *v.* Price, 47 Neb. 875, 66 N. W. 834; Robinson *v.* Ry. Co., 84 Mich. 658, 48 N. W. 205; Vedder *v.* Vedder, 1 Denio 257; Springfield, etc. Ry. Co. *v.* Allen, 46 Ark. 217; U. S. *v.* Adams, 7 Wall. 463.

"The Receipt Must Be Interpreted and Construed From Existing Facts, and in the light of surrounding circumstances." Grumley *v.* Webb, 44 Mo. 444, 100 Am. Dec. 304.

And Is Open to Explanation. — Maze *v.* Miller, 1 Wash. 328, 16 Fed. Cas. No. 9362; Fire Ins. Ass'n. *v.* Wickham, 141 U. S. 564, 12 Sup. Ct. 84; see Tanner *v.* Merrill, 108 Mich. 58, 62 Am. St. Rep. 687, 65 N. W. 664; Bull *v.* Bull, 43 Conn. 455.

Refusal to Give Receipt may be evidence that there was no accord and satisfaction. Rosenfeld *v.* New, 32 N. Y. St. 301, 10 N. Y. Supp. 232; Sicotte *v.* Barber, 83 Wis. 431, 53 N. W. 697. But *compare* Keck *v.* Ins. Co., 89 Iowa 200, 56 N. W. 438; Nassoiy *v.* Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; Potter *v.* Douglass, 44 Conn. 541.

32. Bliss v. Ry. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504; O'Donnell *v.* Town of Clinton, 145 Mass. 461, 14 N. E. 747; Pierce *v.* Drake, 15 Johns. 475; Oliwill *v.* Verdenhalven, 39 N. Y. St. 200, 15 N. Y. Supp. 94; Leslie v. Keepers, 68 Wis. 123, 31 N. W. 486, 4 Pac. 221; Mannakee *v.* McCloshey, 23 Ky. Law 515, 63 S. W. 482; Haar *v.* Henley, 18 U. C. Q. B. (Can.) 494; Rowe *v.* Grand Trunk R. R. Co., 16 U. C. C. P. (Can.) 500.

Contra.—Roach *v.* Gilmer, 3 Utah 389, 4 Pac. 221.

33. In Smith *v.* Elrod, 122 Ala. 269, 24 So. 994, the defendant pleaded an accord and satisfaction made by a transfer of a sawmill and equipment, but the proof showed that the defendant also promised to deliver certain shingles and perform certain other acts. It was held that although the proof was sufficient to show an accord and satisfaction had the same been properly pleaded, yet the variance was fatal.

34. Bruce *v.* Bruce, 4 Dana 530; Cheeves *v.* Danielly, 74 Ga. 712.

35. Truax *v.* Miller, 48 Minn. 62, 50 N. W. 935; Hinkle *v.* Minneapolis & St. L. Ry. Co., 31 Minn. 434, 18 N. W. 275; Hills *v.* Sommer, 53 Hun 392, 6 N. Y. Supp. 469.

In Pennsylvania, however, the rule is broadly stated thus: "Whether a note or bond was accepted in satisfaction of the original claim is matter for the jury, and it is error for the court to decide it as matter of law." Jones *v.* Johnston, 3 Watts & S. 276, 38 Am. Dec. 760; Lees *v.* James, 10 Serg. & R. 307; Wallace *v.* Fairman, 4 Watts 379; Hart *v.* Boller, 15 Serg. & R. 162, 16 Am. Dec. 536; Stone *v.* Miller, 16 Pa. St. 450.

Where Evidence Is All Documentary.—In the case of Sanford *v.* Abrams, 24 Fla. 181, 2 So. 373, the negotiations were all in writing, and it was held that upon the evidence,

jury.[36]

II. ACTIONS TO SET ASIDE.

In an action to set aside an accord and satisfaction, the burden is heavily on the plaintiff to establish the fraud or mistake alleged;[37] and generally he must prove repayment or tender of anything received by him under the compromise.[38]

the court should have determined whether what passed between the parties was an accord and satisfaction, and not have submitted the matter to the jury.

Blackley *v.* McCabe, 16 Ont. App. (Can.) 295.

36. Brenner *v.* Herr, 8 Pa. St. 106; Frick *v.* Algeier, 87 Ind. 255.

It is not necessary, in order to make a question for the jury, that there be a conflict of evidence; if the facts are undisputed, but yet reasonable, men might differ in the inferences to be drawn from them, the question is for the jury. Rosenfeld *v.* New, 32 N. Y. St. 301, 10 N. Y. Supp. 232; Hills *v.* Sommer, 25 N. Y. St. 1003, 6 N. Y. Supp. 469; Mortlock *v.* Williams, 76 Mich. 568, 43 N. W. 592; Perin *v.* Cathcart, (Iowa), 89 N. W. 12; Port Darlington Harbor Co. *v.* Squair, 18 U. C. Q. B. (Can.) 533; Greenwood *v.* Foley, 22 U. C. C. P. (Can.) 352; Weldon *v.* Vaughan, 5 S. C. R. (Can.) 35. *Contra.*—Haist *v.* Grand Trunk R. R. Co., 22 A. R. (Ont.) 504.

37. Currey *v.* Lawler, 29 W. Va. 111, 11 S. E. 897; Helling *v.* United Order, 29 Mo. App. 309; Ball *v.* McGeoch, 81 Wis. 160, 51 N. W. 443.

38. Bensen *v.* Perry, 17 Hun 16; Alexander *v.* R. R. Co., 54 Mo. App. 66; Potter *v.* Ins. Co., 63 Me. 440; Bisbee *v.* Ham, 47 Me. 543; Strodder *v.* Southern G. Co., 94 Ga. 626, 19 S. E. 1022.

Except Where Right to Sum Received Is Undisputed. — Leslie *v.* Keepers, 68 Wis. 123, 31 N. W. 486; Leeson *v.* Anderson, 99 Mich. 247, 58 N. W. 72, 41 Am. St. Rep. 597.

Or Recipient Supposed it Paid on Another Account.—Butler *v.* Richmond T. D. R. Co., 88 Ga. 594, 15 S. E. 668.

ACCOUNTANTS.—See Expert Testimony.

ACCOUNTS, ACCOUNTING AND ACCOUNTS STATED.

By Edgar W. Camp.

CROSS-REFERENCES.

Books of Account;
Contribution;
Equity; Executors and Administrators;
Factors;
Guardian and Ward;
Partnership; Principal and Agent; Principal and Surety;
Receivers; Reference;
Trusts and Trustees;
Waste.

I. ACTIONS FOR ACCOUNTING UNDER CODES OF PROCEDURE.

1. Generally. — The law of evidence in actions for accounting brought under codes of procedure is the same that governs in actions for accounting in equity. Cases from states having codes or practice acts will be cited under the head of "Actions in Equity for Accounting."

II. ACTIONS IN EQUITY FOR ACCOUNTING.

1. Before Interlocutory Decree for Accounting. — A. GENERALLY. a. *Evidence Confined to Right to Such Decree.* — On the hearing the evidence is confined to proving or disproving plaintiff's right to an accounting.[1]

1. Hudson *v.* Trenton, 16 N. J. Eq. 475; Walker *v.* Woodward, 1 Russ. 107; Graham *v.* Golding, 7 How. Pr. (N. Y.) 260; Morrison *v.* Horrocks, 40 Hun 428; 2 Dan. Ch. Pr. (6th Am. Ed.) pp. 856, 857; Law *v.* Hunter, 1 Russ. 100; Hornby *v.* Hunter, 1 Russ. 89.

Whole Subject Shown to Court. "Each party has a right to bring

The plaintiff's right to an accounting must be established before the court can refer the case for the purpose of taking the account.[2] Thus it may be shown that there are mutual demands,[3] or long or

before the court, as fully as his interests may require, the whole subject upon which the decree for an account is to be founded. The circumstance that the court, in practice, acts through the master, cannot alter the case, and the mere fact that the evidence might be lost, is a strong reason for admitting it." Tomlin *v.* Tomlin, 1 Hare 236.

In Standish *v.* Babcock, 48 N. J. Eq. 386, 22 Atl. 734, 30 L. R. A. 604, the account consisted of but few items, and they had all been fully and satisfactorily proved apparently without objection on the hearing; with the exception of a single item. The court held that a reference was therefore unnecessary; that on the original hearing **the only evidence** generally material or competent is such as goes to prove or disprove the right to an account; that evidence respecting all items of the account is in strictness inadmissible at that stage, but that under the circumstances of that case, the court could decide by the same decree that complainant was entitled to an account and also the amount that he was entitled to recover.

2. Beale *v.* Hall, 97 Va. 383, 34 S. E. 53; Lee Co. Justices *v.* Fulkerson, 21 Gratt. (Va.) 182. But see Ridenbaugh *v.* Burnes, 14 Fed. 93.

Evidence Must Show Probable Right.—"To lay the foundation for the interlocutory decree the facts as to the account must be put in issue and there must be some evidence to show the facts probable and the equity proper. A reference will not be made on mere speculation that testimony may be adduced before the master. It is an established rule that testimony in chief be taken before reference is made." Planters Bank *v.* Stockman, 1 Freem. Ch. (Miss.) 502; McLoskey *v.* Gordon, 26 Miss. 260.

In Baltimore etc. Co. *v.* Williams, 94 Va. 422, 26 S. E. 841, the answer fully denied the allegations of the bill relating to the right to an accounting, and apparently there was no evidence adduced on the hearing establishing the right to an accounting. The court said that the prayer for an account should not have been granted; that a reference should not be awarded to enable a plaintiff to make out his case nor until it has been ascertained that he has a right to demand it, and quoted as follows from Barton's Ch. Pr., Vol. 2, p. 630: "The settled rule in respect to orders of reference is that before an application for one shall be granted it must appear with reasonable certainty that an order will be necessary, and it will not be made upon the suggestion that in some contingency one will be required; for it will not do to put the defendant to the trouble and expense of rendering an account until it is ascertained that the plaintiff has a right to demand it, nor will a reference be made for the purpose of furnishing evidence in support of the allegations of the bill."

Error to Order Without Proof. In Sadler *v.* Whitehurst, 83 Va. 46, 1 S. E. 410, the bill was demurred to. The demurrer was overruled and without giving an opportunity to the defendant to answer the court ordered an accounting as prayed for in the bill. The court of appeals held that the making of this order was error; that a court of equity cannot decree an accounting for the purpose of furnishing evidence in support of a bill; that the court had repeatedly decided that an account should not be allowed in any case, unless shown to be proper and necessary by the proceedings and proofs in the cause.

3. Padwick *v.* Hurst, 18 Beav. 575; Phillips *v.* Phillips, 9 Hare 471; Avery *v.* Ware, 58 Ala. 475; Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273; Garner *v.* Reis, 25 Minn. 475; Walker *v.* Cheever, 35 N. H. 339; Porter *v.* Spencer, 2 Johns. Ch. 169.

complicated accounts,[4] or a fiduciary relation between the parties.[5]

b. *Evidence Must Follow the Bill.* — The evidence must not only make out a case for an accounting, but the case stated in the bill.[6]

If the bill is for an account as to particular matters, and plaintiff fails to make a case for accounting as to them, or some of them, he cannot proceed under a general allegation of voluminous and intricate accounts existing between the parties where such allegation has been inserted as a mere pretext to make a case of equity jurisdiction.[7]

4. Crown Coal & Tow Co. *v.* Thomas, 177 Ill. 534, 52 N. E. 1042; Padwick *v.* Hurst, 18 Beav. 575; 3 Pom. Eq. § 1421.

Whether Mere Fact of Complicated Accounts Enough. — But see note in Pomeroy as to present English practice, and see Marvin *v.* Brooks, 94 N. Y. 71, and Uhlmann *v.* Ins. Co., 109 N. Y. 660, 17 N. E. 363, holding that the mere fact of complicated accounts is not sufficient to make a case for accounting in equity. At the utmost it is discretionary with a court of equity to decree an accounting in such a case. Railway Co. *v.* Martin, 2 Phill. 758; Phillips *v.* Phillips, 9 Hare 471; Bliss *v.* Smith, 34 Beav. 508.

It is sufficient if it appear that the trial of any one of the issues will involve the examination of a long account. Whitaker *v.* Desfosse, 7 Bosw. (N. Y.) 678, although the determination of some other issue may render it unnecessary to try the first named issue at all. Batchelor *v.* Albany Ins. Co., 6 Abb. Pr. (N. S.) (N. Y.) 240.

5. Garr *v.* Redman, 6 Cal. 574, 578; Davis *v.* Davis, 1 Del. Ch. 256; Coquillard *v.* Suydam, 8 Blackf. (Ind.) 24; Rippe *v.* Stogdell, 61 Wis. 38, 20 N. W. 645.

6. Crothers *v.* Lee, 29 Ala. 337; McAndrew *v.* Walsh, 31 N. J. Eq. 331; Adams *v.* Gaubert, 69 Ill. 585; Weeks *v.* Hoyt, 5 Hun 347; Salter *v.* Ham, 31 N. Y. 321.

Accounting Limited by Pleadings. In Welch *v.* Arnett (N. J.), 20 Atl. 48, the bill asked for an accounting for certain lumber sawed at the plaintiff's mills. The chancellor ordered an accounting for certain other lumber as well. The court of errors and appeals said that this demand was so distinct from an account of transactions mentioned in the bill, and was to be supported on grounds so dissimilar, that the complainants ought to have presented it in clear and distinct form; that the order on that point was not fairly within the issue raised in the pleadings, and to that extent the order should be modified.

In Manning *v.* Manning, 69 N. Y. St. 744, 35 N. Y. Supp. 333, the only cause of action alleged was that the plaintiff had deposited with the defendant money for investment and speculation on her account, and the defendant had made large profits therefrom, for which he refused to account. The evidence showed that the plaintiff had made no such deposits, but that defendant, the plaintiff's husband, a stock-broker, had opened an account in her name, intending to make a gift of the income and profits to the plaintiff. It was held that even if this made it a cause of action, it was not the cause of action set up in the complaint, and was no ground for a decree for an accounting.

In Arnold *v.* Angell, 62 N. Y. 508, a bill for a partnership accounting, the court found that the partnership was not established; but that plaintiffs had a joint interest with the defendant in certain profits and were entitled to an accounting therefor. The court of appeals held that the order for an accounting was error because made upon a matter not within the pleadings.

7. Darthez *v.* Clemens, 6 Beav. 165; Consequa *v.* Fanning, 3 Johns. Ch. 587; Moore *v.* Swanton Co., 60 Vt. 459, 15 Atl. 114; Arnold *v.* Angell, 38 N. Y. Super. 27; Mitchell *v.*

B. Where Bill Alleges That No Accounting Has Been Had.

a. *Burden of Proof.* — The burden is on the complainant to establish his right to an accounting,[8] and of explaining delay in bringing his suit.[9] But if defendant pleads an accounting, or other affirmative plea, he assumes the burden of proof.[10]

O'Neale, 4 Nev. 504; Ridenbaugh *v.* Burnes, 14 Fed. 93.

But Objection Must Be Made. But if the evidence discloses a case for relief not inconsistent with the object and scope of the bill, and is allowed to go in without objection, although not within the specific allegations of the bill, such evidence may be given effect in entering the decree. Moore *v.* Swanton Co., 60 Vt. 459, 15 Atl. 114.

Expanding Scope of Accounting. If the bill make a case for account it is not proper to refuse to consider evidence which discloses other facts in addition to those charged, when the facts disclosed strengthen claim made and merely expand the measure of accounting. Penn *v.* Fogler, 182 Ill. 76, 55 N. E. 192; Solomons *v.* Ruppert, 34 App. Div. 230, 54 N. Y. Supp. 729.

General Allegation Not Proved. And if the plaintiff prove the specific facts alleged in his bill, he is entitled to an accounting although the bill may contain a general allegation such as the existence of a partnership not sustained by the evidence. Coward *v.* Clanton, 122 Cal. 451, 55 Pac. 147.

On Bill Against Administrator. If on a bill against an administrator or executor for an accounting, settlement and examination of the accounts of another estate ought to be made, an examination may be called for as a part of the general case. Dillard *v.* Ellington, 57 Ga. 567, 582.

8. Graham Paper Co. *v.* Pembroke, 124 Cal. 117, 56 Pac. 627, 71 Am. St. Rep. 26, 44 L. R. A. 632; Farrington *v.* Harrison (N. J.), 15 Atl. 8; Fidelity Title & Trust Co. *v.* Weitzel, 152 Pa. St. 498, 25 Atl. 569; Beale *v.* Hall, 97 Va. 383, 34 S. E. 53, which holds further that a reference should not be ordered for an account for the purpose of establishing plaintiff's right to an accounting; citing Lee Co. Justices *v.* Fulkerson, 21 Gratt. (Va.) 182, and Packet Co. *v.* Williams, 94 Va. 422, 26 S. E. 841.

9. Sheldon *v.* Sheldon, 133 N. Y. 1, 30 N. E. 730, was an action brought about 1890 for an accounting in a transaction that took place in 1864. The court said that the claim was no doubt what is known to the courts as a stale demand; that such demands were looked upon with some suspicion; that a claim surrounded by circumstances such as appeared ought to be sustained by adequate and satisfactory proof, but that the presumption against the stale claim was generally one of fact and not of law. The circumstances are evidence upon the question of the existence of the claim to be considered by the jury, or the court upon a trial of the facts, citing Macauley *v.* Palmer, 125 N. Y. 742, 26 N. E. 912. It appeared in that case that the transaction was between a husband and wife. The claim was that the husband had received certain property from the wife for investment for her benefit, that the husband died 16 years after the transaction took place without having accounted, and without any demand having been made upon him for an account, and that six years later a claim was filed against his estate for the amount demanded and was rejected.

10. Standish *v.* Babcock, 48 N. J. Eq. 386, 22 Atl. 734; Pratt *v.* Grimes, 48 Ill. 376.

In the case of Stevens *v.* Ross (N. J.), 13 Atl. 225, (see also same case 11 Atl. 114, and 19 Atl. 622), the defendant in his pleadings admitted the making of the contract under which the plaintiff asked for an accounting, but claimed that the contract had been abandoned. The court held that the burden of proof was on the defendant to prove by a clear preponderance of testimony the fact of abandonment.

b. *Evidence on Plea of An Accounting.* — Defendant may introduce evidence to show that the parties have *in writing* stated their account and struck a balance.[11]

Although a statement of account contain the expression "errors excepted," it may still be introduced to prove a settled account.[12]

Where one of two who have mutual accounts gives the other a note and receives nothing at the time, it is *prima facie* evidence of accounting and settlement.[13]

A receipt for the amount ascertained on an accounting to be due,

11. Dawson *v.* Dawson, 1 Atk. 1; Burk *v.* Brown, 2 Atk. 399; Sumner *v.* Thorpe, 2 Atk. 1.

And so, *a fortiori* may show a settled account. Story's Eq. Jur. § 527; Pratt *v.* Grimes, 48 Ill. 376; Vermillion *v.* Bailey, 27 Ill. 229.

A settlement of accounts is presumed to embrace all prior transactions between the parties. Bull *v.* Harris, 31 Ill. 487; Bourke *v.* James, 4 Mich. 336; Kennedy *v.* Williamson, 50 N. C. 284 (5 Jones L.); Barkley *v.* Tarrant Co., 53 Tex. 251.

Not Contingent Liabilities.—Dowling *v.* Blackman, 70 Ala. 303.

Presumably Claim Not Provided For in Settlement Invalid. —Straubher *v.* Mohler, 80 Ill. 21.

In Freeman *v.* Bolzell, 63 Wis. 378, 23 N. W. 708, the action was to recover a balance of an alleged indebtedness and said nothing about an accounting. The answer alleged a full and complete settlement between the parties. The court said that failure to mention all the items of work or dealings between the parties at the time of a settlement did not prevent it from being conclusive; that such omissions might have induced omissions; that the items omitted might have been paid for or disputed or gratuitous, or omitted for some other special reason, and that the court below properly refused to instruct that the settlement was only conclusive as to such items only as were included therein, because a settlement of mutual accounts presumptively covers everything whether mentioned or not.

12. Cooper Eq. Pl. 278; Johnson *v.* Curtis, 3 Bro. Ch. 226; Branger *v.* Chevalier, 9 Cal. 353; Story's Eq. Jur. § 526.

In the case of Standish *v.* Babcock, 48 N. J. Eq. 386, 22 Atl. 734, 30 L. R. A. 604, one of the defendants by answer set up the facts of a former action and judgment in bar of the present suit. The court said that the evident purpose was to interpose the defense of *res judicata,* and that treating the answer as a plea the burden of proving the truth of the plea devolved upon the party pleading because it was evidently an affirmative plea, citing 1 Dan. Ch. Pr. 718, and Swayze *v.* Swayze, 37 N. J. Eq. 180, and that treating it as a defense set up by answer it must be sustained by proof for although put in under oath, it would not be evidence of new matter.

13. Wright *v.* Wright, 56 N. Y. St. 305, 26 N. Y. Supp. 238; Sherman *v.* McIntyre, 7 Hun 592; Lake *v.* Tysen, 6 N. Y. 461. And see Randolph *v.* Randolph, 2 Call (Va.) 537.

Notes Given as Collateral. — But not where one party was in the habit of giving the other notes, not to represent money due, but as collateral. Hill *v.* Durand, 58 Wis. 160, 15 N. W. 390.

Consideration Expressed in Note. In the case of Sheldon *v.* Sheldon, 133 N. Y. 1, 30 N. E. 730, it was claimed that certain moneys had been delivered to a trustee for investment in 1864, and it appeared that the trustee had given a note in 1879 "for value received in cash borrowed." The court said that the usual presumption to the effect that the giving of a promissory note is *prima facie* evidence of an accounting and settlement of all demands might not apply because the consideration was expressed in the note to be money borrowed.

is a bar to subsequent action for accounting involving the same matter.[14]

C. Where Bill Is to Open a Settled Account and for an Accounting. — a. *Evidence Must Prove Specific Allegations of Bill.* — A settled account will not be opened except on proof of errors or fraud specifically alleged in the bill.[15]

b. *Burden of Proof.* — The burden of proof is heavily on the party seeking to open a settled account.[16]

c. *Sufficiency of Evidence.* — **(1.) Generally.** — In order that a settled account may be opened, the evidence must show the transaction to be so iniquitous that it ought not to be brought forward at all to

14. Grant *v.* Bell, 87 N. C. 34; Costin *v.* Baxter, 6 Ired. Eq. 197; Harrison *v.* Bradley, 5 Ired. Eq. 136.

15. Mebane *v.* Mebane, 1 Ired. Eq. 403; Story Eq. Pl., § 800.

Accounts, regularly submitted for examination, but by complainant's fault not examined, will not be opened up except for error or fraud specifically charged and proved. Philips *v.* Belden, 2 Edw. Ch. (N. Y.) 1.

Where a settled account has been signed or security given thereon, it will not be opened except for fraud or errors proved as charged. Botifeur *v.* Weyman, 1 McCord Eq. (S. C.) 156.

Discretion of the Court. — But in Ridenbaugh *v.* Burnes, 14 Fed. 83, the bill prayed for accounting as to interests and rents that ought to have been and were not included in a certain settlement, and the proofs failed to establish that defendant had not accounted. Nevertheless, Justice McCrary said that the court might either dismiss the bill, or refer the case, and adopted the latter course, saying: "The proof as it now stands leaves the essential facts relied upon by plaintiff unproved, but enough appears to make it desirable that the real facts be made to appear, if that is practicable. I am the more inclined to adopt this course, because the defendant has not seen fit to testify in the case. It is true that he was not bound to do so until complainant had made at least a *prima facie* showing, but it is impossible to overlook the fact that it would have been easy for him to have made his defense perfectly satisfactory if there is no truth in the complainant's allegations, by going upon the stand and testifying to facts which must be within his knowledge."

16. Marsh *v.* Case, 30 Wis. 531; Philips *v.* Belden, 2 Edw. Ch. 1; Hoyt *v.* McLaughlin, 52 Wis. 280, 8 N. W. 889; Redman *v.* Green, 38 N. C. 54.

He must show wherein the mistake consisted, point it out distinctly and furnish data for its correction. Chubbuck *v.* Vernam, 42 N. Y. 432; Taylor *v.* Haylin, 2 Bro. Ch. 310.

An agreement for correction of errors in a settlement does not shift the burden. Langdon *v.* Roane, 6 Ala. 518, 41 Am. Dec. 60.

In Evans *v.* Evans, 2 Cold. (Tenn.) 143, a case involving transactions between father and son extending over 28 years, the court said that in the absence of proof to the contrary, the parties "must be held to have squared their accounts as they went."

Statements Not Objected To. In Lockwood *v.* Thorne, 11 N. Y. 170, it appeared that an account had been rendered, received and no objection made for some time. The court said that the transaction being thus an account stated, it was conclusive upon the parties, unless the plaintiff affirmatively showed fraud or mistake, and quoted from Chief Justice Marshall, in Chappedelaine *v.* Dechenaux, 4 Cr. 306, as follows: "No practice could be more dangerous than that of opening accounts, which the parties themselves have adjusted, on suggestions supported by doubtful or only probable testimony."

affect the party sought to be bound.[17] If a fiduciary relation exists between the parties, the account will be opened on less proof than is required when no such relation exists.[18]

(2.) When Decree Will Be Refused Although Error Is Shown. —Equitable considerations may move a court to decline to open an account in spite of errors shown.[19]

d. *Leave to Surcharge and Falsify.* — The proof of mere errors will not require the opening of an account after the lapse of several years; in such a case the plaintiff will only be allowed to surcharge and falsify.[20]

17. White *v.* Walker, 5 Fla. 478; Paulling *v.* Creagh, 54 Ala. 646; Taylor *v.* Blackman (Miss.), 12 So. 458; Coulin *v.* Carter, 93 Ill. 536; Philips *v.* Belden, 2 Edw. Ch. 1; Love *v.* White, 5 Tenn. (4 Hayw.) 210; Chambers *v.* Goldwin, 9 Ves. Jr. 254; Drew *v.* Power, 1 Sch. & L. 182; Brands *v.* Depue (N. J.), 20 Atl. 206.

An account twice adjudicated will not be again opened except for fraud or for mistake that could not have been guarded against. Bruen *v.* Hone, 2 Barb. 586.

The fact that certain items of an account otherwise settled have been left for further negotiations, does not affect the residue. Botifeur *v.* Weyman, 1 McCord Eq. (S. C.) 156.

18. Love *v.* White, 5 Tenn. (4 Hayw.) 210; Moses *v.* Noble, 86 Ala. 407, 5 So. 181. "But in such case the entire account must be so infected with fraud or undue influence that it would be inequitable to permit it to stand even in part."

19. Love *v.* White, 5 Tenn. (4 Hayw.) 210.

As where defendant's books have been burned since the former accounting and complainant fails to produce his own books and papers. Bruen *v.* Hone, 2 Barb. 586.

Or the plaintiff is guilty of laches. Bruen *v.* Hone, 2 Barb. 586; Paulling *v.* Creagh, 54 Ala. 646.

Or where complainant was aware at the time of settlement of the facts on which he bases his complaint. Quinlan *v.* Keiser, 66 Mo. 603.

Or where a long time has elapsed since the settlement. Randolph *v.* Randolph, 2 Call. (Va.) 537 (in that case more than fifty years); or where the error proved can be corrected without another accounting. Murrell *v.* Greenland, 1 Desaus. Eq. 332; or where the errors are immaterial. Hamilton Woolen Co. *v.* Goodrich, 88 Mass. (6 Allen) 191.

Effect of Long Acquiescence. Philips *v.* Belden, 2 Edw. Ch. 1: "It is a wise and salutary provision of the law, which permits time to draw a veil over the transactions of men, and equity acting upon this benign principle, gives great effect to lapse of time, and discourages claims not promptly made, especially where there has been no personal disability, or other impediment in the way of ascertaining them. Here has been none, but yet from the time of Mrs. Oglivie's death, (when all her rights devolved upon her son), a period of 20 years or thereabouts has been suffered to elapse without any objection to any part of the accounts, and without the least intimation or assertion of claim arising upon them. If this long acquiescence is not an absolute bar, it is at least a circumstance to require at this day much clearer proof for opening and reinvestigating the accounts than is at present furnished," citing Hampson on Trustees 99, Ellison *v.* Moffat, 1 Johns. Ch. 46, and Rayner *v.* Pearsall, 3 Johns. Ch. 578.

20. Brown *v.* Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250; Cooper Eq. Pl. 278; Bruen *v.* Hone, 2 Barb. 586; Brownell *v.* Brownell, 2 Bro. Ch. 62; Twogood *v.* Swanston, 6 Ves. 485; Cowan *v.* Jones, 27 Ala. 317; Gover *v.* Hall, 3 Har. & J. (Md.) 43; Paulling *v.* Creagh, 54 Ala. 646.

To obtain leave to surcharge and falsify, complainant must show the accounts to be erroneous. Bullock *v.* Boyd, 2 Edw. Ch. 293.

2. After Interlocutory Decree. — A. REFERENCE TO MASTER. a. *Necessity of Reference.* — Complicated accounts should be referred to a master for examination.[21] But a court may state the account without such reference. This is not often done except where the account consists of few items and they are fully established by the evidence submitted on the hearing.[22]

Error of $4000.00 in account of $64,000 is ground for leave to surcharge and falsify. Farnam *v.* Brooks, 9 Pick. (Mass.) 212.

In Moses *v.* Noble, 86 Ala. 407, 5 So. 181, it appeared that a settlement had been had, a note and mortgage given and judgment had been obtained upon the note. For specific errors mentioned in the bill and proved, the court annulled the judgment and opened up the settlement, but it not appearing that fraud had vitiated the entire settlement, but merely that there were mistakes made in including certain items, the plaintiff was not allowed a restatement of the entire account, but only had permission to surcharge and falsify as to the matters alleged and proved.

21. Story's Eq. Jur. § 524; Ennesser *v.* Hudek, 169 Ill. 494, 48 N. E. 673; Patten *v.* Patten, 75 Ill. 446; Moss *v.* McCall, 75 Ill. 190; French *v.* Gibbs, 105 Ill. 523; Dubourg *v.* U. S., 7 Pet. 625; Ransom *v.* Winn, 18 How. (U. S.) 295; Quayle *v.* Guild, 83 Ill. 553; Power *v.* Reeder, 39 Ky. (9 Dana) 6; Walker *v.* Joyner, 52 Miss. 789; Moffett *v.* Hanner, 154 Ill. 649, 39 N. E. 474; Riner *v.* Touslee, 62 Ill. 266; Beale *v.* Beale, 116 Ill. 292, 5 N. E. 540.

As to evidence generally in proceedings before masters, auditors, commissioners or referees see title "REFERENCES."

22. Standish *v.* Babcock, 48 N. J. Eq. 386, 22 Atl. 734; Darby *v.* Gilligan, 43 W. Va. 755, 28 S. E. 737. See also Jewett *v.* Cunard, 13 Fed. Cas. No. 7310; Wheeler *v.* Billings, 72 Fed. 301; Hidden *v.* Jordan, 28 Cal. 301; Emery *v.* Mason, 75 Cal. 222, 16 Pac. 894; Montanye *v.* Hatch, 34 Ill. 394; Shipp *v.* Jameson, 16 Ky. (6 Litt.) 190; Field *v.* Holland, 6 Cranch 8.

Procedure in Stating an Account Without a Reference. — In Stevens *v.* Ross, (N. J.), 13 Atl. 225, where the accounting was asked only of profits arising out of the sale of a certain piece of land, the court said that although the defendant must account yet a reference would not be ordered in the first instance, but that the defendant would be directed to deliver an itemized account within a time limited and within a certain number of days after receiving the account the plaintiff would be required to notify the defendant whether or not it was satisfactory, and if not satisfactory, to state the particulars in which it was claimed erroneous, after which either party might apply to the court for directions as to how the exceptions to the account were to be tried.

"We do not mean that the circuit judge may not at his option, with entire propriety, state the accounts himself, instead of ordering a reference to a commissioner, but when he does so, he will proceed as a commissioner would upon charge and discharge accounts; and when he states the account, the parties, by exceptions, should bring to his attention such of his conclusions as they object to, not only that he may have the opportunity to make corrections, but also that in case of appeal it may be understood by this court exactly what remains to be contested. Barnehee *v.* Beckley, 43 Mich. 613, 5 N. W. 976.

In Illinois it is reversible error for the court to state an account instead of referring it to the master. In Moffett *v.* Hanner, 154 Ill. 649, 39 N. E. 474, the court said: "Where the rights of parties in a chancery proceeding are involved, and an accounting is to be had, the court should first find and declare the rights of the parties, and the rule to be adopted in stating the account by an interlocutory decree, and then refer the cause to the master to take

b. *Regulation of Proceedings Before Master.* — (1.) **Generally.** The accounting is limited in its scope by the order of reference and by the pleadings.[23]

and state the account. Stating the account is the appropriate work of the master, and the usual and proper practice in chancery. When such statement is made concisely, exceptions thereto may bring to the trial court and to an appellate tribunal the issue between the parties, that the same may be comprehended and determined. The exceptions are the pleadings to the items of an account, and must be specific and not general, as they can then be reviewed by the appellate court or supreme court. Mosier *v.* Norton, 83 Ill. 519; Quayle *v.* Guild, 83 Ill. 553; Moss *v.* McCall, 75 Ill. 190; Patten *v.* Patten, 75 Ill. 446; Steere *v.* Hoagland, 39 Ill. 246; Bressler *v.* McCune, 56 Ill. 475; Riner *v.* Touslee, 62 Ill. 266; Groch *v.* Stenger, 65 Ill. 481."

In the case of Beale *v.* Beale, 116 Ill. 292, 5 N. E. 540, it was held that after the court had sustained exceptions to the master's report, the matters involved in the exceptions being complicated it was error for the court to proceed to investigate the matters without another reference.

But in the case of Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636, the court held that after sustaining exceptions to the master's report involving only a few items, it was not error for the court to state the account without further reference. The court saying: "We know of no rule of law which made it improper for the court to take upon itself the determination of such questions of value, and said values being found the restatement of the account, upon the basis of such findings was a very simple matter, which the court might well make without the further intervention of the master, we find nothing in the action of the court in this respect which can be held to be in any material degree violative of the general rule of chancery practice, which requires a reference to the master to take and state the accounts in all cases involving intricate and complex accounts."

Why Reference More Proper. In Barnebee *v.* Beckley, 43 Mich. 613, 5 N. W. 976, it appeared that the matter had been referred to a master to state an account. Exceptions had been taken to the master's report. The trial court had ruled upon the exceptions, and had then proceeded itself to an examination of the case and a statement of the account. The supreme court said that inasmuch as such cases were open to an appeal, and cases of accounting were likely to involve personal feeling and therefore persistency in litigation, it was a mistake for the trial court to yield to the wishes of the parties and undertake to settle a case of accounting otherwise than in the usual way; that the customary and regular method gives a regular accounting upon charge and discharge accounts, and a commissioner's report showing allowance and disallowance and exceptions to the report showing the items wherein the commissioner is supposed to have erred and the ruling of the court on the exceptions. An appeal on such a report is simple and can be disposed of without examining the entire mass of evidence; that an accounting on complicated transactions may require the constant presence of parties, clerks and servants for many days and that it is only in the commissioner's office that this sort of investigation can be gone through with.

23. Calvert *v.* Carter, 18 Md. 73; Wisner *v.* Wilhelm, 48 Md. 1; Dayton *v.* District, 18 Ct. Cl. 13; Boyle *v.* Hardy, 28 Mo. 390; Izard *v.* Bodine, 9 N. J. Eq. 309; Petrick *v.* Ashcroft, 20 N. J. Eq. 198; Consequa *v.* Fanning, 3 Johns. Ch. (N. Y.) 587; Philips *v.* Belden, 2 Edw. Ch. 1.

"A court of chancery may, with perfect propriety, refer an account generally, and, on the return of the report, determine such questions as may be contested by the parties; or it may, in the first instance, decide any principle which the evidence in the cause may suggest, or all the

(2.) By the Order of Reference. — In the order of reference the court may regulate the procedure before the master.[24]

(3.) By Rules of Court. — In the Federal Court parties accounting must bring in their accounts in the form of debtor and creditor; any of the other parties not satisfied with such accounts may examine the accounting party *viva voce* or on interrogatories, or by deposition, as the master may direct.[25] This rule is a modification of the English rule No. 61, New Orders of 1828.[26] The practice in the state courts is similar.[27]

principles on which the account is to be taken. The propriety of the one course or of the other depends on the nature of the case. Where items are numerous, the testimony questionable, the accounts complicated, the superior advantage of a general reference, with a direction to state specifically such matters as either party may require, or the auditors may deem necessary, will readily by perceived." Field *v.* Holland, 6 Cranch (U. S.) 8.

"Orders of reference should specify the principles on which the accounts are to be taken or the inquiry proceed, as far as the court shall have decided thereon; and the examinations before the master should be limited to such matters within the limits of the order as the principles of the decree or order may render necessary." Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495.

Where the issues raised by the pleadings necessarily involve a general accounting, the evidence need not be confined to the claims or accounts set up by either party in the pleadings. Northern Grain Co. *v.* Pierce, 13 S. D. 265, 83 N. W. 256. And see Williamson *v.* Downs, 34 Miss. 402.

24. Calvert *v.* Carter, 18 Md. 73; Power *v.* Reeder, 9 Dana (Ky.) 6; Boyle *v.* Hardy, 28 Mo. 390; Union S. R. *v.* Mathiesson, 24 Fed. Cas. No. 14,398; Jenkins *v.* Bank, 97 Ill. 568, 581.

In certain cases the court, decreeing an account, directs it to be taken with the admission of certain documents or testimony not having the character of legal evidence. Dan. Ch. Pr. 1231; Lupton *v.* White, 15 Ves. 432, 10 Rev. Rep. 94.

Merchants having agreed on rules for adjusting their mutual accounts and providing for a variance from the rules if justice required it, a court likewise may depart from the rules in settling their accounts. Braxton *v.* Willing, 4 Call (Va.) 288.

But it is error to admit an account stated and an annexed affidavit made in a foreign country, without knowledge of the party sought to be charged thereby, long before commencement of suit, and without proof that that party ever acknowledged the justice of the account, or promised payment, or that it was ever seen by him; and where the two principal items therein are balances of other accounts. Lewis *v.* Bacon, 3 Hen. & M. (Va.) 89.

25. Rules of Practice in Equity, No. 79. Foote *v.* Silsby, 3 Blatchf. 507, 9 Fed. Cas. No. 4920.

The master may examine witnesses *viva voce*, the parties being present and not objecting. Story *v.* Livingston, 13 Pet. (U. S.) 359.

26. For the practice under this rule see Dan. Ch. 1st Ed., pp. 877 *et seq.*; Smith's Ch. Pr., 2nd Ed., Vol. 2, Ch. 13, pp. 111 *et seq.*

27. Patterson *v.* Johnson, 113 Ill. 559; Kirkman *v.* Vaulier, 7 Ala. 217; Callender *v.* Colegrove, 17 Conn. 1.

Settling the Interrogatories. In Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495, the court said that the books assumed the practice to be settled that the parties and witnesses are to be examined before the master upon written interrogatories, but that in the case of the examination of a principal, interrogatories are settled by the master, in the case of witness by counsel, citing Parkinson *v.* Ingram, 3 Ves. 603; Stanyford *v.* Tudor, Dickens 548; Hughes *v.* Williams, 6 Ves. 459, and Purcell *v.*

B. Submitting Statements of Account. — a. *Generally.* — In order to reduce the inquiry to order the master should require statements of account.[28] After the accounts and statements are filed, evidence will be received only as to points in dispute as shown by them.[29]

b. *Form of Statements.* — Such a statement should exhibit the account as the party claims it to be in connected and concise form.[30]

Macnamara, 17 Ves. 434, that sometimes the master was directed to settle the interrogatories in the case of witness, citing Browning *v.* Barton, Dickens 508, but that while that was the usual method of examination, it was not indispensable; that the practice in New York had been more relaxed and oral examinations had frequently, if not generally prevailed; that it was a question merely of convenience.

28. Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495; Story *v.* Brown, 4 Paige (N. Y.) 112; Hicks *v.* Chadwell, 1 Tenn. Ch. 251.

A party refusing to produce books and vouchers before the master is bound by the master's report. Peers *v.* Barnett, 12 Gratt. (Va.) 410.

In Story *v.* Brown, 4 Paige (N. Y.) 112, the court said that the master might require the parties within such time as he thought reasonable to bring in in writing the items of charge claimed against the adverse party, so that it might be known to what points testimony was to be directed, and so as to preclude the making of claims afterwards for any other or different items, unless some excuse should be shown. That one object of the rule was to prevent the delay and expense of a separate summons and attendance upon further proceedings in the master's office. That the master ought to regulate at the first hearing the manner of executing the reference and the steps to be taken so far as then practicable.

29. Myers *v.* Bennett, 71 Tenn. (3 Lea) 184.

"Under the practice in England and in New York, as long as a separate chancery system was kept up in that state, upon a decretal order for a regular partnership account, it seems to have been the duty of each litigant to present to the clerk and master a statement of the account as he claimed it ought to be. With these statements before him, the clerk and master readily ascertained the points of difference, and settled with the parties the items upon which proof should be taken." Hicks *v.* Chadwell, 1 Tenn. Ch. 251.

"After such evidence is taken and a draft of report made parties cannot dispute other items." Patterson *v.* Johnson, 113 Ill. 559.

One may not prove credits beyond those claimed in his pleadings. Purdy *v.* Rutter, 3 W. Va. 262.

30. Hicks *v.* Chadwell, 1 Tenn. Ch. 251.

"Parties cannot in *lieu* of their respective statements put in their general books of account; Reed *v.* Jones, 8 Wis. 421. These books usually consist of immense folios which neither the clerk (Turner *v.* Hughes, 1 Bush. Eq. 116) nor the court can be required to grope through. Norwood *v.* Norwood, 2 Bland, 481 in note; Budeke *v.* Ratterman, 2 Tenn. Ch. 459; Poor *v.* Robinson, 13 Bush 290. It is the duty of the parties to have them examined by experts, to ascertain exactly what they do show, and to extract from them, in the form of balance sheets, exhibits and schedules, such general statements and such specific items and facts as may be in dispute, or tend to elucidate contested matters of charge or discharge." Myers *v.* Bennett, 3 Lea (Tenn.) 184.

But it is not ground of objection that the account submitted is in a book containing also other items. Henshaw *v.* Freer, Bailey Eq. (S. C.) 311.

The books also should be produced. Turner *v.* Hughes, 1 Busb. Eq. (N. C.) 116.

The statement must specify items, one cannot claim credits under head of "general expense." Methodist

C. Examination of Party Accounting. — After the party accounting has filed his account, the adverse party has the right to examine him fully touching it.[31] This examination may be on interrogatories or *viva voce*, as the master directs.[32]

Formerly a party could not be examined in his own behalf under the form of cross-examination after his examination by the adverse party.[33]

Church *v.* Jacques, 3 Johns. Ch. (N. Y.) 77.

The master may require parties to exhibit accounts within time fixed, and decline to hear evidence of other items, unless delay is excused. Story *v.* Brown, 4 Paige (N. Y.) 112.

If one ordered to account offers to prove that he cannot produce such statement because the books are in complainant's possession, the master must inquire before making absolute order to produce the account. McCartan *v.* Van Syckel, 23 N. Y. Super. (10 Bosw.) 694.

31. Jackson *v.* Jackson, 3 N. J. Eq. 96; Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495; Henshaw *v.* Freer, Bailey Eq. (S. C.) 311.

32. Jackson *v.* Jackson, 3 N. J. Eq. 96.

"The master ought, in the first instance, to ascertain from the parties or their counsel, by suitable acknowledgments, what matters or items are agreed to or admitted; and then, as a general rule, and for the sake of precision, the disputed items claimed by either party ought to be reduced to writing by the parties respectively, by way of charges and discharges, and the requisite proofs ought then to be taken on written interrogatories, prepared by the parties and approved by the master, or by *viva voce* examination, as the parties shall deem most expedient, or the master shall think proper to direct in the given case. That the testimony may be taken in the presence of the parties or their counsel (except when by a special order of the court it is to be taken secretly); and it ought to be reduced to writing in cases where the master shall deem it advisable, by him or under his direction, as well where a party as where a witness is examined." Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495.

33. Foote *v.* Silsby, 3 Blatchf 507, 9 Fed. Cas. No. 4920; Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495.

Examination of Accountant. — "In all matters of account in this court, it is the peculiar right of the party who seeks the account, to examine the accountant under oath and thereby test his conscience as to facts and circumstances material to the investigation of truth and the ends of justice. The mode of examination differs, in different places. . . . In the English chancery it is by written interrogatories, generally prepared and exhibited by the party seeking the examination, but settled by the master and considered as his act. These interrogatories, thus settled, are served on the examinant, and he puts in his answer in writing, on advisement of counsel. Full opportunity is given to consider of the interrogatories and the answers, and to give all proper explanation coming within the scope of the questions propounded. Under this mode of proceeding, there can be no cross-examination. Nor is it necessary or proper for the ascertainment of truth that there should be. The party charged has no right to be a witness in his own behalf. When examined by the adverse party, he is entitled to have the interrogatories before him, and time to answer advisedly and understandingly. Whatever is in answer to the question, or fairly explanatory of the answer, he has a right to state, but nothing more. If the answers, or any of them, are evasive or improper, exceptions may be taken, and the party be ordered to put in a sufficient answer. In this way the whole truth is elicited. Such is the English practice: Colton *v.* Harvey, 12 Ves. 391; 1 Newl. Prac. 161; Hoffman's Mast. in Chan. 14-21; 1 Hoffman's Prac. 529, 533.

. . . . .

D. Answer As Evidence. — When an account is called for by the bill (oath not being waived), and given in the answer, it must be regarded as responsive matter, and *prima facie* evidence of the state of accounts between the parties.[34]

E. Burden of Proof. — When one is ordered to account, the burden is on him to prove any credits that he claims.[35] If there is

"The practice of oral examination is universal in the state of New Jersey, as well in relation to parties as witnesses, and I believe the practice of cross-examination by counsel is also universal.

. . . . .

"These examinations, according to our mode, are conducted, not by the master, but by the counsel of the party obtaining the reference. He examines, to certain points, at his own discretion and in his own way, having previously prepared his course of interrogation. The answers are given immediately, and without opportunity for advisement; and if the counsel of the examinant had not the privilege of cross-examination, the result would be more likely to mislead than properly instruct the mind of the master.

. . . .

"When a party is before a master, he cannot be cross-examined generally. He cannot make evidence for himself by the introduction of facts or matters not the subject of inquiry on the original examination. He can only be called on to explain, or to make such statements as may prevent misunderstanding, or rebut any unfair inference that may arise from the answer." Jackson *v.* Jackson, 3 N. J. Eq. 96.

34. May *v.* Barnard, 20 Ala. 200; De Mott *v.* Benson, 4 Edw. Ch. 297; Powell *v.* Powell, 7 Ala. 582. See Dozier *v.* Edwards, 13 Ky. (3 Litt.) 67, and Barksdale *v.* Hall, 13 Rich. Eq. (S. C.) 180, where complainants demanded an accounting from one as administrator of one and executor of another estate, from which latter office he had been discharged and his accounts settled, and he answered claiming credit for over-payments as executor, the complainant cannot, by amending, deprive him of the benefit of the discovery made; nor is he estopped from claiming such credits. Dillard *v.* Ellington, 57 Ga. 567.

Statement of payment, and an account set up by way of set off in the answer, is matter in avoidance and therefore not evidence. Bank *v.* Stockman, 1 Freem. Ch. (Miss.) 502.

As to the propriety of calling an answer under oath evidence, see opinion of Justice Woodbury in Jewett *v.* Cunard, 13 Fed. Cas. No. 7310.

As to the use and effect of answers and other pleadings as evidence for and against the pleader see the articles, "Admissions and "Answers in Equity."

35. Thatcher *v.* Hayes, 54 Mich. 184, 19 N. W. 946.

And to Show the Disposition of Funds Proved to Have Come Into His Hands.—Silverthorn *v.* Brands, 42 N. J. Eq. 703, 11 Atl. 328.

Where an Accounting is Ordered on a Bill and Cross Bill, complainant has the burden of establishing credits claimed by him and defendant of establishing credits claimed by him. Crawford *v.* Norris (Ark.), 12 S. W. 707.

Where an Allowance, Clearly Excessive, Is Asked, the party claiming it must establish the amount he is entitled to, and the referee is not to guess at it. Spalding *v.* Mason, 161 Sup. Ct. 592.

The burden was on complainant to show first, that the particular sums of money were in fact paid, and this burden was sustained by the production of either the books or cancelled checks, or in their absence by proper entries on the books of the company, or other secondary evidence. This being done, the burden still remained upon complainant to show that the payments were applicable to the particular purposes mentioned in the order, for complainant was only entitled to credit for such disbursements as were applicable to those purposes. This burden might be sustained in

a preponderance of evidence in favor of the credit, it should be allowed; a higher degree of proof is not required.[36]

The accounting party has the burden of discharging himself from any charge that appears against him on his own statement of account, or that may be allowed against him on examination of himself or on other evidence.[37]

F. PRODUCTION OF VOUCHERS IN DISCHARGE. — a. *Generally.* A party accounting must produce in his discharge vouchers for payments claimed to have been made by him.[38]

Vouchers are *prima facie* evidence of disbursements.[39]

b. *When Not Required.* — **(1.) Charge and Credit Simultaneous.** But where moneys were paid over the same day they were received, so that the admission of receipt is immediately followed by the claim of credit, the accounting party's affidavit may support his discharge.[40]

some instances by mere inspection of the vouchers. The greater part of the expenses were for payments to laborers. As to those the burden was sustained by showing generally that the work was done for the specific purpose mentioned in the order. There are other items of payment which should not be allowed without proof that they were within the scope of the inquiry. The general oath of an officer of the company that they were made for the purpose named, would not generally be sufficient, because it would be a mere expression of opinion by the witness. It must appear by consideration of the nature and character of the payment itself, that it was made for the purpose in question. N. Y. Bay Cemetery Co. *v.* Buckmaster (N. J.), 33 Atl. 819.

36. Clapp *v.* Emery, 98 Ill. 523.

But the mere fact that a suit is pending, which, if successful, would entitle defendant to a certain credit in his account, is not sufficient evidence to justify the allowance of such credit. Crown Coal & Tow Co. *v.* Thomas, 177 Ill. 534, 52 N. E. 1042.

37. Smith's Ch. Pr., vol. 2, p. 117; Dan. Ch. Pr., vol. 2, p. 880.

His Own Admission in His Account is Sufficient Proof to establish them, unless it otherwise appears that they were not chargeable against him. Williamson *v.* Downs, 34 Miss. 402.

38. Davenport *v.* Davenport, 1 Sim. 512.

As An Executor's Oath Will Not Discharge Him, Neither Will That of His Coexecutor. — "The examination of one personal representative cannot discharge another personal representative when by that examination the party examined would discharge himself also." Dines *v.* Scott, 1 T. R. Eng. Ch. 358.

The Vouchers Must Be Produced by the Accounting Party at His Peril and must be admitted in evidence subject to be impeached. Halstead *v.* Tyng, 29 N. J. Eq. 86.

39. Dan. Ch. Pr., vol. 2, p. 881.

"Vouchers are *prima facie* evidence of disbursements. The rule in respect to the receipt of them on an accounting has been laid down to be, that in all matters of account the party who produces the vouchers in support of the account produces them at his peril, and the master is bound to admit them in evidence, except the other side can lay a reasonable ground to show that the voucher in question can be impeached, of which the master is to judge and then to require evidence in regard to it if he thinks proper. Hoffman's Office of Masters in Chancery 81; Bennet's Pract. in the Master's Office 85. Of course, if the master doubts the payment, he may require proof besides the voucher. The voucher however, cannot of itself be sufficient proof of payment if it does not show for what or on what account the money was paid." Halstead *v.* Tyng, 29 N. J. Eq., 86.

40. Smith's Ch. Pr., vol. 2, p. 117; Daniell's Ch. Pr., vol. 2, p.

(2.) Credit Appearing in Book Offered by Opposite Party. — Where there is no fiduciary relation between the parties and the evidence to charge one of them consists of entries in his own books, he may use entries in the same book in his discharge.[41]

Otherwise as to those holding a relation of trust or confidence.[42]

(3.) When Vouchers Are Lost. — And where an account is of long standing the court will sometimes permit the accounting party to discharge himself upon oath, of all such matters as he cannot prove by vouchers by reason of their loss.[43]

(4.) For Small Items. — And as to small sums the party's oath will support his discharge.[44]

G. Where Evidence Is Not Sufficient to Enable Master to State Account. — If the master from lack of evidence cannot state an account, the court will leave the parties in *statu quo*.[45]

884; Ridgeway *v.* Darwin, 7 Ves. 404; Thompson *v.* Lamb, 7 Ves. 587; Robinson *v.* Scotney, 19 Ves. 582.

41. Robertson *v.* Archer, 5 Rand. (Va.) 319; Dan. Ch. Pr. 1228; Darsten *v.* Orford (Earl), 1 Eq. Cas. Abr. 10; Jones *v.* Jones, 4 Hen. & M. (Va.) 447; Wagoner *v.* Gray, 2 Hen. & M. (Va.) 603; Freeland *v.* Cocke, 3 Munf. 352.

A plaintiff putting in evidence an account kept by defendant showing an item charged against plaintiff concedes the correctness of that item. Dolan *v.* Mitchell, 39 App. Div. 361, 57 N. Y. Supp. 157. But see *contra*, Robertson *v.* Archer, 5 Rand. (Va.) 319.

Complainant does not admit the correctness of an account by merely pleading or stating that defendant submitted such account. Wilson *v.* Dowse, 140 Ill. 18, 29 N. E. 726.

42. Reeve *v.* Whitmore, 11 Jur. N. S. 722; Carter *v.* Lord Colrain, Barn. 126; Boardman *v.* Jackson, 2 Ball. & B. 382.

"As to executors, they are under a moral and equitable and indeed a legal obligation, from the very nature of their undertakings, to furnish those to whom they are accountable the means of charging them to the full extent of their liabilities. White *v.* Lady Lincoln, 8 Ves. 363. For those having the right to claim the account have no other perfect means of getting this imformation." Robertson *v.* Archer, 5 Rand. (Va.) 319.

43. Dan. Ch. Pr. 1230; Peyton *v.* Green, 1 Ch. Rep. 146; Holstcomb *v.* Rivers, 1 Ch. Cas. 127. See also Turner *v.* Corney, 5 Beav. 515.

44. "It is understood to be the settled course of the court (Anon. 1 Vern. 283; Witcherly *v.* Witcherly, Id. 470; Everard *v.* Warren, 2 Ch. Cas. 249; Morely *v.* Bonge, Mos. 252; Robinson *v.* Cumming, 2 Atk. 409, and 2 Fonb. 452, 460, 462.) that, upon the defendant's accounting before the master, he is to be allowed, on his own oath, being credible and uncontradicted, sums not exceeding forty shillings each; but then he must mention to whom paid, for what, and when, and he must swear positively to the fact, and not as to belief only, and the whole of the items so established must not exceed £100, and the defendant cannot, by way of charge, charge another person in this way. The forty shillings sterling was the sum established in the early history of the court, and perhaps $20 would not now be deemed an unreasonable substitute." Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495; Halsted *v.* Tyng, 29 N. J. Eq. 86.

In this country generally the limit of a single item is twenty dollars, and in Tennessee the aggregate of such items must not exceed five hundred dollars. Goodner *v.* Browning, 28 Tenn. 783.

45. Slater Myers & Co. *v.* Arnett, 81 Va. 432; Lewis *v.* Bacon, 3 Hen. & M. (Va.) 89.

Where one partner so keeps the books that it is impossible to tell the true state of the partnership accounts, every presumption against

H. On Leave to Surcharge and Falsify.—a. *Scope of Inquiry.* On leave to surcharge and falsify, evidence is admissible only as to items specified in the pleadings.[46]

b. *Burden of Proof.* — On leave to surcharge and falsify, the *onus probandi* is on him to whom leave is granted.[47]

I. Objections to Evidence. — All objections to admission of evidence and sufficiency of evidence should be taken before the master.[48]

him is proper. Dimond *v.* Henderson, 47 Wis. 172, 2 N. W. 73.

But the presumption against a wrong doer does not apply to one who failed through incompetency (known to his partner) to keep correct books, there being no evidence of dishonesty. Knapp *v.* Edwards, 57 Wis. 191, 15 N. W. 140.

46. Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418.

In England it was held that if account was surcharged or falsified in one item, the complainant might go to the master with liberty to surcharge and falsify it at large. *Ex parte* Townsend, 2 Moll. 242; Davis *v.* Spurling, Tam. 199.

If the items specified and proved cast suspicion on entire account, the liberty to surcharge and falsify is unrestricted. Bullock *v.* Boyd, 1 Hoff. Ch. (N. Y.) 294.

Under permission to surcharge only omissions can he shown; under leave to falsify only false items. Philips *v.* Belden, 2 Edw. Ch. (N. Y.) 1.

47. Cowan *v.* Jones, 27 Ala. 317; Philips *v.* Belden, 2 Edw. Ch. (N. Y.) 1.

Accounts settled without opportunity for full scrutiny will be invalidated on slighter evidence than where such opportunity existed and full investigation was made. Lee *v.* Reed, 34 Ky. 109.

In surcharging and falsifying accounts after considerable lapse of time, clear evidence will be required especially where there has been acquiescence. Gover *v.* Hall, 3 Har. & J. (Md.) 43.

Account Presumed Correct. "Where liberty is given to surcharge and falsify, the court takes the account to be a stated and settled account and establishes it as such. If either party can show an omission for which an entry of debit or credit ought to be made, such party surcharges, that is, adds to the account, and if anything should be inserted which is wrong, he is at liberty to show it, and this is falsification. The *onus probandi* is always on the party making the surcharge or falsification, and if he fails to prove it, the account must stand as correct. It is presumed to be correct, however, having been once settled until the contrary appears. Here lies the difference between this and a general account, for in the latter the party producing the account must show the items to be correct." Philips *v.* Belden, 2 Edw. Ch. (N. Y.) 1.

48. Reed *v.* Winston, 4 Hen. & M. (Va.) 450; Kirkman *v.* Vaulier, 7 Ala. 217; Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495.

Objection that evidence is not relevant should be made before the master, and if not so made the evidence may be considered. Callender *v.* Colegrove, 17 Conn. 1.

In Methodist Church *v.* Jacques, 3 Johns. Ch. 77, it was held that the rule of practice is founded on much good sense that no exceptions are to be taken to a report which were not made before the master signed the report, because the master might have allowed the objections, saving unnecessary expense and trouble, citing 2 Harr. Pr. 146; Wyatt Pr. Reg. 380-381, and adding that the rule was not departed from, except in special cases, citing Pennington *v.* Muncaster, 1 Madd. Ch. 555.

In Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495, the court said that after an examination is concluded, the parties being provided with a copy of the master's report ought to have a day assigned for settling the report and making objections,

J. Recommitting to Master. — An accounting once made by the master may, for cause shown, be recommitted to him to be restated.[49] Recommitment may be denied on account of laches.[50] The master may be directed to hear further testimony, or to restate the account without further testimony.[51]

K. Restatement Without Recommitment. — The court may restate the account without sending it back to the master.[52]

L. Matters Arising After Master's Report and Before Final Hearing. — Evidence as to matters occurring after master's report and before final hearing is admissible on such hearing.[53]

and when the report is settled and signed, the parties ought to be confined in their exceptions to be taken in court, to such objections as were overruled or disallowed by the master.

49. Dignan *v.* Dignan (N. J. Eq.), 17 Atl. 546; Barnum *v.* Barnum, 42 Md. 251.

Unless shown to be erroneous the master's report establishes the facts. Dillard *v.* Ellington, 57 Ga. 567.

When exceptions to a master's report are sustained and the accounts are complicated, the matter must be again referred. Beale *v.* Beale, 116 Ill. 292, 5 N. E. 540.

50. In the case of Fischer *v.* Hayes, 16 Fed. 469, an account was ordered to determine damages from infringement of patent. The defendant refused to produce his books upon the ground that they would throw no light upon the question at issue. That refusal took place in August, 1881. The examination was not finished until February, 1882. Plaintiff made no effort to compel the production of the books. The court refused to refer the case back in order that the books might be introduced in evidence.

Discretion to Reopen Case. — But in Dignan *v.* Dignan (N. J.), 17 Alt. 546, in an accounting between father and son for partnership transactions, the master made his report and was about to file it when the father applied to open the case for further testimony on the ground that he had discovered numerous vouchers, which would largely reduce the amount found against him, and excused their non-production before the master by saying that he had relied upon his bookkeeper and clerk to collect the necessary papers and had supposed that all had been collected and presented. The court held that although the petitioner had been guilty of laches in failing to produce the papers earlier, yet the court would not be justified in allowing even the most extreme carelessness to stand in the way of supplying necessary proof, especially when that proof is documentary, unless it appeared that by admitting such testimony, injustice would be done, and cited Mulock *v.* Mulock, 28 N. J. Eq. 15; Hewes *v.* Hewes, 4 Sim. 1, and Gregoy *v.* Marychurch. Bev. 275, 19 L. J. Ch. (N. S.) 77.

51. Barnum *v.* Barnum, 42 Md. 251; *In re* Donnelly, 3 Phila. 18.

In the case of Camac *v.* Francis, 4 Fed. Cas. No. 2329, an account was referred back to report such further credits as either party might show himself entitled to, but the court refused to refer the accounts generally, on the suggestion that plaintiff had since the previous hearing obtained documents and evidence in support of his exceptions and that he expected it would be in his power to discover new credits not yet known to him.

52. This may be done where the items are few in number and the matter will not involve examination of complicated accounts. Whittemore *v.* Fisher, 132 Ill. 243, 24 N. E. 636; Smith *v.* McKernan, 41 Ill. App. 132. *Compare* Beale *v.* Beale, 116 Ill. 292, 5 N. E. 540.

53. Kendall *v.* N. E. C. Co., 13 Conn. 383.

III. COMMON LAW ACTION FOR AN ACCOUNTING.

1. Before Verdict Quod Computet. — The action at law for an accounting long ago fell into disuse in England and in most of the states of the Union. It was necessary for the plaintiff to show a privity between himself and the defendant by express or implied contract, or by law.[54]

Before verdict *quod computet* the only question for determination is, shall there be an accounting; evidence to show that profits have or have not accrued, or that one joint tenant or tenant in common, has received more than his share, is inadmissible. The adjusting of balances is left entirely with the auditor.[55]

The defendant must be shown to have acted in the character alleged in the declaration, i. e., as bailiff, receiver or otherwise.[56]

The evidence must strictly support the declaration as to the plaintiff's interest in the money or goods.[57]

54. Co. Litt. 90b; *id.* 172a; Bac. Abr. Account. A; 3 Blk. Com. 164.

In the case of Griffith *v.* Willing, 3 Binn. (Pa.) 317, the court held that if the parties were partners, the action of account render lay at common law, but if they were only tenants in common the action was given by a statute.

55. Hawley *v.* Burd, 6 Ill. App. 454. But in England under Stat. 4 Anne Ch. 16 § 27, one sued as tenant in common could prove that he had received no more than his just share of the profits. Chitty Pl. p. 1299. See however McPherson *v.* McPherson, 11 Ired. Law (N. C.) 391, 53 Am. Dec. 416.

56. Wheller *v.* Horne, Willes 208; Spalding *v.* Dunlap, 1 Root (Conn.) 319; Co. Lit. 172a, 1 Selw. N. P. 1-3.

In the case of Irvine *v.* Hanlin, 10 Serg. & R. (Pa.) 219, it was said that the action of account render under the statute of Anne is different from the action at common law, for under the latter the bailiff was answerable not only for receipts, but for what he might have made, whereas under the statute the tenant in common answering as bailiff, was liable only for what he had actually received above his just share, and because also the auditors under the statute could examine the parties on oath, that therefore the declaration ought to state that the parties were tenants in common and that defendant had received more than his share, but that if he is charged as bailiff generally the plaintiff must prove that the defendant was actually a common law bailiff.

Defendants Must Be Shown to Be Jointly Liable.—In Whelen *v.* Watmough, 15 Serg. & R. (Pa.) 153, it was held that while a partner might have this action against his co-partner, yet he could not have it against two co-partners of himself, because each co-partner was bound to account to him severally for the moneys received by such co-partner, and not jointly for moneys received by the various co-partners so that where one sued two defendants jointly, and the evidence showed that plaintiff and defendants were co-partners the case must be dismissed.

57. Spalding *v.* Dunlap, 1 Root (Conn.) 319; McPherson *v.* McPherson, 11 Ired. Law (N. C.) 391, 53 Am. Dec. 416.

Plaintiff Must Show Receipt by Defendant of Moneys From the Persons Named in Declaration.—In Jordan *v.* Wilkins, 13 Fed. Cas. No. 7526, the defendant was charged as receiver of certain sums for the plaintiff from certain persons named in the declaration. The evidence showed sums received, but not from any of the persons named in the declaration, and showed that the sums so received were the money of a partnership, of which plaintiff and defendant were members. Mr. Jus-

It is not necessary to prove a demand for an accounting.[58]

If defendant pleads *plene computavit,* the burden is upon him to show an actual accounting and balance struck.[59]

To sustain the plea of nothing in arrear defendant must show by an exhibition of accounts that nothing is due the plaintiff.[60]

2. After Verdict in Proceedings Before Auditors. — By such judgment nothing is determined except that the defendant ought to account.[61]

Before the statute 4 Anne Ch. 16, auditors could not compel the parties to be examined under oath.[62]

Auditors are not bound by any previous accounting between the parties.[63]

Defendant cannot introduce evidence to show that he has accounted, or that he is not indebted, or any other fact whereby he would be excused from rendering an account.[64]

tice Washington held that if the plaintiff meant to proceed upon the statute of Anne he ought to have stated his case according to the facts, citing James v. Brown, 1 Dall. 339, where it was held that if the proof showed the receipt from one of the persons named in the declaration, it would be sufficient, and the court said that in that case the most liberal construction had been given to the statute in consequence of the want of chancery jurisdiction in Pennsylvania.

58. Sturges *v.* Bush, 5 Day (Conn.) 452.

59. Baxter *v.* Hozier, 5 Bing. 288; McPherson *v.* McPherson, 11 Ired. Law (N. C.) 391, 53 Am. Dec. 416; Lee *v.* Adams, 12 Ill. 111.

If the Agreement Was For Sale of Goods, and Return of Those Not Sold, he must prove not only an accounting for money received but the return of goods unsold. Read *v.* Bertrand, 4 Wash. 556, 20 Fed. Cas. No. 11,602. And he must show an accounting for charges attending sales and for losses if any on sales. Baxter *v.* Hozier, 5 Bing. 288.

Proof of Accounting Before One Person Supports Plea of Accounting Before Two.—Bull. N. P. 127; Bac. Abr. Acc. E.

If the Business Was Such as to Call For Daily Accounts, of which it is not the custom to take vouchers, it is presumed that the defendant accounted and the burden is on the plaintiff. Evans *v.* Birch, 3 Camp. 10.

60. Lee *v.* Abrams, 12 Ill. 111.

"The defense . . . of nothing in arrear goes upon the ground that there is nothing now in the defendant's hands, which he is liable to account for. This may be shown in various modes,—as, for example, that it has been handed over to the plaintiff, or to a third person by his direction, or that it has been destroyed, or has perished without the fault of the defendant." Pickett *v.* Pearsons, 17 Vt. 470.

61. Lee *v.* Abrams, 12 Ill. 111.

62. Co. Litt. 199 (Harg. note 83).

63. But if the parties had agreed on any particular items, or if rests had been made in a running account and balances struck, but no final accounting made, the auditors would be concluded as to such items and by such balances and as to any unpaid balances carried into the account. Lee *v.* Abrams, 12 Ill. 111.

64. Lee *v.* Abrams 12 Ill. 111; Bac. Abr. Accompt. F; Leon. 219; Taylor *v.* Page, Cro. Car. 116.

But he may prove payments made on account (Lee *v.* Abrams, 12 Ill. 111), or that goods were jettisoned; or that he was robbed of them; or that they were taken by the public enemy. Bac. Abr. Accompt. G.

If in truth and in fact plaintiff ought to account for a sum received, evidence as to the amount is admis-

The proofs before the auditors must be consistant with the pleadings and verdict.[65]

Evidence is admissible of sums received by defendant after the commencement of the action.[66]

Auditors could examine only parties and had no power to try issues.[67]

IV. ACTIONS ON ACCOUNT.

1. Generally. — This term has come to be applied to certain cases in assumpsit. It includes actions to recover for goods sold and delivered from time to time; or for services rendered on several occasions, or for moneys from time to time advanced. The rules of evidence in other actions in assumpsit apply here, and only such special rules as have been adopted for this class of cases will here be noticed.

2. Book Debt. — A. Testimony of Parties. — Book debt lay on claims, usually for small sums, evidenced by entries in account

sible, although when received both parties supposed that defendant was entitled to it in his own right and for his own benefit. Smith *v.* Brush, 11 Conn. 359.

65. Spear *v.* Newell, 22 Fed. Cas. No. 13,224; Lee *v.* Abrams, 12 Ill. 111; Bac. Abr. Acc. F; Godfrey *v.* Saunders, 3 Wils. 73.

In An Action Between Partners, the parties were entitled to an investigation of every particular transaction and to have its results embraced in the account, although there were no allegations respecting it in the pleadings. Boyd *v.* Foot, 5 Bosw. (N. Y.) 110.

Defendants Not Concluded by Amounts or Dates Set Forth in Declaration.—In the case of Newbold *v.* Sims, 2 Serg. & R. (Pa.) 317, it appeared that defendant was called on to render an account of his actions as supercargo of a brig, and he alleged that the brig had been seized with its cargo for breach of the laws of the United States. It appeared that there was a remission of the forfeiture under the law, and a sale of the cargo, and that defendant had made some payments to the plaintiffs. The question whether he had fully accounted was submitted to the jury, and they found for the plaintiff. The court held that verdict did not preclude the defendant from showing before the auditors how the cargo was taken out of his hands, and that he could claim allowances so far as the cargo had been appropriated by the government; that the accounting should be taken according to the truth of the matter, and that it was not to be inferred from the judgment entered on the verdict that the defendant had received all the sums, and at the times mentioned in the declaration; that he would have to account for all that he had received and would be allowed every item in discharge that he could make out fairly chargeable against the plaintiffs.

66. Smith *v.* Brush, 11 Conn. 359; Robinson *v.* Bland, 2 Burr. 1077.

In Newbold *v.* Sims, 2 Serg. & R. (Pa.) 317, it was held that auditors are not restricted to the days laid in the declaration; that after judgment on the verdict all articles of account are included and the whole account brought down to the time when the auditors make an end of the account; that the auditors would make the proper charges and allow the proper credits without regard to the verdict.

If a declaration avers receipt of moneys by defendant between certain days plaintiff cannot show such receipt at an earlier date. Sweigart *v.* Lowmarter, 14 Serg. & R. (Pa.) 200.

67. Wisner *v.* Wilhelm, 48 Md. 1.

books. Parties were competent to testify in their own behalf.[68]

A party might testify on all the issues.[69] His testimony was usually given before auditors only, and *viva voce*.[70]

B. Burden of Proof. — The plaintiff has the burden of establishing any items denied.[71]

C. Use of Account Books. — For a full statement of the law as to the use of such books as evidence, see the title "Books of Account."

D. Other Means of Proof. — Plaintiff may prove his claim without producing the book.[72]

68. Terrill *v.* Beecher, 9 Conn. 344; Marshall *v.* Bond, Tapp. (Ohio) 99.

Parties were permitted to testify on the ground that they had no other means of proof. Irwin *v.* Jordan, 26 Tenn. (7 Humph.) 167.

69. Stevens *v.* Richards, 2 Aiken (Vt.) 81; Fay *v.* Green, 2 Aiken (Vt.) 386; May *v.* Corlew, 4 Vt. 12; Mattocks *v.* Owen, 5 Vt. 42; Burton *v.* Ferris, Brayt. (Vt.) 78; Delaware *v.* Staunton, 8 Vt. 48; Hilliker *v.* Loop, 5 Vt. 116, 26 Am. Dec. 286; Bradley *v.* Bassett, 13 Conn. 560; Keeler *v.* Mathews, 17 Vt. 125; Stanford *v.* Bates, 22 Vt. 546; Clark *v.* Marsh, 20 Vt. 338.

A wife joined as plaintiff with her husband might testify. Gay *v.* Rogers, 18 Vt. 342.

Quoad the book debt, they are admissible, like other witnesses, to testify fully in support or confutation of the account. Peck *v.* Abbe, 11 Conn. 207; Bryan *v.* Jackson, 4 Conn. 288; e. g. to prove admissions. Stanford *v.* Bates, 22 Vt. 546; Clark *v.* Marsh, 20 Vt. 338; Reed *v.* Talford, 10 Vt. 568; Bryan *v.* Jackson, 4 Conn. 288.

But not to a new promise to avoid statute of limitations. White *v.* Dow, 23 Vt. 300.

The party testifying to sustain the charges on his book cannot testify as to the value of the articles charged, or of the labor performed; much less as to a specific contract. Cram *v.* Spear, 8 Ohio (8 Ham.) 494.

As to interest there must be other proof than the oath of plaintiff of defendant's promise to pay it. Phenix *v.* Prindle, Kirby (Conn.) 207.

As to the weight to be given to testimony of a party to the action, see, Whiting *v.* Corwin, 5 Vt. 451.

70. Read *v.* Barlow, 1 Aiken (Vt.) 145; Delaware *v.* Staunton, 8 Vt. 48; Fay *v.* Green, 2 Aiken (Vt.) 386; May *v.* Corlew, 4 Vt. 12.

But his deposition could not be used. Pike *v.* Blake, 8 Vt. 400; Gilbert *v.* Toby, 21 Vt. 306.

But a deposition may of course be used as an admission against the maker. Gilbert *v.* Toby, 21 Vt. 306.

Party must answer all material questions or his charges will be disallowed. Mattocks *v.* Owen, 5 Vt. 42.

In Vermont the court heard no testimony: "The court will not go into a preliminary inquiry into the facts, either by court or jury, as in the action of account, but only decide the law of the case upon such facts as may be found and reported by the auditor." Matthews *v.* Tower, 39 Vt. 433.

71. Read *v.* Barlow, 1 Aiken 145, and 1 Vt. 97. Bundy *v.* Ayer, 18 Vt. 497, holding that plaintiff must show a sale completed by delivery. Hunter *v.* Kittredge, 41 Vt. 359.

Items charged as "goods" and "medicine" being partly for intoxicating liquors sold in violation of law, the burden was on plaintiff to establish the validity of each charge. Graves *v.* Ranger, 52 Vt. 424.

But defendant assumes the burden of establishing the truth of any plea in confession and avoidance. Smith *v.* Woodworth, 43 Vt. 39. (Where payment was pleaded.)

See the authorities cited on this point in the article on "Admissions."

72. Cross *v.* Haskins, 13 Vt. 536; Read *v.* Barlow, 1 Aiken (Vt.) 145.

It is discretionary with the court

3. Actions on Verified Account.—A. Verified Statement Must Follow the Statute.— In several states the introduction in evidence in actions on account, of a verified statement of the account is provided for and regulated by statute. In order that one may use such statement as evidence he must bring himself strictly within the terms of the act.[73]

If the verified account be mislaid, or lost, a new account may be supplied.[74]

The statute allowing a verified account to be used as evidence in an action thereon, extends to a set off or counterclaim set up by defendant consisting of an account.[75]

B. Effect As Evidence of Verified Statement.— The verified account put in evidence is sufficient to make out plaintiff's case except so far as its correctness is denied under oath.[76]

to require the books to be produced. Ward *v.* Baker, 16 Vt. 287.

Failure to produce the books is said to be presumptive evidence against the claim. Leavenworth *v.* Phelps, Kirby (Conn.) 71; Palmer *v.* Green, 6 Conn. 14.

In Ohio unless the book was produced, plaintiff could not be a witness in his own behalf. Crane *v.* Spear, 8 Ohio (8 Ham.) 494.

73. Rogers *v.* Fenwick, 20 Fed. Cas. No. 12,011; Gainer *v.* Pollock, 96 Ala. 554, 11 So. 539; Cook *v.* Byrnham, 44 Pac. [illegible]; Dewey *v.* Burton (Kan.), 46 Pac. 321.

Compare Alexander *v.* Moore, 111 Ala. 410, 20 So. 339; McGowan *v.* Lamb, 66 Mich. 615, 33 N. W. 881; Lunsford *v.* Butler, 102 Ala. 403, 15 So. 239; Gordon *v.* Sibley, 59 Mich. 250, 26 N. W. 485; Duer *v.* Endres, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 323; Shaudy *v.* Conrales, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 235; Brin *v.* Wachusetts Shirt Co. (Tex.), 43 S. W. 295.

Where the statute requires that the affidavit be made by a party, his agent or attorney, one made by the plaintiff's assignor is not sufficient in absence of showing of agency. Carpenter *v.* Historical Pub. Co. (Tex.) 24 S. W. 685.

Code § 3780 provides that an account on which an action is brought, coming from another state or county, with plaintiff's affidavit to the correctness of the account, is conclusive evidence unless the party charged denies the account on oath. *Held* that such action must be brought on the proved account and the declaration allege that the account is from another state or county and is verified under the statute and must make profert of such account, or plaintiff will not be allowed to introduce it in evidence. Hunter *v.* Anderson, 48 Tenn. (1 Heisk.) 1; Wilkhorn *v.* Gillespie, 53 Tenn. (6 Heisk.) 329.

But if an account not verified as required by statute is received in evidence without objection, it is sufficient to sustain a judgment. Locke *v.* Farley, 1 N. W. 955.

The time for objection to the verified account for insufficiency is when it is offered in evidence. Elyton L. Co. *v.* Morgan, 7 So. 249; Gordon *v.* Sibley, 59 Mich. 250, 26 N. W. 485.

74. Alexander *v.* Moore, 111 Ala. 410, 20 So. 339.

75. Heer Dry Goods Co. *v.* Shaffer, 51 Ark. 368, 11 S. W. 517; Cahn *v.* Salinas, 2 Willson Civ. Cas. Ct. App. § 104; Bonner *v.* White, 87 Miss. 653, 29 So. 402.

76. Rockmore *v.* Cullen, 94 Ga. 648, 21 S. E. 845; Cahn *v.* Salinas, 2 Willson Civ. Cas. Ct. App. § 104; Moore *v.* Powers, 16 Tex. Civ. App. 436, 41 S. W. 707; Bonner *v.* White, 78 Miss. 653, 29 So. 402.

Plaintiff Need Prove Only Items Controverted.—Shuford *v.* Chinski, (Tex.), 26 S. W. 141.

"The act (of 1874) was intended to give to sworn accounts the same *prima facie* standing in courts as had been given to instruments charged to have been executed by

But without filing counter-affidavit defendant may show that the account was not due when the action was begun,[77] or that the claim is outlawed,[78] or has been paid,[79] or a recoupment or counter-claim.[80]

If no sworn denial is made, or the verification is insufficient, the plaintiff may object at the trial to the introduction of any evidence against the correctness of his account.[81]

C. DEFENDANT'S COUNTER-AFFIDAVIT. — The sworn denial is likewise statutory and must follow the act.[82]

the other party, to the extent of dispensing with further proof of their correctness unless the same or some items thereof were denied also under oath, in the nature of a plea of *non est factum*. The parties to join in a sworn issue when the account is intended to be contested in whole or in part. The rule would not apply to a separate and independent defense not going to the justice of the account sued on." English *v.* Miltenberger, 51 Tex. 296. Rives *v.* Habermacher, 1 White & W. Civ. Cas. Ct. App. § 747, apparently the defense permitted in this case, without filing sworn denial of account, was payment and the same defense was likewise permitted in Galveston etc. *v.* McTiegue, *id. ib.* 461.

Affidavit to Account Under Rev. St. Sec. 2266. in suit against partnership, proves the partnership unless same is denied under oath. Carder *v.* Wilder, 1 White & W. Civ. Cas. Ct. App. § 14. See also Bjorkquest *v.* Wagar, 83 Mich. 226, 47 N. W. 235, where affidavit showed plaintiff was doing business under name of Bjorkquest & Son.

Nor in absence of counter affidavit can defendant impeach plaintiff's affidavit by showing that plaintiff was not a member of firm at date of delivery of the goods. Moore *v.* Powers, 16 Tex. Civ. App. 436, 41 S. W. 707. But see Trundle *v.* Edwards, 4 Sneed (Tenn.) 572, where it was said that the verified account establishes the existence of the debt but not the character in which defendant is sued, nor the ground of his liability and other material allegations.

77. Johnston *v.* Johnson, 44 Kan. 666, 24 Pac. 1098.

78. Wagener *v.* Boyce (Ariz.), 52 Pac. 1122.

79. Moore *v.* Powers, 16 Tex. Civ. App. 436, 41 S. W. 707; Galveston etc. *v.* McTiegue, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 461.

The intimation in Loeb *v.* Nunn, 4 Heisk. (Tenn.) 449, is to the contrary.

80. Briggs *v.* Montgomery, 3 Heisk. (Tenn.) 673; Galveston etc. *v.* Schwartz, 2 Tex. App. Civ. Cas. § 758.

81. Rockmore *v* Cullen, 94 Ga. 648, 21 S. E. 845; Moore *v.* Powers, 16 Tex. Civ. App. 436, 41 S. W. 708; English *v.* Miltenberger, 51 Tex. 296.

But in Loeb *v.* Nunn, 4 Heisk. (Tenn.) 449, it is said: "The pleas were not sworn to nor was the justice of the account otherwise denied on oath. The plaintiffs, however, took issue upon the pleas of defendants and went to trial without taking any exception to the failure of defendants to deny on oath the justice of the account sued on. . . . The plaintiffs, by taking issue upon the pleas tendered, without affidavit by the defendants denying the justice of the account, and by submitting the cause to the jury upon those issues without objection, waived the benefit of the provisions of the code."

Although a rule of court provides that items in plaintiff's sworn and filed account are admitted unless denied in the affidavit of defense, parties may by stipulation waive the rule and permit defendant to controvert items without such affidavit of defense. O'Connor *v.* Am. I. U. Co., 56 Pa. St. 234.

82. Eberstadt *v.* Jones, 19 Tex. Civ. App. 480, 48 S. W. 558.

An answer denying the justness of the account verified and filed is a sufficient denial under oath. Molino *v.* Blake (Ariz.), 52 Pac. 366.

In so far as the account is denied under oath, it is deprived of all force as evidence;[83] but it may still be used to establish items not so denied.[84]

D. Other Means of Proof. — Although the case be brought under the statute, the plaintiff is not required to prove his case by a verified account, but may introduce such evidence as would be competent in other actions in assumpsit.[85]

4. Other Actions on Open Account. — A. Filing or Serving Statement of Account. — By statute or by rule of court the plaintiff is or may be required to file or serve, as part of his complaint, or otherwise, a statement of the account sued on, under penalty of exclusion of evidence as to items not scheduled.[86]

Failure of plaintiff in this respect is, however, waived, unless properly objected to. The mode of objection will depend on the particular statute or rule; it has often been held that evidence will not be excluded unless the objection is made and heard before trial.[87]

In Bonner *v.* White (Miss.), 29 So. 402, an affidavit showing a set off was said not to amount to a denial of plaintiff's account.

83. Jones *v.* McLuskey, 10 Ala. 27; Brien *v.* Peterman 40 Tenn. (3 Head) 498 (the affidavit of one of two defendants being held sufficient); Olive *v.* Hester, 63 Tex. 190 holding also that the effect of such denial is not destroyed by plaintiff's sworn supplemental petition afterwards filed reiterating his former affidavit.

Burden of Proof is then on the party claiming on the account. Keating Implement & Machine Co. *v.* Erie City Iron Works (Tex. Civ. App.), 63 S. W. 546.

84. Reinhardt *v.* Carter, 49 Miss. 315.

85. Sullivan Timber Co. *v.* Brushagel, 111 Ala. 114, 20 So. 498.

86. Dunker *v.* Schlotfeldt, 49 Ill. App. 652; Sullivan *v.* Blythe, 14 S. C. 621; Goodrich *v.* James, 1 Wend. (N. Y.) 289; Barnes *v.* Henshaw, 21 Wend. (N. Y.) 426; Lovelock *v.* Cheveley, 1 Holt 552; Pierce *v.* Craft, 12 Johns. (N. Y.) 90; Kellogg *v.* Paine, 8 How. Pr. (N. Y.) 329; Dowdney *v.* Volkening, 37 N. Y. Super. 313; Goings *v.* Patten, 1 Daly (N. Y.) 168; Hart *v.* Spect, 62 Cal. 187.

The first item was, "1870, April, account rendered, $3970." This item was held too general and too indefinite to admit of proof. Moore *v.* Gordon, 26 La. Ann. 167.

Under one item of charge, as follows: "To goods sold, materials found, and work done,"—only one particular subject matter of charge can be proved. Jones *v.* Isley, 83 Mass. (1 Allen) 273.

Explanations of the Items. — "It was not error to permit the plaintiff to explain the items in the bill of particulars, or the copy of the account he furnished to defendants prior to the trial, pursuant to section 454 C. C. P. The book or books from which it was taken were brought into court, and it is not disputed that the copy furnished was a correct one. That is all the plaintiff was required to do. The truth of the items of the account was the very point in issue, and his testimony in explanation of the items which he carried into his account by mistake was properly received as tending to show the true state of the account. The penalty of being precluded from giving evidence of the account provided for in said section only applies where the party of whom a copy of the account in controversy is demanded, in writing, refuses to furnish the same." Graham *v.* Harmon, 84 Cal. 181, 23 Pac. 1097.

87. Semmes *v.* Lee, 3 Cranch 439. 21 Fed. Cas. No. 12,652; Dunker *v.* Schlotfeldt, 49 Ill. App. 652; Sul-

Under some statutes requiring a schedule of items to be furnished on demand, if defendant makes the demand and plaintiff wholly fails to comply, defendant may object to introduction of evidence at the trial.[88]

B. Testimony of Parties. — Before parties were permitted generally to testify in their own behalf, it had been provided that in actions on account (usually in actions involving small sums,) the plaintiff might prove his demand by his own oath,[89] and might abandon part of his claim so as to bring himself within the amount that could be so proved.[90] And in analogy with equity practice there were provisions for examining parties in behalf of the adverse party.[91]

The plaintiff's oath was deprived of all evidentiary force if met by the defendant's oath.[92]

livan *v.* Blythe, 14 S. C. 622; Goodrich *v.* James, 1 Wend. (N. Y.) 289; Barnes *v.* Henshaw, 21 Wend. (N. Y.) 426; Pierce *v.* Craft, 12 John. 90; Lovelock *v.* Cheveley, 1 Holt 552; Kellogg *v.* Paine, 8 How. Pr. (N. Y.) 329; Gebbard *v.* Parker, 120 N. Y. 33, 23 N. E. 982; Flanders *v.* Ish, 2 Or. 320.

Contra.—Pipes *v.* Norton, 47 Miss. 61.

88. Lonsdale *v.* Oltman, 50 Minn. 52, 52 N. W. 131.

And a stipulation to furnish the schedule within a certain period obviates the necessity for a demand. Tuttle *v.* Wilson, 42 Minn. 233, 44 N. W. 10.

Code Civ. Proc., § 531, requiring a copy of the account to be served on the adverse party within 10 days after demand, failing which plaintiff to be precluded from proving the account, is applicable only in case of total failure to serve any copy of the account, and not where the copy is merely defective. Schulhoff *v.* Coop. D. A., 3 N. Y. Civ. Proc. 412.

89. Hayden *v.* Boyd, 8 Ala. 323; McWilliams *v.* Cosby, 4 Ired. (N. C.) 110; Colbert *v.* Piercy, 3 Ired. (N. C.) 77; Grant *v.* Cole, 9 Ala. 366; Cram *v.* Spear, 8 Ohio (8 Ham.) 494; Blake *v.* Freeman, 13 Ga. 215; Murfs *v.* Harding, 6 Port. (Ala.) 121.

This form of proof was permitted if the claim though originally for more than the statutory limit had been reduced below it by credits. McWilliams *v.* Cosby, 4 Ired. (N. C.) 110.

Plaintiff's deposition might be taken in his own behalf. Moore *v.* Hatfield, 3 Ala. 442.

The statute was strictly construed. Hayden *v.* Boyd, 8 Ala. 323.

And extended only to a plaintiff, not to a defendant seeking to prove an offset. Bennett *v.* Armstead, 3 Ala. 507.

Defendant could merely deny on oath the plaintiff's testimony, he could not be sworn to testify generally. Hayden *v.* Boyd, 8 Ala. 323; Yarborough *v.* Hood, 13 Ala. 176.

And could deny only what plaintiff testified to on examination in chief. West *v.* Brunn, 35 Ala. 263.

90. Grant *v.* Cole, 9 Ala. 366; Murfs *v.* Harding, 6 Port. (Ala.) 121.

91. Stevens *v.* Hall, 6 N. H. 508; Stetson *v.* Godfrey, 20 N. H. 227; Harrison *v.* Dodson, 11 Rich. (S. C.) 48.

92. Jones *v.* McLuskey, 10 Ala. 27; Hudgins *v.* Nix, 10 Ala. 575; Anderson *v.* Collins, 6 Ala. 783; West *v.* Brunn, 35 Ala. 263; Hayden *v.* Boyd, 8 Ala. 323.

But the denial cannot be "upon information and belief."

Fitzpatrick *v.* Hays, 36 Ala. 684: "The statute evidently contemplates that the denial of the defendant as well as the statement of the plaintiff shall be positive—as of one who speaks from actual knowledge and not merely from information and belief."

C. METHOD OF PROVING PLAINTIFF'S CASE. — a. *By Account Books.* — As to the use of account books in evidence, see the title "BOOKS OF ACCOUNT." But the plaintiff need not resort to his account books.[93]

b. *By Showing an Account Stated.* — He may prove his case by showing an account stated.[94]

c. *By Proving Admissions.* — Or by proving admissions by defendant.[95]

But the admission must be shown to refer to the account sued on,[96] and must extend not only to the admission of an indebtedness, but also of the amount thereof.[97]

93. Moore *v.* Joyce, 23 Miss. 584; Godbold *v.* Blair, 27 Ala. 592; Plummer *v.* Struby-Estabrooke Co., 23 Colo. 190, 47 Pac. 294.

94. Leiser *v.* McDowell, 74 N. Y. Supp. 1021; Hirschfelder *v.* Levy, 69 Ala. 351; Stowe *v.* Sewall, 3 Stew. & P. (Ala.) 67; Theus *v.* Jipson, 3 Tex. App. C. C. § 189.

"To prove an account sued on as an open account, it is not indispensably necessary to produce before the jury a written statement of the account, or to establish the items of the account. It is quite sufficient if it be shown, in a case like this, that the defendant bought goods from the plaintiff, whether one or many items, and admitted the correctness of the charge made by the plaintiff against him for them, with knowledge of the facts; or, in other words, a count as upon an open account, or upon an account simply, may be well supported by proof of an account stated. Johnson *v.* Kelly, 2 Stew. (Ala.) 490; Holmes *v.* Gayle, 1 Ala. 517; Pryor *v.* Johnson, 32 Ala. 27." Sullivan Timber Co. *v.* Brushagel, 111 Ala. 115, 20 So. 498.

Where parties meet and go over mutual accounts, and strike a balance, that fact may be shown in evidence as an admission in an action on account. Duffy *v.* Hickey, 63 Wis. 312, 23 N. W. 707.

As to method of proving an account stated *see* in this article the section on "ACCOUNT STATED."

95. Sullivan Timber Co. *v.* Brushagel, 111 Ala. 114, 20 So. 498; Gill *v.* Staylor (Md.) 39 Atl. 650; Rice *v.* Schloss, 90 Ala. 416, 7 So. 802; Hirschfelder *v.* Levy, 69 Ala. 351; Holmes *v.* Gayle, 1 Ala. 517; Mitchell *v.* Joyce, 69 Iowa, 121, 28 N. W. 473; Savage *v.* Aiken, 21 Neb. 605, 33 N. W. 241; Hurley *v.* Roche, 6 Fla. 746; Stetson *v.* Godfrey, 20 N. H. 227; Craighead *v.* Bank, Meigs (Tenn.) 199; Chandler *v.* Meckling, 22 Tex. 36; Bonnell *v.* Mawha, 37 N. J. Law, 198; Theus *v.* Jipson, 3 Wilson Civ. Cas. Ct. App. § 190; Duffy *v.* Hickey, 63 Wis. 312, 23 N. W. 707.

Proof of defendant's admission is sufficient without proof of the original entries or production of the account. Johnson *v.* Kelly, 2 Stew. (Ala.) 490; Muse *v.* Burns, 3 Wilson Civ. Cas. Ct. App. § 73, Bonnell *v.* Mawha, 37 N. J. Law, 198.

But in a case in Pennsylvania, it was held that the failure of the book entries to contain sufficient to charge defendant is not cured by admission in affidavit of defense. Farrell *v.* Baxter, 11 Wkly. Notes Cas. 400.

Upon the subject of express and implied admissions to prove accounts see *infra* "ACCOUNTS STATED."

96. Chandler *v.* Neckling, 22 Tex. 36.

"Suppose, upon a failure by the plaintiff to prove any of his items, he should be permitted to prove the general admission of deceased that he owed him 100 dollars, and recover that sum when in fact he owed him nothing, upon the items upon which the claim was founded, but did owe that sum for a horse; would the recovery be a bar to a proceeding for the value of the horse? We think it would not." Coats *v.* Gregory, 10 Ind. 345.

97. Coats *v.* Gregory, 10 Ind. 345.

d. *Otherwise.* — The proof need not be of each item in detail; the proof may be general, going to the correctness of the account as a whole,[98] as, by testimony that the account was properly kept and is correct.[99]

D. Recovery for Amount Proved. — The plaintiff will recover the amount proved, though he may not establish the entire claim.[100]

E. Variance. — Variance between pleadings and proof as to the character of the goods sold or services rendered,[1] or that the price was a fixed instead of the reasonable one,[2] will not be held fatal, especially if the objection is not seasonably made.[3] But an action on account cannot be sustained by proof of a claim for damages arising out of tort.[4]

V. ACCOUNTS STATED.

1. Full or Regular Proof Of. — A. Of Previous Dealings. — To

98. Pryor *v.* Johnson, 32 Ala. 27. Certainty is not usually attainable in actions on open accounts. If the jury are reasonably satisfied, from the evidence, of the facts which constitute the alleged indebtedness, it is sufficient. Godbold *v.* Blair, 27 Ala. 592.

It is error to charge a jury that the account must be proved "to their satisfaction." Smith *v.* Mather, Tex. 49 S. W. 257.

It is error to charge a jury that they have a right to presume that all the items of an account are correct if the most of them have been positively proved. Moore *v.* Joyce, 23 Miss. 584.

99. Ward *v.* Wheeler, 18 Tex. 249; Moore *v.* Joyce, 23 Miss. 584; Baer *v.* Pfaff, 44 Mo. App. 35.

But where one witness swore the account correct, but admitted he knew nothing of the items except two, amounting to $10.00, and another witness testified to an item of $1.00, and a third that he had seen defendant's family buy goods at plaintiff's store, a verdict for $75.00 is not justified. Jesse *v.* Davis, 34 Mo. App. 351. *See* So. H. B. & L. Ass'n. *v.* Butler, 111 Ga. 826, 35 S. E. 679.

100. Belcher *v.* Grey, 16 Ga. 208; Planters Bank *v.* Farmers Bank, 8 Gill & J. (Md.) 449; Memphis Mach. W. *v.* Aberdeen, 77 Miss. 420, 27 So. 608; Lovell *v.* Earle, 127 Mass. 546.

1. Ralston *v.* Kohl, 30 Ohio St. 92; Gen. Elec. Co. *v.* Blacksburg L. & I. Co., 46 S. C. 75, 24 S. E. 43.

2. Bailey *v.* Casey, 60 Tex. 573. "According to the plaintiffs' petition the defendant 'bound, obligated himself and promised to pay' the plaintiffs on demand what the goods were reasonably worth. The evidence of what that value was is shown by agreement between the contracting parties at the times of the respective sales and delivery of the goods, which the defendant testified was the several sums of money charged in the itemized account sued on. . . . Such a transaction is it is true a contract for the sale of goods at a stipulated fixed price, yet it is not incompatible with the cause of action as set forth in the petition. . . . The cause of action set forth being for the value of the goods, that value may be shown by evidence which establishes the agreement of the parties ascertaining at the time of the sale what that value was."

3. Gen. Elec. Co. *v.* Blacksburg L. & I. Co., 46 S. C. 75, 24 S. E. 43.

But where plaintiff alleged that the indebtedness arose for supplies, and the first item in his account was: "Account rendered $3970," as this item did not purport to be for supplies, testimony as to it should have been rejected. Moore *v.* Gordon, 26 La. Ann. 167.

4. Sandeen *v.* Ry. Co., 79 Mo. 278.

prove an account stated it must appear that there were dealings between the parties before the alleged statement of account;[5] but the specific items constituting the account need not be shown.[6]

The plaintiff may, however, in proving a settlement, show the items included.[7]

A Single Transaction may be the basis of a stated account.[8]

5. Powers *v.* Ins. Co., 68 Vt. 390, 35 Atl. 331; Quincey *v.* White, 63 N. Y. 370; Field *v.* Knapp, 108 N. Y. 87, 14 N. E. 829; Callahan *v.* O'Rourke, 17 App. Div. 277, 45 N. Y. Supp. 764; Stevens *v.* Tuller, 4 Mich. 387; Toms *v.* Sills, 29 U. C. Q. B. (Can.) 497.

"Authorities on this subject might be cited to any extent." Zacarino *v.* Pallotti, 49 Conn. 36.

Account for Goods Not Ordered. Plaintiff sent goods to defendant erroneously, supposing they had been ordered by him, and rendered several accounts which were retained and no objection made. When defendant discovered the goods upon his premises he notified plaintiff that they had not been ordered and were at plaintiff's disposal. None of the material was used by the defendant, and he finally sent it back to the plaintiff. No dealings had ever been had between the parties and they were strangers. It was held that the rendering of the accounts was not sufficient to establish an account stated. An account stated only determines the amount of the debt where liability does exist. It cannot be made the instrument to create a liability where none existed before. Austin *v.* Wilson, 33 N. Y. St. 503, 11 N. Y. Supp. 565.

Sale and Account Simultaneous. An implement was sold and delivered to defendant, and at the same time a statement of account showing the price of it. No objection was made to the bill as rendered. The court said that an account stated must relate to some previous transactions; that the relation of debtor and creditor must already exist between them. It is said to be in the nature of a new promise. That the admitted facts showed no accounting; no agreement upon some previous transaction but what was done was part of and in fulfillment of the original contract, a part of the original transaction itself. Truman *v.* Owens, 17 Or. 523, 21 Pac. 665.

See also, Gross *v.* Bricker, 18 U. C. Q. B. (Can.) 410.

The Dealings Must Have Been Such As Imposed a Legal Obligation. — Melchoir *v.* McCarty, 31 Wis. 252, 11 Am. Rep. 605.

6. *Alabama.*—Ware *v.* Dudley, 16 Ala. (N. S.) 742.

Delaware.—Gregory *v.* Bailey, 4 Harr. 256.

Florida.—Jacksonville U. & P. Ry. & N. Co. *v.* Warriner, 35 Fla. 197, 16 So. 898.

Illinois.—American B. Co. *v.* Berner-Mayer Co., 83 Ill. App. 446.

Louisiana.—Oakey *v.* Weil, 7 La. Ann. 169.

Massachusetts. — Union Bank *v.* Knapp, 3 Pick. 96, 15 Am. Dec. 182.

Michigan. — Albrecht *v.* Gies, 33 Mich. 389.

Mississippi.—McCall *v.* Nave, 52 Miss. 494.

New Jersey.—Bonnell *v.* Mawha, 37 N. J. Law 198.

Texas.—Pridgen *v.* Hill, 12 Tex. 374.

Sufficient to Prove Some Antecedent Debt respecting which an account was stated. Knowles *v.* Michel, 13 East 249.

7. Koegel *v.* Givens, 79 Mo. 77; *compare* Walker *v.* Driver, 7 Ala. (N. S.) 679.

Proving the Transactions to Explain the Settlement.—Cape G. & S. L. R. Co. *v.* Kimmel, 58 Mo. 83.

Where Statement of Account Is Denied.—In Mead *v.* White (Pa.), 8 Atl. 913, it is held that where a defendant disputes the allegation that an account has been stated, the plaintiff to prove the settlement may show the several items which precede the settlement, and were claimed to have been included in it.

8. Rutledge *v.* Moore, 9 Mo. 537; Knowles *v.* Michel, 13 East 249;

B. Rendering or Submission of Account. — a. *Necessary To Be Shown.* — A submission or rendering of account must be shown.[9] The statement rendered must show the whole account.[10]

b. *What Is a Sufficient.* — The statement is usually but not necessarily in writing.[11]

And it seems may consist of nothing more than a demand for a certain sum as a balance due, without showing any items.[12]

Highmore *v.* Primrose, 5 M. & S. 65; State *v.* Hartman Steel Co., 51 N. J. Law 446, 20 Atl. 67; Neyland *v.* Neyland, 19 Tex. 423; Cobb *v.* Arundell, 26 Wis. 553.

Calculating Sum Due on Single Liquidated Claim Does Not Make an Account Stated.—McKay *v.* Grinley, 30 U. C. Q. B. (Can.) 54.

9. Lockwood *v.* Thorne, 18 N. Y. 285; Clark *v.* Marbourg, 33 Kan. 471, 6 Pac. 548.

Uncommunicated Book Entries. The balancing of an account on one's books without examination or assent by the other party to the account, is no evidence of an account stated. Nostrand *v.* Ditmis, 127 N. Y. 355, 28 N. E. 27; Loeb *v.* Keyes, 67 N. Y. St. 205, 33 N. Y. Supp. 491.

Parties Not Bound by Their Uncommunicated Book Entries. — Simpson *v.* Ingham, 2 Barn. & C. 65, 26 Rev. Rep. 273; Hume *v.* Bolland, 21 Eng. C. L. 460.

Circumstantial Evidence of Rendition Sufficient. — Hatch *v.* Von Taube, 31 Misc. 468, 64 N. Y. Supp. 393.

But proof merely that it was the rule of the house to render bills weekly is not sufficient to establish the fact that bills were rendered to defendant. Davis *v.* Fromme, 28 App. Div. 498, 48 N. Y. Supp. 474.

Proof of Mailing of a Statement of Account is *prima facie* evidence of rendition of account. New York Cab Co. *v.* Crow, 22 Misc. 340, 51 N. Y. Supp. 252.

Accounting by Public Officers. In Chatham *v.* Niles, 36 Conn. 403, an account presented by selectmen at a regular town meeting of matters out of the ordinary routine of business, not filed with the town records, not properly itemized, was held not so rendered as to become the basis of an account stated.

10. Statement Showing Only One Side of the Account Not Sufficient. McCarthy *v.* Wood, 12 Ky. Law 84, 13 S. W. 792.

Defendant was president and financial manager of a corporation. After his retirement from office, a committee was appointed to examine the affairs of the company and settle with him. Defendant gave the committee the items he had paid out for the company. They were footed up, but the other side of the account, showing what he had received from the company was not gone into. No balance was struck, or settlement agreed upon. This was held not sufficient evidence of an account stated to be submitted to the jury. Pickard *v.* Simson, 24 N. Y. St. 841, 6 N. Y. Supp. 93.

11. No Writing Required.—When parties mutually reckon their account and agree on the balance, and the books are balanced, it is an account stated, and to sustain an action thereon no writing is necessary. Gibson *v.* Sumner, 6 Vt. 163; Lallande *v.* Brown, 121 Ala. 513, 25 So. 997; Pinchon *v.* Chilcott, 3 Car. & P. 236, 14 Eng. C. L. 545; Knowles *v.* Michel, 13 East 249; Watkins *v.* Ford, 69 Mich. 357, 37 N. W. 300; Quinn *v.* White (Nev.), 62 Pac. 995.

12. Knowles *v.* Michel, 13 East 249.

See Clark *v.* Marbourg, 33 Kan. 471, 6 Pac. 548.

An account was presented as follows:

To Mdse.....	$99 25
By Credit.....	9 25
Balance Due.....	$90 00

Defendant, at time it was presented, admitted it was correct. *Held*, that this was evidence to support a judgment for an account stated. May *v.* Kloss, 44 Mo. 300.

If Rendered by a Debtor it should be shown to have been rendered to the person legally as distinguished from the one equitably entitled to receive the balance.[13]

Parol Evidence Is Admissible to Identify the transactions covered by an account stated, where the statement itself does not show them.[14]

The Examination of the Books of Account may be proved as evidence of submission of accounts;[15] or that a statement of the account was delivered,[16] or mailed to the party to be charged.[17]

If Itemized, Should Show Amounts of the Several Items.—One sent an account with a letter asking for payment of a balance, the latter part of August, 1895. The account contained one item the amount of which was left blank. About the same time noticing this omission, a letter was sent giving the amount of the omitted item. The debtor admitted having received the statement of account, but denied having received the supplementary letter. It was held that the facts did not make out an account stated. Ault *v.* Interstate S. & L. A., 15 Wash. 627, 47 Pac. 13.

The omission alone might not in that case have been held conclusive against the account; there were other facts involved.

13. If an Account Sales is Rendered to the Legal Owner of the Goods, the consignee is not bound to notice an equitable or contingent owner. Bevan *v.* Cullen, 7 Pa. St. 281.

14. In the case of Ferguson *v.* Davidson, 147 Mo. 664, 49 S. W. 859, a statement of account was offered in evidence, but it did not appear from the face of the paper what transactions it really covered. It was undisputed that it covered other transactions than those involved in the suit. Whether it covered the latter did not appear and it was held that this could be proved by oral testimony, and was a question for the jury.

15. Gibson *v.* Sumner, 6 Vt. 163; Rice *v.* Schloss, 90 Ala. 416, 7 So. 802; Swain *v.* Knapp, 34 Minn. 232, 25 N. W. 397; Kock *v.* Bonitz, 4 Daly (N. Y.) 117; Lloyd *v.* Carrier, 2 Lans. (N. Y.) 364.

Partnership Accounts.—It appeared that it was one of the stipulations of the agreement of co-partnership that Smith should state the partnership accounts annually so that even if Smith made up the accounts in the absence of Heartt it was the latter's duty to look into them within a reasonable time and point out the errors, or be considered as having acquiesced in the correctness of the accounts as stated on the books to which both parties had access. Heartt *v.* Corning, 3 Paige (N. Y.) 566.

Presumption of Examination.—In the case of Brewer *v.* Wright, 25 Neb. 305, 41 N. W. 159, it appeared that a book was kept at the mill where the plaintiff worked, in which book he entered up every Saturday night his time of service. It appeared that the defendants were at the mill occasionally and sometimes examined the book. The accounts ran for four years. It was presumed that the defendants must have known what the book showed, the entries being charges against them in their own book. It appeared that a settlement had been made, but the defense was that the book entries had not been examined and understood by the defendants at the time of the settlement.

Balance Need Not Be Struck.—Ware *v.* Manning, 86 Ala. 238, 5 So. 682.

But Must Be Ascertainable by Calculation from the accounts rendered or examined. Treadway *v.* Ryan, 3 Kan. 437.

16. May *v.* Kloss, 44 Mo. 300; McCarthy *v.* Wood, 12 Ky. Law 84, 13 S. W. 792; Truman *v.* Owens, 17 Or. 523, 21 Pac. 665.

17. Ault *v.* Interstate S. & L. A., 15 Wash. 627, 47 Pac. 13; Bee *v.* Tierney, 58 Ill. App. 552; Darby *v.* Lastrapes, 28 La. Ann. 605.

c. *Does Not Make an Account Stated.* — But mere proof of rendering of an account is not sufficient to establish an account stated.[18]

C. Assent of Parties to the Account. — a. *Necessary To Be Shown.* — It is necessary to prove the assent of both parties to the correctness of the account.[19]

Presumption of Receipt of Account Mailed.—If a creditor mails an account to his debtor, the law presumes that it has been received and examined by the debtor. The creditor, however, must show that the particular account was the one which he transmitted, and that it was duly forwarded to the debtor. New York Cab Co. *v.* Crow, 23 Misc. 340, 51 N. Y. Supp. 252

But mere proof of mailing does not prove an account stated. Rowland *v.* Donovan, 16 Mo. App. 554.

18. Toland *v.* Sprague, 12 Pet. (U. S.) 300; Guernsey *v.* Rexford, 63 N. Y. 631; Atkinson *v.* Burt, 65 Ark. 316, 53 S. W. 404; White *v.* Campbell, 25 Mich. 463; Robertson *v.* Wright, 17 Gratt. (Va.) 534; Irvine *v.* Young, 1 Sim. & S. 333.

19. *Alabama.*—Christian & Craft Co. *v.* Hill, 122 Ala. 490, 26 So. 149.

California.—Terry *v.* Sickles, 13 Cal. 427.

Connecticut.—Chatham *v.* Niles, 36 Conn. 403.

Kentucky.—Louisville B. Co. *v.* Asher (Ky.), 65 S. W. 133.

Michigan.—Albretch *v.* Gies, 33 Mich. 389.

Missouri.—Cape G. & S. L. R. Co. *v.* Kimmel, 58 Mo. 83.

New York.—Lockwood *v.* Thorne, 18 N. Y. 285.

Oregon.—Holmes *v.* Page, 19 Or. 232, 23 Pac. 961.

Pennsylvania. — Pierce *v.* Pierce, 199 Pa. St. 4, 48 Atl. 689.

Rhode Island.—Allen *v.* Woonsocket Co., 11 R. I. 288.

Tennessee.—Bussey *v.* Cant, 10 Humph. 237.

Accounts Assented to by Debtor Only.—Though an account be assented to by the debtor, it does not become an account stated, unless also assented to by the creditor. Spellman *v.* Muehlfeld, 48 App. Div. 265, 62 N. Y. Supp. 746.

Contra.—But, on the other hand, it is said that what must be proved is the admission of correctness by the party to be charged. Shea *v.* Kerr, 1 Del. 198, 40 Atl. 241; McCall *v.* Nave, 52 Miss. 494; Volkening *v.* De Graaf, 81 N. Y. 268.

Partnership Accounts.—In Rehill *v.* M'Tague, 114 Pa. St. 82, 7 Atl. 224, it appeared that partners decided to adjust their affairs, and employed three clerks to make up a statement of the partnership accounts. The clerks proceeded and made a statement, partly from the partnership books and partly from oral statements furnished by the separate partners. It did not appear that the partners had all or any of them accepted the statements made by the clerks, and it was held that the statement was not a stated account.

Promise to Pay Not Always an Assent to Correctness of Account. An account was handed to the party to be charged, who looked at it, said it was larger than he thought it was, and that a certain third party ought to have paid it. After some further conversation he said that he would see the creditor and pay it; that he would have no trouble about it. It was held that this fell short of establishing an account stated; that it was essential to an account stated that there should be either an express or implied admission to the *correctness* of the account as a claim against the party to be charged. Stevens *v.* Ayers, 32 N. Y. St. 15, 10 N. Y. Supp. 502.

Admission of Items; Denial of Indebtedness. — Mere admission of the correctness of the items of an account does not suffice if the party to be charged denies liability; the assent to be proved is an admission of indebtedness. Ryan *v.* Gross, 48 Ala. 370.

Assent Under Compulsion. — A pledgee made an invalid sale of part

All Facts and Circumstances May Be Shown that will aid in deciding what occurred, or explain what occurred at the settlement of the account.[20]

b. *By Agent.* — Assent by a partner or other authorized agent may be shown.[21]

of the pledge and rendered an account that was objected to; another account was rendered under threat of sale of the rest of the pledge; pledgor paid balance as shown by the account; the court held in an action by the pledgor to recover damages (defendant pleading an account stated and settled) that it appeared the plaintiff did not assent; that the payment was made under duress of goods. Stenton *v.* Jerome, 54 N. Y. 480.

20. Mead *v.* White (Pa.), 8 Atl. 913; Goodrich *v.* Coffin, 83 Me. 324, 22 Atl. 217.

In Coffee *v.* Williams, 103 Cal. 505, 37 Pac. 504, it appeared that the parties met to see how they stood; that they disputed over certain matters; defendant testified as to this meeting that certain matters were discussed, but as to others there was no agreement. The court said that it was not confined to considering the mere naked yes or no of the witnesses, but that the defendant had the right to show, if he could, the inherent improbability of his agreement to such an account, and to that end evidence was admissible of the general nature of the circumstances of the business between the parties; the character of the objections made by the defendant to the items; that the plaintiff who had conducted the business had kept no accounts, and had nothing to present as a basis for settlement; that there was over $30,000 of stock sold by the plaintiff, which formed no part of the statement of account, and that the defendant had objected to all these things. All these matters were properly to be considered in determining whether the defendant acquiesced in an account which was radically different from the truth and from his own contentions.

21. Heidenheimer *v.* Ellis, 67 Tex. 426, 3 S. W. 666; Southwestern T & T. Co. *v.* Benson, 63 Ark. 283, 38 S. W. 341; Fergusson *v.* Fyffe, 8 Cl. & F. 121; Luckie *v.* Forsyth, 3 Jo. & Lat. 388.

Settlement by a Partner With a Third Party is *prima facie* evidence of the balance due from the company to the plaintiff, but not conclusive. The other partners may show that the plaintiff included a separate account held by him against the partner settling. Kirkpatrick *v.* Turnbull, Add. (Pa.) 259.

An Admission by One Partner of correctness of account is evidence of account stated in suit against other members of firm, even after dismissal for want of service as to the partner making the admission. Cady *v.* Kyle, 47 Mo. 346; Martyn *v.* Arnold, 36 Fla. 446, 18 So. 791.

But Not by Partner After Dissolution of Partnership. — Ross *v.* Yeatman, 2 Swan (Tenn.) 144.

May be Made by Surviving Partner. — Langley *v.* Oxford, Ambl. (Eng.) 798.

Assent by Agent.—A person employed an attorney at law to examine bank books and straighten out the account with the bank. The agent, having examined the account, stated that it was correct. This was held to be a sufficient admission on behalf of the principal of the correctness of the account. Burraston *v.* Bank, 22 Utah 328, 62 Pac. 425.

By Bookkeepers.—Rice *v.* Schloss, 90 Ala. 416, 7 So. 802.

Especially, if the principal knew that his bookkeeper was in the habit of rendering accounts to his workmen from time to time as they called for them. Wiley *v.* Brigham, 16 Hun (N. Y.) 106.

Roadmaster of Railroad. — Authorized to audit accounts of laborers. St. Louis I. M. & S. Ry. Co. *v.* Bank, 47 Ark. 541, 1 S. W. 704.

Directors of Corporation. — Jack-

c. *Express Assent.* — (1.) **How Shown.** — This assent may be by an express admission;[22] as where one renders an account showing a balance against himself,[23] or a written admission,[24] as by signing the account.[25]

sonville etc. Co. *v.* Warriner, 35 Fla. 197, 16 So. 898.

President and Secretary of Corporation.—Pick *v.* Slimmer, 70 Ill. App. 358; Concord A. H. Co. *v.* Alaska etc. Co., 78 Ill. App. 682.

Trustees of Religious Corporation.—Trustees *v.* Cagger, 6 Barb. (N. Y.) 576.

Assent by Husband for Wife. Although under the statute both husband and wife are liable for certain supplies furnished to the family, yet the wife is not liable upon an account stated where the account was rendered to the husband, and assented to by him only. Holmes *v.* Page, 19 Or. 232, 23 Pac. 961.

Husband As Agent for Wife. Moody *v.* Thwing, 46 Minn. 511, 49 N. W. 229.

22. Sergeant *v.* Ewing, 36 Pa. St. 156; Anderson *v.* Best, 176 Pa. St. 498, 35 Atl. 194; Langdon *v.* Roane, 6 Ala. (N. S.) 518, 41 Am. Dec. 60; Nooe *v.* Garner, 70 Ala. 443.

Admission Not Expressing Amount Due.—It may be shown that in conversations the defendant said he owed "the bill" or "that bill;" it may be shown *aliunde* what was the bill referred to, and this evidence with his admission may establish an account stated. Goodrich *v.* Coffin, 83 Me. 324, 22 Atl. 217.

23. Toland *v.* Sprague, 12 Pet. (U. S.) 300; St. Louis I. M. & S. Ry. Co. *v.* Bank, 47 Ark. 541, 1 S. W. 704; Foste *v.* Standard etc. Co., 34 Or. 125, 54 Pac. 811; Spellman *v.* Muehlfeld, 48 App. Div. 265, 62 N. Y. Supp. 746.

In Absence of Mistake a Party Is Bound by a statement of account rendered by himself. Martine *v.* Huyler, 29 N. Y. St. 535, 8 N. Y. Supp. 734.

Provided it Was Intended as a Final Adjustment and settlement of the transactions to which it relates. Glasscock *v.* Rosengrant, 55 Ark. 376, 18 S. W. 379.

Clark *v.* Marbourg, 33 Kan. 471, 6 Pac. 548; Bussey *v.* Gant, 10 Humph. (Tenn.) 237; Peterson *v.* Wachowski, 86 Ill. App. 661.

But He May Show the Account Was Rendered Under a Mistake as to the facts. Polhemus *v.* Heiman, 50 Cal. 438.

Clark *v.* Marbourg, 33 Kan. 471, 6 Pac. 548, holding that an account rendered is only *prima facie* evidence against the renderer.

Account Rendered Showing Credit for Previous Counter Account may amount to a stated account as to such previous account. Bewick *v.* Butterfield, 60 Mich. 203, 26 N. W. 881.

But see *contra*, Hughes *v.* Smither, 23 App. Div. 590, 49 N. Y. Supp. 115, affirmed 163 N. Y. 553, 57 N. E. 1112.

24. Spellman *v.* Muehlfeld, 48 App. Div. 265, 62 N. Y. Supp. 746; Moody *v.* Thwing, 46 Minn. 511, 49 N. W. 229; Heidenheimer *v.* Ellis, 67 Tex. 426, 3 S. W. 666; Powell *v.* Noye, 23 Barb. (N. Y.) 184.

Admissions Under Seal or in a Contract.—*Citing* Hoyt *v.* Wilkinson, 10 Pick. 31; Tassey *v.* Church, 4 Watts & S. (Pa.) 141, 39 Am. Dec. 65.

Resolution Entered on Books of Corporation.—Goodwin *v.* Ins. Co., 24 Conn. 591; Trustees *v.* Cagger, 6 Barb. (N. Y.) 576.

Receipt "on account and being the balance per account rendered up to this date." Dudley *v.* Iron Co., 13 Ohio St. 168.

25. Brauger *v.* Chevalier, 9 Cal. 353; Tuggle *v.* Minor, 76 Cal. 96, 18 Pac. 131; Tennessee Brewing Co. *v.* Hendricks, 77 Miss. 491, 27 So. 526; Nichols *v.* Alsop, 6 Conn. 477.

Signing Not Necessary. — In the case of Heartt *v.* Corning, 3 Paige (N. Y.) 566, the court said that in the case of Attorney General *v.* Brooksbank, 2 Young & J. 42, the opinion was expressed that an account stated must be actually signed by the parties to enable a defendant

Such Written Admission Then Becomes the Best Evidence of the account stated;[26] but proof of an admission by word of mouth is sufficient.[27]

(2.) When Must Have Been Given. —Assent, express or implied, may be shown whether given before or after the assignment of the account to the plaintiff.[28]

to plead it in bar to a suit for an account, but that apparently an account not signed might be a good defense if set up in the answer and proved at the hearing, but that that opinion is clearly not law, and is directly opposed to that of Lord Hardwick in Willis *v.* Jernegan, 2 Atk. 252, where he says expressly that it is not necessary the account should be signed by the parties, citing also Jessup *v.* Cook, 1 Halst. 436, and Lamaline *v.* Caze, 2 P. A. Brown, 128. Stebbins *v.* Niles, 3 Cushm. (Miss.) 267.

Rendering Account Giving Credit for a Balance shown on previous counter account. Bewick *v.* Butterfield, 60 Mich. 203, 26 N. W. 881.

26. Walker *v.* Driver, 7 Ala. (N. S.) 679.

If the memorandum of settlement cannot be introduced because not stamped, the account stated may be established by other evidence. Singleton *v.* Barrett, 2 Cromp. & J. 368, 2 Tyr. 409.

27. *Colorado.*—Walker *v.* Steele, 9 Colo. 388, 12 Pac. 423.

Illinois.—Tompkins *v.* Gerry, 52 Ill. App. 592; Concord A. H. Co. *v.* Alaska etc. Co., 78 Ill. App. 682; McCord *v.* Curlee, 59 Ill. 221.

Maine.—Goodrich *v.* Coffin, 83 Me. 324, 22 Atl. 217.

Massachusetts.—Chace *v.* Trafford, 116 Mass. 529, 17 Am. Rep, 171.

Minnesota.—Beals *v.* Wagener, 47 Minn. 489, 50 N. W. 535.

Missouri.—Carroll *v.* Paul, 16 Mo. 226.

New Jersey.—Bonnell *v.* Mawha, 37 N. J. Law 198.

North Carolina.—Webb *v.* Chambers, 3 Ired. 374.

Utah.—Burraston *v.* Bank, 22 Utah 328, 62 Pac. 425.

Promise to Pay Equivalent to Assent.—Plaintiff sent to defendant two accounts, one for money and one for services, with a letter demanding payment. Defendant did not object nor reply. Afterwards, meeting plaintiff, he acknowledged receipt of the letter, said he had no money, but would pay it as soon as he could. This proof was held sufficient to sustain an action upon an account stated. Vernon *v.* Simmons, 28 N. Y. St. 173, 7 N. Y. Supp. 649; Hatch *v.* Von Taube, 31 Misc. 468, 64 N. Y. Supp. 393.

Both Oral and Written Admission.—The oral admission may be proved, though made at the same time with a written signed memorandum of the settlement, such memorandum being inadmissible for lack of a stamp. Singleton *v.* Barrett, 2 Cromp. & J. 368, 2 Tyr. 409.

Admission Made as Witness in Another Action. — Plaintiff proved that a copy of the account showing the balance sued for was mailed to defendant; in another action defendant being a party, testified that he had duly received the account, that it was correct; and proved that in conversations defendant had said that if he was able to pay, he would. This was held sufficient to sustain judgment for the plaintiff. McCormack *v.* Sawyer, 104 Mo. 36, 15 S. W. 998.

Presentation of Bills and Promise to Pay.—In a suit to recover a paving tax proof of presentation of the bills and of a promise to pay made by the defendant, will support a verdict for the plaintiff on an account stated. Clemens *v.* Mayor, 16 Md. 208.

28. Powell *v.* R. R. Co., 65 Mo. 658; Bonnell *v.* Mawha, 37 N. J. Law 198.

It seems it may be shown though made before the account became due.[29]

It has been said that it may be shown though made after the commencement of the action.[30]

(3.) Unqualified and of Precise Sum. — The assent must be unqualified,[31] and of a precise sum.[32]

A Claim of an Offset usually amounts to a qualification of assent.[33]

But Evidence of a Reservation of Items to be further investigated does not show that the account was not stated as to the remainder.[34]

29. Jugla *v.* Trouttet, 120 N. Y. 21, 23 N. E. 1066.

30. Lowenthal *v.* Morris, 103 Ala. 332, 15 So. 672 (*Arguendo* in opinion of Head.)

Contra and the Better Rule. — Allen *v.* Cook, 2 D. P. C. 546; Spencer *v.* Parry, 4 N. & M. 770, 3 Ad. & E. 331.

An account was rendered July 30th. August first a summons was issued and the complaint was dated August 10th. But summons was not served until September 11th, up to which time the defendant retained the statement of account without objection. It was held that the action could be sustained as upon an account stated. Donald *v.* Gardner, 44 App. Div. 235, 60 N. Y. Supp. 668.

In Stowe *v.* Sewall, 3 Stew. & P. (Ala.) 67, which was not an action on an account stated, a stated account was admitted in evidence to establish an indebtedness, although stated after the action was brought.

31. Evans *v.* Verity, R. & M. 239; State *v.* Hartman Steel Co., 51 N. J. Law 446, 20 Atl. 67; Calvert *v.* Baker, 4 M. & W. 417; Stevens *v.* Tuller, 4 Mich. 387.

Promise Must Not Be Contingent or in the Alternative, as if one promised to replace a certain boat or pay $150.00. Rutledge *v.* Moore, 9 Mo. 537.

Assent to One Side of Account. An admission of the correctness of the debit items of an account accompanied by a demand for allowance of additional credits, is not evidence of an account stated. Coombs *v.* Block, 130 Mo. 668, 32 S. W. 1139.

Compare Reinhardt *v.* Hines, 51 Miss. 344.

Reservation of Right to Object to Goods.—Where an account is rendered and the goods mentioned in it delivered and remain in possession of the party to be charged, and payments are made on the account and no objection is made as to the account, these facts establish an account stated, although in making the last payment the party to be charged wrote: "There are still a few pounds due you, provided the goods still on hand, (and I have quite a lot there still from your shipments,) are up to the contract. I shall withdraw very shortly and determine all about it." The defendant assented that the account was correct and the only right he reserved was to impeach it, if the goods were not up to the contract. That right he would have had without expressly reserving it. Samson *v.* Freedman, 102 N. Y. 699, 7 N. E. 419.

32. Teall *v.* Auty, 4 Moore 542, 2 B. & B. 99, 22 Rev. Rep. 656.

33. *United States.* — Harden *v.* Gordon, 11 Fed. Cas. No. 6047.

Alabama.—Ware *v.* Manning, 86 Ala. 238, 5 So. 682.

Mississippi.—Reinhardt *v.* Hines, 51 Miss. 344.

New Hampshire.—Filer *v.* Peebles, 8 N. H. 226.

New Jersey.—State *v.* Hartman Steel Co., 51 N. J. Law 446, 20 Atl. 67.

Oregon.—Crawford *v.* Hutchinson, 38 Or. 578, 65 Pac. 84.

In Pierce *v.* Delamater, 3 How. Pr. (N. Y.) 162, it is held that if one admitted the correctness of an account, but claimed some offset, without specifying its amount or nature, the admission supports an action on account stated.

34. Tuggle *v.* Minor, 76 Cal. 96,

Nor Does a Provision for Correction of after discovered errors.[35]

Proof of Objection to Only One or More Items of an account is not a qualification, but tends to establish an account stated as to the others.[36]

A Qualified Assent Followed by Acceptance of the qualification or proposed modification, is sufficient proof of assent.[37]

A Reservation of Time for Payment does not amount to a qualification of assent to the account.[38]

d. *Implied Assent.* — Acceptance of an account as correct may be implied from circumstances.[39]

(1.) Bank Books and Pass Books. — Balances shown in depositors' bank books or other pass books and not objected to are evidence of accounts stated on the ground of implied assent.[40] But not if the

18 Pac. 131; Wiggins *v.* Burkham, 10 Wall. (U. S.) 129.

35. Although a signed statement contained a memorandum that "this settlement is correct according to our understanding at this time, but should anything occur we are amicably to settle it," it became nevertheless a stated account. Marmon *v.* Waller, 53 Mo. App. 610.

36. *England.*—Chisman *v.* Court, 2 Man. & G. 317, 2 Scott (U. R.) 569.

Alabama.—Joseph *v.* Southwark & Co. (Ala.), 10 So. 327; Ware *v.* Manning, 86 Ala. 238, 5 So. 682; Burnes *v.* Campbell, 71 Ala. 271.

Georgia.—Field *v.* Reed, 21 Ga. 314.

Illinois.—Bee *v.* Tierney, 58 Ill. App. 552; Congress C. Co. *v.* Interior B. Co., 86 Ill. App. 199. But *see* King *v.* Machesney, 88 Ill. App. 341.

Missouri.—Mulford *v.* Caesar, 53 Mo. App. 263.

New York.—Power *v.* Root, 3 E. D. Smith 70.

37. Neagle *v.* Herbert, 73 Ill. App. 17.

An account being rendered, the debtor wrote saying that if the creditor would take back certain of the goods and credit him with their cost, he would pay the balance; the creditor wrote accepting this offer and rendered an account on that basis. This was held sufficient evidence of an account stated. Aylsworth *v.* Gallagher, 22 N. Y. St. 26, 4 N. Y. Supp. 853.

38. Baird *v.* Crank, 98 Cal. 293, 33 Pac. 63; Tuggle *v.* Minor, 76 Cal. 96, 18 Pac. 131; Neagle *v.* Herbert, 73 Ill. App. 17.

Account Rendered by a Garnishee.—An account was rendered showing a balance due from the party rendering it. A memorandum was added that the account was subject to an attachment in a certain action by a third party against the creditor. It was held that this memorandum did not alter the legal character of the account stated, nor qualify the implied promise that nothing was left open between the parties. No right to retain the balance was claimed. The acknowledgement of indebtedness was absolute. The memorandum was merely a notification that present payment of the creditor was prevented by the attachment. It appeared in the case that the attachment had been dissolved before the commencement of the action. Halliburton *v.* Clapp, 72 N. Y. St. 26, 36 N. Y. Supp. 1041.

39. Swain *v.* Knapp, 34 Minn. 232, 25 N. W. 397; Quinn *v.* White, (Nev.), 62 Pac. 995; Stebbins *v.* Niles, 3 Cushm. (Miss.) 267; McCall *v.* Nave, 52 Miss. 494; Ruffner *v.* Hewitt, 7 W. Va. 585; Freeman *v.* Howell, 4 La. Ann. 196, 50 Am. Dec. 561.

An Offer to Settle by Giving Note for Balance amounts to an assent. Elwood Mfg. Co. *v.* Betcher, 72 Minn. 103, 75 N. W. 113.

40. *England.*—Willis *v.* Jernegan, 2 Atk. 252.

entries show only one side of the account.[41]

(2.) Accounts Rendered and Not Objected To. — To show assent it may be proved that the account having been rendered, the party receiving it did not, within a reasonable time, object thereto.[42]

United States.—Marye *v.* Strouse, 5 Fed. 483.

California.—Terry *v.* Sickles, 13 Cal. 437.

Illinois.—Gottfried B. Co. *v.* Szar Kowski, 79 Ill. App. 583.

Iowa.—Schoonover *v.* Osborne, 108 Iowa 453, 79 N. W. 263.

Massachusetts. — Union Bank *v.* Knapp, 3 Pick. 96, 15 Am. Dec. 182.

Mississippi.—Coopwood *v.* Bolton, 26 Miss. 212.

New York.—Wiesser *v.* Denison, 10 N. Y. 81, 61 Am. Dec. 731; Hutchinson *v.* Bank, 48 Barb. 302; Clark *v.* Bank, 11 Daly 239.

Utah.—Burraston *v.* Bank, 22 Utah 328, 62 Pac. 425.

West Virginia.—Ruffner *v.* Hewitt, 7 W. Va. 585.

Even if the Depositor Could Not Read the Entries.—Ruch *v.* Fricke, 28 Pa. St. 241, but it appeared that he understood the figures.

Such Books Are Evidence Against the Bank Also of a stated account. Harley *v.* Bank, 7 Daly (N. Y.) 476.

Forged Checks Included in Account.—That checks returned with the pass book came into the hands of the same clerk who had forged them and he concealed them from the customer, his employer, does not alter the rule. August *v.* Bank, 15 N. Y. St. 956, 1 N. Y. Supp. 139.

But *Compare,* Hardy *v.* Bank, 51 Md. 562, 34 Am. Rep. 325.

Prima Facie Evidence. — In the case of McKinster *v.* Hitchcock, 19 Neb. 100, 26 N. W. 705, the court said as to whether the mere acceptance of a customer's bank book, written up and returned to him by the bank, together with checks without objection, is to be held binding upon the customer as an account stated is a question upon which the authorities differ, *citing* Morse on Banking 358. The better rule is that if such an account be retained for a reasonable time without objection, it will be treated as an account stated, and *prima facie* correct. See also Hardy *v.* Bank, 51 Md. 562, 34 Am. Rep. 325.

Agreement by Depositor to Make His Objection Within Ten Days. Where depositor in receipting for cancelled checks signs an agreement "all claims for reclamation to be made within 10 days," his failure to make objection renders the pass book an account stated. McKeen *v.* Bank, 74 Mo. App. 281.

Checks Not Returned.—In the case of Shepard *v.* Bank, 15 Mo. 143, a depositor in a bank had been in the habit of drawing in various ways for several years; had a bank book showing debits and credits. The book was balanced in 1842 and in 1846, and had the following memorandum made by a bank clerk: "All checks from April '42 to August '46 are taken from the ledgers of the bank, the original checks misplaced, amounts, dates, etc., are correct." This memorandum was made in August, 1846. The depositor kept the book without making objections until he brought suit three years afterwards.

It was held that these facts made out a stated account.

41. Randleson *Ex parte,* 2 Dec. & Ch. 534.

42. *England.*—Willis *v.* Jernegan, 2 Atk. 251; Sherman *v.* Sherman, 2 Vern. 276.

United States.—Standard Oil Co. *v.* Van Ettier, 107 U. S. 325, 1 Sup. Ct. 178.

Alabama.—Christian & Craft Co. *v.* Hill, 122 Ala. 490, 26 So. 140.

Arkansas. — Lawrence *v.* Ellsworth, 41 Ark. 502.

California. — Mayberry *v.* Cook, 121 Cal. 588, 54 Pac. 95.

Colorado.—Freas *v.* Truitt, 2 Colo. 489.

Florida.—Jacksonville etc. Co. *v.* Warriner, 35 Fla. 197, 16 S. W. 898.

Illinois.—House *v.* Beak, 43 Ill. App. 615.

In support of this rule a usage between the parties of objecting to disputed items may be shown.[43]

The account rendered must have been clear and unambiguous;[44] and must show not only the quantities or amounts of goods delivered or sold, but also the amount of money balance.[45]

Partnership Accounts are not within the scope of this rule.[46]

And if the account is sent to and retained by an agent, his authority must be shown.[47]

The rule of implied assent is not so readily applied when invoked by the person to whom the account is rendered.[48]

Louisiana.—Brodnax *v.* Steinhardt, 48 La. Ann. 682, 19 So. 572.

Michigan.—Raub *v.* Nisbett, 118 Mich. 248, 76 N. W. 393.

Minnesota.—Elwood Mfg. Co. *v.* Betcher, 72 Minn. 103, 75 N. W. 113.

Mississippi.—Coopwood *v.* Bolton, 4 Cushm. (26 Miss.) 212.

Missouri.—Powell *v.* R. R. Co., 65 Mo. 658.

New Hampshire.—Rich *v.* Eldredge, 42 N. H. 153.

New Jersey.—State *v.* Hartman Steel Co., 51 N. J. Law 446, 20 Atl. 67.

New York. — Knickerbocker *v.* Gould, 115 N. Y. 533, 22 N. E. 573; Spellman *v.* Muehlfeld, 48 App. Div. 265, 62 N. Y. Supp. 746; Eames V. B. Co. *v.* Prosser, 157 N. Y. 289, 51 N. E. 986.

North Carolina.—Webb *v.* Chambers, 3 Ired. 374.

Oregon.—Crawford *v.* Hutchinson, 38 Or. 578, 65 Pac. 84; Howell *v.* Johnson, 38 Or. 571, 64 Pac. 639.

Pennsylvania.—Verrier *v.* Guillon, 97 Pa. St. 63; Pierce *v.* Pierce, 199 Pa. St. 4, 48 Atl. 689.

Utah.—Burraston *v.* Bank, 22 Utah 328, 62 Pac. 425.

Vermont.—Tharp *v.* Tharp, 15 Vt. 105.

Virginia.—Goldsmith *v.* Latz, 96 Va. 680, 32 S. E. 483.

West Virginia. — Shrewsbury *v.* Tufts, 41 W. Va. 212, 23 S. E. 692.

Leading Case. — Lockwood *v.* Thorne, 18 N. Y. 285, is a leading case in New York on the subject of accounts stated. It is there said that in proving an account stated, it is not necessary to show an express examination or an express agreement. All may be implied from circumstances. If one render an account and the other examining it makes no objection, an inference might be drawn that he was satisfied with it, so if the account be made out by one and transmitted to the other by mail, and the latter fail to object within a reasonable time, it might be inferred that he was satisfied. Such failure to object would be legitimate evidence in proving an account stated. See same case in 12 Barb. 487.

In Admiralty.—In a personal action in admiralty the same principle that acquiescence is evidence of a stated account exists. Martin *v.* Acker, 16 Fed. Cas. No. 9155.

Sale and Statement Simultaneous. Implication of assent is not raised where the sale and delivery of goods and rendering of statement of account are simultaneous. Truman *v.* Owen, 17 Or. 523, 21 Pac. 665.

Mere Failure to Object Held Insufficient.— In Allen *v.* Woonsocket, 11 R. I. 288, it is said that acquiescence, even for a considerable time, does not establish the fact of an account's being settled, unless there are other things in evidence to justify the conclusion. And see Pratt *v.* Boody, 55 N. J. Eq. 175, 35 Atl. 1113.

43. Union Bank *v.* Bank, 9 Gill. & J. (Md.) 439, 31 Am. Dec. 113.

44. Manion B. & W. Co. *v.* Carreras, 26 Mo. App. 229.

45. Robson *v.* Bohm, 22 Minn. 410.

46. Hughes *v.* Smither, 23 App. Div. 590, 49 N. Y. Supp. 115, 163 N. Y. 553, 57 N. E. 1112.

47. Knapp *v.* Smith, 97 Wis. 111, 72 N. W. 349.

48. Rule of Implied Assent Invoked by Debtor.— In White *v.* Campbell, 25 Mich. 463, the party to

This rule of implied assent was thus formerly enforced only between merchants;[49] and is still most strictly enforced between them.[50]

But it has been extended to all classes of business men,[51] and to others.[52]

(A.) To What Accounts Applicable. — An account rendered may thus become evidence of an account stated, although the first item purports to be a balance of a former account rendered.[53]

It is said that the rule of implied assent from failure to object has no application where the claim was the subject of a special contract fixing the amount;[54] nor where the prices to be paid were not agreed upon and have no market value;[55] nor where the claim is for mere unliquidated damages for breach of contract.[56]

whom an account was rendered, being afterwards sued, in order to establish that the claim was outlawed, insisted that the account had become stated against him by his not objecting thereto; but the court held that the rule of implied assent had been made for the benefit of the party rendering the account, and that the other party cannot rest upon the fact that he remained passive, but must show some word or act marking or implying that he assented to the account. See also to same effect Payne *v.* Walker, 26 Mich. 60.

49. Sherman *v.* Sherman, 2 Vern. 276; Shepard v. Bank, 15 Mo. 143; Townes *v.* Birchett, 12 Leigh (Va.), 173.

50. As Between Merchants. — Failure to object makes an account rendered conclusive in absence of fraud or mistake. Green *v.* Smith, 52 Ill. 158; Mackin *v.* O'Brien, 33 Ill. App. 474; McCord *v.* Manson, 17 Ill. App. 118; Miller *v.* Bruns, 41 Ill. 293; Rich *v.* Eldredge, 42 N. H. 153.

51. Rich *v.* Eldredge, 42 N. H. 153; Peona G. S. Co. *v.* Turney, 58 Ill. App. 563; King *v.* Rhoades & Co., 68 Ill. App. 441; McKeen *v.* Bank, 74 Mo. App. 281.

52. McCord *v.* Manion, 17 Ill. App. 118; Sherman *v.* Sherman, 2 Vern. 276; Shepard *v.* Bank, 15 Mo. 143; Brown *v.* Kimmel, 67 Mo. 430; Fleischner *v.* Kubli, 20 Or. 328, 25 Pac. 1086; Bradley *v.* Richardson, 3 Fed. Cas. No. 1786; Crawford *v.* Hutchinson, 38 Or. 578, 65 Pac. 84; McKeen *v.* Bank, 74 Mo. App. 281; Townes *v.* Birchett, 12 Leigh (Va.), 173.

As Between Principal and Agent, such rendition is *prima facie* evidence of assent. McCord *v.* Manson, 17 Ill. App. 118; Tharp *v.* Tharp, 15 Vt. 105; Mansell *v.* Payne, 18 La. Ann. 124; Ruffner *v.* Hewitt, 7 W. Va. 585; Mertens *v.* Nottebohms, 4 Gratt. (Va.), 163.

Mississippi refuses to extend the rule to other than merchants, but says that the rendering of an account and its retention between others than merchants is admissible to show an implied admission and acquiescence in its correctness. What weight should be proven to it is for the consideration of the jury under all the circumstances of the case. Auding *v.* Levy, 57 Miss. 51, 34 Am. Rep. 435.

53. Fleischner *v.* Kubli, 20 Or. 328, 25 Pac. 1086; Dows *v.* Durfee, 10 Barb. (N. Y.) 213.

54. Valley Lumber Co. *v.* Smith, 71 Wis. 304, 37 N. W. 412, 5 Am. St. Rep. 216; Kusterer B. Co. *v.* Friar, 99 Mich. 190, 58 N. W. 52; Howell *v.* Johnson, 38 Or. 571, 64 Pac. 659. *Compare* Robson *v.* Bohn, 22 Minn. 410.

55. Burlingame *v.* Shelmire, 35 N. Y. St. 161, 12 N. Y. Supp. 655; Williams *v.* Glenny, 16 N. Y. 389; Harrison *v.* Ayers, 18 Hun (N. Y.) 336.

56. Charnley *v.* Sibley, 73 Fed. 980; Pynchon *v.* Day, 118 Ill. 9, 7 N. E. 65; Fraley *v.* Bispham, 10 Pa. St. 320, 51 Am. Dec. 486.

(B.) No Implication in Absence of Previous Dealings. — Failure to object does not raise an implication of assent unless the party rendering and the party receiving the account had had dealings on which the account is based.[57]

An Account Against a Deceased Person rendered to his legal representative and not objected to is not evidence of a stated account.[58]

But the account may be stated between the party to be charged and the creditor's assignee.[59]

57. *California.*—Natl. Cycle M. Co. *v.* San Diego C. Co., 135 Cal. 335, 67 Pac. 280.

Florida.—Martyn *v.* Arnold, 36 Fla. 446, 18 So. 791.

Missouri.—Powell *v.* R. R. Co., 65 Mo. 658.

New York.—Austin *v.* Wilson, 33 N. Y. St. 503, 11 N. Y. Supp. 565; Kellogg *v.* Rowland, 40 App. Div. 416; 57 N. Y. Supp. 1064; Callahan *v.* O'Rourke, 17 App. Div. 277, 45 N. Y. Supp. 764; Porter *v.* Labach, 2 Bosw. (N. Y.) 188. See also Burst *v.* Jackson, 10 Barb. (N. Y.) 219.

Pennsylvania.—Spangler *v.* Springer, 22 Pa. St. 454.

Retention of Account and Partial Payment.—M, as attorney for a judgment creditor, collected rents on real estate of the debtor in excess of the amount due upon the judgment. He rendered a statement to C, the debtor, of the excess, deducting certain commissions. C did not object and received a payment of a part of the balance admitted to be due. But on tender of the residue, declined it, insisting that the charge for commissions was not lawful. The rendering and retention of the account was held no evidence of an account stated, because there had been no contract relation between the parties. Mellon *v.* Campbell, 11 Pa. St. 415.

Contrary Ruling. — In Avery *v.* Leach, 9 Hun (N. Y.) 106, it is held that mere proof of the rendition and retention without objection of an account, makes it a stated account, although defendant insists that goods were sold to his son and for his son's benefit and without authority from defendant.

58. In Lambert *v.* Craft, 98 N. Y. 342, it was held that an account against a deceased person which had been presented to his executor and retained without objection, might be afterwards made the basis of a petition to the surrogate for allowance as a valid, undisputed claim. The presentation to and acquiescence of the executor established *prima facie* the accuracy of the account. Ogden *v.* Aster, 4 Rob. 311.

But in Schultz *v.* Morette, 146 N. Y. 137, 40 N. E. 780, the court said: "The doctrine of implied assent has a much more restricted application when the plaintiff relies upon the silence of an executor to whom the claim has been presented. The executor is not presumed to be personally cognizant of the transaction. It would subject estates to great danger if the mere silence of the executor should be an admission of a claim presented, so as to relieve the claimant from establishing it in the ordinary way, and put upon the estate the burden of establishing error. The office of executor or administrator is exceedingly necessary and useful, and must often be assumed by persons unskilled in law, and to infer from mere silence on the part of such an officer an agreement that the claim is just, would often contradict the real intention and tend to subject estates to payment of unfounded claims.

In Ogden *v.* Aster, 4 Rob. 311 (332), it was held that an account rendered by a surviving partner to the administrators of the deceased partner's estate would become an account stated by mere failure to object; and this, although, of the administrators, one was a female not familiar with accounts and the other a relative of the surviving partner.

59. Powell *v.* R. R. Co., 65 Mo. 658; Bonnell *v.* Mawha, 37 N. J. Law 198.

The account had been sent to M,

An Account Not Due Presented and not objected to may be evidence to sustain an action on an account stated after the account becomes payable.[59]

The fact that the account rendered is explicitly stated to be subject to correction does not alter the effect of failure to object within a reasonable time.[61]

(C.) Extent of Implied Assent. — The assent implied is merely assent to the correctness of the account, not to the character or capacity in which the party is charged.[62]

(D.) Rebutting Implied Assent. — It may be that an objection not communicated to the party rendering the account may be proved to negative the implied assent.[63]

A declaration to the creditor of intention to keep him out of the bill as long as possible is inconsistent with the idea of assent to the bill.[64]

The rule of implied assent does not apply, unless the party to be charged is upon the face of the account rendered, a party thereto, or is otherwise clearly informed that the balance is claimed and demanded as against him.[65]

assignee, and not to the person who had made the shipment of goods, he having failed and made an assignment to M. It was held that the account was properly rendered to M, the assignee, he being the only party having a right to demand it, and the only person having authority to settle the account and receive the balance, if any due. There is no rule that the account can be stated only between the original parties. Thompson *v.* Fisher, 13 Pa. St. 310.

60. Jugla *v.* Trouttet, 120 N. Y. 21, 23 N. E. 1066.

61. Branger *v.* Chevalier, 9 Cal. 353; Story's Eq. Jur. § 526; Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99.

E. and O. E.—An account rendered having at the bottom the usual initials, E. and O. E., nevertheless becomes a stated account unless objected to within a reasonable time. Fleischner *v.* Kuhli, 20 Or. 328, 25 Pac. 1086.

But see Ingraham *v.* Lukens, 30 S. C. 616, 9 S. E. 348; Harden *v.* Gordon, 11 Fed. Cas. No. 6047; Kent *v.* Highleyman, 28 Mo. App. 614.

62. The suit was against the defendant survivor of a co-partner. It was held that an account rendered could not be used for the double purpose of proving the partnership as well as the amount of the claim. If an account is presented to one charging him as liable with some other person as his partner, he may deny that relationship, when sued upon the account, and the retention of the account without objection is not an acquiescence in the joint liability alleged in the account. There must therefore be proof outside of the mere statement of the account to show the defendant liable as partner. Kemp *v.* Peck, 35 N. Y. St. 780, 13 N. Y. Supp. 112.

63. Robertson *v.* Wright, 17 Gratt. (Va.) 534. In that case the party receiving the account retained it and merely indorsed thereon memoranda of objections.

64. Blanc *v.* Forgay, 5 La. Ann. 695.

An acceptor of a bill on demand for payment saw the acceptance had been altered by changing place of payment, and stated that he should take such steps as the law would authorize; that he had been prepared to pay, and the holder could have had the money by calling at his house; this was held not the acknowledgment of a subsisting debt. Calvert *v.* Baker, 4 M. & W. 417, 1 H. & H. 404.

65. Davis *v.* Bank, 19 Wash. 65, 52 Pac. 526.

(E.) Burden of Proof. — After it is shown that a statement of account was rendered, the burden is on the one denying the existence of a stated account to prove that objection was made within a reasonable time.[66]

(F.) Reasonable Time to Object. — What is a reasonable time within which to object depends on the circumstances of the case,[67]

Illustration.— B and M were copartners. They took into the partnership H. Afterwards, plaintiff, who had had an account against B & M, remitted to H a statement purporting to be against B & M. The account was sent without any statement expressing why it was sent, and without demand for payment. The name of H appeared only once, and that in an item as follows: "To balance due on settlement charged to B, M & H." There was nothing in the account to show what was involved in that settlement, nor why it was charged to B, M & H. The court said that where the account stated is not the result of an expressed assent or agreement to its correctness, the party to be charged must in terms be a party to the account, or the grounds upon which it is sought to hold him as a debtor should be clearly made known to him, and a demand for payment should be made. Benites *v.* Bicknell, (Utah), 3 Pac. 206.

An Account Rendered by a Trustee to the Trustor, though examined by the beneficiary, does not become by acquiescence an account stated as to the latter. Andrews *v.* Hobson, 23 Ala. 219.

Item in Account Not on Its Face a Proper Charge.— In Porter *v.* Lobach, 2 Bosw. (N. Y.) 188, an account had been rendered to a partnership showing as one item a loan to T (not a member of the firm but connected with it.) It was held that the account did not become stated as to that item by mere failure to object.

66. Ruffner v. Hewitt, 7 W. Va. 585; Townes *v.* Birchett, 12 Leigh (Va.) 173.

Contra.—Robertson *v.* Wright, 17 Gratt. (Va.) 534, which holds that it cannot be presumed that no objection was made, merely because none is proved. Even if such presumption could be made, it would not be competent to found on it the further presumption that Robertson admitted the correctness of the account, for that would be to base a presumption on a presumption, contrary to the rules of evidence.

67. *United States.* — Talcott *v.* Chew, 27 Fed. 273; Allen West Com. Co. *v.* Patillo, 90 Fed. 628.

Louisiana.—Freeman *v.* Howell, 4 La. Ann. 196, 50 Am. Dec. 561; Darby *v.* Lastrapes, 28 La. Ann. 605.

Missouri.—Brown *v.* Kimmel, 67 Mo. 430.

Oregon.—Howell *v.* Johnson, 38 Or. 571, 64 Pac. 659.

Pennsylvania.—Porter *v.* Patterson, 15 Pa. St. 229; Bevan *v.* Cullen, 7 Pa. St. 281.

Matters to Be Considered. — What is a reasonable time within which one must object or be bound depends on the relation of the parties and the usual course of business between them. The presumption of acquiescence from silence depends in large measure on the circumstances— whether the party is a man of business and education, the nature of his business, the local situation of the parties, customary dealings with each other and other circumstances. Martyn *v.* Arnold, 36 Fla. 446, 18 So. 791; White *v.* Hampton, 10 Iowa 238

Whether or Not the Parties Had Equal Means of Knowledge as to prices charged. Stern *v.* Ladew, 47 App. Div. 331, 62 N. Y. Supp. 267.

Between Merchants at Home. An account which has been presented and no objection made thereto after lapse of sufficient posts, is treated under ordinary circumstances as being by acquiescence an account stated. Powell *v.* Ry. Co., 65 Mo. 658.

Instances.—Delay of four months unreasonable. Standard Oil Co. *v.*

and so the evidence should show when the account was rendered.[68]

What is a reasonable time for objection, is held to be a question for the court, and not for the jury.[69]

(G.) Failure to Object Prima Facie Evidence Only. — The failure to object is only *prima facie* evidence.[70]

Van Etten, 107 U. S. 325, 1 Sup. Ct. 178.

Delay of six months unreasonable. Fleischner *v.* Kubli, 20 Or. 328, 25 Pac. 1086.

Delay of two years unreasonable. Longbell L. Co. *v.* Stump, 86 Fed. 574.

Delay of ten years unreasonable. Baker *v.* Biddle, 2 Fed. Cas. No. 764.

Objection within twelve days is made within reasonable time. Wiggin *v.* Burkham, 10 Wall. (U. S.) 129.

Two months. Dows *v.* Durfee, 10 Barb. (N. Y.) 213.

Delay of two weeks, where parties live in same city, tends to show assent. Mulford *v.* Caesar, 53 Mo. App. 263.

Delay of three months unreasonable. Hendy *v.* March, 75 Cal. 566, 17 Pac. 702.

Tax Collector's Account of transactions running through nine years and involving between six and seven hundred thousand dollars does not become stated by retention for thirty-five days. Lott *v.* County, 79 Ala. 63.

The rule of acquiescence by failure to object applies with more force between merchants in the same county, and yet more between merchants residing in the same town and in the daily habit of intercommunication. Between such a shorter period would give rise to the presumption. Townes *v.* Birchett, 12 Leigh (Va.) 173.

68. Hall *v.* Morrison, 3 Bosw. (N. Y.) 520.

69. *United States.* — Toland *v.* Sprague, 12 Pet. 300; Talcott *v.* Chew, 27 Fed. 273; Long-Bell L. Co. *v.* Stump, 86 Fed. 574; Standard Oil Co. *v.* Van Ettier, 107 U. S. 325; Edwards *v.* Hoffinghoff, 38 Fed. 635; Charlotte Oil & Fertilizer Co. *v.* Hartog, 85 Fed. 150.

Florida.—Martyn *v.* Arnold, 36 Fla. 446, 18 So. 791.

Missouri.—Powell *v.* R. R. Co., 65 Mo. 658; Brown *v.* Kimmel, 67 Mo. 430; McKeen *v.* Bank, 74 Mo. App. 281.

New York. — Knickerbocker *v.* Gould, 115 N. Y. 533, 22 N. E. 573; Lockwood *v.* Thorne, 11 N. Y. 170; Hutchinson *v.* Bank, 48 Barb. 302.

Oregon.—Crawford *v.* Hutchinson, 38 Or. 578, 65 Pac. 84; Fleischner *v.* Kubli, 20 Or. 328, 25 Pac. 1086.

Mixed Question of Law and Fact. In the case of Wiggins *v.* Burkham, 10 Wall. (U. S.) 129, it is said that the proposition that what is reasonable time in such cases is a question for the jury cannot be sustained. That where the facts are clear it is always a question for the court; that where the proofs are conflicting the question is a mixed one of law and fact, and the court should instruct as to the law on the several hypotheses insisted on by the parties. To the same effect, Howell *v.* Johnson, 38 Or. 571, 64 Pac. 659.

Contrary Doctrine. — What was a reasonable time was a fact for the jury. The rule that the consignor has a reasonable time of which the jury must judge within which to object, has been so repeatedly ruled that it is no longer an open question (*citing* 3 Wash. 151; 12 Johns. 300; 3 Cow. 381; 1 Johns. Cas. 110; 15 Wend. 431; 17 Mass. 109; 1 Baldwin 536; 13 Pa. 310; 7 Pa. 281; 4 Mason 296; 8 Ecl. 54.) Porter *v.* Patterson, 15 Pa. St. 229. See also Hollenbeck *v.* Ristine, 105 Iowa 448, 75 N. W. 355, 67 Am. St. Rep. 306; Peter *v.* Thickstun, 51 Mich. 589, 17 N. W. 68; Moran *v.* Gordon, 33 Ill. App. 46; Austin *v.* Ricker, 61 N. H. 97.

70. *England.*—Chisman *v.* Court, 2 Man. & G. 307.

United States.—Freeland *v.* Heron, 7 Cranch 147; Toland *v.* Sprague, 12 Pet. 300; Hopkirk *v.* Page, 12 Fed. Cas. No. 6607; Edwards *v.* Hoffinghoff, 38 Fed. 635.

Alabama.—Rice *v.* Schloss, 90 Ala. 416, 7 So. 802.

(H.) Explanation or Excuse of Failure. — And may be explained so as to rebut the implied assent,[71] as by absence of the one to whom

Illinois.—Moran *v.* Gordon, 33 Ill. App. 46.

Iowa.— White *v.* Hampton, 10 Iowa 238; Hollenbeck *v.* Ristine, 105 Iowa 448, 75 N. W. 355, 67 Am. St. Rep. 306.

Missouri.—Shepard *v.* Bank, 15 Mo. 143.

New York.—Lambert *v.* Craft, 98 N. Y. 342; Guernsey *v.* Rexford, 63 N. Y. 631; Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99; Sharkey *v.* Mansfield, 90 N. Y. 227, 43 Am. Rep. 161; Champion *v.* Joslyn, 44 N. Y. 653.

Pennsylvania.—Vantries *v.* Richey, 8 Watts & S. 87; Verrier *v.* Guillon, 97 Pa. St. 63; Sergeant *v.* Ewing, 30 Pa. St. 75, and 36 Pa. St. 156; Coe *v.* Hutton, 1 Serg. & R. 398; Pierce *v.* Pierce, 199 Pa. St. 4, 48 Atl. 689.

Question for Jury.— Although many cases hold that by the mere failure to object, an account rendered becomes unimpeachable, a sound rule is that such fact is admissible as an acknowledgment. The weight of such proof being a question of fact for the jury. Hendrix *v.* Kirkpatrick, (Neb.), 67 N. W. 759.

Divergent Rulings.— In Brown *v.* Kimmel, 67 Mo. 430, it is said that there are cases in which the presumed acquiescence has been considered very slight evidence of the correctness of the account, *citing* Killam *v.* Preston, 4 Watts & S. (Pa.) 14; Spangler *v.* Springer, 22 Pa. St. 454.

In others the courts have considered it conclusive, except where fraud or mistake is clearly shown, *citing* Lockwood *v.* Thorne, 11 N. Y. 170. The cases have been decided on the peculiar circumstances of each, and in no case has the implied admission been declared an estoppel, but only a *prima facie* case, throwing the burden on the adverse party; *citing* Philips *v.* Belden, 2 Edw. Ch. 1; Hutchinson *v.* Bank, 48 Barb. (N. Y.) 302.

Only Slight Evidence.—In the case of Killam *v.* Preston, 4 Watts & S. (Pa.) 14, it was held that the rendering of an account stated, and its retention without objection is some evidence of the admission of its correctness by the party to whom it is sent, but at most very slight. And it was said in that case that an account rendered by one partner to his co-partner of their partnership transactions, and the retention without objection by the co-partner, would not of itself have furnished sufficient legal presumption that the accounts had been settled between the parties, (*citing* Lord Clancarty *v.* Latouche, 1 Ball & Beatt. 428, and Irvine *v.* Young, 1 Simons & Stu. 333.) And see Pratt *v.* Boody, 55 N. J. Eq. 175, 45 Atl. 1113.

Mere Acquiescence Not Sufficient. Acquiescence even for a considerable time does not establish the fact of an account's being settled, unless there are other things in evidence to justify that conclusion. Allen *v.* Woonsocket Co., 11 R. I. 288.

Strength of Inference of Correctness depends on circumstances of the particular case. Hirschfelder *v.* Levy, 69 Ala. 351.

71. Ault *v.* Interstate S. & L. A. 15 Wash. 627, 47 Pac. 13; Guernsey *v.* Rexford, 63 N. Y. 631.

Circumstances To Be Considered. The respondent was on the Pacific Coast, the parties with whom he dealt in Europe. He shipped them salmon, agreeing to be chargeable with all blown tins resulting from improper packing. The respondent saw nothing of the goods after shipping, and relied entirely upon the statements of his consignees, reposed confidence in them, and when they advised him that the salmon had proved bad in consequence of bad packing, he naturally acquiesced. He knew nothing of the extent to which the cargo had suffered from rough weather. It was held that he was not bound, it appearing that the damage to the goods did not result from improper packing. Kinney *v.* Heatley, 13 Or. 35, 7 Pac. 359.

Where Account Does Not Purport To Be Exact.—A contract called for

it was sent;[72] or where the one receiving the account asked for further information, to which he was entitled, and it was not furnished;[73] or where the person receiving the account expected shortly to meet the other, but was delayed by some mischance;[74] or by proof of a course of dealings between the parties, or an understanding that no such default should be insisted upon.[75]

But mere press of business is said not to be an excuse.[76]

If the relation between the parties is such that the one receiving the account could not safely object, no inference of assent arises from his failure to do so.[77]

It may be shown that subsequently a different statement of the account was made and assented to.[78]

Failure to object raises no implication of assent where the party to be charged had already denied all liability;[79] or where the parties

a division of profits over freightage. Statements were rendered showing balances based on *estimated* freight charge. By letter, the party accounting said he claimed only the actual cost. The estimate exceeded the cost. Failure to object by one not knowing this, did not render the account a stated one. Champion *v.* Recknagel, 6 App. Div. 151, 39 N. Y. Supp. 814.

72. Lockwood *v.* Thorne, 18 N. Y. 285; Ault *v.* Interstate S. & L. A., 15 Wash. 627, 47 Pac. 13.

Absence of Partner in Special Charge of Matter Involved.—A bill was presented to A against A & B. A having no knowledge of the matter, asked to have it stand over until he could consult his partner, but retained the account without objection. *Held*, that no account was stated. Miller *v.* Bank, 6 Cushm. (Miss.) 81.

73. Ault *v.* Interstate S. & L. A., 15 Wash. 627, 47 Pac. 13; Carpenter *v.* Nickerson, 7 Daly (N. Y.) 424.

74. Lockwood *v.* Thorne, 18 N. Y. 285.

Or Called Repeatedly Without Finding Him.—Carpenter *v.* Nickerson, 7 Daly (N. Y.) 424.

75. Lockwood *v.* Thorne, 18 N. Y. 285.

76. An account was rendered on September 20th, 1881; the receipt was acknowledged and defendants promised to look over the statements and give their views on the matter. On October 3rd, plaintiff drew for the balance, and wrote that he had received no further word. On the 14th of October he again complained that he had received no statement of errors in the account. October 20th plaintiff telegraphed defendants to send statements of any objections they had. Communication by mail could have been had in two days. The court said that it would not do for a commission merchant to say that his business prevents him from looking over an account contracted in the course of that business. Talcott *v.* Chew, 27 Fed. 273.

77. In Wittkowski *v.* Harris, 64 Fed. 712, it appeared that the previous dealings between a merchant and his factor had not been harmonious or satisfactory; that the factor rendered an account which was not objected to. It was held that the ordinary rule requiring the principal to dissent within a reasonable time did not apply where the relations between the parties had been such as stated, and where it appeared that the factor had control of the property of the principal and the latter had no means of adequate relief as to wrongful acts of his unfaithful and dishonest agent in a foreign market; that the question of implied acquiescence is to be considered by the jury under all the circumstances attending the previous dealings between the parties tending to show their feelings and relations with each other.

78. Dingley *v.* McDonald, 124 Cal. 90, 56 Pac. 790.

79. Engfer *v.* Roemer, 71 Wis. 11,

had before the rendering of the account disagreed as to the balance due.[80]

Where an account is rendered and approved, failure to object to a second and a different account, purporting to cover the same matters, will not make the latter a stated account.[81]

(a.) *Payment and Demand As Evidence of Assent.* — Payments made on an account rendered indicate assent.[82]

That a sum tendered as the balance due on an account rendered was accepted, is evidence to show such account to have been stated.[83]

36 N. W. 618. See also Ryan *v.* Gross, 48 Ala. 370.

In such a case the account will not become stated against him even if it turns out that he was mistaken in supposing that he was not liable.

The court said, when for some independent reason a person disclaims all liability, he is not bound to examine the items of an account rendered, or be taken to have assented to them if he does not object. In such a case he puts himself upon higher ground. He says in effect I have nothing to do with this account, and I deny all liability for anything. If he fails in maintaining the position he has assumed, it cannot be said that he admitted the correctness of all the items for the simple reason that his silence as to them is not inconsistent with his subsequent denial. Quincey *v.* White, 63 N. Y. 307.

Refusal to Pay When Account Is Presented.—Peoria G. S. Co. *v.* Turney, 58 Ill. App. 563; Cobb *v.* Arundell, 26 Wis. 553; Harris *v.* Woodward, 40 Mich. 408.

80. Pierce *v.* Pierce, 199 Pa. St. 4, 48 Atl. 689; Hall *v.* Morrison, 3 Bosw. (N. Y.) 520; Howell *v.* Johnson, 38 Or. 371, 64 Pac. 659.

The court charged that the rule of acquiescence did not apply if when the account was sent, the parties had already come to a disagreement, because then assent from silence could not reasonably be inferred; that if the account was furnished after it was perfectly understood by both that defendant did not intend to pay the money, the mere sending of the account would amount to nothing. Edwards *v.* Hoffinghoff, 38 Fed. 635.

81. Cartwright *v.* Greene, 47 Barb. (N. Y.) 9.

82. Samson *v.* Freedman, 102 N. Y. 669, 7 N. E. 419; Hatch *v.* Von Taube, 31 Misc. 468, 64 N. Y. Supp. 393; Charlotte O. & F. Co. *v.* Hartog, 85 Fed. 150; Woodward *v.* Suydam, 11 Ohio 361.

Statement Must Be Unambiguous. — Although one makes a payment on a bill, the balance is not an account stated unless the bill clearly indicates the nature and amount of the demand. Manion B. & W. Co. *v.* Carreras, 26 Mo. App. 229.

83. Am. Nat. Bank *v.* Bushey, 45 Mich. 135, 7 N. W. 725; McCormack *v.* City (Mo.), 65 S. W. 1038.

Receiving Remittance Without Objection.—If one acknowledges the receipt of the account, communicates with regard to the mode of remitting the balance and receives the remittance without any objection, it is an assent to the account. Bevan *v.* Cullen, 7 Pa. St. 281.

Cashing Check Sent With Account.—An account was rendered accompanied with a check for the balance shown. The account was received without objection and the check cashed. It was held that this sufficiently established an account stated, and in fact estopped the plaintiff from claiming a larger balance. Schuyler *v.* Ross, 37 N. Y. St. 805, 13 N. Y. Supp. 944.

Receipting "on Account." — Accounts were submitted semi-annually and no objection was made prior to 1867, but to the accounts rendered in 1867 and 1868, objection was made. Before that, a receipt in full had always been given. Thereafter, the receipt was given on account. The court said the form of a receipt may be vital upon the question of a stated account. The essence of the principle is that one party has ren-

Payment demanded by a creditor in accordance with an account rendered by the debtor establishes the account as a stated one.[84]

e. *Promise to Pay.* — It is not necessary to show an express promise to pay the balance agreed upon or assented to as correct.[85]

Indeed, unless a new consideration is shown, there is a conclusive presumption of a promise of immediate payment.[86]

But if in the very act of stating an account the debtor signs and the creditor accepts a memorandum that the balance is payable from a certain fund, the creditor must show that he can not satisfy his claim therefrom.[87]

2. Special Modes of Proof. — A. Promissory Notes. — There are

dered another an account, which he considers full and final as to all transactions, included in it to date, and the other party acquiesces. The use of the words "on account" in itself in receipting under such circumstances shows that the party signing the receipt does not consider the account to which it refers a finality. Fickett *v.* Cohu, 16 N. Y. St. 709, 1 N. Y. Supp. 436.

84. Lockwood *v.* Thorne, 24 Barb. (N. Y.) 391. Same case 1 Kern. 170, 18 N. Y. 285; Toland *v.* Sprague, 12 Pet. (N. Y.) 300.

85. McKinster *v.* Hitchcock 19 Neb. 100, 26 N. W. 705; Claire *v.* Claire, 10 Neb. 54, 4 N. W. 411; Knowles *v.* Michel, 13 East 249; Hutchinson *v.* Bank, 48 Barb. (N. Y.) 302; Cobb *v.* Arundell, 26 Wis. 553; Weed *v.* Dyer, 53 Ark. 155, 13 S. W. 592; Watkins *v.* Ford, 69 Mich. 357, 37 N. W. 300; State *v.* Hartman Steel Co., 51 N. J. Law 446, 20 Atl. 67.

Conflict in Early Pennsylvania Cases.—In Killam *v.* Preston, 4 Watts & S. 14, it is said that to maintain an action on an account stated, an express promise to pay must be shown. See also Foster *v.* Allanson, 2 T. R. 479; Fromont *v.* Coupland, 2 Bing. 170, 9 Eng. C. L. 367 and to the contrary, Rackstraw *v.* Imber, Holt 368.

But a contrary doctrine, to the effect that the acknowledgment that a certain sum is due raises an implied promise to pay and the amount is recoverable under the count for account stated, is expressly announced in Tassey *v.* Church, 4 Watts & S. 141, 39 Am. Dec. 65, *citing* I Chitty Pl. 191; 2 Mod. 44; 2 T. R. 480.

86. Koebel *v.* Givens, 79 Mo. 77.

Express Promise to Pay Later Disregarded. — The plaintiff sent goods to defendant, rendering statements with items and furnished statements at the end of each month. After the last delivery and the last payment made on account plaintiff rendered a statement of balance due to which balance the defendant made no objection, but repeatedly promised to pay it, and defendant did not question the correctness of the itemized bill, or of the monthly accounts. The defendant urged that his promise to pay was when he got money from the railway, but it was held that the promise to pay is implied and that a consideration past and executed supports no other promise than such as would be implied. Roscorla *v.* Thomas, 3 Q. B. 234. So that any promise differing from the implied promise, as to pay on a particular day, would be of no effect unless made upon a new consideration. Hopkins *v.* Logan, 5 M. & W. 241; Broom Com. 326; Robbins *v.* Downey, 45 N. Y. St. 279, 18 N. Y. Supp. 100.

Account May Be Stated Although Debtor Refuse to Pay.—Where the correctness of an account is agreed to, but debtor refuses to pay unless creditor will release certain claims growing out of wholly independent transactions, the account nevertheless, is a stated one. White *v.* Whiting, 8 Daly (N. Y.) 23.

87. Montgomerie *v.* Ivers, 17 Johns. (N. Y.) 38.

certain special methods for proving an account stated. Thus a promissory note in an action between maker and payee.[88]

B. Bills of Exchange. — A bill of exchange.[89]

C. Due Bills — Or a due bill is evidence to establish an account stated.[90]

88. *England.*—Story *v.* Atkins, 2 Strange 719; Highmore *v.* Primrose, 5 M. & Serg. 65; Fryer *v.* Roe, 12 C. B. 437.

Canada.—McQueen *v.* McQueen, 9 U. C. Q. B. 536.

Alabama.—Oden *v.* Bonner, 93 Ala. 393, 9 So. 409.

Iowa.—Remsey *v.* Duke, 1 Morris 385.

Mississippi. — McCormick *v.* Altneave, 73 Miss, 86, 19 So. 198.

New Jersey.—Seabury *v.* Bolles, 51 N. J. Law 103, 16 Atl. 54.

New Mexico.—Orr *v.* Hopkins, 3 N. M. 45, 1 Pac. 181.

New York.—Treadwell *v.* Abrams, 15 How. Pr. 219; Wright *v.* Wright, 56 N. Y. St. 305, 26 N. Y. Supp. 238.

Pennsylvania.—Fairchild *v.* Dennison, 4 Watts 258.

Note Payable to "Self" and Endorsed by Maker supports action. Wood *v.* Young, 14 U. C. C. P. (Can.) 250.

A Note Made to an Agent, known to be such by the maker, is evidence of an account stated in an action by the principal. Rhodes *v.* Crawford, 1 U. C. Q. B. (Can.) 257.

Non-negotiable Note. — Reed *v.* Reed, 11 U. C. Q. B. (Can.) 26; Rhodes *v.* Crawford, 1 U. C. Q. B. (Can.) 257.

Note Must be Over Due at commencement of action. Hill *v.* Lott, 13 U. C. Q. B. (Can.) 465.

Interest Recoverable According to Note—Young *v.* Fluke, 15 U. C. C. P. (Can.) 360.

Must Be a Note Payable in Money and unconditionally: a note given to be paid off by giving other security will not support a count on an account stated. Newhorn *v.* Lawrence, 5 U. C. Q. B. (Can.) 359; Tyke *v.* Cosford, 14 U. C. C. P. (Can.) 64.

In Suit by Legal Representative of Payee against payor, such note is evidence of an account stated. Maybury *v.* Berkery, 102 Mich. 126, 60 N. W. 699.

Notes Given As Collateral Security.—Where the evidence shows that the course of business between the parties was for one to give the other notes not representing sums due, but intended to show as collateral security for any indebtedness that might be due, such notes are not evidence of a settlement or an account stated. Hill *v.* Durand, 58 Wis. 160, 15 N. W. 390.

Note for Interest Due on Another Note, the amount of which is stated, is evidence to support an action on account stated for the amount of the principal note. Perry *v.* Slade, 8 Q. B. 115, 15 L. J. Q. B. 10, 10 Jur. 31.

But Not if the Action Is Between Indorsee and Indorser. — Bird *v.* Legge, 7 D. P. C. 814; 5 M. & W. 418; Jardine *v.* Payne, 1 Barn. & A. 663, 9 L. J. (O. S.) K. B. 129.

Note Not Properly Stamped Will Not Support Account Stated.—McKay *v.* Grinley, 30 U. C. Q. B. (Can.) 54.

89. Orr *v.* Hopkins, 3 N. M. 45, 1 Pac. 181; Anthony *v.* Savage, 3 Utah 277, 3 Pac. 546.

Orders on a Merchant, drawn by an employer in favor of laborers and to be paid out of the laborers' wages. Bull *v.* Brockway, 48 Mich. 523, 12 N. W. 685.

Only Between Parties to Bill. Stephens *v.* Berry, 15 U. C. C. P. (Can.) 543.

90. *England.*—Graves *v.* Cook, 2 Jur. (U. S.) 475; Lemere *v.* Elliott, 6 H. & N. 656, 30 L. J. Ex. 350; Payne *v.* Jenkins, 4 Car. & P. 324, 34 Rev. Rep. 809; Douglas *v.* Holme, 4 P. & D. 685, 12 Ad. & E. 641; Buck *v.* Hurst, L. R. 1 C. P. 297, 12 Jur. (U. S.) 704; Highmore *v.* Primrose, 5 M. & S. 65.

Alabama.—Carlisle *v.* Davis, 9

D. Sealed Instruments. — But an instrument under seal cannot be used as evidence for plaintiff suing upon an account stated.[91]

E. Awards and Judgments. — An award made under a parol submission may be evidence to sustain a count upon an account stated.[92]

An award void as such, is sometimes evidence of an account stated.[93]

But not a judgment.[94]

F. Admissions of Indebtedness. — If a fixed sum is admitted to be due, for which an action would lie, that will be evidence of an account stated.[95]

It has been held that one's mere oral statement that he owes a

Ala. (N. T.) 858; Mills *v.* Geron, 22 Ala. 669.

Iowa.—Frost *v.* Clark, 82 Iowa 298, 48 U. W. 82.

Pennsylvania.—Barry *v.* White, 59 Pa. 172.

Tyke *v.* Cosford, 14 U. C. C. P. (Can.) 64.

"Good to Mr. Palmer for $850 on demand." Palmer *v.* McLennan, 22 U. C. C. P. (Can.) 258.

91. Middleditch *v.* Ellis, 2 Ex. 523; Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99; Baker *v.* Heard, 5 Ex. 959, 2 L. J. Ex. 444.

Compare State *v.* Jennings, 10 Ark. 428.

But see Chapman *v.* Lee, 47 Ala. 143, where a contract for the sale of land sealed by one of the parties, apparently not by the other, and a deed of conveyance executed in pursuance thereof, were admitted in evidence of the amount of the account stated; but the point mentioned in the text was not considered. And see also contrary to the text Hoyt *v.* Wilkinson, 10 Pick. (Mass.) 31.

92. Gooding *v.* Hingston, 20 Mich. 439; Bates *v.* Curtis, 21 Pick. (Mass.) 247.

An Award Followed by the Admission of the Balance Due is evidence of an account stated. Buschman *v.* Morling, 30 Md. 384.

93. Montgomerie *v.* Ivers, 17 Johns. 38. But see Ruthven *v.* Ruthven, 18 U. C. Q. B. (Can.) 12.

94. Gooding *v.* Hingston, 20 Mich. 439. (In that case the plaintiff sought to introduce the record of a foreign judgment to sustain his action on account stated.)

In Hall *v.* Odber, 11 East 118, 10 Rev. Rep. 443, it is held that a foreign judgment in favor of the plaintiff confirms his evidence of an account stated for an admitted balance; the judgment being for the same amount.

95. *England.* — Porter *v.* Cooper, 1 C. M. & R. 387; Finney *v.* Tootel, 5 C. B. 504, 17 L. J. C. P. 158.

Alabama.—Ware *v.* Dudley, 16 Ala. (U. S.) 742; Ryan *v.* Gross, 48 Ala. 370.

Connecticut.—Mitchell *v.* Allen, 38 Conn. 188.

Delaware.—Parkin *v.* Bennington, 1 Harr. 209; Gregory *v.* Bailey, 4 Harr. 256.

Illinois.—American B. Co. *v.* Berrier-Mayer Co., 83 Ill. App. 446.

New Jersey.—Bonnell *v.* Mowha, 37 N. J. Law 198.

New York.—Montgomerie *v.* Ives, 17 Johns. 38.

An Indorsement on a Contract, as follows: "Reckoned and settled up to this date and found due B on this contract $92.71" is evidence of an account stated being signed by the debtor. Martin *v.* Beckwith, 4 Wis. 219.

An Admission Made in a Pleading in Another Action. — American B. Co. *v.* Berner-Mayer Co., 83 Ill. App. 446.

Where No Antecedent Debt Existed.—If the paper on its face shows that the promise to pay was not based on an indebtedness existing from promisor to promisee, the paper is not evidence of an account stated. Toms *v.* Sills, 29 U. C. Q. B. (Can.) 497.

certain sum to another is evidence to sustain an action on an account stated.[96]

G. Verified Statements. — Itemized, verified statement admissible by statute to prove the account in actions thereon, is not admissible in actions on account stated.[97]

3. Rebutting Evidence of Account Stated. — If the defendant denies the existence of a stated account, he may show any facts indicating that no account was stated;[98] or may show that it ceased to exist as a stated account, as by merger in a judgment;[99] or that the debt is evidenced by an instrument under seal;[1] or that it orginiated in illegal transactions.[2]

Whether or not an account has been stated, is a question for the jury, unless the evidence is not in conflict and will support but one inference.[3]

4. Burden of Proof to Establish. — The burden of proving an

96. Ware *v.* Manning, 86 Ala. 238, 5 So. 682.

Admission by Partner.—S, J & S were partners. C while in their employ died. Two years after, S said the firm owed C at the time of his death $1100.00. This was held to be evidence of an account stated between C, himself and the firm. Cunningham *v.* Sublett, 4 Mo. 224.

Admission to Third Party. — A statement by the party to be charged made in conversation with B that he was indebted in a certain sum to "A" is not evidence of an account stated in an action by "A," unless "B" was "A's" agent. Thurmond *v.* Sanders, 21 Ark. 255; 1 Chitty's Pl. 359; Hoffar *v.* Dement, 5 Gill. (Md.) 132, 46 Am. Dec. 628; Breckon *v.* Smith, 1 Ad. & E. 489; Curtis *v.* Falindall, 3 U. C. Q. B. (Can.) 323; Green *v.* Burtch, 1 U. C. C. P. (Can.) 313.

Admission Must Be to Party or Agent.—McMurtey *v.* Munro, 14 U. C. Q. B. (Can.) 166; Breckton *v.* Smith, 1 Ad. & E. 488; Bates *v.* Townley, 2 Ex. 152.

Accounting Proved by Admission to Third Party.—An admission to a third party that an accounting has been made and that a certain sum is due thereon may support an action on account. Bloomley *v.* Gruiton, 1 U. C. C. P. (Can.) 309; Green *v.* Burtch, 1 U. C. C. P. (Can.) 313.

97. Comer *v.* Way, 107 Ala. 300, 19 So. 966, 54 Am. St. Rep. 93. *Examine* McCamant *v.* Batsell, 59 Tex. 363.

98. Hawley *v.* Harran, 79 Wis. 379, 48 N. W. 676; McCall *v.* Nave, 52 Miss. 494.

Payments Prior to Alleged Statement.—Defendant may show payments previous to the date of the stating of the account. The existence of the account stated having been put in issue, because such payments go to disprove the allegations that there was an account stated. Kaminsky *v.* Mendelson, 25 Misc. 500, 54 N. Y. Supp. 1010.

May Show That the Attempted Settlement Was Made on Sunday. Melchon *v.* McCarty, 31 Wis. 252, 11 Am. Rep. 605.

May Show That it Was Induced by Fraud. — Upton *v.* Bedlow, 4 Daly (N. Y.) 216.

99. Traited *v.* Dwyer, 61 N. Y. Supp. 1100.

1. Middleditch *v.* Ellis, 2 Ex. 523; Baker *v.* Ellis, 5 Ex. 959, 20 L. J. Ex. 444.

2. Wakefield *v.* Farnum, 170 Mass. 422, 49 N. E. 640; Melchoir *v.* McCarty, 31 Wis. 252, 11 Am. Rep. 605; Rose *v.* Savory, 2 Bing. (N. C.) 145, 1 Hodges 269.

Debtor may prove that items of usurious interest are included. Keane *v.* Branden, 12 La. Ann. 20.

3. Burritt *v.* Villeneuve, 92 Mich. 282, 52 N. W. 614; Rosenfield *v.* Fortier, 91 Mich. 20, 53 N. W. 930; Dobbs *v.* Campbell (Kan.), 63 Pac.

account stated is on him who pleads it, whether as cause of action or as defense.[4]

5. Effect of Account Stated As Evidence. — Except where the law of estoppel applies, an account stated is *prima facie* and not conclusive evidence of the correctness of the balance shown.[5]

6. Showing Fraud, Mistake or Illegality in Account Stated. — The burden of proof is upon one who attacks an account stated on the ground that any items contained therein are tainted by illegality.[6]

The burden is heavily on one who would attack an account stated, on the ground of fraud or mistake.[7]

289; Davis *v.* Tiernan, 2 How. (Miss.) 786.

4. Clark *v.* Marbourg, 33 Kan. 471, 6 Pac. 548; McClellan *v.* Crofton, 6 Me. 307.

If the defendant set up an account stated as a defense of an action upon the original account, he assumes the burden of proving an account stated. Allen *v.* Woonsocket Co., 11 R. I. 288.

5. An account stated is *prima facie* evidence of the correctness of the balance and not conclusive, unless in arriving at the balance there has been some concession as to disputed items, so that the balance is a compromise; or something has been done in reliance on the accounting which would put the party claiming the benefit of it in a worse position —so as to bring the case within the principles of an estoppel *in pais*. A stated account not affected by such considerations may be impeached for mistake or error in law or in fact.

United States.—Burrill *v.* Crossman, 91 Fed. 543.

Connecticut.—Goodwin *v.* Ins. Co., 24 Conn. 591.

Illinois.—Murray *v.* Carlin, 67 Ill. 286; Pick *v.* Slimmer, 70 Ill. App. 358; Eddie *v.* Eddie, 61 Ill. 134; Follansbee *v.* Parker, 70 Ill. 11.

Kentucky.—Louisville B. Co. *v.* Asher, 65 S. W. 133.

Michigan.—White *v.* Campbell, 25 Mich. 463.

Minnesota.—Wharton *v.* Anderson, 28 Minn. 301, 9 N. W. 800.

New Jersey.—Vanderveer *v.* Stalesir, 39 N. J. Law 593.

New York.—Sedgwick *v.* Macy, 24 App. Div. 1, 49 N. Y. Supp. 154; Bergen *v.* Hitchings, 22 App. Div. 395, 48 N. Y. Supp. 96; Young *v.* Hill, 67 N. Y. 172, 23 Am. Rep. 99; Hutchinson *v.* Bank, 48 Barb. 302; Sharkey *v.* Mansfield, 90 N. Y. 227, 43 Am. Rep. 161.

Pennsylvania.—*In re* Hovey (Pa.), 48 Atl. 311.

West Virginia.—Ruffner *v.* Hewitt, 7 W. Va. 585.

Especially When Stated Between Attorney and Client. — Gruby *v.* Smith, 13 Ill. App. 43.

It May Be Shown Certain Items Were Not Considered. — Burrill *v.* Crossman, 91 Fed. 543.

Statement of Accounts by Board of Public Works.—Kinney *v.* People, 3 Scam. (Ill.) 357.

Conclusive Until Leave Given to Surcharge, Falsify or Open It. Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 182.

Account Stated Is Something More Than Prima Facie Evidence. McKay *v.* Overton, 65 Tex. 82.

6. Goodrich *v.* Coffin, 83 Me. 324, 22 Atl. 217.

7. *England.*—Chambers *v.* Goldwin, 9 Ves. Jr. 254.

United States.—Freeland *v.* Heron, 7 Cranch 147; Chappedelaine *v.* Dechenaux, 4 Cranch 306; Charlotte O. & F. Co. *v.* Hartog, 85 Fed. 150.

Alabama.—Ware *v.* Manning, 86 Ala. 238, 5 So. 682; Walker *v.* Driver, 7 Ala. (U. S.) 679; Langdon *v.* Roane, 6 Ala. (U. S.) 518, 41 Am. Dec. 60.

Arkansas. — Moscowitz *v.* Lemp (Ark.), 12 S. W. 781.

California. — Polhemus *v.* Heiman, 50 Cal. 438; Branger *v.* Chevalier, 9 Cal. 353.

Florida.—Martyn *v.* Arnold, 36 Fla. 446, 18 So. 791.

Illinois.—Bull *v.* Harris, 31 Ill. 487.

Admissions by the assignor of the account made after the assignment are not competent to show errors in the account,[8] and unless one can show fraud or mistake, he cannot go into the justness of the items of a stated account.[9]

Kansas. — Dobbs *v.* Campbell (Kan.) 63 Pac. 289.

Missouri.—Shepard *v.* Bank, 15 Mo. 143; McCormick *v.* Interstate etc. Co., 154 Mo. 191, 55 S. W. 252.

Nebraska.—Kennedy *v.* Goodman, 14 Neb. 585, 16 N. W. 834.

New Jersey.—Brown *v.* Van Dyke, 8 N. J. Eq. 795, 55 Am. Dec. 250.

New York.—Lockwood *v.* Thorne, 11 N. Y. 170; Stenton *v.* Jerome, 54 N. Y. 480; Valentine *v.* Valentine, 2 Barb. Ch. 430.

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

Oregon.—Hoyt *v.* Clarkson, 23 Or. 51, 31 Pac. 198; Fisk *v.* Basche, 31 Or. 178, 49 Pac. 981.

Pennsylvania. — Shillingford *v.* Good, 95 Pa. 25.

Virginia.—Camp *v.* Wilson, 97 Va. 265, 33 S. E. 591.

Washington. — Baxter *v.* Locket (Wash.) 6 Pac. 429.

West Virginia. — Shrewsbury *v.* Tufts, 41 W. Va. 212, 23 S. E. 692.

Wisconsin. — Marsh *v.* Case, 30 Wis. 531.

Whether Established by Implied or Express Assent the burden of showing incorrectness is thrown upon the party charged. McKinster *v.* Hitchcock, 19 Neb. 100, 26 N. W. 705.

Clearest and Most Positive Proof of fraud or mistake required. Case *v.* Fish, 58 Wis. 56, 15 N. W. 808; Hoyt *v.* McLaughlin, 52 Wis. 280, 8 N. W. 889; Klauber *v.* Wright, 52 Wis. 303, 8 N. W. 893.

Clearest Evidence of Mistake required to open an account stated in absence of a showing of fraud. Stern *v.* Ladew, 47 App. Div. 331, 62 N. Y. Supp. 267; Allen-West Com. Co. *v.* Patilo, 90 Fed. 628.

Where the Balance Has Been Paid stronger evidence is required to overcome the settlement than where the balance has simply been agreed upon. Nolte *v.* Leary, 14 Mo. App. 598; Branger *v.* Chevalier, 9 Cal. 353; Chambers *v.* Goldwin, 9 Ves. Jr. 254.

Person Receiving Account Aware of Fraud.—Fraud or mistake may be proved, although the person to whom the account was rendered was aware of such fraud or mistake when the account was rendered and did not object thereto. Baxter *v.* Lockett (Wash.), 6 Pac. 429.

But not where there was an express assent to the account. Marmon *v.* Waller, 53 Mo. App. 610; Quinlan *v.* Keiser, 66 Mo. 603; Cannon *v.* Sanford, 20 Mo. App. 590.

Guardian's Accounts. — In Moore *v.* Felkel, 7 Fla. 44, it is held (p. 69) that the accounts of an executor who is also guardian cannot be deemed stated as to the minor, but that the *onus* must remain upon the executor where the attempt is made to falsify, but on the complainant as to items of surcharge.

Upon the issue whether or not a mistake occurred in stating an account, the accounts of the parties used in stating the account are relevant as part of the *res gestae*. Madigan *v.* DeGraff, 17 Minn. 52.

8. State *v.* Jennings, 10 Ark. 428.

9. *United States.* — Perkins *v.* Hart 11 Wheat. 237.

Alabama.—Rembert *v.* Brown, 17 Ala. 667; Hunt *v.* Stockton L. Co., 113 Ala. 387, 21 So. 454.

Arkansas.—Roberts *v.* Totten, 13 Ark. 609; Moscowitz *v.* Lemp (Ark.), 12 S. W. 781; Weed *v.* Dyer, 53 Ark. 155, 13 S. W. 592; Lanier *v.* Union etc. Co., 64 Ark. 39, 40 S. W. 466.

Connecticut.—Chatham *v.* Niles, 36 Conn. 403; Nichols *v.* Alsop, 6 Conn. 477.

Florida.—La Trobe *v.* Hayward, 13 Fla. 190.

Illinois.—Gottfried B. Co. *v.* Szarkowski, 79 Ill. App. 583.

Massachusetts.—Farnam *v.* Brooks, 9 Pick. 212.

Minnesota.—Warner *v.* Myrick, 16 Minn. 91.

But, an account, though stated, may remain open to correction in accordance with some express agreement of the parties.[10]

7. Variance. — Plaintiff must show a fixed and certain sum to be due, though he need not prove the precise sum laid in the complaint.[11]

A plaintiff may give in evidence a stated account for a sum larger than that for which judgment is demanded, and show or admit payments, reducing the balance to the sum demanded.[12]

8. Presumption As to What Included in Account Stated. — An account stated will be presumed in absence of evidence to the contrary to include all items then due from one to the other.[13]

Missouri.—Kronenberger *v.* Binz, 50 Mo. 121.

Nebraska. — McKinster *v.* Hitchcock, 19 Neb. 100, 20 N. W. 705.

New York.—Morton *v.* Rogers, 14 Wend. 576; Hutchinson *v.* Bank, 48 Barb. 302.

Pennsylvania. — Miller *v.* Probst, Add. 344; Kirkpatrick *v.* Turnbull, Add. 259.

South Carolina.—Gem Chemical Co. *v.* Youngblood, 58 S. C. 56, 36 S. E. 437.

South Dakota.—Hale *v.* Hale, 14 S. D. 644, 86 N. W. 650.

Tennessee.—Bankhead *v.* Alloway, 6 Cold. 56.

Utah. — Lawler *v.* Jennings, 18 Utah 35, 55 Pac. 60.

Virginia.—Neff *v.* Wooding, 83 Va. 432, 2 S. E. 731.

Wisconsin.—Martins *v.* Beckwith, 4 Wis. 219; Hawley *v.* Harran, 79 Wis. 379, 48 N. W. 676.

Going Into the Account. — The defendant cannot show the character of work or labor done for the purpose of proving that it was valueless; that would be to go behind the settlement and open up the whole merits of the antecedent transaction. Koegel *v.* Givens, 79 Mo. 77.

10. Troup *v.* Haight, Hopk. Ch. (N. Y.) 239; Camp *v.* Wilson, 97 Va. 265, 33 S. E. 591; Waldron *v.* Evans, 1 Dak. 11, 46 N. W. 607.

But the Burden Is Still on Him Who Seeks to Correct It.—McKay *v.* Overton, 65 Tex. 82.

11. Ware *v.* Manning, 86 Ala. 238, 5 So. 682.

12. Thompson *v.* Smith, 82 Iowa 598, 48 N. W. 988. See Loventhal *v.* Morris, 103 Ala. 332, 15 So. 672.

13. Taylor *v.* Thwing, 21 Misc. 76, 46 N. Y. Supp. 892; Johnson *v.* Johnson, 4 Call (Va.) 38.

But it may be shown that certain matters were by agreement omitted. Waldron *v.* Evans, 1 Dak. 11, 46 N. W. 607; Mills *v.* Geron, 22 Ala. 669; Ryan *v.* Rand, 26 N. H. 12.

The Burden of Proof is on the defendant to show that his account then due was not taken into consideration in the settlement. Keller *v.* Keller, 18 Neb. 366, 25 N. W. 364; Ryan *v.* Rand, 26 N. H. 12.

Items Not Due not presumed to be included. Beebe *v.* Smith (Ill.), 62 N. E. 856.

ACCRETION.—See Boundaries.

ACCUSED.—See Competency; Credibility; Character.

ACKNOWLEDGMENTS.

By Lewis R. Works.

CROSS-REFERENCES.

See the titles of the various instruments of which acknowledgments are taken, as "DEEDS," "MORTGAGES," etc.

I. DEFINITION.

An acknowledgment is the act of a party in appearing before a competent officer and declaring that an instrument he has executed is his act and deed.[1]

II. HOW EVIDENCED.

Cannot Be Shown by Parol. — According to common practice and under statutory enactments which obtain everywhere, an acknowledgment is properly evidenced by the certificate of the officer taking it, known as a certificate of acknowledgment or as a certificate of probate, and under ordinary circumstances it cannot be shown by parol.[2]

Exception. — Ancient Instrument. — It has been held, however, that after the lapse of a great length of time and the disappearance of an instrument, the fact that its signer acknowledged its execution, and that a certificate was attached, may be shown by evidence *aliunde*.[3]

1. Anderson's Dic. Law.

2. Bellas *v.* M'Carty, 10 Watts (Pa.) 13; Patterson *v.* Stewart, 10 Watts (Pa.) 472; Rollins *v.* Menager, 22 W. Va. 461; Stayner *v.* Applegate, 8 U. C. C. P. (Can.) 451.

Must Be Written.—"The defendant proposed to prove title to the premises demanded, to be in one Seth Stoddard, and to this end offered in evidence a deed, which had never been acknowledged in writing, with accompanying testimony, that a parol acknowledgment was actually made. This evidence was rejected; and most correctly. It is provided by statute that no deed shall be accounted complete in law, to convey real estate, but such as is written, witnessed, acknowledged, and recorded. Tit. 142, c. 1. s. 7. The acknowledgment, to be recorded, must necessarily be in writing; and such is the invariable practice. To the record all men recur, for the purpose of ascertaining the title of lands; and to satisfy the enquiry, a written acknowledgment is indispensably necessary." Pendleton *v.* Button, 3 Conn. 406.

3. Tiffany *v.* McCumber, 13 U. C. Q. B. (Can.) 150.

III. THE CERTIFICATE.

1. As Evidence. — A. Generally. — A certificate of acknowledgment is *prima facie* evidence of the material facts therein stated.[4]

When Conclusive. — And is conclusive of such facts except in cases of fraud, duress, mistake, imposition, or the like.[5]

Proof by Parol.—"The secondary evidence of the contents and of the execution and acknowledgment of the trust deed shows with sufficient certainty that petitioner joined with her then husband in its execution, and acknowledged the same substantially in compliance with the statute then in force. . . . Conceding, as it is thought must be done under the evidence, that the trust deed had attached to it a certificate of acknowledgment by an officer authorized by law to take acknowledgments of such instruments, that fact of itself, after the lapse of 28 years, ought to overcome the denial of demandant that she never released her dower by the deed to Greenebaum or otherwise. . . . The name of the officer who took the acknowledgment is unknown, so that his testimony cannot be had. It is not known whether he is living or not. But there is satisfactory proof there was a certificate of acknowledgement by a proper officer attached to the trust deed and that ought to be regarded as evidence of as high a grade as that of demandant, who alone offers her testimony, after very many years, and after all the original deeds and every record of them had been destroyed by fire, to impeach the deed under which the title passed from her then husband." Berdel *v.* Egan, 125 Ill. 298, 17 N. E. 709.

4. *United States.* — Willink *v.* Miles, 30 Fed. Cas. No. 17,768; Linton *v.* Nat. Life Ins. Co., 104 Fed. 584; Van Ness *v.* Bank of U. S., 13 Pet. 17.

Alabama.—Barnett *v.* Proskauer & Co., 62 Ala. 486.

California. — Baldwin *v.* Bornheimer, 48 Cal. 433; Fogarty *v.* Finlay, 10 Cal. 239, 70 Am. Dec. 714.

Illinois.—Blackman *v.* Hawks, 89 Ill. 512; O'Donnell *v.* Kelliher, 62 Ill. App. 614; Ramsay's Estate *v.* People, 97 Ill. App. 283.

Kentucky.—Woodhead *v.* Foulds, 7 Bush 222.

Maryland.—Davis *v.* Hamblin, 51 Md. 525.

Minnesota.—Dodge *v.* Hollinshead, 6 Minn. 25, 80 Am. Dec. 433.

North Carolina.—Williams *v.* Kerr, 113 N. C. 306, 18 S. E. 501; Nimrocks *v.* McIntyre, 120 N. C. 325, 26 S. E. 922.

Recitals Prima Facie Evidence. "It has always been held that the certificate of an officer authorized by law to take acknowledgments to a deed, mortgage or other instrument, is *prima facie* evidence of such acknowledgment by the makers of such instruments, and it is to be regarded as having great and controlling weight until it is overcome by clear, convincing and satisfactory proof. . . . In taking acknowledgments of deeds, mortgages and other instruments, an officer acts under the sanction of his official oath, and his certificate of official acts, required by law to be made, ought to be regarded as of as high a grade of evidence as testimony given under oath. The officer acting in this case has since died. Although deprived of the testimony of the officer on the witness stand, there remains the presumption that will always be indulged as to the certainty of an officer's acts done in the capacity in which he is serving. After his death his certificates of official acts must be heard to speak for him, otherwise there would be no security for titles acquired under instruments required by law to be acknowledged before such officers." Warrick *v.* Hull, 102 Ill. 280.

5. *Arkansas.*—Meyer *v.* Gossett, 38 Ark. 377.

California.—DeArnaz *v.* Escandon, 59 Cal. 486.

Mississippi.—Johnston *v.* Wallace, 53 Miss. 331, 24 Am. Rep. 699.

Ohio.—Baldwin *v.* Snowden, 11 Ohio St. 203.

Pennsylvania. — Carr *v.* H C

B. Of Authority of Officer. — The certificate is *prima facie* evidence of the authority of the officer making it.[6]

C. Of Signature of Officer. — And of the authenticity of his signature as well.[7]

D. Of Execution. — The certificate is *prima facie* evidence of the execution of the instrument to which it is attached,[8] but the

Fricke Coke Co., 170 Pa. St. 62, 32 Atl. 656; Williams *v.* Baker, 71 Pa. St. 476; Heeter *v.* Glasgow, 79 Pa. St. 79, 21 Am. Rep, 46.

Texas. — Atkinson *v.* Reed (Tex. Civ. App.), 49 S. W. 260; Wiley *v.* Prince, 21 Tex. 637.

West Virginia.—Pickens *v.* Knisely, 36 W. Va. 794, 11 S. E. 32.

Conclusive in Absence of Fraud. "The rule is settled by our decisions, and generally by the weight of authority, that where a mortgage, or other conveyance, is duly acknowledged before a proper officer, and the requisite certificate of acknowledgment is affixed in the form prescribed by statute, this circumstance constitutes such cogent proof of a free agency and absence of restraint, as to be perfectly conclusive, unless rebutted by clear proof of fraud or imposition practiced on the grantor, in which the officer or the mortgagee participated." Downing *v.* Blair, 75 Ala. 216; Atkinson *v.* Reed (Tex. Civ. App.), 49 S. W. 260; Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552; Williamson *v.* Carskadden, 36 Ohio St. 664; Hartley *v.* Trosh, 6 Tex. 208.

"The certificate of the officer to the separate acknowledgment of a wife to a deed of conveyance is conclusive of the facts therein stated, except in cases of fraud, mistake or imposition." Summers *v.* Sheern (Tex. Civ. App.), 37 S. W. 206; Holland *v.* Webster (Fla.), 29 So. 625; Henke *v.* Stacy (Tex. Civ. App.), 61 S. W. 509; Orser *v.* Vernon, 14 U. C. C. P. (Can.) 573; Monk *v.* Farlinger, 17 U. C. C. P. (Can.) 41.

6. Keichline *v.* Keichline, 54 Pa. St. 75; Thompson *v.* Morgan, 6 Minn. 292; Willink *v.* Miles, 1 Pet. C. C. 429, 30 Fed. Cas. No. 17,768; Jinwright *v.* Nelson, 105 Ala. 299, 17 So. 91; Harding *v.* Curtis, 15 Ill. 252; Thurman *v.* Cameron, 24 Wend. (N. Y.) 87.

Officer's Authority. — In Pilaud *v.* Taylor, 113 N. C. 1, 18 S. E. 70, it is said: "Proof of official character of the officer taking an acknowledgment is not necessary to give it validity, in the absence of any statute requiring such proof, if the certificate purports to have been made by an officer authorized by law to take acknowledgments, and is in due form; but the certificate itself is *prima facie* evidence of that fact." Willink *v.* Miles, 1 Pet. C. C. 429, 30 Fed. Cas. No. 17,768; Grandin *v.* Emmons, 10 N. D. 223, 86 N. W. 723.

7. Keichline *v.* Keichline, 54 Pa. St. 75; Granniss *v.* Irvin, 39 Ga. 22.

Officer's Signature.—"The certificates of acknowledgment were, we think, properly received in evidence. The objections to them, if all allowed, would destroy almost entirely the utility of the statutes, which declare a probate or certificate of acknowledgment indorsed by certain officers upon a deed, to be *prima facie* evidence of its execution. If their official character, their signatures, and that they acted within their territorial jurisdiction must be shown by extrinsic evidence, the party may as well, and in general perhaps with more convenience to himself, procure the common law proof. The practice is to take a certificate which appears on its face to be in conformity with the statutes, as proof of its own genuineness. It need only be produced." Thurman *v.* Cameron, 24 Wend. (N. Y.) 87.

8. Tunison *v.* Chamblin, 88 Ill. 378; Albany Co. Sav. Bank *v.* McCarty, 54 N. Y. St. 577, 24 N. Y. Supp. 991; Andrews *v.* Reed (Kan.), 18 Pac. 20; Shelden *v.* Freeman, 116 Mich. 646, 74 N. W. 1004; Northwestern Loan & Banking Co. *v.* Jonasen, 11 S. D. 566, 79 N. W. 840; People *v.* Snyder, 41 N. Y. 397; Borland *v.* Walrath, 33 Iowa 130; Barry *v.* Hoffman, 6 Md. 78.

Evidence of Execution.—"The cer-

fact that it shows the instrument to have been acknowledged subsequent to its date does not overcome the presumption that it was executed on that date.[9]

E. Of Capacity to Execute. — The certificate is not evidence of the capacity of the party whose acknowledgment is taken to execute the main instrument.[10]

F. Of Delivery. — The certificate is competent evidence upon the question as to whether there has been a delivery of the instrument it accompanies,[11] and it shows, *prima facie*, that the delivery occurred prior to the date of the acknowledgment.[12] It has been

tificate of the officer who took her acknowledgment is appended to the deed, and is in due form. This, though not conclusive, is very strong evidence of the fact of execution." Van Orman *v.* McGregor, 23 Iowa 300; Ramsay's Estate *v.* People, 97 Ill. App. 283.

9. Date of Execution.—"The trust deed bears date on the 13th day of October, 1856, and the notes are by it described as bearing even date therewith; and in the absence of proof showing that it was executed on a different day, the date specified will be presumed to be the true date of its execution. It is true that it was not acknowledged until the 30th of that month, but that does not prove that it had not been executed before that time." Darst *v.* Bates, 51 Ill. 439.

10. Want of Capacity.—"In Williams *v.* Baker, 71 Pa. St. 476, the court considered this question, under a statute requiring a separate acknowledgment by married women of conveyances of their separate property, and requiring also a certificate very similar in form to that contained in § 2508 of the Code of 1886. The wife sought to avoid her conveyance, certified in due form, by parol evidence, on the ground of her incapacity, because of infancy, to execute the same. The certificate of the officer was relied on as conclusive of the validity of her deed against an attack of that kind. The court said that the form of the certificate did not make it the duty of the magistrate to ascertain and certify in relation to anything, except whether the woman executed voluntarily, of her own free will and accord, without compulsion from her husband, and that, inasmuch as the certificate is conclusive only of such facts as the officer was required to certify, she was not concluded by his certificate from showing she was a minor when she signed. We must give a similar construction to our statute." Thompson *v.* New England Security Co. (Ala.), 18 So. 315.

11. Stewart *v.* Redditt, 3 Md. 67; Ford *v.* Gregory, 10 B. Mon. (Ky.) 175.

Evidence of Delivery.—"Counsel contend, however, that it is well settled in this State, by the cases of McConnell *v.* Brown, Litt. Sel. Cases, 468, and Ford *v.* Gregory, 10 B. M., 180, that the acknowledgment of a deed is *prima facie* evidence of previous delivery. In the first of these cases, the court expressly says that an acknowledgment is merely evidence of the delivery, but it is not a delivery. . . .

"The acknowledgment is a fact which may be proven to show delivery, but, standing alone, it does not establish a presumption of delivery, and, for many good reasons, it ought not to do so. It only requires the act of the grantor to make the acknowledgement, and it would be dangerous policy to allow such weight to an act of his own as to make it *prima facie* evidence of the important fact of delivery, which requires the concurrence of the grantee." Alexander *v.* de Kermel, 81 Ky. 345.

12. Ford *v.* Gregory, 10 B. Mon. (Ky.) 175; Scobey *v.* Walker, 114 Ind. 254, 15 N. E. 674.

Delivery Antedates Acknowledgment. — "It is further said, in Scobey *v.* Walker (Ind. Sup.), 15 N. E. 674; Sweetser *v.* Lowell, 33 Me.

held that though the certificate shows a deed to have been acknowledged subsequent to its date, the presumption that it was delivered on the day of its date is not overcome.[13]

2. Aider Of. — A. By Presumption. — a. *Authority of Officer.* If a certificate of acknowledgment is in due form, it will generally be presumed that the officer making it had authority to take the acknowledgment.[14]

Authority to Act Within Certain Limits. — It will be presumed that an officer taking an acknowledgment acted within the territorial limits in which he was empowered to act.[15]

446; Jayne *v.* Gregg, 42 Ill. 413; and Ford *v.* Gregory, 10 B. Mon. 175, also cited by appellant's counsel, that the acknowledgment is *prima facie* evidence of delivery on the day of the date of the deed,—at least, on some date prior to the date of acknowledgment. The rule is well established that, where a document purporting to be a duly acknowledged deed, with regular evidence of its execution upon its face, is found in the hands of the grantee, or if such deed is found upon the proper records, a presumption arises that it was delivered at the time it bears date, or at some time prior to the date of its acknowledgment." Smith *v.* Scarbrough, 61 Ark. 104, 32 S. W. 382.

13. Deininger *v.* McConnell, 41 Ill. 227; Hardin *v.* Crate, 78 Ill. 533.

Date of Delivery. — "The delivery of a deed is always presumed to have been made on the day of its date, and its subsequent acknowledgment does not change this presumption." Ford *v.* Gregory, 10 B. Mon. (Ky.) 175.

14. In Absence of Another Officer. — Where one officer has authority to take acknowledgments in the absence of another, but fails to show in a given certificate that the other was absent, it will be presumed that the acknowledgment was properly taken. McKissick *v.* Colquhoun, 18 Tex. 148.

Officer Using Wrong Title. — If an individual holds two offices, under only one of which he is empowered to take acknowledgments, and in acting, appends the title of the wrong office to his name at the end of the certificate, he will be presumed to have acted as the proper officer. Owen *v.* Baker, 101 Mo. 407, 14 S. W. 175, 20 Am. St. Rep. 618.

Exceptions Where Paper Acknowledged in Another State or Country. — In Hayes *v.* Banks (Ala.), 31 So. 464, "the mortgage was acknowledged in the state of Mississippi, before one C. E. Gay, who styles himself as 'chancery clerk' and 'ex officio notary public.' . . .

"A 'chancery clerk' of another state is not designated in our statute as one of the officers authorized to take acknowledgments of deeds; and in the absence of an official seal as notary public, or other evidence of notarial powers, the mere fact that he styles himself 'ex officio notary public' does not aid the matter."

In McCammon *v.* Beaupre, 25 U. C. Q. B. (Can.) 419, under a statute admitting a deed of a married woman after execution "before a Court of Record of a foreign country," an averment that a certificate was executed before a judge of a district court of Minnesota, without averring that that was a court of record, was held bad; though it could be cured by evidence that it was such a court.

15. Failure to Specify County. If the officer fails to specify a county in the certificate, it will be presumed that he was qualified to act in some jurisdiction in the state and acted in the proper jurisdiction. Carpenter *v.* Dexter, 8 Wall. (U. S.) 513; Fuhrman *v.* London, 13 Serg. & R. (Pa.) 386, 15 Am. Dec. 608; Ross & Co.'s and Elsbree's Appeals, 106 Pa. St. 82. In the latter case the court said: "It is further urged that the execution of the mortgage is worthless as notice, in that it does not appear, in the certificate of acknowledgment, that the officer taking it

b. *Venue.* — If a certificate is defective in its showing as to venue, presumptions will usually be indulged to cure the defect.[16]

c. *Seal.* — Under certain circumstances a seal may be presumed to have been attached to a certificate of the acknowledgment of an instrument.[17]

was a justice of the peace for the county of Bradford. The person thus certifying, however, subscribes himself as a justice of the peace, and, as was said in Fuhrman *v.* London, 13 S. & R. 386, it cannot be supposed that he would have received the acknowledgment of a deed or mortgage for or on lands in Pennsylvania, unless he had been a justice of the peace for some county in the state; see also Angier *v.* Schieffelin, 22 P. F. S. 106." Smith *v.* Sherman (Iowa), 85 N. W. 747.

Jurisdiction Presumed Where Place of Taking Stated. — Where the certificate shows that an acknowledgment was taken within a certain territory, it will be presumed that the officer acted in that territory and that it was within his jurisdiction. Douglass *v.* Bishop, 45 Kan. 200, 25 Pac. 628, 10 L. R. A. 857; Thurman *v.* Cameron, 24 Wend. (N. Y.) 87.

"The objection that the certificate of acknowledgment does not show for what county the officer taking the acknowledgment had authority to act, nor to what county he was an officer, is not tenable, because it is shown by the certificate that it was made in Tarrant county, Tex., and it will be presumed that the officer acted in that county, and that he acted within his jurisdiction." Chamberlain *v.* Pybas, 81 Tex. 511, 17 S. W. 50.

Certificate Not Stating Where Acknowledgment Taken. — Where an officer is authorized to take acknowledgments at a certain place and his certificate does not show where a given acknowledgment was taken, it will be presumed that the act was performed within his territorial jurisdiction. Rackleff *v.* Norton, 19 Me. 274; People *v.* Snyder, 41 N. Y. 397.

"The acknowledgment was taken before a justice of the peace in Delaware county, and is in all things in due form except that the certificate does not state that he took it in the town for which he was officially acting, the law giving justices of the peace, power to take acknowledgments in the towns in which they resided. But we think the objection is not tenable. Where a conveyance is acknowledged before an officer authorized to take such acknowledgments within the limits of his jurisdiction, it will be presumed that such acknowledgment was actually taken within such limits." Bradley *v.* West, 60 Mo. 33. But see *In re*, Hereshall, 109 Fed. 861.

16. Failure to State Place of Appearance. — If a certificate shows a venue in the caption but does not recite that the party appeared before the officer in any particular place, it will be presumed that the acknowledgment was taken in the venue named in the caption. Rogers *v.* Pell, 154 N. Y. 518, 49 N. E. 75; Sidwell *v.* Birney, 69 Mo. 144.

Place of Appearance Presumed. "It is said that the certificate of the privy examination and acknowledgment of Mrs. Creigh is faulty because it certifies that she appeared before the justice without saying that she appeared in a particular county. . . The certificate has the caption, 'State of West Virginia, Greenbrier county, to-wit.' It will be presumed that the act occurred in that county, and that the officer did not do an illegal act by taking an acknowledgment out of his county." Bensimer *v.* Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774; Robinson *v.* Byers, 13 Grant's Ch. (Can.) 388; Simpson *v.* Hartman, 27 U. C. Q. B. (Can.) 460.

Failure to Show Venue. — Where the certificate does not show a venue it will be presumed that the acknowledgment was taken in a county where the main instrument was executed. Doe *v.* Peeples, 1 Kelly (Ga.) 3.

17. Record Not Indicating Use of Seal. — In the case of a recorded certificate of acknowledgment where the record does not indicate that a seal was used, but the recorded certificate recites; "I have affixed my

d. *Date.* — **Failure to Show Date.** — Where a certificate is undated it will be presumed that the acknowledgment was taken on the day of the date of the instrument to which it is attached,[18] and where the certificate is not clear as to date, it will be presumed, in order to give it effect, that the acknowledgment was taken after the execution of the instrument it accompanies.[19]

e. *Defective Statements and Omissions.* — **No Presumption From**

seal of office," it will be presumed that a seal was affixed to the original certificate. Coffey *v.* Hendricks, 60 Tex. 676, 2 S. W. 47. In the case cited it was said: "There was an agreement in writing between counsel that the record of deeds might be read in evidence, in lieu of certified copies, and the statements of facts show that the deed in question was read from the record, and gives a copy both of the instrument and the certificate of acknowledgment. The attesting clause of the latter reads: 'In testimony whereof, I have hereunto set my hand, as clerk, and affixed thereto the impress of my seal of office,' etc. It is held, in Ballard *v.* Perry, 28 Tex. 347, that where a certified copy of a deed is offered in evidence, and the notary, in his certificate, declares that he has affixed his seal thereto, that it is to be presumed that his seal was properly attached, although its place is not indicated by the characters ordinarily used for that purpose."

Certified Copy Not Indicating Use of Seal. — Where a certified copy of a certificate of acknowledgment does not show the scroll usually employed to indicate the presence of a seal on the original instrument the fact that it was there may be presumed. In the case of Ballard *v.* Perry, 28 Tex. 347, the court said: "This deed was also objected to for want of a seal to the notary's certificate of probate. The objection, if established, should have been sustained. The instrument offered in evidence was not the deed itself, but a certified copy of it, from the records of the office of the county clerk. The fact cannot, therefore, be determined by an inspection of the paper presented to the court. But, as the certificate of the notary declares that he has affixed his official seal to it, and the clerk should not have recorded the deed unless this were the case, we think it may be presumed that the seal was properly attached, although in the copy from the record its place is not indicated by a scroll and the initial letters (L. S.), as is customary in copies of sealed instruments. The clerk who recorded this deed may not have supposed this necessary or proper."

18. Rackleff *v.* Norton, 19 Me. 274; Doe *v.* Peeples, 1 Kelly (Ga.) 3.

19. **Certificate Antedating Main Instrument.** — If, through a clearly apparent clerical error, a certificate is dated before the instrument to which it is attached, the acknowledgment will be presumed to have been taken after the execution of the instrument. Fisher *v.* Butcher 19 Ohio 406, 53 Am. Dec. 436. In that case the court said: "It is only necessary that the acknowledgment should be taken after the deed is executed. It is not important that it should be taken at any specified time. If it were made at any time between the making of the deed and the bringing of the suit, it would be good. It appears from the certificate that the deed was made at the time; it refers to it as the above conveyance, and certifies to an acknowledgment of the signing and sealing thereof. The paper itself sufficiently shows an acknowledgment of the deed after its execution, and that the contradiction of dates arises from a clerical mistake. An examination of the certificate will show how the mistake occurred. It is a printed form, with a blank after the word 'forty,' for the insertion of the units. This blank was omitted to be filled, and makes the date read, 'eighteen-hundred and forty.'

"It being, then, a mere clerical mistake, which the instrument itself sufficiently corrects, the court were right in admitting the deed in evidence."

Lapse of Time. —Lapse of time creates no presumption in aid of a certificate in which a material statement is omitted.[20]

Notary's Acquaintance With Grantor. — Where a statute does not require the notary to state in his certificate that the grantor is known to him, but requires statement of proofs of his identity if not known, and proofs are not given in the certificate, it will be presumed that the notary knew the grantor.[21]

B. By Evidence. — a. *Authority of Officer.* — **Official Character Omitted from Certificate.** — Where the officer taking the acknowledgment does not state his official character in the certificate, the omission may be corrected by proof,[22] but the contrary has been asserted in some cases.[23]

20. Material Statement Omitted. "It is urged that, after this lapse of time, it ought to be presumed that Cochran acknowledged the deed. The question here is as to the legality of the record. That depends upon compliance with the law under which it was made. The law could only be complied with by the statement in the certificate of authentication of those facts required to be stated. It is a matter required to exist in writing. There is no room for presumption on such a question." Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797.

Contra.—Monk *v.* Farlinger, 17 U. C. C. P. (Can.) 41.

21. Presumption That Notary Knew Grantor. — "Upon the trial in the court below, intervenors offered in evidence, as a recorded instrument, the deed from Munger to McGown, the certificate of acknowledgment to which did not recite that the grantor was known to the officer, to which appellant objected. This acknowledgment was taken in 1874, and it has been decided that the law in force at that time did not require the officer to certify that the grantor was known to him, but only required him, in case the grantor was not known, to attach certain proofs of his identity. These proofs not being attached to the certificate of acknowledgment, we think it should be presumed that the grantor was known to the officer, and the acknowledgment, therefore, be held sufficient." Driscoll *v.* Morris, 2 Tex. Civ. App. 603, 21 S. W. 629.

22. Russ *v.* Wingate, 30 Miss. 440; Bennet *v.* Paine, 7 Watts (Pa.) 334; Byer *v.* Etnyre, 2 Gill (Md.) 150, 41 Am. Dec. 410; Silcock *v.* Baker (Tex. Civ. App.), 61 S. W. 939.

Proof of Official Character. "We perceive nothing in the Maryland Acts of Assembly which requires justices of the peace or other officers to describe in their certificates their official characters. It is no doubt usual and proper to do so, because the statement in the certificate is *prima facie* evidence of the fact, where the instrument has been received and recorded by the proper authority. But such a statement is not made necessary by the Maryland statutes. And whenever it is established by proof that the acknowledgment was made before persons authorized to take it, it must be presumed to have been taken by them in their official capacity; and when their official characters are sufficiently shown by parol evidence, or by the admissions of the parties, we see no reason for requiring more where the Acts of the Legislature have not prescribed it." Van Ness *v.* Bank of U. S., 13 Pet. 17.

23. Cannot Be Shown By Proof. Shults *v.* Moore, 1 McLean 520, 32 Fed. Cas. No. 12,824. The opinion was delivered by Justice McLean, who, after referring to Van Ness *v.* Bank of U. S., 13 Pet. 17, quoted from in the note last above set forth said: "I did not accord with the above decision, though I expressed in the reports no dissent. It appeared to me that the acknowledgment upon its face must contain all the requisites to its validity, to have the effect of notice under the regis-

Jurisdictional Limits.—As a general rule, evidence *aliunde* is admissible to show that the certifying officer had authority to act in the place where the acknowledgment was taken, and that he acted within his jurisdiction,[24] and if the certificate incorrectly states the place where the acknowledgment was taken, evidence is admissible to show that fact and to show where it was really taken.[25]

b. *Venue.* — Where the certificate is defective in its showing of a venue, the error may be cured by evidence *aliunde*.[26]

c. *Seal.* — **Absence Of.** — If no seal is affixed to the certificate it cannot be validated by parol evidence.[27]

tration laws. . . . The acknowledgment must be made before a justice of the peace, and the evidence of this must be on the deed, or connected with it. And if this acknowledgment be defective in not showing that the person who took the acknowledgment had a right to take it, the act does not appear to be official, and is not a compliance with the statute."

Authority of Foreign Official. In Cameron *v.* Beaupre, 25 L. C. Q. B. (Can.) 419, it was said that the fact that a certain court in Minnesota was a court of record might be proved to sustain an acknowledgment required to be made before a judge of a court of record.

24. Place of Jurisdiction Omitted From Caption. — Where the name of the county is omitted in the caption of the certificate, parol evidence is admissible to show that the certifying officer is an officer of the county where the acknowledgment was taken.

"The first objection taken to the acknowledgment is, that a venue is wanting, the county being omitted in the caption thereof.

"This objection was obviated, if a valid one, by proof that the justice of the peace who took the acknowledgment was a justice of the peace of Schuyler county at the time, and that he took it as such justice." Graham *v.* Anderson, 42 Ill. 514, 92 Am. Dec. 89.

Conflict of Statement as to Jurisdiction. — If the officer taking the acknowledgment signs himself as an officer of a certain jurisdiction and the caption of the certificate names a place without that jurisdiction, parol evidence is admissible to show that the acknowledgment was actually taken in the jurisdiction given by the officer. Rogers *v.* Pell, 154 N. Y. 518, 49 N. E. 75.

25. Angier *v.* Schieffelin, 72 Pa. St. 106, 13 Am. Rep. 659.

26. Defective Caption. — Where the place of the taking of the acknowledgment is uncertain from a defective caption to the certificate, the venue may be shown by reference to a certificate accompanying the certificate of acknowledgment and given to show the authority of the notary. Harding *v.* Curtis, 45 Ill. 252.

Venue May Be Shown By Reference to Seal. — "It is insisted that, as the certificate does not show in what part of the world the acknowledgment was taken, it fails to show that it was good originally, or that it was subsequently rendered so by the validating act of the legislature. At the time of the acknowledgment in question every notary public within the state was required to 'provide a seal of office whereon shall be engraved in the center a star of five points, and the words 'Notary Public, County of ————, Texas,' around the margin, and he shall authenticate all his official acts therewith.' This seal, if attached, would properly be looked to by the officer who made the record to aid the certificate of acknowledgment, and as the record was made it must be presumed, especially after so great a lapse of time, that the seal used showed that the certificate was made by an officer of the proper county in this state." Stephens *v.* Motl, 81 Tex. 115, 16 S. W. 731.

27. Parol Evidence Does Not Cure Absence of Seal. — "The deposition of the witness Hartzell was admissible as evidence of the execution of the deed from Thomas King to John C. King, by the former,

Exception. — But the fact that a seal was affixed and the style of it may be shown by parol where the impression of the seal has been obliterated.[28]

d. *Date.* — **Parol Evidence to Show.** — Parol evidence is admissible to show that an acknowledgment was taken on a date different from that expressed in the certificate.[29]

but not for the purpose of validating the notary's certificate, which was shown to be defective for want of his official seal. Had the deposition been admitted for such a purpose, it would have been error, for the reasons assigned by the defendant. The witness Hartzell, who was a notary public for Navarro county, and who took the acknowledgment of Thomas King in the deed of conveyance to J. C. King, but from some cause failed to affix his seal of office, was a competent witness to prove these facts as showing his title from Thomas King, but not to fix notice on the defendant." King *v.* Russell, 40 Tex. 124.

28. Parol Evidence to Show Seal to Ancient Instrument. — The law required "that every notary public shall provide a seal of office, whereon shall be engraved, in the center, a star of five points, and the words 'Notary Public, County of ————, Texas,' and shall authenticate all his official acts therewith." Attached to the certificate in question, where a seal is usually found, was a circle or ring defined by a reddish discoloration of the paper. About the center, as also along the rim, of this circle, small particles of red sealing wax adhere. There was, however, no impression thereon of a star or letters of any character. A witness testified that while a boy he lived with Young, the notary public who used, as a notary public, a seal which he himself made of metal, with a star in the center and letters around the edge, which letters witness did not know; that Young used the seal by putting melted wax on the paper, and pressing the seal upon it. As to the wife, this deed was admissible as an ancient instrument, provided it was fortified by her privy acknowledgment, properly authenticated. The use of a seal such as was prescribed by law was necessary to such authentication. If, however, such seal was in fact used, and the impression had been obliterated by time, its absence would not impair or affect the title transmitted by the deed. Whether or not the notary public used a seal provided with a star of five points, and the letters prescribed by the statute, was a question of fact which the court was correct in submitting to the determination of the jury." Stooksberry *v.* Swan (Tex. Civ. App.), 21 S. W. 694.

29. Certificate Incorrectly Dated. "Parol evidence is admissible to prove that a certificate of acknowledgment was executed on a date other than that appearing on the face of it, without contravening the rule 'that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a written instrument.' The *factum* of the acknowledgment is not questioned, and the rejected proof was to show the true date, of which the date it bore was only *prima facie* evidence. Hall *v.* Cazenove, 4 East 477; Jayne *v.* Hughes, 10 Exch. 430; Randfield *v.* Randfield, 6 Jur. (N. S.) 901; Raffell *v.* Reffell, 12 Jur. (N. S.) 910; Gately *v.* Irvine, 51 Cal. 172; Shaunnessey *v.* Lewis, 130 Mass. 355; 1 Greenl. Ev. § 284, note D; 5 Am. & Eng. Enc. Law 79; 7 Am. & Eng. Enc. Law 91. See also Fisher *v.* Butcher, 53 Am. Dec. 436; Meech *v.* Fowler, 14 Ark. 29; Holt *v.* Moore, 37 Ark. 148; Smith *v.* Scarborough, 61 Ark. 104, 32 S. W. 382." Merrill *v.* Sypert, 65 Ark. 51, 44 S. W. 462.

"By the law in force when this deed was made, it was the duty of the clerk to indorse upon the deed the acknowledgment under seal of the court, and to make an entry upon the minutes showing and giving a description of the lands sold, the purchase money, and the names of the parties to the suit. He did make the entry; and while this

e. *Defective Statements and Omissions.* —**Contradicting Statements of Certificate.**— Where a certificate states the facts, they cannot be shown to have been different by the introduction of evidence *aliunde* in aid of the certificate.[30]

Omitting Name of Acknowledgor.— If the certificate omits the name of the party whose acknowledgment is taken, the blank cannot be filled by parol.[31]

Acquaintance With Grantor. — Where the certificate fails to show that the officer was acquainted with the party making the acknowledgment, resort may be had to evidence *aliunde* to show that he was so acquainted.[32]

entry does not, under our rulings, supply the place of a certificate on the deed, still it shows regularity in the proceedings. The certificate was indorsed on the deed. The deed was made 50 years ago; and the defendants, and those under whom they claim, have been in possession of the property for at least 40 years. The certified copy offered in evidence was made some 10 years before the commencement of this suit, June 20th, 1863, and that indicates that the record shows a seal, and there is no intimation that it is not a correct copy of the record. Under these circumstances we hold that the court should have presumed that the clerk did attach the seal to the certificate, as he says in it he did; and this, too, though the seal used by the clerk was a metallic one, and though a couple of experts gave it as their opinion that the seal was not attached. The impression though made by a metallic seal, was liable to become obliterated from the long lapse of time and use of the document. If a case can be conceived where a presumption of this character should be made in order to uphold rather than strike down acts of public officers, this is one. There is certainly a general disposition on the part of the court to uphold such official acts; and here the circumstances are strong in favor of the fact that the seal was attached." Hammond *v.* Gordon, 93 Mo. 223, 6 S. W. 93.

30. Barnett *v.* Shackleford, 6 J. J. Marsh. (Ky.) 532, 22 Am. Dec. 100.

Aiding by Contradiction. — "The certificate of acknowledgment cannot be helped by proving that the facts were different, as they actually occurred, from the statement of them in the certificate." Chauvin *v.* Wagner, 18 Mo. 531.

31. Filling Blank By Parol. Hayden *v.* Wescott, 11 Conn. 129. The certificate passed upon in the case cited was in the following form: "State of Vermont, Windsor county, ss. Woodstock, May 25th, 1831. Personally appeared ———— and acknowledged this instrument, by him sealed and subscribed to be his free act and deed. Eli Dunham, Justice of the Peace." The court said:

"The statute requires that all deeds of land shall be acknowledged; and the only question is, how the acknowledgment shall be evidenced; because it is obvious, that if parol evidence may be introduced, to aid a defective certificate, on the same principle it may be introduced to supply one. The acknowledgment may rest in parol, and the certificate of the magistrate may be entirely dispensed with. The claim now made, inevitably leads to this conclusion. It can only be necessary to observe, that such a claim is opposed to the uniform course of practice, to the spirit and meaning of the statute, and to the authority of adjudged cases."

32. Evidence to Show Officer Knew Grantor. — "There was at the trial oral evidence by the master to supply any apparent defect in the identification. He testified that he knew Mr. Rogers. He did not testify that he knew him to be the president of the corporation, but that fact sufficiently appears in the certificate. There was evidence that the corporation by resolution had authorized the president, Mr. Rogers, to execute a general assignment for

Reference to Main Instrument. — If there is a defect in the certificate the instrument which it accompanies may be referred to for its correction.[33]

Entries by Recorder. — A defective certificate cannot be aided by reference to the entries made by the officer recording the instrument to which it is attached.[34]

3. Impeachment Of. — A. Burden of Proof. — The burden of proof is on him who assails the verity of a certificate of acknowledgment,[35] and it is not shifted by the mere fact that the notary

the benefit of creditors, to a person to be named by him; and the signature to the assignment reads: 'Asa L. Rogers, President of the Rogers Manufacturing Company.' The instrument is that of the corporation, and its corporate seal is affixed. If it were necessary so to do, resort could be had to the second certificate of acknowledgment by Rogers, bearing the date of the previous one, where the master certifies that Rogers was personally known to him to be the individual who executed the assignment." Rogers *v.* Pell, 47 App. Div. 240, 62 N. Y. Supp. 92.

33. *Canada.*—Jackson *v.* Robertson, 4 U. C. C. P. 272.

United States.—Carpenter *v.* Dexter, 8 Wall. 513.

Florida.—Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815.

Georgia.—Doe *v.* Peeples, 1 Kelly 3; Grantiss *v.* Irvin, 39 Ga. 22.

Maine.—Rackleff *v.* Norton, 19 Me. 274.

Minnesota.—Wells *v.* Atkinson, 24 Minn. 161.

Missouri.—Owen *v.* Baker, 101 Mo. 407, 14 S. W. 175, 20 Am. St. Rep. 618.

Ohio.—Fisher *v.* Butcher, 19 Ohio 406, 53 Am. Dec. 436.

Pennsylvania. — Luffborough *v.* Parker, 12 Serg. & R. 48.

Texas.—Gulf C. & S. F. Ry. Co. *v.* Carter, 5 Tex. Civ. App. 675, 24 S. W. 1083.

Vermont.—Brooks *v.* Chaplin, 3 Vt. 281, 23 Am. Dec. 209.

Main Instrument May Cure Defects. — "This certificate, under the hand and seal of the notary, is as follows: 'State of Minnesota, Hennepin County, ss. I, Robert Christensen, a notary public in and for said county, do hereby certify that this mortgage was duly acknowledged before me by the above named J. H. Hennepin, the mortgagor therein named, and entered by me this twenty-sixth day of June, 1885.'

"J. H. Huntington is named as mortgagor in the body of the instrument, which purports to be executed by him, his signature immediately preceding the certificate. It is the policy of the law to uphold certificates of this character, and for that purpose resort will be had, if necessary, to the whole instrument to which they are attached. . . . No particular form of certificate being required, it is sufficient if the fair import of it is that the mortgagor appeared in person before the officer, and acknowledged that the instrument was his act and deed. Sanford *v.* Bulkley, 30 Conn. 347. These facts clearly appear from the language of this certificate when read in connection with the mortgage itself. It is perfectly evident that the word 'Hennepin' is a mere clerical error." Brunswick-Balke-Collender Co. *v.* Brackett, 37 Minn. 58, 33 N. W. 214.

34. Gulf C. & S. F. Ry. Co. *v.* Carter, 5 Tex. Civ. App. 675, 24 S. W. 1083.

35. *United States.* — Pierce *v.* Feagans, 39 Fed. 587; Linton *v.* Nat. Life Ins. Co., 104 Fed. 584.

Alabama.—Barnett *v.* Proskauer, 62 Ala. 486.

Arkansas.—Meyer *v.* Gossett, 38 Ark. 377.

California. — People *v.* Cogswell (Cal.), 45 Pac. 270.

Maryland. — Ramsburg *v.* Campbell, 55 Md. 227.

Michigan.—Hourtienne *v.* Schnoor, 33 Mich. 274; Johnson *v.* Van Velsor, 43 Mich. 208, 5 N. W. 265.

taking the acknowledgment was the attorney for the party profiting by it and defending the verity of the certificate.[36]

B. For Fraud, Duress, Etc. — The certificate may be impeached by evidence that the acknowledgment it shows was procured through fraud, duress, imposition or the like;[37] but in such cases there must be a clear and satisfactory preponderance of the evidence to overcome the recitals of the certificate.[38]

Missouri.—Ray *v.* Crouch, 10 Mo. App. 321.

Texas.—Atkinson *v.* Reed (Tex. Civ. App.), 49 S. W. 260.

Burden of Proof. — "The burden on the plaintiff required her to meet and overcome the evidence afforded by the certificate of the notary, supported by the attestation of the witnesses, that she appeared before him as an officer, and acknowledged the deed. It stands to reason that, in the absence of anything to impeach the integrity of the officer and the witnesses, no slight importance should be attached to such evidence; because it is the evidence of an act done in pursuance of law, and which can be attested and proved in no other way. In other words, it is the evidence required by law of the execution and acknowledgment of a deed. To say that the taking of an acknowledgment is a ministerial, and not a judicial act, is simply to say that it may be attacked collaterally; it does not impair its value as a certificate made by one acting under authority of law, not only in the matter of taking the acknowledgment, but also in certifying the same." Ford *v.* Osborne (Ohio), 12 N. E. 526.

36. Burden Not Shifted, When. "It is assigned as error that the court gave undue prominence in his charge to the testimony of Newton H. Barnard in stating to the jury that the certificate of acknowledgment of the mortgage from Arnold to Dougherty was not to be lightly overturned by interested witnesses. Arnold denied that he ever acknowledged the mortgage, and there was some other testimony, and some things about the acknowledgment itself, that tended to corroborate his denial. Barnard and other witnesses testified that he did acknowledge it. Barnard was the notary who signed the certificate of acknowledgment. The rule undoubtedly is that the burden of proof rests upon the person denying the acknowledgment to show the falsity of the certificate, which carries with it the usual presumption that the officer making it has certified the truth, and has not been guilty of wrongful or criminal actions. See Hourtienne *v.* Schnoor, 33 Mich. 274; Johnson *v.* Van Velsor, 43 Mich. 219, 5 N. W. 265, and cases there cited.

"It is not claimed that Mr. Barnard was a party to any fraud in this respect, as we understand from the record, briefs, and oral arguments in this case; but it is contended that he was the attorney of the plaintiffs then as he is now, and also a witness in their behalf, and that this instruction gave too much weight to his testimony, which was given in favor of the truth of the certificate as he made it. This in our opinion, would not alter the presumption in favor of the certificate." Dikeman *v.* Arnold, 78 Mich. 455, 44 N. W. 407.

37. *Illinois.*—Lowell *v.* Wren, 80 Ill. 238; Blackman *v.* Hawks, 89 Ill. 512; Fitzgerald *v.* Fitzgerald, 100 Ill. 385.

Maryland.—Cent. Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597; Davis *v.* Hamblin, 51 Md. 525.

New York.—Marden *v.* Dorthy, 12 App. Div. 188, 42 N. Y. Supp. 827.

Pennsylvania.—Louden *v.* Blythe, 16 Pa. St. 532, 55 Am. Dec. 527.

Tennessee. — Kennedy *v.* Security Bldg. & Loan Ass'n. (Tenn.), 57 S. W. 388.

Texas. — Chester *v.* Breitling (Tex.), 32 S. W. 527.

38. *Alabama.*—Downing *v.* Blair, 75 Ala. 216.

Illinois.—O'Donnell *v.* Kelliher, 62 Ill. App. 641.

Nebraska.—Phillips *v.* Bishop, 35 Neb. 487, 53 N. W. 375; Council Bluffs Sav. Bank *v.* Smith, 50 Neb.

Grantee Must Have Had Notice of Fraud, etc. — And the grantee or mortgagee, or his successor in interest, must have participated in, or had notice of, the fraud, mistake or imposition.[39]

90, 80 N. W. 270; Barker *v.* Avery, 36 Neb. 599, 54 N. W. 989; Pereau *v.* Frederick, 17 Neb. 117, 22 N. W. 235.

Pennsylvania.—Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552.

South Dakota. — Northwestern Loan & Banking Co. *v.* Jonasen, 11 S. D. 566, 79 N. W. 840.

Tennessee.—Kennedy *v.* Security Bldg. & Loan Ass'n. (Tenn.), 57 S. W. 388; Thompson *v.* So. Bldg. & Loan Ass'n. (Tenn.), 37 S. W. 704.

Preponderance of Evidence. —"The evidence to impeach a certificate of acknowledgment of a competent officer to a deed of conveyance must be so full and satisfactory as to convince the mind that the certificate is false or forged. A mere suspicion, or even preponderance of evidence less than sufficient to establish a moral certainty to that effect, is insufficient." Griffin *v.* Grimm, 125 Ill. 430, 17 N. E. 782.

Acknowledgments by Married Women. — This rule generally applies in cases of acknowledgments by married women.

United States.—Young *v.* Duvall, 109 U. S. 573; Ins. Co. *v.* Nelson, 103 U. S. 544.

Illinois.—Myers *v.* Parks, 95 Ill. 408; Blackman *v.* Hawks, 89 Ill. 512; Massey *v.* Huntington, 118 Ill. 80, 7 N. E. 269.

Missouri. — Springfield Eng. & Thresher Co. *v.* Donovan, 147 Mo. 622, 49 S. W. 500.

Tennessee.—Thompson *v.* So. Bldg. & Loan Ass'n. (Tenn.), 37 S. W. 704.

West Virginia.—Rollins *v.* Menager, 22 W. Va. 461.

Wisconsin.—Smith *v.* Allis, 52 Wis. 337, 9 N. W. 155.

39. Benedict *v.* Jones (N. C.), 40 S. E. 221.

When Grantee Need Not Be Charged With Notice of the Fraud. The grantee need not be charged with notice of the fraud or imposition where the grantor did not actually appear before the officer, for he then had no jurisdiction to make the certificate and it is a mere fabrication through which the grantor should not be the loser; Grider *v.* Am. Freehold Land Mortgage Co., 99 Ala. 281, 12 So. 775, 42 Am. St. Rep. 58; Meyer *v.* Gossett, 38 Ark. 377; Michener *v.* Cavender 38 Pa. St. 334, 80 Am. Dec. 486.

Officer Acting Without Jurisdiction. — "If it is true, as alleged by the defendants joining in the answer, that they never appeared before the officer or acknowledged the execution of such mortgage, the certificate of acknowledgment is, as to them, fraudulent; and in availing themselves of that defense, it is not necessary to show that the mortgagee had notice of such fraud." Williamson *v.* Carskadden, 36 Ohio St. 664.

Acknowledgment Under Coercion. It has even been held that notice need not have been brought home to the grantee in a case where there was an actual appearance before the officer but where the acknowledgment was procured through coercion—on the part of one other than the grantee.

"Whatever other or further construction it may be necessary in a proper case to put upon the statute, it is clear that the object was to secure to the wife freedom of action, especially from the influence of her husband, in executing deeds of real property. We are clear that in this case his presence under the circumstances was not permitted by the statute. It was a coercive presence. The spirit and meaning and intention of the law were violated, and the mortgage and acknowledgment, as far as she was concerned, were properly held insufficient to pass her estate. On the point that the mortgagee, Gurdon H. Edgerton, was entirely ignorant and innocent in this matter, we think on grounds before stated that this was not important. And further, he had no right to be ignorant of the manner in which the mortgage was executed and acknowledged. It ran to him. He was not obliged to take it or advance money on it. If he saw fit to do so without

C. Competency and Sufficiency of Evidence. — a. *Negativing Recitals of Certificate.* — Except in case of fraud, duress, imposition or the like, a certificate cannot be impeached by evidence merely negativing its recitals.[40]

making prudent inquiry, it was his own misfortune." Edgerton *v.* Jones, 10 Minn. 427.

Notice of Fraud. — In Shrader *v.* Decker, 9 Barr (Pa.) 14, it was held that the acknowledgment of a deed, by husband and wife, for the wife's land, may be shown to have been obtained by fraud and duress of the wife, and thus avoided as to volunteers, or purchasers with notice, *aliter as to bona fide purchasers without notice.*

In Louden *v.* Blythe, 16 Pa. St. 532, and 27 Pa. St. 22, it was held that the certificate of the magistrate is conclusive in favor of one who accepted it in good faith, and paid his money, without knowing or having reason to suspect it to be untrue. But, that if the certificate be false in fact, and the mortgagee knew it, or knew of circumstances which would put an honest and prudent man upon inquiry, then it may be contradicted by parol evidence. In the case last cited, the mortgage was set aside, not simply because the magistrate taking the acknowledgment knew that the wife's acknowledgment was induced by undue influence, on the part of the husband, but because the mortgagee was also present, and knew enough to put him upon inquiry.

In Hartley *v.* Frost, 6 Tex. 208, it is said that where the certificate of the privy examination of a married woman is in due form, in order to impeach its veracity, it is not sufficient to allege that there was no privy examination, that the contents were not made known to her, etc. The certificate is conclusive in the absence of an allegation of fraud or imposition—as, for instance, that there was a fraudulent combination between the notary and the parties interested.

"We doubt whether a case can be found where the certificate of the magistrate has been allowed to be impeached, on the ground of fraud, without evidence charging the grantee with notice of the fraud, or the officer taking it with complicity therein." Baldwin *v.* Snowden, 11 Ohio St. 203; Benedict *v.* Jones (N. C.), 40 S. E. 221.

Acknowledgments By Married Women. — This rule generally applies in cases of acknowledgments by married women.

Alabama.—Jinwright *v.* Nelson, 105 Ala. 399, 17 So. 91.

Arkansas. — Meyer *v.* Gossett, 38 Ark. 377.

California. — Banning *v.* Banning, 80 Cal. 271, 22 Pac. 210, 13 Am. St. Rep. 156; De Arnaz *v.* Escandon, 59 Cal. 486.

Kentucky.—Tichenor *v.* Yankey, 89 Ky. 508, 12 S. W. 947.

Oregon.—Moore *v.* Fuller, 6 Or. 272, 25 Am. Rep. 524.

Pennsylvania.—Louden *v.* Blythe, 16 Pa. St. 532, 55 Am. Dec. 527.

Tennessee. — Romer *v.* Welcker, 99 Tenn. 623, 42 S. W. 439.

Texas. — Kocourek *v.* Marak, 54 Tex. 201, 38 Am. Rep. 623; Atkinson *v.* Reed (Tex. Civ. App.), 49 S. W. 260; Pool *v.* Chase, 46 Tex. 207; Wiley *v.* Prince, 21 Tex. 141.

West Virginia.—Rollins *v.* Menager, 22 W. Va. 461; Pickens *v.* Kniseley, 36 W. Va. 794, 11 S. E. 932.

40. Married Women's Acknowledgments. — The same rule generally holds in cases of acknowledgments by married women.

Alabama. — Jinwright *v.* Nelson, 105 Ala. 399, 17 So. 91; Read *v.* Rowan, 107 Ala. 366, 18 So. 211.

Arkansas.—Meyer *v.* Gossett, 38 Ark. 377.

California.—Banning *v.* Banning, 80 Cal. 271, 22 Pac. 210 13 Am. St. Rep. 156.

Illinois.—Strauch *v.* Hathaway, 101 Ill. 11, 40 Am. Rep. 193.

Kentucky. — Cox *v.* Gill, 83 Ky. 669; Tichenor *v.* Yankey, 89 Ky. 508, 12 S. W. 947.

Mississippi.—Johnston *v.* Wallace, 53 Miss. 331, 24 Am. Rep. 699.

Nebraska. — Council Bluffs Sav.

Bank *v.* Smith, 59 Neb. 90, 80 N. W. 270.

Pennsylvania.—Heeter *v.* Glasgow, 79 Pa. St. 79, 21 Am. Rep. 46; Louden *v.* Blythe, 16 Pa. St. 532, 55 Am. Dec. 527; Citizens' Sav. & Loan Ass'n. *v.* Heiser, 150 Pa. St. 514, 24 Atl. 733; Jamison *v.* Jamison, 3 Whart. 451, 31 Am. Dec. 536.

Tennessee.—Kennedy *v.* Security Bldg. & Sav. Ass'n. (Tenn.), 57 S. W. 388.

West Virginia.—Rollins *v.* Menager, 22 W. Va. 461; Pickens *v.* Kniseley, 36 W. Va. 794, 11 S. E. 932.

Actual Appearance Before Officer. "The mortgages of the American Freehold Land Mortgage Company and the Loan Company of Alabama, involved in this case, each embracing, along with other land, the homestead of the mortgagors, were confessedly signed by Thornton and his wife, in the presence of Manghen, the notary public, who brought them to the residence of the mortgagors for the purpose of having them properly executed. On these facts—the presence of the officer for the purpose stated, the presence of the instruments themselves, the presence of the grantors for said purposes, and the signing of the papers then and there by them—the notary's certificates of the acknowledgment of the husband and the separate acknowledgment of the wife are not open to impeachment by parol evidence, no fraud or duress having been shown. Mortgage Co. *v.* James (Ala.), 16 So. 887; Jinwright *v.* Nelson (Ala.), 17 So. 91; Grider *v.* Mortgage Co., 99 Ala. 281, 12 So. 775;" American Freehold Mortgage Co. *v.* Thornton, 108 Ala. 258, 19 So. 529, 55 Am. St. Rep. 26.

Fraud Must Be Shown.—Where the certificate of the privy examination of a married woman is in the form required by the statute, it is not sufficient, in order to impeach it, to allege that there was no private examination, that she did not acknowledge the deed, that she did not release her homestead right. There must be some allegation of fraud or imposition practiced toward her, some fraudulent combination between the parties interested and the officer taking the acknowledgment. Ridgeley *v.* Howard et al., 3 Harris & McHenry, 321; Jamison *v.* Jamison, 3 Whart. (Penn.) 557; Hartley et al. *v.* Frost and Wife, 6 Texas 208.

The certificate of the officer as to the acknowledgment must be judged of solely by what appears on the face of the certificate, and if that is in substantial compliance with the statute, it ought not to be impeached except for fraud and imposition. Graham *v.* Anderson, 42 Ill. 514, 92 Am. Dec. 89.

Am. Freehold Land Mortgage Co. *v.* James, 105 Ala. 347, 16 So. 887; Kennedy *v.* Security Building & Sav. Ass'n. (Tenn.), 57 S. W. 388; Miller *v.* Marx, 55 Ala. 322.

When Certificate Conclusive.—"It must be regarded as settled by the great weight of authority that when the grantor or mortgagor appears before the officer, and makes an acknowledgment of the execution of the instrument, which is duly certified by the officer to have been made in conformity to law, the certificate is conclusive of the truth of all the facts therein certified, and which the officer was by law authorized to certify, until successfully assailed for duress or fraud in which the grantee or mortgagee participated, or of which he had notice at the time of parting with the consideration. The taking and certifying of the acknowledgment are held in many of the cases to be of a judicial nature; and when the officer has jurisdiction, so to speak, by having the party acknowledging, and the instrument to be acknowledged, before him, and enters upon and exercises this jurisdiction, the parties will not be allowed to impeach the truth of the facts which he is required by law to certify, and does certify, in the absence of fraud or duress, as above stated." Grider *v.* American Freehold Land Mort. Co., 99 Ala. 281, 12 So. 775, 42 Am. St. Rep. 58; McCardia *v.* Billings (N. D.), 87 N. W. 1008.

Married Women's Acknowledgments.—*Exceptions.*—The doctrine has become established in some jurisdictions that a certificate of acknowledgment by a married woman may be impeached by parol without a

Exception Where No Actual Appearance Before Officer. — Where there is no actual appearance before the certifying officer he has no jurisdiction to make the certificate, and its recitals may be negatived without proof of fraud.[41]

b. *Of Officer Making Certificate.* — The testimony of the officer who makes a certificate of acknowledgment is not admissible to impeach it,[42] although the contrary has been maintained in some

showing of fraud. Hughes *v.* Coleman, 10 Bush (Ky.) 246; Woodhead *v.* Foulds, 7 Bush (Ky.) 222; Dodge *v.* Hollinshead, 6 Minn. 25, 80 Am. Dec. 433; Annan *v.* Folsom, 6 Minn. 500; Steffen *v.* Bauer, 70 Mo. 399.

Impeachment By Parol.—"So far as Mrs. Kem is concerned, her testimony was clear that her husband was present during her examination by the notary, and that the notary gave no explanation or information to her of the contents of the deed she signed. The notary, however, testified precisely to the contrary, that she was examined separate and apart from her husband, and that he explained to her the purport of the deed. There is no possibility of reconciling these conflicting statements, and it was a simple question of credibility with the jury, and the verdict of the jury cannot be disturbed here on this point." Wannell *v.* Kem, 57 Mo. 478.

"While the great weight of authority is to the contrary, except in cases of forgery, it has been held in this state, through a long line of decisions, that a married woman may by parol evidence contradict the certificate of an officer to an acknowledgment to a deed conveying her real estate. Wannell *v.* Kem, 57 Mo. 480; Sharpe *v.* McPike, 62 Mo. 300; Steffen *v.* Bauer, 70 Mo. 399; Clark *v.* Edwards' Adm'r, 75 Mo. 87; Webb *v.* Webb, 87 Mo. 541; Mays *v.* Pryce, 95 Mo. 604, 8 S. W. 731; Pierce *v.* Goerger, 103 Mo. 540, 15 S. W. 848; Comings *v.* Leedy, 114 Mo. 454, 21 S. W. 804." Springfield Engine & Thresher Co. *v.* Donovan, 147 Mo. 622, 49 S. W. 500; Belo *v.* Mayes, 79 Mo. 67; Drew *v.* Arnold, 85 Mo. 128.

41. Johnston *v.* Wallace, 53 Miss. 331, 24 Am. Rep. 699; Grider *v.* Freehold Land Mortgage Co., 99 Ala. 281, 12 So. 775, 42 Am. St. Rep. 58; Kennedy *v.* Security Building & Sav. Ass'n. (Tenn.), 57 S. W. 388; Williamson *v.* Carskadden, 36 Ohio St. 664; Smith *v.* Ward, 2 Root (Conn.) 302; Donahue *v.* Mills, 41 Ark. 421.

Notary Acting Without Jurisdiction. — "The paper was not signed in the presence of the notary. It was never in the presence of the grantor and the notary after it was signed, nor in the possession of the notary after it was signed. When the notary had it and executed his certificate of acknowledgment, there was nothing to acknowledge,—there was no signature; nor was there any signature at any time while it was in his possession. Treating his powers and acts as judicial, they were lacking in one essential of jurisdiction,—there was no signature of any kind, genuine or otherwise, before him. He had to do officially only with signatures. His powers were not called into exercise until there was a subscription to be acted upon. There being no signature, there was nothing for him to certify an acknowledgment of. The grantor was not before him. Nathan, refusing to sign, was not a grantor. He had a paper writing in the form of a deed before him, but he had neither a signature to be acknowledged, nor a signatory to acknowledge his execution of the paper. He was without jurisdiction to act in the premises, and his action, like that of other judicial officers and of courts proceeding without having acquired jurisdiction, is void, may be shown to be so by parol, and has been shown to be so in this case." Cheney *v.* Nathan, 110 Ala. 254, 20 So. 99, 55 Am. St. Rep. 26.

42. Shapleigh *v.* Hill, 21 Colo. 419, 41 Pac. 1108; Central Bank *v.* Copeland, 18 Md. 305, 81 Am. Dec. 597; Hockman *v.* McClanahan, 87 Va. 33, 12 S. E. 230.

jurisdictions.[43]

c. *Of Maker of Main Instrument.*—The testimony of the grantor or mortgagor alone is not sufficient to overcome the recitals of the certificate.[44]

d. *Disputing Authority of Officer.*—Where one takes an acknowledgment as justice of the peace, a certificate of the county clerk that such party was not a justice of the peace at the date of the certificate of acknowledgment is competent evidence for the purpose of impeaching.[45]

e. *Disputing Statement of Venue.*—If a certificate shows that the acknowledgment was taken in a certain county, parol evidence is admissible to show that it was taken elsewhere, in impeachment

Officer's Testimony Incompetent. "His official acts are done and certified under oath, and it would be mischievous in the extreme, to permit such a person to appear as a witness and falsify his own solemn act. Such a course would expose weak or dishonest men to the most dangerous temptations, and render the tenure of property unsafe and precarious, by subjecting the evidences of titles under which it is held to the frail and uncertain memory or to the corruption, of officers who have in due form certified the regularity of their acts. Upon the same principle which renders a sheriff incompetent as a witness to impeach his return, the deposition of the commissioner who took and certified the acknowledgment in this case, was inadmissible to contradict and falsify his certificate. Planters' Bank *v.* Walker, 3 S. & M. 409; 3 Phill. Evid. (Cow. & Hill), 1090 2d Edit." Stone *v.* Montgomery, 35 Miss. 83.

43. Garth *v.* Fort, 15 Lea (Tenn.) 683.

Officer's Testimony Competent. "The officer who certified to her acknowledgment testified that she did not in fact appear before him or acknowledge the execution of it; and the controlling question in the case is whether he was competent as a witness to impeach his official certificate. We think the rule declared by the authorities generally, as applicable to the situation here, makes him competent, leaving the question of the weight of his testimony to the judgment of the trier. The certificate is the act of a ministerial officer and not conclusive like a judicial record, and does not estop him as between these parties. The Illinois cases examined are Lowell *v.* Wren, 80 Ill. 238; McDowell *v.* Stewart, 63 Id. 538; Sisters of Loretto *v.* Catholic Bishop, 86 *Id.* 174; Berdel *v.* Egan, 125 *Id.* 302." McCurley *v.* Pitner, 65 Ill. App. 17.

44. O'Donnell *v.* Kelliher, 62 Ill. App. 641; Lickmon *v.* Harding, 65 Ill. 505; Kerr *v.* Russell, 69 Ill. 666, 18 Am. Rep. 634; Post *v.* First Nat. Bank, 138 Ill. 559, 28 N. E. 978; Fisher *v.* Stiefel, 62 Ill. App. 580; Smith *v.* Allis, 52 Wis. 337, 9 N. W. 155; Gray *v.* Law (Idaho), 57 Pac. 435; Kennedy *v.* Security Building & Sav. Ass'n. (Tenn.), 57 S. W. 388.

Testimony of Grantor.—"The officer acts under the weight of his official oath, and is disinterested, and his certificate is entitled to great and controlling weight until overcome by clear and satisfactory proof. The evidence of the grantor will not overcome it." Blackman *v.* Hawks, 89 Ill. 512; McCardia *v.* Billings (N. D.), 87 N. W. 1008.

45. That He Was Not Officer. "We think it was competent to show by the certificate of the county clerk, the state of the county records, for the purpose of proving that Fisk, before whom the acknowledgment of the deed was taken, was not, at the time of the acknowledgment purported to have been taken, a justice of the peace. It seems to us as competent to make it appear by the certificate of the county clerk that his records show that there was no such

of the certificate;[46] but this has been said not to be so except in case of fraud.[47]

f. *Disputing Statements of Fact in Certificate.* — Where the certificate sets forth what was done at the taking of the acknowledgment, it cannot be impeached by parol evidence showing that something different transpired.[48]

IV. BY MARRIED WOMEN.[49]

1. Aider of Certificate. — A. By Presumption. — **That Officer Did His Duty.** — It has been held, under certain peculiar statutes, that where a certificate of acknowledgment of a married woman does not show all the facts, it will be presumed that the officer did his duty and the certificate will stand.[50]

justice in the county at the time, as that a particular person was at a particular time a justice of the peace. Such certificate would not establish, conclusively, that Fisk was not a justice, but it was competent evidence, as tending to show that fact." Ross *v.* Hole, 27 Ill. 104.

46. Acknowledgment Out of Officer's Jurisdiction. — "If a justice of the peace for one county goes out of his own into another county and takes the acknowledgment of a married woman to a deed purporting to convey her homestead, the conveyance would be void as to the homestead. It is competent to show this fact by parol, though it may appear to the contrary on the face of the acknowledgment." New England Mortgage Security Co. *v.* Payne, 107 Ala. 578, 18 So. 164.

47. Fraud Must Be Shown. — "It is not alleged that any fraud was practiced by the parties. The land conveyed is in Barren county. The acknowledgment of the deed is proper by both husband and wife, and before the clerk of Barren county, and this fact admitted by both the grantors. They say, however, that they were in Metcalfe county when the deed was acknowledged, and that the writing was not explained to the wife, and she never consented that the deed might be recorded, and, therefore, the indorsement was a mistake. . . .

"When the parties admit the execution of the deed and the acknowledgment before the clerk of the county where the land lies, or before the clerk where they reside, and the clerk's certificate is in accordance with law, they will not be permitted to show, under the allegation of a mistake, that the certificate was not in the form of or as required by law, or that the clerk was out of the county when he took the acknowledgment." Cox *v.* Gill, 83 Ky. 669.

48. Disputing Facts Recited. "Where it appears by the certificate on the deed made in the usual form, that the party on a particular day came before two justices of the peace of the county, and acknowledged the instrument of writing to be his act and deed, parol evidence is not admissible to prove that the said justices separately took the said acknowledgment at different times or places within the said county." Ridgeley *v.* Howard, 3 Har. & McH. (Md.) 321.

49. Most of the rules of evidence bearing upon acknowledgments of married women are the same as those bearing upon ordinary acknowledgments and they have been treated in the general part of the article above. The cases treated under this head are those only which are peculiar to certificates of acknowledgment by married women.

50. Ruffner *v.* McLenan, 16 Ohio 639.

Presumption That Officer Did His Duty. — "The deed was executed by three men and their wives, and the justice who took the acknowledgment certifies that they all appeared

B. By Evidence. — **Defective Statements and Omissions.** — Where a certificate of acknowledgment by a married woman omits to state all the facts required by the statute, parol evidence is not admissible to show what actually occurred when the acknowledgment was taken.[51]

Knowledge of Contents of Instrument. — Where a married woman did not acknowledge that she was "made acquainted with the contents" of an instrument, it cannot be shown in aid of the certificate that she did, in fact, know the contents of the instrument at the time of its execution.[52]

before him and acknowledged the execution of the deed, etc. and that the *femes covert,* naming them, 'being separate and apart from, acknowledged that they executed the same freely, and without fear or compulsion from their husbands.' The certificate does not state that they were separate and apart from their husbands, nor that the contents of the deed were first made known to them. But all this was unnecessary. The deed was executed under the statute of 1838, which is the same as that of 1824. In Stevens *v.* Doe, 6 Blackf. 465, it was held, under the latter statute that it would be presumed, the contrary not appearing, that the officer did his duty as to the separate examination of the wife, and making her acquainted with the contents of the deed, and that those facts need not be certified. The acknowledgment in question is undoubtedly good under the decision above mentioned." Fleming *v.* Potter, 14 Ind. 486.

51. *United States.* — Elliott *v.* Piersol, 1 Pet. 328.

Alabama. — Cox *v.* Holcomb, 87 Ala. 589, 6 So. 309, 13 Am. St. Rep. 79.

Iowa. — O'Ferrall *v.* Simplot, 4 Iowa 381; O'Ferrall *v.* Simplot, 4 Greene 162.

Kentucky.—Blackburn *v.* Pennington, 8 B. Mon. 217; Barnett *v.* Shackleford, 6 J. J. Marsh. 532, 22 Am. Dec. 100.

Mississippi.—Willis *v.* Gattman, 53 Miss. 721.

New York.—Elwood *v.* Klock, 13 Barb. 50.

Pennsylvania.—Barnet *v.* Barnet, 15 Serg. & R. 72, 16 Am. Dec. 516; Watson *v.* Bailey, 1 Binn. 470, 2 Am. Dec. 462; Jourdan *v.* Jourdan, 9 Serg. & R. 268, 11 Am. Dec. 724.

Texas. — Looney *v.* Adamson, 48 Tex. 619.

Amending Certificate by Parol. "The statute has required that all that is essential to an acknowledgment shall appear in the certificate, to bar the wife's dower, and such is the construction given to the homestead act. This acknowledgment cannot rest partly in writing and partly in parol; it must all be in writing. It is so required to protect the wife in her rights. The statute has declared that in this mode, and this alone, can the wife bar her rights. Our statute has adopted this as a more convenient mode than that provided by the common law, which required that the acknowledgment should be made in open court by fine or recovery, and it always became a matter of record. And the certificate of acknowledgment has taken its place, and like it, is required to be reduced to writing, and certified under the hand of the officer. We know of no case, in practice or reported, which has held that a defective certificate of acknowledgment may be aided by parol." Ennor *v.* Thompson, 46 Ill. 214.

52. Parol Evidence to Show Knowledge of Contents. — The remaining question is, whether a court of equity will aid the defective execution so as to bar her claim, upon its being shown *dehors* the deed that she was acquainted with its contents, and acknowledged the instrument with intent to pass her dower.

"A married woman has no legal existence or power to transfer her interest in real estate, except through the statutory channel. The mode of

2. Impeachment of Certificate. — A. Testimony of Husband and Wife Alone. — A certificate of acknowledgment cannot be impeached by the testimony of husband and wife alone,[53] although the contrary has been held.[54]

executing the conveyance confers upon her the power to convey. Where the power exists independent of its mode of execution, and has been defectively executed, it is not a case of want of power, but of defective execution, which a court of equity will aid. But where the power and mode of execution are inseparable, the power resulting from the mode, and that mode has not been pursued, it is not a case of defective execution, but a want of power, which a court of equity can not aid. Hence, when a married woman attempts to convey, and lacks power from not pursuing the prescribed mode, courts of equity will not relieve, because to amend the mode is to create the power." Silliman *v.* Cummins, 13 Ohio 116.

53. Shell *v.* Holston Nat. Building & Loan Ass'n. (Tenn.), 52 S. W. 909; Thompson *v.* Southern Building and Loan Ass'n. (Tenn.), 37 S. W. 704.

Insufficiency of Testimony. "When the testimony proving the fraud or deceit, in the case before us, proceeds from husband and wife only, their credibility is affected by their interest. . . . In the absence of a fact in corroboration of the evidence of husband and wife, the official certificate ought not to be overturned. Miller *v.* Marx, 55 Ala. 322. The evidence which renders it nugatory and void, converting the conveyance into mere waste paper, should not be beclouded with circumstances of suspicion, or if it is, ought to be corroborated. Especially is this true when the evidence in impeachment proceeds only from the husband and wife, refers only to occurrences between them in the privacy of domestic life, is easily fabricated and almost impossible of contradiction." Smith *v.* McGuire, 67 Ala. 34.

54. Wannell *v.* Kem, 57 Mo. 478.

ACQUIESCENCE.—See Admissions.

ACQUITTAL.—See Records; Judgment.

ACT OF GOD.—See Carriers.

ACT OF INSOLVENCY.—See Bankruptcy; Insolvency.

ACT OF LEGISLATURE.—See Judicial Notice; Laws.

ACT OF STATE.—See Judicial Notice; Public Policy.

ACTUARY.—See Expert Testimony; Insurance.

ADDRESS.—See Domicile.

ADEMPTION.—See Wills.

ADJOINING LAND OWNERS.

By R. K. Wood.

I. DEFINITIONS.

When applied to land, the word "adjoining" means lying next to, contiguous, in actual contact with, touching, as distinguished from lying near, or "adjacent."[1]

1. Lateral and Subjacent Support. — The right of lateral support of land is the right to have the corpus of the soil itself, either in its natural condition or as burdened with improvements, supported by the adjoining land; and the right of subjacent support is a like right in respect of the land lying beneath.[2]

2. Party Wall. — By a party wall, we must understand a wall between the estates of adjoining owners, which is used for the common benefit of both, chiefly in supporting the timbers used in construction of contiguous houses on such estates.[3]

II. EVIDENCE IN ACTIONS BETWEEN.

1. Competency of Evidence in General. — A. Of Negligence. a. *Damages As Res Ipsa Loquitur.* — Where the gravamen of the action is negligence, or want of skill in a lawful use of the premises, evidence of ensuing damages to the adjoining land does not *ipso facto* establish such negligence.[4]

1. Walton *v.* St. Louis Ry. Co. 67 Mo. 56; Holmes *v.* Carley, 31 N. Y. 289; *in re* Ward, 52 N. Y. 395; Akers *v.* United R. R. Co., 48 N. J. Law 110; McCullough *v.* Absecon Co., 48 N. J. Eq. 170, 21 Atl. 481.

Primary Meaning Defined.—"The primary meaning of the word 'adjoining' is to lie next to, to be in contact with, excluding the idea of any intervening space." Yard *v.* Ocean Beach Ass'n., 49 N. J. Eq. 306, 24 Atl. 729.

2. **Doctrine Not Applicable to Hydraulic Mining Claims.** — Hendricks *v.* Spring Valley Co., 58 Cal. 190, 41 Am. Rep. 257.

3. *Per Curiam in* Graves *v.* Smith, 87 Ala. 450, 6 So. 308, 13 Am. St. Rep. 60, 5 L. R. A. 298, see Weston *v.* Arnold, L. R. 8 Ch. App. 1084; Glover *v.* Mersman, 4 Mo. App. 90; Brown *v.* Werner, 40 Md. 15.

"Partition Wall" Distinguished. In construing an act regulating the height of division fences and partition walls, as applying to fences or walls built upon the line and resting partly on land of the adjoining proprietor, the court say: "'Partition wall' is not a phrase which in legal technology is used to designate a wall used by adjoining owners as a party wall." Western Co. *v.* Knickerbocker, 103 Cal. 111, 37 Pac. 192.

4. **Rationale of Rule.** — Spohn *v.* Dives, 174 Pa. St. 474, 34 Atl. 192. In Schultz *v.* Byers, 53 N. J. Law

b. *Lateral Support.*— **(1.) Character of Soil.** —In an action involving the question of liability for removal of lateral support, evidence of the character of the soil is admissible,[5] as where it tends to show whether the adjoining soil was of such a character as to sustain its own weight by natural character,[6] or that landslides had occurred at or near the spot.[7]

(2.) Notice. — (A.) Exempting From Extraordinary Care. —Evidence of notice to the owner of adjoining premises by one making an excavation on his own soil, is admissible to exonerate such excavator from liability for injury to improvements on the former's land which might have been avoided by the exercise of extraordinary precaution,[8] but is not competent to absolve the excavator from the use

442, 22 Atl. 514, 26 Am. St. Rep. 435, the court says: "There was no proof or offer to prove at the trial, that the defendant was negligent in digging his cellar whereby the plaintiff's house was caused to settle, and the walls to crack, beyond the mere fact that this was the result. This result alone was not sufficient, for it may have been caused by defects in the plaintiff's house."

In Ward *v.* Anderson, 3 Mo. App. 275, the court say: "The giving way of the building and the cracks under it may have been caused by its own weakness, or by the condition of the land under it, and not by excavation. It does not appear from the evidence that the building sunk or became cracked immediately upon the excavation's being made; and if it did, mere sychronism, or concurrence in respect to time, does not establish or tend to establish the relation of cause and effect."

Res Ipsa Loquitur.—A contrary rule has been maintained, under the maxim *res ipsa loquitur*.

Percolating Filthy Water.—Ball *v.* Nye, 99 Mass. 582, 97 Am. Dec. 56.

Excavating.—Bernheimer *v.* Kilpatrick, 53 Hun 316, 6 N. Y. Supp. 858.

5. City of Covington *v.* Gevlor, 93 Ky. 275, 19 S. W. 741; Delaney *v.* Bowman, 82 Mo. App. 252; Shrieve *v.* Stokes, 8 B. Mon. (Ky.) 453, 48 Am. Dec. 401.

Upon Question of Defective Wall. In Spohn *v.* Dives, 174 Pa. St. 474, 34 Atl. 192, the following instruction in the court of common pleas, upon the question of negligence in excavating resulting in injury to buildings on the adjoining premises, was approved on appeal: "There has been considerable testimony as to the materials this wall was constructed of, and the nature of the soil upon which it was placed, as to its being new earth, wet, soft, or dry, or sufficient to sustain an ordinary wall. All these matters you will take into consideration, and you will determine from them whether the fall or sagging of the plaintiff's wall, whereby the injuries to their property were caused, was the fault of an original defect in the construction of the plaintiff's wall. If so, of course, they cannot recover."

6. Walters *v.* Hamilton, 75 Mo. App. 237.

7. Louisville & N. R. Co. *v.* Bonhayo, 94 Ky. 67, 21 S. W. 526.

8. Notice Absolves from Extraordinary Precaution. — *California.* Sullivan *v.* Zeiner, 98 Cal. 346, 33 Pac. 209, 20 L. R. A. 730; Aston *v.* Nolan, 63 Cal. 269; Nippert *v.* Warneke, 128 Cal. 501, 61 Pac. 96.

Indiana.—Bohrer *v.* Dienhart Co., 19 Ind. App. 489, 49 N. E. 296; Block *v.* Haseltine, 3 Ind. App. 491, 29 N. E. 937.

Kansas.—Winn *v.* Abeles, 35 Kan. 85, 10 Pac. 443, 57 Am. Rep. 138.

Kentucky.—Shrieve *v.* Stokes, 8 B. Mon. 453 48, Am. Dec. 401; O'Neil *v.* Harkins, 8 Bush 650; Lapp *v.* Guttenkunst (Ky.), 44 S. W. 064; City of Covington *v.* Geylor, 03 Ky. 275, 19 S. W. 741; Clemens *v.* Speed, 03 Ky. 284, 19 S. W. 660, 19 L. R. A 240.

Maryland.—Shafer *v.* Wilson, 44 Md. 268; Bonaparte *v.* Wiseman, 89

of ordinary care and prudence in prosecuting such work.[9]

(B.) Failure to Give.— Evidence of failure to give notice of excavation may be competent to establish negligence on the part of the excavator,[10] it being a question of fact to be determined by all the circumstances of the case.[11]

Md. 12, 42 Atl. 918, 44 L. R. A. 482.

Missouri.—Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901.

New York.—Lasala *v.* Holbrook, 4 Paige 169, 25 Am. Dec. 524.

Pennsylvania.—Spohn *v.* Dives, 174 Pa. St. 474, 34 Atl. 192.

South Dakota. — Novotny *v.* Danforth, 9 S. D. 301, 68 N. W. 749.

Vermont.—Beard *v.* Murphy 37 Vt. 99, 86 Am. Dec. 693.

Rule Stated. — In Clemens *v.* Speed, 93 Ky. 284, 19 S. W. 660, 19 L. R. A. 240, the chief justice says: "A man improves his property knowing there must be changes in the improvement adjoining it, and it would be a harsh and unjust rule if he could improve as he chooses, and tie his neighbor down from doing so, however careful he may act. If the latter proposes to remove his building, and injury is likely to result therefrom to the building of his neighbor, he must notify him of his intention, that he may look to his own protection; and in making the removal or erecting a new building he must use reasonable care and precaution to protect that neighbor; but if all this is done and yet injury results, it is *damnum absque injuria.*"

9. Notice Does Not Exonerate From Ordinary Care. — *England.* — Massey *v.* Goyder, 4 Car. & P. 161, 19 Eng. C. L. 456.

California.—Aston *v.* Nolan, 63 Cal. 269.

Georgia.—Bass *v.* West, 110 Ga. 698, 36 S. E. 244.

Indiana. — Block *v.* Haseltine, 3 Ind. App. 491, 29 N. E. 937.

Missouri.—Eads *v.* Gains, 58 Mo. App. 586; Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901; Delaney *v.* Bowman, 82 Mo. App. 252.

South Dakota.—Ulrick *v.* Dakota Co., 2 S. D. 285, 49 N. W. 1054, and 3 S. D. 44, 51 N. W. 1023.

Virginia.—Tunstall *v.* Christian, 80 Va. 1, 56 Am. Rep. 581.

Statutory Notice Does Not Exempt From Common Law Duty.—In Aston *v.* Nolan, 63 Cal. 269, the court say: "It is apparent that by giving the notice a person excavating cannot relieve himself of any portion of his prudent care with which he must have conducted the work in the absence of the statutory provisions requiring notice. His excavation must be such as would not have caused the soil of the adjacent lot to tumble in had it remained in its natural state—not built upon. But if he gives the notice, and so conducts the work as that the soil, without the weight of the edifice, would not have fallen, his whole duty is performed."

10. Want of Notice Evidence of Negligence.—Beard *v.* Murphy, 37 Vt. 99, 86 Am. Dec. 693; Bonaparte *v.* Wiseman, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482; Krish *v.* Ford, (Ky.), 43 S. W. 237.

Statement of Rule.—In Schultz *v.* Byers, 53 N. J. Law 442, 22 Atl. 514, 13 L. R. A. 569, the court say: "There was error in rejecting the evidence which was offered to show that the defendant gave no notice to the plaintiff of his intention to excavate the land adjoining the house of the plaintiff's."

11. Bonaparte *v.* Wiseman, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482.

Knowledge May Have Been Otherwise Acquired.—In Mamer *v.* Lussem, 65 Ill. 484, it was held erroneous to instruct the jury that an excavator's liability depended on his having given reasonable notice, "because," as the court say: "It excludes the idea that plaintiff might have had full knowledge of the intended excavation from other sources."

A Circumstance of the Case.—In Montgomery *v.* Trustees, 70 Ga. 38, the chief justice approved the following charge, given after declining to charge that failure to give notice entitled plaintiff to recover without

(3.) Protecting Improvements. — Where due notice has been given of a proposed excavation, evidence is not admissible to charge the excavator with negligence, which shows his neglect or refusal to protect the building or other improvement on the adjoining premises by shoring, underpinning, or in similar manner.[12]

(4.) License to Enter. — Statutory provision may make evidence of neglect to furnish support competent as establishing negligence in case it is shown that license was given the excavator to enter on the adjoining premises sufficiently to provide for such support,[13] and evidence of the authorization of acts necessary for the excavator to perform his duty is sufficient to establish such license.[14]

(5.) Of Intent. — Where malicious motive is alleged on the part of one making an excavation, evidence of the purpose for which he prosecuted the work is admissible.[15]

c. *In Party Wall.* — In an action touching the use of a party wall owned by both adjoining proprietors, it is held that evidence is incompetent as establishing negligence which shows that the act complained of was a mere omission, as neglect to remove wall damaged by fire.[16]

B. Of Notice. — a. *In Excavating.* — **(1.) Actual Knowledge.** In actions involving the question of due notice in respect of excavations on adjoining premises, evidence is competent to exonerate

more: "If they failed to give notice, that is one circumstance from which you must determine whether negligence is imputable to them or not."

12. No Duty to Protect Improvements After Notice.—Block *v.* Haseltine, 3 Ind. App. 491, 29 N. E. 937; Larson *v.* Metropolitan Ry. Co., 110 Mo. 234, 19 S. W. 416, 33 Am. Rep. 439, 16 L. R. A. 333; Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901; Walters *v.* Hamilton, 75 Mo. App. 237; Peyton *v.* Mayor, 9 Barn. & C. 725, 17 Eng. C. L. 324; Massey *v.* Goyder, 4 Car. & P. 161, 19 Eng. C. L. 456; Lapp *v.* Guttenkunst (Ky.), 44 S. W. 964; City of Covington *v.* Geylor, 93 Ky. 275, 19 S. W. 741; Bonaparte *v.* Wiseman, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482.

Evidence of Due Notice Will Support a Recovery for the Cost of Such Protection.—Eads *v.* Gains, 58 Mo. App. 586; Walters *v.* Hamilton, 75 Mo. App. 237.

13. Sherwood *v.* Seaman, 2 Bosw. (N. Y.) 127.

14. Sun Ass'n. *v.* Tribune Ass'n. 44 N. Y. Super. 136; Walters *v.* Hamilton, 75 Mo. App. 237.

In the case of Ketchum *v.* Newman, 116 N. Y. 422 22 N. E. 1052, defendants excavated, shoring up the adjacent building, the license to enter for such purpose being revoked, before a wall had been erected, and it was held that suffering such shoring up was evidence competent to imply a license for further entry for purposes of building a new wall.

Tender of License. — It has been held that evidence need not be given of a tender of such license, until request for the license is shown. Cohen *v.* Simmons, 16 Hun 634, 21 N. Y. Supp. 385; Dorrity *v.* Rapp, 72 N. Y. 307.

15. Winn *v.* Abeles, 35 Kan. 85, 10 Pac. 443, 57 Am. Rep. 138. See City of Quincey *v.* Jones, 76 Ill. 231, 20 Am. Rep. 243.

Other Use Immaterial.—In showing that an excavation was made for a useful purpose, evidence of a use to which the land could have been adapted before excavating was held immaterial. Conboy *v.* Dickinson, 92 Cal. 600, 28 Pac. 809.

16. Mickel *v.* York, 66 Ill. App. 464; Ainsworth *v.* Lakin (Mass.), 62 N. E. 746.

the excavator from negligence in failing to give formal written or verbal notice, which tends to show that the adjoining owner had actual knowledge of such proposed excavation,[17] and such evidence has been received as equivalent to the notice required by statute.[18]

(2.) **Judicial Notice.** — Judicial notice will be taken of the fact that digging beneath a foundation wall will cause it to crack unless properly underpinned.[19]

C. Custom and Usage. — a. *In Excavating.* — In determining the question of negligence in excavating, evidence is admissible to show the methods usually employed by builders in such cases.[20]

b. *In Party Wall.* — In an action for negligent construction of a party wall, evidence of experts was held admissible to show if the insertion of flues was customary in erection of such walls, as tending to establish the fact that the wall was not negligently weakened thereby,[21] and like evidence is admissible in respect of the

17. **Knowledge Obviates Formal Notice.**—Schultz *v.* Byers, 53 N. J. Law 442, 22 Atl. 514, 13 L. R. A. 569.

Removal of Adjoining House. In Peyton *v.* The Mayor, 9 Barn & C. 725, 17 Eng. C. L. 324, in a suit by the reversioner against the owner of an adjoining house for removing the latter without shoring up the plaintiff's, Lord Tenterden, chief justice of the King's Bench, said: "It did not appear that the defendants gave any previous notice of the intention of pulling down their house, or of the time of doing so, but the defective state of both houses was known to the parties. . . The operation of taking down the defendant's house was carried on by day, and the operation must have been seen and known by the tenant and occupier of the plaintiff's house."

What Amounts to Knowledge. Where preliminary work was done, and discontinued for two months before the excavating was extended to where it injured the adjacent house, this was held insufficient to warrant the presumption that such adjacent owner had knowledge of the character and extent of the work. Bonaparte *v.* Wiseman, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482.

Object of Notice.—The object of the notice is, that the party may have the knowledge of what is going on, of the fact that the wall is being pulled down. The plaintiff had that knowledge, and that is notice. Montgomery *v.* Trustees, 70 Ga. 38.

18. **Actual Knowledge Equivalent to Statutory Notice.** — Ulrick *v.* Dakota Co., 3 S. D. 44, 51 N. W. 1023; Novotny *v.* Danforth, 9 S. D. 301, 68 N. W. 749.

19. Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901.

20. **Identity of Conditions.** Block *v.* Haseltine, 3 Ind. App. 491, 29 N. E. 937.

In Shrieve *v.* Stokes, 8 B. Mon. (Ky.) 453, 48 Am. Dec. 401, the chief justice, in holding that it was admissible to prove what was usually done by builders, said: "The evidence should have been confined to what was usual in cases exactly similar to the one on trial, and to the manner in which cellars are usually dug out in such cases."

Negligence in Omitting to Employ Method Must Be Alleged. In Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901, it was held that evidence was properly refused which sought to show that it was usual to excavate and wall up in sections, where no such charge of negligence was in the pleadings.

21. Gorham *v.* Gross, 125 Mass. 232, 28 Am. Rep. 234.

In this case the contract for construction provided that details not specified should be "decided by the custom in regard to party walls in the said city of W," and an exception to the testimony of an expert was

use of such wall by the insertion of joists.[22]

D. Expert Opinion. — In determining the question of reasonable care and skill in respect of the protection of property from injury by work on adjoining premises, evidence is competent to show whether the work was executed in accordance with the advice of one experienced in such matters,[23] though such opinion is not in itself conclusive evidence of due care and skill.[24]

E. Inspection of Premises. — a. *Actual.* — In general, inspection of the premises is not competent of itself as evidence, but as a means of enabling the jury to understand and apply the evidence adduced in court,[25] but such inspection is competent as direct evi-

overruled, on the ground that "not a technical custom, but the usual practice" was intended.

22. McMinn *v.* Karter, 116 Ala. 390, 22 So. 517. The court say: "We do not know judicially that the letting in of sleepers, joists, and rafters in the way proposed by the respondent would at all weaken or injure this wall."

23. Expert Opinion in Excavating.—Hammond *v.* Schiff, 100 N. C. 161, 6 S. E. 753; Larson *v.* Metropolitan Ry. Co., 110 Mo. 234, 19 S. W. 416, 33 Am. St. Rep. 439, 16 L. R. A. 330; Shrieve *v.* Stokes, 8 B. Mon. (Ky.) 453, 48 Am. Dec. 401; Block *v.* Haseltine, 3 Ind. App. 491, 29 N. E. 937.

Expert Opinion in Alteration of Wall.—Levy *v.* Fenner, 48 La. Ann. 1389, 20 So. 895.

Application of Rule.—In Winn *v.* Abeles, 35 Kan. 85, 10 Pac. 443, 57 Am. Rep. 138, an action by a lessee against his lessor for injury to tenement by excavation on adjoining land by third person, lessor testified that he had acted under advice of a skilled architect in protecting the building, and the court say: "In determining what action he should take to protect the building it was proper for Abeles to consult a practical and skillful man who had had experience in such matters, and to regard his advice in the means employed to accomplish his purpose. The testimony complained of was therefore competent to prove that he acted with reasonable caution, and with good faith in the steps taken by him."

24. Expert Opinion Not Conclusive.—Charless *v.* Rankin, 22 Mo 556, 66 Am. Dec. 642 the court say: "The question is, as to the fact of negligence, whether the work was done in a careless and improvident manner, so as to occasion greater risk to the plaintiff than in the reasonable course of doing the work he would have incurred, and not whether, in the opinion of the superintendent, no matter how skillful he may have been, everything was done that he deemed necessary. His opinion may be proper evidence to be considered by the jury, but it does not conclude the matter, constituting of itself a bar to the plaintiff's recovery."

Setting a Fire.—Evidence of one skilled in clearing land by fire has been held incompetent on the question of negligence. Higgins *v.* Dewey, 107 Mass. 494, 9 Am. Rep. 63; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Fraser *v.* Tupper, 29 Vt. 409.

25. See Horan *v.* Byrnes, 70 N. H. 531, 49 Atl. 569.

In Lateral Support, Damage Done By Removal Of. — In Schultz *v.* Bower, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630, in an action for damages for wrongful removal of lateral support, the jury, having been sent to view the premises, the court say: "In the charge the jury were told that they had been permitted to look the premises over, so that they might have another standard by which to gauge the evidence they had heard in court; that it might perhaps help them in determining whether the witnesses for the plaintiff or the witnesses for the defendant had more nearly told the truth in regard to the damages to the

dence of whether premises are diminished in value for rental purposes by the erection of a fence malevolently on adjoining land.[26]

b. *By Photograph.* — In an action for damages caused by the use of a party wall, photographs of the premises are admissible, their accuracy to be estimated from the testimony of the witnesses.[27]

2. Defenses. — A. CONTRIBUTORY NEGLIGENCE. — a. *In Lateral Support.* — In an action for injury to improvements caused by removing the lateral support of the adjoining premises, evidence of the omission by the plaintiff to use reasonable care and prudence may establish contributory negligence, considered with reference to the circumstances of the case,[28] and evidence of the excavator's promise to take such precautions has been held competent to disprove such contributory negligence.[29]

premises; . . . Our opinion is that, taking the charge as a whole, its fair import is that the jury might use what they saw or supposed they had learned on the view as evidence in the case, at least for some purposes. . . . This was error."

26. Smith *v.* Morse, 148 Mass. 407, 19 N. E. 393.

27. Dorsey *v.* Habersack, 84 Md. 117, 35 Atl. 96.

In this case, the court say: "There is sufficient evidence of the experience, etc., of the photographer to justify the court in admitting them; and, as both sides had photographs in evidence, the jury could judge of their accuracy from the testimony of the witnesses."

28. Walters *v.* Pfiel, 1 M. & M. 362, 22 Eng. C. L. 544. See Mayhew *v.* Burns, 103 Ind. 328, 2 N. E. 793; Shrieve *v.* Stokes, 8 B. Mon. (Ky.) 453, 48 Am. Dec. 401.

Contributory Negligence Held Not Admissible. — Gildersleeve *v.* Hammond, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46, the court say: "The defendants knowingly, intentionally and wilfully removed the natural support of the plaintiff's building by the removal of her own soil. The building fell while the work was going on. They knew the consequences that must inevitably follow their wrongful acts. One may not deliberately undermine my building, and then avoid the consequences by saying to me, 'You might have protected it.'" Stevenson *v.* Wallace, 27 Gratt. (Va.) 77.

29. Promise to Protect. — Louisville & N. R. Co. *v.* Bonhayo, 94 Ky. 67, 21 S. W. 526.

No Variance, as Showing Liability Upon Contract. — In Gildersleeve *v.* Hammond, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46, the court say: "It is, however, insisted by the defendants that the plaintiff was guilty of contributory negligence, in not shoring up and protecting her own property when she saw the imminent danger. Under the evidence, the defendants informed her that they would protect her building, and this would relieve her from any further responsibility. This evidence was objected to upon the ground that it tended to prove a different cause of action from that set up in the declaration; namely, a liability arising from contract. This clearly cannot be so. It was not introduced or used for that purpose. It was competent evidence to relieve the plaintiff from the charge of contributory negligence."

Notice of Change in Mode of Proceeding Must Be Shown.—In Larson *v.* Metropolitan Ry. Co., 110 Mo. 234, 19 S. W. 416, 33 Am. St. Rep. 439, 16 L. R. A. 330, the court say: "If defendant notified plaintiff that a certain mode of proceeding was to be pursued, and this led him to act upon that hypothesis, and refrain from taking steps which would otherwise have been necessary and prudent to insure the safety of his property, the risk of injury to the plaintiff in the premises imposed on defendant the duty towards him of conforming to the plan of work of which it

b. *In Party Wall, Plaintiff's Knowledge of Damage.* — In an action for injuries caused by the negligent use of a party wall, evidence that plaintiff was aware of the damage being caused, and could have prevented, but omitted to do so, is admissible in bar of recovery for such damages.[30]

B. Altering Burden of Easement. — a. *Weight of Improvement.* — The right of lateral and subjacent support being incident to the soil alone, evidence is competent in bar of an action for the removal of the same where no negligence is shown, which shows that the lateral or direct pressure of the soil was increased by the presence of a building or other improvement thereon.[31]

b. *Defect in Improvements.* — **(1.) In Lateral Support.** — Evidence has been held admissible to exonerate from injury to improvements through the removal of lateral support which reveals that such improvement fell because of its inherent insufficiency of construction,[32] but other decisions have held such evidence competent only

had advised him, or to reasonably notify him of a change in that plan in season to admit of his adopting protective measures of his own.

30. Hartford Co. *v.* Calkins, 186 Ill. 104, 57 N. E. 863.

31. Increasing Pressure in Lateral Support. — *England.* —Partridge *v.* Scott, 3 M. & W. 220, 49 Rev. Rep. 578; Wyatt *v.* Harrison, 3 Barn. & A. 871, 37 Rev. Rep. 566.

Illinois.—Mamer *v.* Lussem, 65 Ill. 484.

Kentucky. — Lapp *v.* Guttenkunst (Ky.), 44 S. W. 964; Krish *v.* Ford (Ky.), 43 S. W. 237.

Michigan. — Gildersleeve *v.* Hammond, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46; Hemsworth *v.* Cushing, 115 Mich. 92, 72 N. W. 1108.

Missouri.—Obert *v.* Dunn, 140 Mo. 476, 41 S. W. 901; Busby *v.* Holthaus, 46 Mo. 161.

Vermont.—Beard *v.* Murphy, 37 Vt. 99, 86 Am. Dec. 693.

Wisconsin.—Laycock *v.* Parker, 103 Wis. 161, 79 N. W. 327.

Intervening Land.—Evidence that an excavation injuring plaintiff's house was made on land of defendant not immediately adjoining was held incompetent to relieve the latter from liability, it being shown that he owned the intervening ground, the distance of the house from the line of excavation being a fact for the jury's consideration. See also, Witherow *v.* Tannerhill, 194 Pa. St. 21, 44 Atl. 1088; Austin *v.* Hudson River R. Co., 25 N. Y. 334.

And the fact that an alley of two or three feet in width lies between will not preclude a showing that the intervening earth was such as to render it highly probable it would give away. Shrieve *v.* Stokes, 8 B. Mon. (Ky.) 453, 48 Am. Dec. 401.

Increasing Pressure in Subjacent Support.—Wilms *v.* Jess, 94 Ill. 464, 34 Am. Rep. 242; Marvin *v.* Brewster Co., 55 N. Y. 538, 14 Am. Rep. 322; Pringle *v.* Vesta Co., 172 Pa. St. 438, 33 Atl. 690. But see Jones *v.* Wagner, 66 Pa. St. 429, 5 Am. Rep. 385.

Erections Which Have Been Held Insufficient as Evidence of Such Result.—O'Neil *v.* Harkins, 8 Bush (Ky.) 650; Farrand *v.* Marshall, 19 Barb. (N. Y.) 380; Gilmore *v.* Driscoll, 122 Mass. 199, 23 Am. Rep. 312; White *v.* Tebo, 43 App. Div. 418, 60 N. Y. Supp. 231.

Improvement Made by Third Person.—In Foley *v.* Wyeth, 2 Allen (Mass.) 131, 79 Am. Dec. 771, it was held that evidence of the erection of the improvement by a third person was inadmissible as a defense.

32. Defect in Improvement Excuses Injury.—Spohn *v.* Dives, 174 Pa. St. 474, 34 Atl. 192; Shafer *v.* Wilson, 44 Md. 268.

in determining the degree of negligence and in mitigation of damages.[33]

(2.) Condemned Building. — In an action for injury to an adjoining building through the negligent use of a party wall, evidence is not admissible to show that the building had been condemned by public authority, where no notice thereof had been given the owner.[34]

C. ESTOPPEL.— a. *In Lateral Support.*— **(1.) Consent.** —Evidence of the consent of an adjoining land owner to the removal of lateral support, will bar a recovery for injury occasioned thereby.[35]

(2.) Agreement to Protect. — An excavator is estopped to deny liability for damages caused by his failure in the performance of an express agreement to protect the improvements on adjoining premises.[36]

b. *In Party Wall.* — Permissive use of a wall as a party wall will estop the adjoining owner from objecting thereto.[37]

33. Stevenson *v.* Wallace, 27 Gratt. (Va.) 77.

In Dodd *v.* Holme, 1 Ad. & E. 493, 28 Eng. C. L. 240, the court say: "The bad condition of the house would only affect the amount of damages. If it was true that the premises could have stood only six months, the plaintiff still had a cause of action against those who accelerated its fall; the state of the house might render more care necessary on the part of the defendant not to hasten its dissolution."

34. Bonquois *v.* Monteleone, 47 La. Ann. 814, 17 So. 305.

35. City of Covington *v.* Geyler, 93 Ky. 275, 19 S. W. 741.

Attempt to Guard Against Injury. In Dowling *v.* Hennings, 20 Md. 179, 83 Am. Dec. 545, it was held that an attempt to guard against the injury threatened by such removal is incompetent as evidence of such assent.

36. Walters *v.* Hamilton, 75 Mo. App. 237.

Application of Rule.—In Delaney *v.* Bowman, 82 Mo. App. 252, the court say: "In making the proposed improvement the defendant voluntarily promised to protect the rear portion of the east wall of plaintiff's building. The plaintiff had the right to rely on this promise, although voluntarily made. . . . It is suggested that, as the plaintiff knew the width of the alley, and as he was as capable of judging of its sufficiency to protect his wall as the defendant, he could not complain that the means adopted by the defendant for his protection were ineffectual. It is true that the agent of the plaintiff had knowledge of the width of the wall, but it was not established that he knew the character of the soil as disclosed by the excavation, nor was he advised of the means adopted by defendant to prevent the accident. Under the promise of defendant he had the right to assume that defendant would adopt all reasonable means to prevent the sides of the excavation from caving."

37. Use of Wall Encroaching on Adjoining Land. — Zeininger *v.* Schnitzler, 48 Kan. 63, 28 Pac. 1007; Bank *v.* Thomas (Cal.), 41 Pac. 462.

Use of Wall Erected Wholly on One Side of Line. — Wilford *v.* Gerard (Ky.), 56 S. W. 416.

In this case, it was held that permissive use of a wall, with an understanding that the respective rights of the parties should be adjusted in the future, estopped the builder from demanding that the house be removed which was erected pursuant to such use.

Opening Windows in Wall. — In Dunscomb *v.* Randolph (Tenn.), 64 S. W. 21, the only objection made to the opening of windows in a wall was a notice that the adjoining owner would hold the co-tenant liable for any damages caused by falling bricks, and this was held evidence to estop the adjoining owner from objecting

3. Presumption. — A. Of Notice. — In absence of allegation and evidence of a want of notice, in an action for the removal of lateral support, it will be presumed that such notice was properly given.[38]

B. Of Contribution to Party Wall. — In the absence of statutory provision or agreement to the contrary, evidence of the use by an adjoining owner of a wall erected partly upon his land is not in general held admissible to establish an implied promise to contribute to the cost of such wall;[39] but the facts and circumstances of the case may be such as to establish the presumption.[40]

to such windows until she desired to use the wall.

38. Block *v.* Haseltine, 3 Ind. App 491, 29 N. E. 937.

In this case, the chief justice says: "As the complaint is silent upon the subject of notice, it must be presumed that notice was properly given."

39. No Implied Promise of Contribution. — *Alabama.* — Bisquay *v.* Jeunelot, 10 Ala. 245, 44 Am. Dec. 483; Autoniarchi *v.* Russell, 63 Ala. 356, 35 Am. Rep. 40; Preiss *v.* Parker, 67 Ala. 500.

Florida.—Orman *v.* Day, 5 Fla. 385.

Illinois.—McCord *v.* Herrick, 18 Ill. App. 423.

Massachusetts.—Wilkins *v.* Jewett, 139 Mass. 29, 29 N. E. 214.

Missouri.—Abrahams *v.* Krautler, 24 Mo. 69, 66 Am. Dec. 698.

West Virginia.—List *v.* Hornbrook, 2 W. Va. 340.

40. When Promise of Contribution Is Implied. — Day *v.* Caton, 119 Mass. 513, 20 Am. Rep. 347; Huck *v.* Flentye, 80 Ill. 258; Campbell *v.* Messier, 4 Johns. Ch. 334, 8 Am. Dec. 570; Keith *v.* Ridge, 146 Mo. 90, 47 S. W. 904; Sanders *v.* Martin, 2 Lea (Tenn.) 213, 31 Am. Rep. 598; Wilford *v.* Gerard (Ky.), 56 S. W. 416; Rindge *v.* Baker, 57 N. Y. 209, 15 Am. Rep. 475.

ADJUDICATION.—See Judgment.

ADJUSTMENT OF LOSS.—See Insurance.

ADMINISTRATORS.—See Executors and Administrators.

ADMIRALTY.

By H. L. Gear.

I. GENERAL PRINCIPLES AND RULES.

1. In Cases Generally. — A. Admiralty Proceedings Distinguished. — Admiralty proceedings are of a peculiar nature, and as a class, are distinguished from actions at law and suits in equity.[1] In general, no proceedings can be more unlike than those in the common law courts and in the courts of admiralty.[2]

a. *Trial by Jury Not a Test.* — That a trial by jury may be had in a common law court of the same subject matter, is not a test of the jurisdiction in admiralty,[3] and does not require a trial by jury in admiralty court.[4] When a case of concurrent jurisdiction comes rightfully into a court of admiralty, it is to be conducted, tried and decided by the court according to the usages of that court;[5] in which a trial by jury is generally not allowed,[6] except in cases arising upon the lakes under the Act of 1845.[7]

b. *Court Judge of Law and Fact.* — A court of admiralty is judge both of the law and of the facts.[8] A verdict of a jury, when allowed, is deemed only advisory to the court.[9] The court of admiralty will determine a question of fraud or good faith in the purchase of a vessel, from the evidence, upon the same principles which usually govern trials by jury.[10]

c. *Proceedings Modeled Upon Civil Law.* — The proceedings in the courts of admiralty are, in general, modeled after the forms of the civil law,[11] though the courts of the United States do not

1. Waring *v.* Clarke, 5 How. 441. **Exclusion From General Statutes.** Admiralty proceedings are so peculiar and diverse from ordinary civil suits, that they will be deemed excluded from general statutes regulating civil proceedings, unless expressly alluded to. Atkins *v.* Fibre Disintegrating Co., 1 Ben. 118, 2 Fed. Cas. No. 600.

2. The Schooner Adeline, 9 Cranch 244. **Principles of Common Law Inapplicable.** — The principles of the common law are inapplicable to process and proceedings in admiralty. Clarke *v.* New Jersey Steam Nav. Co., 1 Story 531, 5 Fed. Cas. No. 2859; The Harriet, Olc. 222, 11 Fed. Cas. No. 6096.

3. Waring *v.* Clarke, 5 How. 441.

4. Davis *v.* New Brig, Gilp. 473, 7 Fed. Cas. No. 3643; Boon *v.* The Hornet, Crabbe 426, 3 Fed. Cas. No. 1640; Waring *v.* Clarke, 5 How. 441.

5. Boon *v.* The Hornet, Crabbe 426, 3 Fed. Cas. No. 1640; Davis *v.* New Brig, Gilp. 473, 7 Fed. Cas. No. 3643; Atlee *v.* Packet Co., 21 Wall. 389.

6. Waring *v.* Clarke, 5 How. 441; The Sarah, 8 Wheat. 391; U. S. *v.* The Betsey and Charlotte, 4 Cranch 442; Whelan *v.* U. S., 7 Cranch 112; Parsons *v.* Bedford, 3 Pet. 433; The Margaret, 9 Wheat. 421; The Vengeance, 3 Dall. 297; Atlee *v.* Packet Co., 21 Wall. 389; The Paolina S., 11 Fed. 171; Clark *v.* U. S., 2 Wash. C. C. 519, 5 Fed. Cas. No. 2837; The Erie Belle, 20 Fed. 63; Bigley *v.* The Venture, 21 Fed. 880.

7. The Eagle, 8 Wall. 15; Gillet *v.* Pierce, 1 Brown Adm. 553, 10 Fed. Cas. No. 5437.

8. Elwell *v.* Martin, 1 Ware 53, 8 Fed. Cas. No. 4425.

9. The Empire, 19 Fed. 558; Sanderson *v.* City of Toledo, 73 Fed. 220.

10. The Romp, Olc. 196, 20 Fed. Cas. No. 12,030.

11. American Ins. Co. *v.* Johnson, Blatchf. & H. 9, 1 Fed. Cas. No. 303; U. S. *v.* The Betsey and Charlotte, 4 Cranch 442; The Schooner Adeline, 9 Cranch 244. **Proceedings in Rem.** — A proceeding *in rem* is a proceeding under

exercise all the powers of admiralty courts organized under the civil law.[12]

(1.) Process Acts of Congress. — The Process Act of 1789 regulating proceedings in admiralty referred generally to the civil law; but the Act of 1792 employed the terms: "According to the principles, rules and usages which belong to courts of admiralty, as distinguished from courts of common law," which referred to the admiralty practice of this country, as engrafted upon the British practice.[13]

d. *Causes Governed by Maritime Law.* — Causes in admiralty are governed by the rules of the maritime law, as recognized and adopted in this country,[14] excepting in so far as modified by the legislation of Congress.[15]

(1.) Effect of Local Law. — The maritime law and the jurisdiction of the admiralty courts thereunder cannot be limited or abrogated by any local law,[16] though a court of admiralty may, in the exercise of its maritime jurisdiction, enforce a state statute conferring a maritime right, according to the rules of courts of admiralty.[17]

(2.) Law of Nations. — A court of admiralty is a court of the law

the civil law. The Moses Taylor, 4 Wall. 411.

12. *Ex parte*, Easton, 95 U. S. 68.

13. Manro *v.* Almeida, 10 Wheat 473.

14. Maritime Law in the United States. — Though the constitution grants judicial power over all cases of admiralty and maritime jurisdiction, a case in admiralty does not arise under the constitution or laws of the United States, but such cases are as old as navigation, and the ancient law, admiralty and maritime, is applied by the federal courts to the cases as they arise. American Ins Co. *v.* Canter, 1 Pet. 511.

The constitutional grant had reference to the maritime law which was generally recognized in this country when the constitution was adopted. *Ex parte* Easton, 98 U. S. 68; The Lottawanna, 21 Wall. 558.

And is not to be restricted or interpreted by what were cases of admiralty and maritime jurisdiction in England. Waring *v.* Clark, 5 How 441; Steele *v.* Thatcher, 1 Ware 85, 22 Fed. Cas. No. 13,348; Davis *v.* Seneca, Gilp. 10, 7 Fed. Cas. No. 3650; The Seneca, 3 Wall. Jr. 395, 21 Fed. Cas. No. 12,670; The Huntress, 2 Ware 89, 12 Fed. Cas. No. 6914.

Operation of Maritime Law. The maritime law is only so far operative in any country, as it is adopted by its laws and usages. The received maritime law may differ in different countries without impairing the general integrity of the system, as a harmonious whole. The Lottawanna, 21 Wall. 558; The Scotland, 105 U. S. 24.

15. The Barque Chusan, 2 Story 455, 5 Fed. Cas. No. 2717; U. S. *v.* The Little Charles, 1 Brock. 347, 26 Fed. Cas. No. 15,612; The Siren, 13 Wall. 389; Butler *v.* Boston etc. Steamship Co., 130 U. S. 527; The City of Washington, 92 U. S. 31; *Ex parte* Garnett, 141 U. S. 1.

16. Butler *v.* Boston etc. Steamship Co., 130 U. S. 527; The J. E. Rumbell, 148 U. S. 1; Workman *v.* New York City, 179 U. S. 552; The Lottawanna, 21 Wall. 558; The Eagle *v.* Fraser, 8 Wall. 15; The Barque Chusan, 2 Story 455, 5 Fed. Cas. No 2717.

17. Peyroux *v.* Howard, 7 Pet. 324; The J. E. Rumbell, 148 U. S. 1; The Lottawanna, 21 Wall. 558.

Jurisdiction Not Conferred. — No state law can confer jurisdiction upon the admiralty courts, and local laws can only furnish rules to ascertain the rights of the parties, in cases of maritime jurisdiction. The Orleans, 11 Pet. 175.

of nations, and derives in part its jurisdiction from that law.[18] The law of prize, which is part of the general maritime law,[19] is based upon the law of nations, consisting of the common consent of civilized countries.[20] No one nation can change the law of the sea.[21]

(3.) Usages of the Sea. — The usages of the sea were the rules of decision in admiralty in cases of collision, prior to the adoption of the sailing rules by Congress.[22]

(4.) Judicial Question. — The question as to what are the true limits of the maritime law, and of the admiralty jurisdiction, is a judicial question.[23]

B. General Rules of Evidence. — a. *State Rules Inapplicable.* State laws and rules regulating evidence in the state courts are not applicable in a court of admiralty holding its session within the state.[24]

b. *Common Law Rules.* — In general, courts of admiralty follow the common law rules of evidence, when justice does not require a departure therefrom,[25] but they are not confined to the strict rules of common law as to the admission of evidence.[26] Where justice

18. The Huntress, 2 Ware 89, 12 Fed. Cas. No. 6914.

19. The Siren, 13 Wall. 389; The Admiral, 3 Wall. 603.

20. The Schooner Adeline, 9 Cranch 244; 30 Hogsheads of Sugar, 9 Cranch 191.

General Maritime Law. — From the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is received by those nations in common became the maritime law of the world. The Lottawanna, 21 Wall. 558.

21. The law of the sea is of universal obligation, and no statutes of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. The Scotia, 14 Wall. 170.

22. The City of Washington, 92 U. S. 31.

23. The Lottawanna, 21 Wall. 558.

24. Construction of Judiciary Act. — § 34 of the Judiciary act of Congress which adopts state rules of evidence applies only to civil cases at common law, and not to cases in admiralty. The Independence, 2 Curt. 350, 13 Fed. Cas. No. 7014; The William Jarvis, 1 Spr. 485, 30 Fed. Cas. No. 17,697.

Competency of Witnesses. — State statutes making the parties competent witnesses cannot apply to a court of admiralty. The Independence, 2 Curt. 350, 13 Fed. Cas. No. 7014; The Australia, 3 Ware 240, 2 Fed. Cas. No. 667.

Depositions "According to Common Usage." — § 866 of the Revised Statutes authorizing federal courts to issue commissions to take depositions "according to common usage," does not require a court of admiralty to conform to the practice of the state courts, and it may by rule provide a different method for taking depositions. The Westminster, 96 Fed. 766.

25. The J. F. Spencer, 3 Ben. 337, 13 Fed. Cas. No. 7315; The Ann Green, 1 Gall. 274, 1 Fed. Cas. No. 414; The Liverpool Packet, 1 Gall. 513, 15 Fed. Cas. No. 8406; The San Jose Indiano, 2 Gall. 268, 21 Fed. Cas. No. 12,322; Jeffries *v.* De Hart, 102 Fed. 765.

Rules as to Competency of Witnesses. — The rules of the common law as to the competency of witnesses are adopted in a court of admiralty in the exercise of its jurisdiction as an instance court. The Boston, 1 Sum. 328, 3 Fed. Cas. No. 1673; except as modified by act of congress. U. S. *v.* Cigars, Woolw. 123, 28 Fed. Cas. No. 16,451.

26. Elwell *v.* Martin, 1 Ware 53,

requires it, courts of admiralty may take notice of facts outside of the record,[27] and may accept hearsay and belief as testimony.[28]

c. *Laxity of Rules in Admiralty.* — From the nature of the case heard, the character of the witnesses, and the place (the sea) where not much documentary evidence is made or preserved, the rules of admiralty are lax and must often bend to circumstances.[29]

d. *Rules of Equity.* — Courts of admiralty, within the limits of their jurisdiction, administer justice rather according to the enlarged and liberal rules and principles of equity, than the strict rules of the common law,[30] and will equitably construe documentary evidence.[31] In causes in admiralty based upon negligence, if the negligence alleged is proved, evidence of the contributory negligence of the libellant, will not bar recovery, as in an action at law; but the admiralty court will determine the case upon principles of equity, and damages will be awarded or apportioned between the parties, as equity and justice may require.[32] But courts of admiralty do not recognize the equity rule making a sworn answer equal to two witnesses, or one witness with corroborating circumstances.[33] Nor can they award distinctly equitable relief,[34] or enforce equitable titles.[35]

8 Fed. Cas. No. 4425; The J. F. Spencer, 3 Ben. 337, 13 Fed. Cas. No. 7315; The Vivid, 4 Ben. 319, 28 Fed. Cas. No. 16,978; The Harriet, Ole. 222, 11 Fed. Cas. No. 6096.

Proof of Commercial Documents. A court of admiralty may receive commercial documents in evidence on proof less formal than would be necessary in a common law court. The Boskenna Bay, 22 Fed. 662.

27. The J. F. Spencer, 3 Ben. 337, 13 Fed. Cas. No. 7315.

28. The Olinde-Rodrigues, 89 Fed. 105; The Estrella, 4 Wheat. 298.

29. The Vivid, 4 Ben. 319, 28 Fed. Cas. No. 16,978.

30. The Sarah Ann, 2 Sum. 206, 21 Fed. Cas. No. 12,342; The Betsy and Rhoda, 2 Ware 117, 3 Fed. Cas. No. 1366; Brown *v.* Lull, 2 Sum. 443, 4 Fed. Cas. No. 2018; The Virgin, 8 Pet. 538; O'Brien *v.* Miller, 168 U. S. 287; Brown *v.* Burrows, 4 Fed. Cas. No. 1995; Richmond *v.* New Bedford Copper Co., 2 Low. 315, 20 Fed. Cas. No. 11,800; Pope *v.* Nickerson, 3 Story 465, 19 Fed. Cas. No. 11,274.

31. O'Brien *v.* Miller, 168 U. S. 287; Pope *v.* Nickerson, 3 Story 465, 19 Fed. Cas. No. 11,274; The Virgin, 8 Pet. 538.

32. The Explorer, 20 Fed. 135; The Wanderer, 20 Fed. 140; The Daylesford, 30 Fed. 633; The Mabel Comeaux, 24 Fed. 490; The Truro, 31 Fed. 158; Olson *v.* Flavel, 34 Fed. 477; The Eddystone, 33 Fed. 925; Anderson *v.* The Ashebrooke, 44 Fed. 124; Finch *v.* The Lighter Mystic, 44 Fed. 398; Carmody *v.* The City of Rome, 49 Fed. 392; The Max Morris, 28 Fed. 881; The Continental, 14 Wall. 345; Atlee *v.* Packet Co., 21 Wall. 389; The Mariana Flora, 11 Wheat. 1; The North Star, 106 U. S. 17; Hostetter *v.* Park, 137 U. S. 1.

33. U. S. *v.* The Matilda, 5 Hughes 44, 26 Fed. Cas. No. 15,741; Sherwood *v.* Hall, 3 Sum. 127, 21 Fed. Cas. No. 12,777; Jay *v.* Almy, Woodb. & M. 262, 13 Fed. Cas. No. 7236; Hutson *v.* Jordan, 1 Ware 385, 393, 12 Fed. Cas. No. 6959.

34. Montgomery *v.* Henry, 1 Dall. 52; Ward *v.* Thompson, 22 How. 330; Bogart *v.* The John Jay, 17 How. 399; Schuchardt *v.* Babbidge, 19 How. 239; Davis *v.* Child, 2 Ware 78, 7 Fed. Cas. No. 3628; The William D. Rice, 3 Ware 134, 29 Fed. Cas. No. 17,691; Paterson *v.* Dakin, 31 Fed. 682.

35. Kynoch *v.* The S. C. Ives, Newb. 205, 14 Fed. Cas. No. 7958; The William D. Rice, 3 Ware 134, 29 Fed. Cas. No. 17,691; The Ella

e. *Inspection of Books and Papers.* — A proceeding *in rem* in admiralty is not within the act of Congress of 1782 for ordering the inspection of books and papers,[36] nor can an inspection or copies of letters or documents not in issue be obtained by interrogatories annexed to the libel.[37] Where a paper has been intrusted to the libellant for the benefit of both parties, the court, on motion, will order its production before answer.[38]

f. *Proof of Foreign Laws.* — In the district court of the United States sitting in admiralty, the law of England may be proved by printed books of statutes, reports of decisions, and text writers, as well as by the testimony of experts.[39] Foreign laws which justify the seizure of a vessel cannot be proved by the mere certificate of the American consul, but must either be verified by oaths, or authenticated under the national seal.[40] Foreign laws must be proved as facts in courts of admiralty, as well as in other courts.[41] The written foreign law may be proved by a properly authenticated copy; the unwritten by the testimony of experts.[42] A collision occurring in foreign waters between foreign vessels, is to be governed by the foreign law, if it is proved as a fact, but if not so proved, it will be governed by the maritime law of the forum.[43] Marine ordinances of a foreign country promulgated by the lawful executive authority of the United States, are admissible in a court of admiralty in this country.[44]

2. In Prize Causes. — A. General Rules. — a. *Rules of Law.* In prize causes, in a special manner, the allegations, proofs and proceedings, are in general, modeled on the civil law, with such alterations as the practice of nations, and the rights of belligerents and neutrals unavoidably impose.[45] The court of prize is emphati-

J. Slaymaker, 28 Fed. 767; Wenberg *v.* Cargo of Mineral Phosphate, 15 Fed. 285; Rea *v.* The Eclipse, 135 U. S. 599; Kellum *v.* Emerson, 2 Curt. 79, 14 Fed. Cas. No. 7669.

36. U. S. *v.* Twenty-eight Packages of Pins, Gilp. 306, 28 Fed. Cas. No. 16,561.

37. Havermeyers & E. S. R. Co. *v.* Compania Transatlantica Espanola, 43 Fed. 90.

38. Letter. — A letter addressed to the libellant forming part of a contract, is not such a paper as will be ordered to be produced. The Voyaguer de la Mer, 6 Sprague 372, 13 Fed. Cas. No. 7025.

39. The Pawashick, 2 Low. 142, 19 Fed. Cas. No. 10,851.

Law of Great Britain, Matter of Fact. — The law of Great Britain, since the Declaration of Independence, is the law of a foreign country, and as such is matter of fact which the courts of this country cannot be presumed to be acquainted with, and should be pleaded and proved in a court of admiralty. The Montana, 129 U. S. 104.

40. Church *v.* Hubbart, 2 Cranch 165.

41. The Montana, 129 U. S. 104; Talbot *v.* Seeman, 1 Cranch 1.

42. Ennis *v.* Smith, 14 How. 400.

43. The Scotland, 105 U. S. 24.

44. Proof of Law of France. The law of France upon a matter of such concern as the condemnation of a neutral vessel, which was promulgated in this country as the law of France by the joint act of the departments of state and of war, assumed a character of such notoriety as to be admissible in evidence in our courts of admiralty. Talbot *v.* Seeman, 1 Cranch 1.

45. The Schooner Adeline, 9 Cranch 244; The Olinde Rodrigues,

cally a court of the law of nations.[46] The rules of the prize court as to the vesting of property are those of common law,[47] but common law rules of evidence and practice cannot be allowed to prevail in prize cases.[48] The common law doctrine as to the incompetency of interested witnesses is not applicable in prize cases.[49]

b. *Oral Testimony Not Allowed.* — Oral testimony in open court is not permissible in prize cases,[50] and it is an irregularity to allow the captured crew to be examined or re-examined *viva voca*, in open court.[51]

B. Proofs Upon Hearing. — Prize causes are usually heard, in the first instance, upon papers found on the captured vessel, and the examination of officers and members of the captured crew, taken *in preparatorio*.[52]

a. *Papers of Captured Vessel.*—All ship's papers found on board, including bills of lading, letters, and other papers relating to the ship or cargo, constitute evidence on the question of prize, or no prize, and are presumptive evidence of the facts of which they speak.[53] A bill of lading affords a weak presumption of ownership, which should be supported by satisfactory proof.[54]

(1.) Custody and Sealing of Papers. — The custody of the papers of the captured vessel belongs exclusively to the prize court, and the captors must deliver them on oath immediately on arrival in port to the registry of the prize court.[55] The papers are to be kept under seal, until the cause is ready for hearing, when their publication is ordered.[56]

89 Fed. 105; Penhallow *v.* Doane, 3 Dall. 54.

46. Thirty Hogsheads of Sugar, 9 Cranch 191; The Schooner Adeline, 9 Cranch 244; Penhallow *v.* Doane, 3 Dall. 54, Prize Cases, 2 Black 635.

47. The San Jose Indiano, 2 Gall. 268, 21 Fed. Cas. No. 12,322.

48. The Dos Hermanos, 2 Wheat. 76, 1 Wheat. Appendix 499.

49. The Anne, 3 Wheat. 435.

50. The George, 2 Gall. 249, 10 Fed. Cas. No. 5327.

51. The Pizarro, 2 Wheat. 227; The Dos Hermanos, 2 Wheat. 76; 1 Wheat. Appendix 498.

52. The Sally Magee, 3 Wall. 451; The Sir William Peel, 5 Wall. 517; The Newfoundland, 89 Fed. 99; The Olinde Rodrigues, 89 Fed. 105; The Adula, 176 U. S. 361; The George, 1 Wheat. 408; The Pizarro, 2 Wheat 227; The Amiable Isabella 6 Wheat 1; The Dos Hermanos, 2 Wheat, 76; The Falcon, Blatchf. Pr. Cas. 52, 8 Fed. Cas. No. 4616; The Julia, 2 Spr. 164, 14 Fed. Cas. No. 7576; The Liverpool Packet, 1 Gall. 513, 15 Fed. Cas. No. 8406; The Ann Green, 1 Gall. 274, 1 Fed. Cas. No. 414, 1 Wheat. Appendix 498; Cushing *v.* Laird, 107 U. S. 69.

53. Effect of Papers as Proof. If the papers affirm the ship and cargo to be such property as is not prize, there must be an acquittal, unless the captors are able by counter-evidence to defeat the presumption arising from the papers, and to show ground for condemnation; and on the other hand, if the papers affirm the ship and cargo to belong to any enemy, there must be a condemnation, unless those contesting the capture can produce clear and unquestionable evidence to the contrary. The Resolution, 2 Dall. 19.

54. The Arrabella, 2 Gall. 368, 1 Fed. Cas. No. 501.

55. The Dos Hermanos, 2 Wheat. 76; Cushing *v.* Laird, 107 U. S. 69; 1 Wheat. Appendix 495; 2 Wheat. Appendix 81; The Diana, 2 Gall. 93, 7 Fed. Cas. No. 3876.

56. Object of Sealing Papers.

(2.) Absence of Papers. — The omission of the captors to bring in the ship's papers must be explained to the court, or condemnation will be withheld.[57] The failure of the owners of the captured property to put on board documentary evidence of the property forfeits their right to prove it.[58] The absence of bills of lading and the manifest, and the want of any invoice or charter-party on a vessel carrying contraband of war, are circumstances indicating a strong suspicion of the illegality of the voyage.[59] The absence of the log-book of a vessel captured under suspicious circumstances, is evidence against the honesty of her voyage.[60] But the absence of the ship's papers will not justify condemnation if a legitimate voyage is shown.[61]

(3.) Concealment and Spoliation of Papers. — If any of the ship's papers are concealed and suppressed, and not given up to the captors, nor produced at the preparatory examination, they should not afterwards be allowed to be proved.[62] The spoliation of papers upon the captured vessel, when seized, warrants the most unfavorable inferences against her, if not satisfactorily explained,[63] but it is open to satisfactory explanation, and is not of itself a sufficient ground of condemnation,[64] though it is evidence more or less con-

The practice of the prize courts to seal the ship's papers is designed to prevent injustice and fabrication of evidence, and to detect fraud and prevent false claims to ownership. The Cuba, 2 Spr. 168, 6 Fed. Cas. No. 3457.

Papers Not Admissible at Hearing. — Papers not delivered to the custody of the court and offered for the first time at the hearing in the prize court, are not admissible. The Peterhoff, Blatchf. Pr. Cas. 463, 19 Fed. Cas. No. 11,024; The Liverpool Packet, 1 Gall. 513, 15 Fed. Cas. No. 8406; The Ann Green, 1 Gall. 274, 1 Fed. Cas. No. 414; 1 Wheat. Appendix, note II, 497.

57. The Arabella, 2 Gall. 368, 1 Fed. Cas. No. 501.

58. The Flying Fish, 2 Gall. 374, 9 Fed. Cas. No. 4892.

59. The Springbok, Blatchf. Pr. Cas. 434, 22 Fed. Cas. No. 13,264; The Stephen Hart, Blatchf. Pr. Cas. 387, 22 Fed. Cas. No. 13,364.

60. The Joseph H. Toone, Blatchf. Pr. Cas. 223, 13 Fed. Cas. No. 7541.

61. Cushing *v.* U. S., 22 Ct. Cl. 1.

Absence of Papers of American Merchantman. — The absence of the passport and manifest required to protect an American merchantman from search, under a treaty, does not render her liable to condemnation, but merely places her under the rules of international law. The Venus, 27 Ct. Cl. 116.

62. The Ann Green, 1 Gall. 274, 1 Fed. Cas. No. 414.

Rule Not to be Relaxed. — It is a rule not to be relaxed, that as the evidence to acquit or condemn must come in the first instance from the ship's papers and preparatory examination, no papers should be allowed which are not produced at the first examination. Papers to be allowed as evidence at the hearing should be delivered up, at least, at the time of the preparatory examination, and in an unmutilated and unsuspicious state. The Liverpool Packet, 1 Gall. 513, 15 Fed. Cas. No. 8406.

63. The Andromeda, 2 Wall. 48; The Bermuda, 3 Wall. 514; The Julia, 8 Cranch 181, 21 Fed. Cas. No. 12,232; The Pizarro, 2 Wheat. 227; The Olinde Rodrigues, 174 U. S. 510; The St. Lawrence, 1 Gall. 467; The Mersey, Blatchf. Pr. Cas. 187, 17 Fed. Cas. No. 9489; The Peterhoff, Blatchf. Pr. Cas. 463, 19 Fed. Cas. No. 11,024; The Cheshire, 3 Wall. 234, 5 Fed. Cas. No. 2655.

64. Rule Stated. — "Concealment,

vincing of the existence of such ground.[65] Where concealment of papers touching shipment on an enemy's vessel is indicated, there must be clear and decisive proof of the integrity of the claim, or condemnation will follow.[66]

(4.) Other Frauds Concerning Papers. — Where false and simulated papers are mixed with genuine papers, the captors are not bound to unravel the fraud, or to trust the explanation of those captured, but should submit the whole to the scrutiny and decision of the prize court.[67] Where the papers show that the ship is off her regular course, a strong presumption of fraud arises.[68] Where the ship's papers show an absolute port of destination, the concealment from them of the fact that it was contingent upon the raising of a blockade, is strong evidence of the dishonesty of the voyage.[69] Where the destination stated in the ship's papers is false, and the real voyage is of doubtful legality, the false destination is sufficient ground for condemnation.[70] The attempt of a neutral vessel by a deceptive representation in the ship's papers to mislead a blockading force, is fraudulent misconduct which justifies condemnation.[71] The mutilation of the log-book of a vessel seized under suspicious circumstances, unexplained by proof, is sufficient ground for condemnation.[72] Where a ship sailing with false papers carries contraband of war, and the master testifies falsely as to the cargo, the ship will be condemned.[73]

(5.) Enemy's Flag, Passport and License. — Evidence of the voluntary use of the enemy's flag and passport,[74] or of the documentary

or even spoliation of papers is not of itself sufficient ground of condemnation in a prize court. It is undoubtedly a very awakening circumstance, calculated to excite the vigilance, and to justify the suspicions of the court. But it is a circumstance open to explanation, . . . and if the party in the first instance, frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If on the other hand, the spoliation be unexplained, . . . if the cause labor under heavy suspicions . . . it is made the ground of a denial of further proof, and condemnation follows from defects in the evidence, which the party is not permitted to supply." The Pizarro, 2 Wheat. 227; The Olinde Rodrigues, 174 U. S. 510.

65. The Olinde Rodrigues, 174 U. S. 510.

66. The London Packet, 1 Mason 14, 15 Fed. Cas. No. 8474.

67. The George, 1 Mason 24, 10 Fed. Cas. No. 5328.

68. The Joseph H. Toone, Blatchf. Pr. Cas. 223, 13 Fed. Cas. No. 7541.

69. The Cheshire, Blatchf. Pr. Cas. 151, 5 Fed. Cas. No. 2655.

70. The Revere, 2 Spr. 107, 20 Fed. Cas. No. 11,716.

71. The Louisa Agnes, Blatchf. Pr. Cas. 107, 15 Fed. Cas. No. 8531.

72. The Ella Warley, Blatchf. Pr. Cas. 288, 8 Fed. Cas. No. 4373.

73. The Peterhoff, Blatchf. Pr. Cas. 463, 19 Fed Cas. No. 11,024.

74. The Hiawatha, Blatchf. Pr. Cas. 1, 12 Fed. Cas. No. 6451; The Hallie Jackson, 11 Fed. Cas. No. 5961; The Guido, 175 U. S. 382.

Estoppel of Owners. — When a ship is captured as prize of war, she is bound by the flag and pass under which she sailed. Owners are not at liberty, when there happens to be evidence against them, to turn around and deny the character the ship has assumed for their benefit. The William Bagaley, 5 Wall. 410. It is a well settled principle of the

license of the enemy, used in the enemy's interest, though under another's flag,[75] is sufficient proof that she is the enemy's vessel, and justifies condemnation.

(6.) Invocation of Papers From Other Causes. — The captors may invoke before the prize court, the ship's papers and other original evidence in other prize causes in which the same claimants have an interest,[76] but not depositions taken as further proof.[77] The invocation of papers by a claimant is granted only on motion and at the discretion of the court.[78]

b. *Captured Property As Evidence.* — The captured property itself is part of the original evidence allowed at the first hearing, and the court may order a survey and report thereof, for purposes of proof.[79]

law of prize that sailing under flag and pass of an enemy, is one of the modes by which a hostile character may be affixed to property; for if a neutral vessel enjoys the privilege of a foreign character, she must expect at the same time to be subject to the inconveniences attaching to that character. Rogers *v.* The Amado, Newb. 400, 20 Fed. Cas. No. 12,005. The fact that British subjects were interested, and that British underwriters insured a vessel which had a Spanish registry and sailed under a Spanish flag and Spanish license, and was officered and manned by Spaniards, cannot change the rule that she must be deemed a Spanish ship and dealt with accordingly. The Pedro, 175 U. S. 354.

75. The Julia, 8 Cranch 181; The Aurora, 8 Cranch 203; The Hiram, 1 Wheat. 440; The Ariadne, 2 Wheat. 143; The Langdon Cheves, 4 Wheat. 103; The Adula, 176 U. S. 361; The Alliance, Blatchf. Pr. Cas. 262, 1 Fed. Cas. No. 245.

Concealed Enemy Interest. — The vessel of a nation sailing under the passport or license of its enemy, affords a strong presumption of concealed enemy interest, or at least of ultimate destination of enemy use. The Julia, 8 Cranch 181.

License to Pass Fortifications. Evidence of mere possession of a custom house clearance and a license or permit from the enemy to pass fortifications, does not render the vessel liable to seizure otherwise than it indicated that she is the enemy's property. The Sarah Starr, Blatchf. Pr. Cas. 69, 21 Fed. Cas. No. 12,352.

76. The Springbok, Blatchf. Pr. Cas. 434, 22 Fed. Cas. No. 13,264; The George, 1 Wheat. 408; The Experiment, 4 Wheat. 84. Invocation of such papers should regularly be allowed after the hearing and only when there are suspicious circumstances.

77. The Experiment, 4 Wheat. 84; The Joseph H. Toone, Blatchf. Pr. Cas. 124, 13 Fed. Cas. No. 7540.

78. The Springbok, Blatchf. Pr. Cas. 434, 22 Fed. Cas. No. 13,264; The Peterhoff, Blatchf. Pr. Cas. 463, 19 Fed. Cas. No. 11,024.

79. Test of Ground of Seizure. The law does not authorize distinct tests of the ground of seizure to the captors and to the court, and the prize property is part of the evidence in every prize cause upon the original hearing. The cargo cannot deceive, and an inspection thereof for concealed contraband is usual. The origin of the captured property may be ascertained by the court, regardless of the formal papers. The Liverpool Packet, 1 Gall. 513, 15 Fed. Cas. No. 8406; The Dos Hermanos, 2 Wheat, 76; Cushing *v.* Laird, 107 U. S. 69; The Flying Fish, 2 Gall. 374, 9 Fed. Cas. No. 4892.

Duty of Captors, How Enjoined. The duty of the captors to bring in for examination the principal officers of the prize, is enjoined by the prize act, by the instructions of the president, and by the settled rule of the prize courts. The Arabella, 2 Gall. 368, 1 Fed. Cas. No. 501; The Both-

c. *Examination in Preparatorio.* — As a settled rule, the captors are required to bring in for the examination *in preparatorio* the master, principal officers, and others of the crew of the captured vessel, and the examination should be confined to these,[80] unless special leave is first given by the court to examine other witnesses.[81] In the absence of special leave, the testimony of other witnesses should be excluded from evidence at the hearing.[82]

(1.) **Deviation From Rule.** — Any deviation by the captors from the settled rule must be explained to the court, or condemnation will be withheld.[83] An unexplained examination confined to witnesses not on board the captured vessel, is a great irregularity.[84] But where the monition against the cargo is not replied to, although no one on board was sent as a witness, the testimony of a person present at the capture of the vessel and cargo, will be allowed against the cargo.[85] If the usual testimony is shown to be unavailable, the want of it may be supplied by affidavits of the captured taken *bona fide* in another port,[86] but not by copies of them.[87]

(2.) **Examination Upon Standing Interrogatories.** — The examination *in preparatorio* is taken in reply to standing interrogatories,[88] generally adopted by the courts of prize in this country,[89] and is usually taken before standing prize commissioners.[90] The witnesses brought in by the captors, in order to prevent collusion, should be examined

nea, 2 Gall. 78, 3 Fed. Cas. No. 1686; 1 Wheat. Appendix 495; 2 Wheat. Appendix 81.

Examination of Charterer. — The charterer of a vessel, entered as supercargo, should be examined as one of the crew of the captured vessel. The Adula, 89 Fed. 351.

80. The Olinde Rodrigues, 89 Fed. 105; The Sir William Peel, 5 Wall. 517; The Newfoundland, 89 Fed. 99; The Alliance, Blatchf. Pr. Cas. 646, 1 Fed. Cas. No. 246; 1 Wheat. Appendix, 495-6.

81. The Alliance, Blatchf. Pr. Cas. 646, 1 Fed. Cas. No. 246; The Falcon, Blatchf. Pr. Cas. 52, 8 Fed. Cas. No. 4616; 1 Wheat. Appendix 496.

82. The Olinde Rodrigues, 89 Fed. 105; The Sir William Peel, 5 Wall. 517.

83. The Arabella, 2 Gall. 368, 1 Fed. Cas. No. 501.

Omission of Duty Reprehended. The omission of duty on the part of the captors to obey the settled rule is reprehended in the strongest terms by the prize courts, and if not explained, is deemed indicative of fraud. The Bothnea, 2 Gall. 78, 3 Fed. Cas. No. 1686.

84. The Alliance, Blatchf. Pr. Cas. 646, 1 Fed. Cas. No. 246.

85. The Wave, Blatchf. Pr. Cas. 329, 29 Fed. Cas. No. 17,299.

86. 2 Wheat. Appendix 24; The Arabella, 2 Gall. 368, 1 Fed. Cas. No. 501.

87. The Arabella, 2 Gall. 368, 1 Fed. Cas. No. 501.

88. The George, 1 Wheat. 408; 1 Wheat. Appendix 495; 2 Wheat. Appendix 81; The Dos Hermanos, 2 Wheat. 76; Cushing *v.* Laird, 107 U. S. 69; The Ann Green, 1 Gall. 274, 1 Fed. Cas. No. 414.

89. Adoption of Standing Interrogatories. — The standing interrogatories of the English High Court of Admiralty were generally adopted as a model by the district judges in the principal states, during the war of 1812, with few additions and scarcely any variations. 1 Wheat. Appendix 495; 2 Wheat. Appendix 81.

90. 1 Wheat. Appendix 495; The Ann Green, 1 Gall. 274, 1 Fed. Cas. No. 414.

as soon as possible after the arrival of the captured vessel,[91] and without communication with or instruction by counsel,[92] and should be separately examined.[93] The standing interrogatories are framed to elicit the truth on the question of prize or no prize, and to draw forth everything, within the knowledge of the witnesses, on the controversy between the captors and the captured.[94]

(3.) Duty of Commissioners on Examination. — It is the duty of commissioners in examining the witnesses, not merely to require a formal and direct answer to every part of each interrogatory, but to require each witness to state the facts with all minuteness and detail,[95] and not to suffer a witness to evade a sifting inquiry.[96]

(4.) Objections to Examination. — Exceptions to the mode of proof should be taken at the examination, or they will be considered waived,[97] and the court will not notice on the final hearing objections to irregularities of the commissioners in the mode of examination, or in the admission of testimony, or to the competency of witnesses examined.[98] An irrelevant statement of a witness examined made in relation to another witness, will be stricken out.[99]

(5.) Sealing and Custody of Examination. — The examination *in preparatorio*, when completed and signed by the witnesses, should be sealed and directed to the custody of the proper district court, together with any paper not already lodged by the captors in the registry of the court.[1]

C. Test Affidavits of Claimants. — Claimants of the captured property, or of any part of the cargo, are required to make a test

91. 1 Wheat. Appendix 495.

92. Cushing v. Laird, 107 U. S. 69; 1 Wheat. Appendix 497.

93. 1 Wheat. Appendix 498.

94. The George, 1 Wheat. 408.

95. The Ann Green, 1 Gall. 274, 1 Fed. Cas. No. 414.

96. 1 Wheat. Appendix, 498.

Solemnity of Examination in Preparatorio. — The greatest solemnity is attached to the examination *in preparatorio*; and a witness examined will not be allowed afterwards to contradict his own declarations in answer to the standing interrogatories, upon the important question of domicile or national character. Cargo of El Telegrafo, 1 Newb. 383, 5 Fed. Cas. No. 2535.

97. Intervention of Consul Immaterial. — The intervention of a consul who intervened for the claimant cannot excuse laches in failing to object to the mode of proof at the proper time. The Elizabeth, Blatchf. Pr. Cas. 250, 8 Fed. Cas. No. 4350.

98. Mode of Rectifying Testimony. — In order to rectify or suppress testimony, an application should be made to court upon special motion, with notice, pointing out irregularities complained of, and praying proper relief. The Ezilda, Blatchf. Pr. Cas. 232, 8 Fed. Cas. No. 4599.

Enlargement of Testimony. — A witness examined upon the standing interrogatories cannot claim a right to modify or enlarge his testimony after its completion and submission; but where mistake appears, the court may allow him to answer special interrogatories. The Peterhoff, Blatchf. Pr. Cas. 345, 19 Fed. Cas. No. 11,022.

99. The Peterhoff, Blatchf. Pr. Cas. 345, 19 Fed. Cas. No. 11,022.

1. Signature of Witness. — When the evidence is taken, each sheet is afterwards read over to the witness and separately signed. 1 Wheat. Appendix 498.

affidavit of the verity of their claims,[2] which should regularly state that the property, both at the time of the shipment and at the time of the capture, belonged, and will, if restored, belong to the claimant,[3] and the claimant may aver that the alleged prize is not liable to condemnation and seizure.[4]

a. *Test Affidavits by Agent.* — Test affidavits by an agent of the claimant when the principal is out of the country, is the common course of the admiralty.[5] But claims in prize cases should not be verified by agents, where the principals are within the jurisdiction, as the captors in such case have a right to the oath of the claimant.[6] If a test affidavit is made by an agent, in the absence of the principal, if he is within reach, his suppletory oath should be tendered.[7] When the claim is put in by the master in behalf of the owner, the master's affidavit may state his belief merely.[8] But the test affidavit of an agent who does not assume to have personal knowledge of the facts stated, is not evidence.[9]

b. *Papers Annexed to Affidavits.* — Papers annexed to the test affidavits are not thereby made evidence, and will be stricken from the record as irregular and inadmissible.[10]

c. *Limits of Claim and Affidavit.* — The claim, answer and test oath of the claimants should not stand in opposition to the ship's papers, and preparatory examination, unless the case arose before the war,[11] and should be limited to the question of prize or no prize, and introduce no matter extraneous thereto.[12] Nor can the claim-

2. 1 Wheat. Appendix 500; The Schooner Adeline, 9 Cranch 244; The Lively, 1 Gall. 315, 15 Fed. Cas. No. 8403; The St. Lawrence, 1 Gall. 467, 21 Fed. Cas. No. 12,232; The Sally, 1 Gall. 401, 21 Fed. Cas. No. 12,258; 2 Wheat. Appendix 21.

3. 2 Wheat. Appendix 21.

Irregularity Not Fatal. — An irregularity in the affidavit of ownership, in omitting to state it as of the time of the shipment, is not fatal The Schooner Adeline, 9 Cranch 244.

4. The Lynchburg, Blatchf. Pr. Cas. 49, Fed. Cas. No. 8637a; The Napoleon, Blatchf. Pr. Cas. 296, 17 Fed. Cas. No. 10,012; The Joseph H. Toone, Blatchf. Pr. Cas. 124, 13 Fed. Cas. No. 7540; The John Gilpin, Blatchf. Pr. Cas. 291, 13 Fed. Cas. No. 7343.

5. 1 Wheat. Appendix 500; The Schooner Adeline, 9 Cranch 244.

6. The Lively, 1 Gall. 315, 15 Fed Cas. No. 8403; The St. Lawrence, 1 Gall. 467, 21 Fed. Cas. No. 12,232; The Sally, 1 Gall. 401, 21 Fed. Cas. No. 12,258.

7. The Schooner Adeline, 9 Cranch 244.

8. Cushing *v.* Laird, 107 U. S. 69.

9. The D. Sargeant, Blatchf. Pr. Cas. 576, 7 Fed. Cas. No. 4098.

10. The Delta, Blatchf. Pr. Cas. 133, 7 Fed. Cas. No. 3777; The Empress, Blatchf. Pr. Cas. 146, 8 Fed. Cas. No. 4476; The Cheshire, Blatchf. Pr. Cas. 151, 5 Fed. Cas. No. 2655.

Correspondence Referred to in Test Affidavit. — The test affidavit cannot be considered as evidence of the correspondence referred to therein, as being in possession of the claimant; and if the correspondence is not itself produced in evidence, it will be presumed adverse to the claimant. The Sally Magee, 3 Wall. 451.

11. 1 Wheat. Appendix 501; The Ann Green, 1 Gall. 274, 1 Fed. Cas. No. 414; The Diana, 2 Gall. 93, 7 Fed. Cas. No. 3876.

12. The Delta, Blatchf. Pr. Cas. 133, 7 Fed. Cas. No. 3777; The Empress, Blatchf. Pr. Cas. 146, 8 Fed. Cas. No. 4476; The John Gilpin,

ant question the authority of the captors,[13] nor any irregularities on the part of the captors.[14] The affidavit of the claimant that he is not within the exceptions of a proclamation, which is silent as to the capture involved, is not proof of the negative averred.[15]

D. Further Proof. — Where the court has doubts upon the hearing, it may in its discretion order further proof either *suo sponte*,[16] or upon motion of an interested party upon affidavits or other proof showing ground therefor.[17] The court may by its order, provide that both the claimants and the captors shall be allowed the benefit of further proof.[18] But upon a simple order for further proof, the captors are not entitled to introduce new evidence, if not specially authorized,[19] unless the new evidence is upon plea and proof, in which case both parties are permitted to introduce new evidence to support their respective allegations.[20]

a. *Mode of Further Proof.* — Further proof, when allowed by the prize court, may be taken by affidavits,[21] and additional docu-

Blatchf. Pr. Cas. 291, 13 Fed. Cas. No. 7343; The Napoleon, Blatchf. Pr. Cas. 296, 17 Fed. Cas. No. 10,012; The Sunbeam, Blatchf. Pr. Cas. 316, 22 Fed. Cas. No. 13,013; The Joseph H. Toone, Blatchf. Pr. Cas. 124, 13 Fed. Cas. No. 7540; The Lynchburg, Blatchf. Pr. Cas. 49, 15 Fed. Cas. No. 8637a; The Louisa Agnes, Blatchf. Pr. Cas. 107, 15 Fed. Cas. No. 8531; The Cheshire, Blatchf. Pr. Cas. 151, 5 Fed. Cas. No. 2655.

13. The Tropic Wind, Blatchf. Pr. Cas. 64, 24 Fed. Cas. No. 14,486.

Question Between Government and Captors. — The question of the authority for the seizure is between the government and the captors, and is one with which the claimant has nothing to do. It only goes to the question whether condemnation shall go to the government or to the captors. The Dos Hermanos, 2 Wheat. 76; The Amiable Isabella, 6 Wheat. 1.

14. The Joseph H. Toone, Blatchf. Pr. Cas. 223, 13 Fed. Cas. No. 7541.

15. The Gray Jacket, 5 Wall. 342.

16. The Sir William Peel, 5 Wall. 517; The Sally Magee, 3 Wall. 451.

17. The Sally Magee, 3 Wall. 451; The Sir William Peel, 5 Wall. 517; The Amy Warwick, 2 Spr. 123, 1 Fed. Cas. No. 341.

Exceptions to Rule Requiring Showing. — The general rule requiring a detailed showing upon oath to obtain an order for further proof, does not apply where it is sought to meet evidence of an opponent by counter evidence on the same points. The Amy Warwick, 2 Spr. 123, 1 Fed. Cas. No. 341.

Rejected Depositions Used as Affidavits. — The rejected depositions of witnesses whose depositions were not properly taken upon the preparatory examinations may be used as affidavits on motion for an order for further proof. The Sir William Peel, 5 Wall. 517.

18. The George, 1 Wheat. 408; 1 Wheat. Appendix 504; The Mary, 8 Cranch 388; The St. Lawrence, 8 Cranch 434; The Fortuna, 2 Wheat. 161; The Venus, 1 Wheat. 112; The Grotius, 8 Cranch 456; The Sir William Peel, 5 Wall. 517; The Olinde Rodrigues, 174 U. S. 510.

19. 1 Wheat. Appendix 504.

Affidavits of Captors Exceptional. Except under peculiar circumstances, the affidavits of captors are not received in our prize courts. 2 Wheat. Appendix 26.

20. 1 Wheat. Appendix 504.

21. 1 Wheat. Appendix, 504, 506.

Affidavits Taken in Foreign Countries. — *Upon further proof allowed.* Affidavits taken in foreign countries before notaries public, whose attestations are properly verified are in general admissible. 2 Wheat. Appendix 26; The Arabella, 2 Gall. 368, 1 Fed. Cas. No. 501.

mentary evidence then introduced, if properly verified.[22] When the benefit of further proof is allowed to the captors, their affidavits, properly attested, are admissible evidence as to the facts within their knowledge.[23] Claimants, upon further proof, may produce affidavits showing their proprietary interest,[24] and authenticated copies of correspondence and invoices bearing upon that question.[25] Further proof, when allowed upon appeal to the supreme court, in a prize case, must be taken by commission under its rule.[26] But it is a general rule of the prize court not to issue a commission to take evidence in the enemy's country.[27]

b. *Caution As to Further Proof.* — An order for further proof is made with caution, because of the temptation it holds out to fraud and perjury,[28] and will not be allowed in favor of a party who is guilty of fraud or misconduct,[29] or who has shown himself capable of abusing the order.[30]

c. *Further Proof of Claimants.* — Liberal indulgence is usually

22. 1 Wheat. Appendix 504, 506; La Nereyda, 8 Wheat. 108.

Necessity of Verification of Papers. Papers by themselves prove nothing, and both the original ship's papers and papers introduced upon further proof must be verified to the satisfaction of the court. 2 Wheat. Appendix 23; The Fortuna, 2 Wheat. 161.

23. The Sally, 1 Gall. 401, 21 Fed. Cas. No. 12,258; 1 Wheat. Appendix 506; 2 Wheat. Appendix 26.

Affidavits of Captors, When Allowed. — The attestations of captors, upon further proof allowed to them, are admissible under the ordinary usage of prize courts, especially as to facts within their knowledge relating to the circumstances of the capture, and no objection lies to their competency as witnesses in the prize court. The Anne, 3 Wheat. 435.

24. 2 Wheat. Appendix 26; The Friendschaft, 3 Wheat. 14; The Atalanta, 3 Wheat. 409; The Mary, 9 Cranch 126.

Usage as to Further Proof by Claimant. — It is so much the habit of the prize courts to expect that upon further proof allowed the claimant will comply with the usual and almost invariable practice to prove his proprietary interest upon oath, and to explain the nature, origin and character of his rights, that the absence of such proofs leads to considerable doubts. La Nereyda, 8 Wheat. 108.

Introduction of Letters Referred to. — Letters referred to in an affidavit on further proof should be produced and further time may be allowed therefor. The Frances, 8 Cranch 354.

25. The Friendschaft, 3 Wheat. 14; 2 Wheat Appendix 26.

26. The London Packet, 2 Wheat. 371; 2 Wheat. Appendix 26; The Argo, 2 Wheat. 287, note; The Fortuna, 2 Wheat. 161.

27. The Diana, 2 Gall. 93, 7 Fed. Cas. No. 3876; 2 Wheat. Appendix 26.

28. The Sally Magee, 3 Wall. 451; The Gray Jacket, 5 Wall. 342; The Adula, 176 U. S. 361; The St. Lawrence, 8 Cranch 434.

29. 1 Wheat. Appendix 505-6; The St. Lawrence, 8 Cranch 434; The Hazard, 9 Cranch 205; The Dos Hermanos, 2 Wheat. 76; The Pizarro, 2 Wheat. 227; The Gray Jacket, 5 Wall. 342; The Liverpool Packet, 1 Gall. 513, 15 Fed. Cas. No. 8,406; The Sally, 1 Gall. 401, 21 Fed. Cas. No. 12,258; The Bothnea, 2 Gall. 78, 3 Fed. Cas. No. 1686; The George, 2 Gall. 249, 10 Fed. Cas. No. 5327; The Betsy, 2 Gall. 377, 3 Fed. Cas. No. 1364; The Springbok, Blatchf. Pr. Cas. 434, 22 Fed. Cas. No. 13,264.

30. The San Jose Indiano, 1 Mason 38, 21 Fed. Cas. No. 12,324; 1 Wheat. Appendix 506.

allowed to claimants who have not clearly violated good faith, in ordering further proof to support their claim,[31] especially if there is doubt as to the proprietary interest and neutral character of the claimants,[32] or if the preliminary proofs do not satisfactorily establish a lawful capture.[33] Further proof for the claimants received without objection, though otherwise objectionable, will be deemed consented to, and allowed.[34]

(1.) When Not Allowed. — The claimant will not be allowed further proof to contradict his evidence at the preparatory examination.[35] Further proof should be denied to a claimant who has falsely

31. 1 Wheat. Appendix 504; The Frances, 8 Cranch 354; The St. Lawrence, 8 Cranch 434; The Dos Hermanos, 2 Wheat. 76; The Atalanta, 3 Wheat. 409; The Amiable Isabella, 6 Wheat. 1; The London Packet, 5 Wheat. 132; The Ann Green, 1 Gall. 274, 1 Fed. Cas. No. 414; The Rapid, 1 Gall. 295, 20 Fed. Cas. No. 11,576; The Liverpool Packet, 1 Gall. 513, 15 Fed. Cas. No. 8406; Moodie v. The Betty Carthcart, Bee 292, 17 Fed. Cas. No. 9742; The Avery, 2 Gall. 308, 2 Fed. Cas. No. 671; The Falcon, Blatchf. Pr. Cas. 52, 8 Fed. Cas. No. 4616; The Julia, 2 Spr. 164, 14 Fed. Cas. No. 7576.

Indulgence to Remove Doubts of Good Faith. — Where the case of the claimant seemed false and fraudulent but there was a possibility that it might be genuine, the court said: "This court, without better evidence than was thus presented to our view, gave the most liberal indulgence for procuring evidence to support the claim. We now express our satisfaction in having done so, inasmuch as it has enabled an honest man both to save his property, and vindicate his reputation." The Venus, 5 Wheat. 127.

Fraud of Master Not Imputable to Claimant. — The fraud of the master of a belligerent vessel in throwing papers overboard, cannot preclude a *bona fide* neutral claimant of part of the cargo, to whom no fraud was imputable, from being allowed further proof of property. The Friendschaft, 3 Wheat. 14.

32. The Mary, 9 Cranch 126; The San Jose Indiano, 2 Gall. 268; 21 Fed. Cas. No. 12,322.

Names and Domiciles of Copartners. — Where the shipment was made to a firm, who were claimants of the cargo, if their names do not appear, further proof will be ordered as to the names and domiciles of each of its members. The Adeline, 9 Cranch 244.

Consignment to Neutral Claimant. A bill of lading consigning goods to a neutral claimant, though without invoice or letter of advice, is a sufficient foundation for further proof. The Friendschaft, 3 Wheat. 14.

Doubt as to Neutrality of Claimant. — If the neutrality of the claimant is in doubt upon the ship's papers, he cannot complain of the delay in restitution attending further proof to remove the doubt. The George, 1 Wheat. 408.

33. The Sir William Peel, 5 Wall. 517; 1 Wheat. Appendix 504; The Grotius, 8 Cranch 456; The Amiable Isabella, 6 Wheat. 1; The Ann Green, 1 Gall. 274, 1 Fed. Cas. No. 414; The Rapid, 1 Gall. 295, 20 Fed. Cas. No. 11,576; The Liverpool Packet, 1 Gall. 513, 15 Fed. Cas. No. 8406; The Nellie, Blatchf. Pr. Cas. 553, 17 Fed. Cas. No. 10,095; The Falcon, Blatchf. Pr. Cas. 52, 8 Fed. Cas. No. 4616; The Avery, 2 Gall. 308, 2 Fed. Cas. No. 671; The Julia, 2 Spr. 164, 14 Fed. Cas. No. 7576.

34. The Pizarro, 2 Wheat. 227.

35. The Alexander, 1 Gall. 532, 1 Fed. Cas. No. 164; The Adula, 176 U. S. 361.

Shipment in Hostile Ship. — If the shippers in a hostile ship fail to put on board documentary evidence of a neutral character, they will be denied further proof. The Flying Fish, 2 Gall. 374, 9 Fed. Cas. No. 4892.

claimed property belonging in part to another,[36] or who is a mere voluntary assignee of claims for which he has paid nothing, and which he has agreed to prosecute at his own risk and expense,[37] or if he has made a guilty concealment in his test-affidavit and claim,[38] or has been guilty of concealment or spoliation of papers which is not satisfactorily explained,[39] or of a fraudulent use of papers.[40] Further proof will not be allowed where the case for the claimant is incapable of satisfactory explanation,[41] nor will it be readily allowed upon appeal upon the same points upon which it was allowed in the lower court.[42]

d. *Further Proof of Captors.* — When the case at the original hearing is not sufficiently clear to authorize either condemnation or restitution of the captured property, the captors will be allowed further proof of its validity.[43] They will be allowed further proof where the circumstances create a suspicion of the illegality of the voyage,[44] or where part of the cargo libeled as prize was taken from a burned ship from which no witnesses could be obtained,[45] or where the sinking of the captured vessel precludes a preparatory examination of the crew,[46] or to rebut a collusive capture,[47] or to rebut the defense of claimants,[48] or to counteract

36. The Dos Hermanos, 2 Wheat 76.

37. The Euphrates, 8 Cranch 385.

38. The Gray Jacket, 5 Wall. 342

39. Relaxation of Rule. — It is a relaxation of the rules of the prize court to allow further proof where there is a concealment of material paper. The Fortuna, 3 Wheat. 161; The Pizarro, 2 Wheat. 227; The St. Lawrence, 8 Cranch 434; 1 Wheat. Appendix 505.

40. 1 Wheat. Appendix 505.

41. The Dos Hermanos, 2 Wheat 76; The Hazard, 9 Cranch 205; The Euphrates, 8 Cranch 385; The Adula, 176 U. S. 361; 1 Wheat. Appendix 505.

42. The Dos Hermanos, 2 Wheat 76.

43. The Grotius, 8 Cranch 456; The Sir William Peel, 5 Wall. 517; The Newfoundland, 80 Fed. 99, 176 U. S. 97; The Olinde Rodrigues, 80 Fed. 105, 91 Fed. 274; The Nellie Blatchf. Pr. Cas. 553, 17 Fed. Cas. No. 10,095; The Elizabeth, Blatchf. Pr. Cas. 250, 8 Fed. Cas. No. 4,350. The Annie, Blatchf. Pr. Cas. 209, 1 Fed. Cas. No. 415.

Irregularity of Captors. — Where the captors have been irregular in not bringing in the ship's papers, and the master of the captured ship, further proof of the nature of the captured property will be ordered. The London Packet, 1 Mason 14, 15 Fed. Cas. No. 8474.

44. The Newfoundland, 80 Fed. 99, 176 U. S. 97; The Olinde Rodrigues, 80 Fed. 105.

45. The Thomas Watson, Blatchf. Pr. Cas. 120, 23 Fed. Cas. No. 13,933; The Sarah, Blatchf. Pr. Cas. 195, 21 Fed. Cas. No. 12,337.

46. The Actor, Blatchf. Pr. Cas. 200, 1 Fed. Cas. No. 36.

47. Exculpation of Charge of Fraud. — Where the captors are charged with direct and positive fraud which is to strip them of their rights, it will rarely happen that the original evidence on the question of condemnation or restoration of the captured vessel will afford sufficient light to determine whether the capture was *bona fide* or collusive, and if the circumstances are of doubtful appearance, justice requires that an opportunity be afforded to the captors to explain those circumstances, and to clear themselves of the imputation of fraud. The collusiveness of the capture must be almost confessed before the court will refuse further proof. The George, 1 Wheat. 408.

48. Further Proof After Opinion

further proof allowed to the claimants,[49] or to add proof where the claimants failed to object to the proof taken prior to the hearing,[50] or to establish a joint interest in the prize.[51]

(1.) When Not Allowed. — When the case for the claimant appears unsuspicious upon the original evidence, the court is inclined not to allow further proof to the captors,[52] and will not ordinarily include the captors, where the case stands merely for further proof by possible claimants who have not appeared and may not appear.[53]

e. *Failure of Further Proof.* — Where an order for further proof is made, and the party disobeys its injunctions or neglects to comply with them, courts of prize consider such negligence as contumacy leading to presumptions fatal to the claim.[54] Where in a doubtful case further proof is allowed for a year and a day to claimants who have not appeared, if no claimant appears and makes proof within that period, all claims are deemed abandoned and condemnation follows as of course.[55] Where further proof was allowed to captors and claimants, and the claimants without adducing proof moved for restitution, they could not reserve a right to further proof in case of denial of the motion.[56]

Pronounced. — Where the claimants made a full defense on the record, the libellants were allowed to put in further proof after the opinion was pronounced. The Sarah Starr, Blatchf. Pr. Cas. 69, 21 Fed. Cas. No. 12,352.

49. The St. Lawrence, 8 Cranch 434; The Mary, 8 Cranch 388; The Fortuna, 2 Wheat. 161; The Venus, 1 Wheat. 112; The Sir William Peel, 5 Wall. 517.

50. Excuse Not Required. — In such case no excuse need be shown for failure to bring in as witnesses only the master and cabin boy out of a large crew, in order to allow further and explanatory proof by the captors. The Elizabeth, Blatchf. Pr. Cas. 250, 8 Fed. Cas. No. 4350.

51. The George, 1 Wheat. 408.

52. The Bothnea, 2 Gall. 78, 3 Fed. Cas. No. 1686; 1 Wheat. Appendix 504.

53. 1 Wheat. Appendix 504; 2 Wheat. Appendix 19, 20, 21-6.

54. Conclusive Evidence of Hostile Interest. — If, upon further proof allowed, no proof is adduced, or if proof is defective, or the parties refuse to swear, or swear evasively, it is deemed conclusive evidence of hostile interest. 1 Wheat. Appendix 506; La Nereyda, 8 Wheat. 108; The Pearl, 5 Wall. 574.

55. Suspension Confined to Cases of Doubt. — The suspension for a year and a day is confined to cases where it is doubtful upon the original evidence whether the property captured belongs to an enemy or to a neutral. The Falcon, Blatchf. Pr. Cas. 52, 9 Fed. Cas. No. 4616; The Julia, 2 Spr. 164, 14 Fed. Cas. No. 7576; The Harrison, 1 Wheat. 298; 1 Wheat. Appendix 501; 2 Wheat. Appendix 20; The Adeline, 9 Cranch 244; The Avery, 2 Gall. 308, 2 Fed. Cas. No. 671.

If the right of capture is not doubtful, notwithstanding there are unexplained defects in the original proof, condemnation will be made at the hearing, without suspension for further proof. The Zaralla, Blatchf. Pr. Cas. 173, 30 Fed. Cas. No. 18,203; The Gipsey, Blatchf. Pr. Cas. 126, 10 Fed. Cas. No. 5456.

Claim Presented During Suspension. — A claim presented within the limit of a year and a day allowed therefor, cannot be approved in the supreme court upon appeal; but the cause will be remanded to the court below, for presentation to that court. The Harrison, 1 Wheat. 298.

56. Settled Practice. — The settled practice of the prize courts forbids the taking of proof under such

II. RELATION OF PROOF TO PLEADING.

1. In General. — Though the technical rules of the common law pleading do not prevail in admiralty,. there must be a substantial agreement between the pleadings and the proof,[57] and in general no evidence is admissible unless it is applicable to some allegation in the libel[58] or in answer.[59] Evidence outside of the allegations made by either party cannot be considered in support of the cause of action or defense.[60]

A. Evidence Under General Pleading. — Evidence of special damage may be given in admiralty under a general allegation,[61] and damages may be proved under a prayer for general relief,[62] and are not limited to the specific amount averred in the libel.[63] The

circumstances. The Olinde-Rodrigues, 174 U. S. 510.

57. Hays *v.* Pittsburg G. & B. Packet Co., 33 Fed. 552; Jenks *v.* Lewis, 1 Ware 43, 13 Fed. Cas. No. 7280; McKinley *v.* Morrish, 21 How. 343; The William Harris, 1 Ware 373, 29 Fed. Cas. No. 17,695; Kramme *v.* The New England, 1 Newb. 481, 14 Fed. Cas. No. 7930; Campbell *v.* The Uncle Sam, 1 McAll. 77, 4 Fed. Cas. No. 2372; The Boston, 1 Sum. 328, 3 Fed. Cas. No. 1673; The Sarah Ann, 2 Sum. 206, 21 Fed. Cas. No. 12,342; The Morton, 1 Brown Adm. 137 17 Fed. Cas. No. 9864.

58. McKinley *v.* Morrish, 21 How. 343; Soule *v.* Rodoconachi, Newb. 504, 22 Fed. Cas. No. 13,178; The Thomas Melville, 31 Fed. 486; Jenks *v.* Lewis, 1 Ware 43, 13 Fed. Cas. No. 7280; The Boston, 1 Sum. 328, 3 Fed. Cas. No. 1673; The William Harris, 1 Ware 373, 29 Fed. Cas. No. 17,695.

59. Examples. — Evidence is inadmissible to show a forfeiture of seaman's wages, not pleaded in the answer, or to prove, under a plea that libellant, a pilot, withdrew his signal and sailed away; that other pilots offered their services at the same time, and that taking the libellant as pilot would have inconvenienced the vessel (Marshall *v.* The Earnwell, 68 Fed. 228), or to prove a defense, not pleaded, that a lien was lost by laches (The Shady Side, 23 Fed. 731). Orne *v.* Townsend, 4 Mason 541, 18 Fed. Cas. No. 10,583; Turner *v.* The Black Warrior, 1 McAll. 181, 24 Fed. Cas. No. 14,253; The Boston, 1 Sum. 328, 3 Fed. Cas. No. 1673.

60. The Morton, 1 Brown Adm. 137, 17 Fed. Cas. No. 9864; Kramme *v.* The New England, 1 Newb. 481, 14 Fed. Cas. No. 7930; Davis *v.* Leslie, 1 Abb. Adm. 123, 7 Fed. Cas. No. 3639; The Sarah Ann, 2 Sum. 206, 21 Fed. Cas. No. 12,342; The Rhode Island, Olc. 505, 20 Fed. Cas. No. 11,745.

Examples. — Evidence of a naked tort cannot support a libel upon a contract. Hays *v.* Pittsburg G. & B. Packet Co., 33 Fed. 552. Nor can evidence supply facts not averred in an information for forfeiture in admiralty. The Hoppet, 7 Cranch 389. Nor can a penalty demanded against a vessel be recovered upon proof of grounds not averred. The Pope Catlin, 31 Fed. 408. Nor can proof of a claim for salvage or as lightermen be considered upon a libel *in rem* for seamen's wages. The Sarah E. Kennedy, 29 Fed. 264; nor can proof of a defense not pleaded avail the claimants. The Washington Irving, Abb. Adm. 336, 29 Fed. Cas. No. 17,243; White *v.* Rainier, 45 Fed. 773.

61. West *v.* The Uncle Sam, 1 McAll. 505, 29 Fed. Cas. No. 17,427.

62. Penhallow *v.* Doane, 3 Dall. 54; The Gazelle, 128 U. S. 474; Pratt *v.* Thomas, 1 Ware 437, 19 Fed. Cas. No. 11,377.

63. Grubbs *v.* The John H. Fisher (Dist. Court W. D. of Pa.), 22 Pitts. Law J. N. S. 122; Pratt *v.* Thomas, 1 Ware 437, 19 Fed. Cas. No. 11,377; The Gazelle, 128 U. S.

court of admiralty is not precluded from granting any relief appropriate to the case appearing upon the record and prayed for in the libel, merely because the entire case is not distinctly stated in the libel.[64]

B. Material Variance. — In courts of admiralty there are no technical rules of variance which will prevent recovery in a meritorious case.[65] The object of the rule requiring a substantial agreement between the pleadings and proofs is to prevent surprise,[66] and the unintended omission in the libel to state facts proved which have not occasioned surprise,[67] or which have been supplied by the defense,[68] is not a material variance which will be allowed to work injury to the libellant.

2. Amendments to Support Evidence. — A. Of Libel. — The libellant will be allowed to amend his pleadings to conform to the proof at any stage of the case,[69] or to support evidence of increased

474; McCready *v.* The Brother Jonathan, 15 Fed. Cas. No. 8732a.

64. Dupont *v.* Vance, 19 How. 162.

Relief Upon Substantial Facts Alleged. — If a libellant propounds with distinctness the substantive facts upon which he relies, and prays, either specially or generally, for appropriate relief (even if there is some inaccuracy in his statement of subordinate facts, or of the legal effect of the facts propounded), the court may award any relief which the law, applicable to the case, warrants. The Gazelle, 128 U. S. 474.

Relief Inconsistent With Prayer. Where specific relief and general relief were both prayed for, it was held in the circuit court that no relief could be granted which was entirely inconsistent with or different from the specific relief prayed. Wilson *v.* Graham, 4 Wash. C. C. 53, 30 Fed. Cas. No. 17,804.

65. The Clement, 2 Curt. 363, 5 Fed. Cas. No. 2879; The Cambridge, 2 Low. 21, 4 Fed. Cas. No. 2334; Crawford *v.* The William Penn, 3 Wash. C. C. 484, 7 Fed. Cas. No. 3373; Davis *v.* Leslie, 1 Abb. Adm. 123, 7 Fed. Cas. No. 3639; The Gazelle, 128 U. S. 474; Dupont *v.* Vance, 19 How. 162; West *v.* The Uncle Sam, 1 McAll. 505, 29 Fed. Cas. No. 17,427; Talbot *v.* Wakeman, 23 Fed. Cas. No. 13,731a; The General Meade, 20 Fed. 923; West *v.* Silver Wire etc. Mfg. Co., 5 Blatchf. 477, 29 Fed. Cas. No. 17,425; Young *v.* The Kendal, 56 Fed. 237; Davis *v.* Adams, 102 Fed. 520; Henry *v.* Curry, 1 Abb. Adm. 433, 11 Fed. Cas. No. 6381; The Syracuse, 12 Wall. 167.

Waiver of Variance. — An objection that the libel does not allege the particular facts proved by reason of its generality, cannot be urged upon appeal for the first time. The Quickstep, 9 Wall. 665. Objection to a variance must be taken when the evidence is offered at the trial, and it is too late after the evidence is closed. Dunstan *v.* The Kirkland, 3 Hughes 641, 8 Fed. Cas. No. 4181.

66. Dupont *v.* Vance, 19 How. 162; The Quickstep, 9 Wall. 665; The Syracuse, 12 Wall. 167.

67. The Clement, 2 Curt. 363, 5 Fed. Cas. No. 2879; The Quickstep, 9 Wall. 665; The Syracuse, 12 Wall. 167.

68. The Iris, 1 Low. 520, 13 Fed. Cas. No. 7062; The Cambridge, 2 Low. 21, 4 Fed. Cas. No. 2334.

Defendant Not Surprised by His Own Showing. — While the court takes care to prevent surprise, the defendant cannot be surprised when he makes a case for the libellant. Dupont *v.* Vance, 19 How. 162; Deming *v.* The Rapid Transit, 52 Fed. 320.

69. Davis *v.* Leslie, 1 Abb. Adm. 123, 7 Fed. Cas. No. 3639; Nevitt *v.* Clark, Olc. 316, 18 Fed. Cas. No. 10,138; The City of New Orleans,

damages,[70] or of a newly discovered ground of forfeiture,[71] or of the different ownership of a vessel from that alleged.[72] Where a supplementary libel is allowed in a prize case to support additional testimony, such testimony must be confined to the new allegations.[73] The libel may be amended to add interrogatories to be answered by the defendant.[74]

a. *When Not Allowed.* — An amendment of the libel will not be allowed so as to change the entire nature of the claim to the prejudice of the rights of others,[75] nor to introduce a new ground of claim upon which proper evidence has not been taken, after the defendant's witnesses have gone,[76] nor to support evidence of a distinct kind of negligence, or new kind of damage, where the circumstances make it inequitable,[77] nor inequitably to support an increased claim for demurrage.[78]

B. Of Answer. — A defective answer may be amended so as to point out what proof of notice is to be introduced,[79] or to sustain proof of damages by a collision,[80] and the court may grant leave to change an admission in the answer to a denial,[81] but a clean show-

33 Fed. 683; Davis *v.* Adams, 102 Fed. 520.

Change of Tort to Contract. — An amendment may be allowed to conform to the proofs, even although it may change a libel for tort to one upon contract, when required by equity and natural justice, and when the amendment will not be a hardship to the defendant. Where there is no objection to evidence, and no dispute about the facts, the pleadings will be deemed amended to support the proofs. The Rhode Island, 17 Fed. 554; The Maryland, 19 Fed. 551.

70. McCready *v.* The Brother Jonathan, 15 Fed. Cas. No. 8732a; The St. John, 7 Blatchf. 220, 21 Fed. Cas. No. 12,224; Darrell *v.* The Alice Gray, 6 Fed. Cas. No. 3579; The J. E. Trudeau, 54 Fed. 907.

71. U. S. *v.* The Haytian Republic, 57 Fed. 508.

72. U. S. *v.* The Queen, 4 Ben. 237, 27 Fed. Cas. No. 16,107.

73. The Boston, 1 Sum. 328, 3 Fed. Cas. No. 1673.

74. Interrogatories to be Appended. — Interrogatories must be appended at the close of the libel, and cannot be propounded after answer without an amendment of the libel. The Edwin Baxter, 32 Fed. 296.

75. Prejudicial Amendment. Material men, claiming as such, in their pleadings and proofs, cannot, on final argument, be allowed to amend to change the entire nature of their claims so as to prejudice the rights of other creditors seeking payment from an inadequate fund. The Alanson Sumner, 28 Fed. 670.

76. The Keystone, 31 Fed. 412.

77. Inequitable Circumstances. The circumstances making such amendment inequitable, are the dispersion of the goods damaged, long lapse of time, loss of defendant's witnesses, and a failure to explain why a distinct kind of negligence desired to be proved was not made part of the original libel. The Thomas Melville, 31 Fed. 486.

78. Increase of Demurrage Denied. — An amendment of a libel to increase a claim for demurrage will be denied, when the facts were known, and the claim as pleaded was twice before verified on oath, and the amendment was not asked until after trial and apportionment of damages. New Haven Steamboat Co. *v.* Mayor etc., 36 Fed. 716.

79. Virginia Home Ins. Co. *v.* Sundberg, 54 Fed. 389.

80. The Pennsylvania, 12 Blatchf. 67, 19 Fed. Cas. No. 10,951.

81. Kenah *v.* The John Markee Jr., 3 Fed. 45; Whitney *v.* The Em-

ing of grounds must be made by affidavit to change an admission to a denial, or to allege a new defense not previously shown.[82]

a. *When Not Allowed.* — An answer cannot be amended after the hearing to contradict a material admission therein,[83] nor to set up and prove a different claim of right from that contended for to the close of the trial,[84] nor so to recast the answer, in view of the decision, as to shift the burden of proof, and obtain other advantages;[85] nor can it be amended at the hearing to conform to the evidence, by changing an averment of a material fact deliberately pleaded, under full knowledge of the grounds relied upon by the libellant.[86]

3. Pleadings As Evidence. — A. In General. — Neither party to a suit in admiralty can contradict the averments of his own pleading.[87] A sworn answer is in general, not evidence, as such for the respondent,[88] but it may be referred to, to explain ambiguities in the testimony, and in aid of presumptions arising from the evidence, to supply connecting links in the proof,[89] and when such answer is fully responsive to the libel, and states the case fairly, it has some effect as evidence for the respondent.[90]

B. Admissions in Pleading. — One party is entitled to rely upon averments made by the opposite party, as admissions of the facts averred,[91] and though the answer be amended to change an admis-

pire State, 1 Ben. 57, 29 Fed. Cas. No. 17,586.

82. Amendment Denying Documents. — An amendment to deny documents before admitted, requires an affidavit denying the signatures, and explaining the admission; and to deny copies admitted correct requires a showing that the originals are in the possession of the libellant, and can be produced without delay. Lamb *v.* Parkman, 14 Fed. Cas. No. 8019.

83. The Mary C., 1 Hask. 474, 16 Fed. Cas. No. 9201.

After decision upon appeal that averments in the answer insisted upon at the hearing and in argument, were conclusive admissions that appellant's vessel was in fault, there is no equity in an application to amend by striking out those averments and it must be denied. The Horace B. Parker, 74 Fed. 640, 20 C. C. A. 572.

84. McCarthy *v.* Eggers, 10 Ben. 688, 15 Fed. Cas. No. 8681; The Prindiville, 1 Brown Adm. 485, 19 Fed. Cas. No. 11,435.

85. Lamb *v.* Parkman, 14 Fed. Cas. No. 8019.

86. The Iola, 13 Fed. Cas. No. 7057.

87. Totten *v.* The Pluto, 24 Fed. Cas. No. 14,106.

88. The Crusader, 1 Ware 448, 6 Fed. Cas. No. 3456; The Australia, 3 Ware 240, 2 Fed. Cas. No. 667; Cushman *v.* Ryan, 1 Story 91, 6 Fed. Cas. No. 3515; The Thomas & Henry, 1 Brock. 367, 23 Fed. Cas. No. 13,919; Jay *v.* Almy, 1 Woodb. & M. 262, 13 Fed. Cas. No. 7236.

89. The Crusader, 1 Ware 448, 6 Fed. Cas. No. 3456.

90. Equity Rule Not Applied. The equity rule as to the effect of a sworn answer as testimony is not applied in admiralty. Hutson *v.* Jordan, 1 Ware 393, 12 Fed. Cas. No. 6959; U. S. *v.* The Matilda, 5 Hughes 44, 26 Fed. Cas. No. 15,741; Eads *v.* The H. D. Bacon, Newb. 274, 8 Fed. Cas. No. 4232; The Crusader, 1 Ware 448, 6 Fed. Cas. No. 3456; Jay *v.* Almy, 1 Woodb. & M. 262, 13 Fed. Cas. No. 7236.

91. Totten *v.* The Pluto, 24 Fed. Cas. No. 14,106; Ward *v.* The Fashion, 6 McLean 152, Newb. 8, 29 Fed. Cas. No. 17,154; The Belle, 6 Ben. 287, 3 Fed. Cas. No. 1271;

sion to a denial, such amendment does not relieve the respondent from the effect of the admissions as evidence.[92] In general, an allegation of the libel which is neither expressly admitted nor denied, is not deemed admitted, and must be proved,[93] but in certain cases the failure to deny an averment of the libel, may be taken as an admission of the facts averred.[94]

a. *Failure to Take Issue.* — The libel must generally be proved in case of default,[95] but the court has discretion whether to require proof or not.[96] An admission in answer to a libel for seamen's wages, that the seamen shipped for the voyage and performed the service, entitles them to recover without proof if no defense is shown.[97] Where a plea to the libel interposes no defense, the court may either allow an answer to be filed, or enter a decree at once for the damages claimed.[98]

b. *Absence of Replication.* — If the answer is sworn and no replication is filed, the truth of the answer is deemed admitted,[99] but if the sworn answer was not demanded, the libellant may contradict

The Aldebaran, Olc. 130, 1 Fed. Cas. No. 150; The Santa Claus, Olc. 428, 21 Fed. Cas. No. 12,327; The Serapis, 37 Fed. 436.

Allegations as Evidence. — The allegations of a party are not evidence for him unless used by the other side as evidence, and when so used, they are to be weighed as they deserve without requiring more than one witness in all cases to overcome them. Jay *v.* Almy, 1 Woodb. & M. 262, 13 Fed. Cas. No. 7236.

The libellant in a suit for seaman's wages is entitled to use an admission as to the date of his service, without being bound by an averment as to when it began. Berry *v.* The Montezuma, 3 Fed. Cas. No. 1358a.

92. Kenah *v.* The John Markee Jr., 3 Fed. 45; Whitney *v.* The Empire State, 1 Ben. 57, 29 Fed. Cas. No. 17,586.

93. The Dictator, 30 Fed. 699; Clarke *v.* The Dodge Healey, 4 Wash. C. C. 651, 5 Fed. Cas. No. 2849.

94. Examples. — The failure to take a dilatory plea and to contradict facts in a seaman's libel showing that the action was not premature, precludes proof of the contrary. The William Harris, 1 Ware 373, 29 Fed. Cas. No. 17,695.

The failure to deny a material averment of the libel in a collision case, will be considered upon a conflict of testimony on the point, notwithstanding an amendment was allowed to deny the averment. Hutson *v.* Jordan, 1 Ware 393, 12 Fed. Cas. No. 6959.

95. Phipps *v.* The Lopez, 43 Fed. 95; Cape Fear Towing and Transportation Co. *v.* Pearsell, 90 Fed. 435; Sanders *v.* The Sea Fowl, 21 Fed. Cas. No. 12,296a.

Cause Heard Ex Parte. — Upon default, the cause is heard and adjudged *ex parte*; but when mistake of the defendant appears, through ignorance of the practice, his counsel may be allowed to offer evidence as *amicus curiae*. The David Pratt, 1 Ware 495, 7 Fed. Cas. No. 3597.

The filing of a claim does not stay proceedings *ex parte* by the libellant, if there is no appearance on the return day. Baxter *v.* The Dona Fermoas, 2 Fed. Cas. No. 1123a.

96. U. S. *v.* The Mollie, 2 Woods 318, 26 Fed. Cas. No. 15,795.

Effect of Default as an Admission. A default amounts to a formal admission of the truth of the allegations of the libel against a vessel. Rostron *v.* The Water Witch, 44 Fed. 95.

97. The Belle, 6 Ben. 287, 3 Fed. Cas. No. 1271.

98. The Sea Gull, Chase 145, 21 Fed. Cas. No. 12,578.

99. The Mary Jane, 1 Blatchf. & H. 390, 16 Fed. Cas. No. 9215.

it by proof, without replication or notice of proof.[1] When evidence is offered at the hearing, if no objection is made to the failure to file a replication, it is deemed waived.[2]

C. Limitation of Pleadings As Evidence. — Where two libels for salvage are separately filed, the answer of the vessel admitting the allegations of one libel cannot conclude the other libellant.[3] A libel in admiralty cannot be given in evidence against the libellant in another court as an admission or confession.[4] The statement of a seaman in a libel for wages is not competent evidence to prove services rendered under shipping articles.[5]

D. Interrogatories and Answers. — Either party in an admiralty proceeding has the right to append interrogatories to his pleading touching the matter at issue, which the other party must answer under oath,[6] and upon default of such answer the subject matter may be taken *pro confesso* against him.[7] The answers to the interrogatories are evidence in the cause, for both parties,[8] though not positive evidence in favor of the party answering them,[9] and not conclusive as to disputed facts in favor of either party.[10] Answers to interrogatories, annexed to the pleadings which admit

1. The Infanta, 1 Abb. Adm. 263, 13 Fed. Cas. No. 7030.

2. Thomas *v.* Gray, 1 Blatchf. & H. 493, 23 Fed. Cas. No. 13,898.

3. The Venezuela, 55 Fed. 416.

4. **Evidence by Cestui Que Trust.** Where the suit was brought by the libellant as a trustee, the *cestui que trust* may give in evidence the record of recovery by the trustee, to show the recovery and the title on which it rested. Church *v.* Shelton, 2 Curt. 271, 5 Fed. Cas. No. 2714.

5. The Osceola, Olc. 450, 18 Fed. Cas. No. 10,602.

6. The David Pratt, 1 Ware 495, 7 Fed. Cas. No. 3597; Cammell *v.* Skinner, 2 Gall. 43, 9 Fed. Cas. No. 5210; The Australia, 3 Ware 240, 2 Fed. Cas. No. 667; Admiralty Rules, 23, 27, 30, 32.

Compliance with Admiralty Rules. The admiralty rules of the supreme court requiring the interrogatories to be appended at the close of the pleading, must be complied with. Scobel *v.* Giles, 19 Fed. 224; The Edwin Baxter, 32 Fed. 296.

Inspection of Documents Not Allowed. — Interrogatories appended to the libel must be confined to issuable matters to which only the defendant's oath is required, and such as ask for the production of letters between defendants and their agents to prove damage, should be stricken out. Havermeyers etc. Co. *v.* Compania etc. Espanola, 43 Fed. 90; Stoffregan *v.* The Mexican Prince, 70 Fed. 246.

7. Admiralty rules 23, 27, 30, 32; The David Pratt, 1 Ware 495, 7 Fed. Cas. No. 3597.

8. The David Pratt, 1 Ware 495, 7 Fed. Cas. No. 3597; The Australia, 3 Ware 240, 2 Fed. Cas. No. 667; The L. B. Goldsmith, Newb. 123, 15 Fed. Cas. No. 8152.

9. Cushman *v.* Ryan, 1 Story 91, 6 Fed. Cas. No. 3515; The Serapis, 37 Fed. 436.

10. **Effect of Answers as Evidence.** Their effect at most is to turn the scale of disputed evidence when *in equilibrio*. They are no more evidence for one party than the other, and will not be conclusive for either, if the weight of proof is on the other side, or if by self-contradiction suspicion attaches to the answers themselves. The equity rule as to the effect of answers as evidence does not apply in favor of an answer to interrogatories. Eads *v.* The H. D. Bacon, Newb. 274, 8 Fed. Cas. No. 4232; The L. B. Goldsmith, Newb. Adm. 123, 15 Fed. Cas. No. 8152.

facts, stand as evidence like the pleadings and require no further proof of the facts admitted.[11]

III. PRESUMPTION AND BURDEN OF PROOF.

1. General Presumption. — A. Vessel and Cargo. — Joint owners of a vessel and cargo are presumed to own in equal parts, unless the contrary appears.[12] A consignee of cargo is presumed to know the contents of the charter-party.[13] It will be presumed that a contract of shipment is controlled by maritime law, and that the principles of general law were not changed by statute in another jurisdiction, where consigned bills of lading limiting the liability of a vessel were executed, though changed in the place of the forum.[14] The master of a vessel must be presumed to have contracted to carry wheat in reference to the course of trade connected with getting it forward.[15]

B. Master of Vessel. — The person described as master in the registry of a vessel must be deemed master for every legal intendment and purpose,[16] and a person once a master will be presumed to continue such until displaced by some overt act or declaration of the owners.[17] The master is conclusively presumed to know the existence and contents of the ship's papers.[18]

C. Evidence. — It is presumed that evidence wilfully suppressed by an owner or claimant, would be adverse, if produced.[19] A claimant is presumed to confess the truth of facts within his knowledge, which he does not deny in presence of the court.[20] Where the testimony is irreconcilable and evenly balanced, the non-production of a material witness by one who has the burden of proof, raises a decisive presumption against him.[21] Where the evidence is conflicting, a waiver of the libellant's claim cannot be presumed.[22]

2. Burden of Proof in General. — A. Performance of Conditions. — The burden is upon the libellant to show the performance

11. The Serapis, 37 Fed. 436.

Rebuttal of Presumption. — Insurance by each owner in different parts may rebut the presumption of equal ownership. The Betsey, 23 Ct Cl. 277.

12. Shaw v. Thompson, Olc. 144, 21 Fed. Cas. No. 12,726.

13. The Countess of Dufferin, 10 Ben. 155, 6 Fed. Cas. No. 3280.

14. The Henry B. Hyde, 82 Fed. 681.

15. **Course of Trade for Wheat.** Where the course of trade for wheat demanded that it should be shipped at a particular port through an elevator to a railway, the master of the vessel must be held to have contracted with knowledge of it, and to be governed accordingly. The Convoy's Wheat, 3 Wall. 225.

16. The Dubuque, 2 Abb. 20, 7 Fed. Cas. No. 4,110.

17. The Tribune 3 Sum. 144, 24 Fed. Cas. No. 14,171.

18. The Julia, 8 Cranch 181.

19. The Bermuda, 3 Wall. 514; The Sally Magee, 3 Wall. 451; The Andromeda, 2 Wall. 481; The Octavia, 1 Wheat. 20; The Luminary, 8 Wheat. 407.

20. The Silver Moon, 1 Hask. 262, 22 Fed. Cas. No. 12,856.

21. The Fred. M. Lawrence, 15 Fed. 635.

22. The Hamilton J. Mills, 22 Fed. 790.

of the statutory conditions of enforcing a lien upon a vessel,[22] and that the conditions of suit embodied in shipping articles have been complied with.[24] The burden is upon the owner of the vessel to prove that a sufficient medicine chest was provided for seamen.[25]

B. Non-Performance. — The burden is upon the libellant to show non-performance or injury from neglect or unskillful performance of an agreement to tow a vessel,[26] and to prove an excuse for failure to exercise usual display and diligence in performing lighterage service.[27]

C. Interpretation of Conditions. — The burden is upon a libellant to prove his interpretation of the conditions of a charter party as to "working hours," according to the custom of the port.[28]

D. Title Under Master's Sale. — The burden is on one claiming title under the sale of a vessel by the master, by virtue of his office, to prove that the sale was *bona fide* and necessary.[29]

E. Wrongs. — The burden is upon a libellant for demurrage to prove that a fault caused the delay,[30] and is upon the libellants against a tug for taking seamen and their baggage from a ship to prove knowledge of those in charge of the tug, that they were doing a wrongful act.[31]

F. Pilotage. — The burden is upon a pilot suing for pilotage fees for services not performed, to prove the refusal or neglect of the master of the vessel to accept his offer,[32] and to show that upon speaking a vessel for pilotage, his offer and signals were heard and understood.[33] The burden is upon the libellant of a tug in charge

23. Kretzmer *v.* The William A. Levering, 35 Fed. 783.

24. Proof of Right to Sue. Where the shipping articles forbade a suit for wages of seamen until the ship was unloaded, the burden is upon them to show either that the vessel was actually unloaded when the libel was filed, or that the ship had been moored for the full time allowed for unloading. Granon *v.* Hartshorne, 1 Blatchf. & H. 454, 10 Fed. Cas. No. 5689.

25. Harden *v.* Gordon, 2 Mason 541, 11 Fed. Cas. No. 6047.

26. The Webb, 14 Wall. 406; The Burlington *v.* Ford, 137 U. S. 386; The G. H. Starbuck, 5 Ben. 53, 10 Fed. Cas. No. 5378.

27. The Nadia, 18 Fed. 729.

28. Proof of Suspension of Hire. Where the charter-party provided for a suspension of hire "in the event of damage preventing the working of the ship for more than 24 working hours," and the ship was docked for repairs from Saturday afternoon to Monday afternoon, and the charterer suing for such suspension claimed that the contract did not mean day hours merely, but one day and night of 24 consecutive hours, the burden was upon him to prove that the words used had that meaning according to the custom of the port in loading and unloading vessels. The Principia, 34 Fed. 667.

29. The Henry, 1 Blatchf. & H. 465, 11 Fed. Cas. No. 6,372; The Amelie, 6 Wall. 18.

Purchase of Wrecked Vessel. The purchaser of a wrecked vessel from the master may prove honesty of the master and the necessity to sell, by presumptive evidence. The Lucinda Snow, Abb. Adm. 305, 15 Fed. Cas. No. 8591.

30. Levech *v.* Cargo of Wooden Posts, 34 Fed. 917.

31. The G. H. Starbuck, 5 Ben. 53, 10 Fed. Cas. No. 5378.

32. The Talisman, 23 Fed. 111; The Thomas Turrall, 6 Ben. 404, 23 Fed. Cas. No. 13,932; The Harriet S. Jackson, 32 Fed. 110.

33. The Mascotte, 39 Fed. 871.

of a pilot for injury to the tow, to show that the tug caused such injury.[34]

G. Wages of Seamen. — The burden is upon seamen suing for wages to prove all facts denied except as to the shipping articles and log book,[35] and to sustain the suit in accordance with the shipping articles.[36] The burden is upon the master of the vessel suing for services performed to show employment for the voyage.[37] The burden is upon the owners of the vessel to prove defenses to an action for the wages of seamen,[38] or payments made thereon,[39] and to give clear proof that the seamen were informed of and agreed to a clause in an unusual place in the shipping articles, reducing their wages.[40]

H. Change of Voyage. — The burden is on the charterer of a vessel taking a different voyage from that agreed upon in the charter to prove that such voyage was substituted therefor.[41]

3. In Cases of Prize. — A. Presumptions. — a. *Title.* — Title is presumed from possession,[42] and is presumed to be in accordance with the ship's papers.[43]

b. *Hostility of Ship and Cargo.* — A ship sent into an enemy's port for adjudication as prize, and allowed to proceed upon her voyage therefrom, is presumed to have the enemy's license,[44] and if the proprietary interest in a captured vessel does not clearly appear, she is presumed enemy's property,[45] and goods found upon a hostile ship are presumed to be enemy's property.[46]

(1.) Trade With Enemy. — The trade from an enemy's country is

34. Benefit of Reasonable Doubt. In such case, the tug in charge of the pilot should have the benefit of any reasonable doubt as to whether the weather forbade the continuance of her course. The Frederick E. Ives, 25 Fed. 447.

35. Orne *v.* Townsend, 4 Mason 541, 18 Fed. Cas. No. 10,583.

36. Granon *v.* Hartshorne, 1 Blatchf. & H. 454, 10 Fed. Cas. No. 5689.

37. Burden Sustained by Inference. — In order to sustain such burden by inference from services rendered in getting the vessel ready for the voyage, the inference must be such as to exclude all reasonable doubt of employment for the voyage. Jones *v.* Davis, 1 Abb. Adm. 446, 13 Fed. Cas. No. 7460.

38. The Belle, 6 Ben. 287, 3 Fed. Cas. No. 1271; The Villa y Herman, 101 Fed. 132.

39. The Napoleon, Olc. 208, 17 Fed. Cas. No. 10,015; The Fritheoff, 14 Fed. 302.

40. The Ringleader, 6 Ben. 400, 20 Fed. Cas. No. 11,850.

41. Wheelwright *v.* Walsh, 42 Fed. 862.

42. Extent of Presumption. The presumption of title from possession prevails in admiralty as against all except the rightful owner, and where neutral property is taken from the prior possession of the rightful owner, its ownership is not affected by the possession of a British privateer, from which it is recaptured by an American privateer. The Resolution, 2 Dall. 1; 2 Wheat Appendix 24, 25.

43. The Resolution, 2 Dall. 1; The Carlos F. Roses, 177 U. S. 655.

44. The Langdon Cheves, 4 Wheat. 103.

45. 2 Wheat. Appendix 24.

46. The London Packet, 5 Wheat. 132; The Sally Magee, 3 Wall. 451; The Carlos F. Roses, 177 U. S. 655; The Flying Fish, 2 Gall. 374, 9 Fed. Cas. No. 4892; The San Jose Indiano, 2 Gall. 268, 21 Fed. Cas. No. 12,322; 2 Wheat. Appendix 24.

deemed hostile, regardless of the domicile of the parties.[47] A neutral ship violating her neutrality in aid of the enemy is deemed enemy's property,[48] and a colorable transfer of an enemy's vessel to a neutral, is presumed from continued hostile trade under the management or in the interest of the former owners, and from nonpayment of the purchase money.[49] An American ship dealing with the enemy is deemed hostile, and lawful prize.[50]

c. *Blockade.* — The intention to violate a blockade may be presumed from the conduct and position of the vessel when captured.[51] The deviation of a voyage into a blockaded port is presumed to be in the interest of the cargo, if it is not shown that those in charge had no knowledge of the blockade.[52]

(1.) Notice of Blockade. — Notice of a blockade at the port of destination will be presumed from its notoriety when the voyage was begun,[53] and a vessel in a blockaded port when the blockade was begun, is presumed to have knowledge when it began.[54] A public blockade notified to neutral powers is presumed to continue until public notification or other absolute proof of its discontinuance.[55]

B. Burden of Proof. — a. *Captors.* — The burden is upon the captors to prove a lawful capture of enemy's property,[56] and to overcome any presumption from the ship's papers to the contrary.[57]

b. *Claimants.* — The burden is upon the claimants to rebut any presumption or suspicion of hostile interest,[58] to prove neutral inter-

47. The Friendschaft, 4 Wheat. 105; The Cheshire, 3 Wall. 231; The Prize Cases, 2 Black 681.

48. Maley *v.* Shattuck, 3 Cranch 458; The Brig Eastern, 2 Dall. 34; The Society, 9 Cranch 209; The Hazard, 9 Cranch 205; The Antonio Johanna, 1 Wheat. 159; The Fortuna, 3 Wheat. 236; The Baigorry, 2 Wall. 474; The Hart, 3 Wall. 559; The Commercen, 2 Gall. 261, 6 Fed. Cas. No. 3055; The Alliance, Blatchf. Pr. Cas. 262, 1 Fed. Cas. No. 245; The Gondar, Blatchf. Pr. Cas. 266, 10 Fed. Cas. No. 5526.

49. The Benito Estenger, 176 U. S. 568.

50. The Alexander, 8 Cranch 169; The Julia, 8 Cranch 181; The Aurora, 8 Cranch 203; The Sally, 8 Cranch 382; The St. Lawrence, 8 Cranch 434; The Hiram, 8 Cranch 444; The Joseph, 8 Cranch 451; The Admittance, 18 How. 110; The Rugen, 1 Wheat. 62; The Diana, 2 Gall. 93, 7 Fed. Cas. No. 3876.

51. The Cornelius, 3 Wall. 214; The Cheshire, 3 Wall. 231.

52. The Sunbeam, Blatchf. Pr. Cas. 656, 23 Fed. Cas. No. 13,615.

53. The Adula, 89 Fed. 351.

54. Law of Nations. — This presumption is a settled rule of the law of nations. Prize Cases, 2 Black 635, 677.

55. The Baigorry, 2 Wall. 474.

56. The Resolution, 2 Dall. 1; The Thomas Watson, Blatchf. Pr. Cas. 120, 23 Fed. Cas. No. 13,933; The Sarah and Caroline, Blatchf. Pr. Cas. 123, 21 Fed. Cas. No. 12,340.

57. The Ship Resolution, 2 Dall. 1.

58. Proof to Overcome Presumption. — In order to overcome a presumption of enemy's property, the proof must be clear and unquestionable. The Resolution, 2 Dall. 1. And the claimants must show the absence of anything to impeach the transaction, and disclose fully all the circumstances. The Carlos F. Roses, 177 U. S. 655; Hooper *v.* U. S. 22 Ct. Cl. 408.

est,[59] or foreign property alleged,[60] and to make clear proof of title[61] and of payment therefor.[62]

c. *Blockade.* — The burden is upon a neutral vessel attempting to enter a blockaded harbor to prove beyond a reasonable doubt, that it was owing to absolute and uncontrollable necessity.[63]

d. *Violation of Neutrality.* — Where one belligerent vessel captured by another seeks the aid of a neutral port for restitution, the burden is upon its owner to prove a violation of neutrality,[64] and clear proof of any violation thereof which is charged will justify restitution to the owner,[65] but if they fail to prove it beyond a reasonable doubt, restitution will be ordered to the captors.[66]

(1.) **Augmentation of Force.** — The burden is upon the captured vessel charging an augmentation of force by the captors by enlistment in the neutral territory, to prove such enlistment,[67] and is then upon the captors to prove enlistment of subjects of their government transiently within the United States.[68]

4. Cases of Forfeiture. — A. Registry of Vessels. — To sustain a forfeiture of a vessel for violation of the registry of vessels act, the burden is upon the prosecution to prove the violation beyond a reasonable doubt,[69] but if a *prima facie* case is made, the burden is upon the claimants to rebut it by papers and other proofs within their power, else the vessel will be condemned.[70]

B. Embargo and Non-Intercourse Laws. — A prohibited cargo

59. The Benito Estenger, 176 U. S. 568; The Jenny, 5 Wall. 183; U. S. *v.* The Lilla, 2 Cliff. 169, 26 Fed. Cas. No. 15,600; U. S. *v.* Hayward, 2 Gall. 485, 26 Fed. Cas. No. 15,336; The San Jose Indiano, 2 Gall. 268, 21 Fed. Cas. No. 12,322.

Proof of Neutral Interest. — Neutral interest must be proved beyond a reasonable doubt. The Amiable Isabella, 6 Wheat. 1.

60. The Napoleon, Ole. 208, 17 Fed. Cas. No. 10,015.

61. The Benito Estenger, 176 U. S. 568; The Carlos F. Roses, 177 U. S. 655; Johnson *v.* Thirteen Bales, 2 Paine 639, 13 Fed. Cas. No. 7415.

62. The Benito Estenger, 176 U. S. 568; The Rover, 2 Gall. 240, 20 Fed. Cas. No. 12,091.

63. Stringency of Rule. — Any rule less stringent would open the door to fraud and pretenses of distress and danger; and where a similar excuse has been proved by the same vessel before, which was thereupon released, the second production of exculpating testimony for a second attempt, will be rigidly scrutinized. The Diana, 7 Wall. 354.

64. The Estrella, 4 Wheat. 298; La Amistad de Rues, 5 Wheat. 385; The Santissima Trinidad, 7 Wheat. 283.

65. The Estrella, 4 Wheat. 298; The Santissima Trinidad, 7 Wheat. 283; The Gran Para, 7 Wheat. 471; The Santa Maria, 7 Wheat. 490; The Arrogante Barcelones, 7 Wheat. 496.

Forfeitures of Right of Redress. Where it appears that the captured vessel began hostilities in neutral waters, she forfeits all right to protection and redress from the neutral government. The Anne, 3 Wheat. 435.

66. La Amistad de Rues, 5 Wheat. 392; The Santissima Trinidad, 7 Wheat. 339.

67. The Estrella, 4 Wheat. 298; La Amistad de Rues, 5 Wheat. 385; The Santissima Trinidad, 7 Wheat. 283.

68. The Estrella, 4 Wheat. 298; The Santissima Trinidad, 7 Wheat. 283.

69. U. S. *v.* The Burdett, 9 Pet. 682.

70. The Luminary, 8 Wheat. 407.

laden at a prohibited port and brought into a United States port, is presumed to have been laden with unlawful intent, unless rebutted by proof.[71] The burden is upon the government to prove that a prohibited cargo claimed as forfeited, for violation of the non-intercourse law, was on board as part of the cargo at the time of the offense.[72] The burden is upon the owners of the vessel to sustain any defense set up against the forfeiture,[73] to prove that the case was an exception to the act,[74] to prove by clear and positive evidence an excuse of necessity,[75] and the absence of intention to violate the law,[76] and to disprove the identity of the vessel when presumptively shown.[77]

C. Slave Trade. — The burden is on a slave trader entering a port of the United States in violation of law, to prove a plea of necessity and distress by conclusive testimony.[78] The government may sustain its burden to prove that a vessel was fitted out to engage in the slave trade by circumstantial evidence,[79] and the burden is on the vessel to give clear explanation to rebut strong indications of guilty purpose, or the vessel and cargo will be condemned.[80] The burden is upon the claimants of the captured property to make clear proof of a foreign proprietary interest.[81]

D. Customs. — The burden of proof is upon the government prosecuting the master of a vessel for not reporting to the offices of customs to prove that no report was made at the proper office;[82] where the government makes out a *prima facie* case against a vessel seized for violation of the revenue law, the burden is upon the claimants to rebut it.[83]

71. U. S. *v.* The Paul Shearman, 1 Pet. C. C. 98, 27 Fed. Cas. No. 16,012.

72. U. S. *v.* An Open Boat, 5 Mason 232, 27 Fed. Cas. No. 15,968.

73. The Short Staple, 1 Gall. 104, 22 Fed. Cas. No. 12,813; The Argo, 1 Gall. 150, 1 Fed. Cas. No. 516; Ten Hogsheads of Rum, 1 Gall. 187, 23 Fed. Cas. No. 13,830.

Degree of Proof. — A defense to forfeiture must be proved beyond a reasonable doubt. The Octavia, 1 Wheat. 20.

74. **British Goods Imported in Neutral Vessels.** — Where the exception was of British goods imported in neutral vessels, the burden is upon the claimants to show the neutrality of the vessel. U. S. *v.* Hayward, 2 Gall. 485, 26 Fed. Cas. No. 15,336.

75. Brig James Wells *v.* U. S., 7 Cranch 22; The New York, 3 Wheat. 59; The Aeolus, 3 Wheat. 302.

76. The New York, 3 Wheat. 59.

77. The Schooner Jane, 7 Cranch 363.

78. **Vigilance Against Slave Trade.** In the execution of the laws of the United States against the slave trade, no vigilance can be excessive, and restitution ought never to be made but in cases which are purged of every intentional violation, by proofs the most clear, the most explicit and unequivocal. The Josefa Secunda, 5 Wheat. 338; U. S. *v.* The Sally, 2 Cranch 406.

79. The Slaver "Reindeer," 2 Wall. 383; The Slaver "Weathergage," 2 Wall. 375; The Slaver "Sarah," 2 Wall. 366.

80. The Slaver "Kate," 2 Wall. 350.

81. The Antelope, 10 Wheat. 66; The Plattsburg, 10 Wheat. 133.

82. U. S. *v.* Galacar, 1 Spr. 545, 25 Fed. Cas. No. 15,181.

83. The John Griffin, 15 Wall. 20.

5. Bottomry and Repairs. — A. PRESUMPTIONS. — Presumptions are in favor of bottomry bonds,[84] and where the bond does not import to the contrary, the master must be presumed to have lawfully executed it.[85] Necessary advances for repairs and supplies in a foreign port ordered by the master, are presumed to have been made on the credit of the vessel,[86] but such presumption of credit may be repelled by proof that supplies were sold to the owner or his agent.[87] The lender on bottomry is presumed to have made due inquiry as to the apparent necessity for repairs,[88] and where such apparent necessity is shown, there is a presumption of the necessity of credit by the vessel.[89]

B. BURDEN OF PROOF. — The burden is on the obligee of a bottomry bond to show a necessity for the advances,[90] and is upon a

84. Bottomry Bonds Favored. Bottomry bonds, for the benefit of the ship owners, and the general advantage of commerce, are greatly favored in courts of admiralty, and where there is no suspicion of fraud every fair presumption is made to support them. O'Brien *v.* Miller, 168 U. S. 287.

85. Matters of Defense. — The want of authority of the master to execute the bond for not communicating with the owners of the cargo, if practicable, is matter of defense to be pleaded and proved, especially where the necessity for the bond, and the fact that it was for the best interests of the cargo owners is shown. O'Brien *v.* Miller, 168 U. S. 287.

86. Hazelhurst *v.* The Lulu, 10 Wall. 192; The Patapsco *v.* Boyce, 13 Wall. 329; The Metropolis, 9 Ben. 83, 17 Fed. Cas. No. 9503; The Acme, 7 Blatchf. 366, 1 Fed. Cas. No. 28; The Plymouth Rock, 9 Ben. 79, 19 Fed. Cas. No. 11,236; The Emily B. Souder, 17 Wall. 666; The Washington Irving, 2 Ben. 323, 29 Fed. Cas. No. 17,245.

87. The Aurora, 1 Wheat. 96; Phelps *v.* The Camilla, Taney 400, 19 Fed. Cas. No. 11,073; The St. John, 74 Fed. 842.

Satisfactory Proof Required.—The presumption can only be repelled by clear and satisfactory proof. The Emily B. Souder, 17 Wall. 666.

88. The Fortitude, 3 Sum. 228, 9 Fed. Cas. No. 4953.

89. The Grapeshot, 9 Wall. 129; Hazelhurst *v.* The Lulu, 10 Wall. 192; The Chusan, 2 Story 455, 5 Fed. Cas. No. 2717; The Plymouth Rock, 9 Ben. 79, 19 Fed. Cas. No. 11,236; The Native, 14 Blatchf. 34, 17 Fed. Cas. No. 10,054; The Eclipse, 3 Biss. 99, 8 Fed. Cas. No. 4268.

Degree of Proof Required. — Proof of absolute and indispensable necessity is not required, where supplies are furnished on the credit of the ship in a foreign port; and in such cases, courts of admiralty do not scrutinize carefully the accounts against the ship. The Grapeshot, 9 Wall. 129. And necessity is sufficiently shown where the furnishing was in good faith on the order of the master, and honestly and reasonably believed to be necessary to fit the ship for her voyage from the foreign port.

90. The Fortitude, 3 Sum. 228, 9 Fed. Cas. No. 4953; The Lulu, 10 Wall. 201.

Less strictness of proof is required against the ship, than against a hypothecation of the cargo. The Julia Blake, 107 U. S. 418; The Aurora, 1 Wheat. 96; The Grapeshot, 9 Wall. 129; The Kalorama, 10 Wall. 204; Bush & Sons Co. *v.* Fitzpatrick, 73 Fed. 501; Putnam *v.* The Polly, Bee 157, 20 Fed. Cas. No. 11,482; Hurry *v.* The John and Alice, 1 Wash. 293, 12 Fed. Cas. No. 6923; Welden *v.* Chamberlain, 3 Wash. 290, 28 Fed. Cas. No. 17,055; Rucher *v.* Conyngham, 2 Pet. Adm. 295, 20 Fed. Cas. No. 12,106; The Mary, 1 Paine 671, 16 Fed. Cas. No. 9187; Patton *v.* The Randolph, Gilp. 457, 18 Fed. Cas. No. 10,837; The Bridgewater, Ole. 35, 4 Fed. Cas. No. 1865.

libellant for money borrowed by the master upon a pledge of unearned freight, to show the necessity of the vessel.[91] But where an apparent necessity is shown for advances for repairs or supplies, the burden is upon the owners of the vessel to prove that the master had other sufficient funds or credit,[92] to the knowledge or means of knowledge of the lender,[93] and that the advances were not made upon the credit of the vessel.[94] The burden is on the owner when sued for repairs, to show delay and damage, and to show error in a bill of particulars certified by his agent.[95]

6. Cases of Collision. — A. PRESUMPTIONS. — a. *Laws Applicable.* The rules and regulations adopted by the principal maritime nations whose vessels navigate the Atlantic Ocean, will be presumed to bind both foreign and domestic ships in cases of collision, between them,[96] except that each may probably follow the sailing rules of its own country,[97] and that the maritime law deemed applicable will be that recognized by the court of the forum.[98] Collisions between foreign vessels of the same nationality in foreign waters or on the high seas will be deemed governed by the laws of their nationality.[99] It will be presumed that the rules of navigation governing cases of collision in Canadian waters are the same as those of the United States.[100]

b. *Fact of Collision.* — The mere fact of collision between vessels does not raise a presumption of negligence,[1] but proof of the

91. Bush & Sons Co. *v.* Fitzpatrick, 73 Fed. 501.

92. The Ship Virgin, 8 Pet. 538; The Grapeshot, 9 Wall. 129; The Lulu, 10 Wall. 192; The Custer, 10 Wall. 204; The Kalorama, 10 Wall. 204; The Emily B. Souder, 17 Wall. 666; The Phebe, 1 Ware 265, 19 Fed. Cas. No. 11,064; The Nestor, 1 Sum. 73, 18 Fed. Cas. No. 10,126; The Fortitude, 3 Sum. 228, 9 Fed. Cas. No. 4953.

Neglect of Means of Knowledge. The lender cannot shut his eyes to the means of knowledge, and must make reasonable inquiry. The Julia Blake, 107 U. S. 418.

93. The Sarah Starr, 1 Spr. 453, 12 Fed. Cas. No. 12,354; The Fortitude, 3 Sum. 228, 9 Fed. Cas. No. 4953; The Grapeshot, 9 Wall. 129; The Lulu, 10 Wall. 192; The Kalorama, 10 Wall. 204; The Custer, 10 Wall. 204; The Emily B. Souder, 17 Wall. 666.

94. Concurrent Credit. — Credit may be given both to the vessel and to the owner or the master. The Ship Virgin, 8 Pet. 538; The Chusan, 2 Story 455, 5 Fed. Cas. No. 2717; The Patapsco, 13 Wall. 329; The Prospect, 3 Blatchf. 526, 20 Fed. Cas. No. 11,443; The George Dumois, 68 Fed. 926.

95. The Mattano, 52 Fed. 876.

96. The Belgenland, 114 U. S. 355; The Scotia, 14 Wall. 170; The City of Washington, 92 U. S. 31.

97. The Scotia, 14 Wall. 170; The Belgenland, 114 U. S. 355.

98. The Scotland, 105 U. S. 24; The Belgenland, 114 U. S. 355; Smith *v.* Condry, 1 How. 28.

99. The Scotia, 14 Wall. 170; The Scotland, 105 U. S. 24.

100. Robinson *v.* Detroit etc. Nav. Co., 73 Fed. 883.

1. Collision Between Tugs. Where two colliding tugs are libelled for injury to the tow, there is no presumption of negligence against either tug. The L. P. Dayton, 120 U. S. 337; The James Bowen, 10 Ben. 430, 13 Fed. Cas. No. 7192; The Bridgeport, 7 Blatchf. 361, 4 Fed. Cas. No. 1861.

circumstances of the injured vessel may raise a presumption of negligence against the other.[2]

c. *Fault in Management.* —A colliding vessel is presumed to have contributed negligently to a collision if it omitted to comply with statutory requirements,[3] or with rules essential to good seamanship,[4] or if defectively manned,[5] or having an incompetent,[6] or unskillful and negligent pilot,[7] or an incompetent and unskillful officer in charge of the deck,[8] or failing to have a trustworthy and sufficient lookout.[9]

d. *Sailing Vessels Colliding.* — A sailing vessel meeting another end on, is deemed negligent in not porting her helm, but star-boarding it,[10] and one with wind free is presumed negligent in colliding

2. The Bridgeport, 7 Blatchf. 361, 4 Fed. Cas. No. 1861.

3. The Pennsylvania, 19 Wall. 125; The Martello, 153 U. S. 64; Taylor *v.* Harwood, Taney 437, 23 Fed. Cas. No. 13,794; The Bolivia, 49 Fed. 169; Merchants' and Miners' Transportation Co. *v.* Hopkins, 108 Fed. 890; Foster *v.* The Miranda, 6 McLean, 221, 17 Fed. Cas. No. 9997.

4. The Martello, 153 U. S. 64; The H. F. Dimock, 77 Fed. 226; The New York *v.* Rae, 18 How. 223; The Albert Dumois, 177 U. S. 240.

Faulty Navigation. — Faulty navigation is *per se* a sufficient answer to the defense of inevitable accident. Mabey *v.* Cooper, 14 Wall. 204.

Imminence of peril caused by mismanagement of the vessel cannot excuse the violation of a rule of navigation. Peters *v.* The Dexter, 23 Wall. 69.

5. **Presumption Not Conclusive.** The presumption from want of sufficient manning is not conclusive, and must yield if overcome by inference from the circumstances. The fact that the vessel was short handed, and had no proper lookout, is not decisive of fault, but is considered as bearing upon probabilities and raising a presumption against the vessel. Robinson *v.* Detroit & C. S. Nav. Co., 73 Fed. 883; The Albert Dumois, 177 U. S. 240.

6. **Employment of Cooper.** — The presumptions are against the proper management of a vessel by one acting as a pilot, who is a cooper and not a pilot by occupation. The Washington, 3 Blatchf. 276, 29 Fed. Cas. No. 17,220.

7. The China, 7 Wall. 153; The Great Republic, 23 Wall. 20; Bussy *v.* Donaldson, 4 Dall. 206; The Merrimac, 14 Wall. 199; The Civilta and The Restless, 103 U. S. 699; Camp *v.* The Marcellus, 1 Cliff. 481, 4 Fed. Cas. No. 2347; The Alabama, 1 Ben. 476, 1 Fed. Cas. No. 122; The Carolus, 2 Curt. 69, 5 Fed. Cas. No. 2424; Smith *v.* The Creole, 2 Wall. Jr. 485, 22 Fed. Cas. No. 13,033; The Blossom, Olc. 188, 3 Fed. Cas. No. 1564; Ward *v.* Ogdensburgh, 5 McLean 622, 29 Fed. Cas. No. 17,158; The Parkersburgh, 5 Blatchf. 247, 18 Fed. Cas. No. 10,753; The Ottawa, 3 Wall. 268; The Hypodame, 6 Wall. 216.

8. Chamberlain *v.* Ward, 21 How. 548.

9. The Genesee Chief, 12 How. 443; The Catharine, 17 How. 170; Chamberlain *v.* Ward, 21 How. 548; The George W. Roby, 111 Fed. 601; Haney *v.* Baltimore Steamer Packet Co., 23 How. 287; The Ottawa, 3 Wall. 268; The Ariadne, 13 Wall. 475; The Clara, 102 U. S. 200; The Nevada, 106 U. S. 154; The Oregon, 158 U. S. 186; The Emily, Olc. 132, 8 Fed. Cas. No. 4453; The Blossom, Olc. 188, 3 Fed. Cas. No. 1564; The New York *v.* Rae, 18 How. 223; The Hypodame, 6 Wall. 216; St. John *v.* Paine, 10 How. 557; Ward *v.* The Ogdensburgh, 5 McLean 622, 29 Fed. Cas. No. 17,158.

10. The Annie Lindsley, 104 U. S. 185; The Dexter, 23 Wall. 69; The Nichols, 7 Wall. 122; The Maggie J. Smith, 123 U. S. 340.

with one close-hauled;[11] but the latter is deemed negligent if she luffs into the wind instead of keeping her course.[12] Vessels colliding in an open lake with plenty of room to maneuver in easy navigation, are both presumed negligent.[13]

e. *Steamers Colliding.* — A steamer colliding squarely with another is presumed negligent in not porting her helm.[14] If their lines cross, the steamer colliding on the starboard side is deemed negligent.[15] A steamer running against the tide is deemed negligent in not stopping to prevent a collision with one running with the tide.[16] Any steamer not taking diligent precaution to avoid collision with another, is presumed negligent.[17]

f. *Collision of Steamers With Other Vessels.* — A steamer must keep out of the way of a sailing vessel, and is presumed negligent for colliding therewith,[18] unless proper precautions were made inef-

11. The Argus, Olc. 304, 1 Fed. Cas. No. 521; The Erastus Wiman, 20 Fed. 245; St. John *v.* Paine, 10 How. 557; The Ann Caroline, 2 Wall. 538; Bentley *v.* Coyne, 4 Wall. 509; The Mary Eveline, 16 Wall. 348; The Rebecca, Blatchf. & H. 347, 20 Fed. Cas. No. 11,618.

12. The Catharine *v.* Dickinson, 17 How. 177; The Argus, Olc. 304, 1 Fed. Cas. No. 521; The Elizabeth Jones, 112 U. S. 514; The Mary Eveline, 16 Wall. 348.

Exception. — The close hauled vessel is not deemed negligent for luffing, if the accident was inevitable. Bentley *v.* Coyne, 4 Wall. 509.

13. Pettit *v.* Camden County Freeholders, 87 Fed. 968.

14. N. Y. etc. Co. *v.* Philadelphia etc. Co., 22 How. 461; Union S. S. Co. etc. *v.* N. Y. etc. Co., 24 How. 307; The Vanderbilt, 6 Wall 225; The Galatea, 92 U. S. 439; The America, 92 U. S. 432; The Johnson, 9 Wall. 146.

15. The Corsica, 9 Wall. 630; The Columbia, 10 Wall. 246; Belden *v.* Chase, 150 U. S. 674; The E. A. Packer *v.* N. J. Lighterage Co., 140 U. S. 360.

16. The Galatea, 92 U. S. 439.

17. The America, 92 U. S. 432; Chamberlain *v.* Ward, 21 How. 548; The Maria Martin, 12 Wall. 31; The Connecticut, 103 U. S. 710; The Southern Belle, 18 How. 584; Williamson *v.* Barrett, 13 How. 101; The Continental, 14 Wall. 345; The Britannia *v.* Cleugh, 153 U. S. 130; Nichels *v.* The Servia, 149 U. S. 144; The Breakwater, 155 U. S. 252; The Manitoba, 122 U. S. 97; The Favorita, 1 Ben. 30, 8 Fed. Cas. No. 4693; The Umbria, 166 U. S. 404; Goslee *v.* Shute, 18 How. 463; Snow *v.* Hill, 20 How. 543; The Victory, 168 U. S. 410; The R. L. Maybey, 4 Blatchf. 88, 20 Fed. Cas. No. 11,870; The Relief, Olc. 104, 20 Fed. Cas. No. 11,693; The Santa Claus, Olc. 428, 21 Fed. Cas. No. 12,327; The Chesapeake, 1 Ben. 23, 5 Fed. Cas. No. 2642; Sturgis *v.* Clough, 21 How. 451; The Scranton, 5 Blatchf. 400, 21 Fed. Cas. No. 12,558; The Niagara, 3 Blatchf. 37, 18 Fed. Cas. No. 10,220; The Washington, 3 Blatchf. 276, 29 Fed. Cas. No. 17,220; The Cayuga, 1 Ben. 171, 5 Fed. Cas. No. 2536.

18. The Winona, 8 Blatchf. 499, 29 Fed. Cas. No. 17,411; The New Orleans, 8 Ben. 101, 18 Fed. Cas. No. 10,179; The Washington Irving, Abb. Adm. 336, 29 Fed. Cas. No. 17,243; The J. D. Peters, 42 Fed. 269; Merchants and Miners Transp. Co. *v.* Hopkins, 108 Fed. 890; Squires *v.* Parker, 101 Fed. 843; Barker *v.* The City of New York, 1 Cliff. 75, 2 Fed. Cas. No. 765; Newton *v.* Stebbins, 10 How. 586; The Monticello, 17 How. 152; The Oregon *v.* Rocca, 18 How. 570; N. Y. etc. S. S. Co. *v.* Rumball, 21 How. 372; The Fannie, 11 Wall. 238; The Scotia, 14 Wall. 170; The Falcon, 19 Wall. 751; The Sea Gull, 23 Wall. 165; The Commerce, 16 Wall. 33; The Clarita & The Clara, 23 Wall. 1; Ward *v.* The Fashion, 6 McLean,

fective by the fault of the sailing vessel.[19] A change of course of the sailing vessel is not presumed negligent, if the fault of the steamer made the collision inevitable.[20] A steamer colliding with a flat boat or floating boat, is presumed negligent.[21] A steamer is deemed negligent in not avoiding collision with another vessel where it failed to slacken its speed,[22] or to stop and reverse the engine in a case of emergency.[23] A sailing vessel at fault for not having the fog horn required is presumed to have contributed negligently to a collision with a steamer in a fog.[24]

g. One Vessel Overtaking Another. — One vessel coming behind another and seeking to pass it is presumed negligent for any resulting collision,[25] but a vessel wrongfully or carelessly interposed in

152, 29 Fed. Cas. No. 17,154; The Maverick, 1 Spr. 16, Fed. Cas. No. 9316; The Carroll, 8 Wall. 302; N. Y. etc. S. S. Co. *v.* Calderwood, 19 How. 241; The Fairbanks, 9 Wall. 420; The City of Paris, 9 Wall. 634; The Stephen Morgan, 94 U. S. 599; The Abbotsford, 98 U. S. 440; The Louisiana, 21 How. 1; The Civilta and The Restless, 103 U. S. 699; The Belgenland, 114 U. S. 355; The Benefactor, 102 U. S. 214; The Nacooche, 137 U. S. 330; The Blue Jacket *v.* The Tacoma Mill Co., 144 U. S. 371; The Martello, 153 U. S. 64.

Presumption Against Willful Collision. — A steamer colliding with a sailing vessel is presumed not to have run it down willfully. The Rochester, 81 Fed. 237.

19. Mistakes In Extremis. — The steamer is not responsible for mistakes *in extremis* caused by the fault of the sailing vessel. The Blue Jacket *v.* Tacoma Mill Co., 144 U. S. 371, 25 Fed. 831.

Deviation of Course. — The sailing vessel may deviate sufficiently to avoid obstructions, but is deemed at fault in not resuming her course, and in taking it into the pathway of the steamer. The John L. Hasbrouck, 93 U. S. 405; The Potomac, 8 Wall. 590; The Scotia, 14 Wall. 170; The Illinois, 103 U. S. 298; The S. C. Tryon, 105 U. S. 267.

20. The Falcon, 19 Wall. 75; The Fairbanks, 9 Wall. 420; The City of Paris, 9 Wall. 634; The Wenona, 19 Wall. 41; The Lucille, 15 Wall. 676; The Adriatic, 107 U. S. 512.

Violation of Sailing Rule. — The failure of the steamer to keep out of the way is no defense for the sailing vessel in violating an express sailing rule. The Stephen Morgan, 94 U. S. 599.

21. Ure *v.* Coffman, 19 How. 56; Pearce *v.* Page, 24 How. 228; Nelson *v.* Leland, 22 How. 48; Fretz *v.* Bull, 12 How. 466; Culbertson *v.* Shaw, 18 How. 584; The Southern Belle, Newb. 461, 6 Fed. Cas. No. 3462.

22. The Pennsylvania, 19 Wall. 125; Newton *v.* Stebbins, 10 How. 586; The Sea Gull, 23 Wall. 165; The Allegheny, 9 Wall. 522; The Favorita, 18 Wall. 598; McCready *v.* Goldsmith, 18 How. 89; The Martello, 153 U. S. 64; The Nacooche, 137 U. S. 330; The Victory, 168 U. S. 410; Rogers *v.* The St. Charles, 19 How. 108; The New York *v.* Rae, 18 How. 223.

23. The Sea Gull, 23 Wall. 165; The Martello, 153 U. S. 64; The City of New York, 147 U. S. 72; Nelson *v.* Leland, 22 How. 48; Williamson *v.* Barrett, 13 How. 101.

24. The Martello, 153 U. S. 64; The Bolivia, 49 Fed. 169; Merchants and Miners Transp. Co. *v.* Hopkins, 108 Fed. 890; The Pennsylvania, 19 Wall. 125.

25. Whitridge *v.* Dill, 23 How. 448; The Great Republic, 23 Wall. 20; The Cayuga, 14 Wall. 270; The Suffolk County, 9 Wall. 651; The Carolus, 2 Curt. 69, 5 Fed. Cas. No. 2424; The Rhode Island, Olc. 505, 20 Fed. Cas. No. 11,745; The Governor, 1 Abb. Adm. 108, 10 Fed. Cas. No. 5615; Ward *v.* The Dousman, 6 McLean, 231, 29 Fed. Cas. No. 17,153; The Osceola, 30 Fed. 383; The Hasbrouck, 29 Fed. 463; The Continental, 31 Fed. 166; The Narragansett, Olc.

the track of another, so as to render the collision inevitable, is deemed responsible therefor,[26] and the overtaking vessel is not presumed responsible for a collision which would not have occurred but for the fault of the other vessel.[27]

h. *Collision With Moored Vessel.* — There is a presumption of negligence against any moving vessel which collided with another vessel that was moored,[28] unless it was anchored in an improper and unexpected place which rendered the collision inevitable.[29] The presumption of fault is conclusive against the moving vessel, where the vessel at anchor collided with was on proper ground and showed proper lights,[30] and where the colliding vessel had her canvas fully spread in a fog so as to prevent prompt maneuvering.[31]

B. Burden of Proof. — a. *In General.* — The burden of proof is upon the libellant to establish negligence of the libelled vessel in causing the collision,[32] and to prove the freedom from fault of his own vessel.[33] The burden is upon each of two colliding vessels to

246, 17 Fed. Cas. No. 10,019; Seaman *v.* The Crescent City, 1 Bond 105, 18 Fed. Cas. No. 12,581; The Rhode Island, 1 Blatchf. 363, 20 Fed. Cas. No. 11,743; The City of Merida, 24 Fed. 229; The Isle of Pines, 24 Fed. 498.

26. The New Jersey, Olc. 415, 18 Fed. Cas. No. 10,161; The Narragansett, Olc. 246, 17 Fed. Cas. No. 10,010.

27. Long Island R. Co. *v.* Killien, 67 Fed. 365.

28. Mercer *v.* The Florida, 3 Hughes 488, 17 Fed. Cas. No. 9433; The St. John, 54 Fed. 1015; The Brady, 24 Fed. 300; The Bulgaria, 74 Fed. 898; The Scioto, 2 Ware 360, 21 Fed. Cas. No. 12,508; The Lady Franklin, 2 Low. 220, 14 Fed. Cas. No. 7984; The Oregon, 158 U. S. 186; The Le Lion, 84 Fed. 1011; Strout *v.* Foster, 1 How. 89; The Granite State, 3 Wall. 310; The Louisiana, 3 Wall. 164; The Bridgeport, 14 Wall. 116; McCready *v.* Goldsmith, 18 How. 89; The Southern Belle, 18 How. 584; The New York *v.* Rae, 18 How. 223; The Virginia Ehrman, 97 U. S. 309.

29. The Ailsa, 76 Fed. 868; The Oliver, 22 Fed. 848; Strout *v.* Foster, 1 How. 89; Martin *v.* Five Canal Boats, 24 Fed. 500.

30. The Florida, 3 Hughes 488, 17 Fed. Cas. No. 9433.

31. The George Bell, 3 Hughes 368, 11 Fed. Cas. No. 5856.

32. The Edwin H. Webster, 18 Fed. 724; The William Young, Olc. 38, 30 Fed. Cas. No. 17,760; The Joseph Stickney, 1 Fed. 624; The Amanda Powell, 14 Fed. 486; The David Dows, 16 Fed. 154; The New Jersey, Olc. 415, 18 Fed. Cas. No. 10,161; The Neptune, Olc. 483, 17 Fed. Cas. No. 10,120; The Rescue, 51 Fed. 927; The Fred Schlesinger, 71 Fed. 747; The Hercules, 55 Fed. 120; The Wioma 55 Fed. 338; The Maryland, 14 Fed. 367; The Chas. L. Jeffrey, 55 Fed. 685; The Washington Irving, Abb. Adm. 336, 29 Fed. Cas. No. 17,243.

Libel of Tow Against Tugs. — A ship towed by a tug, libelling its own tug and another for collision has the burden of proving negligence against each tug separately. The L. P. Dayton, 18 Blatchf. 411, 4 Fed. 834, 120 U. S. 337.

Identity of Libelled Tug. — A canal boat libelling a steam tug for collision, has the burden to prove the identity of the defendant, with the colliding tug. The City of Chester, 18 Fed. 603.

33. Collision Upon Canal. — The libellant for collision upon a canal has the burden to excuse his noncompliance with a rule of the canal. The Curtis Park, 19 Fed. 797.

A canal boat tying up in a fog on the tow path side has the burden to prove a sufficient warning to an approaching vessel colliding therewith. The City of Milwaukee, 14 Fed. 365; The Relief, Olc. 104, 20 Fed. Cas.

establish fault on the part of the other,[34] and is upon a vessel neglecting ordinary precaution to prove that such neglect did not cause or contribute to the collision.[35] A vessel clearly in fault for a collision has the burden to prove clearly the contributory negligence of the other vessel,[36] and any reasonable doubt must be resolved in its favor.[37]

b. *Neglect of Statutory Rules.* — A vessel neglecting compliance with a statutory rule of navigation, has the burden to prove not only that such neglect did not cause the collision,[38] but also that it could not have contributed thereto,[39] and that the collision would have happened if the statute had not been violated,[40] and to establish by clear and indisputable evidence that she was not wholly at fault,[41] or that she was justified in departing from the rule by impending peril,[42] or by agreement.[43]

c. *Vessel Bound to Keep Out of Way.* — A vessel bound in duty to keep out of the way of another has the burden to prove either that she kept out of the way,[44] or that there was a sufficient reason for not doing so,[45] that due care was used to avoid the collision,[46]

No. 11,693; Ward *v.* The Fashion, 6 McLean 152, 29 Fed. Cas. No. 17,154; The Columbus, Abb. Adm. 384, 6 Fed. Cas. No. 3043; The Charles L. Jeffrey, 55 Fed. 685; The Henry Clark *v.* O'Brien, 65 Fed. 815.

34. The Victory, 168 U. S. 410.

35. The H. F. Dimock, 77 Fed. 226; The John Craig, 66 Fed. 596; The Anglo-Norman, Newb. 492, 16 Fed. Cas. No. 9174; The Clapp *v.* Young, 5 Fed. Cas. No. 2786; The Great Republic, 23 Wall. 20; Donnell *v.* Boston Towboat Co., 89 Fed. 757; The Lion, 1 Spr. 40, 15 Fed. Cas. No. 8379; The George W. Roby, 111 Fed. 601; Call *v.* Old Dominion S. S. Co., 31 Fed. 234.

36. The Churchill, 103 Fed. 690; The Minnie, 100 Fed. 128; The City of New York, 147 U. S. 72; The Oregon, 158 U. S. 186; The Victory, 168 U. S. 410; The Mexico, 84 Fed. 504.

37. The City of New York, 147 U. S. 72; The Victory, 168 U. S. 410; The Umbria, 166 U. S. 404; The Ludvig Holberg, 157 U. S. 60; The Saale, 59 Fed. 716; The Minnie, 100 Fed. 128; The Oregon, 158 U. S. 186.

38. The St. Louis, 98 Fed. 750; The Trave, 55 Fed. 117.

39. The Richelieu etc. Co. *v.* Boston, 136 U. S. 408; The Martello *v.* Willey, 153 U. S. 64; The Britannia, 153 U. S. 130; The Glendale, 81 Fed. 633; The Trave, 55 Fed. 117; Thames Towboat Co. *v.* Central R. Co. 61 Fed. 117; St. Louis and N. O. Transp. Co. *v.* U. S., 33 Ct. Cl. 51; The Lansdowne, 105 Fed. 436; The Bolivia, 49 Fed. 169; The Yarmouth, 100 Fed. 607; The Belden *v.* Chase, 150 U. S. 674.

Absence of Mechanical Foghorn. The absence of the mechanical foghorn required by statute, must be shown not to have contributed to a collision in a fog. The Pennsylvania *v.* Troop, 19 Wall. 125.

40. The Saale, 59 Fed. 716.

41. Taylor *v.* Harwood, Taney 447; Martinez *v.* Anglo-Norman, Newb. 492, 16 Fed. Cas. No. 9174.

42. Belden *v.* Chase, 150 U. S. 674; Crockett *v.* Isaac Newton, 18 How. 583; The Sunnyside, 91 U. S. 208.

43. The Milwaukee, 1 Brown Adm. 313, 17 Fed. Cas. No. 9626.

44. The City of Augusta, 80 Fed. 297.

45. The Java, 14 Blatchf. 524, 13 Fed. Cas. No. 7233.

46. The Normandie, 42 Fed. 151; The Wenona, 8 Blatchf. 499, 29 Fed. Cas. No. 17,411; The Henry Clay, 72 Fed. 1021; The Maverick, 75 Fed. 845; The Java, 14 Blatchf. 524, 13 Fed. Cas. No. 7233; The George L. Garlick, 88 Fed. 553; Henderson *v.*

and that it was inevitable,[47] or was owing to the fault of the other vessel.[48]

d. *Vessel Bound to Keep Course.* — A vessel in duty bound to keep her course, which changed it prior to collision, has the burden to show that the change of course was justified by the conduct of the other vessel,[49] or was necessary to avoid immediate collision,[50] or did not contribute to the collision,[51] and that the collision was inevitable,[52] and without fault on her part.[53]

e. *Moored Vessels.* — **(1.) Burden Upon Moving Vessels.** — The burden is upon a moving vessel which collides with a moored or anchored vessel to rebut the presumption of negligence,[54] and to

Cleveland, 93 Fed. 844; Merchants and Miners Transp. Co. *v.* Hopkins, 108 Fed. 890; Squires *v.* Parker, 101 Fed. 846; The Oregon *v.* Rocca, 18 How. 570; U. S. S. Co. *v.* Rumball, 21 How. 385; The Lucy, 74 Fed. 572; The Clement, 2 Curt. 363, 5 Fed. Cas. No. 2879; The Bessie Morris, 13 Fed. 397.

47. The Mary A. Bird, 102 Fed. 648; Merchants and Miners Transp. Co. *v.* Hopkins, 108 Fed. 890; The Clement, 2 Curt. 363, 5 Fed. Cas. No. 2879; The Henry Clay, 72 Fed. 102; U. S. S. Co. *v.* Rumball, 21 How. 372; The Nettie Sundberg, 100 Fed. 886; La Bourgogne, 86 Fed. 475; The Homer, 99 Fed. 795; The Virginia Ehrman, 97 U. S. 309.

Steamship Colliding With Sailing Vessel. — A steamer colliding with a sailing vessel has the burden to prove that it could not have been prevented by any reasonable precaution. Squires *v.* Parker, 101 Fed. 553.

48. The Mary Bird, 101 Fed. 648; The Iava, 14 Blatchf. 524, 13 Fed. Cas. No. 7233; The Lizzie Major, 8 Ben. 333, 15 Fed. Cas. No. 8422; The Washington Irving, Abb. Adm. 336, 29 Fed. Cas. No. 17,243; The Seneca, 47 Fed. 87; Bigelow *v.* Nickerson, 78 Fed. 113; The Clement, 2 Curt. 363, 5 Fed. Cas. No. 2879; The Gypsum Prince, 67 Fed. 612.

49. Turning Toward Backing Vessel. — A vessel bound to keep her course which turned toward a vessel that was backing out of her way, has the burden to prove a sufficient cause therefor in the conduct of the backing vessel. The Corsica *v.* Schuyler, 9 Wall. 630.

Sheer of Steamer. — The burden of proving that the sheer of a steamer in a narrow channel was caused by the fault of a meeting steamer, and tow, is on those alleging it. The Alexander Folsom, 52 Fed. 403.

50. The Ella Warner, 30 Fed. 203.

51. Donnell *v.* Boston Towboat Co., 89 Fed. 757.

52. The Sagua *v.* The Grace, 42 Fed. 461.

53. Sheering Caused by Suction. A vessel sheering from her course, owing to the alleged suction of another vessel, and colliding with a third vessel which had agreed to pass in a certain way, must prove her entire freedom from fault. The Ohio, 91 Fed. 547.

54. Henderson *v.* Cleveland, 93 Fed. 844; The America, 95 Fed. 191; The Milwaukee, 2 Biss. 509, 17 Fed. Cas. No. 9625; The Wm. M. Hoag, 69 Fed. 742; The Dean Richmond, 103 Fed. 701, 107 Fed. 1001; Amoskeag etc. Co. *v.* The John Adams, 1 Cliff. 404, 1 Fed. Cas. No. 338.

Rebuttal of Presumption. — There is not only a presumption in favor of a vessel at anchor because she is at anchor, but also a presumption of fault on the part of the colliding vessel, which shifts the burden upon the latter to rebut it by clear proof of the fault of the vessel at anchor. The Oregon, 158 U. S. 186.

Steamer Towed Out of Slip. — A steamer towed out of a slip which injured moored vessel by jamming it with the towline, has the burden to show that she was without fault. The City of Augusta, 30 Fed. 844.

show that she could not have prevented the collision,[55] and that the moored vessel was at fault.[56] The burden is upon a vessel breaking away from her moorings and colliding with another vessel at anchor, to prove inevitable accident,[57] and to excuse the breaking away and drifting against the other vessel.[58]

(2.) Burden Upon Moored Vessel. — The burden is upon a barge sunk at her mooring amidst breaking ice, after a collision, to show that the sinking was not caused by the breaking of the ice, but was the fault of the colliding vessel.[59] A vessel anchored in a channel at night has the burden to prove that she exhibited a proper light and maintained a watch to prevent the collision.[60] A vessel moored in an improper place has the burden to show that the collision was not caused by its fault, but by the act of the other vessel.[61] Upon collision in a dense fog between a steamer and a moored vessel, the burden is upon the moored vessel to show that she was moored in a proper place.[62]

(3.) Burden Upon Ship Towed. —The owner of a ship which collided with a vessel at anchor, while towed by a tug, has the burden to prove the negligence of the tug.[63]

f. *Collision in Narrow Place.* — An unencumbered steamer passing a tug with a heavy tow in a narrow channel has the burden to prove that the side of passage chosen was the only safe one, and that she took every precaution to avoid the collision.[64] A steamer crossing the channel of a river to anchor must prove great care against collision,[65] and a steamer backing from a shoal in a narrow

55. The Nettie Sundberg, 100 Fed. 886; La Bourgogne, 86 Fed. 475.

Exoneration of Moving Vessel. A moving vessel colliding with a vessel at anchor must exonerate herself by proof that it was not in her power to prevent the collision by any practicable precautions. The Homer, 99 Fed. 795; The Milwaukee, 2 Biss. 509, 17 Fed. Cas. No. 9625; The Louisiana, 3 Wall. 164; The Virginia Ehrman and The Agnese, 97 U. S. 309.

56. Amoskeag etc. Co. *v.* The John Adams, 1 Cliff. 404, 1 Fed. Cas. No. 338; The Oregon, 158 U. S. 186; The Milwaukee, 2 Biss. 509, 17 Fed. Cas. No. 9625; The Porter *v.* Hemminger, 6 Can. Ex. 208.

57. The Fremont, 3 Sawy. 571, 9 Fed. Cas. No. 5094; The Louisiana, 3 Wall. 164.

58. Sufficiency of Excuse. — A sufficient excuse is shown by proof that all practicable precautions were taken and that the breaking away and collision were owing to a storm, which made the posts give way at which they were moored. The Waterloo and The Glenalvon, 79 Fed. 113, 100 Fed. 332; The Chickasaw, 38 Fed. 358.

59. The Maryland, 14 Fed. 367.

60. The Armonia, 67 Fed. 362.

61. St. Louis M. V. Transp. Co. *v.* U. S., 33 Ct. Cl. 250.

62. Amoskeag etc. Co. *v.* The John Adams, 1 Cliff. 404, 1 Fed. Cas. No. 338.

63. Responsibility of Ship. Where the collision was caused by the wrong steering of the ship, and its failure to steer with the tug, the ship alone is deemed responsible therefor. The Invertrossachs, 59 Fed. 194.

But where the ship tried to follow the tug, but was negligently thrown loose from it, and caused to collide with the anchored vessel, the ship is not deemed at fault. The James Gray, 106 U. S. 184.

64. The Lucy, 74 Fed. 572.

65. The Maryland, 14 Fed. 367.

place has the burden to show that the backing did not contribute to a collision with a barge in tow.[66]

g. *Collision With Pier.* — A vessel complaining of the owner of a pier for collision has the burden to prove that she was not in fault, and that the pier was an obstruction to navigation.[67]

7. Towage. — A. Presumptions. — Damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault,[68] but the negligence of the tug may be presumed from the circumstances,[69] and will be presumed where the tow was stranded upon a shoal owing to the fact that the tug deviated from a proper course,[70] or where the tow was not properly constructed, and broke loose to its injury,[71] or where the stopping of the tug in its harbor caused the tow to impinge upon a pier,[72] or where a tow delivered in good condition was sunk,[73] or logs were lost from a seaworthy raft by collision with the shore and breaking of the tow-line,[74] or by insecure fastening of the raft.[75] The presumption that government buoys correctly indicate places of danger, cannot justify the following of them blindly by a tug which towed a vessel upon a rock without looking for displacement of the buoys.[76]

B. Burden of Proof. — a. *Upon Owners of Tow.* — The burden is upon the owners of the tow to prove a breach of the contract of towage,[77] and negligence of the tug,[78] and that such negligence was the proximate cause of the loss,[79] and to show a total loss of the tow, and that it would cost more than it would be worth to raise and

66. The John Craig, 66 Fed. 596.

67. The Henry Clark *v.* O'Brien, 65 Fed. 815.

68. **Contract of Towage.** — The contract of towage requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators employ in similar services. The Steamer Webb, 14 Wall. 406.

69. The Steamer Webb, 14 Wall. 406; The Quickstep, 9 Wall. 665; The Seven Sons, 29 Fed. 543.

70. The Steamer Webb, 14 Wall. 406.

71. The Quickstep, 9 Wall. 665.

72. The Margaret, 94 U. S. 494; The Cayuga, 16 Wall. 177.

73. The Seven Sons, 29 Fed. 543.

74. **Loss of Piles From Raft.** The mere loss of piles from a raft in tow will not be presumed negligent. The A. R. Robinson, 57 Fed. 677; Wilson *v.* Sibley, 36 Fed. 379.

75. The Wasp, 86 Fed. 470.

76. The Hercules, 81 Fed. 218.

77. **Breach of Contract.** — The burden is upon one who alleges breach of the contract of towage to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness to his injury in the performance. The Steamer Webb, 14 Wall. 406.

78. Richter *v.* The Olive Baker, 40 Fed. 904; The Frederick E. Ives, 25 Fed. 447; The Brazos, 14 Blatchf. 446, 4 Fed. Cas. No. 1821; The Mary, 14 Fed. 584; The Aurora, 25 Fed. 778; The Hercules, 55 Fed. 120; The America, 6 Ben. 122, 1 Fed. Cas. No. 282; The George L. Garlick, 16 Fed. 703; The W. H. Simpson, 80 Fed. 153; Pederson *v.* John D. Spreckels & Bros. Co., 87 Fed. 938; The Carbonero, 106 Fed. 329; The W. E. Gladwish, 17 Blatchf. 77, 29 Fed. Cas. No. 17,355.

79. The Carbonero, 106 Fed. 329. **Loss After Towage.** — The loss of a barge three days after the towage was finished must be proved to have been proximately caused by negligent towage. The Mary, 14 Fed. 584.

Loss of Dredge Towed. — A libel-

repair it.[80] Where the tug assumed no risk of unseaworthiness, the tow which sprung a leak has the burden to prove the amount of loss over what it would have been if due care had been used.[81] The owners of a tow lost in a squall, have the burden to prove negligence of the tug in proceeding before the squall,[82] and if the tug was in charge of a pilot, it should have the benefit of any reasonable doubt as to the weather's permitting continuance.[83]

b. *Upon Owners of Tug.* — The owners of the tug have the burden to excuse the stranding of the vessel towed out of her usual course,[84] or the abandoning of the tow during a storm,[85] or the striking of the tow upon a rock,[86] or unseen obstructions in the channel,[87] and to prove that the grounding of the tow was in the customary channel, and owing to unusually low water,[88] and that due care was exercised by the tug in navigation.[89] The burden is upon a tug which stopped *en route* in breach of contract, to prove that the subsequent loss of the tow from springing a leak and capsizing, was not owing to such breach,[90] and where a tug stopped *en route* for good reason, and the tow was thereafter injured in a squall, the tug has the burden to prove that at no time could she have resumed the towage so as to avoid the injury.[91]

8. Salvage. — The burden is upon the owner of a wrecked vessel to prove that the price agreed upon for salvage was exorbitant, and was extorted under unfair circumstances,[92] and to prove a defense of the forfeiture of the claim of salvage by misconduct,[93] and to prove an alleged agreement to pay the usual compensation, instead of a fixed compensation as alleged in the libel.[94]

9. Seaworthiness. — A. PRESUMPTIONS. — a. *Implied Contract.* In every contract to carry goods by sea, an implied contract of warranty of absolute seaworthiness of the vessel at the beginning of the voyage, is presumed, in the absence of a stipulation to the con-

lant seeking to recover the value of a dredge sunk while in tow, must prove that the negligence of the tug caused the sinking. The Hercules, 55 Fed. 120.

80. Dowell *v.* The Pa. R. Co., 13 Blatchf. 403, 7 Fed. Cas. No. 4039.

81. McCormick *v.* Jarrett, 37 Fed. 380.

82. The George L. Garlick, 16 Fed. 703; The Frederick E. Ives, 25 Fed. 447.

83. The Frederick E. Ives, 25 Fed. 447.

84. The Steamer Webb, 14 Wall. 406; The Kalkaska, 107 Fed. 959.

85. The Clematis, 1 Brown Adm. 499, 5 Fed. Cas. No. 2876.

86. The Belle, 89 Fed. 879; The Taurus, 91 Fed. 796.

87. The Ellen McGovern, 27 Fed. 868.

88. The James H. Brewster, 34 Fed. 77.

89. The Steamer Webb, 14 Wall. 406; The Ellen McGovern, 27 Fed. 868; The Kalkaska, 107 Fed. 959.

90. Phillips *v.* The Sarah, 38 Fed. 252.

91. The W. E. Cheney, 6 Ben. 178, 29 Fed. Cas. No. 17,344.

92. Connoly *v.* The Dracona, 5 Can. Ex. 146.

93. Pleading and Proof. — The defense of misconduct must be specially pleaded with distinctness and must be proved as alleged. The Alexandra, 104 Fed. 904.

94. Elphicke *v.* White Line Towing Co., 106 Fed. 945.

trary,[95] which includes latent defects rendering the vessel unseaworthy,[96] and latent defects subsequently discovered rendering the vessel unseaworthy, are presumed to have existed when the voyage began.[97]

b. *Staunchness of Vessel.* — A vessel is presumed seaworthy which was staunch and strong in the perils of the sea for a considerable time,[98] and which is found seaworthy upon a careful preliminary survey by the charterer.[99] There is no presumption of unseaworthiness from the breaking of a crank-shaft in the perils of the sea, after enduring them safely for many years.[1]

c. *Improper Manning.* — A vessel not properly manned is presumed unseaworthy,[2] and the same presumption follows from an incorrect compass, and want of skill of the officers in command.[3]

d. *Leakage and Sinking of Vessel.* — A vessel is presumed unseaworthy which springs a leak before encountering the perils of the sea,[4] or which capsizes from overloading,[5] or in smooth waters from the swell of a steamer,[6] or which sinks at her dock, when loaded,[7] or sinks shortly after starting upon her voyage.[8]

e. *Insecure Port Hole.* — A vessel is presumed unseaworthy if a port hole is left insecure when starting upon her voyage, through which sea water is admitted upon the cargo.[9]

95. The Edwin I. Morrison, 153 U. S. 199; The Caledonia, 43 Fed. 681; The Director, 34 Fed. 57; The Eugene Vesta, 28 Fed. 762; Bowring *v.* Thebaud, 42 Fed. 794; The Northern Belle, 9 Wall. 517; Lawrence *v.* Minturn, 17 How. 100; The Carib Prince, 63 Fed. 266; Kellogg *v.* La Crosse etc. Packet Co., 3 Biss. 496, 14 Fed. Cas. No. 7663; Work *v.* Leathers, 97 U. S. 379; The Rover, 33 Fed. 515.

96. The Caledonia, 157 U. S. 124; The Edwin I. Morrison, 153 U. S. 199; The Carib Prince, 63 Fed. 266; Work *v.* Leathers, 97 U. S. 379; The Rover, 33 Fed. 515.

97. Work *v.* Leathers, 97 U. S. 379.

98. The Warren Adams, 74 Fed. 413; The Calvin S. Edwards, 50 Fed. 477; The Marlborough, 47 Fed. 667; The Millie R. Bohannon, 64 Fed. 883.

99. The Piskataqua, 35 Fed. 622.

1. The Rover, 33 Fed. 515; Chadwick *v.* Denniston, 41 Fed. 58.

2. Holland *v.* 725 Tons of Coal, 36 Fed. 784; The Sarah, 2 Spr. 31, 21 Fed. Cas. No. 12,338.

3. Bazin *v.* Steamship Co., 3 Wall. Jr. 229, 2 Fed. Cas. No. 1152.

4. Pacific Coast S. S. Co. *v.* Bancroft-Whitney Co., 94 Fed. 180; Kellogg *v.* La Crosse etc. Packet Co., 3 Biss. 496, 14 Fed. Cas. No. 7663; The Queen of the Pacific, 75 Fed. 74; The Gulnare, 42 Fed. 861.

5. The Oneida, 108 Fed. 886.

6. The Nord-Deutscher Lloyd *v.* Ins. Co. of North America, 110 Fed. 420; Ins. Co. of North America *v.* North German Lloyd Co., 106 Fed. 973.

7. Forbes *v.* Merchants Exp. & Transp. Co., 111 Fed. 796; Tygert-Allen Fertilizer Co. *v.* Hogan, 103 Fed. 663.

8. The Arctic Bird, 109 Fed. 167.

9. The Phoenicia, 90 Fed. 116; Farr & Bailey Mfg. Co. *v.* International Nav. Co., 98 Fed. 636.

Failure to Close Port Holes. — The failure to close port holes before sailing, against which goods are stored, renders the vessel unseaworthy. Putnam *v.* Manitoba, 104 Fed. 145. Also the failure to securely fasten them whereby they become open, though accessible. But if the glass doors are fastened and merely the iron doors are left open and accessible the fault is one merely of management. The Silvia, 171 U. S. 462.

B. Burden of Proof. — Where loss is claimed from perils of the sea, the burden is upon the vessel to prove seaworthiness at the beginning of the voyage,[10] and where unseaworthiness was excepted, provided due diligence was used to make the vessel seaworthy, the burden is upon her to prove due diligence and thorough and careful inspection.[11]

10. Injury to Cargo. — A. Presumptions. — a. *Negligence of Vessel.* — A presumption of negligence arises from injury to the cargo from a leak in the vessel,[12] or from leakage from casks caused by interference therewith,[13] or from injury by the gnawing of rats,[14] or from any injury to goods acknowledged to have been received in good condition.[15]

b. *Care of Shipper.* — The shipper is presumed to have used proper care in packing the damaged goods,[16] and it is presumed that the packages were full when shipped.[17]

c. *Stowage.* — Goods shipped under a common bill of lading are presumed to be properly stowed under deck according to common usage,[18] unless otherwise indicated.[19] The vessel is presumed negli-

10. The British King, 89 Fed. 872, 92 Fed. 1018; The Thomas Melville, 31 Fed. 486; The Phoenicia, 90 Fed. 116, 99 Fed. 1005.

Negligence of Vessel. — The negligence of the owners of the vessel in failing to make the vessel seaworthy, is not included in an exception of perils of the sea, and the vessel has the burden to prove that a cap and plate not securely fastened to a bilge pump hole were originally safe, and were carried away by the perils of the sea. The Edwin I. Morrison, 153 U. S. 199.

11. The Friesland, 104 Fed. 99.

12. The Samuel E. Spring, 29 Fed. 397; Kellogg *v.* La Crosse etc. Packet Co., 3 Biss. 496, 14 Fed. Cas. No. 7663.

13. The Giglio *v.* The Brittannia, 31 Fed. 432; The Newark, 1 Blatchf. 203, 18 Fed. Cas. No. 10,141.

Natural Loss of Liquids. — The vessel is not deemed negligent for ordinary leakage from casks, or loss therefrom by evaporation, or by fermentation and bursting of the casks. Nelson *v.* Woodruff, 1 Black 156.

Breach of Stipulation. — A vessel not complying with stipulations is accountable for leakage resulting therefrom, though stipulated against. Hunnewell *v.* Taber, 2 Spr. 1, 12 Fed. Cas. No. 6880.

Injury to Other Cargo. — The vessel is deemed liable for leakage which injures the cargo, if not caused by the perils of the seas. Bearse *v.* Ropes, 1 Spr. 331, 2 Fed. Cas. No. 1192.

14. The Carlotta, 9 Ben. 1, 5 Fed. Cas. No. 2413; The Isabella, 8 Ben. 139, 14 Fed. Cas. No. 7099; Stevens *v.* The Navigazione Generale Italiana, 39 Fed. 562; The Euripides, 71 Fed. 728; The Miletus, 5 Blatchf. 335, 17 Fed. Cas. No. 9545; The Italia, 59 Fed. 617; The Timor, 61 Fed. 633.

15. Nelson *v.* Woodruff, 1 Black 156, Choate *v.* Crowninshield, 3 Cliff. 184, 5 Fed. Cas. No. 2691; The Black Hawk, 9 Ben. 207, 3 Fed. Cas No. 1469; The Isabella, 8 Ben. 139, 14 Fed. Cas. No. 7099; English *v.* Ocean Steam Nav. Co., 2 Blatchf. 425, 8 Fed. Cas. No. 4490; The William Taber, 2 Ben. 329, 29 Fed. Cas. No. 17,757; Western Mfg. Co. *v.* The Guiding Star, 37 Fed. 641; The Historian, 28 Fed. 336; Howard *v.* Wissman, 18 How. 231.

16. English *v.* Ocean Steam Nav. Co., 2 Blatchf. 425, 8 Fed. Cas. No. 4490; The Moravian, 2 Hask. 157, 17 Fed. Cas. No. 9789

17. American Sugar Refining Co. *v.* The Euripides, 63 Fed. 140.

18. The Delaware, 14 Wall. 579; The Peytona, 2 Curt. 21, 19 Fed. Cas. No. 11,058; Vernard *v.* Hudson, 3 Sum. 405, 28 Fed. Cas. No. 16,921.

19. Goods Specially Marked.

gent and liable to loss or injury to goods which are improperly stowed.[20] A presumption of improper stowage is raised from the breaking of packages delivered in good order.[21] But mere injury to the cargo by motion of the ship in heavy weather does not raise a presumption that it resulted from bad stowage.[22]

B. Burden of Proof. — a. *Upon Owner of Cargo.* — The owner of cargo, the injury to which is *prima facie*, excused by the vessel, has the burden to prove that it might have been avoided by reasonable care,[23] and that the negligence of the vessel caused or contributed to the injury,[24] and to prove negligence avoiding the effect

Goods liable to sweat in the hold, which are marked "cabin storeroom," are improperly stored in the hold. The Star of Hope, 17 Wall. 651.

Goods to be Stowed on Deck. Goods properly stowed on deck, under the terms of a bill of lading, if necessarily jettisoned, are at the owner's risk. Lawrence *v.* Minturn, 17 How. 100.

20. The Delaware, 14 Wall. 579; The Star of Hope, 17 Wall. 651; The Rebecca, 1 Ware 187, 20 Fed. Cas. No. 11,619; The Paragon, 1 Ware 326, 18 Fed. Cas. No. 10,708; The Sloga, 10 Ben. 315, 22 Fed. Cas. No. 12,955; The America, 8 Ben. 491, 1 Fed. Cas. No. 283; The Joliet S. S. Co. *v.* Yeaton, 29 Fed. 331; The Bergenseren, 36 Fed. 700; Hills *v.* Mackill, 36 Fed. 702; The Gloaming, 46 Fed. 671; The Maggie M., 30 Fed. 692; The Keystone, 31 Fed. 412; The Bitterne, 35 Fed. 927; The Nith, 36 Fed. 86, 383; The Johanne, 48 Fed. 733; The Britannia, 34 Fed. 906; The Frey, 92 Fed. 667; The Glide, 78 Fed. 152; The Aspasia, 79 Fed. 91; The Earnwood, 83 Fed. 315; Paturzo *v.* Compagnie Francaise, 31 Fed. 611; The David *v.* Caroline, 5 Blatchf. 266, 7 Fed. Cas. No. 3593.

21. The Burgundia, 29 Fed. 607.

22. The Polynesia, 30 Fed. 210; The Connaught, 32 Fed. 640.

23. Clark *v.* Barnwell, 12 How. 272; Western Transportation Co. *v.* Downe, 11 Wall. 129; Hunt *v.* The Cleveland, 6 McLean 76, 12 Fed. Cas. No. 6885; The Olbers, 3 Ben. 148, 18 Fed. Cas. No. 10,477; The Warren Adams, 74 Fed. 413.

24. The Strathdon, 89 Fed. 374; 94 Fed. 206; 101 Fed. 604; Western Transportation Co. *v.* Downer, 11 Wall. 129; Turner *v.* The Black Warrior, 1 McAll. 181, 24 Fed. Cas. No. 14,253; The Rocket, 1 Biss. 354, 20 Fed. Cas. No. 11,975; The Invincible, 1 Low. 225, 13 Fed. Cas. No. 7055; The Delhi, 4 Ben. 345, 7 Fed. Cas. No. 3770; Vaughan *v.* 630 Casks of Wine, 7 Ben. 506, 28 Fed. Cas. No. 16,900; 630 Casks of Sherry, 14 Blatchf. 517, 22 Fed. Cas. No. 12,918; The Pereire, 8 Ben. 301, 20 Fed. Cas. No. 10,979; The Moravian, 2 Hask. 157, 17 Fed. Cas. No. 9789; Hunt *v.* Cleveland, 6 McLean 76, 12 Fed. Cas. No. 6885; The Neptune, 6 Blatchf. 193, 17 Fed. Cas. No. 10,118; The Montana, 17 Fed. 377; The Jefferson, 31 Fed. 489; The Thomas Melville, 31 Fed. 486; The Connaught, 32 Fed. 640; The Portuense, 35 Fed. 670; The Barraconta, 39 Fed. 288; The Hindoustan, 67 Fed. 794; The Centurion, 68 Fed. 382; The Flintshire, 69 Fed. 471; The Warren Adams, 74 Fed. 413; Crowell *v.* Union Oil Co., 107 Fed. 302; The Southwark, 108 Fed. 188.

Doubt as to Negligence. — The owner of the cargo cannot recover for injury, if the cause is left in doubt, and may as well be attributable to perils of the sea as to negligence. Rich *v.* Lambert, 12 How. 347; The George Heaton, 20 Fed. 323.

Loss of Cargo by Fire. — The owner of cargo destroyed by fire has the burden to prove that it was caused by the ship's negligence. New Jersey Steam Nav. Co. *v.* Merchant's Bank, 6 How. 344.

of a stipulation limiting the vessel's liability,[25] and the effect of a deterioration of goods from natural causes,[26] and to prove that damage to the cargo was done on board the steamer,[27] and to prove that it was the result of bad stowage,[28] or of injury from rats.[29]

b. *Upon Owner of Vessel.* — **(1.) Bill of Lading.** — The owner of the vessel has the burden to prove that damage or loss of cargo shipped under a bill of lading as being in good order and condition, was from a cause excepted by the bill of lading,[30] or existed when the goods were laden on board,[31] or was the result of inherent

25. Excepted Perils of Navigation. Where an excepted peril of navigation is shown *prima facie*, there is no presumption of negligence from injury to the cargo, and the burden of proving it to avoid the exception is upon the claimants of the cargo. Western Transportation Co. *v.* Downer, 12 Wall. 129; Clark *v.* Barnwell, 12 How. 272.

Excepted Leakage. — To avoid an exception of average leakage, the claimant of casks of wine, shown to be casks of an inferior quality, has the burden to prove greater than average leakage, and that it was owing to the vessel's negligence. Vaughan *v.* 630 Casks of Wine, 14 Blatchf. 517, 22 Fed. Cas. No. 12,-918; The Henry B. Hyde, 90 Fed. 114; Turner *v.* The Black Warrior, 1 McAll. 181, 24 Fed. Cas. No. 14,-253; Hunt *v.* The Cleveland, 6 McLean 76, 12 Fed. Cas. No. 6885; The Portuense, 35 Fed. 670; The Montana, 17 Fed. 377; The Jefferson, 31 Fed. 489; The Hindoustan, 67 Fed. 794; Crowell *v.* Union Oil Co., 107 Fed. 302.

26. Natural Deterioration. Damage to goods shipped resulting either from an intrinsic principle of decay, or from the humidity and dampness of the ship, must be borne by the owner of the goods unless he proves that the damage might have been avoided by reasonable care of the ship. Clark *v.* Barnwell, 12 How. 281.

Excepted liability for the deterioration of garlic must be borne by the owner thereof unless he makes the same proof. The Hindoustan, 67 Fed. 794.

27. The Adriatic, 16 Blatchf. 424, 1 Fed. Cas. No. 90; The Vincenzo, 10 Ben. 228, 28 Fed. Cas. No. 16,948; Nelson *v.* National S. S. Co., 7 Ben. 340, 17 Fed. Cas. No. 10,112.

28. Bad Handling. — The bad handling of goods stowed, is included in bad stowage. The Black Hawk, 9 Ben. 207, 3 Fed. Cas. No. 1469; Rich *v.* Lambert, 12 How. 356; The America, 8 Ben. 491, 1 Fed. Cas. No. 283; The Delhi, 4 Ben. 345, 7 Fed. Cas. No. 3770; Crowell *v.* Union Oil Co., 107 Fed. 302; The Connaught, 32 Fed. 640; The Centurion, 68 Fed. 382.

29. The Carlotta, 5 Fed. Cas. No. 2621.

30. Degree of Proof. — The vessel must prove clearly beyond a reasonable doubt that the loss was caused by excepted perils of the sea, and it is not sufficient to prove that it might have been so caused. The Compta, 4 Sawy. 375, 6 Fed. Cas. No. 3069.

Questions of Fact. — Whether excepted perils includes breakage and leakage in the violence of the sea is a question of fact depending on the circumstances of the case. The Frey, 106 Fed. 319.

31. Nelson *v.* Woodruff, 1 Black 156.

Iron Injured by Rust. — Where iron shipped as in good order and condition but marked "rusty," was badly corroded with rust from salt water at the end of the voyage, the vessel has the burden to prove that when received on board, it was otherwise affected than by atmospheric rust. The Nith, 36 Fed. 86.

defects,[32] and that the vessel is not at fault for such damage.[33]

(2.) Stowage. — The vessel has the burden to rebut presumed negligence in the stowage of the cargo,[34] and to prove that the injury could not have been avoided by reasonable care in stowage.[35]

32. Western Mfg. Co. *v.* Guiding Star, 37 Fed. 641; The Olbers, 3 Ben. 148, 18 Fed. Cas. No. 10,447.

Prima Facie Soundness. — Where the owner of a vessel is committed to the *prima facie* facts of soundness and good condition of potatoes shipped the burden is on him to overcome the *prima facie* presumption, and to prove that the potatoes when loaded on board were unsound and unfit for shipment. The Howard *v.* Wissman, 18 How. 231.

Visible Circumstances. — The *prima facie* evidence arising from the shipping of goods as in good order and condition only extends to open and visible circumstances and does not preclude the vessel from sustaining the burden to show that the loss was due to intrinsic qualities or the heat and humidity of the vessel for which the vessel was not responsible. Nelson *v.* Woodruff, 1 Black 156.

Contents Unknown. — Where the bill of lading adds to the shipment "contents unknown" any implication of admission as to the intrinsic qualities of the article is excluded. Clark *v.* Barnwell, 12 How. 272; The Columbo, 3 Blatchf. 521, 6 Fed. Cas. No. 3040; The California, 2 Sawy. 12, 4 Fed. Cas. No. 2314.

Apparent Good Order. — Where goods in packages were shipped "in apparent good order" the burden is on the vessel to show that a package was in fact secretly defective or insufficient. The Oriflamue, 1 Sawy. 176, 18 Fed. Cas. No. 10,571.

33. The Maggie M., 30 Fed. 692; The Zone, 2 Spr. 19, 30 Fed. Cas. No. 18,220; Zerega *v.* Poppe, Abb. Adm. 397, 30 Fed. Cas. No. 18,213; The Burgundia, 29 Fed. 607; The Martha, Olc. 140, 16 Fed. Cas. No 9145; Soule *v.* Rodocanachi, Newb 504, 22 Fed. Cas. No. 13,178.

Broken Cask of Wine. — Where a cask of wine shipped as in good order was broken the vessel must show that the damage was not caused by its negligence. The Black Hawk, 9 Ben. 207, 3 Fed. Cas. No. 1469.

Goods Properly Packed. — The vessel must show that goods properly packed were not damaged by its fault. The Historian, 28 Fed. 336.

Damage Upon Ordinary Voyage. The burden is upon the vessel to show that goods damaged upon an ordinary voyage were not damaged by its negligence. The Wilhelmina, 3 Ben. 110, 29 Fed. Cas. No. 17,658.

Damage From Rats. — Damage from rats is not included in excepted perils of the sea, and the burden is upon the owner of the vessel to rebut presumed negligence from such damage. Stevens *v.* Navigazione Generale Italiana, 39 Fed. 562.

34. The Maggie M., 30 Fed. 692; The Black Hawk, 9 Ben. 207, 3 Fed. Cas. No. 1469; The Burgundia, 29 Fed. 607.

Stowage of Salt Over Iron. — The stowage of salt over iron around the main mast, without drainage away from it is presumed negligence, which the vessel must overcome by proof that the iron was injured by rust otherwise than by such salt mixed with sea water which broke down the mast coat during the storm and burst in upon the salt and iron. The Nith, 36 Fed. 86.

Precaution in Stowage.—Goods injured from mere "blowing" upon an ordinary voyage are presumed to have been negligently stowed and the burden is upon the vessel to prove otherwise and that proper precautions were taken to avoid the danger. The Wilhelmina, 3 Ben. 110, 29 Fed. Cas. No. 17,658.

35. Oil Stowed Over Cork. Where oil barrels stowed over cork bales got adrift in heavy weather and being thereby smashed injured the cork, the burden is on the vessel to prove that reasonable care in storing the cargo could not have avoided

(3.) Baggage. — The owners of a vessel carrying passengers have the burden to prove that injury to baggage resulted wholly from inevitable accident,[36] and that baggage damaged in a storm was properly stowed.[37]

(4.) Incompetent Master. — The owners of the vessel have the burden to prove diligence in the employment of an incompetent master by whose incompetent management the cargo was injured.[38]

(5.) Shortage in Cargo Delivered. — The burden is upon the vessel to explain a short delivery of cargo under a bill of lading specifying a greater amount, and to show that it delivered all that it received;[39] but it is upon the shipper or owner of the cargo to prove the delivery of the greater amount to the vessel if no bill of lading was taken,[40] or if it specifies that the quantity, number or weight is unknown,[41] and

the injury. The Maggie M., 30 Fed. 692.

36. Inevitable Accident. — In order to prove inevitable accident it must be shown that the injury could not have been prevented by any human efforts, sagacity and care. The Majestic, 166 U. S. 375; Dibble *v.* Morgan, 1 Woods 406, 7 Fed. Cas. No. 3881.

37. Drifting of Baggage.—Where baggage got adrift in a severe gale and was thereby damaged the burden is upon the ship owner to prove that it was properly stowed in order to avail himself of excepted perils of the sea. The Kensington, 88 Fed. 331.

38. Burden Not Sustained. Such burden is not sustained, but the owners of the vessel must be deemed negligent toward the owners of the cargo, where it appears that they have employed a master of such intemperate habits and so addicted to intoxication, as to render him unfit for his position without exercising due diligence in such employment. The Guild Hall, 58 Fed. 796.

39. Manchester *v.* Milne, Abb. Adm. 115, 16 Fed. Cas. No. 9006; The J. W. Brown, 1 Biss. 76, 14 Fed. Cas. No. 7590; Brouty *v.* 5346 Bundles of Staves, 21 Fed. 590.

Degree of Proof. — The proof of mistake in quantity should be clear and unquestionable to rebut the evidence afforded by the bill of lading. Goodrich *v.* Norris, Abb. Adm. 196, 10 Fed. Cas. No. 5545.

Weighing Done by Ships. — Where the ships did the weighing, the vessel is exonerated by proof that it delivered to the consignee, all that it received from the shipper. Hopkins *v.* Wood, 12 Fed. Cas. No. 6693.

Estoppel of Vessel. — The vessel is not ordinarily estopped as against the shipper to contradict the weights and quantities specified in the bill of lading, and it cannot be estopped to show that no cargo was delivered under the bill of lading. Pollard *v.* Vinton, 105 U. S. 7; The Freeman *v.* Buckingham, 18 How. 182; The Lady Franklin, 8 Wall. 325; The Sutton *v.* Kettell, 1 Spr. 309, 23 Fed. Cas. No. 13,647; Adams *v.* The Pilgrim, 1 Ohio Dec. 477.

Clean Bill of Lading. — A clean bill of lading for a specified quantity or which expressly specifies that any deficiency is to be paid for by the vessel, cannot be avoided by proof of delivery of a less quantity as being all that was received. Merrick *v.* 19,514 Bushels of Wheat, 3 Fed. 340; Sawyer *v.* Cleveland Iron Min. Co., 69 Fed. 211; Creighton *v.* George's Creek, 6 Fed. Cas. No. 3382.

40. Manning *v.* Hoover, Abb. Adm. 188, 16 Fed. Cas. No. 9044.

41. Unknown Particulars. — In an action for a short delivery of cargo, where it appears that the vessel delivered all that it received, the amount shipped must be shown by the claimant where the bill of lading specifies "quantity and quality unknown" or "weight and quality unknown" or "weight, contents and value unknown," or "weight unknown," or that the vessel is "not

to show the value of goods not delivered.[42]

(6.) Delivery of Cargo. — The shipper suing for non-delivery of cargo must prove it,[43] whereupon the burden is upon the vessel to show delivery,[44] or to excuse a failure to deliver it to the consignee,[45] and to show that a missing part was placed upon a wharf where his goods were kept,[46] and that notice was given to the consignee.

accountable for numbers or weight." Abbott *v.* The National S. S. Co., 33 Fed. 895; Eaton *v.* Neumark, 33 Fed. 891, 37 Fed. 375; Campart *v.* The Prior, 2 Fed. 819; The Pietro G., 38 Fed. 148; The Ismaele, 14 Fed. 491; The Querini Stamphalia, 19 Fed. 123; The Fern Holme, 24 Fed. 502.

Presumptive Liability Removed. By such clauses the presumptive liability of the vessel for a short delivery of an amount stated in the bill of lading is removed and a short delivery cannot be claimed under proof by the vessel of complete delivery of what was received in the absence of further proof than the amount stated in the bill of lading or in a weigh-master's certificate; and where different weights are put in evidence the greater cannot be adopted without preponderating proof. Eaton *v.* Neumark, 33 Fed. 891; Abbott *v.* National S. S. Co., 33 Fed. 895; Pietro G., 38 Fed. 148; The Querini Stamphalia, 19 Fed. 123; The Ismaele, 14 Fed. 491.

Burden on Consignee. — Under such clauses the burden is on consignee claiming a short delivery to prove that the missing quantity was abstracted by the vessel and to prove that an increased shortage in delivery of goods separated by its agents from those of another consignee, who received an increase of the amount shipped was owing to the fault of the vessel. Eaton *v.* Neumark, 37 Fed. 375; The Ismaele, 14 Fed. 491.

Proof of Shortage. — Under such a clause it will require more than the proof that a weigher found some of a specified number of bags of canary seeds shipped a few pounds short in weight to establish responsibility for shortage. The Fern Holme, 24 Fed. 502.

Bona Fide Purchaser. — The vessel may under such a clause clear itself of a short delivery of a particular number and weight stated by proof of complete delivery of the amount shipped even as against a *bona fide* purchaser of the bill of lading.

42. Seller *v.* The Pacific, Deady 17, 21 Fed. Cas. No. 12,644.

43. Alternate Consignees.—Under a bill of lading specifying delivery to either one of two persons the shipper must give some evidence showing that no delivery was made to either of them, and proof of non-delivery to one of them is not sufficient. The Falcon, 3 Blatchf. 64, 8 Fed. Cas. No. 4617.

44. Burden, How Cast. — Slight evidence of non-delivery will cast the burden on the vessel to prove delivery. The Falcon, 3 Blatchf. 64, 8 Fed. Cas. No. 4617.

45. Delivery to True Owner. The vessel may show as an excuse for non-delivery to the consignee that the goods were delivered to the true owner. The Idaho, 93 U. S. 575.

Absence of Excuse. — It is no excuse for a delivery by the vessel to the wrong person where the bill of lading stipulated for delivery to order and was not produced. The Thames, 14 Wall. 98.

A Mis-delivery by the vessel is not excused though made by mistake or imposition. The Santee, 2 Ben. 519, 21 Fed. Cas. No. 12,328; 7 Blatchf. 186, 21 Fed. Cas. No. 12,330; The Huntress, 2 Ware 89, 12 Fed. Cas. No. 6914.

46. Carry *v.* Atkins, 6 Ben. 562, 5 Fed. Cas. No. 2399.

Reception of Goods at Wharf. A consignee who received the goods from the vessel at the wharf, without qualification or reservation, upon proof by the vessel of due care and delivery of all in its possession,

signee of the place of delivery,[47] or that it was excused by usages and circumstances,[48] and to prove usages affecting the delivery,[49] or that the vessel acted under the consignee's directions,[50] and to establish an agreed day for delivery.[51]

11. Personal Injuries. — A. Assault. — The burden is on the master to justify an assault and battery committed upon a seaman,[52] but is upon a seaman suing a vessel for an assault by the master to prove that the master was acting within the scope of his duty;[53] and to prove that an assault by the master by way of punishment for his fault was excessive in degree, or unlawful in its kind.[54] The burden is upon a father who sues for an assault upon his minor child upon the high seas, to prove actual damage, or what is such by intendment of law.[55]

B. Negligence. — The burden is on the vessel to prove that injury to a stevedore from fall of an insecure stanchion was not occasioned by its negligence,[56] and to show in case of injury to a longshoreman from falling on a dark night through an unlighted hatch, in the path to the bunkers, that he customarily left the hatches open on dark nights without a light.[57] The burden is upon

has the burden to prove that a subsequently discovered deficiency was chargeable to the wrongful acts of the vessel. McCready *v.* Holmes, 15 Fed. Cas. No. 8733.

47. The Prince Albert, 5 Ben. 386, 19 Fed. Cas. No. 11,426.

48. The Mary Washington, Chase 125, 16 Fed. Cas. No. 9229.

Notorious Usage. — A usage or custom to excuse notice must be known to the shipper and must be clear and notorious. Howe *v.* Lexington, 12 Fed. Cas. No. 6767a.

Ignorance of Names of Consignees. A master of a vessel who has wrongfully omitted to sign bills of lading, and sailed without learning the names of the consignees cannot excuse notice to them of the landing of the goods. The Peytona, 2 Curt. 21, 19 Fed. Cas. No. 11,058.

49. Usages of Place of Delivery. Contracts for the delivery of cargo are presumed to have been made with reference to the reasonable usages of the place of delivery. The Richmond, 1 Biss. 49, 20 Fed. Cas. No. 11,796; Field *v.* Lovett Peacock, 9 Fed. Cas. No. 4768; Irzo *v.* Perkins, 10 Fed. 779; The Mill Boy, 13 Fed. 181; The Grafton, Olc. 43, 10 Fed. Cas. No. 5656; 1 Blatchf. 173, 10 Fed. Cas. No. 5657; Bradstreet *v.* Heran, Abb. Adm. 209, 3 Fed. Cas. No. 10,792; The Boston, 1 Low. 464, 3 Fed. Cas. No. 1671; Higgins *v.* U. S. Mail S. S. Co., 3 Blatchf. 282, 12 Fed. Cas. No. 6469; Devato *v.* 823 Barrels Plumbago, 20 Fed. 510.

50. The Staincliffe, 15 Fed. 350.

51. Petrie *v.* Heller, 35 Fed. 310.

52. Treadwell *v.* Joseph, 1 Sum. 390, 24 Fed. Cas. No. 14,157.

53. Spencer *v.* Kelley, 32 Fed. 838.

54. Carleton *v.* Davis, 2 Ware 225, 5 Fed Cas. No. 2411; Stout *v.* Weedin, 95 Fed. 1001.

55. Plummer *v.* Webb, 1 Ware 75, 19 Fed. Cas. No. 11,234.

56. Failure to Inspect Stanchion. In the absence of evidence of care to inspect the stanchion, the fastenings of which were insecure, for injury to the stevedore from its unexpected fall, he being ignorant of the insecurity, the vessel is responsible. The William Branfoot, 48 Fed. 914.

57. Unlighted Lanterns. — The ship is responsible for the unlighted condition of the passage-way while coaling, although supplying lanterns, without using care to see that they were lighted. The Saratoga, 87 Fed. 349.

a person injured by a tug in freeing barges for tow, to show the negligence of the tug,[58] and is upon a laborer employed in stowing cotton in the hold of a ship, injured by the rolling against him of bales of cotton lowered by the winchman, to prove the incompetence or gross negligence of the winchman in order to charge the ship for the injury.[59] A libellant suing for negligence does not have the burden to prove his freedom from contributory fault.[60]

IV. JUDICIAL NOTICE.

1. Laws and Regulations. —Courts of admiralty will take judicial notice of regulations of the light-house board made upon authority of an act of Congress,[61] and that laws of the sea have been recognized and acquiesced in by the principal commercial states of the world,[62] and that a rule of international law exempts fishing vessels from capture as prize, in the absence of a treaty or public act of the government:[63] the supreme court will take judicial notice of a treaty, in pursuance of which a decree in admiralty, correct when made, will be reversed and restoration decreed as provided in the treaty;[64] but an appellate court will not take judicial notice of a rule of supervising inspectors, which the lower court held to have been violated.[65] A foreign statute cannot be judicially noticed,[66] but must be offered in evidence and be made part of the record upon appeal.[67]

58. Burden Not Sustained. — The burden is not sustained when the testimony of the tug's crew leaves the evidence equally credible on both sides. The Meta, 88 Fed. 21.

59. Incompetence of Winchman. The incompetence of a winchman whose duties required skill cannot relieve a ship-owner from liability for the injury on the ground that he was a fellow-servant where the ship-owner did not use reasonable care to provide a skillful winchman. The Anaces, 96 Fed. 856.

60. The Frank and Willie, 45 Fed. 494.

61. Rules Prescribing Lights. Rules prescribing the number and kinds of lights to be placed on the draws of bridges across navigable streams were judicially noticed, though not pleaded nor offered in evidence. Smith *v.* City of Shakopee, 103 Fed. 240.

62. Recognition of Historical Fact. — This is only a recognition of the historical fact that, by common consent of mankind these rules have been acquiesced in as of general observation; the law of nations may be judicially noticed and need not be proved as facts. Sears *v.* The Scotia, 14 Wall. 170.

63. Works of Jurists. — The works of jurists and commentators on international law are resorted to by the courts for trustworthy evidence of what that law really is. The Paquete Habana, 175 U. S. 677.

64. Treaty Affecting Rights of Parties. — A treaty is the law of the land, and where it affects the rights of parties litigating in court, the treaty binds those rights and is as much to be regarded by the court as an act of Congress, and a vessel cannot be condemned, the restoration of which is directed by the treaty. The Peggy, 1 Cranch 103.

65. The Clara, 55 Fed. 102.

66. Sears *v.* The Scotia, 14 Wall. 170; The New York, 82 Fed. 810.

67. Insufficient Certificate. — The statement of the clerk that a foreign statute returned upon appeal is a correct copy of the statute as published without any showing that it was made part of the record by

2. Notorious Facts. — The courts will take judicial notice of the notorious course of travel between a neutral port and blockaded ports,[68] and that certain persons have been notoriously engaged in violating a blockade;[69] they will take judicial notice of historical facts, and consult public documents and histories in determining such facts.[70] They will take notice that American gold coin became an article of merchandise and traffic.[71]

3. Navigable Waters. — Courts of admiralty will take judicial notice that the waters on which a maritime contract is to be performed are navigable,[72] and that the yachting season in northern waters ends before the first of November.[73]

4. Lease of Vessel. — Judicial notice will be taken that, under a lease of a sailing vessel for ninety-nine years, the vessel will have fallen apart, and that the owner will be dead before the expiration of the term.[74]

5. Location of Places. — Upon a libel against a ferry-boat crossing East River from Astoria to New York, the court will judicially notice that Astoria is on Long Island, and that its inhabitants have commercial relations with other states.[75] The court will judicially notice the situation of a town in a foreign country which lies at the mouth of the river where a bar exists which the vessel in suit could not cross.[76]

6. Showing of Facts Judicially Noticed. — The claimant of a lien for wages may bring before the court facts judicially known, which do not appear in the libel, in an allegation attached to exceptions.[77]

being offered and received in evidence will not entitle it to be considered. The New York, 82 Fed. 819.

68. The Mersey, Blatchf. Pr. Cas. 187, 17 Fed. Cas. No. 9489; The William H. Northrup, Blatchf. Pr. Cas. 235, 29 Fed. Cas. No. 17,696; The Stephen Hart, Blatchf. Pr. Cas. 387, 22 Fed. Cas. No. 13,364; The Peterhoff, Blatchf. Pr. Cas. 463, 19 Fed. Cas. No. 11,024.

69. The Minna, Blatchf. Pr. Cas. 333, 17 Fed. Cas. No. 9634.

70. U. S. *v.* 1500 Bales of Cotton, 27 Fed. Cas. No. 15,058.

71. Current History. — The court in 1868 took judicial notice of the fact that gold coin was no longer used as money in the business of the country, but had become an article of merchandise and traffic. U. S. *v.* American Gold Coin, 1 Woolw. 217, 24 Fed. Cas. No. 14,439.

72. Lands *v.* Cargo, etc. of Coal, 4 Fed. 478; King *v.* American Transp. Co., 1 Flip. 1, 14 Fed. Cas. No. 7787.

73. Demurrage. — The allowance of demurrage after the close of the yachting season, of which the court takes judicial notice, without any proof of any use of the vessel thereafter, is improper. The Conqueror, 166 U. S. 110.

74. The Cygnet, 66 Fed. 349.

75. Commerce With Ferry-Boats. The court will judicially notice that commerce is there carried on with other states by means of the ferry-boats; and proof that a ferry-boat from Astoria to New York was ready to carry all passengers and freight that might offer, was sufficient to throw upon the ferry-boat the burden of proving that they were not destined for other states, in order to avoid the provisions of the steamboat act requiring her boiler to be inspected. The Sunderwick, 6 Ben. 112, 23 Fed. Cas. No. 13,624.

76. The Peterhoff, Blatchf. Pr. Cas. 463, 19 Fed. Cas. No. 11,024.

77. The Seminole, 42 Fed. 924.

V. COMPETENCY OF WITNESSES.

1. Incompetency. — A. Common Law Rule. — In the absence of an act of Congress altering the rule of the common law, witnesses who were incompetent to testify at common law are held incompetent in the instance court of admiralty.[78] Interested witnesses are excluded excepting in cases of necessity, and state laws allowing the party to testify are inapplicable.[79] The master of a vessel is incompetent to prove any matter of defense which originated in his own acts for which he was responsible,[80] and is not competent to prove that a medicine-chest was on board the vessel for the purpose of throwing the expense of medical advice on a seaman.[81]

B. Waiver of Objection. — The court will receive the testimony of the libellants, if not objected to by the respondents,[82] and an objection that a witness was interested cannot be made after the hearing.[83] A libellant who, upon the taking of a deposition, cross-examined the witness and read the cross-examination in support of the libel, cannot afterward object to the competency of his testimony in chief for the claimants of the libelled vessel.[84]

2. Competent Witnesses. — A. Parties. — An interested party may be examined upon interrogatories, upon demand of the adverse party.[85] Seamen having a common interest in the litigation may testify for each other,[86] and the testimony of joint libellants in an

78. **Testimony of Parties.** — The testimony of parties to a suit should be taken under a special order of the court showing the cause, so that, in the order, the court may restrict the inquiries within the exceptions to the rule which renders parties incompetent witnesses. The Boston, 1 Sum. 328, 3 Fed. Cas. No. 1673.

Rules of Evidence. — Admiralty courts are governed by the same rules of evidence as common law courts, as respects the competency of witnesses, where justice does not require a different rule. The J. F. Spencer, 3 Ben. 337, 13 Fed. Cas. No. 7315.

79. The Independence, 2 Curt. 350, 13 Fed. Cas. No. 7014; The Australia, 3 Ware 240, 2 Fed. Cas. No. 667; The William Jarvis, 1 Spr. 485, 29 Fed. Cas. No. 17,697.

80. The William Harris, 1 Ware 373, 29 Fed. Cas. No. 17,695.

Forfeiture for Misconduct.—The master of the vessel is not a competent witness upon an information *in rem* for a forfeiture occasioned by his misconduct. The Hope, 2 Gall. 48, 12 Fed. Cas. No. 6678.

Lost or Damaged Goods. — In a suit *in rem* against the vessel for the value of lost or damaged goods, the master is an interested and incompetent witness, unless made competent by release. The Peytona, 2 Curt. 21, 19 Fed. Cas. No. 11,058.

81. The William Harris, 1 Ware 373, 29 Fed. Cas. No. 17,695.

82. Ferrara *v.* The Talent, Crabbe 216, 8 Fed. Cas. No. 4745.

83. Nelson *v.* Woodruff, 1 Blatchf. 156.

84. The Osceola, Olc. 450, 18 Fed. Cas. No. 10,602.

85. The Australia, 3 Ware 240, 2 Fed. Cas. No. 667; Gammell *v.* Skinner, 2 Gall. 45, 9 Fed. Cas. No. 5210; The David Pratt, 1 Ware 509, 7 Fed. Cas. No. 3597; Cushman *v.* Ryan, 1 Story 91, 6 Fed. Cas. No. 3515; The L. B. Goldsmith, Newb. Adm. 123, 15 Fed. Cas. No. 8152; The Serapis, 37 Fed. 436.

86. **Question of Credibility.**—The only question, in such case, is as to the credibility of the witnesses, and not as to their competency. The Elizabeth *v.* Rickers, 2 Paine 291, 8 Fed. Cas. No. 4353.

action *in rem* is admissible, one for the other.[87] Parties are rendered competent by permission of the court to strike their names off as parties to the action in order that they may testify where good cause is shown therefor;[88] and parties generally are rendered competent to testify in admiralty cases by the act of Congress of July 12, 1864, giving parties such right in civil actions.[89] In courts of prize, no person is incompetent to testify, merely on the ground of interest.[90]

B. Master of Vessel. — The master of a vessel is rendered competent to testify where his interest in the event of the litigation is released,[91] and is a competent witness for the owner of the vessel in a suit *in rem* for wages,[92] and the master and crew are competent witnesses for the owner of a vessel in case of collision.[93] The master is a competent witness for the owners in a suit for contribution by way of general average, for loss of the mast, sails and rigging of the vessel sacrificed for the common benefit of ship, cargo and freight,[94] and also in a suit by the owners of the vessel against the shippers of cargo for freight, where the defense is that the cargo was never delivered to consignee.[95]

C. Other Persons. — An officer who aided in a seizure for violation of the revenue laws, is a competent witness for the govern-

87. Scrutiny of Evidence. — Such testimony, though legally admissible, ought to be narrowly scrutinized, and received with great caution. Graham *v.* Hoskins, Olc. 224, 10 Fed. Cas. No. 5669; The Swallow, Olc. 334, 23 Fed. Cas. No. 13,665.

88. The Osceola, Olc. 450, 18 Fed. Cas. No. 10,602.

89. Definition. — The phrase "civil action," as used in the statute, includes all judicial controversies in which rights of property are involved, and extends to the trial of a seizure of property for the violation of the internal revenue laws, and the claimant of the property is a competent witness in his own behalf. U. S. *v.* Cigars, Woolw. 123, 28 Fed. Cas. No. 16,451.

90. Common Law Doctrine Not Applied. — It is a mistake to suppose that the common law doctrine as to competency, is applicable to prize proceedings. The testimony of interested persons is admissible, subject to all exceptions as to its credibility. The Anne, 3 Wheat. 435.

91. Bottomry Bond. — The master of a vessel who gave a bottomry bond, is a competent witness for the owner of the bond, particularly if released by him. The Medora, 1 Spr. 138, 16 Fed. Cas. No. 9391; Furniss *v.* Magonn, Olc. 55, 9 Fed. Cas. No. 5163.

Release by Some Part Owners. — A release of the master made by some of the part owners of lost or damaged goods will render him competent to testify in a suit *in rem* to recover their value. The Peytona, 2 Curt. 21, 19 Fed. Cas. No. 11,058. A sale by the master of his interest as part owner of the vessel before suit, and a release to him by his co-owners of all liability to them for recovery of wages, render him a competent witness in an action against the vessel therefor. The Osceola, Olc. 450, 18 Fed. Cas. No. 10,602.

92. The Hudson, Olc. 396, 12 Fed. Cas. No. 6831.

93. The Osceola, Olc. 450, 18 Fed. Cas. No. 10,602.

94. Exception. — The case is excepted where the master would be exonerated from some certain liability, provided the owner should prevail. Patten *v.* Darling, 1 Cliff. 254, 18 Fed. Cas. No. 10,812.

95. Swett *v.* Black, 1 Spr. 574, 23 Fed. Cas. No. 13,690.

ment.[96] An informer is made by statute a competent witness at the trial, when he is a necessary witness.[97]

VI. MODE OF TAKING EVIDENCE.

1. Oral Testimony. — A. Permissibility. — Oral testimony is not permissible in prize cases,[98] but is permitted in proceedings in admiralty generally by Section 30 of the Judiciary Act.[99]

B. Mode of Taking Down. — Oral evidence in an admiralty case should be taken down in the narrative form, and not by questions and answers.[1]

C. Oral Cross-Examination. — The oral cross-examination of witnesses on a commission sent abroad may be allowed on condition of waiving irregularity in the motion for the commission.[2]

D. Oral Evidence in the Supreme Court. — Oral evidence may be used in the supreme court in an admiralty proceeding to prove the value in a matter of dispute,[3] but it cannot be used as further evidence in the cause.[4]

2. Affidavits. — A. In Prize Causes. — Affidavits of ownership are used in prize causes,[5] and the want of regular evidence in such causes may be supplied by the affidavits of the captured crew, in a proper case.[6]

B. Affidavits of Merits. — An affidavit of merits, or a sworn answer showing merits, is required in order to set aside a default in an admiralty case.[7] The rule of courts of law that affidavits of merits should be made by the parties is not inflexible in admiralty, and such affidavits may be made by the attorney or proctor upon good cause shown.[8] Where affidavits are conflicting as to the

96 Contingent Interest. — The contingency that trespass would be brought against the officer for the seizure is too remote to sustain the objection of incompetency. U. S. *v.* 25 Cases of Cloth, etc., Crabbe 356, 28 Fed. Cas. No. 16,562.

97. Necessity a Question for the Court. — Of the necessity of the informer's becoming a witness, the court is to judge, after hearing the evidence in the case, and the deposition of the informer, taken before the trial, is not admissible. The Thomas and Henry, 1 Brock. 367, 23 Fed. Cas. No. 13,919.

98. The George, 2 Gall. 249, 10 Fed. Cas. No. 5327.

99. Provision of Judiciary Act. The 30th section of the judiciary act directs that "the mode of proof by oral testimony and the examination of witnesses in open court, shall be the same in all the courts of the United States," and a witness who is within reach of the court in a cause of admiralty jurisdiction should give his testimony in open court, unless his deposition is taken by order of the court. The Samuel, 1 Wheat. 9.

1. The Syracuse, 6 Blatchf. 238, 23 Fed. Cas. No. 13,718.

2. The Louisiana, 1 Ben. 328, 15 Fed. Cas. No. 8536.

3. U. S. *v.* Brig Union, 4 Cranch 216.

4. The Samuel, 3 Wheat. 77.

5. The Schooner Adeline, 9 Cranch 244; The Grey Jacket, 5 Wall. 342, 1 Wheat. App. 500.

6. The Arabella, 2 Gall. 368, 1 Fed. Cas. No. 501.

7. Matters of Opinion. — An affidavit of merits setting forth matters of opinion is not sufficient. Scott *v.* The Young America, Newb. 107, 21 Fed. Cas. No. 12,550.

8. Authority of Proctor. — A proctor in admiralty is in many cases

merits of the cause, a motion to discharge the respondent from arrest on the ground that there is no cause of action against him, cannot be granted.[9]

C. Other Affidavits. — A proctor may make affidavit upon a motion to file additional security for costs.[10] An affidavit must be made to show the exclusion of a witness which is not reported by the master to whom the cause was referred, and to show to the court, the testimony expected to be given by such witness.[11] An affidavit of the respondent cannot be used upon the hearing of an exception to the libel,[12] nor can affidavits be used to support a motion to discharge property from custody.[13] Affidavits may be used in the supreme court to prove the value of the matter in dispute,[14] but cannot be used as further proof unless taken upon commission.[15]

3. Depositions. — A. Rules of Practice. — A court of admiralty is not required by Section 886 of the Revised Statutes, to conform to the practice of the state courts in taking depositions, and it may by rule provide a different method of taking them.[16]

B. Depositions de Bene Esse. — Depositions *de bene esse* may be taken in the district and circuit courts in admiralty cases,[17] but cannot be taken upon appeal to the supreme court,[18] or to the cir-

clothed with all the authority of the party himself, and courts of admiralty admit proctors to all the functions of attorneys-at-law, and they may make affidavits on motions incidental to the suit, when the facts cannot be supposed to be peculiarly within the knowledge of the party. The Harriet, Olc. 222, 11 Fed. Cas. No. 6096.

9. Wicks *v.* Ellis, Abb. Adm. 444, 29 Fed. Cas. No. 17,614.

10. The Harriet, Olc. 222, 11 Fed. Cas. No. 6096.

11. Object of Affidavit. — Such affidavit is required in order that the court may know whether the excluded testimony would be independent evidence, or only cumulative. The New Philadelphia, 1 Black 62.

12. Prince Steam Shipping Co. *v.* Lehman, 39 Fed. 704.

13. Ownership, How Determined. The question whether the property sought to be discharged upon affidavits, is the property of the United States, cannot be determined upon affidavits, but should be raised by claim and answer. Cartwright *v.* The Othello, 1 Ben. 43, 5 Fed. Cas. No. 2483.

14. Appeal in Collision Case. Upon appeal in a collision case, to the supreme court, leave was granted to the appellants to make proof of the jurisdictional value by affidavits. The Grace Girdler, 6 Wall. 441.

15. The London Packet, 2 Wheat. 371.

16. Rule in Admiralty. — Under a rule in admiralty of a district court, which permits parties to attend the examination of witnesses whose testimony is taken on commission, either personally or by their proctors, if the adverse party desires to be represented he should furnish the name and address of his representative to the party taking out the commission or to the commissioner, in order that he may be notified. The Westminster, 96 Fed. 766.

17. The Argo, 2 Wheat. 287; The London Packet, 2 Wheat. 371; The Samuel, 1 Wheat. 9; The Osceola, Olc. 450, 18 Fed. Cas. No. 10,602.

18. Unauthorized Practice. — The 30th section of the judiciary act of 1789 as to taking depositions *de bene esse*, applies in terms only to cases in the district and circuit courts, and not to cases pending in the supreme court; but an unauthorized practice had prevailed prior to this decision, to take depositions *de bene esse* in

cuit court of appeals.[19] Such a deposition cannot be taken in a foreign country.[20] A deposition *de bene esse* cannot be taken merely because of the liability of the witness to be ordered out of the reach of the court.[21] Such a deposition can only be used upon proof that the attendance of the witness cannot be procured upon the trial, and is not evidence-in-chief.[22] The waiver of objection to a deposition *de bene esse*, does not make it a deposition-in-chief.[23]

C. Commission to Take Depositions. — No commission is allowable to take depositions in an enemy's country in prize cases,[24] but in admiralty cases generally, commissions are issued to take evidence in foreign countries.[25] Commissions must issue to take depositions for use as further evidence upon appeals in admiralty cases.[26]

D. Objections to Depositions. — A deposition taken before the clerk of the court to the knowledge of the objecting parties will be admitted in an admiralty case, notwithstanding objections that there was no preliminary proof of the materiality of the evidence, and that it was not proved that the commission was sealed up, and

causes there pending, and because of this unauthorized practice, leave was given to take the testimony in due form, under commissions in the supreme court, where depositions *de bene esse* according to the usual practice were objected to. The Argo, 2 Wheat. 287.

19. The Beeche Dene, 55 Fed. 526.

20. The Alexandra, 104 Fed. 904.

21. **Unauthorized Deposition.** — A deposition *de bene esse* not authorized by the terms of the judiciary act nor by any order of the court, is inadmissible in evidence. The Samuel, 1 Wheat. 9.

22. The Samuel, 1 Wheat. 9.

Proof Required. — A party who offers a deposition *de bene esse* in evidence, must show that the requisites of the judiciary act have been complied with, and that the deponent is out of reach of the court, as provided in the act, and unless he does this, the deposition cannot be read. Thomas and Henry, 1 Brock. 367, 23 Fed. Cas. No. 13,919.

23. **Construction of General Waiver.** — The general waiver of objection to the deposition *de bene esse* must be understood as extending the waiver to the deposition only in the character in which it was taken, and not as imparting any new character to it. The Thomas and Henry, 1 Brock. 367, 23 Fed. Cas. No. 13,919.

24. The Diana, 2 Gall. 93, 7 Fed. Cas. No. 3876.

25. **Waiver of Irregularities.** Where there were irregularities in a motion made by the claimant for a commission to examine witnesses abroad, and the libellants offered to waive such irregularities, provided the claimants would permit them to cross-examine the witnesses orally, the court issued a commission allowing them to do so. The Louisiana, 1 Ben. 328, 15 Fed. Cas. No. 8536.

Appointment of Commissioner. Upon application for a commission to take a deposition abroad, if no other person is known who could act as commissioner, the wife of the witness may be named by the court as commissioner. The Norway, 2 Ben. 121, 18 Fed. Cas. No. 10,358.

Witnesses Not Named in Commission. — The testimony of the witnesses whose names were not inserted in a commission to take testimony abroad, may be taken if it is satisfactorily proved after return of the deposition that their names and materiality were not known when the commission was sued out and transmitted. The Infanta, 1 Abb. Adm. 263, 13 Fed. Cas. No. 7030; The Diana, 2 Gall. 93, 7 Fed. Cas. No. 3876.

26. The Louisiana, 1 Ben. 328.

that no notice was given of its filing.[27] A libellant who submitted to an objection to a deposition at the trial, on being allowed a continuance with leave to re-examine the witness, cannot long afterwards use the same deposition objected to.[28] A motion to suppress depositions must be promptly made after they have been returned to the court.[29] The depositions of witnesses for a claimant will not be suppressed because taken before answer, if prejudice to the libellant does not appear.[30]

E. Use of Deposition Upon Another Libel. — A deposition taken upon a libel for a collision on behalf of the owners of the injured vessel, libellants, is not admissible upon a libel for the same collision by the master of the vessel on behalf of the cargo owners.[31] Depositions taken without notice to the defendants in another suit for collision, though involving the same questions as upon the second libel, are not admissible where the defendants are not the same and had no right or opportunity to cross-examine the witnesses, especially where no reason appears why the witnesses were not introduced in person.[32]

4. Reference to Commissioners. — A. Cases for Reference. The court will refer causes in admiralty to commissioners or references for their opinion and advice on questions of fact,[33] or questions of nautical skill,[34] or to state an account,[35] or ascertain damages.[36]

27. The Argo, 2 Wheat. 287; The London Packet, 2 Wheat. 371; The Beeche Dene, 55 Fed. 526; The Glide, 68 Fed. 710.

Sufficiency of Acts of Clerk. Where the clerk of the court was the commissioner who filed the deposition in the clerk's office, it need not be sealed up and directed to the clerk, and where it was marked "filed" in the clerk's office and the usual order was then engrossed upon the minutes that the deposition be filed and opened, the failure of the libellants to give formal notice of the act of filing to the respondent's proctor only leaves to the latter the burden of disproving the regularity of the proceedings. Nelson *v.* Woodruff, 1 Black 156.

Presumption of Order for Commission. — Where both parties joined in the execution of a commission issued in the usual form by the clerk of the court, it must be presumed that an order for the commission was entered or waived. Rich *v.* Lambert, 12 How. 347.

28. The Emulous, 24 Fed. 43.

29. Smith *v.* Serapis, 49 Fed. 393.

30. The Pride of the Ocean, 10 Ben. 610, 19 Fed. Cas. No. 11,419.

31. The John H. Starin, 9 Ben. 331, 13 Fed. Cas. No. 7351.

32. Rutherford *v.* Geddes, 4 Wall. 220.

33. Lee *v.* Thompson, 3 Woods 167, 15 Fed. Cas. No. 8202.

34. Reference to Expert Commissioners. — Where the rights of parties depend upon questions of nautical skill or seamanship in the management of a vessel, the court may refer the subject to persons skilled in navigation, and act upon their report thereon. The Emily, Olc. 132, 8 Fed. Cas. No. 4,453.

35. Shaw *v.* Collyer, 4 Blatchf. 370, 21 Fed. Cas. No. 12,718.

36. The Ship Shand, 4 Fed. 925; The Lively, 1 Gall. 315, 15 Fed. Cas. No. 8403; Murray *v.* The Charming Betsey, 2 Cranch 64; The Baltic, 3 Ben. 105, 2 Fed. Cas. No. 824; Howe *v.* The Lexington, 12 Fed. Cas. No. 6767b; The Narragansett, Olc. 388, 17 Fed. Cas. No. 10,020; Farrell *v.* Campbell, 7 Blatchf. 158, 8 Fed. Cas. No. 4682; Taber *v.* Jenny, 1 Spr. 315, 23 Fed. Cas. No. 13,720; Ross *v.* Southern Cotton Oil Co., 41 Fed. 152; The Transit, 4 Ben. 138, 24 Fed. Cas. No. 14,138; The Beaver, 8 Ben. 504; 3 Fed. Cas.

or to take the testimony.[37]

B. Proceedings. — a. *Time for Taking Evidence.* — A limited time for closing all evidence before the commissioners, fixed by order of the court, will be enlarged upon proof of new evidence which the party could not procure to be taken within the time limited.[38]

b. *Mode of Procedure.* — The proceedings on a reference to a commissioner to compute damages in a collision case are to be conducted in the manner usual on a reference in chancery;[39] but commissioners appointed to state damages in a case of illegal capture, are subject to common law rules.[40]

c. *Reception of Evidence.* — Commissions appointed to state damages should not hear *ex parte* evidence without notice to the other party.[41] Upon an order of reference to a commissioner to ascertain damages, a statement by the court as to a fact affecting the amount of damages, and not material to the question of liability, is not binding, and does not preclude either party from introducing any competent evidence before the commissioner as to the extent of the damages.[42]

d. *Control of Proceedings by Court.* — If the commissioner refuses to allow a witness to testify before him, application should be made to the court to control the proceedings upon a certificate of the commissioner, prior to the report of the commissioner,[43] and a statement of the commissioner in his report of the refusal of a witness to testify before him will be disregarded by the court.[44] On a reference to the master to take evidence, where a witness was not allowed to testify before him, whose exclusion was not reported

No. 1200; Panama R. Co. *v.* Napier Shipping Co., 61 Fed. 408.

Questions Not Submitted. — The court will not hear questions arising on a reference to the commissioner to compute damages, at the instance of the parties, unless they have submitted them to the commissioner, and he has decided them, or declined to do so. The E. C. Scranton, 2 Ben. 81, 8 Fed. Cas. No. 4271.

Legality of Order of Reference. The legality or propriety of an order of reference to ascertain damages cannot be impeached upon exception to the commissioner's report. The Rhode Island, 1 Abb. Adm. 100, 20 Fed. Cas. No. 11,743.

37. Power of Court. — The court of admiralty, whenever it deems it necessary or expedient, may refer a cause to a commissioner to take testimony; and it is not necessary, when the cause is referred to the clerk as such commissioner, to assign any especial reason for such reference. The Wavelet, 25 Fed. 733; The Sallie P. Linderman, 22 Fed. 557; The New Philadelphia, 1 Black 362; Puget Sound Machinery Depot *v.* The Gny C. Goss, 53 Fed. 826.

38. The Ruby, 5 Mason 451, 20 Fed. Cas. No. 12,103.

39. The E. C. Scranton, 2 Ben. 81, 8 Fed. Cas. No. 4271.

40. The Lively, 1 Gall 315, 15 Fed. Cas. No. 8403.

41. The Lively, 1 Gall. 315, 15 Fed. Cas. No. 8403.

42. The Ship Shand, 4 Fed. 925.

43. Application to Court. — Application to the court in the case of any improper or irregular proceedings by a commissioner, or to control the proceedings before him, can only be had on a certificate as to his proceedings. The E. C. Scranton, 2 Ben. 81, 8 Fed. Cas. No. 4271, 4 Ben. 127, 8 Fed. Cas. No. 4272.

44. The Peterhoff, Blatchf. Pr. Cas. 463, 19 Fed. Cas. No. 11,024.

by the master, proof must be made to the court of such exclusion and of his proposed testimony.[45]

e. *Objections to Evidence.* — An objection to the mode of proof before a commissioner should be taken at the examination, or it will be considered waived.[46] Objection to the admission of evidence before the commissioner cannot be raised by exception to his report.[47] A neglect at the trial to object to the competency of evidence is a waiver of the right to object to the same evidence upon a subsequent reference to the clerk.[48] Exceptions to evidence before the commissioner, not accompanied by report of the evidence objected to, cannot be noticed.[49]

f. *Report of Commissioners.*—Commissioners appointed to assess the amount of damages in a case of illegal capture, should make a special report, stating the items in detail.[50] The clerk's report in matters referred to him should state facts and conclusions, and not detail the evidence at length.[51] A report of a commissioner appointed to ascertain the amount due to the libellant, need not detail the allowances, unless a specification is demanded.[52]

g. *Objections to Report.* — An objection to the report as to the amount of damages in an admiralty case cannot be taken by argument.[53] Upon a new trial upon appeal, the appellant may object to damages found by a commissioner in the district court, though not there objected to.[54] The credibility and reliability of witnesses cannot be investigated on exceptions to the report unless the objections rest wholly on questions of law.[55]

C. Decision of Commissioner. — The decision of the commissioner on questions of fact is not conclusive,[56] and will be reversed when clearly erroneous;[57] but the court will adopt the conclusion of the commissioner where the testimony conflicts unless there is

45. The New Philadelphia, 1 Black 362.

46. The Elizabeth, Blatchf. Pr. Cas. 250, 8 Fed. Cas. No. 4350.

47. The E. C. Scranton, 4 Ben. 127, 8 Fed. Cas. No. 4272; The Transit, 4 Ben. 138, 24 Fed. Cas. No. 14,138; The Emily, 4 Ben. 235, 8 Fed. Cas. No. 4451.

48. The Trial, Blatchf. & H. 94, 24 Fed. Cas. No. 14,170.

49. Indefinite Exceptions. — Indefinite exceptions to the admission or exclusion of evidence, or to its insufficiency, not properly explained by evidence, must be rejected. The Commander-in-Chief, 1 Wall. 43.

50. The Lively, 1 Gall. 315, 15 Fed. Cas. No. 8403.

Improper Assessment of Damages. Damages assessed as a gross sum without any specification of items or any explanation of the principles on which that sum was allowed by the commissioners are improperly allowed. Murray *v.* The Charming Betsey, 2 Cranch 64.

51. The Trial, 1 Blatchf. & H. 94, 24 Fed. Cas. No. 14,170.

52. Mitchell *v.* Kelsey, 17 Fed. Cas. No. 9663.

53. Howe *v.* The Lexington, 12 Fed. Cas. No. 6767b.

54. Farrell *v.* Campbell, 7 Blatchf. 158, 8 Fed. Cas. No. 4682; Ross *v.* Southern Cotton Oil Co. 41 Fed. 152.

55. Burton *v.* The Commander-in-Chief, 4 Fed. Cas. No. 2215.

56. Lee *v.* Thompson, 3 Woods 167, 15 Fed. Cas. No. 8202.

57. The Cayuga, 59 Fed. 483, 8 C. C. A. 188.

a clear preponderance of evidence,[58] or palpable error appears.[59]

D. Motion to Dismiss for Want of Evidence. — Where the libellant rested his proof before the commissioners without notice of further proof, whereupon the claimant filed a motion to dismiss for want of evidence, and without then submitting the motion to the court, but upon notice that it was not waived proceeded with his evidence, the claimant is entitled to have the motion decided by the court on the evidence in chief for the libellant, unaided by evidence adduced by the libellant on cross-examination of claimant's witnesses, or in rebuttal.[60]

E. Taxation of Testimony. — Under the revised statutes, upon the reference of an admiralty case to a commissioner to take testimony, the testimony of each witness is to be considered as a deposition, and is taxable as such.[61]

VII. DOCUMENTARY EVIDENCE.

1. Official Certificates. — A. Originals. — The official certificate of a notary is competent evidence in admiralty to prove the making of a marine protest and its contents.[62] The commission of a public ship, signed by the proper authorities of a nation to which she belongs, is complete proof of her national character.[63] The certifi-

58. Holmes *v.* Dodge, Abb. Adm. 60, 12 Fed. Cas. No. 6637; Panama R. Co. *v.* Napier Shipping Co., 61 Fed. 108.

Decision by Experts. — Where a case *in rem* is referred to experts to ascertain and report upon facts appertaining to their calling or experience, their decision will be adopted, unless there is a manifest preponderance of testimony against it. The Isaac Newton, Abb. Adm. 588, 13 Fed. Cas. No. 7090.

Decision Upon Maritime Lien. Where the right to a maritime lien for supplies depends on questions of fact, such as whether the supplies were ordered by the master and furnished on the credit of the vessel, and the evidence is conflicting, the finding of the commissioner thereon, who heard and saw the witnesses, will not be disturbed. The John McDermott, 109 Fed. 90.

59. The Narragansett, Olc. 388, 17 Fed. Cas. No. 10,020: Panama R. Co. *v.* Napier Shipping Co., 61 Fed. 108, 9 C. C. A. 533.

60. Puget Sound Machinery Depot *v.* The Guy C. Goss, 53 Fed. 826.

61. Proctor's Affidavit. — The proctor's affidavit to expenses actually incurred, is not sufficient, if objected to, to support a taxation by the clerk. The Sally P. Linderman, 22 Fed. 557.

62. Deposition Not Required. The examination of the notary upon a deposition under a commission is not required as additional proof. The Gallego, 30 Fed. 271.

Protest of Master of Vessel. Where a protest was certified by the master of a vessel, a copy thereof, which the master when called as a witness, did not dispute, is admissible evidence. The Vivid, 4 Ben. 319, 28 Fed. Cas. No. 16,978.

63. Absolute Verity of Commission. — Mr. Justice Story, delivering the opinion of the court, said: "The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired and cannot be controverted. This has been the settled practice between nations; and it is a rule, founded in public convenience and policy, and cannot be broken in upon, without

cate of a consul in a foreign port, that a seaman was discharged by his consent, is conclusive evidence, if not assailed for fraud;[64] but a consular certificate of the discharge of a seaman, on application of the master, is only *prima facie* evidence of the facts stated therein, as against the seaman.[65]

B. Certified Copies. — The proceedings of a vice-admiralty court of a foreign nation, certified to be a true copy from the record, are sufficiently verified to be admitted in evidence by proof of the hand-writing of the judge and the register of the court to the certificate.[66] Certified copies of documents relating to the condemnation and sale of a vessel, certified by the British consul to be copies of official documents on file in his office, and proved by depositions before the trial, are admissible in evidence.[67]

C. Best Evidence. — The certificate of a consul is not the best evidence of any unofficial act, or of any act not performed by himself.[68] A paper certified by a consul to be a true copy of a

endangering the peace and repose, as well of neutral as of belligerent sovereigns. The commission in the present case is not expressed in the most equivocal terms; but its fair purport and interpretation must be deemed to apply to a public ship of the government. The Santissima Trinidad, 7 Wheat. 283.

Commission of Unacknowledged Government. — The seal to the commission of a new government not acknowledged by the government of the United States, cannot prove itself; but the fact that a vessel cruising under such commission is employed by such government, may be established by other evidence, without proving the seal. U. S. *v.* Palmer, 3 Wheat. 610. Cited also in The Estrella, 4 Wheat. 298.

64. **Showing of Consent Essential.** — The discharge of a seaman in a foreign port by the consul can only be certified upon the consent of the seaman given or proved before him and the party relying upon such discharge in defense to an action for subsequent wages, must show that such consent was given. Lamb *v.* Briard, Abb. Adm. 367, 14 Fed. Cas. No. 8010; The Atlantic, Abb. Adm. 451, 2 Fed. Cas. No. 620.

65. **Effect of Certificate of Discharge.** — If such certificate of discharge was granted by the consul for a cause sanctioned by the usages and principles of maritime law, as recognized in the United States, the payment of the wages then earned bars future wages; but the certificate being only *prima facie* evidence of the material facts stated, in a suit for wages for the unperformed part of the voyage by the discharged seaman, it may be proved that the discharge was illegal or without sufficient cause. The F. F. Oaks, 36 Fed. 442.

Fraud of Master. — If the master fraudulently procures a certificate of discharge by a United States consul in a foreign port, he can claim no benefit or immunity under it. Tingle *v.* Tucker, 1 Abb. Adm. 519, 23 Fed. Cas. No. 14,057.

66. Mumford *v.* Bowne, Anthon 56.

67. The J. F. Spencer, 3 Ben. 337, 13 Fed. Cas. No. 7315.

68. **Certificate As to Ship's Papers.** — The certificate of the American consul at a foreign port under his seal of office, that the ship's papers were lodged with him, agreeably to the requisitions of the embargo law, is good evidence of that fact, but not of other facts stated in it. U. S. *v.* Mitchell, 2 Wash. 478, 26 Fed. Cas. No. 15,791.

Certificate As to Penalty. — The certificate of a consul is competent to remit a penalty due the United States, but is not evidence of acts which are not official nor within his personal knowledge. Brown *v.* The

bill of lading is not admissible, though the party had but one original.[69] An attested copy of a bottomry bond executed in a foreign country, is not the best evidence; but the court will continue the cause to allow the original to be produced.[70] The commission of a vessel cruising under a foreign government, which was lost with the vessel, may be proved by oral evidence.[71] A verified certificate of a foreign justice is not the best evidence in favor of the captors of the vessel, but an authenticated copy must be produced.[72] Where original shipping articles proved before a commissioner were redelivered to the vessel, which proceeded on its voyage, a copy thereof, certified by the commissioner, is competent evidence.[73]

2. Documents Pertaining to Vessels. — A. Log Book. — The log book of a vessel is not *per se* proof of the facts stated therein, except as provided by statute;[74] but entries in a ship's log made with full knowledge and opportunity of ascertaining the truth, are admissible proof thereof, against the party making them.[75] A log book stating a desertion by seamen is not conclusive evidence thereof.[76] The log book of a vessel is admissible evidence of the

Independence, Crabbe 54, 4 Fed. Cas. No. 2014; The Alice, 12 Fed. 923.

Authority of Consul's Certificate. A consul's certificate of any fact is not evidence between third persons unless expressly or impliedly made so by statute. Leby *v.* Burley, 2 Sum. 355, 15 Fed. Cas. No. 8300.

69. The Alice, 12 Fed. 923.

70. The Jerusalem, 2 Gall. 191, 14 Fed. Cas. No. 7293.

71. The Estrella, 4 Wheat. 298.

72. **Presumptive Evidence for Claimants.** — The rule of evidence which applies forcibly against the captors, does not apply to the claimants, and the sworn certificate has the force of presumptive evidence in their favor. Miller *v.* The Ship Resolution, 2 Dall. 24.

73. Henry *v.* Curry, Abb. Adm. 433, 11 Fed. Cas. No. 6381.

74. **A Log Book Kept by the Master** is not evidence upon an indictment for confining the master. U. S. *v.* Sharpe, Pet. C. C. 118, 27 Fed. Cas. No. 16,264; U. S. *v.* Gilbert, 2 Sum. 19, 25 Fed. Cas. No. 15,204; Jones *v.* The Phoenix, 1 Pet. Adm. 201, 13 Fed. Cas. No. 7489; Worth *v.* Mumford, 1 Hilt. 1.

75. **Statement Binding Upon Officers of the Vessel.** — The testimony of the officers of a sailing vessel, that certain ropes were in good condition at the time of an accident resulting from the parting of the ropes, will not prevail over a statement in the ship's log that they were in bad condition. The Lamington, 87 Fed. 752.

An entry in the ship's log book, if it tells against the party making it, must be accepted as the truth, and can no more be denied than a deed. The Newfoundland, 89 Fed. 510.

76. **Log Book Not Conclusive.** If the log book states a desertion, it may be repelled by proof of the falsity of the entry, or its being made by mistake. Orne *v.* Townsend, 4 Mason 541, 18 Fed. Cas. No. 10,583.

The entry in the log book is not conclusive evidence, and is to be admitted in support of no circumstances, but those stated in Act April 23, 1800 (2 Stat. 48) which makes it legal evidence in proof of desertion. Jones *v.* The Phoenix, 1 Pet. Adm. 201, 13 Fed. Cas. No. 7489.

In order that a ship's log book may be admissible in evidence in a proceeding for the statutory forfeiture of a seaman's wages for desertion, under Act Cong., July 20, 1790 (1 Story Laws, p. 102, §§ 2, 6), providing that absence without leave of master or officer commanding the ship, for 48 hours, if the fact is entered on the log book on the day when the seaman leaves, is a forfeiture of wages, the entry on the log book must be in strict compliance with the statute; and an entry that

time of her arrival at and departure from a port.[77] Written entries by the captain in a memorandum book, made a month later from alleged original entries in pencil, erased, are not entitled as evidence to be considered as a log book properly kept.[78] A log book to be admissible in evidence must be sufficiently identified.[79] A clause in the British Shipping Act making certain entries in the official log book competent evidence in all courts does not make them such in the courts of this country.[80]

B. Protests. — The protest of the master of a vessel may be given in evidence to corroborate[81] or contradict his testimony;[82] but where the protest is a mere narration of bad weather met with, it cannot be received as evidence for himself or his owners.[83] A protest is not evidence to show that the captain is not chargeable with the loss of cargo.[84] The protest of a charterer against

the men abandoned the ship, is not sufficient, since the fact that the men left the vessel without leave must be entered distinctly. Worth *v.* Mumford, 1 Hilt. 1.

To prove the absence of a seaman for 48 hours without leave as evidence of desertion under the statute, a proper entry in the log book is indispensable, though not conclusive evidence. The entry, to support the statutory forfeiture, must be made the day the absence takes place; and it must state the name of the seaman against whom the forfeiture is proposed to be enforced. The Rovena, 1 Ware 313, 20 Fed. Cas. No. 12,090.

An entry of desertion in a ship's log book is not admissible in evidence to show a general maritime desertion.

77. Smallwood *v.* Mitchell, 2 Hayw. 145.

78. Original Entries. — Such written entries are not entitled to be considered as evidence of the contemporaneous original entries. Brink *v.* Lyons, 18 Fed. 805.

79. Proof of Log Book. — If a log book be offered in evidence, it should be proved to be the book report kept on the voyage. It is not sufficient to prove the handwriting of the mate as to some of the entries in it. U. S. *v.* Mitchell, 2 Wash. C. C. 478, 26 Fed. Cas. No. 15,791.

In debt on an embargo bond, the log book is admissible, where it has been identified by a witness, though he does not recollect seeing the mate make regular entries in it; it also appearing that every exertion has been made to procure the attendance of the mate. U. S. *v.* Mitchell, 3 Wash. C. C. 95, 26 Fed. Cas. No. 15,792.

80. Law of Forum. — The admissibility or competency of evidence in a legal proceeding pertains to the remedy, and is governed by the *lex fori*, and therefore a clause of the British Shipping Act of 1854, making certain entries in the official log book competent entries in all courts, does not make them so in the courts of any other country. The City of Carlisle, 39 Fed. 807, 5 L. R. A. 52.

81. Sampson *v.* Johnson, 2 Cranch 107, 21 Fed. Cas. No. 12,281.

82. U. S. *v.* Sharpe, Pet. C. C. 118, 27 Fed. Cas. No. 16,264.

Use of Protest as Evidence.—The protest of the master of a vessel is not evidence *per se*. It can only be used to impeach the testimony of the master himself, or as incidently corroborative of the log book. Straffin *v.* Newell, T. U. P. Charlt. 172; Lamalere *v.* Caze, 1 Wash. 413, 14 Fed. Cas. No. 8002.

The protest of some of the crew taken abroad may be read to invalidate their evidence taken under a commission. Winthrop *v.* Union Ins. Co., 2 Wash. 7, 30 Fed. Cas. No. 17,901.

83. Merriman *v.* The May Queen, Newb. 464, 17 Fed. Cas. No. 9481.

84. Cunningham *v.* Butler, 2 Hayw. 392.

the action of the vessel in a foreign port, and *ex parte* depositions in support of the facts therein alleged, are not admissible to establish a controverted fact.[85] The protest of one of the crew of a captured vessel made at the first port arrived at in the United States, and left with the brokers of insurers to fix the date of loss, is admissible for that purpose, but is not evidence of any fact contained in it.[86]

C. Shipping Articles. — a. *Admissibility.* — Shipping articles, being the proper and usual documents for the ship for the voyage, are, in the admiralty, always admitted as evidence of the terms of hire,[87] though the evidence is not ordinarily conclusive,[88] and the shipping articles are not the sole evidence of the rights of the seamen,[89] unless the seamen have, with full understanding of its stipulations, signed the shipping articles,[90] or have stipulated for shares

85. Otis Mfg. Co. *v.* The Ira B. Ellems, 48 Fed. 591.

86. Ruan *v.* Gardner, 1 Wash. 145, 21 Fed. Cas. No. 12,100.

87. Willard *v.* Dorr, 3 Mas. 161, 29 Fed. Cas. No. 17,680; Ketland *v.* Libering, 1 Wash. 20, 14 Fed. Cas. No. 7744; The Atlantic, 1 Abb. Adm. 451, 2 Fed. Cas. No. 620; The Exile, 20 Fed. 878; Veacock *v.* McCall, 1 Gil. 329, 28 Fed. Cas. No. 16,904.

88. The Elvine, 19 Fed. 528; Willard *v.* Dorr, 3 Mas. 161, 29 Fed. Cas. No. 17,680; The Samuel E. Spring, 27 Fed. 764; The Samuel Ober, 15 Fed. 621; The Lola, 6 Ben. 142, 15 Fed. Cas. No. 8468; The Cypress, 1 Blatchf. & H. 83, 6 Fed. Cas. No. 3530; The Ringleader, 6 Ben. 400, 20 Fed. Cas. No. 11,850; Wickham *v.* Blight, 1 Gil. 452, 29 Fed. Cas. No. 17,611; The Rochambeau, 3 Ware 304, 20 Fed. Cas. No. 11,973; The Australia, 3 Ware 240, 2 Fed. Cas. No. 667.

89. The Trial, 1 Blatchf. & H. Adm. 94, 24 Fed. Cas. No. 14,170; Patten *v.* Park, Anthon 32; Wickham *v.* Blight, 1 Gil. 452, 29 Fed. Cas. No. 17,611; Sheffield *v.* Page, 1 Spr. 285, 21 Fed. Cas. No. 12,743; Page *v.* Sheffield, 2 Curt. 377, 18 Fed. Cas. No. 10,667.

Agreement With Shipping Agent. The shipping articles are not the sole evidence of the seamen's rights. Effect must be given to an agreement made by the shipping agent at the time when the articles were signed and relied upon by the seamen as forming part of the contract, where such an agreement is clearly proved. Statements, representations, and agreements made to the seamen by shipping notaries, when the articles are signed, bind the ship, and that without reference to the instructions which the captain has given the notary. When the ship-owner allows a shipping agent to employ a crew for him he holds out to the seamen, that the shipping agent has authority to bind the ship by the contract which he makes. The actual bargain made between the shipping agent, and the seaman, at the time of the shipment, binds the ship. The Lola, 6 Ben. 142, 15 Fed. Cas. No. 8468.

Other Evidence. — A seaman is not obliged to call for the shipping articles on the trial of his action for wages, in order to establish presumptive right to recover. His right depends, not upon the articles, but upon the service, and this he may prove by other evidence; e. g., the testimony of the master. The Trial, 1 Blatchf. & H. 94, 24 Fed. Cas. No. 14,170.

90. The Quintero, 1 Low. 38, 20 Fed. Cas. No. 11,517.

Explanation of Contract. — A contract signed by seamen which was fully explained to them before they signed it, is conclusive upon them. A sailor who has signed shipping articles in the presence of a consul speaking the same language as himself, shall not absolve himself from duty thereunder by alleging that he did not understand what he agreed to do. The Exile, 20 Fed. 878.

Officers Bound by Shipping Arti-

of the vessel's earnings.[91]

b. *Validity and Effect.* — Any stipulations in shipping articles which derogate from the legal rights, or just compensation of the seamen,[92] or any stipulations, the nature and operation of which

eles. — The mate of a vessel is concluded by the shipping articles specifying his compensation, and, in the absence of fraud, the master of a whaling ship is concluded by the terms of his contract with the owners for compensation. Slocum *v.* Swift, 2 Low. 212, 22 Fed. Cas. No. 12,954; Veacock *v.* McCall, Gilp. 329, 28 Fed. Cas. No. 16,904; The Lakme, 93 Fed. 230.

Stipulation as to Suit. — A stipulation in shipping articles that seamen shall not sue until the vessel is unladen, is binding upon them, if fairly made. Granon *v.* Hartshorne, 1 Blatchf. & H. 454, 10 Fed. Cas. No. 5689.

91. Shipping Articles for Whaling Voyage. — Where shipping articles were entered into for a whaling voyage which contemplated the payment of the officers and crew by shares of the vessel's earnings, a stipulation therein that any one of them who might be prevented from performing his duty during the whole of the voyage, should receive a share only in proportion to the time served by him, is binding upon all the officers and crew without evidence that special explanation of it was made to the seamen. In general, seamen are bound by their contract for wages of a specified rate, or where the mode of compensation is by proportional division of the earnings of the vessel among the owners, officers and crew. The Atlantic, Abb. Adm. 451, 2 Fed. Cas. No. 620.

Unexplained New Provision. — Where shipping articles were in the usual printed form for whaling voyages, with an additional clause in writing, containing novel conditions as to the mode of computing the shares of the seamen, a seaman to whom such new provisions were not made known at the time of the shipment is not bound by such provisions. Mayshew *v.* Terry, 1 Spr. 584, 16 Fed. Cas. No. 9361.

Shares Treated as Wages.—Agreements in shipping articles by which the seamen are to receive a share of the profits of the voyage, are contracts of hiring and the shares may be recovered as wages. Reed *v.* Hussey, 1 Blatchf. & H. 525, 20 Fed. Cas. No. 11,646.

92. Brown *v.* Lull, 2 Sum. 443, 4 Fed. Cas. No. 2018; Matern *v.* Gibbs, 1 Spr. 158, 16 Fed. Cas. No. 9273.

Unjust Agreements. — All agreements and arrangements with sailors are subject to examination in the court of admiralty and if unjust will be set aside and disregarded. Waling *v.* The Christina, Deady 49, 28 Fed. Cas. No. 17,059; The Almatia, Deady 473, 1 Fed. Cas. No. 254; The Ringleader, 6 Ben. 400, 20 Fed. Cas. No. 11,850; The Mermaid, 104 Fed. 301; The Occidental, 101 Fed. 997.

A stipulation in shipping articles that if the seaman, having absented himself from his vessel, afterwards returns to his duty, his return shall not relieve him from a forfeiture of his wages, is void. Freeman *v.* Baker, 1 Blatchf. & H. 372, 9 Fed. Cas. No. 5084.

Illegal Stipulations. — So far as shipping articles provide for a forfeiture of wages in excess of that provided by statute, they are contrary to law. A general coasting and trading voyage, in which the vessel is trading at ports in different states, is within the act of Congress of July 20, 1790, requiring the contract with the seamen to be in writing, and a verbal contract is illegal and not binding. The Crusader, 1 Ware 448, 6 Fed. Cas. No. 3456.

The court will not countenance an evasion of U. S. act of June 26, 1884, prohibiting the payment of advance wages to seamen, and declaring that such advance payment shall constitute no defense to an action for recovery of full wages—an evasion, for instance, where the rate of wages stated in the shipping articles is less than that agreed on by parol, the difference being paid in advance. The Samuel

were not fully explained to the seamen, will be held void.[93] Shipping articles are void which do not sufficiently describe or state the nature of the voyage,[94] and where the voyage is properly described

E. Spring, 27 Fed. 764; The San Marcos, 27 Fed. 567.

Exceptions to Void Articles. — U. S. Rev. St. § 4523, making void shipments of seamen made contrary to statute, etc., has no application to contracts whereby fishermen ship for shares in the catch. The Cornelia M. Kingsland, 25 Fed. 856.

The acts of Congress of 1790 and 1840, entitling seamen shipped without written articles, to demand the highest rate of wages, etc., do not apply to fishing vessels. Seamen shipped on these, by parol agreements, can recover only the wages agreed for. The Ianthe, 3 Ware 126, 12 Fed. Cas. No. 6992.

Compare The Australia, 3 Ware 240, 2 Fed. Cas. No. 667.

93. The Almatia, Deady 473, 1 Fed. Cas. No. 254; The Rochambeau, 3 Ware 304, 20 Fed. Cas. No. 11,973; Brown *v.* Lull, 2 Sum. 443, 4 Fed. Cas. No. 2018; Harden *v.* Gordon, 2 Mason 541, 11 Fed. Cas. No. 6047; Sarah Jane, 1 Blatchf. & H. 401, 21 Fed. Cas. No. 12,348; The Cyprus, 1 Blatchf. & H. 83, 6 Fed. Cas. No. 3530; Heard *v.* Rogers, 1 Spr. 556, 11 Fed. Cas. No. 6298; Matern *v.* Gibbs, 1 Spr. 158, 16 Fed. Cas. No. 9273; Mayshew *v.* Terry, 1 Spr. 584, 16 Fed. Cas. No. 9361; The Disco, 2 Sawy. 474, 7 Fed. Cas. No. 3922.

Reduction of Wages. — An unusual clause in shipping articles inserted in an unusual place in the article, reducing the wages of the seamen upon a returning voyage from Hong Kong to San Francisco will be set aside and disregarded as unjust in admiralty unless the ship owner gives clear proof that the sailors were clearly informed of and agreed to it, and in the absence of such evidence the seamen were entitled to recover full wages for the voyage, notwithstanding they had signed releases in full under protest of their ignorance of the clause inserted. The Ringleader, 6 Ben. 400, 20 Fed. Cas. No. 11,850.

Forfeiture of Wages. — A court of admiralty will avoid a clause in shipping articles which was not clearly explained to the seamen, and which undertook to forfeit all their wages and property if they should be absent from the ship for 48 hours without the express permission of the master. The Quintero, 1 Low. 38, 20 Fed. Cas. No. 11,517.

New Stipulations Not Explained. Any new or unusual stipulations in the shipping articles which derogate from the rights or privileges of a seaman under general maritime law will be held void in admiralty unless it appears that they were fully and fairly explained to the seamen, and that an additional compensation was allowed, adequate to the new restrictions. The Australia, 3 Ware 240, 2 Fed. Cas. No. 667.

Ambiguity in Shipping Articles. Any ambiguity in the shipping articles should be resolved in favor of the seaman, it being the duty of the master or owner of the vessel to have the shipping articles couched in plain language which the seamen cannot misunderstand. Wope *v.* Hemenway, 1 Spr. 300, 30 Fed. Cas. No. 18,042; Jansen *v.* The Theodor Heinrich, Crabbe 226, 13 Fed. Cas. No. 7215; The Disco, 2 Saw. 474, 7 Fed. Cas. No. 3922.

94. Rights of Seamen. — If the shipping articles do not sufficiently describe the voyage, the seaman may leave at any time; and if the master imprison him because he refuses to remain and do duty on board, this is a tort. Snow *v.* Wope, 2 Curt. 302, 22 Fed. Cas. No. 13,149.

Where a crew was shipped on an indefinite voyage, the destination of which was concealed from the seamen, the seamen are not bound to work in loading a cargo at the compensation fixed by the shipping articles, at such concealed destination. The Brookline, 1 Spr. 104, 4 Fed. Cas. No. 1937.

A shipping contract which does not specify the duration or place of termination of a voyage is not binding on the seamen. Walling *v.*

therein, it cannot be varied by proof,[95] and if departed from, the seamen are not bound,[96] and if broken up without cause the seamen may claim full wages for the voyage, less earnings meanwhile.[97]

c. *Best Evidence.* — In a suit upon shipping articles by a seaman to recover wages for the voyage, if the articles are not produced by the master or owner at the trial, after due requirement, his state-

The Christina, Deady 49, 28 Fed. Cas. No. 17,059.

But a defect in shipping articles in not specifying the terminus of the voyage, will not justify the master in discharging the seamen abroad. The presumption is, that a return to the United States was intended. Burke *v.* Buttman, 1 Low. 191, 4 Fed. Cas. No. 2160.

A seaman cannot be bound for service on a ship during a particular voyage or for a definite period of time, so as to be chargeable with desertion, which will forfeit his wages, because he leaves the ship before the completion of the voyage or the expiration of such time, unless he signs shipping articles, as prescribed by Rev. St. § 4511, which definitely state the nature of the voyage. The Mermaid, 104 Fed. 301.

Illegal Articles.—Shipping articles which provide for a voyage to or from ports to be determined by the master, or fixed at his option, do not definitely state the nature of the voyage as required by the Revised Statutes, and are illegal and void. The Occidental, 101 Fed. 997; The Mermaid, 104 Fed. 301.

95. Voyage Described Conclusive Upon Owner.—The voyage described in the shipping articles is conclusive upon the ship owner in an action *in rem* by the seamen for their wages. The Triton, 1 Blatchf. & H. Adm. 282, 24 Fed. Cas. No. 14,181.

It cannot be shown that it was understood that the vessel was not to complete the voyage described in the shipping articles. Thompson *v.* The Oakland, 23 Fed. Cas. No. 13,971.

Effect Upon Seamen. — Where the shipping articles, describing the voyage, were fully explained to the seamen before they signed it, they are concluded thereby. The Quintero, 1 Low. 38, 20 Fed. Cas. No. 11,517.

But where two voyages were expressly agreed upon, one of which was described in the articles and the other was not and both were performed, the mariner may prove the oral agreement and recover accordingly. Page *v.* Sheffield, 2 Curt. 377, 18 Fed. Cas. No. 10,667; Sheffield *v.* Page, 1 Spr. 285, 21 Fed. Cas. No. 12,743.

96. The William Jarvis, 1 Spr. 485, 30 Fed. Cas. No. 17,697; The Gem, 1 Low. 180, 10 Fed. Cas. No. 5304; Potter *v.* Allin, 2 Root 63; The Laura Madsen, 84 Fed. 362.

97. The Maria, 1 Blatchf. & H. Adm. 331, 16 Fed. Cas. No. 9074; Campbell *v.* The Steamer Uncle Sam, 1 McAll. 77, 4 Fed. Cas. No. 2372.

Death of Seamen During Voyage. Where seamen shipped for a whole voyage and died before the return of the vessel, their administrators may recover full wages. Walton *v.* The Neptune, 1 Pet. Adm. 142, 29 Fed. Cas. No. 17,135.

Seamen Forced From Vessel. Where seamen were forced from the vessel, who had shipped for the voyage, they are entitled to wages to the time of its completion, deducting earnings meanwhile. Singstrom *v.* The Hazard, 2 Pet. Adm. 384, 22 Fed. Cas. No. 12,905.

Where seamen have been turned off from an armed vessel without their consent, and without lawful cause, they are entitled to their shares of prizes taken during the voyage for which they are shipped. The Heroe, 21 Fed. 525.

Where the crew of a fishing vessel were not allowed to participate in the fishing by the owners of the vessel, as provided for in the shipping articles, they are justified in leaving the vessel, and are entitled to be paid their full share of the catch. Goodrich *v.* The Domingo, 1 Saw. 182, 10 Fed. Cas. No. 5543; The Hibernia, 1 Spr. 78, 12 Fed. Cas. No. 6455.

ment of the contents thereof, when disputed, will be *prima facie* evidence of the same.[98] In an action grounded upon shipping articles, seamen are not bound to produce them, even when they are on the records of an admiralty court, in consequence of the vessel's capture, and after a notice to the defendant to produce them, they may prove their contents by oral evidence.[99] Original shipping articles proved before a commissioner, and given up to the vessel which has departed, may be proved by a copy certified by the commissioner.[1] Charges made on shipping papers of advances to the seamen in the course of the voyage, are not evidence until verified by the suppletory oath of the master.[2]

D. Bills of Lading. — a. *Effect As Evidence.* — A bill of lading in the usual form, is a receipt for goods, which is not conclusive evidence in relation to any contract,[3] or of an express agreement as to the price of freight,[4] or of the amount of cargo upon which the freight is to be estimated,[5] or of the condition of goods when laden on board, as between the original parties,[6] but is conclusive as against assignees of the cargo for a valuable consideration.[7] Unless fraud or mistake is shown the bill of lading is conclusive evidence of the articles shipped.[8]

b. *Legal Effect.* — The *prima facie* legal effect of a bill of lading, is to vest the ownership of the goods in the consignee.[9] Usage

98. The Osceola, Olc. 450, 18 Fed. Cas. No. 10,602.

99. Patten *v.* Park, Anthony 46.

1. Henry *v.* Curry, Abb. Adm. 433, 11 Fed. Cas. No. 6381.

2. The David Pratt, 1 Ware 509, 7 Fed. Cas. No. 3597.

3. Knox *v.* Ninetta, Crabbe 534, 14 Fed. Cas. No. 7912.

4. Simmes *v.* Marine Ins. Co., 2 Cranch C. C. 618, 21 Fed. Cas. No. 12,862.

5. The Henry, 1 Blatchf. & H. 465, 11 Fed. Cas. No. 6372.

6. Bradstreet *v.* Heran, 1 Abb. Adm. 209, 3 Fed. Cas. No. 1792; Baxter *v.* Leland, 1 Abb. Adm. 348, 2 Fed. Cas. No. 1124; The Martha, Olc. 140, 16 Fed. Cas. No. 9145; Nelson *v.* Woodruff, 1 Black. 156.

7. Bradstreet *v.* Heran, 1 Abb. Adm. 209, 3 Fed. Cas. No. 1792.

8. Backus *v.* The Marengo, 6 McLean 487, 2 Fed. Cas. No. 712.

False Bills of Lading. — The owner of a vessel may deny the validity of bills of lading fraudulently signed by the master of the vessel, as against the *bona fide* owners of the bills of lading, where the master had no authority to execute them so as to bind the owner's interest in the vessel, and his signature of the bills of lading was obtained by fraud and represented no goods actually delivered upon the vessel, and were negotiated solely for obtaining money upon them. The Freeman *v.* Buckingham, 18 How. 182; Pollard *v.* Vinton, 105 U. S. 7.

Neither the master of a vessel nor the shipping agent of steamboats upon rivers, has authority to bind the vessel or its owners by a false bill of lading for goods or cargo not received for shipment, and such bills of lading, being outside of the power conferred upon the master is void in the hands of a person, who may have afterwards, in good faith, taken it and advanced money on it. Pollard *v.* Vinton, 105 U. S. 7.

9. **Consignment for Use of Third Party.** — The effect of a consignment of goods, generally is to vest the property in the consignee; but if the bill of lading is special to deliver the goods to A for the use of B, the property vests in B, and the action must be brought in his name in case of loss or damage. Grove *v.* Bryan, 8 How. 429.

Presumptive Title of Consignee.

may be shown to qualify the effect of a bill of lading.[10] A bill of lading signed after damage to the cargo will not have the effect to increase the liability of the vessel.[11] A through bill of lading does not import joint liability of the separate vessels upon which the goods were shipped.[12]

c. *Transfer.* — The endorsement of a bill of lading has the effect to transfer all right in the consigned property to the assignee.[13]

A bill of lading is presumed to vest the title in the consignee, unless the contrary is shown by the bill of lading itself, or by extrinsic evidence. The Sally Magee, 3 Wall. 451; Lawrence *v.* Mintern, 17 How. 100.

Bill of Lading to Shipper's Order. A bill of lading taken, deliverable to the shipper's own order, is inconsistent with an intention to pass the ownership of the cargo to the person for whom they were purchased, even if the shipment was made in the purchaser's own vessel, where the consignment was to a bank as security for payment of drafts drawn by the shipper upon the consignee. Dowes *v.* National Exchange Bank, 91 U. S. 618.

10. Broadwell *v.* Butler, 6 McLean 296, 4 Fed. Cas. No. 1901; Andrews *v.* Roach, 3 Ala. 190.

Usages Part of Contract.—Parties who contract on a subject-matter concerning which known usages prevail, incorporate such usages by implication into their agreements, if nothing is said to the contrary; and a usage of the trade for a vessel to touch and stay at a port out of its course, established as a general usage, forms part of the contract of carriage, created by the bill of lading, even if the general usage be not known to the particular shipper. Hostetter *v.* Park, 137 U. S. 30; Thatcher *v.* McCulloh, Olc. 365, 23 Fed. Cas. No. 13,862.

Delivery of Cargo. — Where a cargo is, by a bill of lading, to be delivered at a designated port of wide extent, without specifying a particular place, the custom of the port controls the delivery, and a usage may be shown for a majority of the consignees of the cargo of a general ship to name a suitable place of discharge. Devato *v.* Eight Hundred and Twenty-Three Barrels Plumbago, 20 Fed. 510.

Specific Terms Not Varied by Usage. — Where an option is expressly given to the shipper alone, no usage can be shown to authorize the consignee to exercise the option. McGovern *v.* Heissenbuttel, 8 Ben. 46, 16 Fed. Cas. No. 8805.

The legal effect of the language of bills of lading cannot be varied by slight proof of a custom which is not notorious and certain, and has not been uniform in its application, or long established in practice. Garrison *v.* Memphis Ins. Co., 19 How. 312; Brittan *v.* Barnaby, 21 How. 537.

A usage in San Francisco, however general, cannot have the force of custom to release its merchants from the obligation of a bill of lading, nor can any previous assent to the usage of any particular firm engaged there in the shipping business, though acquiesced in by one who had had other dealings with it, be interpreted into an agreement, so as to deprive him of a right under an ordinary bill of lading, subsequently made. Brittan *v.* Barnaby, 21 How. 537.

Evidence is not admissible to vary the common bill of lading, by showing a custom contrary to its legal effect. The Reeside, 2 Sum. 567, 20 Fed. Cas. No. 11,657.

11. The Edwin, 1 Spr. 477, 8 Fed. Cas. No. 4300.

12. Sumner *v.* Walker, 30 Fed. 261.

13. Purchase of Stolen Bill of Lading. — The purchaser of a stolen bill of lading, who has reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstanding *draft*, is not a *bona fide* purchaser, and is not entitled to hold the merchandise covered by the bill against its true owner. Shaw *v.* Merchant's National Bank, 101 U. S. 557; Ryberg *v.* Snell, 2 Wash. 294,

The assignee has a right to have the goods discharged from the vessel for examination and comparison with the bill of lading, but cannot require delivery without paying freight.[14] Under a bill of lading to order the vessel takes the risk of delivery to the endorsee.[15]

d. *Best Evidence.* — A copy of a bill of lading, with affidavit of its correctness, is not the best evidence, and is not admissible to prove the original.[16] A bill of lading is not necessary as evidence where a suit is not brought upon it.[17] A paper certified by a consul to be a true copy of a bill of lading is not admissible, though the party has but one original.[18]

E. Charter-Party. — a. *Relation to Bills of Lading.* — As between the shipowner and the owner of a charter-party, shipping his own goods, the charter-party controls the bill of lading where there is a difference between them;[19] but bills of lading are not, as between the shipowners and the charterers, new contracts superseding all stipulations contained in the charter-party in regard to the delivery of the goods.[20] A parol charter will control an inconsistent bill of lading signed after the vessel is loaded and leaves the port.[21] A clause of a charter-party providing that bills of lading should be signed by the master, excludes implied authority in the charterers, to bind the ship by bills of lading.[22] If a charter-

21 Fed. Cas. No. 12,189; Walter *v.* Ross, 2 Wash. 283, 29 Fed. Cas. No. 17,122; The Treasurer, 1 Spr. 473, 24 Fed. Cas. No. 14,159; The Mary Ann Guest, Olc. 498, 16 Fed. Cas. No. 9197; Conard *v.* Atlantic Ins. Co., 1 Pet. 386; The Vaughan and Telegraph, 14 Wall. 258; The Thames, 14 Wall. 98.

14. The Treasurer, 1 Spr. 473, 24 Fed. Cas. No. 14,159.

15. The Thames, 14 Wall. 98.

16. Wood *v.* Roach, 2 Dall. 180. In this case, Bradford, Justice, said: "The paper offered in evidence is not a bill of lading; but it is offered as a copy, and to prove that a bill of lading, of the same tenor and date was executed. If the instrument itself were produced, proof of the signature would be *prima facie* evidence that it was given when it bears date; but when the instrument does not appear, it cannot be supplied by the oath of the defendant." The evidence was accordingly rejected.

17. Newhall *v.* Nixon, 4 Wall. 572.

18. The Alice, 12 Fed. 923.

19. Ardan S. S. Co. *v.* Theband, 35 Fed. 620; The Chadwicke, 29 Fed. 521.

20. Stipulations in Charter-Party. A clause of the charter-party saying that "the charterers' responsibility shall cease when cargo is all on board and bills of lading signed," does not terminate the responsibility of the ship to the charterers upon the charter-party—especially where the charter contains a provision that the goods are to be delivered according to the custom at the port of discharge, and other provisions in regard to the appointment of stevedores and designation of wharf for unloading. The Iona, 80 Fed. 933.

21. Huron Barge Co. *v.* Turney, 71 Fed. 972.

22. Bills of Lading Signed by Charterers. — Though a provision of a charter-party, that the master shall sign bills of lading as presented, with indemnity from the charterers, does not authorize the charterers to sign bills of lading themselves, or require the master to give bills of lading for goods carried on deck, so as to bind the ship thereby, where the charter provides that goods carried on deck shall be at the charterer's risk; yet a ship and its master are bound to third persons under bills of lading executed by the charterers in his presence and

party makes no mention of primage, none can be allowed, though stipulated for in the bill of lading.[23] Where a consignee of the charterer has notice that the freight must be paid to the master and not to the charterer, it imposes the like obligation upon him as if expressly reserved in the bill of lading, and such consignee must be presumed to know the contents of the charter-party.[24]

b. *Usage.* — A charter-party should be construed conformably to the usage of trade in general, and to the particular trade to which it relates.[25] A charter-party which expressly provides for the

with his knowledge and concurrence, as if signed by the master in person; and the ship cannot deny privity with actual known shippers of cargo, under cover of a single bill of lading given to the charterers as sole shippers, where to the master's knowledge, clean bills of lading were issued to the actual shippers in his presence by the charterers as his agents. The Sprott, 70 Fed. 327.

23. Carr *v.* Austin etc. Co., 14 Fed. 419.

24. Control of Vessel. — When, by the charter-party, the possession and control of the vessel remains with the master and owner, the consignee cannot deal with the charterer as owner for the voyage, and a payment by him to the charterer by crediting debts due him from the charterer on the freight, will not discharge his liability to the master who may recover the freight from him to the amount due on the charter-party. Shaw *v.* Thompson, Ole. 144, 21 Fed. Cas. No. 12,726.

25. Balfour *v.* Wilkins, 15 Saw. 429; Houge *v.* Woodruff, 19 Fed. 136; Gronn *v.* Woodruff, 19 Fed. 143; Continental Coal Co. *v.* Birdsall, 108 Fed. 882, 48 C. C. A. 124.

Construction of Charter-Party. In Raymond *v.* Tyson, 17 How. 53, the court said: "First, it must be remembered, that a charter-party is an informal instrument as often as otherwise, having inaccurate clauses, and that on this account they must have a liberal construction, such as mercantile contracts usually receive, in furtherance of the real intention of the parties and usage of trade. So Lord Mansfield said a long time since. Abbott, in his treatise relative to merchant ships and seamen, Story's edition, 188, gives the rule of construction very much in the same words, but perhaps with more precision. 'The general rule which our courts of law have adopted, in the construction of this as well as other mercantile instruments, is, that the construction should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which this contract relates.' Chancellor Kent, in his 47th chapter on the contract of Affreightment, cites the rule approvingly. The late Mr. Justice Thompson, of this court, asserts it in Ruggles *v.* Bucknor, 1 Paine 358. Judge Story acted upon it ten years afterwards, in the case of the Volunteer, 1 Sum. 550; and again in another case, 2 Sum. 589. . . . The other case mentioned in 2 Sum. 589, Certain Logs of Mahogany *v.* Richardson, was one which was decided upon the inaccurate and inconsistent stipulations of a charter-party by a liberal construction of them, in furtherance of the real intention of the parties, and the usage of trade."

Custom as to Stowage. — A charter-party for the transportation of merchandise from Calcutta to Boston, prescribing no mode of stowing, tacitly refers to the established and known usage of the trade for the manner of stowing the cargo. Lamb *v.* Parkman, 1 Spr. 343, 14 Fed. Cas. No. 8020.

Custom of Trade. — A custom of trade in reference to a particular cargo which is not excluded by the terms of the charter-party is admissible in evidence to qualify its terms as part thereof. Albion Phosphate M. Co. *v.* Wyllie, 77 Fed. 541.

Custom as to Navigation. — Under a charter-party extending to the close of navigation upon the Great

usage and customs of the place of loading and discharge of cargo, binds the owner of the vessel by the proved customs of the port.[26] The established usage of a port for loading or discharging vessels may be shown to explain the meaning of uncertain language in the

Lakes evidence is admissible to prove the customary close of the season of navigation thereupon. Eddy *v.* Northern S. S. Co., 79 Fed. 361.

Explanation of Doubtful Terms. Established usage may be shown to explain the meaning and use of dubious and uncertain phrases in the charter-party. Balfour *v.* Wilkins, 5 Saw. 429, 2 Fed. Cas. No. 807.

Proof of Usage. — A custom or usage of the port in which a charter was made, may be shown in evidence in a suit to determine the rights of the parties under the charter-party, where it is silent on the subject to which the custom relates in order to place the court in the position of the parties when the charter was made; but to entitle the custom to be read in the charter-party, there must be no room in the evidence to doubt of its existence, and it must appear to be reasonable, certain, consistent with the language of the charter-party, and not contrary to law, and so general and long established that the parties are conclusively presumed to have contracted with reference to it. Continental Coal Co. *v.* Birdsall, 108 Fed. 882.

A custom for like vessels to tow additional vessels, is not sufficiently proved to be construed into a charter-party, so as to allow the chartered vessel to cause delay by such towage, where it appears that such vessels do not always engage in such towing. The Oregon, 55 Fed. 666.

Usage. When Inapplicable. — The usage of a special line of trade to ship certain goods at a particular season of the year cannot enter into the construction of a charter-party not naming the date of shipment or delivery, though executed at such season, when from unavoidable causes, it was impracticable to carry out the shipment at the time intended. Hall *v.* Hurlbut, Taney 589, 11 Fed. Cas. No. 5936. A custom created by the charterers subsequent to the charter-party, will not, like a general custom, be incorporated in the charter-party for the purpose of construing its obligations. The George Dumois, 88 Fed. 537.

Invalid Custom. — A custom in the Chinese coolie traffic, to overcrowd vessels, has no binding effect in the construction of a charter-party, so as to require a vessel carrying Chinese, to carry such a number of passengers as is dangerous to life and health. The Hound, 12 Fed. Cas. No. 6371.

26. Customs Provided for in Charter-Party. — The owner of a vessel is bound by the customs of a port to which he contracts to carry cargo, where the charter provides that "the cargo is to be brought alongside the vessel and taken away at the expense and risk of the charterers, according to the use and customs of the place of loading and discharging. Bertellote *v.* Part Cargo of Brimstone, 3 Fed. 661. Where, by the terms of a charter-party, the vessel was to take a cargo of coal to be furnished by the hirer, and there were to be lay-days, as customary in loading, and the cargo was to be received as customary, both parties are bound to conform to a peculiar custom shown to exist at the port of loading, as to the mode of loading, receiving and furnishing the cargo. Nichols *v.* Tremlett, 1 Spr. 361, 18 Fed. Cas. No. 10,247.

Seager *v.* N. Y. and C. Mail Steamship Co., 55 Fed. 880, Aff'g. 55 Fed. 324.

Delivery As Customary. — Under a charter-party providing for the discharge of a cargo of fruit at the usual fruit-berth as fast as the vessel can deliver "as customary," that term relates to the duty of the vessel, not of the charterers, and provides for the delivery as fast as the custom of the port will allow. Good *v.* Isaacs, C. A. (1892,) 2 Q. B. 555.

Delay in Delivery. — Under a charter-party, providing for the discharge of the cargo "with customary dispatch," a custom of the port, au-

charter-party;[27] but unambiguous language in a charter-party having a fixed and definite meaning, cannot be changed or limited by evidence of local usage.[28] "Customary cleaning" provided for in

thorizing certain delays, cannot justify the consignee in voluntarily delaying the discharge of the cargo in violation of the express terms of the contract. "Customary dispatch in discharging" means discharging with speed, haste, expedition, due diligence, according to the lawful, reasonable, well-known customs of the port of discharge, and means the same as "usual customs." Lindsay v. Cusimano, 10 Fed. 302.

27. A charter-party entered into at Liverpool, England, to load a vessel with grain at Portland, Oregon, which provided that the charterers should have thirty working days, not counting "rainy days," in which to load the vessel, is in contemplation of law, made at Portland, Oregon; and the condition and the conveniences of that port for loading vessels with grain, and the established usage thereof, upon that subject, may be shown to explain the meaning and use of the uncertain phrase "rainy day," which was intended at that port, to apply only to the days on which the rainfall was such as to prevent the loading of the vessel with safety and convenience. Balfour v. Wilkins, 5 Sawy. 429, 2 Fed. Cas. No. 807.

Delay in Discharging Cargo. Under a charter-party providing for demurrage for delay caused by the charterer, a custom of the trade requiring the vessel to deliver the cargo at different places in the same port, will prevent demurrage for delay, in going from one place of discharge to another. The Mary E. Taber, 1 Ben. 105, 16 Fed. Cas. No. 9208.

Discharge of Cargo of Salt. — One who buys a cargo of salt on board a chartered vessel after her arrival, is bound only to reasonable diligence in discharging conformably with the custom of the port; and by usage in the salt trade, rainy weather is to be deducted from the time of the discharge. Houge v. Woodruff, 19 Fed. 136; Gronn v. Woodruff, 19 Fed. 143.

Custom As to Piling Cargo. — A custom of the port of discharge requiring the vessel to pile its cargo of hemp upon the dock, for one-half its width and the length of the vessel, is not inconsistent with the printed clause of the charter-party, that "cargo shall be received and delivered alongside of the vessel within the reach of her tackles," and the vessel is not entitled to extra compensation for handling such cargo according to the custom. Seager v. N. Y. & C. Mail S. S. Co., 55 Fed. 880, affirming 55 Fed. 324.

Unforseen Obstacles. — There is no implied agreement that a charterer will unload or discharge the ship in the customary time at the port of delivery, regardless of all extraordinary circumstances and unforseen obstacles. Empire Transp. Co. v. Philadelphia & R. Coal & I. Co., 77 Fed. 919, 35 L. R. A. 623.

28. Ten Thousand and Eighty-two Oak Ties, 87 Fed. 395; The Gazelle, 128 U. S. 474.

Working Days. —The term "working days," as used in the charter-party, is unambiguous, and has a fixed and definite meaning which cannot be varied by evidence of local usage. Pederson v. Engsler, 14 Fed. 422.

Dispatch for Discharge of Cargo. Under a charter-party providing for a dispatch for discharging cargo at Havana, the custom and rules of the port of Havana, cannot control as to the time for discharging cargo there, and the risk of delay in delivery of the cargo by the rules of that port requiring it to be delivered only at the mole, is upon the charterers and not upon the owners of the vessel. Sleeper v. Puig, 17 Blatchf. 36, 22 Fed. Cas. No. 12,941.

Time for Loading. — In a charter-party allowing "eighteen working days, Sundays excepted," for loading, evidence of custom cannot control those words, and "rainy days" cannot be excepted under proof of custom of the port. The Cyprus, 20 Fed. 144.

a charter-party, is disproved by damage to the cargo resulting from insufficient cleaning.[29]

c. *Other Questions of Proof.* — Where the proof shows that the vessel's service began on the day of a date of a charter-party, it is immaterial that it is proved to have been executed subsequent to its date.[30] An unambiguous charter-party,[31] or a written contract therefor, is conclusive evidence of its terms,[32] though an ambiguous charter-party may be explained by evidence.[33] A sub-charterer charging fraud of the master in stowing cargo in violation of his rights, is bound to prove it.[34] A charter-party which never became a binding contract as a whole, is evidence of an implied contract in the subsequent use of the vessel, so far as adopted without objection.[35] Stipulations that the general owners shall keep the vessel in good condition during the charter, and receive goods at the request of the charterer, and none without the charterer's assent, are conclusive evidence that the possession and control of the vessel are retained by the general owners.[36] It will not be

Safe Port for Discharge. — Under a clause in a charter-party by which the charterers were bound to order the vessel "to a safe, direct, Norwegian or Danish port, or as near thereonto as she could safely get and always lay in discharge, afloat," the charterers cannot order the vessel to a port having a bar across its mouth, which it is impossible for the vessel to pass either in ballast or in cargo, where the only anchorage outside the bar is not reasonably safe for the vessel to lie and discharge; and evidence cannot be received of a custom to consider such a port as safe, inasmuch as it would directly contradict the charter-party. The Gazelle, 128 U. S. 474.

29. Insufficient Cleaning. — A charter-party provided that the vessel, after delivering her cargo of petroleum on a voyage previous to that under the charter, should be "cleaned as customary previous to loading homeward cargo." Said homeward cargo consisted of fruit which was impregnated with petroleum and otherwise damaged thereby. *Held*, that the fact of damage by petroleum must be accepted as evidence that the vessel was not cleaned in the customary or proper manner, as required by the charter. The Carlotta, 9 Ben. 1, 4 Fed. Cas. No. 2413.

30. Bowley *v.* U. S., 8 Ct. Cl. 189.

31. The Eli Whitney, 1 Blatchf. 360, 8 Fed. Cas. No. 4345; The Augustine Kobbe, 37 Fed. 702; Baker *v.* Ward, 3 Ben. 499, 2 Fed. Cas. No. 785.

32. Galgate Ship Co. *v.* Starr, 58 Fed. 894.

33. The Wanderer, 29 Fed. 260.

34. The Lloyd, 21 Fed. 420.

35. Implied Contract. — Where a charter-party was signed by brokers for both parties, subject to approval by the owners of two disputed clauses, which were never agreed to by the owners, the charter-party is not a binding contract, and no contract can be implied in favor of the owners as to the disputed clauses, but the delivery of the vessel by the owners to the charterer is an implied adoption of all the terms of the existing charter-party, and a waiver by the owners of the vessel of previous objections thereto. La Compania, etc. *v.* Spanish-American Light and Power Co., 31 Fed. 492.

36. Charter-Party Containing Covenants. — A charter-party, sounding wholly in covenants, and containing agreements that the owner was to fit the vessel for the voyage, and that she should take in a cargo furnished by the charterer, reserving the cabin, and also room for the crew, water, provisions, etc., and that the charterer was to pay a stipulated freight for the cargo, is to be construed under the presumption of law against the change of ownership, and, as be-

presumed in the absence of evidence that there was any defect in the chartered vessel or fault in her management by reason of detention from injury caused by heavy seas, under a charter-party for voyages specified at a rate *per diem*.[37] The valuation of a yacht fixed in the charter-party is conclusive evidence of its value as between the parties, in the absence of any showing of fraud or mistake.[38] The owners of the vessel are bound to prove the meaning of technical language which they have caused to be put into the charter-party, and to show a breach of the charter-party.[39] The court will not compel plaintiff to produce a charter-party of which defendant has a counterpart.[40]

F. Other Documents. — a. *Ship's Manifest.*—The ship's manifest of cargo, required by law to be recorded in the custom-house, may be proved by a copy thereof, certified under the hands and seal of the custom-house officers, and shown to have been compared with the record.[41] On a libel charging a vessel with violation of the embargo act, the report and manifest of her cargo are admissible to be shown where it was taken on.[42] Upon a prosecution for

ing in the light of the acts of the parties under it, an affreightment for the voyage, and not a letting of the entire ship. The Aberfoyle, 1 Abb. Adm. 242, 1 Fed. Cas. No. 16; Leary *v.* U. S., 14 Wall. 607.

Presumption. — The presumption is, that the owner does not waive his rights under the general rules of law. The Erie, 3 Ware 252, 8 Fed. Cas. No. 4512.

Demise of Vessel. — Where the owner parts with all possession and control of the vessel to the charterer the contract is one of demise for the voyage, with rent payable at the end of the term. U. S. *v.* Shea, 152 U. S. 178.

Inclination of Courts. — The inclination of courts is to construe a charter-party as a contract of affreightment charging the ship-owners as carriers and not as a demise of the vessel, unless its tenor clearly calls for the latter construction. Richardson *v.* Winsor, 3 Cliff. 395, 20 Fed. Cas. No. 11,795.

37. **Burden Upon Charterer.** Where a charter-party is not for time specified, but for voyages specified, the rule is, that the owners are bound only to due diligence amid the circumstances in which the voyages are made, although the compensation is an allowance *per diem*; and if the charterer alleges a want of this diligence, the burden is on him to prove it. Bowley *v.* U. S., 8 Ct. Cl. 189.

38. **Valuation of Pleasure Yacht.** A pleasure yacht has no determinable market value, and where the charterer of the yacht provided that "for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars, ($75,000)" and that the liability of the charterer should not exceed that sum, such provision is intended solely for the purpose of fixing the damage in the case of loss or injury to the yacht. Upon her total loss while in possession of the charterer, the owner was entitled to recover the full amount stipulated, without any deduction on account of hire paid by the charterer. Moore *v.* Sun Printing & Publishing Ass'n., 95 Fed. 485.

39. The John H. Pearson, 14 Fed. 749.

Burden Upon Libellants. — Libellants are bound to prove their interpretation of a charter-party. The Principia, 34 Fed. 667.

40. Sampson *v.* Johnson, 2 Cranch C. C. 107, 21 Fed. Cas. No. 12,281.

41. U. S. *v.* Johns, 4 Dall. 412.

42. U. S. *v.* The Little Charles, 1 Brock. 347, 26 Fed. Cas. No. 15,612.

smuggling, the manifest of the steamer produced from the usual place of deposit of ship's manifests in the custom-house, is admissible, where it appears that no other manifest of the voyage is on file.[43]

b. *Commercial Documents.* — Commercial documents executed abroad may be considered as evidence without strict proof, if the question arises unexpectedly on the trial and *res gestae* show their authenticity and correctness.[44]

c. *Survey of Vessel.* — The report of a survey made upon an examination of a vessel to ascertain her situation after disaster in a foreign port, is evidence that such a survey was made, but not of the facts stated in it;[45] but if the surveyors, in a deposition, refer to their certificate of a survey of the vessel, as containing all they know, it becomes evidence of the facts stated in it.[46] A copy of a survey of a vessel not purporting to be made by any one connected with her, and not proved to be correct, is not admissible against her.[47]

d. *Delivery Book of Cargo.* — The delivery book of cargo, showing the order in which the goods were unladen, is better evidence, and entitled to greater weight than the testimony of the crew.[48]

e. *Letters.* — Where the claimant of a cargo libelled as prize, relies upon letters to show title, he must produce the letters themselves, if their absence is not accounted for, and his affidavit as to their contents will not be received.[49] A letter of instructions from the owners to the captain of the vessel at the time of sailing, sworn to by the captain to be the only instructions he had, are admissible to prove that he had no orders to buy the vessel on their account in case of capture.[50] Letters written to parties by their own agents which were no part of the contract of shipment, but were mere reports by the agents to their principals, are not admissible for such parties, or to corroborate the agents as against third persons.[51]

f. *Title of Vessel.* — The statement of the title of the vessel in the custom-house documents is not conclusive evidence thereof,[52] and one who holds the legal title to a vessel may be shown to be a mortgagee thereof.[53] The certificate of enrollment of a vessel

43. The Missouri, 4 Ben. 410, 17 Fed. Cas. No. 9653; U. S. *v.* The Missouri, 9 Blatchf. 433, 26 Fed. Cas. No. 15,785.

44. The Boskenna Bay, 22 Fed. 662.

45. Watson *v.* Ins. Co. of North America, 2 Wash. C. C. 152, 29 Fed. Cas. No. 17,284; U. S. *v.* Mitchell, 2 Wash. C. C. 478, 26 Fed. Cas. No. 15,791.

46. U. S. *v.* Mitchell, 2 Wash. C. C. 478, 26 Fed. Cas. No. 15,791.

47. The Vivid, 4 Ben. 319, 28 Fed. Cas. No. 16,978.

48. Llado *v.* Tritone, 15 Fed. Cas. No. 8427.

49. The Sally Magee, 3 Wall. 451.

50. Story *v.* Strettel, 1 Dall. 13.

51. Ins. Co. *v.* Guardiola, 129 U. S. 642.

52. Chickering *v.* Hatch, 1 Story 516, 5 Fed. Cas. No. 2671.

53. Morgan *v.* Shinn, 15 Wall. 105.

Inconclusive Facts. — The facts that the bill of sale was recorded; that the vessel was re-enrolled in the name of the transferee; that a policy of insurance was taken out in his

is not *prima facie* evidence of ownership thereof,[54] but is, upon incidental questions, *prima facie* evidence of the port to which the vessel belongs.[55] The builder's certificate and registry and enrollment are not conclusive evidence of ownership.[56] Delivery of a vessel to the agent of the person for whom it was built, unaccompanied by any written conveyance, vests the title in the owner.[57] A ship built in the United States for alien residents abroad, becomes their property without documentary proof of title.[58] By the general maritime law, a transfer of a ship should be evidenced by a bill of sale;[59] but the equitable ownership of a vessel may be shown without a bill of sale or registry.[60] A bill of sale of a vessel, accompanied by possession, is only *prima facie* evidence of title.[61]

name as owner, and that no note or bond was taken by him, will not overcome positive evidence that the bill was taken as a mere security for a loan. Davidson *v.* Baldwin, 79 Fed. 95.

54. Dudley *v.* The Superior, 1 Newb. Adm. 176, 7 Fed. Cas. No. 4115.

Evidence of Ownership. — Under a law which makes criminal certain acts done on board a vessel owned in whole or in part by a citizen of the United States, an American registry is not even *prima facie* evidence of such ownership; though such registry is made by the government only on the presumption of such ownership, and after oath by one or more persons of such ownership by them. Nor is general reputation of such ownership any evidence of it. Ownership, in such a case, is a fact to be proved as other facts. U. S. *v.* Brune, 2 Wall. Jr. 264, 24 Fed. Cas. No. 14,677.

The purchaser of a part of a vessel from one not in possession, but who claims to be the owner, although exercising no acts of ownership, is not an innocent purchaser without notice of true ownership, no inquiry having been made of known part-owners as to the validity of the seller's title, and no inference can be justified from the certificate of enrollment, which affords not even *prima facie* evidence of ownership. The Nancy Dell, 14 Fed. 744.

55. Rebuttal of Evidence. — The enrollment of a vessel, although inadmissible to show title, yet on an incidental question regarding liens, is *prima facie* evidence of the port to which the vessel belongs. Evidence of the notorious residence of the owner, at a place nearer to some other port than that of enrollment, may be available in contradiction thereof. Dudley *v.* The Superior, 1 Newb. Adm. 176, 7 Fed. Cas. No. 4115.

56. Showing of Fraud. — The real owner of a vessel, who claims as builder, may prove his ownership, and show that the builder's certificate and registry and enrollment have been fraudulently made and issued in the name of another. Scudder *v.* Calais Steamboat Co., 1 Cliff. 370, 21 Fed. Cas. No. 12,565.

57. Subsequent Bill of Sale to Agent. — Where there was no original intent on the part of the agent to appropriate the vessel to his own use, when it was delivered to him for the owner, the subsequent act of the agent in taking the bill of sale to himself, four months afterwards, would not divest the owner's title and vest it in the agent, and the purchaser of the vessel from one holding it in trust for the real owner with notice of the trust, can stand in no better situation than the seller. Scudder *v.* The Calais Steamboat Co., 1 Cliff. 370, 21 Fed. Cas. No. 12,565.

58. Passage of Title. — The passage of the title of such ship is the same as that of any other chattel. The Active, Olc. 286, 1 Fed. Cas. No. 34.

59. Weston *v.* Penniman, 1 Mason 306, 29 Fed. Cas. No. 17,455.

60. Hall *v.* Hudson, 2 Spr. 65, 11 Fed. Cas. No. 5935.

61. Full Title.—In order to con-

A bill of sale of a ship need not recite the certificate prescribed by the registry act.[62]

3. Judgments and Decrees. — A. Conclusiveness. — A sentence of condemnation of a vessel by a court of competent jurisdiction concludes the title,[63] and a decree of condemnation or acquittal in admiralty is conclusive evidence of title in an action for damages.[64] The decree of a foreign court of admiralty condemning insured property for a breach of blockade is conclusive evidence of the breach of blockade in a collateral action on a policy of marine insurance,[65] and where the property is condemned as that of the

stitute a full title under the bill of sale, accompanied by possession, as against the creditors of the vendor, the transfer should be *bona fide* and for a valuable consideration. It is not necessary to the title that the vessel shall be enrolled in the custom house, such enrollment being only necessary to entitle to the character and privileges of an American vessel. Hozey *v.* Buchanan, 16 Pet. 215.

62. D'Wolf *v.* Harris, 4 Mason 515, 8 Fed. Cas. No. 4221.

63. Rose *v.* Himley, 4 Cranch 241; Hudson *v.* Guestier, 4 Cranch 293; Wheelwright *v.* Depeyster, 1 Johns. 471; Jenkins *v.* Putnam, 1 Bay 8; Williams *v.* Armroyd, 7 Cranch 424; The Globe, 2 Blatchf. 427, 10 Fed. Cas. No. 5483; Bradstreet *v.* Neptune Ins. Co., 3 Sum. 600, 3 Fed. Cas. No. 1793; Armroyd *v.* Williams, 2 Wash. 508, 1 Fed. Cas. No. 538; Cushing *v.* U. S., 22 Ct. Cl. 1.

64. Conclusiveness in Trespass. In Gelston *v.* Hoyt, 3 Wheat. 246, Story J. says: "If a sentence of condemnation be pronounced, it is conclusive that a forfeiture is incurred; if a sentence of acquittal, it is equally conclusive against the forfeiture; and in either case, the question cannot be litigated in another forum. . . . Nothing can be better settled than that a sentence of condemnation is, in an action of trespass for the property seized, conclusive evidence against the title of the plaintiff." In an action of trespass for taking the plaintiff's vessel, where the plaintiff established title by a decree of the district court of the United States, a subsequent judgment rendered in a state court, hearing on the question of title was of no avail to counteract the plaintiff's evidence of title. Dennison *v.* Hyde, 6 Conn. 508.

In trespass by the owner of the vessel for an illegal seizure a sentence of restitution of the vessel without a justification of the seizure is conclusive evidence of the plaintiff's right to maintain the action. Gelston *v.* Hoyt, 3 Wheat. 246; Hoyt *v.* Gelston, 13 Johns. (N. Y.) 141; affirmed 13 Johns. 561.

65. Forfeiture of Insurance Policies. — The sentence of a British prize court condemning the vessel for attempting to commit a breach of blockade, forfeited the marine insurance policy and exonerated the underwriters from their liability, and the sentence of condemnation for breach of the blockade, was conclusive evidence of the commission of that offense, which vitiated the policy, and it was error to permit evidence to disprove that fact Croudson *v.* Leonard, 4 Cranch 434.

Where the sentence of a court of admiralty condemning a vessel recited that, at the date of the decree, the port which the vessel attempted to enter was blockaded, in an action on a policy to recover for the total loss arising from the condemnation, evidence is inadmissible to sustain the policy to show that at the time of her capture, the port was not blockaded. Maryland Ins. Co. *v.* Bathurst, 5 Gill & J. (Md.) 159.

In an action upon an insurance policy upon a vessel and cargo where the defendants produced the sentence of a court of vice-admiralty of Gibraltar, condemning the vessel for a breach of blockade, "by egress and for other sufficient reasons," the words, "for other sufficient reasons" were held matter of surplusage and

enemies of the foreign country, the decree of a foreign court of admiralty is conclusive evidence in such action of a breach of the warranty of neutrality of the insured property.[66] The decree of restitution of a vessel, illegally seized, is conclusive evidence of the illegality of the seizure.[67] A decree *in rem* in admiralty, is conclusive evidence of facts stated therein, against all parties interested.[68] A decree in a former action may be conclusive against

the decree was held to be conclusive evidence of a breach of blockade which discharged the underwriters. Baxter *v.* New Eng. Marine Ins. Co., 6 Mason 277; Vandenheuvel *v.* United Ins. Co., 2 Johns. Cas. 127; Ludlow *v.* Dale, 1 Johns. Cas. 16; Goix *v.* Low, 1 Johns. Cas. 341.

66. Groning *v.* Union Ins. Co., 1 Nott. & M. 337.

Prima Facie Evidence. — In the following cases it is held under the facts that the sentence of a foreign court of admiralty, condemning property as that of the enemy, is competent *prima facie* evidence of that fact, but not conclusive. Lambert *v.* Smith, 1 Cranch C. C. 361, Fed. Cas. No. 8028; Maley *v.* Shattuck, 3 Cranch 458; Bourke *v.* Granberry, Gill (Md.) 16; Vanderheuvel *v.* United Ins. Co., 2 Johns. Cas. (N. Y.) 127; Goix *v.* Low, 1 Johns. Cas. (N. Y.) 341; New York Firemen Ins. Co. *v.* De Wolf, 2 Cow. (N. Y.) 56.

67. The Appollon, 9 Wheat, 362; Magoun *v.* New Eng. Marine Ins. Co., 1 Story 157, 16 Fed. Cas. No. 8961; Hoyt *v.* Gelston, 13 Johns. (N. Y.) 141; Gelston *v.* Hoyt, 13 Johns. (N. Y.) 561, 3 Wheat. 246.

Conclusiveness of Acquittal. — In Gelston *v.* Hoyt, 3 Wheat. 246, Story J., says: "A distinction, however, has been taken and attempted to be sustained at the bar, between the effect of a sentence of condemnation and of a sentence of acquittal. It is admitted that the former is conclusive; but it is said that it is otherwise as to the latter, for it ascertains no fact. . . . Lord Chief Justice De Gray declares that the rule of evidence must be, as it is often declared to be, reciprocal; and that in all cases in which the sentences favorable to the party are to be admitted as conclusive evidence for him, the sentences, if unfavorable, are, in like manner, conclusive evidence against him. . . . And upon principle, where is there to be found a substantial difference between a sentence of condemnation and of acquittal *in rem*? If the former ascertains and fixes the forfeiture, and, therefore, is conclusive, the latter no less ascertains that there is no forfeiture, and, therefore restores the property to the claimant. . . . A sentence of acquittal *in rem*, does, therefore, ascertain a fact, as much as a sentence of condemnation; it ascertains and fixes the fact that the property is not liable to the asserted claim of forfeiture. It should, therefore, be conclusive upon all the world of the non-existence of the title of forfeiture, for the same reason that a sentence of condemnation is conclusive of the existence of title of forfeiture. It would be strange, indeed, if when the forfeiture *ex directo* could not be enforced against the thing, but by an acquittal was completely purged away, that indirectly the forfeiture might be enforced through the seizing officers; and that he should be at liberty to assert a title for the government, which is judicially abandoned by, or conclusively established against, the government itself."

68. The Mary Anne, 1 Ware 99, 16 Fed. Cas. No. 9105; Penhallow *v.* Doane, 3 Dall. 54; Otis *v.* The Rio Grande, 1 Woods 279, 18 Fed. Cas. No. 10,613; Blanque *v.* Peytavin, 4 Mart. (La.) 458; Stewart *v.* Warner, 1 Day (Conn.) 142; The Garland, 16 Fed. 283; Peters *v.* Warren Ins. Co., 3 Sum. 389, 19 Fed. Cas. No. 11,035; Cuculla *v.* La. Ins. Co., 5 Mart. (La.) 464; Cuculla *v.* Orleans Ins. Co., 6 Mart. (La.) 14; Mankin *v.* Chandler, 2 Brock. 125, 16 Fed. Cas. No. 9030; Bailey *v.* Sundberg, 40 Fed. 483; The William Murtaugh, 17 Fed. 259; Andrews *v.* Brown, 3

Cush. (Mass.) 130; Zeno *v.* La. Ins. Co., 6 Mart. (La.) 63.

Decree of Foreign Court. — The decree of a foreign prize tribunal of general jurisdiction, condemning a vessel for a violation of law is conclusive that the seizure was made in conformity with law. To give such jurisdiction, the prize need only be seized and possessed by the captor, in the captor's country or in a neutral's. Cheriot *v.* Foussat, 3 Binn. (Pa.) 220.

To hold a sentence of a foreign court *in rem* conclusive on the parties, personal or public notice to the parties, and proper judicial proceedings, must appear. Bradstreet *v.* Neptune Ins. Co., 3 Sum. 600, 3 Fed. Cas. No. 1793.

The sentence of acquittal of a foreign court acting *in rem*, in cases of revenue seizure and prize, is conclusive, except in cases of fraud. Magoun *v.* New Eng. Marine Ins. Co., 1 Story 157, 16 Fed. Cas. No. 8961.

The conclusiveness of a decree of the admiralty court of a foreign country, condemning as prize an American vessel, is not affected by the fact that the original owners were deprived of an opportunity to contest the right of the captors; it appearing that in no event could the decree have been different on the facts admitted. Whatever may be done by foreign courts in reference to the established principles of the law of nations relative to the conclusiveness of sentences of foreign prize courts, the courts of the United States will not, for purposes of retaliation, depart from the fixed law of nations, which declares that they are conclusive. Armroyd *v.* Williams, 2 Wash. C. C. 508, 1 Fed. Cas. No. 538; affirmed in Williams *v.* Armroyd, 7 Cranch 423.

The doctrine that the sentence of a foreign court of admiralty in a prize case, is conclusive of any matter of fact directly decided, rests upon the propriety of leaving the cognizance of prize questions exclusively to prize jurisdiction; and the impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is co-ordinate throughout the world. Croudson *v.* Leonard, 4 Cranch 434; Juando *v.* Taylor, 2 Paine 652, 13 Fed. Cas. No. 7558; Vandenheuvel *v.* United Ins. Co., 2 Johns. Cas. 144; Baxter *v.* New Eng. Marine Ins. Co., 6 Mass. 277, 7 Mass. 275.

Decree in Federal Court. — A decree *in rem* in a federal court of admiralty is conclusive upon the parties in any subsequent litigation. Jenkins *v.* Putnam, 1 Bay (S. C.) 8; Denison *v.* Hyde, 6 Conn. 508; Hoyt *v.* Gelston, 13 Johns. (N. Y.) 141; Gelston *v.* Hoyt, 13 Johns. 561, 3 Wheat. 246; Buchanan *v.* Biggs, 2 Yeates (Pa.) 232; Mankin *v.* Chandler, 2 Brock. 125; Bailey *v.* Sundberg, 49 Fed. 583; The William Burtagh, 17 Fed. 259; The Navarro, Olc. 127, 17 Fed. Cas. No. 10,059; Andrews *v.* Brown, 3 Cush. 138.

Decrees in Rem. — In proceedings *in rem*, in the district court of the United States, for the condemnation of a vessel, all persons having an interest in the subject-matter, whether as seizing officers, or informers, or claimants, are, or may be parties, so far as their interest extends; and the decree of the court acts upon the thing in controversy, and the decree is binding upon all the world upon the points which it professes to decide. The seizing officer cannot be deemed a stranger to the decree *in rem*, and is bound by a decree which ascertains the seizure to be tortious; but if he were a stranger he would still be bound by the decree of a court of competent jurisdiction *in rem* as to the points directly in judgment, as being conclusive upon the whole world. Gelston *v.* Hoyt, 3 Wheat. 306.

A decree of acquittal on a proceeding *in rem*, without a probable cause of seizure, and not appealed from with effect, is conclusive, in every inquiry before any other court, that there was no justifiable cause of seizure. The Appollon, 9 Wheat. 362.

The determination of an issue of fact and law against a claimant under a libel *in rem* is conclusive after an appeal therefrom is dismissed, in a subsequent suit *in personam* between the same parties in respect to the same matter. Wager *v.* Providence Ins. Co., 150 U. S. 99.

a libel in admiralty.[69] One admiralty court may carry into effect

In an action on a policy of insurance for loss occasioned by a collision at sea, a libel and decree against the vessel insured, in a proceeding *in rem* in the admiralty court for damage done to the other vessel by the collision, is sufficient evidence against the insurers, both of the collision and of the negligence of the master and crew of the vessel insured. Street *v.* Augusta etc. Co., 12 Rich. Law (S. C.) 13.

Where a steamboat had been libelled and sold by order of a federal court in one state, its decree will be held conclusive in another state, notwithstanding a suit had been previously commenced in such other state on some of the same claims for which the vessel was sold. Thomas *v.* Southard, 2 Dana (Ky.) 475.

A judgment of condemnation in the United States district court cannot be examined in a state court in an action of trespass against the officers. Buchanan *v.* Biggs, 2 Yeates (Pa.) 232.

Where, on a libel *in rem* for collision, the master of the libellee, though not a formal party, takes an active part in the defense, a dismissal on the merits renders the question *res judicata*, as against a subsequent libel *in personam* against him. Bailey *v.* Sundberg, 49 Fed. 583.

The owner of a vessel, in case of injury to the vessel and cargo, may maintain an action for damage to both against another vessel causing the injury; and after the latter has been once arrested, and given bail for the whole damage, if the owner of the cargo afterwards cause all claim on his account to be withdrawn from the suit, he cannot, ordinarily, again maintain an action against the same vessel *in rem*, and arrest her a second time for the damage. The Wm. Murtagh, 17 Fed. 259.

A decree in admiralty in the district court of the United States, that the possession of a certain vessel should be delivered to the libellant, on the ground that the libellee had violated a contract for the sale and delivery thereof by the libellant to him, is a good bar to a bill in equity by the libellee against the libellant, for a specific performance of the same contract; provided such violation was material to the decision of the libel, was put in issue therein, and was decided by the court; but if such violation was not material, or if the case was not decided on that point, or if it be ambiguous, or not apparent on the face of the decree, on what ground the decision was made, such decree is not conclusive evidence of the fact of the violation of the contract. Andrews *v.* Brown, 3 Cush. (Mass.) 138.

69. The Globe, 2 Blatchf. 427, 10 Fed. Cas. No. 5483; Ball *v.* Trenholm, 45 Fed. 588; The Navarro, Olc. 127, 17 Fed. Cas. No. 10,059; Coffee *v.* U. S., 116 Sup. Ct. 437; Faucett *v.* The L. W. Morgan, 6 Fed. 200.

Foreign Judgment. — A foreign judgment in a suit at law against the vessel's owner for damages for a collision is no bar to a suit *in rem* in this country; but such judgment is conclusive as to the extent of the damages. The East, 9 Ben. 76, 8 Fed. Cas. No. 4251.

Former Federal Judgment. — A judgment of acquittal, in a criminal prosecution for a violation of the internal revenue laws, is conclusive in favor of defendant, as claimant of the property involved in a subsequent suit *in rem*, when, as against him, the existence of the same act or fact involved in the criminal prosecution is in issue as cause for the forfeiture of such property. Coffey *v.* U. S., 116 U. S. 426.

The owner of a vessel which was sunk by collision with a steamer, brought a libel *in rem*, and the steamer was attached, but no notice was given or publication made as required by Adm. Rule 9. Subsequently, the steamer was released on her owner's giving bond to the libellant for less than her value. A decree dismissing the libel was binding on the libellant only, and would not prevent a new libel by the owner of the cargo. Bailey *v.* Sundberg, 49 Fed. 583, 1 C. C. A. 387.

the decree of another admiralty court.[70]

B. Inconclusiveness. — A foreign sentence of condemnation of a vessel merely as prize, is not conclusive evidence that the legal title of the vessel was not in a subject of a neutral nation;[71] and its decree condemning a vessel as prize, if ambiguous or based upon insufficient reasons, is not conclusive evidence of a breach of a warranty of neutrality.[72] The decree of a foreign court of admiralty

A verdict and judgment against the owners of a vessel in a suit to charge them personally with the penalties incurred, under § 4465 of the Revised Statutes, for carrying a greater number of passengers than was stated in the certificate of inspection, is not conclusive against their vendees in a subsequent suit *in rem* in admiralty to enforce against the vessel the lien of the penalties, under § 4469, the title of the vessel not being involved in the former action its owners not being privies to the suit, and they may show in the subsequent suit *in rem* in admiralty that the number of passengers illegally carried was less than the number found in the first suit. The Boston, 8 Fed. 628.

A cause of action different from a suit *in personam* in which a judgment was recovered before the decree in an admiralty suit was entered cannot render such former judgment *res adjudicata* in the admiralty suit. Gray *v.* National S. S. Co., 7 Fed. 273; The William Murtagh, 17 Fed. 259.

70. Penhallow *v.* Doane, 3 Dall. 54; The Centurion, 1 Ware 490, 5 Fed. Cas. No. 2554.

Conclusiveness of Decree. — Upon a libel to carry into effect the decree of another admiralty court, the grounds of the decree, cannot be inquired into, the decree *in rem* being conclusive on all the world. Penhallow *v.* Doane, 3 Dall. 54.

Decree of Foreign Admiralty Court.—The federal admiralty courts will carry into effect the sentences and decrees of foreign admiralty courts. Otis *v.* The Rio Grande, 1 Woods 279, 18 Fed. Cas. No. 10,613.

But an admiralty court will not carry into effect the decrees of foreign admiralty courts any further than a court of common law will carry into effect the judgments of other tribunals. Bowler *v.* Eldridge, 18 Conn. 1; Pennsylvania R. Co. *v.* Gilhooley, 9 Fed. 618.

71. Bourke *v.* Granberry, Gilmer (Va.) 16; Vandenheuvel *v.* United Ins. Co., 2 Johns. Cas. 451.

Limits of Conclusiveness. — The conclusiveness of the sentence of a foreign court of admiralty cannot include more than its own correctness, and does not establish any particular fact, without which the sentence may have been rightly pronounced. The mere condemnation of a vessel libelled as enemy's property, which may proceed upon any ground not stated and which might merely forfeit the protection of the neutral character of the vessel, is not conclusive against the fact of its neutral character and that fact remains open to investigation in another suit. Maley *v.* Shattuck, 3 Cranch 458.

The condemnation of a vessel as lawful prize, affords no judicial inference of the vessel's being enemy's property, as there may be other just causes of condemnation. Goix *v.* Low, 2 Johns. Cas. 480; Bailey *v.* C. S. Ins. Co., 1 Treadw. Const. 381.

Stipulation of Proof. — A stipulation in a policy warranting the property to be American, proof to be made here, is not set aside by the sentence of a foreign court against the neutrality; but the same may be vindicated here, notwithstanding such sentence. Sperry *v.* Delaware Ins. Co., 2 Wash. 243, Fed. Cas. No. 13,236; Maryland Ins. Co. *v.* Woods, 6 Cranch 29.

72. Uncertainty in Decree. Where the libel in a prize case asserted in one place that the property was French and in another that it was American, and where it was impossible to fix by the record of a foreign court whether the prize was

is not *prima facie* evidence of facts rebutted by the record,[73] and is only *prima facie* evidence of the facts upon which the condemnation is founded, where the inference from the record is not conclusive.[74] The judgment in a former action is not conclusive evidence

French or American, evidence may be received in an action upon policies of marine insurance to establish American ownership within the warranty that the property was American. Vasse *v.* Ball, 2 Dall. 270.

In an action on a policy of insurance, a judgment of a foreign court of admiralty condemning the ship for a breach of blockade is conclusive only when it states the specific cause of condemnation; and where the decree stated that the vessel was condemned for a rescue from a belligerent captor, or otherwise, the assured was permitted to give evidence disproving the fact of such rescue. Robinson *v.* Jones, 8 Mass. 536, 5 Am. Dec. 114.

Insufficient Reasons for Decree. To constitute the breach of warranty by the assured, against seizure or detention of a vessel on account of illicit or prohibited trade, there must be an illicit or prohibited trade in fact, existing, and it is not sufficient that there has been a condemnation under a pretext of such a trade in a foreign court of admiralty where the presumption of facts to warrant a condemnation is repelled by a detail of the precise grounds upon which the sentence was pronounced. Johnson *v.* Ludlow, 2 Johns. Cas. 481; Francis *v.* Ocean Ins. Co., 6 Cow. 404.

A decree of a court in the Island of Hayti, not founded on a libel, and in which no trial was had, condemning a vessel and cargo belonging to a citizen of the United States for an alleged breach of blockade, is not conclusive evidence of that fact. Sawyer *v.* Maine Fire and Marine Ins. Co., 12 Mass. 291.

Where a vessel was seized and confiscated by the courts of Mexico, and it appeared by the record of the proceedings that there was no suitable allegation of the offense in the nature of a libel, and there was no statement of facts *ex directo* upon which the sentence professed to be founded, the proceedings and decree were not conclusive as to the existence of the laws of Mexico, the jurisdiction of the court, and the cause of seizure and condemnation. Bradstreet *v.* Neptune Ins. Co., 3 Sum. 600, 3 Fed. Cas. No. 1793.

73. Johnson *v.* Ludlow, 2 Johns. Cas. 481.

74. Vasee *v.* Ball, 2 Dall. 270.

Decree in Foreign Prize Court. Though the decree of a foreign prize court of admiralty condemning as prize, property libelled as enemy's property, is not conclusive against the neutrality of the vessel, Maley *v.* Shattuck, 3 Cranch 488; yet such a decree is competent *prima facie* evidence that goods condemned as enemy's property were such, in a suit upon a policy of insurance against the goods condemned. Lambert *v.* Smith, 1 Cranch C. C. 361.

New York Cases.—The decisions in New York cases are contrary to the decision of the federal courts that the decree of a foreign court of admiralty is conclusive as to the points decided therein, and hold that the decree of a foreign court of admiralty is only *prima facie* evidence of the facts stated in express terms as to the grounds of condemnation. In Ocean Ins. Co. *v.* Francis, 2 Wend. (N. Y.) 64, the chancellor said: "In all such cases, the decisions of the court condemning a vessel or cargo as a good and lawful prize, is conclusive to change the property, and can never be inquired into collaterally in any of the courts of the country under whose jurisdiction such condemnation took place. It has also been decided in the supreme court of the United States, and in some of our sister states, as well as in England, that the sentence is final and conclusive against all the world, not only to change the property, but as to the facts on which the condemnation was founded, and that neither can be examined directly or collaterally by the courts of any other country. (Croudson *v.* Leonard, 4 Cranch 434;

of title or right if the court had no jurisdiction of the subject-matter.[75] A foreign decree of damages for collision is not evidence of the collision or its causes or consequences, but only of the

Dempsey *v.* Ins. Co. of Philadelphia, 1 Binn. (Pa.) 209, note; Baxter *v.* New England Marine Ins Co., 6 Mass. 277; Stewart *v.* Warner, 1 Day (Conn.) 143. This court, however, has adopted a different rule, which must now be considered as the settled law of the state. It is, that the sentence of a foreign court of admiralty condemning the property as good and lawful prize, according to the laws of nations, is conclusive to change the property, but it is only *prima facie* evidence of the facts on which the condemnation purports to have been founded. And in a collateral action, such evidence may be rebutted by showing that no such facts did, in reality, exist. (Vandenheuvel *v.* United Ins. Co., 2 Johns. Cas. 451; New York Firemen Ins. Co. *v.* De Wolf, 2 Cow. 56.)"

Disproof in Cases of Fraud. Where the sentence of a foreign court of admiralty and prize *in rem* was founded in fraud, it is not conclusive upon the parties and they may disprove it by evidence. Bradstreet *v.* Neptune Ins. Co., 3 Sum. 600, 3 Fed. Cas. No. 1793.

75. Rose *v.* Himely, 4 Cranch 241; Bradstreet *v.* Neptune Ins. Co., 3 Sum. 600, 3 Fed. Cas. No. 1793; Swift *v.* Myers, 37 Fed. 37; Cheriot *v.* Foussat, 3 Binn. (Pa.) 220.

While the presumption is that a foreign court which has condemned a prize is a legitimate tribunal, yet where it is shown that the court was constituted by a military commander, especially where not shown to be the commander-in-chief, the burden is on the party supporting the condemnation to show that the court was instituted by lawful authority. Snell *v.* Fousatt, 3 Binn. (Pa.) 239 note, 1 Wash. 271.

Although the decision of a prize court of competent jurisdiction is conclusive as to the ownership of property, and a court of common law has no jurisdiction of prize, yet if plaintiff claims goods as his property, which defendant denies on the ground of their having been condemned for prize, a court of common law may inquire whether the condemnation was pronounced by a court of competent authority. Wheelwright *v.* Depeyster, 1 Johns. (N. Y.) 471, 3 Am. Dec. 345.

The state courts may decide whether or not a prize court had jurisdiction over the subject matter and its judgment will not be conclusive evidence unless it had such jurisdiction. Slocum *v.* Wheeler, 1 Conn. 129.

Jurisdiction of State Court. Downs *v.* Allen, 22 Fed. 805.

Where the proceedings in a state court to enforce a maritime lien were void for want of jurisdiction, an incidental finding of the existence of the lien and of the amount due, is not conclusive in a subsequent proceeding in the federal court to enforce the same lien. The B. F. Woolsey, 7 Fed. 108.

The regularity of the judgment in a state court cannot be assailed in the federal court in the absence of proof that there was no jurisdiction in the state court. Barker *v.* Parkenhorn, 2 Wash. C. C. 142, 2 Fed. Cas. No. 993.

Judgment of Federal Court. — The jurisdiction of a district court of the United States is always open to inquiry when its judgment is relied upon in a state court. McCauley *v.* Hargrove, 48 Ga. 50.

State courts have the restricted right to examine collaterally into the alleged defects of judgments rendered by United States courts, to ascertain whether the court which rendered the judgment had jurisdiction, and whether it exercised that jurisdiction according to the legal forms of proceeding. Want of jurisdiction may be shown either as to the subject-matter or the person, or in proceedings *in rem*, as to the thing. Paste *v.* Lewis, 39 La. Ann. 5, 1 So. 307; Gould *v.* Jacobson, 58 Mich. 288, 25 N. W. 194.

amount awarded.[76] A decree of restitution to the claimant in admiralty is *prima facie* evidence of ownership.[77] In admiralty, if a former judgment is relied upon as a defense, it is not conclusive unless the record shows that the matter in question was actually set up and passed upon.[78] A decree of a state court not in the same right is not a bar to a proceeding in admiralty,[79] and a federal decree, likewise, is not *res adjudicata*.[80]

76. Dunham *v.* New England Mutual Ins. Co., 1 Low. 253, 8 Fed. Cas. No. 4152; New England Mutual Ins. Co. *v.* Dunham, 3 Cliff. 332, 18 Fed. Cas. No. 10,155; The East, 9 Ben. 76, 8 Fed. Cas. No. 4251.

77. Thompson *v.* Stewart, 3 Conn. 171.

78. The Vincennes, 3 Ware 171, 28 Fed. Cas. No. 16,945. *Compare* Duncan *v.* Stokes, 47 Ga. 593.

Claim in Reconvention. — A claim in reconvention, though somewhat broader than a counter-claim adjudicated between the parties in a state court is barred by the former judgment in the state court. Barras *v.* Bidwell, 3 Woods 5.

79. **Personal Judgment in a State Court.** — A personal judgment in the state court is not a bar to a proceeding in admiralty to enforce a lien against the vessel if the personal judgment remains unsatisfied. Rogers *v.* The Reliance, 1 Woods 274, 20 Fed. Cas. No. 12,019.

The fact that judgment was recovered in a state court against the master for the value of supplies furnished to the vessel, if unpaid, is no bar to the enforcement of a lien upon the vessel for such supplies in admiralty. The Brothers Apap, 34 Fed. 352.

Where seamen recovered a judgment for wages in a state court against a part owner of a vessel, and attached and sold his interest therein, subject to a mortgage, but did not attain full satisfaction for their claim and the purchaser bought in the mortgage and subsequently became sole owner, the proceedings in the state court did not operate as a merger of their cause of action, so as to prevent an enforcement of their unpaid lien in admiralty against the vessel to the extent of the mortgage and of the interest not before sold. Tabor *v.* The Cerro Gordo, 54 Fed. 391.

80. **Decree in Admiralty.** — A decree in admiralty against a libel for wages on the ground of desertion of the vessel, is not a bar to a common law action in a state court to recover the value of the services rendered. Murphey *v.* Granger, 32 Mich. 358. *Compare* Granger *v.* Judge of Wayne Circuit, 27 Mich. 406.

Acquittal of Criminal Assault. An acquittal of the commanding officer of a squadron, when tried for assault and battery and false imprisonment of a seaman, is not admissible evidence in his favor, in a civil suit by the seaman against him for the same acts. Wilkes *v.* Dinsman, 7 How. 89.

Upon the question of penalties, *compare* Allen *v.* U. S., Taney 42, 1 Fed. Cas. No. 240, and the Boston, 8 Fed. 628.

Decree Dismissing Libel. — A decree dismissing a libel in admiralty by the owner of a vessel is no bar to a new libel against the vessel by the owner of the cargo. Bailey *v.* Sundberg, 49 Fed. 583.

Decree for Distinct Tort. — A judgment of a court of admiralty upon a libel against the master of a vessel for assault and battery and imprisonment on the high seas is not a bar to a common law action for a like offense committed by the master on shore in a foreign port in the course of the voyage. Adams *v.* Haffard, 20 Pick. 127.

Decree as to Salvage.—A libel for damages against the owners of a vessel for depreciation of the cargo by delay in towage is not concluded by a previous dismissal of the libellant's petition to participate in a libel for salvage brought by the defendants. Schwarzchild *v.* National S. S. Co., 74 Fed. 257.

C. Proof of Record of Judgment. — Unless under peculiar circumstances, no part of the record of the admiralty court in which insured property was condemned, except the libel and sentence of condemnation, is admissible in an action upon a marine policy of insurance.[81] In such action, a recital on the record of the proceedings of a foreign court of admiralty, that copies of documents therein contained were copies of proved originals found on board the condemned vessel, is not evidence that they were so found;[82] but where such record is read, without objection, it is proof of admissible documents contained therein.[83] A copy of the record of a foreign vice-admiralty court, under the seal of the court, and certified in the manner fixed by treaty, is admissible in evidence.[84]

D. Best Evidence. — Record evidence of a libel and condemnation is the best evidence thereof,[85] and the proceedings of a court of

Decree as to Collision. — A decree dismissing a libel as to collision for failure to establish fault in the respondents, cannot be held to incorporate an opinion of the court that the collision was an inevitable accident in order to enable the libellant to plead it as *res adjudicata* upon a libel pending against him in another court. Ward *v.* The Fashion, 6 McLean 195, 29 Fed. Cas. No. 17,155.

Acquittal of Seaman. — The acquittal of a seaman upon a criminal trial for a larceny of part of the cargo, is not conclusive to rebut a charge of larceny when set up as a defense against his suit for wages. Alexander *v.* Galloway, 1 Abb. Adm. 261, 1 Fed. Cas. No. 167.

81. Mode of Proof. — It can never be necessary, in order to prove a condemnation in an action upon a policy of maritime insurance, to produce anything more than the libel and sentence; although it is a frequent but useless practice to read the proceedings at length. Depositions not read by the plaintiff who produced the proceedings in evidence, for no other purpose than to prove the libel and condemnation, cannot be used by the defendant. Marine Ins. Co. *v.* Hodgson, 6 Cranch 206.

Exception to Rule. — A party who wishes to bring himself within exceptions to the rule against introducing other parts of the record, must state the purpose for which he means to read such other parts, and confine himself to such parts. Hourquebie *v.* Girard, 2 Wash. 212, 12 Fed. Cas. No. 6732; Gardere *v.* Columbian Ins. Co., 7 Johns. 514; Marine Ins. Co. *v.* Hodgson, 6 Cranch 206; Marshall *v.* Union Ins. Co., 2 Wash. C. C. 452, 16 Fed. Cas. No. 9135.

82. Maryland Ins. Co. *v.* Bathurst, 5 Gill & J. (Md.) 159.

83. Proof of Record Without Objection. — Though a record of a court of admiralty is always admissible proof of the condemnation of a vessel and as between the insurer and insured, it is only evidence according to the general rule to prove the cause of the condemnation, yet where the whole record is read in evidence without objection and it contains documents which, if produced, would be evidence in the cause and where if objection had been made, the opposite party would have had an opportunity to supply a proof of such document by other means, the record must be considered as proof of them in exception to the general rule. Russel *v.* Union Ins. Co., 4 Dall. 421.

84. Yeaton *v.* Fry, 5 Cranch 335; The Maria, 1 Rob. 296; Thompson *v.* Stewart, 3 Conn. 171.

85. Proof of Allegation. —Where the libel and condemnation of a vessel and cargo were pleaded as part of the cause of action, record evidence of such libel and condemnation was essential to the plaintiff's recovery. Arnold *v.* Smith, 5 Day (Conn.) 150.

admiralty before which the question of prize or no prize was tried, is the best evidence of what was done therein.[86] A consular certificate is not sufficient to entitle the record of the condemnation of a vessel in a foreign court of admiralty to admission in evidence.[87] Copies of condemnation proceedings had in San Domingo, while belonging to France, made after the island passed to England, certified by the English governor and his secretary, in the French and English language, were the best evidence which the nature of the case afforded.[88]

4. Official Documents. — A. Message of President. — Upon a libel for violation of the neutrality laws in aiding a foreign belligerent, an official message of the president showing that neither of the belligerent factions was recognized by the United States, is conclusive evidence of that fact, in the absence of any proclamation or certificate to the contrary.[89]

B. Official Proclamation. — An official proclamation of the president of the United States is a public act, of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect.[90] It is conclusively presumed that a proclamation of the president had a valid existence on the day of its date.[91] The proclamation of the president dispensing with a blockade is conclusive evidence that it was not before terminated.[92]

86. Messonier *v.* Union Ins. Co., 1 Nott. & M. 155.

87. Proof of Foreign Record. The record of the condemnation of a vessel in a foreign court of admiralty is not evidence *per se*. The seal must be proved by a witness who knows it, or the handwriting of the judge or clerk must be proved, or it must be shown that it is an examined copy. Catlett *v.* Pacific Ins. Co., 1 Paine 594, 5 Fed. Cas. No. 2517.

A copy of a foreign decree of admiralty certified under the seal of a foreign minister of the kingdom in which the tribunal exists, is not sufficiently authenticated to be competent evidence without proof that such minister has the official custody of such proceedings. Vandervoort *v.* Smith, 2 Caines (N. Y.) 155.

Copies of the proceedings or decrees of foreign courts or tribunals, though under the hands and seals of the officers of such courts, are not, of themselves, evidence, but must be proved like other facts. Delafield *v.* Hand, 3 Johns. (N. Y.) 310.

The sentence of a court of vice-admiralty is sufficiently established by a deposition annexed to it, stating that the seal affixed thereto was the seal of the court, and proving the signature and official character of the person whose name was subscribed. Gardere *v.* Columbian Ins. Co., 7 Johns. 514.

The proceedings of a foreign vice-admiralty court are sufficiently verified by the proof of the handwriting of the judge and of the register of the court to a certified copy from the record. Mumford *v.* Brown, Anthon 56.

Copies of documents relating to the condemnation and sale of a vessel, certified by the British consul to be copies of official documents on file in his office, and proved by deposition before the trial, are sufficiently authenticated to be admissible. The J. F. Spencer, 3 Ben. 337, 13 Fed. Cas. No. 7315.

88. Hadfield *v.* Jameson, 2 Munf. (Va.) 53.

89. The Conserva, 38 Fed. 431.

90. Armstrong *v.* U. S., 13 Wall. 154.

91. Lapeyre *v.* U. S., 17 Wall. 191.

92. The Circassian, 2 Wall. 135.

C. Commission of Public Ship. — The commission of a public ship when duly authenticated, imports absolute verity;[93] but the commission of a new government to a vessel employed thereby cannot be proved by the seal of such government if not acknowledged by the government of the United States.[94]

D. Certificate of Foreign Governor. — The certificate of a foreign governor possessing executive and superintending control over the sale of a vessel captured as prize, is admissible evidence, and he must be presumed to have acted with legitimate authority.[95]

5. Parol Evidence in Relation to Documents. — A. Inadmissibility. — a. *Contracts.* — Parol evidence is inadmissible to vary or contradict a bill of lading, in so far as it is a contract,[96] or to vary the terms of a charter-party, or of a contract therefor,[97] or the terms of a written contract for a boiler of specified dimensions,[98] or of a

93. The Santissima Trinidad, 7 Wheat. 283.

94. The Estrella, 4 Wheat. 298.

95. Bingham *v.* Cabott, 3 Dall. 19.

96. The Lady Franklin, 75 U. S. 8 Wall. 325; The Guiding Star, 62 Fed. 407; Higgins *v.* U. S., etc. Co., 3 Blatchf. 282, 12 Fed. Cas. No. 6469; McGovern *v.* Heissenbuttel, 8 Ben. 46, 15 Fed. Cas. No. 8805.

Conclusiveness of Contract. — A bill of lading, in so far as it is evidence of a contract between the parties to transport and deliver the goods as therein stipulated, stands on the footing of all other contracts in writing and cannot be contradicted or varied by parol evidence. If the bill of lading is silent as to the mode of stowing the goods, its legal import is that the goods are to be carried under deck, and parol evidence is not admissible to show that the shipper agreed that the goods should be stowed on deck. The Delaware, 14 Wall. 579; The Waldo, 2 Ware 162. Evidence of prior conversations is inadmissible to vary the provisions of a bill of lading. O'Rourke *v.* 220 Tons of Coal, 1 Fed. 619. Parol evidence cannot be used to insert in a bill of lading a warranty for the delivery of cargo at a particular day. Petrie *v.* Heller, 35 Fed. 310. Parol evidence is not admissible to explain the quantity and condition of goods shipped under a bill of lading as against a *bona fide* purchaser of a bill of lading. Bradstreet *v.* Heron, 1 Abb. Adm. 209, 3 Fed. Cas. No. 1792.

97. The Eli Whitney, 1 Blatchf. 360, 8 Fed. Cas. No. 4345.

Contract Between Ship-Brokers. A letter from a ship-broker to proposed charterers of a vessel, confirming the charter on the part of the owner, and specifying the terms, and a reply on behalf of the charterers confirming the charter, are analogous to bought and sold notes in dealings by brokers, and are such conclusive evidence of the terms of the contract as to exclude parol testimony in an action brought upon the formal charter-party executed thereunder. Galgate Ship Co. *v.* Starr, 58 Fed. 894.

Merger in Charter-Party.—Where a charter-party recites the carrying capacity of the vessel, in an action thereon, evidence of false representations by the owners as to her carrying capacity is inadmissible, as all such representations are merged in the charter-party. Baker *v.* Ward, 3 Ben. 499, 2 Fed. Cas. No. 785. Evidence of a parol agreement by charterers to advance sums to meet drafts made previous to the execution of the charter-party is inadmissible to vary or add to the written contract, which is held to have merged all previous agreements. The Augustine Kobbe, 37 Fed. 696.

98. Size of Boiler. — Where there is nothing to show that a contract ordering a boiler of certain dimensions for a tug does not express the whole contract, evidence is not admissible to show that the contractor was to examine the tug and ascer-

written contract for wages in shipping articles, if fairly understood;[99] or to vary a voyage described in the shipping articles;[1] or the terms of a contract embodied in a receipt;[2] or to impeach a settlement and release of wages after a libel therefor, in the absence of any showing of fraud or duress;[3] or, in the absence of fraud, to vary a contract between the master and the owners of a vessel;[4] or to prove that part of what purports to be, on its face, an entire contract, was omitted therefrom;[5] or to prove prior conversations

tain and put in the size of the boiler required by it. The Bertha, 91 Fed. 272.

99. **Promise of Extra Pay.** — Seamen who have signed shipping articles cannot vary the contract by introducing parol evidence as to promises of extra pay for overtime not contained in the articles. The Lakme, 93 Fed. 230. Where the shipping articles specify the wages of the mate of a vessel, he cannot give parol evidence of an agreement to allow him other compensation. Veacock *v.* McCall, Gilp. 329, 28 Fed. Cas. No. 16,904.

1. **By Shipowner.** — Parol proof offered by a shipowner to vary the voyage described in the shipping articles is not admissible in an action *in rem* by the seamen for their wages. The Triton, 1 Blatchf. & H. Adm. 282, 24 Fed. Cas. No. 14,181.

By Seamen. — Where the contract was fully explained to the seamen, before they signed it, they cannot vary the voyage by parol evidence. The Quintero, 1 Low. 38, 20 Fed. Cas. No. 11,517.

Termination of Voyage. — A parol understanding that the vessel was not to complete the voyage described in the shipping articles is not admissible. Thompson *v.* The Oakland, 23 Fed. Cas. No. 13,971. A contract between owners and master, for a whaling voyage not exceeding five years' duration does not include several voyages extending through five years, but terminates when the object of the voyage is fulfilled after obtaining a full cargo, and parol evidence is not admissible to show that other voyages were included. The doctrine of Page *v.* Sheffield, 2 Curt. 377, does not apply to a contract for a whaling voyage. Slocum *v.* Swift, 2 Low. 212, 22 Fed. Cas. No. 12,954.

2. **Release of Injuries From Collision.** — An instrument stating that in consideration thereof, the owner of a vessel released and forever discharged another vessel and her owners from all claims whatsoever on account of the injuries resulting from a collision, except the claim made by the owners for loss of the use of the former vessel, is in the nature of a contract, and not a mere receipt, and cannot be disputed or controlled by parol evidence that a certain claim was not in the minds of the parties, where all the claims were germane to the transaction. The Cayuga, 59 Fed. 483, 8 C. C. A. 188.

Receipted Bill for Towage. — A statement contained in a receipted bill for towing, delivered in advance to the owner of the vessel towed, that the towing is "at the risk of the owner or master of the vessel towed," is a contract in writing, within the rule which excludes parol evidence to vary, explain, or contradict it. Milton *v.* Hudson R. Steamboat Co., 4 Lansing 76.

Receipt of Goods for Carriage. A receipt of goods for carriage, containing the terms of transportation, is a written contract which cannot be varied by parol evidence of a prior oral agreement between the shipper and master. Barber *v.* Brace, 3 Conn. 9.

Termination of Contract for Wages. — A receipt of payment on final discharge of the cargo, is the usual and sufficient evidence of the termination of the contract for wages for seamen. Phillips *v.* The Thomas Scattergood, 1 Gilp. 1, 19 Fed. Cas. No. 11,106.

3. The Belvedere, 160 Fed. 498.

4. Slocum *v.* Swift, 2 Low. 212, 22 Fed. Cas. No. 12,954.

5. **Warranty of Vessel's Title.** Where a vessel's title is warranted in a bill of sale, parol evidence is

and statements preceding a contract by letter to repair a vessel;[6] or to vary the terms of a policy of marine insurance;[7] or to prove usage varying the terms of an unambiguous contract.[8]

b. *Other Instruments.* — Parol evidence is inadmissible to assail the statements of a log-book by the party making them;[9] or to countervail the official report of the master of a foreign vessel to the consul of his nation, that a seaman deserted the ship;[10] or to contradict the express terms of the sentence of a court of admiralty;[11] or to contradict the terms of a bill of sale of an interest in a vessel, absolute in its terms and expressing a present sale, by proof that the title was to vest at a future period.[12]

inadmissible to show a warranty of soundness. Pender *v.* Fobes, 1 Dev. & B. 250; Sheffield *v.* Page, 1 Spr. 285, 21 Fed. Cas. No. 12,743.

6. Lawrence *v.* Morrisania Steamboat Co., 12 Fed. 850.

7. **Policy Stating Value.** — In an action upon a policy of marine insurance, which stated the value of the vessel insured, parol evidence of a value other than that stated in the policy is inadmissible. Marine Ins. Co. *v.* Hodgson, 6 Cranch 206.

Prior Verbal Agreement. — Parol evidence is inadmissible to prove that a written policy executed after loss of the vessel known to the insured owner, and extending over past time, in renewal of a prior policy as of a date anterior to the loss, was executed in pursuance of a verbal agreement for renewal of the policy then made; and such policy is vitiated by failure of the owner to make known the loss, when it was executed. Merchants' Mutual Ins. Co. *v.* Lyman, 15 Wall. 664.

Indorsement on Policy. — An indorsement on the policy giving the vessel liberty to deviate in a specified manner, cannot be explained by parol evidence of conversation between the parties when the indorsement was made. Hearne *v.* New Eng. Mutual Marine Ins. Co., 20 Wall. 488.

8. **Marine Insurance Policy.** Where a policy of marine insurance is on its face susceptible of a reasonable construction, without resorting to extrinsic evidence, parol evidence of usage cannot be admitted to contradict, vary or control it. Oriental Ins. Co. *v.* Wright, 1 Wall. 456; Hearne *v.* Marine Ins. Co., 87 U. S., 20 Wall. 488; Smith *v.* Mobile Nav. etc. Co., 30 Ala. 167.

Blank Policy. — Though the person intended to be insured under a blank policy in a specified vessel whose master is named may be shown, parol evidence is not admissible to show a usage of insurance companies, as to the effect of such policies. Turner *v.* Burrows, 8 Wend. 144.

Bill of Lading. — Parol evidence of usage is not admissible to contradict the terms of a contract embodied in a bill of lading. The Reeside, 2 Sum. 568, 20 Fed. Cas. No. 11,057; Cox *v.* Peterson, 30 Ala. 608; Boone *v.* The Belfast, 40 Ala. 184; McGovern *v.* Heisenbuttel, 8 Ben. 46, 16 Fed. Cas. No. 8805.

Charter-Party. — The unambiguous language of a charter-party cannot be varied by parol evidence of usage. The Gazelle, 128 U. S. 474; Pederson *v.* Engster, 14 Fed. 422; The Cyprus, 20 Fed. 144; Sleeper *v.* Puig, 17 Blatchf. 36, 22 Fed. Cas. No. 12,941; 10,082 Oak Ties, 87 Fed. 935.

9. The Newfoundland, 89 Fed. 510; The Lamington, 87 Fed. 752; Bunge *v.* The Utopia, 1 Fed. 892.

10. **Discharge of Seamen.** — The master will not be permitted to contradict such report of desertion by evidence that he discharged the seamen in port. The Infanta, Abb. Adm. 263, 13 Fed. Cas. No. 7030.

11. Croudson *v.* Leonard, 4 Cranch 434; Gelston *v.* Hoyt, 3 Wheat. 246; Maryland *v.* Bathurst, 5 Gill & J. (Md.) 159; Baxter *v.* New Eng. Marine Ins. Co., 6 Mass. 277.

12. Rennell *v.* Kimball, 5 Allen (Mass.) 356.

B. Admissibility. — a. *Contracts.* — Parol evidence is admissible to show an independent contract not embodied in a bill of lading;[13] to prove an independent oral contract in addition to that embodied in shipping articles;[14] to prove an amount of seamen's wages not specified in the shipping articles;[15] to show an oral agreement that the title of a vessel was to vest in the purchaser before delivery, where the written contract for its construction was silent in relation thereto;[16] and to prove the particulars of an agreement not included in a contract for the charter of a vessel;[17] and to prove parts of an incomplete contract for the supply of coal to a vessel, and to show the previous dealings of the parties as bearing thereupon.[18] Seamen may show by parol evidence that shipping articles purporting to fix their wages were incorrect or invalid;[19] and that a rate was fixed by oral agreement greater than that specified in the

13. Knox *v.* The Nietta, 1 Crabbe 534, 14 Fed. Cas. No. 7912.

14. Page *v.* Sheffield, 2 Curt. 377, 18 Fed. Cas. No. 10,667; Sheffield *v.* Page, 1 Spr. 285, 21 Fed. Cas. No. 12,743.

Omission of Oral Agreement. Where in the original articles for a whaling voyage the time of its continuance orally agreed upon was accidentally omitted to be written out, parol evidence is admissible to supply the defect. The Antelope, 1 Low. 130, 1 Fed. Cas. No. 484.

15. Wickham *v.* Blight, Gilp. 452, 29 Fed. Cas. No. 17,611; Page *v.* Sheffield, 2 Curt. 377, 18 Fed. Cas. No. 10,667.

Absence of Shipping Articles. Where the master of a vessel has dispensed with shipping articles in order to hold the seamen to less than the usual rate, he must make clear proof of a verbal contract limiting their wages. The Acorn, 15 Fed. 751.

16. The Poconoket, 70 Fed. 640.

17. Loud *v.* Campbell, 20 Mich. 320.

Particulars Not Included. — Where part of a contract for the charter of a vessel was embodied in a letter written by one of the defendants to an action on the contract, and addressed to defendant's firm, which was handed to the master of the vessel to deliver to persons having charge of the defendant's affairs at the port of loading, the introduction of such letter in evidence does not preclude parol evidence as to particulars of the agreement not included in the letter. Where a written agreement for the chartering of a steamer was silent as to its capacity, parol evidence is admissible to show that the amount paid had reference to a particular carrying capacity. Harriman *v.* The First Bryan Baptist Church, 63 Ga. 186.

18. The Alida, Abb. Adm. 173, 1 Fed. Cas. No. 200; Fisher *v.* Abeel, 66 Barb. (N. Y.) 351.

Incomplete Contract. — Where a contract for a supply of coal to a vessel was incomplete in its terms though the contract is conclusive as to the terms employed, parol evidence is admissible to supply the terms of the contract not expressed, and to show the dealings of the parties previously as bearing upon their intention as to omitted terms. The Alida, Abb. Adm. 173, 1 Fed. Cas. No. 200.

19. The Elvine, 19 Fed. 528; The Samuel Ober, 15 Fed. 621; The Ringleader, 6 Ben. 400, 20 Fed. Cas. No. 11,850; The Lola, 6 Ben. 142, 15 Fed. Cas. No. 8468; Brown *v.* Lull, 2 Sum. 443, 4 Fed. Cas. No. 2018.

Clear Proof Required. — Although shipping articles may be shown by parol to be incorrect or invalid, unless clearly so shown they will control as to the amount of wages agreed upon. But a clear showing will be sufficient to vitiate the shipping contract. The Samuel Ober, 15 Fed. 621; The Lola, 6 Ben. 142, 15 Fed. Cas. No. 8468; Brown *v.* Lull, 2 Sum. 443, 4 Fed. Cas. No. 2018.

articles;[20] and that a clause in the shipping articles limiting wages was not read nor explained to them and was not binding.[21]

(1.) Parties to Contracts. — Parol evidence is admissible to show that other parties not named in a charter-party were interested therein.[23] Parol evidence is admissible in favor of seamen to show that there were other owners of a vessel than those who signed shipping articles for a fishing voyage,[24] and is admissible to show that the real owner of a vessel was other than the one who obtained the legal title.[25] Parol evidence is admissible to explain a mistake in the names of the shippers in a bill of lading.[26] The owner of a vessel being a stranger to a bill of lading under a charter-party, may contradict it by parol evidence.[27]

20. The Lola, 6 Ben. 142, 15 Fed. Cas. No. 8468; The Ringleader, 6 Ben. 400, 20 Fed. Cas. No. 11,850; The Tarquin, 1 Low. 358, 23 Fed. Cas. No. 13,755; Mayshew *v.* Terry, 1 Spr. 584, 16 Fed. Cas. No. 9361; Sweeney *v.* Cloutman, 2 Cliff. 85, 23 Fed. Cas. No. 13,685.

21. The Samuel Ober, 15 Fed. 621; The Tarquin, 1 Low. 358, 23 Fed. Cas. No. 13,755; Mayshew *v.* Terry, 1 Spr. 584, 16 Fed. Cas. No. 9361; The Ringleader, 6 Ben. 400, 20 Fed. Cas. No. 11,850; Heard *v.* Rogers, 1 Spr. 556, 11 Fed. Cas. No. 6298; The Quintero, 1 Low. 38, 20 Fed. Cas. No. 11,517; The Australia, 3 Ware 240, 2 Fed. Cas. No. 667; The Rochambeau, 3 Ware 304, 20 Fed. Cas. No. 11,973; Harden *v.* Gordon, 2 Mason 541, 11 Fed. Cas. No. 6047; Brown *v.* Lull, 2 Sum. 443, 4 Fed. Cas. No. 2018; The Sarah Jane, 1 Blatchf. & H. 401, 21 Fed. Cas. No. 12,348; The Cypress, 1 Blatchf. & H. 83, 6 Fed. Cas. No. 3530; Sweeney *v.* Cloutman, 2 Cliff. 85, 23 Fed. Cas. No. 13,685; The Almatia, Deady 473, 1 Fed. Cas. No. 254.

23. Absence of Name of Owner. Where no person or corporation is named as owner of the vessel in a bill of lading, as contracting for the carriage of the goods, but only the signature of an agent appears, parol evidence is admissible to show the name of the owner of the vessel. The Maryland Ins. Co. *v.* Ruden, 6 Cranch 338.

24. Owner Not Named in Articles. — The owner of a vessel not named in shipping articles is liable for the wages of the seamen, and cannot escape liability by a sale of the vessel, though made after the voyage was terminated, and prior to a demand upon him by the seamen for their wages. Bronde *v.* Haven, Gilp. 592, 4 Fed. Cas. No. 1924; Wait *v.* Gibbs, 4 Pick. 298.

25. Parol Evidence for Part Owner. — A part owner of a vessel suing for a share of the proceeds of her sale, may prove by parol evidence, the amount of his interest in the vessel, in contradiction of recitals in the registry of the vessel and the bill of sale thereof. Whiton *v.* Spring, 74 N. Y. 169; Scudder *v.* Calais Steamboat Co., 1 Cliff. 370, 21 Fed. Cas. No. 12,565.

26. Lee *v.* Salter Lalor Supp. 163.

27. Shipment Under Charter-Party. — Where the shipper, under a charter-party, which gives the hirer the full control of the vessel, proceeded against the vessel for breach of the contract of carriage, through fault of the master, the owner of the vessel intervening as a third party for his own interest, may contradict the bill of lading by parol testimony. The Phebe, 1 Ware 265, 19 Fed. Cas. No. 11,064.

Rights of Third Persons. — The rule excluding parol proof cannot affect third persons, who, if it were otherwise might be prejudiced by things recited on the writings contrary to the truth, through the ignorance, carelessness, or fraud of the parties, and who, therefore, ought not to be precluded from proving the truth however contradicting to the written instruments of others, and parol proof is always admissible in matters of contract to show fraud,

(2.) **Explanation of Contracts.** — Parol evidence is admissible to show an oral agreement preceding an ambiguous bill of lading or charter-party, in explanation of its meaning,[28] the purpose for which a chartered vessel was hired;[29] the circumstances under which a charter was made, and the conduct of the parties, in explanation of ambiguous terms;[30] and the acts and declarations of the parties and their agents, and their subsequent conduct under the terms of a charter-party referring to subsequent transactions;[31] and to show all the circumstances surrounding the parties to a contract of marine insurance, in order to explain the sense in which the parties understood it;[32] and that a policy of marine insurance

and it may be shown by third parties, where the contract may operate as a fraud upon them, however *bona fide* it may be as between the parties thereto. Barreda *v.* Silsbee, 21 How. 146.

28. Ambiguous Bill of Lading. Where a statement in a bill of lading written at the bottom thereof above the master's signature, referring to the charter-party, causes ambiguity, parol evidence is admissible to show an oral agreement which preceded the shipping of the cargo. The Wanderer, 29 Fed. 260.

Ambiguous Exception in Charter-Party. —Where defendants chartered for a single voyage the whole tonnage of plaintiff's vessel, except so much as should be necessary for the accommodation of the officers and crew, and the storage of provisions, and the captain gave up the cabin usually occupied by him and his officers, and induced the sailors to give up quarters usually occupied by them, and allowed defendants to fill those places with freight, proof of the conversation between the captain and defendants, when in negotiation for the charter of the vessel, in relation to the parts of the vessel which would be required for the use of the captain and crew and their stores, was properly admitted, in an action for extra compensation for the space given up. Almgren *v.* Dutilh, 5 N. Y. 28.

29. Bradley *v.* The Washington, Alexandria and Georgetown Packet Co., 13 Pet. 89.

30. Practical Interpretation. The provisions of a charter-party, the meaning of which is not clear, are to be construed in the light of the circumstances surrounding the parties when the contract was made, and the practical interpretation which they by their conduct have given to the provisions in controversy. Lowber *v.* Bangs, 2 Wall. 728; Bradley *v.* The Washington, Alexandria and Georgetown Packet Co., 13 Pet. 89.

Latent Ambiguity. — Parol evidence is admissible to explain a latent ambiguity in a charter-party and to show the circumstances under which it was made; to establish its meaning and application to the facts of the case. Balfour *v.* Wilkins, 5 Saw. 429, 2 Fed. Cas. No. 807.

31. Lowber *v.* Bangs, 2 Wall. 743; Barreda *v.* Sillsbee, 21 How. 146.

32. Reed *v.* Merchants' Mutual Ins. Co., 95 U. S. 23.

Construction of Policy.—In the case of Reed *v.* Ins. Co., 95 U. S. 23, it was held that a clause in the policy of insurance, "the risk to be suspended while vessel is at Baker's Island loading" was to be interpreted in the light of extrinsic parol evidence of all the circumstances, as meaning while the vessel is at Baker's Island for the purpose of loading, and not merely while it was there actually loading. The court said: "A strictly literal construction would favor the latter meaning, but a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties. That such was not the sense in which the parties in this case used the words in question is manifest, we think from all the circumstances of the case, although a written agreement cannot be varied (by addition or subtraction) by

made "for the owners of a vessel" was intended to cover both joint and separate property of the owners;[33] and to show the circumstances under which an ambiguous contract of carriage was made in explanation thereof;[34] and that a contract by a vessel for transportation between two points was orally agreed to be transhipped at an intermediate point;[35] and to apply a contract of carriage to its proper subject.[36] Parol evidence of usage is admissible to explain and qualify an ambiguous maritime contract.[37]

proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities."

Latent Ambiguity. — Where a vessel sailed under two charters, either of which answered the call in the policy, there was a latent ambiguity, justifying parol evidence as to which charter was insured. Melcher *v.* Ocean Ins. Co., 59 Me. 217.

33. Foster *v.* U. S. Ins. Co., 11 Pick. 85.

34. Reimbursement for Advances. Under a contract of shipment where it was doubtful whether the consignee had agreed to look only to the goods shipped for reimbursements for advances on them, parol evidence is admissible, in explanation of the contract to show the circumstances under which it was made. In this case it was said by the judge that if freight were assigned in a particular ship, parol evidence might be admitted to show the circumstances under which the contract was made, to ascertain whether it referred to goods on board the ship, or an interest in its earnings. Peisch *v.* Dickson, 1 Mason 911, 19 Fed. Cas. No. 10,911.

35. The Arrow, 6 McLean 470, 4 Fed. Cas. No. 2237.

36. Application to Subject-Matter. — In giving effect to a written contract, by applying it to its proper subject matter, extrinsic evidence may be admitted to prove the circumstances under which it was made, whenever, without the aid of such evidence, the application could not be made in the particular case. Bradley *v.* The Washington, Alexandria and Georgetown Packet Co., 13 Pet. 89. Where a bill of lading provided for a delivery of goods to be shipped on a vessel at "E. R. wharf," and it appeared that the "E. R. Co." owned a wharf which was inaccessible to the vessel, and were in the use of another accessible wharf, parol evidence is admissible to show that the accessible wharf was commonly known by the same designation, in order to apply the contract to its proper subject. Sutton *v.* Bowker, 5 Gray 416.

37. Livingston *v.* Maryland Ins. Co., 6 Cranch 506; Hancocks *v.* Fishing Ins. Co., 3 Sum. 132, 11 Fed. Cas. No. 6013; Raymond *v.* Tyson, 17 How. 53; Hosteter *v.* Park, 137 U. S. 30; Andrews *v.* Roach, 3 Ala. 190; 823 Barrels Plumbago, 20 Fed. 510; Seager *v.* N. Y. & C. Mail Steamship Co., 55 Fed. 880, 55 Fed. 324; Phosphate Ins. Co. *v.* Willie, 77 Fed. 541; Eddie *v.* Northern S. S. Co., 79 Fed. 361; Continental Coal Co. *v.* Birdsall, 108 Fed. 182; Balfour *v.* Wilkins, 5 Saw. 429, 2 Fed. Cas. No. 807; Thatcher *v.* McCulloh, Olc. 365, 23 Fed. Cas. No. 13,862; Lamb *v.* Parkman, 1 Spr. 343, 14 Fed. Cas. No. 8020; The Mary E. Tabor, 1 Ben. 105, 16 Fed. Cas. No. 920; The William Gillum, 2 Low. 154, 29 Fed. Cas. No. 17,693.

b. *Receipts.* — Parol evidence is admissible to contradict or vary a bill of lading, in so far as it is a receipt for the thing shipped;[38]

Usage Between Assurers and Assured. — Where goods are shipped for a voyage, and a policy is effected upon the goods out, and upon the proceeds thereof at home, though the identical goods brought home do not seem to be covered by the policy, the assured may show by parol proof that, by the known usage of trade, or by use and practice as between assured and assurers, the word "proceeds" is understood by the parties to include the identical goods, brought back in the homeward voyage. Dow *v.* Whetten, 8 Wend. (N. Y.) 160.

Custom Exempting Assured.—The assured in a marine policy may prove a custom exempting the assured from providing a branch pilot in a coasting trade in which the vessel assured was employed. Cox *v.* Charleston, etc. Co., 3 Rich. 331.

Usage As to Reshipment of Cargo. Under a contract of shipment with the privilege of reshipping, it is competent to show by usage that it was not the duty of the vessel to reship instead of waiting for a rise of water. Broadwell *v.* Butter, 6 McLean, 296, 4 Fed. Cas. No. 1910.

Contract of Carriage. — The words "on the steamer," in a bill of lading, may be explained by parol proof of a general usage of steamboats to lade their goods on barges. Steele *v.* McTyer, 31 Ala. 667. The custom of a river may be shown to relieve a vessel from the loss of the goods. Hibler *v.* McCartney, 31 Ala. 501; McClure *v.* Cox, 32 Ala. 617. Proof of usage to stow goods shipped for transportation in a particular manner will justify such stowage. The William Gillum, 2 Low. 154, 29 Fed. Cas. No. 17,693.

Hiring of Vessel. — Upon a dispute in regard to the hiring of a vessel, parol evidence of custom is admissible to explain the acts of the parties. Perkins *v.* Jordan, 35 Me. 23. Where the master of a coasting vessel chartered it on shares, and was authorized to turn it over to the mate on the same terms, parol evidence is admissible to prove a usage at the port where the vessel belonged to let such vessels to the master upon shares. Thompson *v.* Hamilton, 12 Pick. (Mass.) 425. Parol evidence is admissible to show a general usage as to the mode of engaging and paying crews of fishing vessels in order to show the kind of voyage contemplated. Elridge *v.* Smith, 13 Allen (Mass.) 140.

38. The Delaware, 14 Wall. 579.

Goods Not Shipped. — A bill of lading acknowledging the receipt of goods not actually shipped may be contradicted by oral testimony that it was given by mistake. The Lady Franklin, 8 Wall. 325. Where no cargo was actually shipped and bills of lading were obtained by fraud and transferred for value, the owner of the vessel may prove the facts constituting the fraud as against a *bona fide* purchaser of the bills of lading. The Freeman *v.* Buckingham, 18 How. 192. A bill of lading, as the receipt for the thing shipped, may be modified or contradicted by parol evidence that the goods were not actually shipped upon the particular vessel, and the master and part owners of several steamboats constituting a line, have no power to bind all the boats of the line for each shipment whether it carries the freight or not, and if one of them does not carry the freight, it may show that to escape liability. The Guiding Star, 62 Fed. 407. That part of a bill of lading, which acknowledges that goods have been shipped, may be shown by parol evidence to have been made by mistake. Sutton *v.* Kettell, 1 Spr. 309, 23 Fed. Cas. No. 13,647; The Tuskar, 1 Spr. 71, 24 Fed. Cas. No. 14,274. Parol evidence is admissible to show that cargo signed for by an agent of the steamship company, of which delivery was acknowledged had not in fact been delivered, and to explain the circumstances under which he had been induced to sign bills of lading. Lazard *v.* Merchants' and Miners' Transp. Co., 78 Md. 1. See Hedricks *v.* The Morning Star, 18 La. Ann. 353.

or a mere statement of the amount of the cargo;[39] or of the ownership of the goods shipped;[40] or of the condition of the goods at the time of lading;[41] and to assail ordinary receipts by seamen in full of all demands for their wages;[42] and to explain receipts in full

39. Glass *v.* Goldsmith, 22 Wis. 488.

Evidence of Amount of Cargo. The bill of lading is only *prima facie* evidence of the amount of the cargo upon which freight is to be estimated, and the true amount may be shown. The Henry, Blatchf. & H. 465, 11 Fed. Cas. No. 6372. An ordinary bill of lading is not conclusive, as between the original parties, either as to the shipment of goods named in it, or as to the quantity said to have been received; and any mistake or fraud in the shipment of goods may be shown on the trial. Myer *v.* Peck, 28 N. Y. 590; Graves *v.* Harwood, 9 Barb. 477. A variance between the amount of a cargo of coal as stated in the measurer's bill in lading it on board, or in the bill of lading, and the amount of such cargo as ascertained on delivery at the port of consignment, may be explained by showing that the mode of ascertaining the quantity is such that similar variations are necessarily of frequent occurrence. Manchester *v.* Milne, 1 Abb. Adm. 115, 16 Fed. Cas. No. 9006; Manning *v.* Hoover, 1 Abb. Adm. 188, 16 Fed. Cas. No. 9044.

40. Error in Names of Consignees. — Parol evidence is admissible to show that property consigned to two persons belonged to only one of them. Maryland Ins. Co. *v.* Ruden's Adm'r., 6 Cranch 338.

Mistake in Name of Shipper. Parol evidence is admissible in favor of the owners of the vessel to show a mistake of the clerk who wrote a bill of lading in the name of the shipper. Lee *v.* Salter, Lalor Supp. 163.

41. Glass *v.* Goldsmith, 22 Wis. 488; Howard *v.* Wissman, 18 How. 233.

Parol Proof Between Original Parties. — As between the original parties to the bill of lading, its statements respecting the condition of the goods at the time they are laden on board, may be explained or rectified by parol proof. Baxter *v.* Leland, 1 Abb. Adm. 348, 2 Fed. Cas. No. 1124; Bradstreet *v.* Heron, 1 Abb. Adm. 209, 3 Fed. Cas. No. 1792; Ellis *v.* Willard, 9 N. Y. 529; The Martha, Ole. 140, 16 Fed. Cas. No. 9145; Nelson *v.* Woodruff, 66 U. S. (1 Black) 156; Tarbox *v.* Eastern Steamboat Co., 50 Me. 339; Hastings *v.* Pepper, 11 Pick. 43. In Ellis *v.* Willard, 9 N. Y. 529, the court says: "A shipowner may be estopped from alleging a deficiency in the property shipped as against a consignee who has advanced money upon the credit of the bill of lading. But receipts and admissions, as such, are always open as between the parties to explanation, and are impeachable for any mistake, error or false statement contained in them. In a word, they may always be contradicted, varied, or explained by parol testimony. A bill of lading is not an exception to the rule; and that part of the bill which relates to the receipt of the goods, their quality, condition and quantity, is treated as a receipt, as distinct from the contract."

Clear Evidence Required. Though a bill of lading acknowledging the goods to be in good order is open to explanation, still its recital cannot be overthrown nor qualified except by very clear evidence; it cannot be weakened by a conjectural showing. Bond *v.* Frost, 6 La. Ann. 801.

42. The Mary Paulina, 1 Spr. 45, 16 Fed. Cas. No. 9224; The Rajah, 1 Spr. 199, 20 Fed. Cas. No. 11,538; Jackson *v.* White, 1 Pet. Adm. 179, 13 Fed. Cas. No. 7151.

Sealed Receipts. — Receipts or releases given by seamen, even with all the solemnity of sealed instruments, will have no effect in a court of admiralty beyond the actual consideration fairly paid.

Inquiry Into Facts. — Receipts given by seamen in full of all demands are only *prima facie* evidence, and the facts may be examined into. Thorne *v.* White, 1 Pet. Adm. 168, 23 Fed. Cas. No. 13,989. A receipt

given to insurance companies upon loss of a vessel by fire.[43]

in full of all demands, given by a seaman to the master or owners, is open, in a court of admiralty, to explanation by proof that at the giving of the receipt there existed a demand in favor of the seaman which was not in fact satisfied by the payment made; but, in order to free a demand from the operation of such receipt, the evidence of a valid demand which was not in fact satisfied by the receipt, should be clear and convincing. Leak *v.* Isaacson, 1 Abb. Adm. 41, 16 Fed. Cas. No. 8160.

Receipt No Bar to Recovery. Where a seaman, being in a strange land and in great need of money, after having repeatedly asked for his wages without receiving them, agreed to take one-third the amount due him in full payment and release the shipowners, and accordingly signed a receipt in full, the agreement to take less than the whole amount due was *nudum pactum,* and the receipt was no bar to the recovery of the whole balance due. Savin *v.* The Juno, 1 Woods 300, 21 Fed. Cas. No. 12,390. Contracts with seamen, upon a discharge before completion of voyage, concerning wages already earned, will be set aside and disregarded by courts of admiralty, if equitable. The Hermine, 3 Saw. 80, 12 Fed. Cas. No. 6409. A receipt signed by a seaman at the end of an eight months' voyage, acknowledging the payment of nine ($9) dollars, in full of all demands against the ship, will not bar his suit for wages and short allowance, without proof of an adequate compensation actually paid him. Piehl *v.* Blatchen, Olc. 24, 19 Fed. Cas. No. 11,137. Where a crew of seamen signed articles for a voyage in which a clause in an unusual place reduced their wages for a return voyage, and on their arrival home, when offered pay at the reduced rate, protested against the reduction and proclaimed ignorance of such provision, but finally took reduced pay and gave releases in full, they were not bound by such provision in the articles in the absence of clear proof that the sailors were distinctly informed of it and agreed to it, and such receipt and releases were no bar to an action for the remainder for full pay for the return voyage. The Ringleader, 6 Ben. 400, 20 Fed. Cas. No. 11,850.

Charge for Premium on Gold. Where a seaman, on being discharged, was paid in gold by the owners, who rendered him an account, charging him with a premium on gold over United States currency, upon which he wrote, "Approved, correct, and satisfactory," and signed his name, such account was not binding upon him in the absence of an express promise to pay the premium, and parol evidence was admissible to show the circumstances and to support an action to recover the amount of premium from the owners of the vessel. Nelson *v.* Weeks, 111 Mass. 223.

43. Receipts in Full for Loss of Vessel. — Where plaintiff had fire insurance policies on a vessel and it took fire and was scuttled and sunk to save it and cargo, and was afterwards raised, and the loss by fire was appraised by an adjuster under an agreement, with a memorandum that the agreement should not apply to any question that might arise for saving boat and cargo, and the adjuster reported the amount of loss with a statement that plaintiff would make further claim for expenses of raising the vessel, and plaintiff on payment of adjuster's appraisal, gave receipts in full of all claims for loss or damage by fire, containing a clause that in consideration of the payment the policies were canceled and surrendered, one of which payments was by draft, stating that it was in full compromise and payment of all claims for loss and damage by fire, parol testimony was admissible to vary and contradict such receipts and drafts, by showing that they were not intended to be in full of the claim for raising the vessel. Fire Ins. Ass'n. *v.* Wickham, 141 U. S. 564. In this case the court said: "The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor

c. *Other Documents.* — Parol evidence is admissible to show falsity or mistake in the statement of a ship's log book as to the desertion of a seaman;[44] to contradict a report by marine surveyors that a ship is unseaworthy,[45] and the enrollment and statement of the title of a vessel in the custom-house;[46] to show that the one who holds the legal title to a vessel is only a mortgagee;[47] to show

may still sue and recover the residue. If there be a *bona fide* dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void. . . . It is a familiar doctrine that parol evidence is competent to show a want of consideration. . . . The circumstances attending the execution of a receipt in full of all demands may be given in evidence to show that by mistake it was made to express more than intended, and that the creditors had in fact claims that were not included."

44. Orne *v.* Townsend, 4 Mason 541, 18 Fed. Cas. No. 10,583; The Hercules, 1 Spr. 534, 12 Fed. Cas. No. 6401; Worth *v.* Mumford, 1 Hilt. 1.

45. Rights of Crew. — A report that a ship is seaworthy, made by marine surveyors, upon occasion of the crew's demanding to leave her for unseaworthiness, is not conclusive against the crew in a subsequent action for wages after leaving. Bucker *v.* Klorkgeter, 1 Abb. Adm. 402, 4 Fed. Cas. No. 2083.

46. Ring *v.* Franklin, 2 Hall 9; Colson *v.* Bonzey, 6 Me. 474; Gilmore *v.* Brehem, 3 La. Ann. 32.

Evidence in Suit for Wages. The title of a vessel, as stated in the custom-house documents, is not conclusive of the title of the respective owners in a suit for wages. Whatever may be the case in a controversy between the parties to these documents, the true title may be shown to be different from that stated therein, by a third person, whenever his interest is concerned. Chickering *v.* Hatch, 1 Story 516, 5 Fed. Cas. No. 2671.

Evidence by Creditor. — A creditor attaching a steamer may show by parol that his debtor holds the real interest in her, though she is registered in the name of another. The registry is intended to protect against fraud, and not as a shield to fraud. Ealer *v.* Freret, 11 La. Ann. 455.

Evidence by Real Owner. — The real owner of a vessel, who claims as builder, may show by parol evidence that his claim is well founded, and that the builder's certificate and registry and enrollment have been fraudulently made and issued in the name of another. Scudder *v.* Calais Steamboat Co., 1 Cliff. 370, 21 Fed. Cas. No. 12,565. A part owner may contradict the enrollment and registry of title. Whiton *v.* Spring, 74 N. Y. 169. The owner may contradict the enrollment as to his residence. Dudley *v.* The Superior, 1 Newb. 176, 7 Fed. Cas. No. 4115.

47. Blanchard *v.* Fearing, 4 Allen 118; Ring *v.* Franklin, 2 Hall 9; Colson *v.* Bonzey, 6 Me. 474.

Absence of Note. — Where the bill of sale of a vessel, absolute in its terms, is positively shown by parol evidence to be only intended as a mortgage to secure loans by way of advances, the amount of which was not known at the time of the bill of sale, the fact that no bond or note was taken, does not make the bill of sale any the less a mortgage. Morgan *v.* Shen, 15 Wall. 105.

Registration of Vessel. — The fact that the vessel was registered in the name of the mortgagee cannot affect the admissibility of the parol evidence or render the mortgagee who is not in possession of the vessel, liable for supplies and repairs, furnished to the ship. Davidson *v.* Baldwin, 79 Fed. 95; Howard *v.*

fraud in the procurement of title to a vessel;[48] and that the title is in others than those who appear in the enrollment and bill of sale;[49] and to contradict the certificates of foreign notaries to written documents;[50] and the protest of the loss of a vessel.[51]

VIII. DECLARATIONS AND ADMISSIONS.

1. Of Master. — The declarations and admissions of the master, though not strictly part of the *res gestae*, are admissible against the owner of the vessel, when made concerning the contract with the seamen,[52] or a contract to save a sunken vessel.[53] The master, when upon a voyage, is the general agent of the owner, and his declarations and admissions within the scope of his authority, bind the owner,[54] and are evidence against him in a case of colli-

O'Dill, 1 Allen 85; Hesketh *v.* Stevens, 7 Barb. 488; Cutler *v.* Thurlo, 20 Me. 213; Lord *v.* Ferguson, 9 N. H. 380; Cordray *v.* Mordecai, 2 Rich. 518.

Proof Required. — An absolute bill of sale of a vessel, will be construed as a mortgage only upon the clearest proof that it was intended as security. Purington *v.* Aklurst, 74 Ill. 490.

Interest in Resale. — Where a bill of sale for a vessel, absolute in its terms, expressed a certain sum as the consideration, parol evidence is admissible to show that the purchaser was to pay an additional sum in case he resold the vessel within six months for a greater sum than that expressed in the bill of sale. Clark *v.* Geshon, 66 Mass. 589.

48. Scudder *v.* Calais Steamboat Co., 1 Cliff. 370, 21 Fed. Cas. No. 12,565; Ealer *v.* Freret, 11 La. Ann. 455.

49. Evidence by Part Owner. In Whiton *v.* Spring, 74 N. Y. 169, the court said: "There was no error in allowing the plaintiff, Crowell, to recover as owner of one-eighth of the brig. It was competent for him to show, as he did, that he owned the one-eighth, in fact, although the registry of the vessel, and the bill of sale to conform thereto, showed that he owned but one thirty-second part and that the other three thirty-second parts belonged to other parties. The bill of sale and the registry were not conclusive; and I know of no rule of law that prohibited parol proof of the actual truth as to the ownership. I believe it is the settled law of this country that it may be shown that by a parol agreement or transfer the title to a vessel is actually in one while the ship's documents show it to be in another. Colson *v.* Bonzey, 6 Me. 474; Ring *v.* Franklin, 2 Hall 9.

50. U. S. *v.* The Jason, Pet. C. C. 450, 26 Fed. Cas. No. 15,470.

51. Contradiction of Protests. Where the protest of the loss of a vessel is introduced in evidence on the trial of an accusation against the insurers, evidence of declarations contradicting the protest, made by persons who subscribed it, is admissible to discredit the protest. The objection that it is hearsay does not apply. Church *v.* Teasdale, 1 Brev. 255.

52. The Enterprise, 2 Curt. 317, 8 Fed. Cas. No. 4497; The Napoleon, Olc. 208, 17 Fed. Cas. No. 10,015.

53. Eades *v.* The H. D. Bacon, 1 Newb. 274, 8 Fed. Cas. No. 4232.

54. Eades *v.* The H. D. Bacon, 1 Newb. 274, 8 Fed. Cas. No. 4232.

Declarations As to Injury to Goods. — In an action against the shipowner, the declarations of the master in regard to the injury to the goods, made to the agent of the plaintiff before the goods were delivered according to the terms of the bill of lading, are admissible in evidence against the defendant. Price *v.* Powell, 3 N. Y. 322.

Admissions by Master in Possession. — In an action against a vessel

sion.[55] A foreign master, who understands and speaks English imperfectly, will not be charged upon his declarations or admissions in that language, without clear proof that he well understood the meaning of what was addressed to him, and of the words used by him in reply.[56] The statements of the master, when sailing on his own responsibility, under contract with the owners, do not bind the owners,[57] and his statements are inadmissible to show the owner-

for collision, where the vessel was in possession and under control of the master and no ownership of the vessel appears, the admission of the master in regard to the collision is competent evidence though made subsequently to the collision, with like effect as if he were the owner, the possession of the property being considered in such case, *prima facie* evidence of ownership. Bailey *v.* The New World, 2 Cal. 370.

Declarations Without Authority. The declarations of the master of the vessel made respecting the loss of it, after the loss, and after he has ceased to be agent of the owner, are not admissible in evidence against the owner. Polleys *v.* Ocean Ins. Co., 14 Me. 141.

Where the master of a vessel who was part owner, procured a marine insurance on his interest with loss payable to himself, and the vessel was lost with himself and all on board, in an action on the policy by a creditor, claiming that it was obtained for his benefit, to secure a loan to the master, the declaration of the master as to his loan and policy were not admissible as evidence in favor of the creditor in the absence of proof that the master was acting as agent of the creditor in effecting the insurance. Sleeper *v.* Union Ins. Co., 61 Me. 267.

55. Bailey *v.* The New World, 2 Cal. 370.

Declaration of Master After Collision. — Where a steamer collided with and sank a schooner, the declaration of the master of the schooner, when taken on board the steamer after the collision, is admissible in evidence. Bedwell *v.* Potomac, 8 Wall. 590.

In this case, the court said: "The master admitted, as soon as he was taken on board the steamer after the disaster, that the collision occurred through his fault, and this admission was repeated when he noted his protest. His statements on the point were full and explicit, and could not have been easily misunderstood, but if they were not true, or were misunderstood, why was he not called to contradict or explain them? The legality of this evidence cannot be questioned, for courts of admiralty have uniformly allowed the declaration of the master, in a case of collision, to be brought against the owner, on the ground that when the transaction occurred, the master represented the owner, and was his agent in navigating the vessel. This sort of evidence is confined to the confession of the master, and cannot be extended to any other person in the employment of the boat, for in no proper sense has the owner intrusted his authority to any one but the master. The authorities on this subject are collected in the case of The Enterprise, 2 Curt. C. C. 320."

Where the testimony is conflicting, the court will give weight to the fact that the master of one of the colliding steamers, in statements made immediately afterwards and in his official reports, deliberately made some weeks later, did not attribute the collision to any fault of the other steamer alleged in the libel. The Frostburg, 25 Fed. 451.

Great weight should be given to the admissions of the master of a colliding vessel, though not on deck at the time of collision, who states to the injured party that his own vessel was in fault, and promises to pay the damages done by her. The Douglass, 1 Brown Adm. 105, 7 Fed. Cas. No. 4031.

56. The Lotty, Olc. 329, 15 Fed. Cas. No. 8524.

57. Tucker *v.* Stimpson, 12 Gray 487.

ship of the vessel, if not made in the presence of the person sued as owner.[58]

2. Of Captain. — The statement of the captain of a vessel, informing the agents of the owners of damage done to the vessel requiring repairs, and advising the purchase of coal to be loaded during repairs, is admissible as part of the *res gestae*;[59] and the statements of the captain made in the discharge of his duty, while the vessel was in a sinking condition, as to the observed cause of it, are competent evidence;[60] but his statements are not admissible in case of loss or injury, unless shown to be part of the *res gestae*;[61] and if made by way of narration, after the occurrence of the injury, cannot be received in evidence against the owners of the vessel.[62]

3. Of Other Members of Crew. — The admissions of the pilot made after the event, are not competent against the shipowner.[63] Declarations of members of the crew, made immediately after the collision, become a question of the weight of evidence.[64]

58. Chambers *v.* Davis, 3 Whart. (Pa.) 40.

59. Law *v.* Cross, 1 Black (U. S.) 533.

60. Western Ins. Co. *v.* Tobin, 32 Ohio St. 77.

61. Exclusion of Declarations. It was not error in the court below to exclude evidence of declarations made by the captain of the tug after she had become disabled, in regard to the occurrence, where it was not stated what was proposed to be proved and it was not shown that such declarations were a part of the *res gestae*. Union Ins. Co. *v.* Smith, 124 U. S. 405.

62. Murphy *v.* May, 9 Bush (Ky.) 33.

Narrative As to Causes of Injury. The declarations of the captain of a passenger steamer, in reference to the causes of an injury sustained by a passenger in getting on the boat, made two days after the accident, are not admissible evidence against the steamer. Northw. & W. U. Packet Co. *v.* Clough, 20 Wall. 528. In this case, the court said: "A captain of a passenger steamer is empowered to receive passengers on board, but it is not necessary to this power, that he be authorized to admit that either his principal, or any servant of his principal, has been guilty of negligence in receiving passengers. There is no necessary connection between the admission and the act. It is not needful the captain should have such power to enable him to conduct the business intrusted to him, to wit: the reception of passengers; and, hence, his possession of the power to make such admissions affecting his principals is not to be inferred from his employment." Admissions made by the captain of a steamboat as to the cause of a collision are not admissible in an action against the owners of the boat, when the admissions were made when the captain went on board another vessel, immediately after the collision. Rogers *v.* McCune, 19 Mo. 557. Where a passenger on a steamship was injured by the lurching of a vessel in the absence of a handrail, the declaration of the captain, made after the accident, that the place was dangerous and he would have it remedied, are inadmissible against the steamship company. Am. S. S. Co. *v.* Landreth, 102 Pa. St. 131.

63. Dents *v.* The Fanwood, 61 Fed. 523.

64. Weight of Declarations of Sailors. — A sailor whose testimony contradicts statements deliberately made by him in writing, immediately after the collision, is entitled to little credence as a witness. The Douglass, 1 Brown Adm. 105, 7 Fed. Cas. No. 4031. But the declarations of members of the crew made in loose conversation directly after the collision, will have but slight weight

4. Of Owners of Vessel. — The admissions of one of several part-owners of a vessel will not bind the others;[65] and the declarations of one joint owner in possession of the vessel are admissible for other joint owners.[66] A subsequent report to the owner of a vessel by an agent concerning a transaction is inadmissible against the owner.[67]

5. Of Other Persons. — A. Attorney. — A statement by an advocate made by authority of the party represented, in open court, the day after the hearing of an admiralty cause, may be taken as an admission in contradiction of the evidence submitted by such party.[68]

B. Shipping Notaries. — Declarations made to seamen by shipping notaries, at the time of sailing, bind the ship.[69]

C. Admissions by Tender, Offer or Settlement. — A tender by respondents upon a libel for services is an admission of ownership of the vessel;[70] and an abandoned agreement to arbitrate, after refusal of a tender of damages for collision, is an admission of fault.[71] The settlement by a tug of her tow's claim for damages

against their deliberate testimony to the contrary. The New Jersey, Olc. 415, 18 Fed. Cas. No. 10,161; Whitney *v.* The Empire State, 1 Ben. 57, 29 Fed. Cas. No. 17,586; and are entitled to little weight in determining disputed questions of fact, in reference to the navigation of the respective vessels. The Hope and The Freddie L. Porter, 4 Fed. 89.

Declarations Made Under Excitement. — Evidence of verbal statements made in time of excitement and peril should be received with great caution, and when opposed to the direct and concurring testimony of many witnesses, is entitled to but little weight. The Masten, 1 Brown. Adm. 436, 16 Fed. Cas. No. 9266.

Written Protest of Captain and Crew. — A written protest made by a captain and crew on the morning after a collision, which corresponds with their testimony in court, is competent evidence to sustain the testimony of the captain, when sought to be impeached by proof of contradictory statements. Ward *v.* The Fashion, 6 McLean 152, 29 Fed. Cas. No. 17,154.

Declaration Without Weight. No weight is to be attached to evidence of a declaration made by one of the crew of a steamer, which collided with a sailing vessel, that he saw the light of the sailing vessel in time to have avoided the collision. The Roman, 14 Fed. 61.

65. Clark *v.* Wicks, 106 U. S. 13.

Admission of Part Owner. — A statement made in another suit by a part owner of a vessel injured by collision, as to the extent and value of her repairs, is not binding on his co-owners, who were merely tenants in common with him and not partners and is not admissible as evidence against them. A joint owner will not be bound by the admission of his co-owner that damages for injuries are payable to an insurer instead of the owners, made in a proceeding to which such joint owner is not a party. The Betsy, 23 Ct. C. C. 277.

66. Admissions at End of Voyage. The admissions of the master, who is a part owner of the vessel, made at the end of the voyage, as to the meaning of a technical phrase of a charter-party do not conclude either him or his co-owners upon the merits of the case. The John H. Pearson, 14 Fed. 749.

67. The Burdett, 9 Pet. 682.

68. The Harry, 9 Ben. 524, 11 Fed. Cas. No. 6147.

69. The Lola, 6 Ben. 142, 15 Fed. Cas. No. 8468.

70. Jones *v.* Crowell, 13 Fed. Cas. No. 7459.

71. The S. Shaw, 6 Fed. 93.

is evidence of an admission of fault on her part, in a subsequent suit against a colliding vessel for the damages so paid.[72] Admissions made in an offer of compromise voluntarily proposed, without reservation, are competent evidence.[73]

IX. OPINION EVIDENCE.

1. Of Non-Experts. — The testimony of a seaman as to the value of the wardrobe of the wife and children of the captain of a vessel, lost by collision, has no weight as evidence.[74]

2. Of Experts. — A. Admissibility. — a. *Collision.* — In cases of collision, the testimony of experts is admissible to show the bearing of a steamer's rate of speed upon her navigation;[75] and to show whether the special circumstances of the case rendered a departure from the statutory sailing rules necessary;[76] and to prove the value of an injured vessel.[77] In such cases, the court may refer nautical

72. The Hattie M. Spraker, 29 Fed. 457.

73. Gibbs *v.* Johnson, 10 Fed. Cas. No. 5384.

74. The Oregon, 89 Fed. 520.

75. The Blackstone, 1 Low. 485, 3 Fed. Cas. No. 1473.

76. **Special Usage of Navigation.** In a suit to recover damages caused by the sinking of a pilot boat by a steamer during maneuvers incident to the transfer of the pilot, the evidence of experts is admissible to show the usage of navigation under such circumstances. The Alaska, 33 Fed. 107; The Clytie, 10 Ben. 588, 5 Fed. Cas. No. 2913.

77. **Value of Pilot Boat.** — In the absence of evidence as to the market value of the pilot boat injured in a collision, resort may be had to the judgment as to such value of persons acquainted with the business and with her earnings. The Emilie, 4 Ben. 235. In the absence of a market for the chartering of pilot boats, it was proper to resort to the judgment of persons acquainted with the piloting business, as to the value of the time of the vessel, based upon the employment she was in, its character and its constancy, and its then recent results. Such value must include only the value of the use of the boat, as a vessel without pilots and crew, or stores. The Transit, 4 Ben. 138, 24 Fed. Cas. No. 14,138.

Best Evidence of Market Value. In case of a total loss of a vessel by collision, the best evidence of her market value is the opinion of competent persons who knew the vessel shortly before she was lost, and the next best evidence is the opinions of persons familiar with shipping and the transfer of vessels. The Colorado, Brown Adm. 411, 6 Fed. Cas. No. 3029. In ascertaining the market value of a vessel sunk in a collision, the commissioner or court is not restricted to the evidence of competent persons who knew the vessel and testified as to her market value, though that is in general the best single class of evidence. Leonard *v.* Whitwill, 19 Fed. 547.

Estimates of Cost of Repairs. Estimates of the cost of repairs of injury received by the collision, though competent in the absence of better evidence, are not so where the repairs have actually been made. The Mayflower, Brown Adm. 376.

Place of Proof of Value. — Where a vessel is lost at sea, proof of her value at the time and place of her loss may, in ordinary cases, be made by evidence of her value at the last port of departure or at the place of her destination. The Pennsylvania, 5 Ben. 253, 19 Fed. Cas. No. 10,948.

Value of Use of Ferryboat. — Expert evidence is admissible to show the value of the use of an injured ferryboat. The Cayuga, 7 Blatchf. 385, 5 Fed. Cas. No. 2537.

questions to experienced navigators,[78] and may call in a navigator of experience as nautical assessor of damages.[79] Competent seamen on board of a colliding vessel may testify as to whether she was managed with skill and prudence.[80]

b. *Transportation.* — The testimony of experts is admissible to prove the value of goods damaged in transportation when the market value was not ascertainable.[81] The testimony of an experienced navigator is admissible to show the negligence of a tug in the mode of transporting laden barges, one of which was sunk.[82] Experienced shipmasters are competent to show whether a vessel had a full cargo.[83]

c. *Marine Insurance.* — In actions upon marine insurance, the opinion of experts, of nautical skill, is competent as to the prudence of the management of the lost vessel and as to the cause of

78. The Emily, Olc. 132, 8 Fed. Cas. No. 4453; Lowry *v.* The Portland, 15 Fed. Cas. No. 8583.

79. Power of District Judge. —In a collision case there is no error in the district judge's calling to his assistance a navigator of experience as nautical assessor. The Fountain City, 62 Fed. 87, 10 C. C. A. 278.

80. Opportunities of Observation. The testimony of competent seamen on board a vessel, as to whether she was managed with skill and prudence is entitled to more weight from their better opportunities to observe, than the testimony of witnesses on board another vessel, who had no particular opportunities to judge of the matter. The Northern Warrior, 1 Hask. 314, 17 Fed. Cas. No. 10,325.

81. Bareness of Market. —Where it appears that on the day on which the damaged goods should have arrived, there were no sales, and the market was bare, the testimony of experts is admissible to prove the value. The Colon, 10 Ben. 366, 6 Fed. Cas. No. 3025.

82. Testimony of Captain of Tugboat. — The captain of a tugboat who had had many year's experience and was familiar with the making up of tows, was competent to testify as to whether it would be safe or prudent for a tugboat on a bay to tow three boats abreast with a high wind. The court said: "The witness was an expert and was called to testify as such. His knowledge and experience fairly entitled him to that position. It is permitted to ask questions of a witness of this class, which cannot be put to ordinary witnesses. . . . The testimony of experienced navigators on questions involving nautical skill was admissible. . . . The books give a great variety of cases in which evidence of this character is admissible, and we have no doubt of the competency of the evidence to which this objection is made. Eastern Transp. Line *v.* Hope, 95 U. S. 297.

83. Covenant in Charter-Party. Where a charter-party covenanted for a full cargo of general merchandise without specifying any particular amount to be received, the question, what was "a full cargo" under all the circumstances and whether the ship could have been safely loaded to a greater depth, was a question that could be solved only by experienced ship-masters. The court said: "What was a full cargo for this ship to carry with safety was not a fact which could be settled by any rule of law or mathematical computation, and the court must necessarily rely upon the opinions of those who have experience, skill and judgment in such matters. At least three competent witnesses of this character testify that the ship was loaded as deep as prudence would permit under all the circumstances. Both the district and circuit court were of the same opinion, and we do not find in the evidence, anything to convince us that they have erred." Ogden *v.* Parsons, 23 How. 167.

her loss;[84] and to show that an unusual method of stowing cargo was a fact material to the risk.[85]

B. Inadmissibility. — The opinion of navigators is not admissible to show the amount of earnings lost by a vessel damaged by collision;[86] or while detained for repairs.[87] The practice of bringing in sea-faring men to assist the court in cases of salvage has not been sanctioned in this country.[88] The testimony of experts is not admissible to prove that a rule of navigation recognized by general maritime law does not exist in a particular locality.[89] Opinions of experts are not admissible upon questions of negligence which require no expert knowledge or training.[90]

C. Weight of Expert Evidence. — The opinions of experts, however qualified and trustworthy, cannot bind the conscience of the court,[91] and though uncontradicted as to the value of the use

84. Loss of Insured Tug. — In an action upon a policy of marine insurance upon a lost tug, the master, the mate and foreman, of a tug, who were on board of her at the time she was lost on the lake, and her owner, each of whom had been engaged in navigation of the lake for many years, are competent as expert witnesses in regard to the loss, and in regard to the prudence and good seamanship of the management of the tug. Union Ins. Co. *v.* Smith, 124 U. S. 405.

85. Condition Implied in Policy. In M'Lanahan *v.* Universal Ins. Co., 1 Pet. 170, the court considered the question of the materiality of the risk at the time of sailing. The court said: "The material ingredients of all such inquiries, are mixed up with nautical skill, information, and experience; and are to be ascertained in part, upon the testimony of maritime persons, and are in no sense judicially cognizable as matter of law. The ultimate fact itself, which is the test of materiality—that is, whether the risk be increased so as to enhance the premium—is, in many cases, an inquiry dependent upon the judgment of underwriters and others, who are conversant with the subject of insurance."

86. Probable Employment Too Remote. — In an action for damages resulting from collision, mere opinion as to the probable employment of the vessel, and the amount of earning if so employed, is too speculative and contingent to be the foundation of any rule of damages. The R. L. Maybey, 4 Blatchf. 439, 20 Fed. Cas. No. 11,871. See The Conqueror, 166 U. S. 110.

87. Incompetent Evidence. —The mere opinion of the master and the mate of a vessel is incompetent evidence and cannot sustain an allowance for loss of the earnings of a vessel during her detention for repairs. The Isaac Newton, 4 Blatchf. 21, 13 Fed. Cas. No. 7091. See The Conqueror, 166 U. S. 110.

88. The Waterloo, 1 Blatchf. & H. 114, 29 Fed. Cas. No. 17,257.

89. The Clement, 2 Curt. 363, 5 Fed. Cas. No. 2879; The Clement, 1 Spr. 257, 5 Fed. Cas. No. 2880.

90. Safety of Place for Wharfinger. — Where a wharfinger was injured by a steamboat in landing and was charged with contributory negligence, the question whether the place where the wharfinger stood on the wharf was reasonably safe was a question depending on common knowledge and observation, and requiring no special training or experience to decide and no opinions of expert witnesses thereupon were admissible. Inland and Seaboard Coasting Co. *v.* Tolson, 139 U. S. 551.

Prudence of High Rate of Speed. Experts are not allowed to testify to the prudence or propriety of a steamer's keeping up a high rate of speed in a fog. The Blackstone, 1 Low. 485, 3 Fed. Cas. No. 1473.

91. The Iberia, 40 Fed. 893.

of a vessel, cannot prevent the exercise of independent judgment on that question.[92] The conflicting opinions of experts as to the value of a vessel at the time of collision is of less weight than a sale of half thereof, then concluded for a specified sum.[93] The testimony of experts should prevail in behalf of respondents where the libellant has not procured the best evidence obtainable.[94] The facts of the case will prevail over the opinions of each ship's company as to the acts of the other,[95] and the clear testimony of eye-witnesses will prevail over the opinions of experts.[96]

X. RELEVANCE AND COMPETENCY OF EVIDENCE.

1. Admissibility. — Facts which, if standing alone, would be irrelevant, are admissible in evidence upon the statement of counsel, that they are part of a chain of evidence which, as a whole, would be relevant.[97] Where the intention or knowledge of a party becomes a material fact, collateral acts and declarations having a bearing on the issue, are admissible in evidence.[98] In an action

92. Friendly Experts. — Evidence of friendly experts as to the value of the use of a vessel, without any showing that the vessel was profitable, or that there was a demand for its use in the market, is not sufficient to sustain damages for its detention. The Conqueror, 166 U. S. 110.

93. The Albert Dumois, 177 U. S. 240.

94. Absence of Best Evidence. On the question of the value of an iron bark injured by collision, where the libellant, instead of producing evidence of value from Scotland, where such barks are built and sold, called a New York expert, and respondent's expert fixed a lower rate, the libellant not having produced the best evidence attainable, the testimony of respondent should prevail. The City of New York, 23 Fed. 616.

95. Preference of Facts in Proof. In determining the merits in a case of collision, the court will look chiefly to the facts in proof, and will pay but slight attention to the opinions and hypotheses of witnesses, especially those of each ship's company, in respect to the acts of the other; and plans and diagrams, intended to exhibit the course, bearings, and distances of two vessels approaching each other, are of no value as evidence, when framed merely upon the conjecture or opinion of witnesses as to speed, relative bearing, and distances of the vessel. The Narragansett, Olc. 246, 17 Fed. Cas. No. 10,109.

Opinions of Slight Weight. — The estimate or judgment of witnesses formed in the nighttime, and expressed orally, or exhibited on charter or diagram on a vessel in motion, are of slight weight in determining the relative position and bearing of another vessel, also under motion. The Argus, Olc. 304, 1 Fed. Cas. No. 521.

96. Course of Vessel. — In case of a collision, the opinion of experts as to the vessel's course, when founded upon very nice calculation, will not obtain as against the clear testimony of eye witnesses. The D. P. Kelly *v.* Thompson, 1 Low. 124.

Time of Dawn and Sunset. — Testimony of persons who have witnessed dawn and sunset at the place and season involved in the issue, together with that of eye witnesses to the facts in dispute, outweigh the received opinion of geographers and navigators as to the time of such phenonema and the duration of twilight. Fletcher *v.* The Cubana, 9 Fed. Cas. No. 4863.

97. U. S. *v.* Flowery, 1 Spr. 109, 25 Fed. Cas. No. 15,122.

98. Tobin *v.* Walkinshaw, 1 McAll. 186, 23 Fed. Cas. No. 14,070.

relating to a vessel belonging to the plaintiff, a letter of instructions from the plaintiff to the captain of the vessel is admissible in evidence for the plaintiff.[1] Agreements between the part-owners of a vessel, before fitting it out, may be proved on their part by the testimony of others to conversations heard between them.[2] The cost of the repairs of a vessel is competent evidence of the damage caused by collision,[3] and in the absence of proof of the market value of the use of a vessel injured by collision, the books of the owner showing her earnings about that time are competent evidence of her probable earnings during the time of her detention.[4] Entries in books are explainable.[5]

2. Inadmissibility. — Evidence is incompetent to show a custom of vessels to run at full speed in a dense fog without a lookout;[6]

1. McClanachan *v.* McCarty, 2 Dall. 51.

2. **Res Gestae.** — Such conversations are evidence of the contract made between the part owners which was part of the *res gestae* of the fitting out of the vessel. Macy *v.* De Wolf, 3 Woodb. & M. 193, 16 Fed. Cas. No. 8933.

3. **Evidence of Party Repairing.** The party repairing the injured vessel should show positively that he has only reinstated the vessel in the condition in which she was before the collision. The W. H. Clark, 5 Biss. 295, 29 Fed. Cas. No. 17,482; La Champagne, 53 Fed. 398.

4. The Mayflower, 1 Brown Adm. 376, 16 Fed. Cas. No. 9345; The Transit, 4 Ben. 138, 24 Fed. Cas. No. 14,138; The Emilie, 4 Ben. 235, 8 Fed. Cas. No. 4451; The Conqueror, 166 U. S. 110.

5. **Explanation of Entries.** — Where coal was furnished to a vessel in a foreign port to enable her to make her voyage, it is to be presumed that credit was given to the vessel and not exclusively to the owner, and entries of charges to the owner in the journal and ledger of the party furnishing the coal may be explained. The court said: "If the credit was to the vessel there is a lien, and the burden of displacing it is on the claimant. He must show, affirmatively, that the credit was given to the company to the exclusion of a credit to the vessel. This he seeks to do by the form of charge in the libellant's journal and ledger. If it be conceded that these entries tend to support this position, they are far from being conclusive evidence on the subject. Entries in books are always explainable, and the truth of transactions can be shown independent of them. The form of charge in any book of original entries does not appear, as the day-book was not called for by the claimants, nor are the 'invoices' which the libellant was directed to furnish with the coal produced. But, from the form of entry in the journal itself (where the amount furnished to each vessel is set opposite its name), we are lead to the conclusion that the day-book entries which are thus journalized were debited to each steamer by name. If this be so, the journal entries are not inconsistent with the idea of the credit's being given on the security of the ship. More especially is this apparent when it is proven that the reason why monthly accounts were made out to the steamboat company in bulk was for the sake of convenience, and to save a useless accumulation of bills. There is nothing besides this journal entry to indicate that the coal was furnished on the personal credit of the company, and, as other facts in the case are in favor of charge direct to the steamship, we do not think legal inference of credit to the ship is removed." The Patapsco, 13 Wall. 329.

6. Richelieu & O. Nav. Co. *v.* The Boston M. Ins. Co., 136 U. S. 408.

or to prove a local custom for masters of tugs to act as wheelmen;[7] or a usage that crews were not treated for sickness at the ship's expense;[8] or to prove what the captain of a vessel intended to convey by a signal.[9]

XI. WEIGHT OF EVIDENCE.

(For Weight of Expert Evidence, see "Opinion Evidence, IX. 2, C.")

1. In General. — Where the evidence is conflicting and equally balanced, the libellant must fail;[10] but if the libellant recovers in such a case, the decree will be affirmed upon appeal, notwithstanding the conflict and even balance of testimony.[11] Where the evidence on both sides is conflicting and equally credible, the weight of evidence is with the greater number;[12] or with the most probable theory of the case in view of the facts.[13] More weight is to be given to the testimony of witnesses that an occurrence took place, than to that of those who testify that it did not take place, unless

7. The Coleman, 1 Brown 456, 6 Fed. Cas. No. 2981.

8. Rule Not Changeable. — The evidence of such usage is incompetent to vary the settled rule that seamen are entitled to be treated at the ship's expense. Knight *v.* Parsons, 1 Spr. 279, 14 Fed. Cas. No. 7886.

9. Signal Under International Rules. — In a collision case between the steamers governed by the international rules, it is proper to exclude a statement by the captain of one of the vessels as to what information he intended to convey by a signal of one whistle, as the meaning thereof is conclusively determined by the rule. The Lisbonense, 53 Fed. 293.

10. Failure of Libellant. — Where the controversy turns wholly on questions of fact, depending upon testimony which is so conflicting that no safe opinion can be formed of the merits, a decree dismissing the libel will be affirmed on appeal, on the ground that the libellants failed to establish their case by a preponderance of evidence. Lowell *v.* The Joseph Stickney, 56 Fed. 156, 6 C. C. A. 454; Assante *v.* Charleston Bridge Co., 40 Fed. 765. The evidence will not warrant a finding in favor of a libellant where it is evident that the stories told by the witnesses for both parties are intentionally misstated and false. The Wioma, 55 Fed. 338. Where there is an irreconcilable conflict of evidence as to whether there was any collision, libels for the loss will be dismissed. The Amanda Powell, 14 Fed. 486; The C. Vanderbilt, 10 Ben. 607, 6 Fed. Cas. No. 3524. In a great conflict of evidence as to the courses and conduct of colliding vessels, damages will be denied for want of preponderating proof. The Summit, 2 Curt. 150, 23 Fed. Cas. No. 13,606.

Preponderance of Evidence. — Where the testimony is conflicting, but the preponderance is in favor of the libellants, the decree will be in their favor. Merchants' S. S. Co. *v.* The S. C. Trion, 4 Fed. 236.

11. The Sampson, 4 Blatchf. 281, 21 Fed. Cas. No. 12,279.

12. Clark *v.* The Ruth, 39 Fed. 128; The Dale, 46 Fed. 670; The Napoleon, Olc. 208, 17 Fed. Cas. No. 10,015; The Dolphin, 6 Ben. 402, 7 Fed. Cas. No. 3972.

13. The Iroquois, 91 Fed. 173; The Vulcan and The Genevieve, 96 Fed. 859; The Queen Elizabeth, 100 Fed. 874; The Florence P. Hall, 14 Fed. 408; Nester *v.* The City of Cleveland and The John Marten, 56 Fed. 729; The Hope and The Freddie L. Porter, 4 Fed. 80; The Carroll, 1 Ben. 286, 5 Fed. Cas. Co. 2451; The Genesee Chief *v.* Fitzhugh, 12 How. 443.

it appears that the opportunity to know, and the attention were equal.[14]

2. In Collision Cases. — A. Occurrences on Board. — In cases of collision, the testimony of persons on board of one of the vessels respecting their own acts, will be deemed to outweigh the statements of persons on the other vessel as to such acts;[15] and the testimony of witnesses on board of a sailing vessel as to the strength and direction of the wind, is more reliable than that of those on board a steamer with which she came in collision;[16] and the testimony of a steamer's officers as to her speed, is of more weight than

14. Dunning *v.* Bond, 38 Fed. 813; The Sammie, 69 Fed. 847, 13 C. C. A. 686; The Lizzie Henderson, 20 Fed. 524.

15. The Alexander Folsom, 52 Fed. 403, 3 C. C. A. 165; The Havana, 54 Fed. 411; The Express, 55 Fed. 340; Diming *v.* The Sam Sloan, 65 Fed. 125; The Gate City, 90 Fed. 314; The Isaac H. Tillyer, 101 Fed. 478; The Falcon, 8 Fed. Cas. No. 4619; Ayer *v.* The Glaucus, 4 Cliff. 166, 2 Fed. Cas. No. 683; The Governor, Abb. Adm. 108, 10 Fed. Cas. No. 5645; The Neptune, Olc. 483, 17 Fed. Cas. No. 10,120; The Northern Warrior, 1 Hask. 314, 18 Fed. Cas. No. 10,325; The Osceola, Olc. 450, 18 Fed. Cas. No. 10,602; Whitney *v.* The Empire State, 1 Ben. 57, 29 Fed. Cas. No. 17,586.

Testimony of Crew of Moving Vessel. — Courts of admiralty are generally inclined to accept the statements of a crew, as to the movement of their own ship, rather than those coming from those on board another vessel. The Hope and The Freddie L. Porter, 4 Fed. 89. In attempting to gather the actual facts of a collision from the contradictory testimony of witnesses, the testimony of the crew of each vessel, with regard to her course, and the various orders given to and executed by the wheelman and engineer, should be credited in preference to the testimony of an equal number of witnesses upon another vessel relating to her movements as they appeared to them. The Alberta, 23 Fed. 807. The evidence of witnesses on board of a sailing vessel as to her course and maneuvers, is entitled to more weight that that of an equal number who were not on board. The Marion W. Page and The Missouri, 36 Fed. 320. Witnesses upon a vessel in motion, looking at another also in motion, cannot determine by the eye, unaided otherwise, with reliable exactness, either her course, distance, or speed. The Narragansett, Olc. 246, 17 Fed. Cas. No. 10,019. The testimony as to the course and deflections of a vessel of those who hold her helm is entitled to more weight than those on board another moving vessel. McNally *v.* Meyer, 5 Ben. 230, 16 Fed. Cas. No. 8909. In the absence of impeaching testimony, a vessel's own witnesses as to her maneuvers are more trustworthy than the evidence of persons on another moving vessel. The Philadelphia, 61 Fed. 862; The Rita, 88 Fed. 523; Hall *v.* The Buffalo, Newb. Adm. 115, 11 Fed. Cas. No. 5927; The Herbert Manlin, 14 Blatchf. 37, 12 Fed. Cas. No. 6309. The testimony of the officers and crew of each vessel, as to the number of whistles blown upon their own vessel, is to be believed in preference to that of an equal number of witnesses upon the other vessel. The Milwaukee, Brown Adm. 313, 17 Fed. Cas. No. 9626. A vessel is not to be held free from an alleged fault whenever her officers and crew testify that they did not commit it; but if their evidence is direct, positive, consistent, and in accord with the natural course of events, it is not to be set aside because not in harmony with the testimony of observers upon other vessels. The Gypsum Prince, 67 Fed. 612.

16. The Genesee Chief *v.* Fitzhugh, 12 How. 443; The Hammonia, 4 Ben. 575; 11 Fed. Cas. No. 6005; The Hansa, 5 Ben. 501, 11 Fed. Cas. No. 6037.

the opinions of witnesses on other boats.[17] The evidence of witnesses on board a tug and tow as to the actual shortening of the tow line must prevail over the estimates of lookers-on, as to the length of the line.[18]

B. Relative Position of Vessels. — Facts tending to fix the relative position of vessels proved by those on board of them are allowed more weight than the opinion of outnumbering lookers-on.[19] The testimony of the master of a vessel, at her wheel, as to the relative positions of the vessels, is entitled to greater weight than that of seamen on the bow of the other vessel.[20] Witnesses upon one vessel in motion are not reliable as to the relative position and course of an approaching vessel.[21] The testimony as to the relative course and deflections of a vessel of those who hold her helm is entitled to more weight than the testimony of those on board the other vessel.[22] Calculations based on the assumed position of vessels, just before collision, must give way to the positive testimony of eye-witnesses.[23] Witnesses on a fleet of moored flatboats collided with have the greater weight as to her position.[24]

C. Credibility of Witnesses. — The general veracity of witnesses to a collision should not be impeached because of different statements of attendant incidents.[25] A witness supported by his previous deposition, though not on file, will be believed rather than one whose previous deposition does not support his testimony.[26] Where there is an irreconcilable conflict in the evidence of the crews of the colliding vessels, the testimony of disinterested witnesses in a position to see what took place, should govern the case.[27] Evidence of disinterested witnesses in favor of the libellant is not overcome by the testimony of an equal number of interested witnesses for the respondent.[28]

17. The Alexander Folsom, 52 Fed. 403.

18. Towboat No. 1, Norfolk and Western, 74 Fed. 906, 21 C. C. A. 169.

19. The Postboy, 19 Fed. Cas. No. 11,303.

20. The Jeremiah, 10 Ben. 326, 13 Fed. Cas. No. 7289.

21. The Argus, Olc. 304, 1 Fed. Cas. No. 521; The Globe, 10 Fed. Cas. No. 5485; The Narragansett, Olc. 246, 17 Fed. Cas. No. 10,019.

22. McNally *v.* Meyers, 5 Ben. 239, 16 Fed. Cas. No. 8909.

23. The John Craig, 66 Fed. 596.

24. The Hunter No. 2, 22 Fed. 795.

25. Cause of Difference. — The confusion and disturbance consequent on the occurrence would naturally tend to prevent such distinct observation as would enable the eye-witnesses to give concurrent descriptions. Corks *v.* The Belle, 6 Fed. Cas. No. 3231a.

26. Contradictory Affidavits. — The testimony of a witness who has made contradictory affidavits, is of too little weight to warrant the reopening of a suit *in rem* for his examination. The Newport, 38 Fed. 669; Hall *v.* The Buffalo, Newb. Adm. 15, 11 Fed. Cas. No. 5927.

27. The Annie J. Pardee, 25 Fed. 155; The Pacific, 53 Fed. 501; Roanoke N. & B. S. S. Co. *v.* The Lucy, 44 Fed. 938; The Ciampa Emila, 53 Fed. 155, 3 C. C. A. 481; The Charles H. Trickey, 66 Fed. 1020, 14 C. C. A. 225; The M. M. Chase, 2 Hask. 270, 17 Fed. Cas. No. 9684; The Express, 55 Fed. 340; Wells *v.* The Ann Caroline, 29 Fed. Cas. No. 17,389.

28. Laing *v.* The G. L. Buckman, 14 Fed. Cas. No. 7988.

a. *Facts and Inferences Relating to Credibility.* — Where the testimony as to the facts of the collision is irreconcilable, the side will be preferred which is corroborated by the facts and probabilities of the case,[29] and by improbabilities discrediting the witnesses

29. The Freddie L. Porter, 4 Fed. 89; The Express, 55 Fed. 340; Nester *v.* The City of Cleveland and The John Marten, 56 Fed. 729.

Case Governed by Facts and Probabilities. — Where there is an irreconcilable conflict of testimony courts must be governed chiefly by undeniable and leading facts, if such exist in the case. The Hope, 4 Fed. 89; and will dispose of the matter rather by a consideration of the conceded facts and the probabilities of the situation than by an attempt to reconcile the testimony. Nester *v.* The City of Cleveland, 56 Fed. 729. And where the theory of a collision as given by one vessel is unreasonable and inconsistent, and that of the other vessel is simple and consistent, the court will adopt the latter. The Carroll, 1 Ben. 286, 5 Fed. Cas. No. 2451.

Conflict As to Weather. — Where the testimony of witnesses from the two colliding vessels was in irreconcilable conflict as to the condition of the weather, superior credit was due to those witnesses who were sustained by collateral evidence concerning material subsidiary points respecting the force of the wind and time of the commencement of the rain, storm, and gale. The Florence Hall, 14 Fed. 408.

Probability and Improbability. If it is impossible to accept the statements of both crews and harmonize them, yet, where the testimony on one side seems to be natural and carries with it an appearance of probability, while that on the other requires belief in the performance of an act by a master who was a trained seaman of which he must have known the folly and madness, the former testimony will be accepted. Peterson *v.* The Wayne, 37 Fed. 808. The testimony of the crew of a vessel as to the collision with another will be overcome by that of the crew of the latter and of disinterested witnesses, and by the circumstances and inherent probabilities of the case supporting the latter. The Pacific, 53 Fed. 501. Where the testimony is evenly balanced, that theory of the case will be adopted which is most in accordance with the probabilities. The Iroquois, 91 Fed. 173. In such case the court will take into consideration the probabilities and presumptions based upon the skill, knowledge and ability of the crews of the respective vessels; which was the better manned, and the less likely to make a mistake. The Genevieve, 96 Fed. 859.

Direction of the Wind. — Where the recorded official observations of the keepers of a lighthouse and a lightship agree and fix with reasonable certainty the direction of the wind at the time and place of a collision, such evidence will be accepted, rather than the testimony of the crew of either vessel, when the testimony of the two crews conflicts. The Queen Elizabeth, 100 Fed. 874.

Lights on Opposite Vessel. — In a suit for collision in the nighttime, where the officers on watch on one of the vessels and her lookout testify that no colored side light was visible on the other vessel until immediately before the collision, to indicate that she was in motion, or on her course, and there is nothing to indicate negligence on their part, and the management of the vessel was consistent with such fact, but directly contrary to the navigation rule and the practice of good seamanship if such light were seen, their testimony is entitled to greater weight than of casual observers who had no interest in the matter. The Lansdowne, 105 Fed. 436. The well-sustained testimony of two lookouts on a colliding vessel that no light was burning on the vessel with which she collided, will prevail as against the inference that a light which was burning in a strong wind at midnight was also burning four hours later. The Horace B. Parker, 71 Fed. 989.

upon the other side;[30] or by the demeanor of the witnesses, and their disagreement on one side.[31] The well-sustained testimony of witnesses on one side will be preferred when only opposed by inference drawn from facts, sworn to by witnesses on the other side.[32]

b. *Caution As to Testimony.* — Where all upon one vessel were lost, the testimony of those on the other, considering the natural bias of the witnesses, should be received with caution, and not adopted beyond what is consistent, rational and probable.[33] In collision cases, the testimony of passengers who have no practical knowledge of seamanship should be received with caution.[34]

c. *Positive and Negative Testimony.* — The testimony of witnesses, so situated that they cannot be mistaken in regard to a fact connected with the collision, to which they testify positively, is entitled to greater weight than that of witnesses testifying to the negative who might be mistaken.[35]

d. *Absence of Testimony.* — In a collision case, where there is a dispute about lights and their bearings, the absence of the testimony of a proper lookout, has very great weight against the vessel not producing it;[36] and the failure of a vessel to call a witness who had charge of its lights, the absence of which is alleged as a fault, warrants the inference that its evidence would have weakened its case.[37] Where the testimony for the libellant and that of officers

30. Peterson *v.* The Wayne, 37 Fed. 808; The Carroll, 1 Ben. 286, 5 Fed. Cas. No. 2451; The Narragansett, Olc. 246, 17 Fed. Cas. No. 10,019. **Discredit of Libellant's Witnesses.** Where the testimony was in direct and irreconcilable conflict, and the testimony of libellant's witnesses was discredited because of improbabilities of the case attempted to be established by them, the libel was dismissed. The Leverson, 10 Fed. 753.

31. Dickinson *v.* The Gore, Newb. Adm. 45, 7 Fed. Cas. No. 3893.

32. Inference From Circumstantial Facts. — Inference from circumstantial facts in favor of the respondent will not prevail over the positive statements of the witnesses for the libellant where their testimony is not of such a character as to impute to them willful false swearing as to the light upon their vessel. The Wenona, 19 Wall. 41. Mathematical inferences from differing logs made prior to a collision were not sufficient to break the force of the direct testimony as to the identity of the vessel collided with by a steamer. The Newport, 36 Fed. 910.

33. The Columbia, 27 Fed. 704.

34. Klots *v.* The Red Jacket, 14 Fed. Cas. No. 7871.

35. Weight of Positive and Negative Testimony. — Where eleven witnesses are so situated that they cannot be mistaken in regard to a fact to which they testify, and their testimony is to a positive fact, the weight of evidence is in favor of that fact, although other disinterested witnesses contradict it, testifying to a negative fact, there being ground for believing that they might have been mistaken. The Lizzie Henderson, 20 Fed. 524. Testimony of persons on board a vessel that they felt a shock, and, going on deck, saw another vessel lying close under her counter, is sufficient to sustain a finding that a collision had occurred when opposed only by the negative testimony of persons on the other vessel that they were watching and saw no collision, and that the vessels were 10 or 15 feet apart all the time. The Sammie, 69 Fed. 847.

36. The Rahboni, 53 Fed. 952.

37. The Ville Du Havre, 7 Ben. 328, 28 Fed. Cas. No. 16,943.

for the libelled ship conflict, the absence of the testimony of one of the officers of the ship goes to the discredit of the ship's officers.[38] In an action for collision, where the defense was an alibi, the unexcused absence of a witness on the libellant's boat, who was known to have ascertained by inspection the name of the colliding boat, warrants the presumption that his testimony would not support the libellant, which will control the case where the testimony conflicts.[39]

3. In Cases of Seamen. — Upon a libel against a vessel for wages, an affidavit of an agent of a vessel that she is a foreign vessel will not overcome the oath of the libellant that she is an American vessel, so as to entitle the claimant to a dismissal of the libel.[40] Upon a joint libel by a ship's crew, their testimony, each for the other, will be received with great caution, and the court will be inclined to credit the master's testimony to the contrary if he has no interest in the action.[41] Upon a libel by seamen for damages for short allowance, where discrepancies exist in their testimony, the testimony of the officers in contradiction thereof, sustained by the fact that provisions were left at the end of the voyage, is entitled to greater weight, and will defeat the libel.[42] The testimony of the crew of the vessel as to the order in which goods were laden on board the vessel has less weight than the delivery book of the cargo showing a contrary order.[43]

4. Position of Blockading Vessel. — The testimony of the officers of a blockading vessel boarding it near the blockaded port, has more weight as to her position, than that of officers of the vessel boarded, who were not well acquainted with the place.[44]

5. Circumstantial Evidence. — A vessel may be condemned for violation of law upon circumstantial evidence, where the circumstances are sufficiently numerous and strong,[45] and its identity may

38. The Sandringham, 10 Fed. 556.

39. The Fred M. Lawrence, 15 Fed. 635.

40. Armstrong *v.* The Rydesdale, 1 Fed. Cas. No. 547.

41. Caution As to Testimony of Libellant. — The testimony of libellants, the one for the other, in an action *in rem*, although legally admissible, ought to be narrowly scrutinized and received with caution. Graham *v.* Hoskins, Olc. 224, 10 Fed. Cas. No. 5669; The Swallow, Olc. 334, 23 Fed. Cas. No. 13,665.

42. The Pactolas, 88 Fed. 299.

43. Llado *v.* The Tritone, 15 Fed. Cas. No. 8427.

44. The Newfoundland, 89 Fed. 510.

45. Circumstances Outweighing Positive Testimony. — Circumstances will sometimes outweigh positive testimony. The Brig Struggle, 9 Cranch, 71. In this case the court said: "Although mere suspicion not resting upon strong circumstances unexplained, should not be permitted to outweigh positive testimony in giving effect to a penal statute; yet it cannot be regarded as an oppressive rule to require of a party who has violated it to make out the *vis major* under which he shelters himself, so as to leave no reasonable doubt of his innocence; and if in the course of such vindication he shall pass in silence, or leave unexplained circumstances which militate strongly against the integrity of the transaction, he cannot complain if the court shall lay hold of those circumstances as reasons for adjudging him *in delicto*." In The Robert Edwards, 6

be shown by strong circumstances justifying the presumption thereof.[46] Circumstances which warrant a suspicion of illegal conduct are sufficient to show probable cause for the capture of a vessel,[47] and the illegality of a ship's voyage may be shown from circumstantial evidence raising a strong presumption thereof.[48] Upon a question of collusive capture, the court will condemn to the United States, even against positive evidence, if the collusion is evident from the circumstances;[49] but if the circumstances are consistent with the innocence of the captors, the condemnation will go to them.[50] Positive evidence adduced by the claimant upon a libel for forfeiture, may be neutralized by suspicious circumstances.[51] The positive testimony of accomplices in the offense for which a vessel is libelled, is to be viewed with distrust, and may be outweighed by circumstances which they have not explained.[52]

XII. EVIDENCE UPON APPEAL.

1. In Circuit Court. — A. Trial de Novo. — Admiralty causes are tried *de novo* in the circuit court on appeal from the district court,[53] and for that reason the record upon such appeal need not

Wheat. 187, the court said: "The court has been reminded that it ought not, without the most satisfactory and positive proof, in a case so highly penal, to decide that a violation of the law has been committed. Although such proof may generally be desirable, we are not to shut our eyes on circumstances which sometimes carry with them a conviction which the most positive testimony will sometimes fail to produce. And if such circumstances cannot well consist with the innocence of the party, and arise out of her own conduct, and remain unexplained, she cannot complain if she be the victim of them." Circumstances altogether inconclusive, if separately considered, may by their number and joint operation, especially when corroborated by moral coincidence, be sufficient to constitute conclusive proof. The Reindeer, 2 Wall. 383.

46. The Jane *v.* U. S., 7 Cranch 363.

47. The George, 1 Mas. 24, 10 Fed. Cas. No. 5,328.

48. The Schooner Adeline and Cargo, 9 Cranch 285; The Cheshire, Blatchf. Pr. Cas. 151, 5 Fed. Cas. No. 2655; The Joseph H. Toone, Blatchf., Pr. Cas. 223, 13 Fed. Cas. No. 7541; The Spring Bok, Blatchf. Pr. Cas. 434, 22 Fed. Cas. No. 13,264; The Stephen Hart, Blatchf., Pr. Cas. 387, 22 Fed. Cas. No. 13,364.

49. The George, 2 Wheat. 278.

50. The Bothnea, 2 Wheat. 169.

51. Nelson *v.* U. S., Pet. C. C. 235, 17 Fed. Cas. No. 10,116.

52. The Brig Struggle, 9 Cranch 71.

53. The Morning Star, 14 Fed. 866; The Ethel, 31 Fed. 576; The Cassius, 41 Fed. 367; The Saratoga, 1 Woods 75, 21 Fed. Cas. No. 12,356; The Hesper, 122 U. S. 256; The Louisville, 154 U. S. 657; 250 Barrels of Molasses *v.* U. S., 1 Chase 502, 21 Fed. Cas. No. 14,293; Ayer *v.* The Glaucus, 4 Cliff. 166, 2 Fed Cas. No. 683; Reppert *v.* Robinson, Taney 492, 20 Fed. Cas. No. 11,703; Warren *v.* Moody, 9 Fed. 673; Anonymous, 1 Gall. 22, 1 Fed. Cas. No. 444; Weaver *v.* Thompson, 1 Wall. Jr. 343, 29 Fed. Cas. No. 17,311; The Charles Morgan *v.* Kouns, 115 U. S. 69; The City of Lincoln, 19 Fed. 460; Mason *v.* Ervine, 27 Fed. 240; The Montana, 22 Fed. 730; The Thomas Melville, 34 Fed. 350; The Lucille, 19 Wall. 73; The Rover, 2 Gall. 240, 20 Fed. Cas. No. 12,091.

contain the evidence, or an agreed statement of facts, in order to sustain the appeal.[54]

B. Burden of Proof Upon Appeal. — The burden of proof upon questions of fact is upon the appellant,[55] and he has the burden to offer new and materially important testimony to support new allegations without contradicting the former evidence.[56]

C. New Evidence. — a. *Admissibility.*—New evidence is admissible upon appeal to the circuit court,[57] and time will be given to produce it, where it appears that the appellant was not guilty of laches in failing to produce it in the court below.[58]

b. *Caution As to New Evidence.* — The circuit court is cautious in permitting new matter of defense or allegation to be introduced, where the facts are not new or newly discovered, and were known in the district court;[59] and the appellant will not be allowed to produce testimony which he deliberately withheld in the court below.[60] New testimony upon appeal, unless the circumstances are peculiar, is not entitled to the same consideration as testimony introduced in the first instance,[61] and if the failure to produce it in the district court is not excused, new evidence is subject to suspicion in the circuit court.[62]

c. *New Evidence After Default.* — Where the claimants put in no testimony in the district court, and the case went upon the pleadings and the testimony of the libellant, the claimants will not be allowed to introduce upon appeal, the evidence of witnesses who

54. Practice Disapproved. — The practice of bringing admiralty cases into the circuit court by appeal, without the evidence upon facts found by the district courts is disapproved. Gloucester Ins. Co. *v.* Younger, 2 Curt. 322, 10 Fed. Cas. No. 5487; The Ethel, 31 Fed. 576.

55. Libellant As Actor. —The decree of the district court being suspended by the appeal, and the case proceeding *de novo* in the circuit court, the libellant is the actor, having the affirmative, and must make out the allegations of his libel. The Morning Star, 14 Fed. 866.

Burden of Proof As to Damages. On appeal, where damages are discretionary, the burden of proof is on the appellant to show some clear mistake or error in the court below, either in awarding excessive damages, or in promulgating an incorrect rule of law. Cushman *v.* Ryan, 1 Story 91, 6 Fed. Cas. No. 3515.

56. Rose *v.* Himely, Bee 313, 20 Fed. Cas. No. 12,045; Carrigan *v.* The Charles Putnam, Wall. Jr. 307; The Morning Star, 14 Fed. 866.

57. Testimony on Both Sides. Additional testimony may be taken on both sides in the circuit court and the court will protect the rights of the parties where amendments are allowed. The Ethel, 31 Fed. 576.

58. Rose *v.* Himely, Bee. 313, 20 Fed. Cas. No. 12,045.

59. Merits of Controversy. — The power of the court, upon appeal, to allow amendments to the pleadings so as to let in new evidence and new grounds of defense, ought only to be exercised to bring the merits of the controversy fairly before the courts. Reppert *v.* Robinson, Taney 492, 20 Fed Cas. No. 11,703; Coffin *v.* Jenkins, 3 Story 108, 5 Fed. Cas. No. 2948.

60. The Saunders, 23 Fed. 303.

61. Taylor *v.* Harwood, Taney 437, 23 Fed. Cas. No. 13,794.

62. The Busy, 2 Curt. 586, 4 Fed. Cas. No. 2232.

were present at the trial, but may take the depositions of witnesses who were not present, though procurable.[63]

D. Decision of District Court Upon Conflicting Evidence. The decision of the district court upon a controverted question of fact will not be reversed by the circuit court unless clearly contrary to the preponderance of the evidence,[64] and where the witnesses were examined in open court, and the question depended upon the credibility of conflicting witnesses, the circuit court will not interfere with the decision of the district court.[65] The circuit court will not interfere with the amount of an allowance by the district court unless strikingly out of proportion to the service or damage.[66]

E. Libel for Newly Discovered Evidence. — In the absence of any rule preventing it, a libel will lie in the circuit court to review a decree in admiralty for newly discovered evidence which would change the result.[67]

F. Commission to Take Testimony. — A commission to take testimony cannot be issued by the circuit court after an appeal has been taken from its decree, until after the supreme court has decided the question as to the admissibility of the evidence.[68]

G. Deposition Not Made Part of Record. — A deposition, entitled in the district court, but not received by the clerk until after the trial there, and not sent up as a part of the record of that court, cannot be read on appeal in the circuit court.[69]

2. In Circuit Court of Appeals. — A. Appeals, How Governed. Appeals to the circuit court of appeals from the district court and circuit court in admiralty cases are not governed by the law of

63. The Stonington, 25 Fed. 621.

64. Cooper *v.* The Saratoga, 40 Fed. 509; Duncan *v.* The Governor Francis T. Nichols, 44 Fed. 302; Mentz *v.* The Sammy, 44 Fed. 624; The Albany, 48 Fed. 565; The Parthian, 48 Fed. 564; The Alejandro *v.* Wallace, 56 Fed. 621; Davidson *v.* Sealskins, 2 Paine 324, 7 Fed. Cas. No. 3661; Palmer *v.* Dallet, 18 Fed. Cas. No. 10,689; Taylor *v.* Harwood, Taney 437, 23 Fed. Cas. No. 13,794; The Grafton, 1 Blatchf. 173, — Fed. Cas. No. 5655; The Sampson, 4 Blatchf. 28, 21 Fed. Cas. No. 12,270; The Sunswick, 5 Blatchf. 280, — Fed. Cas. No. 13,625; Guimarais' Appeal, 28 Fed. 528; The Thomas Melville, 36 Fed. 708; Baker *v.* Smith, 1 Holmes 85, 3 Fed. Cas. No. 781; The Maggie P., 25 Fed. 202; Levy *v.* The Thomas Melville, 37 Fed. 271; Hill *v.* The Emma Peterson, 12 Fed. Cas. No. 6490; The Royal Arch, 22 Fed. 457.

65. Credibility of Witnesses. — A decision turning upon the credibility of witnesses will not be disturbed though the testimony believed by the district judge may seem improbable. The Saratoga, 40 Fed. 509; The Alhambra, 33 Fed. 73; The Rockaway, 25 Fed. 775; Downes *v.* The Excelsior, 40 Fed. 271; The Wilhelm, 52 Fed. 602.

66. The Narragansett, 1 Blatchf. 211, 17 Fed. Cas. No. 10,017; The Mayflower, 1 Brown Adm. 376, 16 Fed. Cas. No. 9345; Scott *v.* 445 Tons of Coal, 40 Fed. 260; The Albany, 48 Fed. 565; Scott *v.* The City of Worcester, 45 Fed. 119; The Delaware, 6 Blatchf. 527, 7 Fed. Cas. No. 3761.

67. Jackson *v.* Munks, 58 Fed. 596.

68. The Ocean Queen, 6 Blatchf. 24, 18 Fed. Cas. No. 10,411.

69. The Buckeye State, 1 Brown Adm. 65, 4 Fed. Cas. No. 2085.

1875, which regulates appeals to the supreme court on questions of law alone.[70]

B. Trial de Novo. — Appeals from the district court to the circuit court of appeals are governed by the same principles as former appeals to the circuit court, and the case is brought up for a trial *de novo*;[71] upon every issue made by the pleadings, as well those against the appellant, as those determined in his favor;[72] though in the Fifth Circuit ordinary appeals in admiralty are not tried *de novo*.[73]

C. Record Upon Appeal. — The testimony taken in the district court must be returned with the record to the circuit court of appeals, notwithstanding findings of fact, and if not so returned, the appeal will be dismissed unless error of law otherwise appears upon the record.[74] When, owing to the lack of a rule or practice in the district court to reduce the evidence to writing, it cannot be brought up in a proper manner, the cause will not be tried *de novo* in the circuit court of appeals.[75] The record should be so prepared as to show which witnesses were examined in the presence of the district judge, and which were not.[76] The circuit court of appeals cannot be required to review the testimony when the record is not made up as required by the Admiralty Rule.[77] *Certiorari* will lie

70. The Havilah, 48 Fed. 684, 1 C. C. A. 77; The State of California, 49 Fed. 172, 1 C. C. A. 224; The Philadelphian, 60 Fed. 423.

71. The M. M. Morrill, 83 Fed. 215, 48 U. S. App. 656; Gilchrist *v.* Chicago Ins. Co., 104 Fed. 566, 46 C. C. A. 43.

72. Gilchrist *v.* Chicago Ins. Co., 104 Fed. 566, 46 C. C. A. 43.

73. Rule in Fifth Circuit. — Under Rule 8 of the Circuit Court of Appeals for the Fifth Circuit, the practice in admiralty appeals is not like that formerly existing in the circuit courts under Adm. Rule 49, but like the supreme court practice. The Beeche Dene, 55 Fed. 526, 5 C. C. A. 208.

74. The M. M. Morrill, 83 Fed. 215, 48 U. S. App. 656.

75. Evidence Not Supplied. — Where the evidence was not preserved, it could not be included in the record; and where the proctor for the appellant sought to supply it by retaking the testimony before a notary upon notice, without the presence of the other party, the judge properly declined to certify the evidence so taken, and it cannot be considered upon the appeal, and under the peculiar circumstances of the case, the cause was remanded with instructions to grant a new trial, but without regarding such proceeding as a precedent. The Glide, 72 Fed. 200.

Evidence Required to Be in Writing. — The Act of Congress of March 3, 1803, as it appears in U. S. Rev. Stat. § 698, requiring proofs in the circuit court, in cases intended for a review of the facts of an appeal, to be reduced to writing, applies to appeals to the circuit court of appeals; but in any case in which all the proofs are not reduced to writing in the district court, and no equivalent is found in the record, the circuit courts of appeal have no power except to decline to try the facts anew, as they have no power to prescribe rules for the district courts. The Philadelphian, 60 Fed. 423, 9 C. C. A. 54.

76. The Gypsum Prince, 67 Fed. 612, 14 C. C. A. 573.

77. Judge's Note of Testimony. Where the record contains only the judge's note of testimony, and there is no stipulation that anything may be omitted, the testimony will not be reviewed. The Alijandro *v.* Wallace, 56 Fed. 621, 6 C. C. A. 54.

to require the clerk of the district court to include in the record, and properly certify documents which were used in evidence but have been omitted from the record.[78]

D. New Evidence. — a. *When Allowed.* — New evidence will be admitted in the circuit court of appeals[79] when it is of the opinion that substantial justice requires it, although a satisfactory excuse is not given for failure to take the testimony below.[80] Further proof will be allowed in proper cases appealed from the district court,[81] and evidence not intentionally withheld on the trial, or omitted through gross negligence, will be admitted.[82]

78. The Margaret B. Roper, 106 Fed. 740, 45 C. C. A. 577.

79. The Philadelphian, 60 Fed. 423, 9 C. C. A. 54; The Sirius, 54 Fed. 188, 4 C. C. A. 273; The Red River Line *v.* Cheatham, 60 Fed. 517, 9 C. C. A. 124.

Rules Not Affecting New Evidence. — A rule of the circuit court of appeals requiring an assignment of errors in admiralty cases does not prevent the court from permitting new evidence upon appeal, or new pleadings, in proper cases. Chicago Ins. Co. *v.* Graham etc. Transp. Co., 108 Fed. 271. A rule authorizing new proofs only on cause shown, will not be enforced against a party whose case was tried in the district court prior to the rule, relying upon the right to produce new testimony upon appeal which was then admissible; and new evidence will be allowed which was not intentionally withheld in the district court. The Venezuela, 52 Fed. 873.

New Evidence in Admiralty and Prize Cases. — U. S. Rev. Stat. § 698, prohibiting the reception of new evidence in the supreme court on appeal, except in admiralty and prize cases, applies to the U. S. circuit courts of appeals and was not repealed by the Act of Congress of February, 1875, taking from the supreme court the review of findings of facts in admiralty appeals from circuit courts but was left in force, with the exception of such appeals; and in an admiralty suit appealed to the United States circuit court of appeals from a district court, leave will be granted to take and file further proof in a proper case.

New Evidence in Collision Cases. In a collision case, involving the conduct of a French vessel, the records of the French consulate were admissible as new evidence upon appeal so far as containing statements made by the master in the course of examination before the consul, a copy of which has been served on the opposite party as the master's protest; but in so far as containing statements of the crew, it was only admissible in contradiction of testimony given by them at the trial, to which their attention was called upon cross-examination. The Lisbonense, 53 Fed. 293.

80. **Evidence Received Without Objection.** — It is not a matter of course to allow evidence to be introduced upon appeal which was available in the district court, but such evidence will be received without excusing its non-production below, where neither side has objected, and where it has been the practice to take it in such case without such excuse; and, where, in view of such practice, no objection was interposed by the appellee to the taking of new proof, until such taking was completed, a motion thereafter made to suppress the deposition, will be denied. Singlehurst *v.* La Compagnie Generale Transatlantique, 50 Fed. 104.

81. The Philadelphian, 60 Fed. 423, 9 C. C. A. 54.

82. **Illness of Claimant.** — Where a claimant in an admiralty case failed to appear and bring his witness because of illness, and his defense was therefore not developed, the circuit court of appeals will allow his testimony to be taken under a commission. The Glide, 68 Fed. 719; The Venezuela, 52 Fed. 873, 5 C. C. A. 159.

b. *When Not Allowed.* — Additional evidence of a witness examined below cannot be produced in the circuit court of appeals;[83] and the court will strike from the files, depositions taken on appeal by a party who might easily have produced them in the trial court, and who was then well informed as to the importance of the evidence.[84] Where the court is unable to reach a satisfactory conclusion from the evidence, the case may be remanded to the district court for further proofs.[85]

c. *Mode of Taking Evidence.* — Under rules conforming the practice to that of the supreme court, a deposition *de bene esse* cannot be taken as new evidence in the circuit court of appeals, and new evidence therein can only be taken by commission issued by order of the court according to rule 12 of the supreme court.[86]

E. Decision of Lower Court. — The circuit court of appeals has power to re-examine the decision of the lower court upon the facts,[87] and will reverse a decision which is against the preponderance of the evidence.[88] But the findings of fact made by the lower

83. Additional Testimony of Libellant. — A deposition of the libellant taken subsequent to the appeal will be suppressed, where he testified concerning the matter referred to therein on the trial in the court below, and no grounds are shown for introducing additional proof. The Sirius, 54 Fed. 188. Additional testimony of a witness examined below cannot be produced on an appeal in admiralty. The Venezuela, 52 Fed. 873.

84. Non-Prevention of Evidence. Where the party who took such depositions upon appeal was not prevented from presenting it on the trial below, except from his own choice, was informed as to its materiality, and was expressly notified, by a motion to dismiss, that the other party contended that his proof in respect to the matter as to which such testimony was introduced was insufficient, the depositions were properly stricken from the file upon motion. The Lurline, 57 Fed. 398.

85. The Carbonero, 106 Fed. 329; Smith *v.* Elmer E. Wood Transp. Co., 103 Fed. 685.

86. Showing Required. — The commission under rule 12 of the supreme court should not issue, as a matter of course but only when it appears that the testimony is material, and no commission will issue but upon interrogatories and notice to the opposite party. The Beeche Dene, 55 Fed. 525; The Glide, 68 Fed. 719.

87. Cleveland *v.* Chisholm, 90 Fed. 431; The Anaces, 106 Fed. 742; The Natchez, 73 Fed. 267, 19 C. C. A. 500.

Finding of Fact Not Conclusive. The circuit court of appeals is not bound by a finding of fact made by the court below in an admiralty case, but it is its duty, under the statute giving the right of appeal, to determine such question in accordance with the convictions formed from the record by the judges sitting on the appeal. The Columbian, 100 Fed. 991.

88. The Columbian, 100 Fed. 991, 41 C. C. A. 150.

Findings Against Probabilities of the Case. — The general rule that findings of fact of the district judge in admiralty on conflicting oral evidence given in his presence will not be disturbed on appeal, is not without exception; and when he has rejected the positive testimony of witnesses who were in the best position to know exactly what the truth was as to a disputed fact, and has accepted the testimony of others whose opportunity to know the truth was manifestly not as good upon the express ground that the testimony rejected does not harmonize with some theory as to the movements of the vessel,

court will be presumed correct,[89] and the decision of the trial court upon conflicting evidence will be treated with great respect,[90] and will not be disturbed unless the court can clearly see that the decision was against the weight of the evidence.[91] The general rule that the decision of the trial court upon disputed questions of fact, where the witnesses were before it, will be accepted,[92] does not apply fully where the testimony was taken before an examiner.[93]

F. Rehearing. — A rehearing will not be granted by the circuit court of appeals upon newly discovered evidence, in the absence of any showing of sufficient reason why the facts were not ascertained and proved while the case was regularly open.[94]

3. In Supreme Court. — A. Act of 1875. — Since the Act of 1875 the facts found in the district and circuit courts are conclusive upon appeal to the supreme court, and only questions of law can be considered.[95] This act applies to appeals to the supreme court

or with the inherent probabilities of the case, the appellate court may review the testimony unembarrassed by the finding of such fact, since the personal equation of the witnesses does not assist in determining the probabilities of the case. The Albany, 81 Fed. 966.

Additional Testimony. — The decision will be reversed where additional testimony upon appeal changes the weight of the evidence. The Colorado, 59 Fed. 300.

89. The Coquitlam, 77 Fed. 744, 23 C. C. A. 438; The Anaces, 106 Fed. 742, 45 C. C. A. 596.

90. The Anaces, 106 Fed. 742, 45 C. C. A. 596.

91. The Phoenix, 58 Fed. 927, 7 C. C. A. 572; The Alijandro, 56 Fed. 621, 6 C. C. A. 54; The Wilhelm, 59 Fed. 169, 8 C. C. A. 72; Aktieselskabet Banan *v.* Hoadley, 60 Fed. 447, 9 C. C. A. 61; The Joseph Stickney, 56 Fed. 156, 5 C. C. A. 457; The Mary Lenahan, 63 Fed. 883; The Mont Clair, 67 Fed. 156; The P. I. Nevius, 67 Fed. 158, 14 C. C. A. 355; The Fair Wind, 64 Fed. 806, 12 C. C. A. 611; The Empire, 69 Fed. 101, 16 C. C. A. 161; The Robert Graham Dun, 70 Fed. 270, 17 C. C. A. 90; The Belle of the Coast, 69 Fed. 112, 15 C. C. A. 699; The City of Naples, 69 Fed. 794, 16 C. C. A. 421; Brown *v.* Prince Steam Shipping Co., 79 Fed. 999, 24 C. C. A. 678; The Mayflower, 80 Fed. 943; The E. Lukenback, 93 Fed. 841, 35 C. C. A. 628; Cleveland *v.* Chisholm, 90 Fed. 431, 33 C. C. A. 157; Elphick *v.* White Line Towing Co., 106 Fed. 945, 46 C. C. A. 56; The Newport News, 105 Fed. 389, 44 C. C. A. 541; Whitney *v.* Olson, 108 Fed. 292, 47 C. C. A. 31.

Decree Dismissing Libel. — A decree dismissing a libel for collision will be affirmed where the libellants did not establish their case by a preponderance of evidence though the judge rejected the theories of both parties and the court of appeals does not fully concur in its conclusions. The Joseph Stickney, 56 Fed. 156.

92. The Wilhelm, 59 Fed. 169, 8 C. C. A. 72; La Normandie, 58 Fed. 427, 7 C. C. A. 285; The Warrior, 54 Fed. 534, 4 C. C. A. 498; The Charles Hebard, 56 Fed. 315, 5 C. C. A. 516; The Royal, 54 Fed. 204, 4 C. C. A. 285; The Jersey City, 51 Fed. 527, 2 C. C. A. 365; The Express, 52 Fed. 890, 3 C. C. A. 342; The Nannie Lamberton, 85 Fed. 983, 29 C. C. A. 519; Cleveland *v.* Chisholm, 90 Fed. 431, 3 C. C. A. 157; Whitney *v.* Olson, 108 Fed. 292, 47 C. C. A. 31; The Anaces, 106 Fed. 742, 45 C. C. A. 596.

93. The Joseph B. Thomas, 86 Fed. 658, 30 C. C. A. 333.

94. Wineman *v.* The Iron Chief, 63 Fed. 289, 11 C. C. A. 196.

95. The City of New York, 147 U. S. 72; The Abbotsford, 98 U. S. 440; The Clara, 102 U. S. 200; The Benefactor, 102 U. S. 214; The Annie Lindsley, 104 U. S. 185; Collins *v.*

from the district court of Alaska sitting in admiralty.[96]

B. Prior Decisions. — a. *Trial de Novo.* — An admiralty cause in the supreme court was heard *de novo*, as if no sentence of condemnation had been pronounced in the circuit court.[97]

b. *New Evidence.* — Prior to the Act of 1875 the supreme court would hear new evidence upon appeal in admiralty cases, and award commissions to take such evidence,[98] but would not allow further evidence without a showing of satisfactory excuse for not examining the witnesses in the court below.[99] Prize causes were heard in the supreme court in the first instance on the evidence transmitted from the circuit court, upon which it determined

Riley, 104 U. S. 322; Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485; Watts *v.* Camors, 115 U. S. 353; The Maggie J. Smith, 123 U. S 349; The Gazelle, 128 U. S. 474; The Francis Wright, 105 U. S. 381; Merchants' Mut. Ins. Co. *v.* Allen, 121 U. S. 67; The John H. Pearson, 121 U. S. 469; The E. A. Packer, 140 U. S. 360; The Conqueror, 166 U. S. 110, 17 Sup. Ct. 510; Campaina de Navigacion la Fleecha *v.* Brauer, 168 U. S. 104, 18 Sup. Ct. 12; Wupperman *v.* The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753.

96. *In re* Cooper, 143 U. S. 472.

97. Hearing De Nove. — *Suspension of Sentence.*—Chief Justice Marshall said: "The majority of the court is clearly of the opinion, that in admiralty cases an appeal suspends the sentence altogether; and that it is not *res adjudicata* until the final sentence of the appellate court be pronounced. The cause in the appellate court is to be heard *de novo*, as if no sentence had been passed. This has been the uniform practice not only in cases of appeal from the district to the circuit courts of the United States, but in this court also. In prize causes the principle has never been disputed; and in the instance court, it is stated in 2 Browne's Civil Law, that in cases of appeal it is lawful to allege what has not before been proved. The court is, therefore, of the opinion that this cause is to be considered as if no sentence had been pronounced." Yeaton *v.* U. S., 5 Cranch 281.

98. Waiver of Objection to Record of Order. — Where a commission to take new evidence was issued in the usual form, and both parties joined in taking the evidence, neither can object to the evidence, because the record does not show that the court ordered the commission to issue. Rich *v.* Lambert, 12 How. 347; The James Wells *v.* U. S., 7 Cranch 22; The Clarissa Claiborne *v.* U. S., 7 Cranch 107; The Western Metropolis, 12 Wall. 389; The Argo, 2 Wheat. 287; The London Packet, 2 Wheat. 371; The Samuel, 3 Wheat. 77; Yeaton *v.* U. S., 5 Cranch 281.

99. Amendments of Pleadings. No substantial amendments to support further proofs would be allowed in the supreme court, but if the pleadings or evidence were defective and the case appeared to have merits, the court would reverse the decree and remand the case with directions to permit amendments and further proof. The Mabey, 10 Wall. 419; The Caroline, 7 Cranch 496; The Mary Ann, 8 Wheat. 380.

Insufficient Excuse. — The excuse that the party agreed that he would not introduce any testimony in the court below, and therefore did not, is sufficient to justify a commission to take testimony in the supreme court, which is never allowed as of course. The Mabey, 13 Wall. 738.

Excuse Necessary. — No order for commission can be granted upon application unless a sufficient excuse was shown for not taking the evidence the usual way before the courts below. The Juanita, 91 U. S. 366.

whether further proof should be allowed,[1] and would order further proof where necessary to decide upon the validity of a capture,[2] but would not allow further proof where the concealment of material papers appeared.[3]

c. *Depositions Taken in Circuit Court.* — Depositions taken under commission from the circuit court in admiralty, pending an appeal to the supreme court, were not admitted as part of the record upon appeal to the supreme court where no sufficient excuse was shown for not taking them in the usual way in the courts below, and no further proof had been ordered in the supreme court.[4]

4. In Other Courts. — A. Appeal From Territorial Court. An appeal from a territorial court sitting in admiralty is regulated by the rules of admiralty, and not by the territorial statutes.[5]

B. New Evidence. — New evidence was not received upon an appeal in admiralty in Oregon;[6] but in Washington Territory, new evidence was allowed to be introduced upon an appeal in admiralty from the territorial district court to the territorial supreme court.[7]

1. The London Packet, 2 Wheat. 371.

2. The Grotius, 8 Cranch 456; The Sir William Peel, 5 Wall. 517; The Venus, 1 Wheat. 112; The Friendschaft, 3 Wheat. 14; The Fortuna, 2 Wheat. 161.

3. The Fortuna, 3 Wheat. 236.

4. **Similar Showing Required As Upon Application in Supreme Court.** The supreme court cannot admit depositions taken under a commission issued from the circuit court except upon a similar showing of sufficient excuse to that which is required upon an application for a commission to take testimony in the supreme court. Leave was granted in this case to renew a motion to make the depositions taken in the circuit court pending the appeal a part of the record in case the defect of a want of a sufficient excuse could be supplied. The Juanita, 91 U. S. 366.

5. Braithwaite *v.* Jordan, 5 N. D. 196.

6. Cutler *v.* Columbus, 1 Or. 101.

7. Phelps *v.* The City of Panama, 1 Wash. Ty. 615.

ADMISSIBILITY.—See Competency; Relevency.

ADMISSIONS.

By John D. Works.

CROSS-REFERENCES.

Adverse Possession; Affidavits; Answer; Attorney and Client; Best and Secondary Evidence; Confessions; Declarations; Deeds; Depositions; Documentary Evidence; Duress; Dying Declarations; Interpreters; Parol Evidence; Partnership; Pleadings; Principal and Agent; Principal and Surety; Privileged Communications; Res Gestae.

I. DEFINITION AND NATURE OF ADMISSIONS.

Definition. — An admission, competent as evidence in a judicial action or proceeding, is a voluntary acknowledgment in express terms, or by implication, by a party in interest, or by another by whose statement he is legally bound, against his interest, of the existence or truth of a fact in dispute material to the issue.[1]

Distinguished from Confessions.—The term *admission* is distinguishable from that of *confession*. The former is applied to civil transactions and to matters of fact in criminal cases not involving criminal intent, the latter to acknowledgments of guilt in criminal cases.[2]

Must Be Voluntary. — One of the elements of a binding admission, as above defined, is that it must be voluntarily made. Therefore, if it is made under duress, or coercion of any kind, as where one is called as a witness and required to testify, there is a material difference between civil and criminal cases in respect of the right to prove admissions so made. In the former, there is no valid reason why the statement made under oath, as a witness, should not be provable against a party, the same as if made voluntarily, in the strict sense. But if attempted to be used to criminate himself in a criminal case, the rule is different. Such statements cannot be used to incriminate the party making them on the same principle and for the same reason that he could not be compelled to answer a question on the witness stand if his answer would tend to incriminate him.[3]

1. **Definitions.**—Admissions are "concessions or voluntary acknowledgments, made by a party of the existence or truth of certain facts." Bouvier's Law Dic.

"Recognition as fact or truth; acknowledgment, concession; also the expression in which such assent is conveyed." Anderson's Law Dic.

"In the law of pleading and evidence an admission is an acknowledgement that an allegation is true." Rapelje & Lawrence Law Dic.

"A statement, oral or written, suggesting any inference as to any fact in issue, relevant, or deemed to be relevant, to any such fact, made by or an behalf of any party to any proceeding." Stephens' Dig. of Ev., 39.

2. Greenl. Ev., § 170; Stephens' Dig. of Ev., 39, 52; Notara *v.* De Kamalaris, 22 Misc. 337, 49 N. Y. Supp. 216; Chamberlayne's Best on Ev., § 523.

3. **Cannot be used to Criminate.** 1 Greenl. Ev., § 193; Collett *v.* Lord Keith, 4 Esp. 212; State *v.* Senn, 32 S. C. 403, 11 S. E. 292; McGahan *v.* Crawford, 47 S. C. 566, Car. 566, 25 S. E. Rep. 123; Collins *v.* Wilson, 18 Ky. Law 1049, 39 S. W. 33.

In State *v.* Senn, 32 S. C. 403, 11 S. E. 292, the question was as to whether testimony given by defendant in a criminal action before the coroner's jury, at a time when he was not charged with the crime, could be given against him upon the trial of the case. In speaking to the question, the court said: "To be admitted in evidence, confessions, or declarations in the nature of confessions, must be voluntary; and therefore, when made under the charge of crime, they are not, as a rule, regarded voluntary. But it has never been doubted that declarations made by one not a party, but in a prosecution against another, are deemed voluntary, and, as such, may be subsequently used against him, as in the case of State *v.* Jones, 29 S. C. 201, 7 S. E. 206, where the only question was whether, in the matter

So a statement made by one while in the custody of an officer that would be excluded in a criminal case against him, may be competent in a civil action.[4]

of contradicting a witness, his written statement before the coroner was admissible against him, and it was rightly ruled that it was admissible for that purpose. This being the law, the inquiry was soon made as to what would be the rule when the statement was made by one not a party at the time, but made so afterwards; the test being whether the statement was voluntary at the time it was made. The difference would seem to be small between a case where the charge was against another and where there was no charge at all. The earlier cases, however, seem to have taken the other view, and to have held that the subsequent charge and arrest operated retrospectively, and made the prior statement involuntary, and therefore inadmissible. But the later cases seem to have considered the matter differently, and to have corrected the 'variance' pointed out by Mr. Greenleaf, and have, as we think, in accordance with principle and all the analogies, settled the law otherwise." Consequently it was held in that case, that the testimony given by the defendant, before the coroner's jury, and before he was actually charged with the commission of the crime, was admissible against him, for the reason that it was voluntary at the time it was made.

Testimony Taken De Bene Esse. In McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123, the question was as to the admissibility of a declaration against interest, made by one whose testimony was taken *de bene esse*. The declaration was held to be competent evidence, based upon the ground that the declaration of a party, made under oath, in a civil action, is not involuntary. In that case it appeared that it was not shown that the person before whom the deposition was taken was an officer authorized to take depositions; but the rule is stated to be the same, whether the officer had such authority or not.

Made Before Grand Jury Not in Session.—Again in Collins *v.* Wilson, 18 Ky. Law 1049, 39 S. W. 33, the admission sought to be proved was made in the presence of the grand jury in their room, the grand jury not being in session, and the party not having been sent for, or called as a witness. The statement was made in the presence of the jury, after the party had been cautioned that it might be used against him. It was held that the admission was entirely voluntary, and competent to be proved against him, notwithstanding the fact that it was made in the grand-jury room, and in the presence of the jury.

4. Statement When in Custody Competent in Civil Case.—Cox *v.* People, 80 N. Y. 500.

In Notara *v.* DeKamalaris, 22 Misc. 337, 49 N. Y. Supp. 216, a civil action for the recovery of damages for conversion, it appeared that, prior to bringing the suit, the plaintiff had caused the defendant's arrest, on the charge of misappropriating the proceeds of the sales made, and it was offered to prove that the defendant, while so under arrest, had made admissions concerning the nature of his transactions, which they deemed material to establish their cause of action. It appeared that the admissions were made while the defendant was in the custody of the officer, and while under arraignment in the United States Court.

In ruling upon the questions, as to the admissibility of this evidence, the court said: "But it is claimed by the defendant that different rules apply when the statements are made by a person while in the custody of an officer under a criminal charge, or while being arraigned in a criminal court. There is no warrant for such claim. The term 'admission' is usually applied to civil actions, and 'confession' to acknowledgments of guilt in criminal prosecutions. Where statements made by a defendant to an officer, involve him civilly, they may be received as an admission against interest, even

II. DIFFERENT KINDS.

General Classification. — Admissions may be classified as direct, or express, and incidental, the former being such as are made of the very fact or matter in issue, and in express and direct terms; the latter such as are made in some other connection, or of some other fact, indirectly involving an admission of the fact in issue.[5]

There are also admissions arising by way of inference from the conduct of the party, or his silence or acquiescence when called upon to deny a fact asserted by another, and denominated admissions by implication.[6]

These usually arise from assumed character,[7] or from conduct,[8] or from silence or acquiescence.[9]

though they might be rejected as a confession in a criminal court. . . . The circumstances under which the confession is made may affect the value to be given to the evidence, but do not affect its competency when offered as an admission against interest in a purely civil proceeding. It did not appear that the admission was made under the influence of fear produced by threats, or by promises or deception; and it would have been admissible even in a criminal prosecution.

"*Prima facie*, as a matter of course a confession by the prisoner is admissible as evidence against him, and it is for him to show legal ground for excluding it. And it is not sufficient to exclude a confession by a prisoner that he was under arrest at the time, or that it was made to the officer in whose custody he was, or in answer to questions put by him, or that it was made under hope or promise of a benefit of a collateral nature."

5. **Classification.** — 1 Greenl. Ev., § 194; Town of Dover *v.* Winchester, 70 Vt. 418, 41 Atl. 445; Harrington *v.* Gable, 81 Pa. St. 406.

The question as to whether the admission is direct or incidental is not material with respect to its competency, as held in the case of Harrington *v.* Gable, 81 Pa. St. 406, 411, in which it was said: "There is no difference as to the admissibility of this kind of evidence, between direct and incidental admissions."

6. May *v.* Hewitt, Norton & Co., 33 Ala. 161.

7. **Admissions Arising from Assumed Character.** — Cummin *v.* Smith, 2 S. & R. (Pa.) 440; Rex *v.* Gardner, 2 Camp. 513, 11 Rev. Rep. 784; Trowbridge *v.* Baker, 1 Cow. (N. Y.) 251.

In Trowbridge *v.* Baker, 1 Cow. 251, there was no evidence of the official capacity of the party, alleged to be the toll-gatherer, except that he demanded toll, and, connected with other circumstances in the case, it was held that this was sufficient *prima facie* evidence of the fact that he was such toll-gatherer.

8. Snell *v.* Bray, 56 Wis. 157, 14 N. W. 14; Wharton on Ev., §§ 1081, 1151; People *v.* Merchants Ins. Co., 3 Mason 27, 19 Fed. Cas. No. 10,905; Bacon *v.* Inhabitants of Charlton, 7 Cush. 581; Broschart *v.* Tuttle, 59 Conn. 1, 11 L. R. A. 33, 21 Atl. 925.

9. **From What Implied.**—May *v.* Hewitt, Norton & Co., 33 Ala. 161.

"We return therefore to the more important and difficult subject of *self-harming* evidence. This may be supplied by *words, writing, signs*, or *silence*. '*Non refert an quis intentionem suam declaret verbis, an rebus ipsis vel factis.*' Words addressed to others, and writing, are no doubt the most useful forms, but words uttered in soliloquy seem equally receivable; while of signs it has justly been said, '*Acta exteriora indicant interiara secreta.*' Thus a deaf and dumb person may be called on to plead, or to advocate his cause, through the medium of an interpreter who can explain his signs to the court and jury. So of silence,

Again, admissions are divided into partial and plenary,[10] and into oral and written or documentary statements out of court, and judicial or solemn admissions made in open court, or as a part of the proceedings in a cause pending. The latter may be by express allegations or admissions in the pleadings, or by a failure to deny allegations in the pleadings of the opposing party, by statements or admissions made in open court, by stipulation or agreement made in open court, or in writing out of court and filed, or in some way made a part of the proceedings in the cause, by an agreed case, or an agreed statement of facts as a substitute in whole or in part for evidence of such facts, by petitions or affidavits in the cause, by testimony given as a witness therein, either orally, in open court, or by deposition, by answers to interrogatories, by default, by confession of judgment, and by demurrer for the purpose of such demurrer only. These will be considered separately.

1. Direct or Express Admissions. — Direct admissions are sometimes denominated express admissions. They are such as are made in express terms and of the very fact in issue or dispute.[11] They may be oral or written, and either the ordinary admissions made out of court, or judicial or solemn admissions as above defined.

2. Indirect or Incidental Admissions. — Indirect or incidental admissions are such as are made in some other connection or of some other fact or other act done involving an admission of the fact in issue.[12] These often result from the conduct of the party,

'*Qui tacet, consentire videtur,*'—a maxim which must be taken with considerable limitation. A far more correct exposition of the principle contained in it is the following: '*Qui tacet, non utique fatetur: sed tamen verum est, etum non negare;*' and one of our old authorities tells us with truth, '*Le nient dedire n'est cy fort comme le confession est,*' which seems fully recognized in modern times. The maxim is also found guarded in this way, '*Qui tacet consentire videtur, ubi tractatur de ejus commodo.*'" Chamberlayne's Best on Ev., § 521.

10. Partial and Plenary.—Anderson's Law Dic.

11. Express Admissions.—Greenl. Ev., § 194; Anderson's Law Dic., Hodges *v.* Tarrant, 31 S. C. 608, 9 S. E. 1038.

12. Indirect or Incidental.

England. — Stow *v.* Scott, 6 Car. & P. 241; Peacock *v.* Harris, 10 East, 104.

Alabama. — Harmon *v.* Goetter, 87 Ala. 325, 6 So. 93.

Connecticut.—Broschart *v.* Tuttle, 59 Conn. 1, 11 L. R. A. 33, 21 Atl. 925.

Illinois.—Day *v.* Gregory, 60 Ill. App. 34.

New York.—Smith *v.* Hill, 22 Barb. 656; Hurd *v.* Pendrigh, 2 Hill 502. (15 N. Y. Com. Law 501.)

Pennsylvania. — Harrington *v.* Gable, 81 Pa. St. 406; Reed *v.* Reed, 12 Pa. St. 117; Cromelien *v.* Mauger, 17 Pa. St. 169.

South Carolina.—Lynn *v.* Thompson, 17 S. C. 129.

Indirect Admissions.—In Hurd *v.* Pendrigh, 2 Hill 502, the action was on the case for the value of goods, lost by a common carrier, and the plaintiff was permitted to prove that, after the commencement of the suit, the defendant agreed that, if the plaintiff would swear to the bill of the articles lost, he would pay for them, and was also permitted, in connection with this testimony, to introduce in evidence his affidavit, showing such amount, on the ground

the effect of which will be considered under the head of admissions implied from conduct. But it may be by the admission or statement of some collateral fact that involves or assumes as true the fact in issue; and a mere inquiry may, under some circumstances, amount to an admission.[13]

3. Admissions by Implication. — A. Generally. — As we have seen, an admission of a fact may be implied from the assumption of a character, which is itself an admission, by conduct, or by silence or acquiescence. An admission may be made by acts or conduct or by the failure to deny or speak, when called upon to do so by any statement made by another.

B. From Assumed Character. — With respect to the first of these, the assumption of character, it arises most frequently where one is charged in some official character, or the like, and the proof shows that he has acted as such. This is generally held to be sufficient *prima facie* evidence that he was the officer he assumed

that taking the whole together, it amounted to an admission that the plaintiff was entitled to recover the value of the goods so sworn to.

So it was held in Reed *v.* Reed, 12 Pa. St. 117, that the declaration of a vendor, by parol contract, that he would not make a deed until his vendee had paid a specified balance of purchase-money, in the absence of precise evidence of the terms of the contract, was competent evidence to show how much was due to the vendor.

Again, in Cromelien *v.* Mauger, 17 Pa. St. 169, where one person was indebted to another, in a book account, and gave to his creditor a promissory note, payable to himself, and indorsed as collateral security, it was held that the promise to pay the account, subsequently made by the debtor to the holder of the note, the account being produced at the same time, was evidence from which the jury might infer an admission that the holder of the note was the owner of the claim.

So in Smith *v.* Hill, 22 Barb. 656, it was held that where a party forbids the sale of personal property on execution, upon the sole ground that the property is exempt from sale, this will be considered a virtual admission that the execution and sale are *in other respects* legal and valid.

13. Wise *v.* Adair, 50 Iowa 104; Broschart *v.* Tuttle, 59 Conn. 1, 11 L. R. A. 33, 21 Atl. 925; Day *v.* Gregory, 60 Ill. App. 34.

Indirect Admissions.—In Broschart *v.* Tuttle, 59 Conn. 1, 11 L. R. A. 33, 21 Atl. 925, an action to recover damages for the killing of a horse, by the alleged negligence of the defendant, it was held that a statement of the party, to the effect that he was a lawyer, and could carry on the suit at one-sixth the expense of the other; that he knew every juryman in the county; and that twelve men could not be got together that would decide against him, might be proved against him as an indirect admission, which, in the absence of explanation, would tend in some degree, to evince a consciousness of liabilty upon the claim.

In Day *v.* Gregory, 60 Ill. App. 34, a similar case in which the plaintiff was permitted to prove that the defendant said to three or four of the witnesses, on different occasions, that it would be easy to beat appellee in a law suit because he kept no account, it was held that the testimony complained of in connection with other circumstances in proof, might have tended to impeach the reliability of his account, and was therefore admissible.

to be, and avoids the necessity of establishing, by direct evidence, his official capacity.[14]

But the doctrine is not confined to admissions of official character, but extends to the assumption of any character consistent with the truth of the fact sought to be established and inconsistent with its falsity.

C. From Conduct. — Similar rules are applicable to admissions by conduct.[15] Admissions implied from conduct are usually indirect, or incidental, and belong to that class as above defined. They result from the conduct of a party consistent with a state of facts against his interests and inconsistent with some claim made by him in the controversy in which his conduct is sought to be proved. For examples, the payment in part of a claim now disputed, or the payment of a like claim made by another,[16] or the omission from an inventory or schedule required by law to be made, of property owned by him, of the property now claimed and in

14. Implied from Assumed Character.—Cummin *v.* Smith, 2 S. & R. (Pa.) 440; Rex *v.* Gardner, 2 Camp. 513, 11 Rev. Rep. 784; Trowbridge *v.* Baker, 1 Cow. (N. Y.) 249; Pritchard *v.* Walker, 3 Car. & P. 212; Chapman *v.* Beard, 3 Austr. 942, 4 Rev. Rep. 875.

15. Sears *v.* Kings County El. Ry. Co., 152 Mass. 151, 25 N. E. 98, 9 L. R. A. 117; Springer *v.* City of Chicago, 135 Ill. 552, 26 N. E. Rep. 514; 12 L. R. A. 609; Huntington *v.* American Bank, 6 Pick. 340; Readman *v.* Conway, 126 Mass. 374; St. Louis & S. F. Ry. Co. *v.* Weaver, 35 Kan. 412; 11 Pac. 408, 57 Am. Rep. 176.

From Conduct.—In Sears *v.* Kings County El. Ry. Co., 152 Mass. 151, 25 N. E. 98, 9 L. R. A. 117, an action brought by the treasurer of the corporation to recover for salary, it was held competent to show that he, as such treasurer, prepared a statement of its liabilities, in which he did not include any claim of his own for salary; and that he afterwards assented to, as correct, the statement of said liabilities, which did not include his claim.

In Huntington *v.* American Bank, 6 Pick. 340, it was held that paying money into court, upon a *quantum meruit* count, is an admission of the contract as alleged.

And in Springer *v.* City of Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609, it was held that an offer to sell property at a certain price may be proved against the owner as an admission of its value, at or near the time of the offer.

In Readman *v.* Conway, 126 Mass. 374, it was held that on the issue of fact whether a landlord or his tenant was to keep in repair a platform in front of a shop, evidence that for an injury caused by a defect in the platform the landlord repaired it, is competent as an admission that it was his duty to keep the platform in repair. The court saying that "these acts of the defendants were in the nature of admissions that it was their duty to keep the platform in repair, and were therefore competent.

16. Galveston H. & S. A. Ry Co. *v.* Hertzig, 3 Tex. Civ. App. 206, 22 S. W. 1013; Howland *v.* Bartlett, 86 Ga. 669, 12 S. E. 1068; but see Slingerland *v.* Norton, 35 N. Y. St. 426, 12 N. Y. Supp. 647.

Payment to Third Party of Like Claim.—The case of Howland *v.* Bartlett, 86 Ga. 669, 12 S. E. 1068, was one in which an attorney, having collected a fund in which three clients were jointly and equally interested, upon a rule brought against him by two of them, and, it was held that evidence was admissible in their favor, that he pay to the third party a sum almost

controversy,[17] or the giving in of property for assessment for taxes, or omitting from the tax list the property in dispute, or giving it in in the name of another,[18] or the attempt to suborn witnesses or

equal to that claimed of him by each of the other two, and that, yielding to the demand of the client, to avoid being ruled for the money, did not make the transaction incompetent evidence as an admission made by constraint, or with a view to the promise.

Galveston H. & S. A. Ry. Co. *v.* Hertzig, 3 Tex. Civ. App. 296, 22 S. W. 1013, was an action against a railroad company for damages, resulting from a fire alleged to have been caused by negligence. The fire in question had spread from the land of the plaintiff to that of another party, and it was held competent to prove that the defendant had paid the parties to whose lands the fires from plaintiff's lands had spread, for the damages to their lands resulting from the same fire.

A different rule was declared in Slingerland *v.* Norton, 35 N. Y. St, 426, 12 N. Y. Supp. 647, but upon the ground that negotiations or propositions looking to the settlement of the controversy, would not be received in evidence as admission of liability.

17. Hendricks *v.* Huffmeyer (Tex. Civ. App.), 27 S. W. 777; Rankin *v.* Busby (Tex. Civ. App.), 25 S. W. Rep. 678; Judkins *v.* Woodman, 81 Me. 351, 17 Atl. 298; Lyon *v.* Phillips, 106 Pa. St. 57; Fullam *v.* Rose, 160 Pa. St. 47, 28 Atl. 497; Morrill *v.* Foster, 33 N. H. 379.

Inventory Omitting Land.—In Hendricks *v.* Huffmeyer (Tex. Civ. App.), 27 S. W. 777, where the object was to establish a partition and allotment of land and that it was not the property of the decedent, the inventory filed by the administrator of such decedent was held to be admissible to show that the land was not included therein, and as a circumstance tending to show that the land did not belong to the decedent.

Same, Schedule of Bankrupt.—So it was held in Rankin *v.* Busby (Tex. Civ. App.), 25 S. W. 678, that the schedule in bankruptcy, made by the alleged owner, not including the land in question was competent as to the question whether a bankrupt had or had not sold the land. It was said by the court that he was not estopped by his failure to inventory land, but it was a fact competent to go to the jury with reference to the claim of the defendant that Rankin had resold one-half of the certificate to Powell.

Schedule of Property.—In Judkins *v.* Woodman, 81 Me. 351, 17 Atl. 298, where title to certain wood was in question, it was said by the court, "Objection was made to the admission in evidence of a paper said to be a schedule of articles, claimed by the mortgagee, and on which the wood in question does not appear. It was objected to on the ground of irrelevancy. We think it was admissible. It was prepared by the defendants, and was admissible upon the same ground that any declaration of a party, written or oral, is admissible."

A like rule was declared in the case of Lyon *v.* Phillips, 106 Pa. St. 57, with respect to the omission from a schedule of assets, filed by a bankrupt, of certain judgments, claimed to be owned by him.

In Fullam *v.* Rose, 160 Pa. St. 47, 28 Atl. 497, the rule was applied against an executor, seeking to recover money deposited by testator with defendant for safe keeping. It being held that a certified copy of the adjudication of the executor's account is competent to show that the claim in suit was taken therefrom.

18. Whitfield *v.* Whitfield, 40 Miss. 352; Lefever *v.* Johnson, 79 Ind. 554; Steed *v.* Knowles, 97 Ala. 573, 12 So. 75; Richardson *v.* Hitchcock, 28 Vt. 757; Jones *v.* Cummins, 17 Tex. Civ. App. 661, 43 S. W. 854.

Assessed in the Name of Another. In Whitfield *v.* Whitfield, 40 Miss. 352, where the contest was between the father and representatives of the

prevent their attendance,[19] or corrupt jurors, or officers of the court, in his interest,[20] such conduct being inconsistent with the

son, as to the title of personal property, it was held to be competent to show by the assessor's books that during the time that the property was in the possession of the son, it was assessed, not as the property of the son, but of the father.

Tax List Omitting Property.—So in Lefever *v.* Johnson, 79 Ind. 554, a suit for the recovery of personal property, it was held that the tax list, sworn to by a party showing no claim to the property in controversy was admissible in evidence against him. The court saying: "The list was a statement in writing, signed in a firm name and sworn to by appellants; it was made out under the direction of a public officer, in pursuance of a duty enjoined by law, and is competent evidence, tending to show the amount and kind of property owned by the assessed at that time."

Property Assessed Jointly.—In Steed *v.* Knowles, 97 Ala. 573, 12 So. 75, it was held competent to show that the party had had the land in question assessed as belonging to certain parties, one-half to each, as tending to show the ownership of the parties in and to the land at that time.

Assessment Lists, and Rolls, When Competent.—In Jones *v.* Cummins, 17 Tex. Civ. App. 661, 43 S. W. 854, it was held, generally, that original assessment lists are admissible in evidence against the parties making them, the court saying: "The statements of parties to the suit, when pertinent, are always admissible against them; and we see no difference between assessment lists, when signed by the parties, and other statements. It has been held that tax rolls are not admissible as declarations against a party." In this case a distinction is made between the tax rolls made up by the assessor, or by his direction, and the original assessment lists, the former being mere copies of the original lists, and not binding upon the party.

19. Cruikshank *v.* Gordon, 15 N. Y. St. 897, 1 N. Y. Supp. 443; Egan *v.* Bowker, 5 Allen 449.

Procuring Absence of Witness. The case of Cruikshank *v.* Gordon, 15 N. Y. St. 897, 1 N. Y. Supp. 443, was an action for slander, and it was held competent to show against the defendant that, after the papers in the action were served, he offered the witness a thousand dollars to go to Canada, to avoid testifying on the trial. The court, in passing upon the action said: "It is difficult to conceive of a case where an offer to suppress a witness is inadmissible. It was a virtual admission of the speaking of the slanderous words."

Suborning Witness to Swear Falsely.—So in Egan *v.* Bowker, 5 Allen 449, proof was offered to show that one of the parties to the action had suborned a witness to swear falsely in a deposition taken in connection with the case, although the deposition was not put in evidence by either party at the time, the court saying: "The evidence offered for the purpose of showing that the plaintiff had suborned a witness to testify falsely in support of his claim against the defendants, and, in connection therewith, that in procuring such false testimony he had acted under an assumed name, was clearly competent and ought to have been admitted. These facts were in the nature of admissions implied from the conduct of the party that his claim against the defendant was false and unjust. The inference is a reasonable and proper one, that a person having an honest and fair debt which he claims to be due will not endeavor to support it by falsehood and fraud; and the fact that he resorts to such means of proof has a tendency to show that he knows he cannot maintain his suit by evidence derived from pure and incorrupt sources."

20. Corrupting Jurors.—Hastings *v.* Stetson, 130 Mass. 76; Kidd *v.* Ward, 91 Iowa 371, 59 N. W. 270.

justice of his claim or suit, or the performance of any act required of him by the terms of a contract or obligation, the validity of which is in dispute,[21] or the offer to sell property at a given price as evidence of its value,[22] or acting as agent of another for property that he now claims to have owned at the time,[23] or standing by and allowing property that he now claims as his own to be sold to another, without making his title known,[24] or the acceptance by him of the benefits of a contract or transaction the validity of which he is attacking, and any other acts inconsistent with the claim he makes.[25]

21. Floyd Co. *v.* Morrison, 40 Iowa 188; Town of Sharon *v.* Town of Salisbury, 29 Conn. 113; Harpswell *v.* Phibsburg, 29 Me. 313; Brownell *v.* Town of Greenwich, 44 Hun 611, 4 L. R. A. 685, 114 N. Y. 518, 22 N. E. 24.

Settlement of Account.—In Town of Sharon *v.* Town of Salisbury, 29 Conn. 113, it was held that the selectmen of a town had full power, by virtue of their office, to settle an account presented by another town for supplies furnished for a pauper belonging to their town, and that the payment of such an account constituted an implied admission that the pauper was a settled inhabitant of the town, and that, therefore, evidence of such settlement and payment was competent evidence of such admission.

22. Springer *v.* City of Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609.

23. Duncan *v.* Duncan, 26 La. Ann. 532

24. Wisdom *v.*, Reeves, 110 Ala. 418, 18 So. 13; Cox *v.* Buck, 3 Strob. (S. C.) 367; Hatch *v.* Kimball, 16 Me. 146; Traun *v.* Keiffer, 31 Ala. (N. S.) 136; Wendell *v.* Rensselaer, 1 Johns. Ch. 344.

Seeing Expenditures Made on Land Without Asserting Claim.—In Wendell *v.* Rensselaer, 1 Johns. Ch. 344-355, the rule is thus stated: "There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel."

Delivery of Property to Sheriff Under Process.—But in Traun *v.* Keiffer, 31 Ala. (N. S.) 136, while it was held that if a person offers another, in his presence, to purchase from a third person property to which he has a title, of which title the purchaser is ignorant, his failure to assert his title will estop him from afterwards setting it up against such purchaser, it is also held that the delivery of property to the sheriff or the payment of its assessed value in money, under process in his hands issued upon a judgment which is afterwards reversed, is no admission or acknowledgment of the plaintiff's title; and that where property is appraised as a part of an estate, in the plaintiff's presence, who has asserted no title, it is competent to rebut this evidence by the proof of the private assertions of the title by the plaintiff, to one of the appraisers, before the completion of the appraisement.

It is further held in this case that an involuntary or compulsory surrender cannot be evidence of an admission of title in another.

25. *Alabama.*—Sheppard *v.* Buford, 7 Ala. (N. S.) 90; Lewis *v.* Robertson, 100 Ala. 246, 14 So. 166; Turrentine *v.* Grigsby, 118 Ala. 380, 23 So. 666.

California.—Arnold *v.* Skaggs, 35 Cal. 684.

Connecticut.—Davidson *v.* Borough of Bridgeport, 8 Conn. 472;

It is held that claiming the privilege of refusing to testify by a party on the ground that his testimony will tend to criminate him, may be proved in a civil action as an implied admission of his

Page *v.* Merwin, 54 Conn. 426, 8 Atl. 675.

Illinois.—Burt *v.* French, 70 Ill. 254.

Massachusetts.—Elliott *v.* Hayden, 104 Mass. 180; Readman *v.* Conway, 126 Mass. 374; Hathaway *v.* Spooner, 9 Pick. 23.

Mississippi.—Southern Ex. Co. *v.* Thornton, 41 Miss. 216.

Missouri.—The State *v.* Baldwin 31 Mo. 561; North St. Louis and C. Church *v.* McGowan, 62 Mo. 279.

New Hampshire.—Moore *v.* Dunn, 42 N. H. 471.

New York.—Lobach *v.* Hotchkiss, 17 Abb. Pr. 88; Sheldon *v.* Sheldon, 65 N. Y. St. 693, 32 N. Y. Supp. 419; Smith *v.* Hill, 22 Barb. 656.

Oregon.—Heneky *v.* Smith, 10 Or. 349, 45 Am. Rep. 143.

Pennsylvania.—Phillips *v.* Phillips, 8 Watts, 195; Lobb *v.* Lobb, 26 Pa. St. 327.

Texas.—Georgia Home Ins. Co. *v.* O'Neal, 14 Tex. Civ. App. 516, 38 S. W. 62.

Inconsistent Facts. — The case of Arnold *v.* Skaggs, 35 Cal. 684, was on an account for goods, alleged to have been sold and delivered to the defendant. The liability of the defendant turned upon the question as to whether he or one Ingles was the owner of a certain livery stable. It was proposed to show in the action that Ingles, who was in the actual possession of the stable, furnished to the assessor the tax list for the purpose of taxation of the property and business of said stables, as the property of the defendant, and that subsequently the latter appeared with said Ingles before the board of equalization of the county, for the purpose of procuring a reduction of the amount of said assessment, and in connection with these facts, the tax list was offered in evidence. The court held that both the tax list and the act of Ingles professing to act as agent of the defendant in giving in the property for taxation, in the defendant's name, and the subsequent conduct of the defendant himself, in asking for the reduction of the assessment, were competent as admissions by conduct that the defendant was owner of the property.

In Smith *v.* Hill, 22 Barb. 656, it was held that where a party forbids a sale of personal property upon execution, upon the sole ground that the property is exempt from sale, this will be considered as a virtual admission that the execution and sale are in other respects legal and valid.

Heneky *v.* Smith, 10 Or. 349, 45 Am. Rep. 143, was to recover damages for wrongfully and maliciously shooting plaintiff. The court below, as tending to establish the defendant's liability, admitted in evidence a deed, shown to have been executed by him and his wife, to a third party, of some twenty-five different lots or parcels of land, amounting in the aggregate to over four hundred acres, for the expressed consideration of $1200 00. The deed having been executed fourteen days after the shooting and sixteen days after the action was commenced, and the summons served. The court said: "In view of its character and the circumstances under which it was executed, we think it was properly admitted. The jury might reasonably infer from this act of the appellant, in view of all of its surroundings, that it was prompted by a consciousness on his part, that the shooting of the respondent was unjustifiable, and that he was legally liable for the damages occasioned by it. In this view, it would operate like an admission of liability, and be equally competent. Admissions may be by acts, as well as by words."

In the case of Georgia Home Insurance Co. *v.* O'Neal, 14 Tex. Civ. App. 516, 38 S. W. 62, an action upon a policy of fire insurance, it was contended by the defendant that the plaintiff forfeited the policy by his failure to comply with the clause referred to, nevertheless subjected the insured thereafter to ex-

guilt, where, at the time his conduct in this respect is attempted to be proved, any prosecution for the offense is barred by the statute of limitations.[26]

D. From Silence and Acquiescence. —So the silence of a party when a statement is made in his presence, against his interest, and is heard and understood by him, and is made in such way as to call upon him to deny it, if untrue, and the facts are within his knowledge, and the statement is made under such circumstances as naturally to call for a reply, amounts to an admission of the truth of the statement made, and may be sufficient to establish the fact as against him.[27]

amination under oath, as authorized by the terms of the policy. It was held that the action of the insurance company, through its adjuster, who had authority to represent it, in requiring the insured to submit to a sworn examination, under the stipulations in the policy, clearly recognized the validity of the policy, and it could not thereafter be heard to assert its invalidity upon the ground of forfeiture known then to exist.

In Readman *v.* Conway, 126 Mass. 374, it was held that on an issue of fact, whether a landlord or his tenant was to keep in repair a platform in front of a shop, evidence that after an injury, caused by a defect in the platform, the landlord repaired it, was competent as an admission that it was his duty to keep the platform in repair, the court holding that the acts referred to were in the nature of admissions that it was the duty of the landlord to keep the platform in repair.

So in Hathaway *v.* Spooner, 9 Pick. 23, it was held that where a person living upon land, to which he afterwards acquires a title, takes a deed of part of a tract described as bounding on such land, this is evidence against him, in the nature of a confession that the said land does not cover any part of the tract so described.

26. Childs *v.* Merrill, 66 Vt. 302, 29 Atl. 532.

27. From Silence and Acquiescence. — *England.* — Doe *v.* Forster, 13 East. 405; Gaskill *v.* Skene, 14 Ad. & E. (N. S.) 664; Neile *v.* Jakle, 2 C. & K. 709, 61 Eng. C. L. 708; Hayslep *v.* Gymer, 1 Ad. & E. 162, 28 Eng. C. L. 96.

United States.—Morris *v.* Norton, 75 Fed. 912, 21 C. C. A. 553, 43 U. S. App. 739; Cross Lake Logging Co. *v.* Joyce, 83 Fed. 989, 28 C. C. A. 250, 55 U. S. App. 221.

Alabama.—McCulloch *v.* Judd, 20 Ala. 703; May *v.* Hewett, 33 Ala, 161; Hicks *v.* Lawson, 39 Ala. 90.

Georgia.—Block *v.* Hicks, 27 Ga. 522; Morris *v.* Stokes, 21 Ga. 552.

Indiana.—Pierce *v.* Goldsberry, 35 Ind. 317; Puett *v.* Beard, 86 Ind. 104; Ewing *v.* Bass, 149 Ind. 1, 48 N. E. 241.

Kentucky.—Milton *v.* Hunter, 13 Bush. 163.

Louisiana.—Olivier *v.* Louisville & N. R. Co., 43 La. Ann. 804, 9 So. 431.

Maine.—Blanchard *v.* Hodgkins, 62 Me. 119; Johnson *v.* Day, 78 Me. 224, 3 Atl. 647.

Massachusetts.—Sears *v.* Kings County El. Ry. Co., 152 Mass. 151, 25 N. E. 98, 9 L. R. A. 117; Boston & Worcester R. Co. *v.* Dana, 1 Gray 83; President etc. of Greenfield Bank *v.* Crafts, 2 Allen 269; Dutton *v.* Woodman, 9 Cush. 255, 51 Am. Dec. 46; Simonds *v.* Patridge, 154 Mass. 500, 28 N. E. 901.

Mississippi.—The State *v.* Farish, 23 Miss. 483.

Missouri.—Higgins *v.* Dellinger, 1 Jones, 397; Ball *v.* City of Independence, 41 Mo. App. 469.

New Hampshire.—Morrill *v.* Richey 18 N. H., 295; Wallace *v.* Goodell, 18 N. H. 439; Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753.

New York.—Wright *v.* Maseras, 56 Barb. 521; Morse *v.* Bogert, 4 Denio 108, 17 N. Y. Com. Law 514; Jewett *v.* Banning, 21 N. Y. 27.

Objection on One Ground Admits Non-Existence of Other Grounds. So where a party objects to the doing of an act by another, or the validity or effect of any document, on certain specific grounds, this will be taken as an admission that no other grounds of objection

North Carolina. — Tredwell *v.* Graham, 88 N. Car. 208; Radford *v.* Rice, 2 Dev. & Batt. 39.

North Dakota.—Paulson Mercantile Co. *v.* Seaver, 8 N. D. 215, 77 N. W. 1001.

Pennsylvania.—McClenkan *v.* McMillan, 6 Pa. St. 306; Coe *v.* Hutton, 1 Serg. & R. 398; Orner *v.* Hollman, 4 Whar. 45.

South Carolina.—Hendrickson *v.* Miller, 1 S. Car. Const. 295; Coleman *v.* Frazier, 4 Rich. 146, 53 Am. Dec. 727.

Tennessee.—Queener *v.* Morrow, 1 Cold. 123.

Texas. — Simonds *v.* Fireman's Fund Ins. Co., 35 S. W. 300.

Vermont.—Fenno *v.* Weston, 31 Vt. 345.

Wisconsin.—Kimball *v.* Post, 44 Wis. 471; Hinton *v.* Wells, 45 Wis. 268.

Rule Stated.—In Morris *v.* Norton, 75 Fed. 912-924, 21 C. C. A. 553, the rule is stated as follows: "The rule is well settled that conversations between parties to a controversy in which one makes a statement of fact of which both have personal knowledge, and which naturally calls for a denial by the other if the statement is untrue, are competent against the silent party, as admissions, by acquiescence, of the truth of the statement. The weight of the admissions varies with the circumstances of the case and the strength of the probability that the statement, if true, would have evoked a denial, and is always for the jury, guided by a proper caution of the court, as to the theory upon which such conversations are admitted."

Statement to Officer of Corporation, and Undisputed.—The case of Cross Lake Logging Co. *v.* Joyce, 83 Fed. 989, 28 C. C. A. 250, was to recover damages from injury resulting from alleged negligence, growing out of the incompetency of a fellow employee of the plaintiff. Immediately after the accident occurred, a statement was made to the superintendent of the logging company, by the plaintiff, that he, the plaintiff, had notified the superintendent of the incompetency of his fellow employee, and threatened to quit work at once unless he was replaced. At the trial the plaintiff was allowed to testify over the objection of the defendant that when Bolin, the superintendent, came to his assistance, immediately after the accident occurred, he, the plaintiff, exclaimed, "Frank, I wouldn't have lost my leg if you had done as you agreed to, and put another man in his place;" and that Bolin said nothing in reply to this remark. The Circuit Court of Appeals held the testimony to have been competent on the ground that the declaration was a part of the *res gestae*, and said further: "Moreover, the fact that Bolin, though charged by the plaintiff with being at fault, did not deny the accusation, may be regarded as in the nature of an admission on the part of Bolin that the charge was true."

Statement by Third Party. — In Olivier *v.* Louisville & N. R. Co., 43 La. Ann. 804, 9 So. Rep. 431, where the action was for damages for an injury, alleged to have been caused by the negligence of the defendant, it was held that the statements of a companion of the plaintiff, relating to the cause of the accident, and made in his presence and not denied by him, had like force with his own admissions.

Testimony at Trial Undisputed. And so it is held competent to prove that, at a former trial, witnesses were introduced against a party tending to establish a bargain with him of a particular character, and that, at the time, though offering himself as a witness in his own behalf, he did not contradict such testimony. Blanchard *v.* Hodgkins, 62 Me. 119.

Made by Son in Presence of Father.—And that evidence of a declaration of the son of one of the

parties, made in the presence and hearing of his father, who remained silent, was competent evidence of an admission by him. The court said: "We think the evidence was admissible. True it does not prove that the defendant made any reply, but silence may sometimes be regarded as an admission. Whether it should be so regarded in this case, is a question for the jury to decide." Johnson *v.* Day, 78 Me. 224, 3 Atl. 647.

Statement Made by Witness.—In Boston Ry. Co. *v.* Dana, 1 Gray 83, 104, objection was made to proof of the statements of a witness made in the presence of the defendant. With respect to this objection, the court thus declared the rule: "But it appears to us that, on the facts stated in the report, they were competent, as tending to prove admissions by the defendant. They stand on the familiar principle, that what was said to a party, together with his replies thereto, or his silent acquiescence in statements, affecting his own interest, to which he has opportunity of replying, are admissible in evidence against him."

In a Letter.—So it is held that a letter, written to one alleged to be a member of a copartnership, stating that the writer had been informed that a copartnership had been formed between said party and the other alleged copartner, and the failure of the party to whom the letter was written to deny the facts so stated, is competent as tending to show an admission of the existence of such partnership. Dutton *v.* Woodman, 9 Cush. 255.

Made to Authorized Agent. Again, it is held that the statement of a complainant, addressed to the authorized agent of the defendant, in reference to the matters of fact in controversy in the suit and not disputed or denied by the agent, are evidence for the complainant on the ground that the silence of the agent must be regarded as an implied admission of their truth. State *v.* Farrish, 23 Miss. 483.

Demand for Payment of Note. And that the silence of an alleged signer of a note, when it was shown to him, and payment demanded, is competent evidence, tending to show the genuineness of his signature, and if not genuine, of his assent to be bound by it, the court saying: "No principle is better settled than that a man's silence upon an occasion where he is at liberty to speak, and the circumstances naturally call upon him to do so, may be properly considered by the jury as tacit admissions of the statements made in his presence, or of the claims then made upon him. The rule and its qualifications are well stated in 1 Greenl. Ev. 230, 232, §§ 197, 198. Admissions may be implied from the acquiescence of the party; but where it is acquiescence in the conduct or language of others, it must appear that such conduct was fully known, or the language fully understood by the party, before any inference can be drawn from his passiveness, or silence. The circumstances must not only be such as afford an opportunity to act, or speak, but properly and naturally called for some action, or reply, from men similarly situated. This kind of evidence should always be received with caution, and never, unless the evidence is of direct declarations of that kind which naturally call for contradiction, or some assertion made to the party or others with respect to his right, which by his silence he acquiesces in. But the silence of the party, even where the declarations are addressed to himself, is worth very little as evidence, unless where he had the means of knowing the truth or falsehood of the statement." Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753.

Statement Once Denied.—So it was held in Jewett *v.* Banning, 21 N. Y. 27, that where the plaintiff in the action charged the defendant with having committed the assault complained of, and the defendant had denied it, it was still competent to show that at the same place and in the presence of additional witnesses, shortly afterwards, the plaintiff again charged the defendant with having committed the assault, and that no denial of it was then made.

Extends to Statements Made to Officers of Corporations.—The rule extends to declarations made in the presence of officers or agents of a

exist, at least within his knowledge.[28] And if an interrogatory is put, which affords a party an opportunity to explain, or assert the truth, his failure or refusal to answer may be taken as an admission, and raise the presumption that the disclosure of the truth would be against him.[29] And the failure to answer interrogatories propounded in the action will be taken as equivalent to an answer against the party's interest.[30]

It is the fact that one fails to act as men ordinarily would act under the circumstances that renders such evidence competent.[31]

corporation, who have the authority to act for and bind the corporation with respect to the matter to which the statements made in their presence relate. Paulson Mercantile Co. v. Seaver, 8 N. D. 215, 77 N. W. 1001.

Statement of the General Rule. The general rule on the subject is thus stated in McClenkan v. McMillan, 6 Pa. St. 366: "The declaration of one party, made in the presence and hearing of the other, and to him, especially when, as in the case under consideration, they composed a part of the *res gestae*, have always been received in evidence; not because they are the declarations or assertions of the party who made them, and in whose favor they operate, but because the silence of the opponent gives rise to a fair presumption that he admits them to be true. The common sense of the multitude is embraced in the almost proverbial expression that silence gives consent; and the law does not differ from the understanding of the common mind."

28. Smith v. Hill, 22 Barb. 656; Nichols v. Southern Pacific Co., 23 Or. 123, 31 Pac. 296.

Specific Objection to Ticket by Inspector.—Thus it is held that the declaration of a ticket inspector, on examining a ticket, that he rejected it on the ground that it was not presented by the original purchaser, is admissible against the railroad company as evidence that, not being objected to otherwise, it was genuine. Nichols v. S. P. Co., 23 Or. 123, 31 Pac. 296.

Objection to Sale of Property on Ground that it is Exempt.—And that where a party forbids a sale of personal property on execution, on the sole ground that the property is exempt from sale, this will be considered a virtual admission that the execution and sale are in other respects legal and valid. Smith v. Hill, 22 Barb. 656.

29. Effect of Failure to Answer Specifically. — Mitchell v. Napier, 22 Tex. 120; Parsons v. Martin, 11 Gray 111.

30. Knight v. Booth, 35 Tex. 10.

31. President etc. of Greenfield Bank v. Crafts, 2 Allen 269; Femmo v. Weston, 31 Vt. 345; Waring v. U. S. Tel. Co., 44 How. Pr. 69; Vail v. Strong, 10 Vt. 457.

When Failure to Deny Amounts to Admission. — In President etc. of the Greenfield Bank v. Crafts, 2 Allen 269, the question was as to the effect of the presentation of a notice of protest from a notary public, and the failure of the party on whom the notice was served to deny the genuineness of his signature to the paper and protested at the time. The rule with respect to the obligation of the party to deny as to the genuineness of his signature, and the effect of his failure to do so, was thus stated: "Notice of a protest requires no answer and calls for no action on the part of the person to whom it is addressed. He has a right to remain silent, and to stand on his legal rights as to his liability as a party to the note or draft to which it relates. No duty to disclaim or repudiate the paper is thereby imposed on him, and no absolute inference as to his liability thereon is to be drawn from a mere omission to disown or disavow the contract on which he is sought to be charged. We do not mean to say that evidence of the neglect or omission of the defendant to say or do anything concerning the paper bearing his name which was held by the plaintiff, and

Effect of Statements of Husband and Wife in the Presence of Each Other. A statement made by a husband or wife in the presence of the other and of a third party, and not denied by the other, stands upon the same footing as statements made by any one else. Being made in the presence of a third party, they are not privileged."[22] But this

of which he had notice from the notary, was inadmissible. On the contrary, it was admissible as leading to an inference that he did not act as men ordinarily would under like circumstances. If the jury were of opinion that a man receiving direct notice that he was to be held liable on negotiable paper to which his signature was affixed neither by himself or by his authority, would without delay disclaim and repudiate it, then they were at liberty to infer that the conduct of the defendant showed that he either wrote or authorized the signatures."

Failure to Answer a Letter. In the case of Waring *v.* U. S. Tel. Co., 44 How. Pr. 69, strong ground was taken against the admissibility of a letter and accompanying proof of the fact that the letter was not answered by the defendant, the court saying: "In the present case a party having a claim against a corporation, writes a letter to its principal officer, giving a detailed statement of all the facts upon which the claim is founded that it may be laid before the board of directors in the expectation that it will satisfy them of the liability of the corporation and that they will direct it to be paid, and is officially answered by the secretary of the company, that the subject of the claim has been referred to their legal adviser, and after some time has intervened, the president transmitting the written statement of the counsel, that in his opinion the company have a good defense and that he advises against paying the claim. There is nothing in this that can be regarded as an admission of the fact contained in the plaintiff's letter, which would entitle it to be used as evidence to prove these facts. It would be preposterous to hold that all the facts stated in it were admitted by the corporation, because the president, secretary or some officer of the company on an application for compensation for alleged damages, did not by letter deny the truth of them. Even admissions inferred from acquiescence in verbal statements made in a party's presence are received only when the declaration or statement made, is of a kind which calls for immediate contradiction, or is such as would naturally provoke or lead to some action or reply on the part of the person to whom or in respect to whom it is made; because inference from a party preserving silence is considered a very dangerous kind of evidence, and is to be kept within very strict limits."

32. Statement of Husband or Wife Made in Presence of the Other. *Alabama.* — Gillespie *v.* Burleson, 28 Ala. 551.

Georgia. — Sindall *v.* Jones, 57 Ga. 85.

Iowa. — Clark *v.* Evarts, 46 Iowa 248; Owen *v.* Christensen, 106 Iowa 394, 76 N. W. 1003.

Kentucky.—Carrel *v.* Early, 4 Bibb, (Ky.) 270.

Michigan.—Sanscrainte *v.* Torongo, 87 Mich. 69, 49 N. W. 497; Evans *v.* Montgomery, 95 Mich. 497, 55 N. W. 362; Matthews *v.* Forslund, 112 Mich. 591, 70 N. W. 1105.

New Hampshire.—Steer *v.* Little, 44 N. H. 613.

New Jersey.—Boyles *v.* M'Eowen, 3 N. J. Law, 253.

New York.—Lindner *v.* Sahler, 51 Barb. 322.

Tennessee.—Allison *v.* Barrow, 3 Cold. 414, 91 Am. Dec. 291; Queener *v.* Morrow, 1 Cold. 124.

Statement by Wife in Presence of Husband.—In Gillespie *v.* Burleson, 28 Ala. 551, it was held that where slaves were in the possession of husband and wife, the wife's assertions of title, when made in the presence of her husband and acquiesced in by him, are competent evidence against his administrator, in a suit brought by the latter against her vendee.

By Husband in Presence of Wife.

So in Clark *v.* Evarts, 46 Iowa 248, it was held that in an action against the administrator and heirs of the husband, the husband's declarations, made in the presence of his deceased wife, and assented to, and acted upon by her, are competent evidence.

Again, in Owen *v.* Christensen, 106 Iowa 394, 76 N. W. 1003, where a widow sued her husband's executor for property she claimed in her own right, and a witness testified that at the time he drew her husband's will she declared in their presence that the property belonged to him, evidence of the husband's reply was admissible to show, if he also stated that it was his, that she acquiesced, the court saying: "Ordinarily, the declarations of a party made in his own interest are not admissible to establish that interest, but where the declaration is made in the presence and hearing of his adversary, it is admissible, not because of what is declared, but because of the manner in which the declaration is treated by the adversary. If Mr. Owen stated in the hearing of the plaintiff that this property was his, and she acquiesced in this statement, it would be evidence against her because of her acquiescence." The court seems not to have considered directly the question as to whether the question of the admissibility of the evidence was affected by the fact that the parties making the statements were husband and wife.

Of Wife in Husband's Presence. In Carrel *v.* Early, 4 Bibb, (Ky.) 270, it is said: "The declarations of Mrs. Bell were, upon the same principle, admissible; for being made in the presence of her husband, without being contradicted by him, was on his part a tacit admission of their truth, and what a person admits as well as what he says is receivable in evidence against him, and consequently against any person claiming under him."

In Boyles *v.* M'Bowen, 3 N. J. Law 253, the court said: "As to the declarations of the wife of the defendant below, it is a general rule that the declarations of the wife shall not be given in evidence against her husband, but there are exceptions to this rule. . . . It is every day's practice to admit in evidence anything said in the presence of the party and uncontradicted by him, and whether this is said by a stranger, by the wife of the party, or even by the opposite party himself it makes no difference."

Husband Speaking for Wife in Her Presence.—In Lindner *v.* Sahler, 51 Barb. 322, the court said: "When a married woman acts and speaks by her husband, his declarations and acts are hers, and she must see to it, particularly when he assumes to act and speak in her presence for her, that he speaks and acts as the law and her duty would require her to speak and act if she spoke herself. She must in such cases dissent and disapprove his acts and declarations, or they should be deemed hers. She cannot stand by and hear him assert rights for her and in her behalf, or do wrong for her benefit, or refuse to do what her legal duty requires, and escape responsibility. She must be deemed to assent when she does not dissent under such circumstances."

Conversations Between Husband and Wife.—So it is held that conversations between husband and wife, or admissions made by either to the other, in the presence of a third person, do not belong to the class of privileged communications between husband and wife, and may be given in evidence against the husband like any other conversation in which he may have been concerned. Allison *v.* Barrow, 3 Cold. Tenn. 414.

Is a Husband Called Upon to Deny Statement of Wife.—In Queener *v.* Morrow, 1 Cold. Tenn. 123, 128, the court say: "It is assumed as a corollary from the rule which excludes husband and wife from being a witness in a cause, civil or criminal, in which the other is a party, that the statements of the wife were inadmissible; and further, that, from the very nature of the relation between the parties, the husband was not called upon to contradict, or even to notice, the criminations of the wife. These distinctions, though plausibly maintained in the argument, are not

rule, although supported by the weight of authority, has not gone unchallenged.[33]

The rule is the same with respect to statements made by, to, or in the presence of other persons, acting in confidential relations, third parties being present.[34]

Possession of Papers. — Under some circumstances, the possession of papers will be taken as an implied admission of the existence or truth of the facts stated therein.[35]

Failure to Object to Account Rendered. — So the failure to object to an account or other claim made or presented may be competent as tending to show an admission of the correctness of its items.[36] And

sound. In Phillips on Ev., 81, it is laid down, correctly, as we think, that a 'discourse between husband and wife, in presence of a third person, may be given in evidence against the husband, like any other conversation in which he may have been concerned.'

"This must necessarily be so, and the general rule, which excludes the wife from being a witness against her husband, is not infringed in its spirit, in such case. The statements of the wife are not received, or treated, as *evidence* against the husband, but merely as *inducement* to the responsive admissions, declarations, or acts of the husband at the time. Except for this purpose, the statements of the wife are of no effect."

33. Hoffman *v.* Hoffman's Exr. 126 Mo. 486, 29 S. W. 603; Fourth Nat. Bank *v.* Nichols, 43 Mo. App. 385.

Failure to Deny Statement of One by the Other not an Admission.— In Hoffman *v.* Hoffman's Exr., *supra*, it is said:

"Admissions or declarations by a husband or wife in the presence of the other stand upon an entirely different footing. Generally speaking, at common law the husband and wife are not competent to testify against each other in contests with third persons. Much less could mere statements of one be used as evidence against the other. Neither, therefore, would one stand under obligation to dispute a statement made by the other, unless the circumstances were such as would create an estoppel to deny it. Besides, the very relation of husband and wife is such as should deter one from disputing in the presence of strangers, an assertion made by the other."

34. Springer *v.* Byram, 137 Ind. 15, 36 N. E. 361; Sharon *v.* Sharon, 79 Cal. 633, 677; Gallagher *v.* Williamson, 23 Cal. 331, 83 Am. Dec. 114; Moffatt *v.* Hardin, 22 S. Car. 9; Mobile & C. Ry. Co. *v.* Yeates, 67 Ala. 164.

Statements Made to Physician in Presence of Others.—The case of Springer *v.* Byram, 137 Ind. 15, 36 N. E. 361, was an action for personal injuries, alleged to have been sustained by the plaintiff while being transported in a passenger elevator in a public office building, owned by the defendants. It was offered to prove by third parties as witnesses, that immediately after the accident, and while in the ambulance with the physician, the plaintiff made certain statements to the physician as to the cause of the accident. The evidence was objected to on the ground that, being made to his physician, the statements were confidential and could not be proved against him, but it was held by the court that statements, made to the physician in the presence of third parties, were not confidential within the meaning of the statute of Indiana, and that they were admissible the same as if made to some other party. The proof in this case being offered to be made, not by the physician but by others present at the time the statement was made.

35. Possession of Papers as Implied Admission. — 1 Greenl. Ev., § 198; Commonwealth *v.* Jeffries, 7 Allen 548, 561, 83 Am. Dec. 713.

36. Failure to Object to Account.

United States. — Field *v.* Moulson, 2 Wash. C. C. 155, 9 Fed. Cas. No. 4,770.

Alabama.—McCulloch *v.* Judd, 20 Ala. 703; Perry *v.* Johnston, 59 Ala. 648; Peck *v.* Ryan, 110 Ala. 336, 17 So. 733.

Arkansas.—Brown *v.* Brown, 16 Ark. 202.

Georgia.—McLenden *v.* Shackelford, 32 Ga. 474.

Illinois.—Bailey *v.* Bensley, 87 Ill. 556; McCord *v.* Manson, 17 Ill. App. 118; Weigle *v.* Brautigam, 74 Ill. App. 285.

Iowa.—Churchill *v.* Fulliam, 8 Iowa 45; Iowa City State Bank *v.* Novak, 97 Iowa 270, 66 N. W. 186.

Louisiana.—Didier *v.* Auge, 15 La. Ann. 398.

New Hampshire.—Northumberland *v.* Cobleigh, 59 N. H. 250.

New Jersey.—Oram *v.* Bishop, 12 N. J. Law, 153.

New York.—Terry *v.* McNiel, 58 Barb. 241; Peck *v.* Richmond, 2 E. D. Smith 380; Del Piano *v.* Capronigri, 20 Misc. 541, 46 N. Y. Supp. 452; Wilshusen *v.* Binns, 19 Misc. 547, 43 N. Y. Supp. 1085.

Pennsylvania.—Coe *v.* Hutton, 1 Serg. & R. 398; Darlington *v.* Taylor, 3 Grant's Cas. 195; Tams *v.* Lewis, 42 Pa. St. 402.

South Carolina.—McBride *v.* Watts, 1 McCord, 384.

Invoice of Goods Received and Retained Without Objection.—In Field *v.* Moulson, 2 Wash. C. C. 155, 9 Fed. Cas. No. 4770, it was held that an invoice of goods, received by the consignee, retained by him, and not objected to, and the truth of it not disproved, is evidence that all the goods enumerated in it were received by the consignee.

Examination of Account. — So it was held in McCulloch *v.* Judd, 20 Ala. 703, that where an account was placed together with a number of others, in the hands of an attorney for collection, proof that the debtor came several times to his office, and examined the bundle of accounts in which it was filed, and made no objection to either the correctness or justice of any of them, is sufficient to charge him with an acknowledgment of the justice of the demand.

General Statement of the Rule. In Perry *v.* Johnson, 59 Ala. 648, 651, it was said: "The silence of a party, against whom a claim or right is asserted, is a fact which may be shown in an action for the enforcement of such claim or right from which the jury may infer an admission of the truth of the assertion, and the rule is said to rest 'on that instinct of our nature, which leads us to resist an unfounded demand.' The common sense of mankind is expressed in the popular phrase, *silence gives consent*, which is but another form of expressing the maxim of the law, *qui tacet consentire videtur*. The rule involves as facts on which it rests, that it is the interest or duty of the party to whom the declaration or assertion is made, to reply to it. If it proceeds from one having, or asserting, or authorized to assert, adverse interests or claims, it is in the ordinary course of human conduct, if the truth of the assertion is not admitted, that dissent from it should be expressed." But it is clearly pointed out in this case that the mere declarations of a stranger, or the mere expression of an opinion, and not the statement of a fact, is not such a statement as calls for a response, and consequently acquiescence in it, is not inferrible from silence.

Failure to Object to Account. In Brown *v.* Brown, 16 Ark. 202, it was held that where an account against a party is delivered to him, and on examining it carefully, he makes no objection to it, or anything contained in it, it amounts to an indirect admission of the debt; and that acquiescence or silence, when the demand is made, is equivalent to an admission.

Monthly Account of Sales Furnished. — So, in Bailey *v.* Bensley, 87 Ill. 556, it was held that accounts of sales rendered monthly by a commission merchant to the consignor for several years, containing items of charges for storage and insurance, unobjected to until after suit brought by the former, for a balance due him, is *prima facie* evidence of the correctness of the account, and of the right to make such charges.

if a part of the items are objected to and others not, this may be taken as an admission that those not objected to are correct.[37] But if the party denies all liability, his failure to dispute the items of the bill cannot be taken as an admission of their correctness.[38]

Failure to Interpose Defense in Previous Action. — A failure to interpose a defense in a previous action has been allowed to be proved as a circumstance tending to show that the fact constituting the alleged offense did not exist.[39]

Declarations of Party That He Neither Admits nor Denies. — Where the party declares that he neither admits nor denies the statement made, his answer cannot be taken as an admission.[40] But what did occur may be shown in connection with other circumstances tending to establish the fact in dispute.[41]

What Necessary to Constitute an Admission by Silence. — But before the silence of a party can be taken as an admission of what is

Reports of Agent.—The same rule is declared where an agent, from time to time, renders to his principal reports and statements of the business of the agency, and of the accounts between himself and his principal, growing out of it, and such reports and statements were received and retained by the principal without objection.

McCord *v.* Manson, 17 Ill. App. 118.

Books of Account. — Books of account, not otherwise competent as evidence, may be made so by proof that they were submitted to a party to the suit, and contained entries against his interest, which he did not at the time dispute. Oram *v.* Bishop, 12 N. J. Law, 153; Terry *v.* McNiel, 58 Barb. 241.

Statement of Rent Derived from Building.—So the falsity of a statement as to the amount of rent derived from a building, may be disputed by showing that an account of such rents, prepared by the janitor of the building, were submitted to the party making the previous statements, and the correctness of the janitor's statements of the rents received not denied by him. Del Piano *v.* Capronigri, 20 Misc. Rep. 541, 46 N. Y. Supp. 452.

Book Entries Not Original.—And the shop book, even though the entries be not original, and some of the items not the subject of book charge, is competent, if it has been shown to the debtor, without objection on his part. Darlington *v.* Taylor, 3 Grant's Cas. 195.

Statement Made Before Arbitrators.—So in case of an amicable reference to settle the accounts of parties, the statement of one of them, produced and read before the arbitrators, in the presence of both, without objection on the part of the other defendant as to its correctness, except as to one item, the paper containing the statement is admissible to show the assent of the party to the correctness of the account. Tams *v.* Lewis, 42 Pa. St. 402.

General Rule.—And the general rule is declared that where the truth or falsehood of a material fact is known to a party to whom the fact is asserted to exist, his omission to deny its existence is presumptive evidence of its truth, but that when not known his silence furnishes no evidence against him. Robinson *v.* Blen, 20 Me. 109.

37. United States *v.* Kuhn, 4 Cranch C. C. 401, 26 Fed. Cas. No. 15,545; Low *v.* Griffin (Tex. Civ. App.), 41 S. W. 73.

38. Cobb *v.* Arundel, 26 Wis. 553; Hinton *v.* Coleman, 45 Wis. 165.

39. Benson *v.* McFadden, 50 Ind. 431.

40. Vail *v.* Strong, 10 Vt. 457.

41. Dutton *v.* Woodman, 9 Cush. 255, 57 Am. Dec. 46.

said, it must appear that he heard and understood the statement;[42] that he was at liberty to interpose a denial;[43] that the statement was in respect to some matter affecting his rights, or in which he was then interested,[44] and calling, naturally, for an answer;[45] that

42. Must Have Heard and Understood Statement Made. — *Alabama.* Abercrombie *v.* Allen, 29 Ala. 281; Spencer *v.* The State, 20 Ala. 24.

Indiana.—Pierce *v.* Goldsberry, 35 Ind. 317.

Iowa.—Martin *v.* Capital Ins. Co. 85 Iowa 643, 52 N. W. 534.

Maine.—Blanchard *v.* Hodgkins, 62 Me. 119.

Massachusetts.—Tufts *v.* City of Charlestown, 4 Gray 537; Commonwealth *v.* Kenney, 12 Met. 235, 46 Am. Dec. 672; Commonwealth *v.* Harvey, 1 Gray 487.

Michigan.—Barry *v.* Davis, 33 Mich. 515.

Missouri.—Fourth Nat. Bank *v.* Nichols, 43 Mo. App. 385.

Montana.—Territory *v.* Big Knot on Head, 6 Mont. 242, 11 Pac. 670.

New Hampshire.—Steer *v.* Little, 44 N. H. 613; Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753.

New York. — Wright *v.* Maseras, 56 Barb. 521; Yale *v.* Dart, 43 N. Y. St. 789, 17 N. Y. Supp. 179.

Oregon.—Josephi *v.* Furnish, 27 Or. 260, 41 Pac. 424.

Tennessee.—Queener *v.* Morrow, 1 Cold. 123.

43. And at Liberty to Interpose a Denial.—*England.*—Melen *v.* Andrews, 1 M. & M. 336, 22 Eng. C. L. 540; Child *v.* Grace, 2 Car. & P. 193, 12 Eng. C. L. 522.

Alabama.—Collier *v.* Dick, 111 Ala. 263, 18 So. 522.

California.—Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64.

Georgia.—McElmurry *v.* Turner, 86 Ga. 215, 12 S. E. 359.

Illinois.—Slattery *v.* The People, 76 Ill. 217.

Indiana.—Broyles *v.* The State, 47 Ind. 251.

Massachusetts. — Commonwealth *v.* Kenney, 12 Met. 235, 46 Am. Dec. 672; Commonwealth *v.* Harvey, 1 Gray 487; Johnson *v.* Trinity Church Soc., 11 Allen 123.

Michigan.—Barry *v.* Davis, 33 Mich. 515.

North Carolina.—Guy *v.* Manuel, 89 N. C. 83; Durham Tobacco Co. *v.* McElwee, 96 N. C. 71, 1 S. E. 676.

South Carolina.—State *v.* Senn, 32 S. C. 392, 11 S. E. 292.

Tennessee.—Queener *v.* Morrow, 1 Cold. 123.

44. Must Be Statement Affecting His Rights. — *Indiana.* — Pierce *v.* Goldsberry, 35 Ind. 317.

Maine.—Ware *v.* Ware, 8 Greenl. 42.

Massachusetts.—Commonwealth *v.* Kenney, 12 Met. 235, 46 Am. Dec. 672.

Missouri.—State *v.* Hamilton, 55 Mo. 520.

North Carolina.—Durham Tobacco Co. *v.* McElwee, 96 N. Car. 71, 1 S. E. 676.

Pennsylvania.—Moore *v.* Smith, 14 Serg. & R. 388.

Tennessee.—Queener *v.* Morrow, 1 Cold. 123.

Texas.—Bell *v.* Preston, 19 Tex. Civ. App. 375, 47 S. W. 375.

45. And Call Naturally for an Answer.—*England.*—Fairlie *v.* Denton, 3 Car. & P. 103, 14 Eng. C. L. 472.

Alabama.—Lawson *v.* The State, 20 Ala. 65, 56 Am. Dec. 182; Abercrombie *v.* Allen, 29 Ala. 281; Hicks *v.* Lawson, 30 Ala. 90; Spencer *v.* The State, 20 Ala. 24; Wheat *v.* Croom, 7 Ala. 340; Peck *v.* Ryan, 110 Ala. 336, 17 So. 733; Jelks *v.* McRae, 25 Ala. 440.

California.—Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64.

Georgia.—Giles *v.* Vandiver, 91 Ga. 102, 17 S. E. 115.

Iowa. — Churchill *v.* Fulliam, 8 Iowa 45.

Massachusetts.—Hildreth *v.* Martin, 3 Allen 371; Whitney *v.* Houghton, 127 Mass. 527; Larry *v.* Sherborne, 2 Allen 34; Drury *v.* Hervey, 126 Mass. 519; Commonwealth *v.* Densmore, 12 Allen 535.

Missouri.—Phillips *v.* Towler, 23 Mo. 401; Fourth Nat. Bank *v.* Nichols, 43 Mo. App. 385.

the facts were within his knowledge,[46] and that the fact admitted or the inference to be drawn from his silence would be material to the issue.[47]

Some of the cases go further, and hold that the mere statement of a fact in one's presence and a failure to deny or controvert it raises no presumption of the truth of the statement made, unless

New Hampshire.—Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753.

New York.—Waring *v.* U. S. Tel. Co. 44 How. Pr. 69.

North Carolina.—Durham Tobacco Co. *v.* McElwee, 96 N. Car. 71, 1 S. E. 676; Francis *v.* Edwards, 77 N. C. 271.

Pennsylvania.—Moore *v.* Smith, 14 Serg. & R. 388.

Vermont.—Vail *v.* Strong, 10 Vt. 457; Pierce *v.* Pierce, 66 Vt. 369, 29 Atl. Rep. 364; Brainard *v.* Buck, 25 Vt. 573; Gale *v.* Lincoln, 11 Vt. 152; Hersey *v.* Barton, 23 Vt. 684.

46. Facts Must be Within His Knowledge.—Commonwealth *v.* Kenney, 12 Met. 235, 46 Am. Dec. 672; Edwards *v.* Williams, 2 How. (Miss.) 846; Spencer *v.* The State, 20 Ala. 21; Robinson *v.* Blen, 20 Me. 109; Wallace *v.* Goodall, 18 N. H. 439; Fourth Nat. Bank *v.* Nichols, 43 Mo. App. 385.

47. Must be Material to the Issue.—*Alabama.*—Hill *v.* Bishop, 2 Ala. 320.

Indiana.—Zonker v. Cowan, 81 Ind. 395; Nave. v. Flack, 90 Ind. 205, 46 Am. 205.

Massachusetts.—Commonwealth *v.* Kenney, 12 Met. 235, 237, 46 Am. Dec. 672, 673.

Michigan.—Mabley *v.* Kittleberger, 37 Mich. 360.

Nebraska.—Hooper *v.* Browning, 19 Neb. 420, 27 N. W. 419.

New York.—Lydon *v.* Metropolitan El. Ry. Co., 57 N. Y. St. 74, 27 N. Y. Supp. 310; Stephens *v.* Vroman, 16 N. Y. 381.

North Carolina.—Croom *v.* Sugg, 110 N. C. 259, 14 S. E. 748.

Pennsylvania.—Lombard & S. S. Pass. Ry. Co *v.* Christian, 124 Pa. St. 114, 16 Atl. 628.

Texas.—Western Union Tel. Co. *v.* Thomas, 7 Tex. Civ. App. 105, 26 S. W. Rep. 117.

Vermont.—Melendy *v.* Ames, 62 Vt. 14, 20 Atl. 161; Vail *v.* Strong, 10 Vt. 457, 464.

Rule With Its Limitations.—The rule with its limitations is thus stated: "If a statement is made in the hearing of another in regard to facts affecting his rights, and he makes a reply, wholly or partially admitting their truth, then the declaration and the reply are both admissible: the *reply* because it is the act of the party, who will not be presumed to admit anything affecting his own interest, or his own rights, unless compelled to it by the force of truth; and the *declaration*, because it may give meaning and effect to the reply. In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts; first, whether he hears and understands the statement, and comprehends its bearing; and secondly, whether the truth of the facts embraced in the statement is within his own knowledge, or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it. If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law. So, if the matter is of something not within his knowledge; if the statement is made by a stranger, whom he is not called on to notice; or if he is restrained by fear, by doubt of his rights, by a belief that his security will be best promoted by his silence; then no inference of assent can be drawn from that silence." Commonwealth *v.* Kenney, 12 Met. 235, 237, 46 Am. Dec. 672, 673.

the party is under a moral or honorary obligation to disclose, or his reputation or interest is jeopardied by the statement.[48]

Distinction Between Written and Oral Statements As to Effect of Failure to Deny. — A distinction is made, in some of the cases, between a statement orally made in the presence of a party, and a letter or other statement written or exhibited to him, in respect of the necessity of making answer, under penalty of having his failure to do so taken as an admission of the truth of the statements made; it being held that the mere failure to answer a letter or other written statement does not amount to an admission of or acquiescence in the truth of the facts contained in it.[49]

48. Vail *v.* Strong, 10 Vt. 457; Mattocks *v.* Lyman, 16 Vt. 113; Perry *v.* Johnston, 59 Ala. 648; McCann *v.* Hallock, 30 Vt. 232.

Force and Effect of Silence. The extent to which courts should go in the admission of proof of mere silence as the acknowledgment of the truth of a statement and the caution with which such evidence should be received is well stated as follows:

"The most important practical question, by far, discussed in the case, remains to be determined. It seems to have been generally considered that all conversation had in the presence of a party, in regard to the subject of litigation, might properly be given in evidence to the jury. But in Vail *v.* Strong, 10 Vt. 457, and in Gale *v.* Lincoln, 11 Vt. 152, some qualification of this rule is established. It is there held, that unless a claim is asserted by the claimant or his agent, and distinctly made to the party, and calling naturally for a reply, mere silence is no ground of inference against one. And we think even in such a case that mere silence ought not to conclude a party, unless he thereby induces a party to act upon his silence in a manner different from what he otherwise would have acted. There are many cases of this character when one's silence ought to conclude him. But when the claim is made for the mere purpose of drawing out evidence, as, in the present case, it is obvious must have been the fact, or when it is in the way of altercation, or, in short, unless the party asserting the claim does it with a view to ascertain the claim of the person upon whom he makes the demand, and in order to know how to regulate his own conduct in the matter, and this is known to the opposite party, and he remains silent, and thereby leads the adversary astray, mere silence is, and ought to be, no ground of inference against any one. The liabilities to misapprehension, or misrecollection, or misrepresentation are such, that this silence might be the only security. To say, under such a dilemma, that silence shall imply assent, would involve an absurdity little less gross than some of the most extravagant caricatures of this caricature-loving age. With some men, perhaps, silence would be some ground of inferring assent, and with others none at all. The testimony then would depend upon the character and habits of the party—which would lead to the direct trial of the parties, instead of the case." Mattocks *v.* Lyman, 16 Vt. 113, 118.

49. **Distinction as to Written and Oral Statements.**—*England.*—Farlie *v.* Denton, 3 Car. & P. 103, 14 Eng. C. L. 472.

Colorado.—Lee-Clark, etc., Co. *v.* Yankee, 9 Colo. App. 443, 48 Pac. 1050.

Florida.—Sullivan *v.* McMillan, 26 Fla. 543, 8 So. 450.

Massachusetts.—Commonwealth *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596; Fearing *v.* Kimball, 4 Allen 125, 81 Am. Dec. 690.

Michigan. — Canadian Bank *v.* Coumbe, 47 Mich. 358, 11 N. W. 196.

New York.—Waring *v.* U. S. Tel. Co., 44 How. Pr. 69; Learned *v.* Tillotson, 97 N. Y. 1, 49 Am. Rep. 508; Bank of British N. A. *v.* Delafield, 126 N. Y. 410, 27 N. E.

But in other cases, the distinction is not recognized or observed;[50] and in others a distinction is drawn between letters containing a demand and those containing affirmative statements or declarations of the writer as to his version of the controversy between him and his correspondent.[51] And some draw a distinction between cases where the relations between the parties are such that the writer would suffer by the silence of the party addressed, or his future conduct be influenced by such silence, and ordinary cases.[52]

If the party assents to the statements, there can be no question. In that case, however, the assent amounts, in effect, to a direct or express admission of the fact.[53]

Distinction Between Statements Made by Strangers and Parties in Interest.—So with respect to the obligation of a party to answer and deny what is said in his presence, a distinction is made between

797; Talcott *v.* Harris, 93 N. Y. 567; Levison *v.* Seybold Mach. Co., 22 Misc. 327, 49 N. Y. Supp. 148.

Pennsylvania.—Fraley *v.* Bispham, 10 Pa. St. 320, 51 Am. Dec. 486; Dempsey *v.* Dobson, 174 Pa. St. 122, 34 Atl. 459.

Vermont.—Hill *v.* Pratt, 29 Vt. 119.

Failure to Answer Letter.—In Farlie *v.* Denton, 3 Car. & P. 103, 14 Eng. C. L. 472, *supra*, Lord Tenterden said: "What is said to a man before his face he is in some degree called on to contradict if he does not acquiesce in it; but the not answering a letter is quite different, and it is too much to say that a man, by omitting to answer a letter at all events, admits the truth of the statements that letter contains."

And again in Commonwealth *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596: "Letters addressed to an individual, and received by him, are not to have the same effect as verbal communications. Silence in the latter case may authorize an inference of an assent to the statements made, but not equally so in the case of a letter received, but never answered or acted upon."

Failure to Answer Letter.—In Learned *v.* Tillotson, 97 N. Y. 1, 9, 49 Am. Rep. 508, in speaking of the question as to the admissibility of a letter, and in connection therewith, the fact that the letter was unanswered, the court said: "The statement was entirely *ex parte*, not made in the presence of the defendant, and, therefore, he was not in the position of one to whom a conversation is addressed, who is called upon at the time to make an answer to the same, or to suffer the consequences of such inferences as may be derived from the fact of his remaining silent, and thus acquiescing in the correctness of the representations made. Nor can it be said, we think, that the statement contained in the letter bears any analogy to a case where an injured party makes a statement after the transaction, which is held, under certain circumstances in some of the authorities, to be competent testimony."

50. *Delaware.*—Grier *v.* Deputy, 1 Marv. 19, 40 Atl. Rep. 716.

Indiana.—Hays *v.* Morgan, 87 Ind. 331.

Iowa.—Des Moines Sav. Bank *v.* Colfax Hotel Co., 88 Ia. 4, 55 N. W. 67.

Massachusetts. — Robinson *v.* Fitchburg, etc., R. R. Co., 7 Gray 92.

Vermont.—Fenno *v.* Weston, 31 Vt. 345.

Washington.—Smith *v.* Kennedy, 1 Wash. Ter. (N. S.) 55.

Wisconsin.—Murphey *v.* Gates, 81 Wis. 370, 51 N. W. 573.

51. Learned *v.* Tillotson, 97 N. Y. 1, 49 Am. Rep. 508.

52. Porter *v.* Ledoux, 6 La. Ann. 377.

53. McCallon *v.* Cohen, (Tex. Civ. App.), 39 S. W. 973.

the statements made by mere strangers and those made by parties in interest.[54]

Effect of Failure to Deny Ex Parte Affidavits.—And it is held that where an order is made against a party on *ex parte* affidavits charging fraud, a failure on his part to interpose a motion to vacate the order does not amount to an admission of the truth of the charge of fraud or render such affidavits competent evidence.[55]

Whether Party Must Act Knowingly or Not. — The question whether the party must act knowingly or not depends upon circumstances. This branch of the subject will be considered when we come to the effect of admissions when proved. But it may be stated, generally, in this connection, that a party cannot be bound by admissions resulting from mere inference unless the act relied upon was done with knowledge of all the essential facts, in the absence of a showing that an innocent person has acted thereon to his injury.[56]

54. Statements Made by Strangers. — Phillips *v.* Fowler, 23 Mo. 401; Remy *v.* Johnston, 59 Ala. 618; Lee-Clark, etc., Co. *v.* Yankee, 9 Col. App. 443, 48 Pac. 1050.

Failure to Answer Letter from One Not a Party.—In Lee-Clark etc. Co. *v.* Yankee, 9 Colo. App. 443, 48 Pac. 1050, it is said, in speaking of a letter addressed to the defendant in the action, by a third party: "The fact that defendant had received such a letter from Mr. Judd, and failed to reply to it, could not have bound defendant in any manner. Judd was not a party to this suit, and not even a creditor of the firm; and hence the reasons of defendant for such failure to reply were even less material."

Verbal Statement by a Stranger. In Phillips *v.* Towler, 23 Mo. 401, 403, the court said: "The court erred also in allowing the remarks of Robert Towler, made in the presence of the intestate, to go to the jury. They were to the effect that 'the girl had burned plaintiff's stable, and confessed it.' The intestate, it seems, made no reply, and this was received as an admission of the fact on his part, implied from his supposed acquiescence in what was thus said in his hearing. In regard to these admissions inferred from acquiescence in the verbal statements of others, on the maxim, '*Qui tacet consentire videtur*,' it has been most justly remarked, that nothing can be more dangerous than this kind of evidence, and that it ought always to be received with caution, and never admitted at all unless the statements be of that kind that naturally call for contradiction—some assertion made to the party with respect to his rights, which by his silence he acquiesces in. (Moore *v.* Smith, 14 S. & R. 392). A distinction is taken between declarations made by a party interested and a stranger, and it has been determined, that, while what one party declares to the other, without contradiction, is admissible evidence, what is said by a third person may not be so. (Child *v.* Grace, 2 Car. & Payne, 193.)"

55. Talcott *v.* Harris, 93 N. Y. 567.

56. Whether the Party Must Act With Knowledge. — *England.* Rankin *v.* Horner, 16 East, 191.

Indiana. State *v.* Sutton, 99 Ind. 300.

Maine.—Robinson *v.* Blen, 20 Me. 100.

Mississippi. — Edwards *v.* Williams, 2 How. (Miss.) 846.

New York.—Davis *v.* Gallagher, 124 N. Y. 487, 26 N. E. Rep. 1015.

Ohio.— Griffith *v.* Zipperwick, 28 Ohio St. 388.

Pennsylvania.—Lombard & S. S. Pass. Ry. Co. *v.* Christian, 124 Pa. St. 114, 16 Atl. Rep. 628.

Vermont.— Mattocks *v.* Lyman, 16 Vt. 113.

Admissions Based on Information and Belief. — An admission may be competent although of a fact not within the declarant's personal knowledge.[57] Admissions of a party may be used against him though made wholly upon information and belief.[58]

Admissions As to Facts That Party Is Bound to Know. — And without actual knowledge, one may be bound when he has assumed rela-

Statement to One Not Having Knowledge.—In the case of the claim of a step-son against his step-father's estate, for services rendered and goods furnished deceased in his life-time, the former, in the presence of the administrators of the estate, stated the particulars of his claim, to which the administrators made no objection except to two or three items. The facts were not within their personal knowledge. It was said: "The administrators were engaged in trying to settle a disputed claim against the estate. They may therefore be said to have been acting in their representative capacity and in the discharge of their duty, but the claims of plaintiff under consideration related to past transactions with their intestate, and, as Gallagher has testified, pertaining to matters not within his personal knowledge. No admission, therefore, if made by him, would constitute a part of the *res gestae*. Consequently it was held that the failure of the administrators to object not being a part of the *res gestae* was not admissible at all. Davis *v.* Gallagher, 124 N. Y. 487, 26 N. E. 1045.

Effect of Silence. — *Question of Knowledge.* — "To contradict an assertion, implies a knowledge of the matter asserted of, but to suffer a remark to pass uncontradicted does not necessarily imply an admission of its truth. This would depend upon the knowledge of the party to whom the conversation was addressed. If an individual were to say to another, I owe you so much and no more, and that other were to permit the remark to pass uncontradicted, it would be admissible as evidence to show the extent of the debt, but it would be so because the remark was made in reference to a matter which must have been known, or which in all probability was known by the other party. On the other hand, if such a remark should be made in reference to a matter which must necessarily be unknown to the party addressed, his apparent acquiescence would amount to nothing. If the nature of the matter spoken should be such as would be likely to be known to the party to whom the conversation was addressed, such probable knowledge might be sufficient ground for admitting the evidence; but when the truth of the statement could not be known by the party addressed, the statement made to him could not be evidence, without showing that the truth of the matter was within his knowledge." Edwards *v.* Williams, 2 How. (Miss.) 846, 849.

57. Sparr *v.* Wellman, 11 Mo. 230; Chapman *v.* Chicago & N. W. R. W. Co., 26 Wis. 295, 7 Am. Rep. 81.

If admissions made by a party are based upon the supposition that certain information, given him by another, is correct, such admissions may, with other evidence, showing the correctness of the statements made to the party, be competent evidence against him. Chapman *v.* Chicago N. W. Ry. Co., 26 Wis. 295.

58. Reed *v.* McCord, 18 App. Div. 381, 46 N. Y. Supp. 407; Shaddock *v.* Town of Clifton, 22 Wis. 114.

When Statement Without Knowledge Amounts to Admission.— Thus it is held that a statement of an employer as to the cause of an accident by which his employee was killed, made at the coroner's inquest, was competent in an action against him for damages, as an admission, though he had no personal knowledge of the facts. Reed *v.* McCord, 18 App. Div. 381, 46 N. Y. Supp. 407.

tions from which knowledge must be presumed.[59]

The courts have uniformly treated evidence of this kind as dangerous and uncertain, and it is received with great caution.[60]

Effect of Admission for the Jury.—If an admission, direct, incidental, or by inference, tends to establish a fact material to the case, it is competent, and whether it does, alone, or in connection with other facts proved, establish such fact, must be left to the jury.[61]

59. Raggett *v.* Musgrave, 2 Car. & P. 556; Alderson *v.* Clay, 1 Stark 405, 2 Eng. C. L. 157.

60. Evidence Received with Caution.—*United States.*—Dalton *v.* United States, 22 How. 436.

Georgia.—Carter *v.* Buchanan, 3 Kelly 513; Rolfe *v.* Rolfe, 10 Ga. 143.

Iowa.—Churchill *v.* Fulliam, 8 Iowa 45.

Massachusetts.—Whitney *v.* Houghton, 127 Mass. 527; Larry *v.* Sherburne, 2 Allen 34.

Missouri.—Phillips *v.* Towler, 23 Mo. 401.

New Hampshire.—Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753.

Vermont.—Mattocks *v.* Lyman, 16 Vt. 113.

Extent of the Rule.—The jury was instructed that no act or declaration of the defendant, as a payment made or claimed to have been made, without disputing at the time the correctness of the account, is a circumstance which may be considered by the jury as proof of and tending to prove the correctness of such an account. This was held to be stating the proposition entirely too broadly, and it was said: "The defendant is not called upon to dispute the account on every occasion, and care should be exercised in determining whether the circumstance called for was such as to cause his admission to have weight against him." Churchill *v.* Fulliam, 8 Iowa, 45.

Evidence Should be Received with Great Caution.—In Larry *v.* Sherburne, 2 Allen 34, it is said: "There is therefore nothing to show that the evidence of the offer to pay could have any effect as an admission. It is true that there are cases where a party may be affected in his rights by proof of a silent acquiescence in the verbal statements of others. But such evidence is always to be received and applied with great caution, especially where it appears, as in this case, that the statements are made, not by a party to the controversy, but by a stranger. There are many cases where the intervention of a third person may properly be deemed unnecessary, and his statements be regarded as immaterial and impertinent. To them no reply need be made; and no inference can be drawn from the fact that they are received in silence."

61. Hagenbaugh *v.* Crabtree, 33 Ill. 226.

When Failure to Deny Evidence of Admission.—In the case cited it is said: "That such evidence is proper for the consideration of a jury is undeniably true, but it is equally true that such evidence is not conclusive. Nor is such silence always evidence of the truth of the statement thus made. And it is for the obvious reason that under a variety of circumstances, it would be highly improper for a party to make a denial. The proprieties of life should not be outraged or even violated in making such a denial. Nor would the party be bound to do so, if it would lead to violent altercation between the parties. If such a denial would lead to a breach of the peace, or even to an indecent quarrel and abuse, he would not be bound to contradict the statement. Or if it would be indecorous and offensive to those present, or if it would disturb business, social enjoyment or religious exercises, it would be improper to make a denial. If made in court, where it would be a contempt to make the denial, it would be highly improper. The extent of the rule is, that it is a question for the jury, in the light of all the circumstances, to say whether or not it amounts to an admission."

4. Self-Serving Statements.— Statements of Acts in One's Own Interest Incompetent. — It has been shown above that statements against one's interest are in the nature of admissions and, therefore, competent evidence against him. On the other hand, statements, declarations or acts of a party, in his own interest, or tending to establish his theory of the case, or any fact favorable to him, whether oral or in writing, are as a general rule, inadmissible as evidence in his own behalf,[62] except where they are a part of the *res gestae* or the mere statements or declarations of the party offering them. Tobin *v.* Young, 124 Ind. 507, 24 N. E. 121.

Not Competent to Relate Statements Against Interest.—And even where declarations made by a party against his interest have been proved, it is not competent to introduce evidence of different declarations, subsequently made by the same person (who died before the trial) to others. Boston & Worcester R. R. Co. *v.* Dana, 1 Gray 83.

Where There are a Series of Letters.—In Fearing *v.* Kimble, 4 Allen 125, 81 Am. Dec. 690, the question was as to the admissibility of a letter, written by one of the parties to the action, to another in reply to one received by him. It appeared that the plaintiffs in the action had written a letter to the defendant, to which he had replied, both of which letters were allowed in evidence. The plaintiffs were then allowed, under objection, to read a portion of the second letter written by them to the defendant, to which no reply was received. In holding the second letter of the plaintiff, or the third in the series, to have been inadmissible, the court said: "The first letter unanswered would seem to be obviously incompetent evidence to prove the facts therein stated to be true, against the party to whom it was addressed. Why does not the like objection apply to a second letter, reaffirming facts or stating additional ones, and to which there has been no reply? A party may introduce the letter of his adversary, and if need be, for the purpose of enabling the jury to understand fully the letter thus introduced, he may read to the jury the letter to which it was in answer; but to go further, and hold that a second letter of the party, or a third, or fourth, as the

62. **Statements in One's Own Interest Incompetent.** — Stephens' Dig. of Ev. 39.

England.—Richards *v.* Frankum, 9 Car. & P. 221, 38 Eng. C. L. 138.

Alabama.—Downing *v.* Woodstock Iron Co., 93 Ala. 262, 9 So. 177; Hunt *v.* Johnson, 96 Ala. 130, 11 So. 387; Lawson *v.* The State 20 Ala. 65, 56 Am. Dec. 182.

Arkansas.—Brown *v.* Wright, 17 Ark. 9.

Florida.—Sullivan *v.* McMillan, 26 Fla. 543, 8 So. 450.

Indiana.—Tobin *v.* Young, 124 Ind. 507, 24 N. E. 121.

Massachusetts.—Boston & Worcester R. R. Co. *v.* Dana, 1 Gray 83; Fearing *v.* Kimball, 4 Allen 125, 81 Am. Dec. 690.

Michigan.—Bronson *v.* Leach, 74 Mich. 713, 42 N. W. 174; Buckingham *v.* Tyler, 74 Mich. 101, 41 N. W. 868.

New York.—Artcher *v.* McDuffie, 5 Barb. 147; Ogden *v.* Peters, 15 Barb. 560.

Texas.—Poole *v.* State, 32 Tex. Crim. App. 379, 23 S. W. 891; Shiner *v.* Abbie, 77 Tex. 1, 13 S. W. 613; Moody *v.* Gardiner, 42 Tex. 411; Atwood *v.* Brooks, (Tex.) 16 S. W. 535.

When Not Admissible.—Thus it is held that a conversation between a defendant and a stranger to the cause, which plaintiff did not hear, and which did not form a part of the *res gestae*, is inadmissible. Hunt *v.* Johnson, 96 Ala. 130, 11 So. 387.

If statements of a party in whose favor they are offered are admissible in evidence it must be upon the ground that they formed a part of the *res gestae*, or statements made to the opposite party under such circumstances as to call for a denial, and no such denial was made, in which case they became the admissions of the opposite party, and competent for that reason, and not

made in the presence of the other party. *See* "DECLARATIONS."

The fact that the conversation took place at the request of the opposite party does not change the rule.[63]

Reason for the Rule.—The reason is obvious. If such evidence were held to be competent, a party might easily manufacture evidence in his own behalf, that, while competent, would be wholly unreliable. It is for this reason that such statements or acts are termed "self-serving."

Exceptions. In Connection with Failure of the Other Party to Deny, Competent as Showing Admission.—But it does not follow from this case may be, is competent evidence, would be in violation of the rule that a party cannot make evidence for himself by his own declarations, and the further rule that the omission to answer letters written to a party by a third person does not show an acquiescence in the facts there stated, as might be authorized to be inferred in the case of silence, where verbal statements were made directly to him."

When Not Part of Res Gestae. Poole *v.* State, 32 Tex. Crim. App. 379, 23 S. W. 891, was a prosecution for assault and battery on a boy. The statements of the boy to his father, immediately after the alleged assault and battery, upon coming home wounded and crying, and also his subsequent statements made to a witness sent for by the father, were admitted in evidence by the court below. It was held on appeal, that the statements made to the father were admissible as a part of the *res gestae*, but that the subsequent statements made to the third party were incompetent, and the case was reversed on that ground.

By a Partner.—So it is held that in a suit against a firm for the price of bucks purchased by one of the partners, his declarations, not made in the presence of his partner, that he had bought the bucks for and on account of the firm, are not competent against the partner. Atwood *v.* Brooks (Tex.) 16 S. W. 535.

How Much Correspondence Admissible.—The case of Sullivan *v.* McMillan, 26 Fla. 543, 8 So. 450, is an interesting one on this subject. The action was on a contract for the delivery, in a boom, of logs of certain dimensions. Certain letters passed between the parties, and in speaking of the effect of these letters and their admissibility, the court said: "There is, however, in these letters no admissions against the interests of the defendants. The statements are assertions or declarations in the interest of defendants, and against that of the plaintiffs, and are inadmissible of themselves as evidence of their truth in favor of the defendants. Smith *v.* Shoemaker, 17 Wall. 630. This letter, and in fact the whole correspondence, constitute the declaration of the defendants to the plaintiffs that the former would not receive any more logs under the contract, including their reason for not doing so; or, in other words, their refusal to perform the contract, or to permit plaintiffs to perform it. It and nothing else is such refusal, and not merely evidence of it. To ascertain if there was such refusal, the entire correspondence is to be considered. The doctrine of admissions against interest cannot be invoked to constitute these statements or assertions of the defendants evidence of themselves against the plaintiffs, or in support of the plea under consideration. Declarations or statements made in the presence of a party are received in evidence, not as evidence in themselves, but to understand what reply the party to be affected by them should make. If he is silent when he ought to have denied, the presumption of acquiescence arises. 2 Whart. Ev. § 1136; Gibney *v.* Marchay, 34 N. Y. 305; Gebhart *v.* Burkett, 57 Ind. 378; 1 Phil. Ev. (Cow. & H. Notes,) 191, 192. Certainly no view more favorable to the person making the statement can be held where it is made by letter, and not in the presence of the other person."

63. Artcher *v.* McDuffie, 5 Barb. 147.

rule that acts or declarations of a party in his own favor, or tending to establish the truth of his contention, are never competent to be shown in his behalf. On the contrary, they are often competent in his favor, in connection with other evidence. We have shown above that they may be proved when made in the presence of the adverse party, if not denied by him, as tending to show an admission of such party that they are true.

Right to Prove Balance of Conversation or Writing When Part Offered by Opposite Party.—So where statements, oral or written, made against interest, are proved, other acts or declarations made at the time, and as a part of the same conversation, or as a part of the same writing, favorable to the party making the declarations proved against him, and qualifying or explaining what has been so proved, are competent in his behalf.[64]

64. **Exception.**—*Proving Balance of Conversation or Writing.*—Stephens' Dig. of Ev., 66; Chamberlayne's Best on Ev., § 520.

United States.—Insurance Co. *v.* Newton, 22 Wall. 32.

Florida.—Sullivan *v.* McMillan, 26 Fla. 543, 8 So. 450.

Illinois.—Bailey *v.* Pardridge, 35 Ill. App. 121.

Massachusetts.—Trischet *v.* Hamilton Mut. Ins. Co., 14 Gray 456.

Michigan.—Vanneter *v.* Crossman, 42 Mich. 465, 4 N. W. 216.

New York.—Grattan *v.* Metropolitan Ins Co., 92 N. Y. 274, 44 Am. Rep. 372; Platner *v.* Platner, 78 N. Y. 90; Downs *v.* N. Y. Central R. R. Co., 47 N. Y. 83; Rouse *v.* Whited, 25 N. Y. 170, 82 Am. Dec. 337.

Whole Letter Must be Considered. Thus it is held in Bailey *v.* Pardridge, 35 Ill. App. 121, that where the plaintiff introduces letters of the defendant to prove certain facts, he is bound to admit declarations therein which make against him as well.

In an action upon a policy of insurance, the plaintiff, to show a bias and prejudice against him by a witness called by the defense, introduced two letters in evidence, addressed to him by the witness, and then offered to prove the contents of a letter from the plaintiff to the witness, which had been lost, and to which a second letter of the witness was a reply. The defense objected on the ground that this would be permitting the plaintiff to give in evidence his own declarations and statements, but the court admitted the proof of the contents of the lost letter, and ruled "that it was competent for the consideration of the jury so far only in behalf of the plaintiff as it tended to qualify, explain or aid in the consideration of the language of the witness, in the letters written by him and put into the case;" and this ruling was held to be right on appeal; the court saying: "Where a letter is written in answer to another, it may often be unintelligible without referring to the previous one. By referring to the letter to which he is replying, the writer, to that extent, makes it a part of his own communication. Suppose that the first letter contained a question; and the reply was 'to the question contained in your letter I answer Yes.' How could the meaning of the answer be ascertained by the jury, without knowing the question? We can perceive no just distinction between oral conversation and written correspondence, in this respect. Where a statement is made in the course of a conversation or correspondence, which is itself admissible in evidence, the rest of the conversation or correspondence must be admitted, so far as it is connected with and necessary to the full understanding of what follows." Trischet *v.* Hamilton Mut. Ins. Co., 14 Gray 456.

Extent of Rule Stated.—In Vanneter *v.* Crossman, 42 Mich 465, 468, 4 N. W. 216, the rule is thus declared: "The declarations of a party may be given against his own

Must be Part of Same Conversation or Writing.—But it must be a part of the same conversation, or a part of the same document. Other and different conversations or writings not part of or in some way connected with the one first offered in evidence cannot be allowed in favor of the party making the statements.[65]

interest, and when a part of an entire statement or conversation is so given, he may adduce whatever has been omitted which bears in any way upon the rest. But he cannot, by collateral statements outside, make evidence for himself."

So in Grattan *v.* Metropolitan Ins. Co., 92 N. Y. 274, 44 Am. Rep. 372, it is held that the introduction by one party of part of a conversation or a writing renders admissible on the other side so much of the remainder as tends to explain or qualify what has been received; and that is to be deemed a qualification which rebuts and destroys the inference to be drawn from, or the use to be made of, the portion put in evidence.

Confined to so Much as Qualifies or Explains.—But the portion of a conversation stating declarations in the interest of the party making them must be confined to such conversation as is connected with, and which tends in some way to explain, qualify or rebut a portion of the conversation offered against him. Platner *v.* Platner, 78 N. Y. 90.

In the case cited the court said: "There is a limit to the extent to which a party may go in calling out what was said by and to him in a conversation, parts of which the other party has proved: (Rouse *v.* Whited, 25 N. Y. 170). In the case just cited, the rule for that limit is adopted and followed which is laid down in Prince *v.* Samo (7 Ad. & Ell., 627). The rule is this: that where part of a conversation has been given in evidence, any other or further part of that conversation may be given in evidence in reply, which would in any way explain or qualify the part first given. In the case last cited, the rule is applied only to the declarations of a party to the action; and so far it is approved in Garey *v.* Nicholson (24 Wend., 350). But even if the conversation held by the plaintiff's husband with her should be deemed the declarations of a third person not a party to the action, the principle of the rule will apply. It is so laid down in 1 Phil. on Ev., 415, but without the citation of English authority directly in point. The offer of the plaintiff, in the case in hand, was to show the whole conversation, not limiting the evidence to what was said that would explain or qualify what had been proved by the defendant. The plaintiff made also a specific offer to prove that her husband said that the defendants gave the note in suit for the $2,900 note that she owned. Clearly this did not relate to anything which the defendants had shown, as we have stated it."

65. Downs *v.* N. Y. Central R. R. Co., 47 N. Y. 83; Johnson *v.* Brock, 23 Ark. 282; Rouse *v.* Whited, 25 N. Y. 170, 82 Am. Dec. 337; The Queen's Case, 2 Brod. & Bing. 284, 297, 6 Eng. C. L. 152.

Must Be Part of Same Conversation or Writing.—The question will be found very fully discussed and the reasons for the rule and its limitations stated in Rouse *v.* Whited, 25 N. Y. 170, 82 Am. Dec. 337. The discussion of the question by the court is preceded by this general statement: "It is plain that there must be some limitation of the right of the party whose statement or admission, forming a part of a conversation, has been given in evidence against him to prove further or other statements or declarations made by him at the same time or as a part of the same conversation, otherwise the court and the jury might be compelled to listen to a long story about matters not at all connected with any matter or thing in controversy between the parties. No one will say that a party whose statement has been given in evidence against him by his opponent, has a right to prove all that he said at the time or in the same conversation, solely because such further or other statements were made at the same time or in the same conversation"

When Separate Letters or Other Writings Competent.—On the other hand, a separate writing, for example a letter, if so connected with the one first introduced in evidence that it may properly be taken as being equivalent to one continuous conversation relating to the same subject as in case of a continued correspondence, the whole of the correspondence may become material and important as showing the meaning and intent of the party and his position with respect to the matter in dispute. If so, the introduction of one letter or other writing will entitle the other party to bring in the whole correspondence on the same principle that the offer of a part of a conversation entitles the opposite party to bring the balance of it before the court.[66]

Party Offering Conversation Not Bound by Statements Made in the Interest of His Adversary.—And where a party is forced by this rule to prove, or permit to be proved, the whole conversation in order to show such admissions or declarations as make to his advantage, he is not thereby bound by such of the statements or conversation as make against him, and in favor of his adversary, but may disprove the same by other evidence.[67]

How Much of Conversation Competent.—The rule is that if a part of a conversation is proved against a party, amounting to admissions or declarations against his interest, he is entitled to prove the balance of such conversation, relating to and bearing upon the same matter, although the matter offered by him would, if offered in-

And after a review of the authorities, the court concluded by saying: "The question then in this case is, whether the justice, under the rule as limited in Prince *v.* Samo, 7 Ad. & E. 627, should have permitted the defendants to show that when the defendant Oliver Whited told the sheriff, and both the defendants told Seaman, that the property levied on was the plaintiff's, they at the same time made the further statement that the debt was the plaintiff's, or was his debt to pay. Most clearly he should. The plaintiff relied on the statements of the defendants proved by him, to show that the property levied on was his property, and thus to show that his property, to the amount of twenty-seven dollars, had gone to pay the defendant's debt. If the property was his, but it had been levied on and sold to pay his own debt, there was an end of his case. The statements, then, of the defendants, that the debt was the plaintiff's, or belonged to him to pay, if proved, would completely destroy the force and effect and intended use of the admissions or statements first given in evidence by the plaintiff, and ought to have prevented a recovery."

In the case of Prince *v.* Samo, 7 Ad. & E. 627, referred to in the case just quoted from, the rule is stated substantially, as follows: "Where a statement forming a part of a conversation is given in evidence, whatever was said by the same person in the same conversation, that would in any way qualify or explain that statement, is also admissible; but detached and independent statements, and in no way connected with the statement given in evidence, are not admissible, and there is no difference in this respect between statements made in conversation by a party to the suit and those made by a third party."

66. Trischet *v.* Hamilton Mut. Ins. Co., 14 Gray 456.

67. Mott *v.* Consumers' Ice Co., 73 N. Y. 543; Gildersleeve *v.* Landon, 73 N. Y. 609; Tatum *v.* Mohr, 21 Ark. 349.

dependently, be incompetent on the ground that the statements were self-serving.[68]

It has been held that so much of the conversation as relates to the subject matter of the action may be brought out where a part of such conversation has been proved by the opposite party.[69]

But this states the rule altogether too broadly. It must be confined to so much of the conversation as relates, in some way, to that part of the conversation already brought out.[70]

Declarations Proved for Purpose of Impeachment. Other Statements Competent.—And it is held in some states that where statements of a witness, whether a party or not, contradictory of his testimony, are proved for the purposes of impeachment only, other statements made by such witness consistent with his testimony may be proved in his support.[71]

68. How Much of Conversation Competent.—1 Green Ev. § 201; Steph. Dig. of Ev. 39; Insurance Co. v. Newton, 22 Wall. 32; Farley v. Rodocanachi, 100 Mass. 427; Gildersleeve v. Landon, 73 N. Y. 609; Rouse v. Whited, 25 N. Y. 170, 82 Am. Dec. 337.

69. What Competent on Re-Examination.—The Queen's Case, 2 Brod. & Bing. 284, 297, 6 Eng. C. L. 152.

In the case cited, Abbott, C. J., said: "My lords, I agree with the other judges in considering the two questions proposed to us by your lordships to be, with reference to the point on which our opinion has been asked, substantially one, and that question, as proposed by the house, contains these words, 'the witness, being re-examined, had stated what induced him to mention to C. D. what he had so told him;' by which, I understand that the witness had fully explained his whole motive and inducement to inform C. D. that he was to be one of the witnesses; and so understanding the matter, and there being no ambiguity in the words, 'I am to be one of the witnesses,' I think there is no distinction to be made between the previous and subsequent parts of the conversation, and I think myself bound to answer your lordship's question in the negative.

"I think the counsel has a right, upon re-examination, to ask all questions, which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and, also, of the motive, by which the witness was induced to use those expressions; but, I think, he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. And, as many things may pass in one and the same conversation relating to the subject of the conversation, (as in the case put by your lordships, the declaration of a witness that he was to be a witness in a cause or prosecution,) which do not relate to his motive or to the meaning of his expressions, I think, the counsel is not entitled to re-examine as to the conversation to the extent to which such conversation may relate to his being one of the witnesses, which is the point proposed in your lordship's question to the judges."

70. Limitation of the Rule. Prince v. Sams, 7 Ad. & E. 627, 34 Eng. C. L. 333; Rouse v. Whited, 25 N. Y. 170, 82 Am. Dec. 337; 1 Phil. Ev., (4th Am. Ed. from 10 Eng. Ed.) 416.

71. Queener v. Morrow, 1 Cold. (Tenn.) 124; Daily v. The State, 28 Ind. 285; Brookbank v. The State, 55 Ind. 169; Ballow v. State, (Tex. Crim. App.), 58 S. W. 1023.

Rule not Uniform.—But there are cases holding directly to the contrary, 2 Rice on Ev. 620; Stephen's Dig. of Ev.; People v. Doyell, 48 Cal. 85; Dechert v. Municipal Elec. Co. 39 App. Div. 490, 57 N. Y. Supp 225.

How Far Confirmatory Statements

When Part of the Res Gestae.—And the declarations of a party

Competent.—In Queener *v.* Morrow, 1 Cold. (Tenn.) 124, after reviewing some of the English cases and their authorities, in which the ground was taken that former consistent statements of a witness to rebut directer statements by him were not competent evidence, and the court said: "The reason for rejecting confirmatory evidence of former declarations, according to some of the English authorities, is the seeming incongruity of holding, that a representation *without* oath, can be any confirmation of a statement *upon* oath. But there would seem to be some show of reason in the doctrine, that where it was attempted to establish that the statement on oath is a fabrication of recent date, or where a design to misrepresent, from some motive, is imputed to the witness; or where it is sought to destroy his credit, by proof of contradictory representations; evidence of his having given the same account of the matter, at a time when no motive or interest exist, and no influence had been brought to operate upon him to misrepresent the facts, ought to be received, because it naturally tends to inspire increased confidence in the truth of the sworn statement. To this extent, we think, the principle is reasonable and just. But to allow consistent statements, for the purpose of giving support to the credit of the witness, made after the contradictory representations by which it is sought to impeach him, would be to put it in the power of every unprincipled witness to bolster his credit, and, perhaps, escape the just consequences of his own falsehood and tergiversation; and it would be still worse to hold that the statement of an arraigned felon *in vinculus*, offered, perhaps as a *bribe*, to procure his discharge, and made after the contradictory statement proved against him, and at a time when he was laboring under the strongest possible motives to misrepresent the facts, might be received. This cannot be allowed, because of its direct tendency to corrupt the administration of justice, as well as the inherent absurdity of such a practice."

It is said in People *v.* Doyell, 48 Cal. 85, 90: "There are cases which sustain the proposition of defendant's counsel, that when an attempt is made to impeach a witness by proving former contradictory statements, he may be supported by evidence that he has made to other persons, declarations consistent with his testimony. Such is the law of Indiana and perhaps of Pennsylvania and North Carolina. In New York, as in England, after much uncertainty, the rule seems now to be settled that such evidence is ordinarily inadmissible; and in others of the State it is rejected. The best elementary writers reach the conclusion that the evidence is to be received only in exceptional cases. The witness cannot be confirmed by proof that he has given the same account before, for his mere declaration is not evidence. His having given a different account, although not upon oath, necessarily impeaches either his veracity or his memory; but his having asserted the same thing does not in general carry his credibility further than, nor so far as, his oath."

Statement of the Rule.—The rule is thus cited in a note in Stephen's Digest of the Law of Evidence, p. 225, note 3:

"It is not in general permissible to support a witness by evidence that he has made former statements similar to his testimony. Gr. Ev. 1, § 469; Powers *v.* Cary, 64 Me. 10; Reed *v.* Spaulding, 42 N. H. 114; Conrad *v.* Griffey, 11 How. (U. S.) 480; Robb *v.* Hackley, 23 Wend. 50; and cases *infra*. But when his testimony is charged to have been given under the influence of some improper or interested motive, or to be a recent fabrication, and in other like cases, it may be shown that he made other similar statements before the motive existed, or before there could have been any inducement to fabricate. Herrick *v.* Smith, 13 Hun 446; Stolp *v.* Blair, 68 Ill. 541; Hester *v.* Com., 85 Pa. St. 139; Com. *v.* Jenkins, 10 Gray 485; People *v.* Doyell, 48 Cal. 85; State *v.* Hendricks, 32 Kan. 559; see State *v.* Dennin, 32 Vt. 158. In some states

in his own interest are competent where they form a part of the *res gestae*.[72]

To Prove Notice or Demand Competent.—So a letter written, containing a demand or notice, may be competent to prove such demand or notice, but it can not be used by the party writing it to establish the truth of any fact it contains, although it is held in some of the cases, as shown above, that a letter unanswered may be used in connection with evidence that it was unanswered, as tending to show an admission.[73]

5. Partial and Plenary. — Admissions are also divided into partial and plenary. It is a distinction recognized, chiefly, in equity practice. A partial admission is defined as one delivered in terms of uncertainty with explanation or qualification, and a plenary admission as one without any qualification.[74]

6. Documentary. — As here considered, a documentary admission is one contained in some writing. *See* "DOCUMENTARY EVIDENCE."

Not Necessary that it be Executed.—But it is not necessary that it be a valid subsisting document for the purpose for which it was intended, in order to constitute it competent as evidence of an admission. For example, it may be necessary to the binding effect of a document that it be delivered. But if not delivered, if it is signed by the party, it is competent evidence as against him of the truth of any facts stated therein.[75]

such evidence seems to be received whenever it is attempted to discredit a witness by proof of his inconsistent statements. Dodd *v.* Moore, 92 Ind. 397; State *v.* Grant, 79 Mo. 113; see Carter *v.* Carter, 79 Ind. 466.

72. When Part of Res Gestae. 1 Green Ev. § 108; Ogden *v.* Peters, 15 Barb. 560; Hayslep *v.* Gymer, 1 Ad. & E. 162, 28 Eng. C. L. 96; Puett *v.* Beard, 86 Ind. 104; Boyden *v.* Moore, 11 Pick. 362; Cornelius *v.* The State, 12 Ark. 782; Moore *v.* Hamilton, 48 Barb. 120.

73. Richards *v.* Frankum, 9 Car. & P. 221, 38 Eng. C. L. 138.

74. Partial and Plenary Admissions.—Anderson's Dic., Bouv. Dic.

"**In Equity.**—*Partial admissions* are those which are delivered in terms of uncertainty, mixed up with explanatory or qualifying circumstances.

"**Plenary admissions** are those which admit the truth of the matter without qualification, whether it be asserted as from information and belief or as from actual knowledge.

"Self-harming statements are divisible into 'plenary' and 'not plenary.' A 'plenary' confession is when a self-disserving statement is such as, if believed, to be conclusive against the person making it, at least on the physical facts of the matter to which it relates; as where a party accused of murder says, 'I murdered,' or 'I killed,' the deceased. In such cases the proof is in the nature of *direct* evidence, and the maxim is, '*Habemus optimum testem, confitentem reum.*' A confession 'not plenary' is, where the truth of the self-disserving statement is not absolutely inconsistent with the existence of a state of facts different from that which it indicates; but only gives rise to a presumptive inference of their truth, and is therefore in the nature of *circumstantial* evidence." Chamberlayne's Best on Ev. § 524.

"**Partial Admission.** — In equity practice, delivered in terms of uncertainty, with explanation or qualification. *Plenary admission.* Without any qualification." Anderson's Dic.

75. Admissions in Documents. Snyder *v.* Reno, 38 Iowa 329; Cook

Void May be Competent as Evidence of Admission.—So where the instrument is void, or inoperative for the purpose for which it was intended, it may still be competent evidence of an admission by the party executing it, of the truth of the facts stated in it.[76]

v. Anderson, 20 Ind. 15. But see Robinson *v.* Cushman, 2 Denio 149.

Unsigned Paper Competent. — Snyder *v.* Reno, 38 Iowa 329, was an action upon the assignment of notes. The plaintiff claimed that the defendant had transferred notes to him in part payment for certain goods sold and delivered, while the defendant insisted that he had nothing to do with the notes, and that they were transferred by another party. The plaintiff offered in evidence a paper, unsigned, in which it was recited that the defendant did, on the day named therein, sell to the plaintiff certain described notes. The plaintiff testified that the paper contained a list of the notes taken, except two, and that it was handed to plaintiff by the defendant on the day the trade was effected, and that the plaintiff refused to accept it. The defendant objected to the introduction of the paper in evidence, on the ground that it was not executed or accepted and was immaterial. The objection was overruled, and the paper admitted. The court say: "We think it was properly admitted that it was not signed by defendant, and is not proved to be in his handwriting, yet, if he offered it to the plaintiff, he made thereby an admission inconsistent with his present claim that he had nothing to do with the notes, and that they were transferred by Norton."

Where Signed but Not Delivered. In Robinson *v.* Cushman, 2 Denio 149, the case seems to turn upon the fact that the instrument was never delivered, but retained in the possession of the party. The court say: "It is of no value as an obligation, for the reason that it was never delivered. And for the same reason, I think it of little or no value as an admission. In point of form, the instrument contained both an express undertaking to pay a sum of money, and an admission that the money was justly due for services rendered. But by carefully retaining the paper in his own possession, the intestate virtually declared that it was neither to bind him as an obligation, nor affect him as an admission. I will not say that such a paper must, under all possible circumstances, be laid entirely out of view. But while it confessedly has no force as a contract, it cannot be right to give it, under the name of an admission, all the effect of a binding obligation."

76. Void Instrument Competent to Prove Admission. — *Alabama.* Steed *v.* Knowles, 97 Ala. 573, 12 So. 75.

Maine.—Ross *v.* Gould, 5 Greenl. 204.

Michigan.—Hickey *v.* Hinsdale, 12 Mich. 99.

New York.—Fort *v.* Gooding, 9 Barb. 371; Morrell *v.* Cawley, 17 Abb. Pr. 76.

Ohio.—Reis *v.* Hellman, 25 Ohio St. 180.

South Carolina.—Colgan *v.* Phillips, 7 Rich. Law Rep. 359.

Texas.—Huffman *v.* Cartwright, 44 Tex. 296.

Deed of Married Woman.—In Stead *v.* Knowles, 97 Ala. 573, 12 So. 75, a deed made by a married woman was ineffectual to prove the title because of the fact that the husband did not join therein, but it was further held that the instrument, though not effective as a legal conveyance or muniment of title, nevertheless fully recognized and admitted the interest of another in the land, and tended to show that she only claimed a half interest in the land, and that proof of her voluntary signature of the instrument would be sufficient to let in the recitals in the instrument against her as her admission.

Deed Imperfectly Executed by Attorney.—So a deed imperfectly executed by an attorney as the deed of his principal, is nevertheless admissible in evidence, in aid of the grantee's entry, to show the extent

Proposed Contract not Accepted.—Where the document is proposed as a contract by one of the parties, but not agreed to by the other, and a different agreement is actually made, it may still be proved as an admission.[77]

And the written memorandum of a parol contract, although not a contract itself, or admissible in evidence as such, is competent evidence against the party making it, as an admission, if against his interest.[78]

What Writings Competent.—The character of the writing is not material. The effect, so far as the competency of the evidence is concerned, is the same whether the admission or statement relied upon is found in an account stated,[79] a receipt,[80] a letter,[81]

of his claim of title. Ross *v.* Gould, 5 Greenl. 204.

Invalid Contract.—In Hickey *v.* Hinsdale, 12 Mich. 99, it was held that a paper signed by a judgment debtor, and delivered to an attorney for his creditors, making certain promises, was not valid as a contract and could not operate by use of estoppel against the debtor, where it appeared that the creditors had given the attorney no authority to receive such a paper, was admissible in evidence against him as a parol admission of the facts recited in it and open to explanation and contradiction as such.

Sealed Instrument Executed by Agent Approved by Parol.—So, where a sealed instrument executed by an agent who has only a parol authority, is not binding as a contract, and will not sustain an action against the principal, yet admissions contained in it are competent evidence against him. Morrell *v.* Cawley, 17 Abb. Pr. 76.

Contract Not Stamped.—The rule is the same where a contract is not competent as evidence for other purposes by reason of the fact that it is not stamped as required by an act of congress. It is nevertheless competent as an admission. Reis *v.* Hellman, 25 Ohio St. 180.

77. Statement in Proposed Contract Not Executed.—In Beckman *v.* Fletcher, 48 Mich. 555, 12 N. W. 840, it was said: "But a paper rejected as a contract may nevertheless contain important admissions; and these in respect to disputed facts may be very convincing though in making them the party may have had in view an object which was not accomplished. If they were plainly made as admissions of fact, they may be given such weight as they appear to deserve; and the circumstances attending them will be examined for any light they may throw on the deliberation with which the admissions were made. A statement in an abortive contract may be as convincing of a fact as any other; and there is no reason why it should not be if it was intelligently and deliberately made. If it was made by way of concession and compromise, it may on the other hand be entitled to no weight whatever."

78. Standard *v.* Smith, 40 Vt. 513.

79. What Writings Competent. a.—Account Stated.—Wharton's Ev. § 1133; Burrows *v.* Estate of Stevens, 30 Vt. 378; Lockwood *v.* Thorne, 18 N. Y. 285.

80. Receipts. — Wharton's Ev., § 1130.

81. Letters. — *United States.* — Zachry *v.* Nolan, 66 Fed. 467, 14 C. C. A. 253, 30 U. S. App. 244.

California.—Moore *v.* Campbell, 72 Cal. 251, 13 Pac. 689.

Georgia.—Adams *v.* Eatherly, 78 Ga. 485, 3 S. E. 430.

Illinois.—Holley *v.* Knapp, 45 Ill. App. 372; Crain *v.* First Nat. Bank, 114 Ill. 516, 2 N. E. 486; Bailey *v.* Pardridge, 35 Ill. App. 121.

Indiana.—Huston *v.* Stewart, 64 Ind. 388; Peffley *v.* Noland, 80 Ind. 164; Furry *v.* O'Connor, 1 Ind. App. 573, 28 N. E. 103.

Iowa.—Winebrenner *v.* Brunswick-Balke etc. Co., 82 Iowa 741, 47 N.

a promissory note,[82] a tax list,[83] entries in books of ac-

W. 1089; Williams *v.* Souther, 7 Iowa (Clarke) 435.

Massachusetts.—Wiggin *v.* Boston & Albany Ry. Co., 120 Mass. 201; Stone *v.* Sanborn, 104 Mass. 319, 6 Am. Rep. 238.

Michigan.—Kelly *v.* McKenna, 18 Mich. 381.

Missouri.—Higgins *v.* Dellinger, 22 Mo. 397.

North Carolina.—Michael *v.* Foil, 100 N. Car. 178, 6 S. E. 264.

Pennsylvania.—Holler *v.* Weiner, 15 Pa. St. 242.

Texas.—Wills Point Bank *v.* Bates, 72 Tex. 137, 10 S. W. 348.

Vermont.—Wilkins *v.* Burton, 5 Vt. 76; Little *v.* Keyes, 24 Vt. 118.

Letters Written After Commencement of Suit.—In Holler *v.* Weiner, 15 Pa. St. 242, it was said: "That the evidence was properly admitted, cannot be doubted. The letters, although written after the commencement of the suit, are evidence, because they were responded to by the defendants. The letters were admitted as a connected whole; no objection being made to any particular part of the correspondence. Had the defendants taken no notice of the plaintiff's letter, which no doubt would have been the case had his present counsel been at his elbow, the exception would avail here. But allegations made in a letter, responded to by the other party, are considered in the light of declarations or conversations between the parties, and as such properly admissible in evidence. The weight to be given to the testimony is for the jury to determine; who consider, under all the circumstances, how much of the whole statement they deem worthy of belief, including as well the facts asserted by the party in his own favor as those making against him. It is a matter of no sort of consequence whether letters or conversations, as to their competency, are before or after suit brought."

By One Who Has Ceased to be a member of Copartnership.—So it was held in Wills Point Bank *v.* Bates, 72 Tex. 137, 10 S. W. 348, that testimony as to the contents of a letter, written by one member of a firm to another, showing the purpose for which a pretended purchase from a failing debtor was made, is, in a contest between the firm and other creditors as to the validity of such purchase, competent as an admission, though at the time of giving the testimony, the witness to whom the letter was written, has ceased to be a member of the firm, the court saying: "The letter was an admission, made by one member of the firm, shown to have been present at the time the transaction with Gugenheim & Co. was consummated, tending to show what its real nature was, and in reference to which either partner could be compelled to testify. Such declarations or admissions, made by one partner to another, have never been recognized as privileged communications. The fact of partnership being shown to have existed at the time the letter was written, and at the time the transaction to which it referred occurred, the writing of the letter and its contents might be proved by any person having knowledge of those facts. The fact that Williams testified after the dissolution of the partnership does not affect the admissibility of the evidence, showing an admission or declaration made by one member of the firm prior to dissolution."

82. Promissory Notes.—Bowers *v.* Hurd, 10 Mass. 426.

83. Tax Lists. — *Ante*, p. 362.

Alabama.—Steed *v.* Knowles, 97 Ala. 573, 12 So. 75; Wright *v.* Merriwether, 51 Ala. 183; Birmingham Mineral R. Co. *v.* Smith, 89 Ala. 305, 7 So. 634.

Arkansas.—Texas & St. Louis Ry. Co. *v.* Eddy, 42 Ark. 527.

California.—San Jose etc. A. R. Co. *v.* Mayne, 83 Cal. 566, 23 Pac. 522.

Indiana.—Painter *v.* Hall, 75 Ind. 208; Lefever *v.* Johnson, 79 Ind. 554; Kirkpatrick *v.* Pearce, 107 Ind. 520, 8 N. E. 573; German Mut. Ins. Co. *v.* Niewedde, 11 Ind. App. 624, 39 N. E. 534; Comstock *v.* Grindle, 121 Ind. 459, 23 N. E. 494; Sherman *v.* Hogland, 73 Ind. 475.

Massachusetts. — Randidge *v.* Lyman, 124 Mass. 361; Brown *v.* Prov. etc. R. R. Co., 5 Gray 35.

Nevada.—Virginia & Truckee R. R. Co. *v.* Henry, 8 Nev. 165.

Pennsylvania.—Hanover Water Co. *v.* Ashland Iron Co., 84 Pa. St. 270.

Texas.—Railway *v.* Kell, 16 S. W. 936; Jones *v.* Cummins, 17 Tex. Civ. App. 661, 43 S. W. 854.

Vermont. — Richardson *v.* Hitchcock, 28 Vt. 757; Hubbard *v.* Moore, 67 Vt. 532, 32 Atl. 465.

Seeming Conflict in the Cases. There is a seeming conflict in the decided cases, however, as to the purpose for which a tax list, or return, is admissible. In some of the cases it is held that it is competent to prove the value of the property given in for taxation. Birmingham Mineral R. Co. *v.* Smith, 89 Ala. 305, 7 So. 634; Beckwith *v.* Talbott, 2 Colo. 639; Vernon Shell-Road *v.* Mayor etc. of Savannah, 95 Ga. 387, 22 S. E. 625; President etc. *v.* Juniata County, 144 Pa. St. 365, 22 Atl. 896.

While in others the contrary is maintained; but it is held that they are competent to show whether the particular property in controversy was claimed or owned by the party giving in the property at the time the list was made.

Cases Not Necessarily in Conflict. But the cases are not necessarily in conflict. In some of the states the property owner is required to give the *value* of the property as well as its description in his tax list. If he is, his statement is competent evidence against him as to the value of the property given in. In other states, the property owner is only required to furnish a list of property owned by him, leaving the assessor or other designated officer to place a value upon it. In such case, the maker of the list has not stated the value of the property, and therefore the list is not competent evidence against him as an admission. Hubbard *v.* Moore, 67 Vt. 532; 32 Atl. 465.

Of course, when it becomes a public record, it may, as such, be competent for other purposes. It is the assessor's valuation, however, and not that of the property owner. Brown *v.* Providence R. R. Co., 5 Gray 35.

Statement in Can be Used Only for Special Purpose.—But even where a tax list is made by the lister including a valuation of the property, it is held that the value thus fixed is for a special purpose and can not be used as evidence for another purpose, a proposition that may well be doubted.

"Such lists are, however, not competent, either for or against the lister, as original, substantive evidence, to establish the value of a particular article of property for purposes other than taxation. Such valuations are to be regarded as having been made for a special purpose, and like admissions made for a like purpose, they are not competent as original evidence of value for any other than the purpose for which they were made, or in a case involving the question of valuation for taxation." Cincinnati H. & I. R. Co. *v.* McDougall, 108 Ind. 179, 182, 8 N. E. 571; German Mut. Ins. Co. *v.* Niewedde, 11 Ind. App. 624, 39 N. E. 534.

"That statements were evidently those required under sections 3629 to 3633 of the Political Code. Nowhere in them, or in any other sections of that code which have been called to our attention, is there any provision which requires the person whose property is to be assessed to fix the value thereof. The record here shows that such fixing of value, if made, was by the assessor, and not by the defendant. We cannot, therefore, perceive what relevancy the statements had to the question of value of the land to be taken. They were not, in any way, declarations by the defendant as to the value of his land; and even if they have the same force and effect as an assessment roll made by the proper officer, they are inadmissible.

"'The assessment of property for taxation being made for another purpose, and not at the instance of either party, and not usually at the market value of the property, is not admissible as evidence of value in condemnation proceedings.' (Lewis on Eminent Domain, § 448; Texas etc. R'y Co. *v.* Eddy, 42 Ark. 527; Brown *v.* Providence etc. R. R. Co., 5 Gray, 35)" San Jose etc. R. R. Co. *v.* Mayne, 83 Cal. 566, 570, 23 Pac. 522, 523.

count,[84] bank books as against a bank,[85] reports of executors or administrators,[86] a deed,[87] a bill of lading,[88] or any other writing signed or assented to by the party.[89]

Need not be Signed.—It is not even necessary that the document be signed. It may be competent, in the absence of the signature of the party, in connection with other evidence showing his knowledge of its contents and assent to the instrument.[90]

Statement of Owner and the Records Distinguished.—The return of the property owner, which is his own statement, and the tax-rolls or other records or papers made by the assessor or other officer, should be carefully distinguished. Tuckwood *v.* Hawthorne, 67 Wis. 326, 30 N. W. 705; Swain *v.* Swain, 134 Ind. 596, 33 N. E. 792; Hennershotz *v.* Gallagher, 124 Pa. St. 1, 16 Atl. 518.

84. Book Entries.—2 Wharton's Ev., § 1132.

Colorado.—Denver & R. G. R. Co. *v.* Wilson, 4 Colo. App. 355, 36 Pac. 67.

Iowa.—White *v.* Tucker, 9 Iowa 100; State of Iowa *v.* Wooderd, 20 Iowa 541.

Massachusetts.—Topliff *v.* Jackson, 12 Gray, 565.

Mississippi.—Forniquet *v.* West Feliciana R. Co., 6 How. 116.

New York.—Caldwell *v.* Leiber, 7 Paige, 483.

Ohio.—Halleck *v.* State of Ohio, 11 Ohio, 400; Goodin *v.* Armstrong, 19 Ohio, 44.

Vermont.—Chase *v.* Smith, 5 Vt. 556.

85. Bank Books.—President etc. Manhattan Co. *v.* Lydig, 4 Johns. 377, 4 Am. Dec. 280; 2 Wharton's Ev. § 1131; President etc. of Union Bank *v.* Knapp, 3 Pick. 96, 15 Am. Dec. 181.

86. Reports of Executors, Etc. Beal *v.* The State, 77 Ind. 231.

87. Deeds.—Dunn *v.* Eaton, 92 Tenn. 743, 23 S. W. 163; Ross *v.* Gould, 5 Greenl. 204; Steed *v.* Knowles, 97 Ala. 573, 12 So. 75.

88. Bills of Lading. — Emery's Sons *v.* Irving National Bank, 25 Ohio St. 360, 18 Am. Rep. 299.

89. Other Writings. — *United States.*—Mulhall *v.* Keenan, 18 Wall. 342; Zachry *v.* Nolan, 66 Fed. 467, 14 C. C. A. 253, 30 U. S. App. 244.

Alabama.—Colgan *v.* The State Bank, 11 Ala. (N. S.) 222.

California.—Gradwohl *v.* Harris, 29 Cal. 150.

Colorado.—Wilson *v.* Morris, 4 Colo. App. 242, 36 Pac. 248.

Illinois.—Springer *v.* City of Chicago, 37 Ill. App. 206.

Indiana.—Indianapolis Chair Mfg. Co. *v.* Wilcox, 59 Ind. 429.

Maine.—Blackington *v.* City of Rockland, 66 Me. 332.

Massachusetts. — Wadsworth *v.* Ruggles, 6 Pick. 62; McKim *v.* Blake, 139 Mass. 593, 2 N. E. 157; Putnam *v.* Gunning, 162 Mass. 552, 39 N. E. 347; Tripp *v.* New Metallic Packing Co., 137 Mass. 499.

Michigan.—Butler *v.* Iron Cliffs Co., 96 Mich. 70, 55 N. W. 670.

New York.—Rawson *v.* Adams, 17 Johns. 130; Bayliss *v.* Cockcroft, 81 N. Y. 363; Travis *v.* Barger, 24 Barb. 614; Edwards *v.* City of Watertown, 59 Hun 620, 13 N. Y. Supp. 309.

North Carolina.—Hughes *v.* Boone, 102 N. Car. 137, 9 S. E. 286.

Pennsylvania.—Brown *v.* Bank of Chambersburg, 3 Pa. St. 187; Ege *v.* Medlar, 82 Pa. St. 86.

Texas.—Western Wool Co. *v.* Hart, 20 S. W. 131; House *v.* Cessna, 6 Tex. Civ. App. 7, 24 S. W. 962; Robertson *v.* Ephraim, 18 Tex. 118.

Vermont.—Smith *v.* Holister, 32 Vt. 695.

Wisconsin.—Klatt *v.* Foster Lumber Co., 92 Wis. 622, 66 N. W. 791.

90. Not Necessary that it be Signed.—2 Wharton's Ev., § 1129.

United States.—Kirk *v.* Williams, 24 Fed. 437.

Illinois.—Henkle *v.* Smith, 21 Ill. 237.

Indiana.—Cook *v.* Anderson, 20 Ind. 15.

Iowa.—Snyder *v.* Reno, 38 Iowa, 320.

Maine.—Bartlett *v.* Mayo, 33 Me. 518

Competency Subject to General Rules as to Admissibility of Admissions. Its competency is subject, however, to the rules heretofore stated relative to the admissibility of statements or declarations of a party, and is admissible on the same principle.[91] The fact that the statement or declaration is in writing in no way changes the general rules relating to the competency of such evidence. The rule that self-serving declarations can not be proved is applicable in all its force to book entries and other writings, subject to certain exceptions rendering such evidence competent under some circumstances which will be more fully considered when we come to treat of the competency, generally, of book entries and like evidence.[92]

And so with respect to all other limitations as to the extent and admissibility of the admissions and the power and authority of one person to bind another by declarations or admissions made.[93]

Not Conclusive.—An admission in a writing is not, as a general rule, conclusive any more than if orally made. And therefore the party making it may prove the contrary, or show that the admission was made by mistake.[94]

7. Oral Statements. — Oral statements may be either direct or incidental admissions, as above defined; that is to say, they may be direct acknowledgments of the truth of the matter in dispute, or of some other fact indirectly involving an admission of the fact in issue. Whether they are the one or the other is immaterial in respect of their competency as evidence, but may be quite important as to the effect or weight to be given to them when proved, which will be considered further along. *See* "DECLARATIONS."

Admissible Against Party Making Them. — No extended notice of oral admissions is necessary in this connection. The general and well settled rule of law is that the admissions of a party in interest are always competent evidence against him.[95]

Upon What Grounds Admissible. —The authorities are not agreed as to the grounds upon which acts or statements of a party amounting to admissions, are competent evidence. It is said that such evidence is more properly admissible as a substitute for the ordinary or legal proof either in virtue of the direct consent or waiver of the party, as in the case of explicit and solemn admissions; or on grounds of public policy and convenience, as in case of those implied

Massachusetts.—Knowlton *v.* Mosely, 105 Mass. 136; Tripp *v.* New Metallic Packing Co., 137 Mass. 499

Ohio.—Halleck *v.* State of Ohio, 11 Ohio 400.

Vermont.—Hosford *v.* Foote, 3 Vt. 391.

91. Competency Subject to General Rules Affecting Proof of Admissions.—Cook *v.* Barr, 44 N. Y. 156.

92. Adams *v.* Funk, 53 Ill. 219; Brannin *v.* Force, 12 B. Mon. (Ky.) 506; Turnipseed *v.* Goodwin, 9 Ala. (N. S.) 372.

93. Benford *v.* Sanner, 40 Pa. St. 9, 80 Am. Dec. 545.

94. Not Conclusive. — Gradwohl *v.* Harris, 29 Cal. 150.

95. Oral Admissions.—1 Greenl. Ev. Sec. 169; Tenney *v.* Evans, 14 N. H. 343, 40 Am. Dec. 194; Davis *v.* Calvert, 5 Gill & Johns. (Md.) 269, 25 Am. Dec. 282; 1 Phil. Ev. 339; 1 Am. & Eng. Enc. of Law, (2 Ed.) 678.

from assumed character, acquiescence or conduct, and not because, being against interest, they are probably true.[96]

But certainly this is not the generally understood reason for the admission of declarations against interest. They are generally received because, being against interest, they may be regarded as probably true.[97]

8. Judicial. — A. DEFINED. — A judicial admission is one so made in pleadings filed or in the progress of a trial as to dispense with the introduction of evidence otherwise necessary or to dispense with some rule of practice otherwise necessary to be observed and complied with.[98]

96. On What Grounds Admissible.—Under the head of exceptions to the rule rejecting hearsay evidence, it has been usual to treat of *admissions and confessions* by the party, considering them as declarations against his interest, and therefore probably true. But in regard to many admissions, and especially those implied from conduct, and assumed character, it cannot be supposed that the party, at the time of the principal declaration or act done, believed himself to be speaking or acting against his own interest; but often the contrary. Such evidence seems, therefore, more properly admissible as a *substitute* for the ordinary and legal proof, either in virtue of the direct consent and waiver of the party, as in the case of explicit and solemn admissions; or on grounds of public policy and convenience, as in the case of those implied from assumed characters, acquiescence or conduct." 1 Greenl. Ev. § 169.

97. Principles Upon Which are Received.—"The principle on which they are received is founded, chiefly, on the reasonable presumption in favor of the truth of a statement when it is against the interest of the person who makes it." 1 Phil. Ev. 339.

"If a statement is made in the hearing of another, in regard to facts affecting his rights, and he makes a reply wholly or partially admitting their truth, then the declaration and reply are both admissible; the reply, *because it is the act of the party who will not be presumed to admit anything affecting his own interest or his own rights unless compelled to it by the force of truth*; and the declaration because it may give meaning and effect to the reply." Commonwealth *v.* Kenney, 12 Met. (Mass.) 235, 237, 46 Am. Dec. 672, 673.

"Whatever a party voluntarily admits to be true, though the admission be contrary to his interest, *may reasonably be taken for the truth*. The same rule, it will be seen, applies to admissions by those who are so identified in situation and interest with a party that their declarations may be considered to have been made by himself. As to such evidence, the ordinary tests of truth are properly dispensed with; they are inapplicable; an oath is administered to a witness in order to impose an additional obligation on his conscience, and so to add weight to his testimony; and he is cross-examined to ascertain his means of knowledge, as well as his intention to speak the truth. But where a man voluntarily admits a debt or confesses a crime, there is little occasion for confirmation; the ordinary motives of human conduct are sufficient warrants for belief." Starkie Ev. (Sharswood's Notes) p. 50

98. Definitions. — Anderson's Dict., Bouv. Dict.; 1 Greenl. Ev. §§ 27, 205.

"As to the different kinds of self-harming statements. In the first place they are either 'judicial' or 'extra-judicial'—*in judicio* or extra *judiciam*—according as they are made in the course of a judicial proceeding, or under any other circumstances." Chamberlayne's Best Ev., § 522.

"So plainly made in pleadings filed, or in the progress of a trial as to

All admissions made in court, and as a part of the proceedings in a cause pending, or made out of court but to be filed in the cause, as part of the proceedings therein, and express admissions in the pleadings as well as those resulting from a failure to deny the material allegations contained in the pleadings of the adversary party, are usually classed as judicial admissions.[99]

But the most important distinction between judicial and other admissions, is, as we shall see when we come to consider the effect of admissions, that strictly judicial admissions are conclusive upon the party making them, while other admissions are, as a rule and where the elements of estoppel are not present, disputable.[1]

B. Made in Pleadings. — An admission in a pleading may be by an express acknowledgment of some fact or facts set forth in the pleading of the opposite party, or by a failure to deny or otherwise controvert the truth of such fact or facts.

a. *Express Admissions.* — It is quite common practice in pleading to confess and avoid a fact or facts alleged by the adversary party, because the facts alleged cannot be truthfully denied but may be avoided by the allegation and proof of other facts.[2]

This relieves the party having the burden of establishing the truth of such facts, of the necessity of offering any evidence in their support,[3] and casts upon the other party the burden of proving the

dispense with the stringency of some rule of practice." Anderson's Dict.

99. 1 Greenl. Ev., §§ 27, 205; Cook *v.* Guirkin, 110 N. C. 13, 25 S. E. 715.

"Judicial admissions, or those made in court by the party's attorney, generally appear either of record, as in pleading, or in the solemn admission of the attorney, made for the purpose of being used as a *substitute for the regular legal evidence of the fact* at the trial, or in a *case stated* for the opinion of the court. There is still another class of judicial admissions made by the *payment of money into court.*" 1 Greenl. Ev., § 205.

"An admission *in judicio* may be made by a party to an action either expressly by a notice or pleading, or impliedly by a failure to deliver a pleading or to traverse an allegation made by his opponent; sometimes the parties agree to make admissions of facts or documents in order to save the expense of proving them." Rap. & Law Dict.

1. Barber *v.* Bennett, 60 Vt. 662, 15 Atl. 438, 1 L. R. A. 224.

2. Newell *v.* Doty, 33 N. Y. 83; Becker *v.* Sweetzer, 15 Minn. 427; Nash *v.* City of St. Paul, 11 Minn. 174; Lipscomb *v.* Lipscomb, 32 S. C. 243, 10 S. E. 929; Murray *v.* New York L. Ins. Co., 85 N. Y. 236.

3. *California.* — Hellman *v.* Howard, 44 Cal. 100; Hanson *v.* Fricker, 70 Cal. 283, 21 Pac. 751.

Connecticut. — Connecticut Hospital *v.* Town of Bridgewater, 69 Conn. 1, 36 Atl. 1017.

Indiana. — Bondurant *v.* Bladen, 19 Ind. 160.

Missouri. — Emmons *v.* Gordon (Mo.), 24 S. W. 146.

New York. — Paige *v.* Willet, 38 N. Y. 28; Murray *v.* New York L. Ins. Co., 85 N. Y 236; White *v.* Smith, 46 N. Y. 418.

Oregon. — Bush *v.* Cartwright, 7 Or 320.

Admission Conclusive. — In Hellman *v.* Howard, 44 Cal. 100, it was admitted by the pleadings that the promissory note in suit was assigned by the payee to the plaintiffs, and it was held that such admission being made, no question could be raised on the trial whether or not the assignment was made in such form as to pass the interest of a married woman.

matters alleged in avoidance of them.[4]

So it is not unusual for a party to admit, or fail to deny, the truth of a part of the facts alleged, and to traverse a part, which has the same effect as to the part confessed.[5]

Failure to Deny. — So, where the contention between the parties was with respect to the findings of the court, that the appellant paid for the property fifteen hundred dollars, and not five hundred dollars, as found by the court. It was said: "But no such defense was set up, or even hinted at in the answer. It cannot, therefore, be raised here for the first time. The case was properly tried upon the issues presented by the pleadings, and upon all of those issues there was ample evidence to justify the findings." Hanson *v.* Fricker, 79 Cal. 283, 21 Pac. 751.

Admission of One Fact From Which Another Inferred. — In Connecticut Hospital *v.* Town of Bridgewater, 69 Conn. 1, 36 Atl. 1017, the question was as to the effect of an admission in the answer, that the defendant, the Town of Bridgewater, had paid for one year's support of a pauper in the hospital. The action being one of the hospital against the town to complete payment for the support of the pauper, it was held that the answer not only amounted to an admission of the fact of the payment, but carried with it also an admission of liability, the court saying: "It was, however, admitted by the answer that this town had paid for the support of the pauper in question for more than a year after her commitment. An admission in pleading dispenses with proof, and is equivalent to proof. The fact thus admitted had a probative force in tending to show a further admission. Such payment by the town was an act in the nature of an implied admission that it was under an obligation to make it; that is, that it was legally chargeable in favor of the plaintiff for the pauper's support, which was the sole matter put in issue under the pleadings."

Not Permitted to Deny Explicit Admission. — And in Paige *v.* Willet, 38 N. Y. 28, it was held that the defendant, who explicitly admits by his pleading that which establishes the plaintiff's right, will not be permitted to deny its existence, or to prove any state of facts inconsistent with that admission, the court saying:

"While the answer stood upon the record, the defendant was not at liberty to raise an issue which he had emphatically closed. He had surrendered his right to call upon the plaintiffs for proof of a levy, a collection, or to question his liability to pay interest, for all these had been expressly admitted by the answer and the proof furnished out of the mouth of the defendant. It is no answer to say that the plaintiffs had voluntarily gone beyond these admissions and opened up an inquiry which the defendant was at liberty to pursue, and by this means escape from the effect of his own foreclosure. This may have been an unwise, as I think it was, a very unnecessary procedure on the part of the plaintiffs, but it does not help the defendant's case, nor enable him to avoid the effect of his own admissions. Such admissions are conclusive upon the parties litigant, and upon the court, and no countervailing evidence can properly be received, or, if it is, either through inadvertence or by tacit consent, foisted into the case, it is entitled to no consideration."

Admissions in the Complaint. An admission may occur in the complaint as well as in the answer. Thus where a complaint alleged the amount of the account to be $541.90, and that there was a balance due, after deducting all payments, of $175.75, it was held that the plaintiff admitted the payment of $366.15, and that the defendant was not precluded from insisting upon this admission, by disputing the correctness of the items of the account. White *v.* Smith, 46 N. Y. 418.

4. Newell *v.* Doty, 33 N. Y. 83.

5. Becker *v.* Sweetzer, 15 Minn. 427; Griffin *v.* Long Island R. Co., 101 N. Y. 348, 4 N. E. 740; Harland

Express Admissions Not Necessary or Proper Under the Codes. — In equity pleading under the old system if any allegation of a pleading was not intended to be controverted, it was expressly admitted, and matters in avoidance, if any, stated in the same connection. But this is not only unnecessary but improper under the code system of pleading which requires an answer to either deny the allegations of the complaint or to state new matter, the allegation being treated as admitted if not specially denied.[6]

The effect of this is to relieve the party alleging such facts of making any proof in support of them, the result being the same, in the end, as if they had been fully established by evidence.[7]

Only Material Allegations Admitted by Failure to Deny. —It is only the *material* averments of a pleading that are admitted by a failure to deny them.[8]

v. Howard, 32 N. Y. St. 869, 10 N. Y. Supp. 449; Potter *v.* Frail, 67 How. Pr. (N. Y.) 445.

Denial of Facts Not Admitted. Thus where, in an action for goods sold, the answer admits that the defendant purchased the goods, but denies each and every other allegation in said complaint contained, not hereinafter specifically admitted, controverted or denied, it was held that the answer put in issue the value or agreed price of the goods, together with the fact whether the assignment under which the plaintiff claimed, was ever executed as alleged. Rawlings *v.* Alexander, 8 Misc. 514, 28 N. Y. Supp. 748.

6. Gould *v.* Williams, 9 How. Pr. (N. Y.) 51.

7. Blakeman *v.* Vallejo, 15 Cal. 638.

Failure to Deny. — In Powell *v.* Oullahan, 14 Cal. 114, it was said: "Under the pleadings in this case no evidence was necessary on either of the points specified in the motion as a ground of non-suit. As to the first point, it is only necessary to say, that the title of the state is distinctly averred in the complaint, and it is not denied in the answer. In relation to the second point, the complaint alleges that the defendant is in possession and excludes the plaintiff; and this allegation is not only not denied, but the answer shows affirmatively that he was in possession, claiming adversely to the plaintiff when the suit was commenced. . . . If the allegation is material, it is not denied, and must be taken as true. If it is not material, the admission is relied on as establishing an independent fact, not put in issue by the pleadings, affecting the whole case, but no special averment or denial. 'When it appears from the whole conduct of a cause, that a particular fact is admitted between the parties, the jury have the right to draw the same conclusion as to that fact, as if it had been proved in evidence, and to draw such conclusion as to all the issues on the record.'"

8. *California.*—Canfield *v.* Tobias, 21 Cal. 349; Doyle *v.* Franklin, 48 Cal. 537; Kidder *v.* Stevens, 60 Cal. 414.

Missouri. — Wood *v.* Steamer Fleetwood, 19 Mo. 529; Field *v.* Barr, 27 Mo. 416; Sutter *v.* Streit, 21 Mo. 157.

New York. — Sands *v.* St. John, 36 Barb. 628; King *v.* Utica Ins. Co., 6 How. Pr. 485; Gilbert *v.* Rounds, 14 How. Pr. 46.

Oregon. — Larsen *v.* Or. Ry. & Nav. Co., 19 Or. 240, 23 Pac. 974.

Failure to Deny Value of Property. — Thus it is held that the value of an article alleged in a complaint, where the value is not a material issue in the case, is not admitted by the failure to deny the same, the court saying: "In our opinion, the allegation, to be taken as admitted, must be a material one, and it must be so stated in the petition, as to bring to the mind of the defendant the importance of it in the trial of

b. *By Failure to Deny Allegations in Pleadings in Action on Trial.* In treating this branch of the subject it will be necessary to distinguish between the rules of pleading in actions at law under the common law practice and under the codes of the several states, as well as statutory modifications of pre-existing rules, and the rules of pleading and evidence under the equity practice. What is said under this sub-head will be confined, as near as may be, to pleadings in actions at law, whether under the common law practice or code provisions. The effect of admissions in pleadings in suits in equity will be treated separately.

Allegations Not Denied Are Admitted. — The rule is general both at common law and under the codes that a material allegation well pleaded must be denied or it stands admitted.[9]

the cause; then, if the defendant fails to deny it in his answer, it may be taken as confessed; but here, the sum of eight hundred and five dollars, as the worth of the malt, was not a material matter to the action; the action could have been as well supported if the malt had been worth but four hundred dollars, or any other sum." Wood *v.* Steamer Fleetwood, 19 Mo. 529.

Failure to Deny Immaterial Allegations. — So in Canfield *v.* Tobias, 21 Cal. 349, it is held that allegations not material to the plaintiff's cause of action are not admitted by a failure on the part of the defendant to deny them; that the only allegations essential to the complaint are those required in stating the cause of action; and that allegations inserted for the purpose of intercepting, cutting off and anticipating the defense are superfluous and immaterial, and do not require an answer.

Again in Kidder *v.* Stevens, 60 Cal. 414, it is held that the allegation of time, as to seisin or ouster, in the so called action of ejectment, in California, is not material; and that denial of it raises no material issue except when the profits are in question.

But in King *v.* Utica Ins. Co., 6 How. Pr. (N. Y.) 485, it is held that if the party make distinct though immaterial allegations, and in a traversable form, he cannot have his adversary's pleading, taking issue thereon, struck out, the court saying: "And if a party will make a distinct though immaterial allegation, and in a traversable form, I am not aware of any rule of pleading or practice by which he can prevent his opponent from denying its truth, or that requires the court to strike out that denial."

Matters of Aggravation. — In Gilbert *v.* Rounds, 14 How. Pr. (N. Y.) 46, it was held that circumstances of aggravation in actions of assault and battery never were traversable, and that the defendant did not admit such matters by not pleading to the declaration prior to the code; and that statements of new matter in an action for assault and battery, which consist entirely of circumstances of aggravation, do not constitute a defense to the action, nor a counterclaim.

And the rule extends to mere legal conclusions. Larsen *v.* Or. Ry. & Nav. Co., 19 Or. 240, 23 Pac. 974.

Instance of Immaterial Allegation. — In Sands *v.* St. John, 36 Barb. (N. Y.) 628, an action by the receiver of a mutual insurance company on a stock note, it was alleged in the complaint that the company and the receiver were restrained by injunction, for about five years, from bringing any action on the note in suit; and it was held that the allegation's being immaterial could not be taken as true by reason of an omission of the defendant to deny it; and that it was therefore unnecessary for the defendant to accompany the defense of the statute of limitations with a denial of the allegation.

9. Allegations Not Denied Admitted. — *California.* — De Ro *v.* Cordes, 4 Cal. 117; Lee *v.* Figg, 37

Manner and Form of Denial. — But the manner and form in which an allegation may be put in issue is not the same at common law

Cal. 328, 99 Am. Dec. 271; Felch *v.* Beaudry, 40 Cal. 439.

Kansas. — Rock Island Lumber etc. Co. *v.* Fairmont Town Co., 51 Kan. 304, 32 Pac. 1100.

Missouri. — Moore *v.* Sauborin, 42 Mo. 490; Gorman *v.* Dierkes, 37 Mo. 576.

New York. — Churchill *v.* Bennett, 8 How. Pr. 309; Ramsey *v.* Barnes, 35 N. Y. St. 43, 12 N. Y. Supp. 726; Paige *v.* Willet, 38 N. Y. 28; Tell *v.* Beyer, 38 N. Y. 161; Clark *v.* Dillon, 97 N. Y. 370.

Oregon. — Larsen *v.* Or. Ry. & Nav. Co., 19 Or. 240, 23 Pac. 974.

South Carolina.—Charlotte, Columbia etc. Ry. Co. *v.* Gibbes, 23 S. C. 370; Lupo *v.* True, 16 S. C. 579.

Texas. — Edinburg Am. L. etc. Co. *v.* Briggs (Tex.), 41 S. W. 1036.

Failure to Deny Allegation of Demand. — In De Ro *v.* Cordes, 4 Cal. 117, it is said: "The last point we will notice is one urged by respondents to sustain the judgment. They say there was no proof of demand. Under the pleadings, no such proof was necessary. The declaration avers the demand; the answer is not the general issue, but is only a specific denial of two allegations. It denies the collection of the money, and denies that the plaintiff was owner of the ship. Under our practice, and, indeed, under the practice at common law, such an answer is held an admission of all other allegations in the declaration, which are well pleaded."

When Answer Insufficient to Raise Issue. — So in Felch *v.* Beaudry, 40 Cal. 439, a question arose upon the right of the plaintiff to judgment on the pleadings. In passing upon the question, the court said: "If a complaint be itself sufficient, there is no question that the plaintiff may apply for judgment on the pleadings, if the defendant has filed an answer which expressly admits the material facts stated in the complaint; and so when the answer filed leaves all the material allegations of the complaint undenied. This practice is constantly pursued, when denials in verified answers are literal merely, or conjunctive, evasive, or the like. If this be the practice as to answers which insufficiently deny the plaintiff's allegations, why should not answers, which merely set up new matter in defense, if found substantially insufficient, be subjected to the same practice? The ground upon which a motion, made by plaintiff for judgment on the pleadings, proceeds in any case, is that his complaint is sufficient to warrant it, and that the answer presents nothing, either by way of denial or of new matter, to bar or defeat the action."

Defective Reply. — And this rule extends to allegations made in an answer and not denied in the replication or reply, in those states in which a pleading to the answer of the defendant is required. Thus in Moore *v.* Sauborin, 42 Mo. 490, it was held that under the provisions of the statute of Missouri, an allegation of new matter contained in an answer, not denied by the reply, stood confessed upon the record, and entitled the defendant to a judgment.

In Ramsay *v.* Barnes, 35 N. Y. St. 43, 12 N. Y. Supp. 726, the complaint, after alleging the making by the defendant of a promissory note and its endorsement to the plaintiff, alleged that thereafter it was agreed between plaintiff and defendant that the matter was not one of G, but a personal one of the defendant, and that the defendant owed plaintiff a certain sum, which was the true balance then due upon the certain note. The answer, while denying the other allegations of the complaint, did not refer to the statement of the personal obligation of defendant, and it was held that the fact of such personal obligation was admitted.

Pleading in Form an Answer When a Demurrer. — And a pleading in form an answer, going only to a question of law, has been held to be, not an answer but a demurrer, the court saying: "There is not a single material allegation of fact in the complaint which is controverted by the defendant in his pleadings, styled an

and under the codes, nor is it the same in all the states where codes have been adopted. At common law the general issue was permitted.

Under some of the codes a general denial similar in its effects to the general issue at common law is allowed,[10] while in others a specific denial, separately, of each material allegation in the pleading of the opposite party is required to put that allegation in issue.

But, as stated, both at common law and under the codes, a

answer, but the sole issue presented is one of law, whether the act requiring this assessment was constitutional. It is true that, as we have seen, the proper mode of raising such an issue would be by demurrer, and the defendant has not seen fit so to style his pleading; but that cannot alter its legal effect. It does not controvert any material allegation of fact contained in the complaint, and therefore it does not raise any issue of fact. It simply controverts the legal positions taken in the complaint, and thereby raises only an issue of law, and can, therefore, be regarded only as a demurrer." Charlotte, Columbia, etc. R. R. Co. *v.* Gibbs, 23 S. C. 370.

10. General Denial Allowed. *Indiana.* — Butler *v.* Edgerton, 15 Ind. 15; Day *v.* Wamsley, 33 Ind. 145; Craig *v.* Frazier, 127 Ind. 286, 26 N. E. 842; Loeb *v.* Weis, 64 Ind. 285; Wilson *v.* Root, 43 Ind. 486; Board of Comrs. *v.* Hill, 122 Ind. 215, 23 N. E. 779; Hoosier Stone Co. *v.* McCain, 133 Ind. 231, 31 N. E. 956; Indianapolis & Cincinnati Ry. Co. *v.* Rutherford, 29 Ind. 82, 92 Am. Dec. 336.

Minnesota. — Stone *v.* Quaale, 36 Minn. 46, 29 N. W. 326.

Missouri. — Sargent *v.* St. Louis & S. F. Ry. Co., 114 Mo. 348, 21 S. W. 823, 19 L. R. A. 460; Ellet *v.* St. Louis, Kansas City etc. Ry. Co., 76 Mo. 518.

New York. — Otis *v.* Ross, 8 How. Pr. 103; Rost *v.* Harris, 12 Abb. Pr. 446; Benedict *v.* Seymour, 6 How. Pr. 298.

Ohio. — Dayton *v.* Kelly, 24 Ohio St. 345, 15 Am. Rep. 612.

Effect of General Denial. — Thus in Indiana, in an action of recovery for goods alleged to have been sold and delivered to the defendant, it was held that he might show, under an answer of general denial, that the goods were sold and delivered to his wife under such circumstances as not to bind him. Day *v.* Wamsley, 33 Ind. 145.

And in Stone *v.* Quaale, 36 Minn. 46, 29 N. W. 326, it was held that a general denial is the same in effect as a specific denial of the allegations in the whole or in a part of the pleading so denied, the court saying: "In effect it is precisely the same as if each of the allegations so denied was specifically and separately referred to and denied. It is of no greater and no less effect; is no better and no worse denial than such specific and separate denial would be. It puts in issue each allegation of fact to which it relates as fully as if each of such allegations were specifically denied."

And upon this theory as to the effect of the general denial, it is held improper to plead such matters as can be properly proved under the general denial, and upon motion such matter will be stricken out. Sargent *v.* St. Louis & S. F. Ry. Co., 114 Mo. 348, 21 S. W. 823, 19 L. R. A. 460.

Thus in Ellet *v.* St. Louis, Kansas City etc. Ry. Co., 76 Mo. 518, an action against a railway company for the death of a passenger, the neglect alleged was the want of care in the servants of the company and defects in its road. The defendant denied all of the allegations of the petition, and also filed a special plea, alleging that the railroad was well constructed and servants skillful and careful, but that the casualty was caused by an extraordinary rain storm. It was held that this matter was such that it could be shown under the general denial, and the special plea was properly stricken out.

material allegation not denied in manner and form as required by the law of the particular state in which the action is pending, is admitted.[11]

Under the Codes Material Allegations Must Be Denied. — Whatever may have been the requirements of the old common law or the equity practice, in this respect, the codes usually, if not universally, require that all material allegations in the pleading of the opposite party intended to be controverted must be specifically denied in order to put such party to the proof of them.[12]

If Not Denied Taken to Be True. — And if no such denial is interposed the fact alleged is taken to be true and thus established as effectually as if proved at the trial.[13] And the party cannot relieve

11. Calkins *v.* Seabury etc. Min. Co., 5 S. D. 299, 58 N. W. 797; Morrill *v.* Morrill, 26 Cal. 288; Woodworth *v.* Knowlton, 22 Cal. 164; Harden *v.* Atchison & Neb. Ry. Co., 4 Neb. 521.

12. Woodworth *v.* Knowlton, 22 Cal. 164; East River Elec. L. Co. *v.* Clark, 43 N. Y. St. 971, 18 N. Y. Supp. 463.

Effect of Codes on Failure to Deny. — The code usually requires that there be specific denial of each allegation of the complaint in order to raise an issue. In San Francisco Gas Co. *v.* San Francisco, 9 Cal. 453, the answer was: "And this defendant further answering, saith, that this defendant has no knowledge or information in relation to the allegations of the second count of the said complaint, and, therefore, denies the same." It was held that the answer was defective in not denying any of the allegations of the second count of the complaint, either positively or as to information and belief, the only forms in which the allegations of a verified complaint can be controverted so as to raise an issue; and that any other form was unknown to the code of California, and could have no legal effect.

So it was held in Anderson *v.* Parker, 6 Cal. 197, that the allegation of the death of plaintiff's ancestor, in a verified complaint was not sufficiently controverted by the averment in the answer; "that defendant has not sufficient knowledge to form a belief, and therefore neither admits nor denies."

In Newell *v.* Doty, 33 N. Y. 83, it was said: "There is nothing in the plaintiff's point, that because the defendants did not deny the allegations in the complaint, of the making of the note, and delivering it to Brown Brothers, the payees who indorsed it to plaintiff, and because they made no general or specific denial of any allegation in the complaint, that this is such an admission of the cause of action, that a judgment contrary to the admission is erroneous. The 149th section of the code requires such a denial only, of the matters alleged, as the defendant means to controvert. The defendants could not truthfully controvert or deny those allegations; and there is no such unreasonable provision in the code as to require the party to answer a pleading with a falsehood."

13. Facts Not Denied Taken to Be True. — *United States.* — Robertson *v.* Perkins, 129 U. S. 233, 9 Sup. Ct. 279.

California. — Horn *v.* Volcano Water Co., 13 Cal. 62; San Francisco Gas Co. *v.* City of San Francisco, 9 Cal. 453; Burke *v.* Table Mt. Water Co., 12 Cal. 403; Thompson *v.* Lee, 8 Cal. 275; Feeley *v.* Shirley, 43 Cal. 369; Bradbury *v.* Cronise, 46 Cal. 287; San Francisco *v.* Staude, 92 Cal. 560, 28 Pac. 778.

Colorado. — Teller *v.* Hartman, 16 Colo. 447, 27 Pac. 947.

Dakota. — Dole *v.* Burleigh, 1 Dak 227, 46 N. W. 692.

Kansas. — Rock Island Lumber etc. Co. *v.* Fairmont Town Co., 51 Kan 294, 32 Pac. 1100.

Kentucky. — Morton *v.* Waring, 18 B. Mon. 72.

Missouri.—Moore *v.* Sauborin, 42 Mo., 490; Marshall *v.* Thames Fire Ins. Co., 43 Mo. 586; Lee *v.* Casey, 39 Mo. 383.

Nebraska.—Maxwell *v.* Higgins, 38 Neb. 671, 57 N. W. 388.

New York.—Marx *v.* Gross, 51 N. Y. St. 88, 22 N. Y. Supp. 393; Gilbert *v.* Rounds, 14 How. Pr. 46; Coffin *v.* President etc. Grand Rapids H. Co., 40 N. Y. St. 851, 18 N. Y. Supp. 782; Fleischmann *v.* Stern, 90 N. Y. 110; Tell *v.* Beyer, 38 N. Y. 161; Clark *v.* Dillon, 97 N. Y. 370; Walrod *v.* Bennett, 6 Barb. 144.

Ohio.—State *v.* Hawes, 43 Ohio St. 16, 1 N. E. 1.

Oregon.—Wallace *v.* Baisley, 22 Or. 572, 30 Pac. 432; Larsen *v.* Or. Ry. & Nav. Co., 19 Or. 240, 23 Pac. 974.

South Carolina.—Charlotte, Columbia etc. Ry. Co. *v.* Gibbes, 23 S. C. 370.

Wisconsin.—Barstow Stove Co. *v.* Bonnell, 36 Wis. 63; Marsh *v.* Pugh, 43 Wis. 597.

Failure to Deny.—In an action brought against a collector of the Port of New York to recover duties illegally exacted on the importation of Bessemer steel rail crop-ends from England, it was alleged that plaintiff "duly made and filed due and timely protest in writing," and "duly appealed to the Secretary of the Treasury," and "that ninety days had not elapsed since the decision of the secretary." These allegations were not denied in the answer, and it was held that the defendant could not move for the verdict on the ground that the protest was premature; and that no proof was offered that there was any appeal to the secretary, or no decision on said appeal, or of the date of such decision to show that suit had been brought in time. Robertson *v.* Perkins, 129, U. S. 233, 9 Sup. Ct. 279.

Failure to Deny Under Oath. And where the statute requires an answer under oath to put in issue the genuineness and due execution of the note, where a copy of such note is attached to and made a part of the complaint, a general denial, without verification is insufficient and admits the genuineness and due execution of the note sued on. Horn *v.* Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569.

Failure to Deny Conclusive.—So in Burke *v.* Table Mt. Water Co., 12 Cal. 403, it is held that the failure to deny a material averment is an admission of the facts contained in such averment; and that such admission is conclusive against the pleader.

In Putnam *v.* Lyon, 3 Colo. App. 144, 32, Pac. 492, it is said: "According to the amended complaint and the amended answer, the plaintiff sufficiently averred his rights and adverse action by the defendants to entitle him to a decree in his favor in respect of these matters, if his allegations were admitted. The amended answer takes issue on none of these averments. What is said in the cross complaint on this subject need not be considered, since in no event can that be taken as a denial of the plaintiff's complaint. The admissions which follow from the failure to deny relieve the plaintiff of the necessity to make proof, and entirely justify the decree entered."

So it is held in Teller *v.* Hartman, 16 Colo. 447, 27 Pac. 947, that a material allegation of the complaint, not denied in the answer, will be taken as confessed.

Specific Denial Necessary.—Under the Code of New York it is held that if a material allegation in a pleading, whether in the complaint or answer, setting up new matter, is not specifically controverted by the answer or reply, said allegation of new matter, for the purpose of the action must be taken as true. Walrod *v.* Bennett, 6 Barb. (N. Y.) 144.

And the rule is held to extend to pleadings in mandamus, such proceeding being construed as a civil action within the meaning of the statute, and that, therefore, a material allegation in the petition for the writ, not denied by the answer, must be treated as admitted the same as if admitted in express terms. State *v.* Hawes, 43 Ohio St. 16, 1 N. E. 1.

In Larsen *v.* Or. Ry. & Nav. Co., 19 Or. 240, 23 Pac. 974, it is held that by failing to reply to new matter in an answer every material fact that is well pleaded therein, stands admitted, but legal conclusions need not be denied.

himself from this effect of a failure to deny a fact by an allegation that he has no knowledge on the subject.[14]

Denial on Ground of Want of Knowledge. — But a denial *for the reason*, or *on the ground* that the party has no knowledge of the truth or falsity of the fact is allowed in practice in some of the states, and is effectual to put the fact in issue and call for proof of it.[15]

In Fleischmann *v.* Stern, 90 N. Y. 110, it was held that as the code provided that "each material allegation of the complaint, not controverted by the answer, must, for the purpose of the action, be taken as true," the defendant was not at liberty to deny, in his testimony, the existence of the facts constituting the cause of action stated in the complaint, or to prove any state of facts inconsistent therewith, where the answer did not deny such facts; and that the omission to deny was equivalent to the formal admission of the truth of the averments, and was conclusive as such.

In Moore *v.* Sauborin, 42 Mo. 490, the court say: "The provisions of the thirty-sixth section of the same chapter are equally explicit in directing that 'every material allegation of new matter contained in the answer, not controverted by the reply, shall, for the purposes of the action, be taken as true.' We are not called upon to scrutinize very closely the averment of this new matter. There was no demurrer to it. The object evidently was to set up such a settlement or compromise of the whole matter, made between the parties at the time of their appearance before the justice, as amounted to a release of the defendant from all liability on account of the prosecution that had been instituted against the plaintiff. This, if true, was a defense to the action. Without a reply, it stood confessed upon the record and entitled the defendant to a judgment. He was not bound to introduce any evidence upon that point, and we shall not look to the bill of exceptions for the purpose of ascertaining whether it is sustained by the proof made or not."

14. It is held in Maxwell *v.* Higgins, 38 Neb. 671, 57 N. W. 388, that facts pleaded in a petition will be taken as admitted where not specifically denied in the answer, and the answer for want of knowledge, neither admitted nor denied the averments of the petition.

In People *v.* Northern Ry. Co., 53 Barb. (N. Y.) 98, it is said: "But the code declares that every material allegation in the complaint, not controverted by the answer, as prescribed by section 149, is for the purpose of the action to be taken as true. None of the material allegations of the complaint are, in this case, so controverted. It therefore follows that they stand admitted, and being so admitted the plaintiff is entitled to the judgment so demanded."

15. Denial for Want of Knowledge. — *United States.* — Maclay *v.* Sands, 94 U. S. 586.

California. — San Francisco Gas Co. *v.* City of San Francisco, 9 Cal. 453; Thompson *v.* Lynch, 29 Cal. 189; People *v.* Board of Supervisors, 45 Cal. 395; Humphreys *v.* McCall, 9 Cal. 59, 70 Am. Dec. 621; Curtis *v.* Richards, 9 Cal. 33; Cunningham *v.* Skinner, 65 Cal. 385, 4 Pac. 375; Harney *v.* McLeran, 66 Cal. 34, 4 Pac. 884.

Idaho. — People *v.* Curtis, 1 Idaho 753.

Nebraska. — Harden *v.* Atchison & Neb. Ry. Co., 4 Neb. 521.

New York. — Brown *v.* Ryckman, 12 How. Pr. 313; Sheldon *v.* Heaton, 78 Hun 50, 29 N. Y. Supp. 275; Humble *v.* McDonough, 5 Misc. 508, 25 N. Y. Supp. 965; Bennett *v.* Leeds Mfg. Co., 110 N. Y. 150, 17 N. E. 669; Taylor *v.* Smith, 29 N. Y. St. 365, 8 N. Y. Supp. 519.

Oregon. — Sherman *v.* Osborn, 8 Or. 66.

Wisconsin. — Stacy *v.* Bennett, 59 Wis. 234, 18 N. W. 26.

What Sufficient Denial. — In Humble *v.* McDonough, 5 Misc. 508, 25 N. Y. Supp. 965, it is held that the answer that "defendant says that

Denial on Information and Belief. — And a denial on information and belief is allowed in some of the states, and is as effectual to raise an issue upon the facts alleged as a positive answer.[16]

Want of Knowledge or Information Sufficient to Form a Belief. And, in others, a defendant is permitted to allege that he has not knowledge or information on the subject sufficient to form a belief, and thus put the opposite party to the proof of the fact.[17]

upon information and belief he denies each and every allegation" is in substance a general denial on information and belief, and sufficient.

The case also involved a question as to whether an absolute denial was necessary or not, because of the fact claimed that the defendant knew of his own personal knowledge the truth or falsity of the facts alleged in the complaint, and it was held that the facts disclosed did not establish the fact that the matters were within his own personal knowledge.

Hypothetical Denial. — In Brown *v.* Ryckman, 12. How. Pr. 313, the court said:

"The difficulty under which the defendant must rest as to the denial of what another did, which he cannot deny, being ignorant thereof, and which he cannot admit for the same reason, is not considered in any of the cases mentioned, except in the case of Ketcham *v.* Zerega. The code has introduced a system entirely new. It is not an alteration; it is a radical change, and section 140 not only abolishes all the forms of pleading heretofore existing, but provides that the rules by which the sufficiency of a pleading is to be determined, are prescribed by the act. This leads to the decision of the question, whether, under the code, the answer of a defendant under oath, may be hypothetical, and, indeed, whether it can be otherwise in many cases which may arise.

"The defendant in this case admits that he made the note sued, but he does not know whether it was endorsed or delivered to the plaintiff, and he denies any knowledge or information on the subject sufficient to form a belief, which puts that fact in issue. Unless he denies the allegation positively, there is no other mode of reply. He has no alternative. The act prescribes the manner of his denial, and leaves him no choice. The denial is itself, in its own nature, hypothetical. He does not know whether the plaintiff is the owner or not, but if he is, then there is a defense, and so he tells his story."

When Bound to Ascertain Facts. In People *v.* Curtis, 1 Idaho 753, it appeared that the facts could have been ascertained by the defendant by the examination of records possibly within his reach, but not such as he would be presumed to know the contents of, and the court held that, notwithstanding that he might have ascertained the facts by the examination of such records, the denial of the material averments in the complaint, upon information and belief, was sufficient to raise an issue which should have been tried by the court.

16. Denial on Information and Belief Sufficient. — Maclay *v.* Sands, 94 U. S. 586; Humphreys *v.* McCall, 9 Cal. 59, 70 Am. Dec. 621; Wood *v.* Raydure, 46 N. Y. Sup. Ct. 144; Meehan *v.* Harlem Sav. Bank, 12 N. Y. Sup. Ct. 499; Mutraz *v.* Persall, 5 Abb. N. C. 90; Kitchen *v.* Wilson, 80 N. C. 191; Brotherton *v.* Downey, 28 N. Y. Sup. Ct. 436. But see Pratt Mfg. Co. *v.* Jordan Iron etc. Co., 40 N. Y. Sup. Ct. 143.

It is held that the answer to the petition for a writ of mandate, presented to the Supreme Court, may deny allegations of the petition upon information and belief. People *v.* Alameda Co., 45 Cal. 395.

17. Want of Sufficient Knowledge to Form Belief. — *Colorado.* — James *v.* McPhee, 9 Colo. 486, 13 Pac. 535; Haney *v.* People, 12 Colo. 345, 21 Pac. 39.

Florida.— Sharp *v.* Holland, 14 Fla. 384.

Iowa. — Claflin *v.* Reese, 54 Iowa 544, 6 N. W. 729; Manney *v.* French, 23 Iowa 250; Carr *v.* Bosworth, 68

This form of answer, being a concession to the party pleading it, must be complied with or the answer will be held to be insufficient to raise an issue.[18]

Where Party Knows or It Is His Duty to Know, Denial Must Be Positive. A denial on information or belief, or a failure to deny for want of knowledge or information, is insufficient where it is the duty of the party to know the fact or the circumstances are such that the fact is presumptively within his knowledge, or where he is aware before answering that he has the means of ascertaining whether the allegation is true. In such cases his denial must be positive or the fact will be taken as admitted,[19] unless the answer shows that

Iowa 669, 27 N. W. 913; Beyre *v.* Adams, 73 Iowa 382, 35 N. W. 491; Ninde *v.* City of Oskaloosa, 55 Iowa 207, 2 N. W. 618, 7 N. W. 511; McFarland *v.* Lester, 23 Iowa 260.

Kentucky. — Morton *v.* Waring, 18 B. Mon. 72.

Minnesota. — Ames *v.* First Div. St. Paul etc. R. R. Co., 12 Minn. 412; Mower *v.* Stickney, 5 Minn. 397.

Missouri. — Watson *v.* Hawkins, 60 Mo. 550.

New York. — Flood *v.* Reynolds, 13 How. Pr. 112; Thorn *v.* N. Y. Cent. Mills, 10 How. Pr. 19; Heye *v.* Bolles, 33 How. Pr. 266; Collins *v.* North Side Pub. Co., 49 N. Y. St. 37, 20 N. Y. Supp. 892; Snyder *v.* White, 6 How. Pr. 321; Temple *v.* Murray, 6 How. Pr. 329; Davis *v.* Potter, 4 How. Pr. 155; Bidwell *v.* Overton, 35 N. Y. St. 574, 13 N. Y. Supp. 274; Genesee Mut. Ins. Co. *v.* Moynihen, 5 How. Pr. 321; Richter *v.* McMurray, 15 Abb. Pr. 346; Caswell *v.* Bushnell, 14 Barb. 393; Hagaborn *v.* Village of Edgewater, 37 N. Y. St. 542, 13 N. Y. Supp. 687; Duncan *v.* Lawrence, 6 Abb. Pr. 304; Kellogg *v.* Baker, 15 Abb. Pr. 286; Zivi *v.* Einstein, 49 N. Y. St. 224, 20 N. Y. Supp. 893; Warner *v.* U. S. L. & I. Co., 25 N. Y. St. 540, 6 N. Y. Supp. 411; Townsend *v.* Platt, 3 Abb. Pr. 325; Harvey *v.* Walker, 35 N. Y. St. 765, 13 N. Y. Supp. 170; Sherman *v.* Bushnell, 7 How. Pr. 171; Grocers' Bank *v.* O'Rorke, 13 N. Y. Sup. Ct. 18; Livingston *v.* Hammer, 7 Bos. 670.

North Carolina. — Fagg *v.* Southern B. & L. Assn., 113 N. C. 364, 18 S. E. 655; Farmers & Mer. Bank *v.* Board of Aldermen etc., 75 N. C. 45.

Oregon. — Wilson *v.* Allen, 11 Or. 154, 2 Pac. 91; Colburn *v.* Barrett, 21 Or. 27, 26 Pac. 1008; Robbins *v.* Baker, 2 Or. 52.

South Dakota. — Cumins *v.* Lawrence Co., 1 S. D. 158, 46 N. W. 182.

Wisconsin. — Hastings *v.* Gwynn, 12 Wis. 750; Goodell *v.* Blumer, 41 Wis. 436; Boorman *v.* Am. Ex. Co., 21 Wis. 154; Witmann *v.* Watry, 37 Wis. 238; Smith *v.* City of Janesville, 26 Wis. 291; Davis *v.* Louk, 30 Wis. 308.

18. Sayre *v.* Cushing, 7 Abb. Pr. 371; Collart *v.* Fisk, 38 Wis. 238.

19. **When Denial Must Be Positive.** — *United States.* — Buller *v.* Sidell, 43 Fed. 116.

California. — Humphreys *v.* McCall, 9 Cal. 59, 70 Am. Dec. 621; Walker *v.* Buffandeau, 63 Cal. 312; Mulcahy *v.* Buckley, 100 Cal. 484, 35 Pac. 144; Brown *v.* Scott, 25 Cal. 189; Vassault *v.* Austin, 32 Cal. 597; Gribble *v.* Columbus Brewing Co., 100 Cal. 67, 34 Pac. 527; San Francisco Gas Co. *v.* San Francisco, 9 Cal. 453; Loveland *v.* Garner, 74 Cal. 298, 15 Pac. 844.

Idaho. — People *v.* Curtis, 1 Idaho 753.

Kentucky. — Ky. River Nav. Co. *v.* Com. 13 Bush 435; Nashville C. & St. L. Ry. Co. *v.* Carico, 95 Ky. 489, 26 S. W. 177; Wing *v.* Dugan, 8 Bush 583; Huffaker *v.* Nat. Bank, 12 Bush 287; Grindler *v.* Farmers & Drovers' Bank, 12 Bush 333; Barret *v.* Godshaw, 12 Bush 592.

Minnesota. — Wheaton *v.* Briggs, 35 Minn. 476, 29 N. W. 170.

New York. — Edwards *v.* Lent, 8 How. Pr. 28; Wessow *v.* Judd, 1 Abb. Pr. 254; Shearman *v.* N. Y. Cent. Mills, 1 Abb. Pr. 187; Fallon *v.* Dur-

the party could not have obtained the information.[20]

Substituted Parties Bound by Admissions. — An allegation of a defendant, brought in by supplemental complaint, of his ignorance of a fact admitted by the answer of the original defendant, to whose interests he has succeeded, is insufficient, as he is bound by the admitted knowledge of the original party.[21]

Insufficiency of Answer, How Raised. — But again it is held that the insufficiency in this respect must be raised by motion to strike out the answer, and that the burden rests upon the party making the motion to show that the facts are within the knowledge of, or could be ascertained by the party answering, and that if the sufficiency of the pleading is not tested in this way, it will be held sufficient on the trial to raise the issue.[22] But there are cases directly to the

rant, 60 How. Pr. 178; Roblin *v.* Long 60 How. Pr. 200.

In People *v.* Bonney, 98 Cal. 278, 33 Pac. 98, the court cites and approves the decision in People *v.* O'Brien, 96 Cal. 171, 31 Pac. 45.

In U. S. *v.* Sykes, 58 Fed. 1000, which was a case for removing unstamped whiskey, a witness introduced by the defendant confessed himself to be a confederate in the crime. The witness testified that his father (the defendant) had given him instructions to purchase tax paid whiskey, and that his father did not know that the whisky had been put in unstamped casks. The court held that his testimony ought to be corroborated.

Lewis *v.* Acker, 2 How. Pr. 163; Chapman *v.* Palmer, 12 How. Pr. 37; Beebe *v.* Marvin, 17 Abb. Pr. 194; Sherman *v.* Boehm, 13 Daly 42; Ketcham *v.* Zerega, 1 E. D. Smith 553.

Wisconsin. — State *v.* McGarry, 21 Wis. 502; Union Lumbering Co. *v.* Board of Supervisors, 47 Wis. 245, 2 N. W. 281; Mills *v.* Town of Jefferson, 20 Wis. 54; Hathaway *v.* Baldwin, 17 Wis. 635, 86 Am. Dec. 730; City of Milwaukee *v.* O'Sullivan, 25 Wis. 666; Goodell *v.* Blumer, 41 Wis. 436; Brown *v.* La Crosse Gas L. & C. Co., 21 Wis. 51.

20. Jones *v.* Perot, 19 Colo. 141, 34 Pac. 728; Haney *v.* People, 12 Colo. 345, 21 Pac. 39.

What Answer Must Show. — "It is difficult to define with more exact precision when an answer should be positive in its denials, than to say that when the material facts alleged in the complaint are presumptively within the knowledge of the defendant he must traverse them, if he undertakes to do so at all, directly and positively, or he must show how it is that he is without knowledge of such facts. In the case under consideration, we are of opinion the presumption did not arise, that the defendants knew that a judgment had been recovered by Barker against Austin, or the contrary, and, consequently, that they might deny the recovery of such a judgment upon information and belief." Vassault *v.* Austin, 32 Cal. 597.

"The denials in the answer are as follows: The defendant 'denies any knowledge or information sufficient to form a belief as to each and every allegation in the complaint, except as hereinafter admitted.' This form of denial is defective, in that it does not contain a statement to the effect that defendant cannot obtain sufficient knowledge or information upon which to base a belief. From aught that appears, information might have been obtained, upon the slightest inquiry, which would have enabled the defendant to either have admitted or denied in positive form the allegations of the complaint. Civil Code, § 56; Haney *v.* People, 12 Colo. 345, 21 Pac. 39." Jones *v.* Perot, 19 Colo. 141, 34 Pac. 728.

21. Forbes *v.* Waller, 25 N. Y. 430.

22. Smalley *v.* Isaacson, 40 Minn. 450, 42 N. W. 352.

contrary, holding that where the defendant alleges under oath a want of knowledge, the answer cannot be stricken out on a showing by affidavit that the facts were within his personal knowledge.[23]

Answer on Belief. — Under some of the codes a verified answer on the belief of the party is held to be sufficient.[24]

General Rules As to Sufficiency of Answers Founded on Want of Knowledge or Information, or on Information and Belief. — The language of the several codes authorizing answers of this kind does not differ so materially as to call for separate discussion: the authorities above cited will sufficiently indicate the general rules as to the sufficiency of such answers.[25]

When Specific Denial Necessary. — In some of the states a specific denial is only required where the adverse pleading is verified. If not verified a general denial is sufficient.[26] In other states a general denial is permitted except as to certain specified allegations of fact; for example, where a written instrument is the foundation of the action, its execution is deemed admitted unless genuineness and due execution are denied under oath, and in case of allegations of the existence of corporations or of any appointment or authority.[27] The requirement extends to judgments,[28] and to the power of a municipal

23. Caswell *v.* Bushnell, 14 Barb. (N. Y.) 393.

24. "It will be observed that there are differences between our code and that of New York in other particulars connected with the verification of pleadings. Our code provides that every pleading of fact must be verified, but this verification is sufficient when it shows a belief that the facts stated are true, while the code of New York requires the verification to be to the effect that the pleading 'if true to the knowledge of the person making it, except as to matters stated on information and belief, and as to those matters, he believes it to be true.' Our code contemplates, for the sake of brevity and conciseness, a simple statement of facts, without reference to the manner, a knowledge of them, or a reason to believe them, may have been obtained, or may exist; and, it is probable, with this view any reference to knowledge or information was omitted." Treadwell *v.* The Comrs. of Hancock Co., 11 Ohio St. 183.

25. A very interesting discussion of the subject will be found in the notes to Humphreys *v.* McCall, 70 Am. Dec. 621.

26. San Francisco Gas Co. *v.* City of San Francisco, 9 Cal. 453; Snell *v.* Crowe, 3 Utah, page 26 Pac. 522; Schenk *v.* Evoy, 24 Cal. 104; Randolph *v.* Harris, 28 Cal. 561, 87 Am. Dec. 139; Doll *v.* Good, 38 Cal. 287; Rock Springs Coal Co. *v.* Salt Lake Sanitarium Ass'n, 7 Utah 158, 25 Pac. 742.

27. *Alabama.* — Rosenberg *v.* Claflin, 95 Ala. 249, 10 So. 521.

California. — Smith *v.* Eureka Flour Mill Co., 6 Cal. 1.

Colorado. — Watson *v.* Lemen, 9 Colo. 200, 11 Pac. 88.

Iowa. — Stier *v.* City of Oskaloosa, 41 Iowa 353; Curry *v.* District Township etc., 62 Iowa 102, 17 N. W. 191; Ashworth *v.* Grubbs, 47 Iowa 353; Brewer *v.* Crow, 4 Greene 520; Edmonds *v.* Montgomery, 1 Clarke 143; Clark, *v.* City of Des Moines, 19 Iowa 199; Hall *v.* Aetna Mfg Co., 30 Iowa 215; Templin *v.* Rothweiler, 56 Iowa 259, 9 N. W. 207.

Kansas — Rock Island Lumber Co. *v.* Fairmount Town Co., 51, Kan. 304, 32 Pac. 1100.

New York. — East River Elec. L. Co. *v.* Clark, 45 N. Y. St. 635, 18 N. Y. Supp. 463.

Wisconsin. — Crane *v.* Morse, 49 Wis. 368, 5 N. W. 815.

28. Edmonds *v.* Montgomery, 1 Clarke (Iowa) 143.

corporation to make the contract sued on.[29] But is limited to such instruments as are the foundation of the cause of action or defense and made part of the pleading.[30] And in some of the states the denial must go to the *signature* to the note and not to its execution.[31]

29. Clark *v.* City of Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

30. Hay *v.* Frazier, 49 Iowa 454.

31. **Effect of Denial of Execution.** It has been held under the law of Iowa that where an answer did not deny the *signature* to the note sued on, but did deny the *execution* of the note, the denial did not cast on the plaintiff the burden of proving the signature, but permitted the defendant to prove that it was not his genuine signature. Sully *v.* Goldsmith, 49 Iowa 690; Loomis *v.* Metcalf, 30 Iowa 382.

And that in order to put the plaintiff to the proof the genuineness of the *signature* must be specifically and positively denied under oath. Douglass *v.* Matheny, 35 Iowa 112; Carle *v.* Cornell, 11 Iowa 374.

"Appellant's counsel insists that under the statute, the *signature* of George Trump, Jr., not being denied by him under oath, 'it is to be deemed genuine and admitted,' and cannot be contradicted, and he cites Loomis & Leroy *v.* Metcalf & Fuller, 30 Iowa 382. The question there was as to the sufficiency of the denial to put the plaintiff on proof of the signature, and it was held that, in order to cast the burden of proving the genuineness of the signature on the plaintiff, it must be denied under oath by the party whose signature it purports to be. See, also, holding the same view, Douglass *v.* Matheny, *ante*, 112, and cases cited. It was held, in the language of the statute, that unless the signature be thus denied, 'it is to be deemed genuine and admitted.' It was not, however, held, nor do we believe the true meaning of the language of the statute to be, that the defendant is estopped from controverting the execution of the instrument or of his signature thereto by proof, where he has denied the execution in his answer." Sankey *v.* Trump, 35 Iowa 267.

See on this subject Ludlow *v.* Berry, 62 Wis. 78, 29 N. W. 140; Concordia Sav. & Aid Ass'n. *v.* Read, 93 N. Y. 474. In Iowa it is directly held that the only effect of the statute is to shift the burden of proof in case of a denial of the genuineness of the signatures under oath that the failure to so deny is not an admission of the genuineness of the signature, but leaves it open to the defendant to prove that the signature is not genuine. Sankey *v.* Trump, 35 Iowa 267; Fannin *v.* Robinson, 10 Iowa 272.

Brayley *v.* Hedges, 52 Iowa 623, 3 N. W. 652; Farmers & Mer. Bank *v.* Young, 36 Iowa 44.

Requirement Applies to Signature Only. — So it is held that the requirement of a verified denial applies to the signature only, and that an alteration of the instrument may be put in issue by an unverified plea of *non est factum*. Lake *v.* Cruikshank, 31 Iowa 395.

And that the denial must be by the party whose signature it purports to be. Therefore the maker of a note cannot deny the genuineness of the signature of the endorser. Robinson *v.* Lair, 31 Iowa 9; Walker *v.* Sleight, 30 Iowa 310.

Denial of Corporate Existence. So it is held, under certain statutory provisions in Iowa, that the bare denial of an allegation that it is a corporation is not sufficient to put in issue the alleged corporate character of a defendant. Stier *v.* City of Oskaloosa, 41 Iowa 353; Coates *v.* Galena & C. U. Ry. Co., 18 Iowa 277; Blackshire *v.* Iowa Homestead Co., 39 Iowa 624.

So with respect to the allegation that a guardian or administrator was duly appointed. Gates *v.* Carpenter, 43 Iowa 152; Mayes *v.* Turley, 60 Iowa 407, 14 N. W. 731.

And that the party duly performed all the conditions of a contract on his part. Halferty *v.* Wilmering, 112 U. S. 713, 5 Sup. Ct. 364.

And where a promissory note sued

And in some cases the failure to deny under oath has been held to have the effect to relieve the plaintiff from proving the execution or assignment of the instrument in the first instance only, thus shifting the burden of proof.[32] But it is held also that a failure to deny under oath confesses the execution of the instrument.[33]

In some of the states it is held that a general denial is not authorized, but the denials must be specific as to each fact intended to be controverted.[34]

That Instrument Was Procured by Fraud May Be Proved Under Non Est Factum. — It is held that where the execution of an instrument was procured by fraud, the fact may be proved under the answer of *non est factum* which, under the codes of some of the states, may be in the form of a general denial verified, and that it is not necessary to admit the execution of the instrument and plead the fraud in avoidance.[35]

Rule Requiring Verified Denial Applies to Signing of Instrument, Not to Delivery. — There are authorities to the effect that the requirement that the execution of an instrument can be put in issue only by a verified answer, applies only to the manual signing of the instrument, and not to its delivery, and therefore a denial unverified does not confess the delivery of the instrument.[36]

Denial Must Be Specific As to Each Fact Intended to Be Controverted, and Without Evasion. — Under the statutory provisions requiring specific denials of each material allegation of the adverse pleading, the denial must be direct and positive as to each fact alleged, and without evasion.[37] Therefore, if the several facts are stated conjunctively

on is executed by an agent, or purports to have been so executed, a sworn denial is not necessary to put the plaintiff to the proof, but the question is properly raised by an unverified plea of *non assumpsit*. Pope *v.* Risley, 23 Mo. 185.

32. Lyon *v.* Bunn, 6 Iowa 48; Seachrist *v.* Griffeth, 6 Iowa, 390; Partridge *v.* Patterson, 6 Iowa, 514; Terhune *v.* Henry 13 Iowa 99; Klein *v.* Keyes, 17 Mo. 326; Martin *v.* Lamb, 77 Ga. 252, 3 S. E. 10.

33. State *v.* Chamberlain, 54 Mo. 338.

34. Gwynn *v.* McCauley, 32 Ark. 97.

35. What May Be Proved Under Non Est Factum. — "It is also contended by the plaintiff that the defense of the defendant, as shown by the evidence, was improperly admitted under the pleadings; that the answer only denied the execution of the note, and that evidence to show that his name had been procured to the note, without his consent, by fraudulent practices, could not properly be admitted under such an answer; that in order to admit such evidence, the defendant should have admitted the execution of the note and set up the fraud in avoidance of a recovery thereon. This position I think is untenable. The general rule is, that when a deed is void *ab initio*, and not merely voidable, the plea of *non est factum* is proper; and the facts showing the instrument to be void, may be given in evidence to sustain such plea." Corbey *v.* Weddle, 57 Mo. 452.

36. Hammerslough *v.* Cheatham, 84 Mo. 13.

37. Denial Must Be Specific. Pomeroy's Rem. & Rem. Rights, § 633.

Arkansas. — Fain *v.* Goodwin, 35 Ark. 109; Lawrence *v.* Meyer, 35 Ark. 104; Guynn *v.* McCauley, 32 Ark. 97; Moore *v.* Nichols, 39 Ark. 145.

California. — Thompson *v.* Lee, 8 Cal. 275; Feeley *v.* Shirley, 43 Cal.

in the complaint, a denial of them as a whole and not separately, is insufficient and admits them all.[38] But it is held that a party is not bound to deny, in terms, the allegations of the adverse pleading, but may allege a state of facts inconsistent with those intended to be controverted, which is a denial in effect.[39] A different conclu-

369; Bradbury *v.* Cronise, 46 Cal. 287; Fitch *v.* Bunch, 30 Cal. 208; Marsters *v.* Lash, 61 Cal. 622; Morrill *v.* Morrill, 26 Cal. 288; Landers *v.* Bolton, 26 Cal. 393; Mathewson *v.* Fitch, 22 Cal. 86; Levinson *v.* Schwartz, 22 Cal. 229; Nelson *v.* Murray, 23 Cal. 338; Blood *v.* Light, 31 Cal. 115; Heusley *v.* Tartar, 14 Cal. 508; Busenius *v.* Coffee, 14 Cal. 91; De Godey *v.* Godey, 39 Cal. 157; Doll *v.* Good, 38 Cal. 287; Fuhn *v.* Weber, 38 Cal. 636; Randolph *v.* Harris, 28 Cal. 561, 87 Am. Dec. 139; Hunter *v.* Martin, 57 Cal. 365; Patterson *v.* Ely, 19 Cal. 28; Burke *v.* Table Mt. Water Co., 12 Cal. 403; Ord *v.* Steamer Uncle Sam, 13 Cal. 369.

Colorado. — Watson *v.* Lemen, 9 Colo. 200, 11 Pac. 88.

Dakota. — Dole *v.* Burleigh, 1 Dak. 227, 46 N. W. 692.

Georgia — Martin *v.* Lamb, 77 Ga. 252, 3 S. E. 10.

Idaho. — Norris *v.* Glenn, 1 Idaho 590.

Iowa. — Wright *v.* Schmidt, 47 Iowa 233.

Kentucky. — Morgan *v.* Booth, 13 Bush 480; Clarke *v.* Finnell, 16 B. Mon. 329; Francis *v.* Francis, 18 B. Mon. 57; Stevenson *v.* Flournoy, 89 Ky. 561, 13 S. W. 210.

Minnesota.—Minor *v.* Willoughby, 3 Minn. 225; Starbuck *v.* Dunklee, 10 Minn. 168, 88 Am. Dec. 68.

Missouri. — Breckinridge *v.* Am. Cent. Ins. Co., 87 Mo. 62; Kinman *v.* Cannefax, 34 Mo. 147; Emory *v.* Phillips, 1 Jones 499; Dare *v.* Pacific Ry., 31 Mo. 480; Bredell *v.* Alexander, 8 Mo. App. 110.

Nebraska — Hardin *v.* Atchison, Neb. Ry. Co., 4 Neb. 521.

New York. — Seward *v.* Miller, 6 How. Pr. 312; Thorn *v.* N. Y. Cent. Mills, 10 How. Pr. 19; Salinger *v.* Lusk, 7 How. Pr. 430; Spiegel *v.* Thompson, 1 How. Pr. (N. S.) 129; Newell *v.* Doty, 33 N. Y. 83; Malcolm *v.* Lyon, 46 N. Y. St. 921, 19 N. Y. Supp. 210; Conkling *v.* Manhattan Ry. Co., 58 Hun 611, 12 N. Y. Supp. 846; Lewis *v.* Acker, 2 How. Pr. 163; Young *v.* Catlett, 6 Duer 437; Miller *v.* Miller, 1 Abb. N. C. 30; Powers *v.* Rome, etc. Ry. Co., 10 N. Y. Sup. Ct. 285; Storer *v.* Coe, 2 Bos. 661; Judd *v.* Cushing, 22 Abb. N. C. 358; Sheldon *v.* Sabin, 12 Daly, 184.

North Carolina — Bonds *v.* Smith, 106 N. C. 553, 11 S. E. 322; Deloatch *v.* Vinson, 108 N. C. 147, 12 S. E. 895.

South Carolina. — Lupo *v.* True, 16 S. C. 579.

Tennessee. — Miller *v.* Am. Mut. Acc. Ins. Co., 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765.

Wisconsin.—Schaetzel *v.* Germantown F. M. Ins. Co., 22 Wis. 412; Elliott *v.* Espenhain, 54 Wis. 231, 11 N. W. 513; Robbins *v.* Lincoln, 12 Wis. 1; Cuthbert *v.* City of Appleton, 24 Wis. 383; Crane *v.* Morse, 49 Wis. 368, 5 N. W. 815.

38. Denial of Facts Conjunctively Alleged. — *California.* — Blood *v.* Light, 31 Cal. 115; Fish *v.* Redington, 31 Cal. 185; Burke *v.* Carruthers, 31 Cal. 467; Kuhland *v.* Sedgwick, 17 Cal. 123; Doll *v.* Good, 38 Cal. 287; Reed *v.* Calderwood, 32 Cal. 109; Richardson *v.* Smith, 29 Cal. 529; More *v.* Del Valle, 28 Cal. 170; Leroux *v.* Murdock, 51 Cal. 541; Wordworth *v.* Knowlton, 22 Cal. 164; Randolph *v.* Harris, 28 Cal. 561, 87 Am. Dec. 139; Jones *v.* Eddy, 90 Cal. 147, 27 Pac. 190.

Kentucky. — Morgan *v.* Booth, 13 Bush 480.

Minnesota. — Pullen *v.* Wright, 34 Minn. 314, 26 N. W. 394.

New York. — Hopkins *v.* Everett, 6 How. Pr. 159; Shearman *v.* New York Cent. Mills, 1 Abb. Pr. 187.

Oregon. — Moser *v.* Jenkins, 5 Or. 447.

39. Statement of Inconsistent Facts. — Hill *v.* Smith, 27 Cal. 476; Kinney *v.* Dodge, 101 Ind. 573; Sohn

sion is reached in some of the cases.[40]

Denial As Broad As the Allegation, Sufficient. — The requirement is that the denial shall traverse fully and without evasion or equivocation the allegation of the adverse pleading. It follows that if the allegation is general in terms when it should be specific, the denial may be equally general. In other words, if the denial is as broad and specific as the allegation, it is a sufficient denial.[41]

When Verification Need Not Be Positive. —While the requirement that the pleading shall be direct and positive is uniform in those states in which a party is compelled to plead under oath, and is allowed to allege or deny on information and belief, it is sufficient if his verification is that he is informed and believes the allegation of the pleading to be true.[42]

Denial of Every "Material" Allegation.— It has been held that an answer denying every "material" allegation of a complaint is sufficiently specific and amounts to a general denial.[43] So it has been held to be a good general denial to deny "each and every allegation of the complaint not herein admitted or controverted," or "not explained."[44] But to render such an answer a sufficient denial, the

v. Jervis, 101 Ind. 578; Clauser *v.* Jones, 100 Ind. 123; Mays *v.* Hedges, 79 Ind. 288; Nicholson *v.* Caress, 76 Ind. 24; McDonald *v.* American Mortgage Co., 17 Or. 626, 21 Pac. 883.

40. Must Be Direct and Unequivocal. — "A denial may be general or specific, at the option of the pleader, but in either case it must be direct and unequivocal. If it merely *implies* that the allegation is controverted, or justifies an *inference* that such is or will be claimed to be its effect, it will not be construed as a denial." West *v.* Am. Bank, 44 Barb. (N. Y.) 175.

41. Denial as Broad as Allegation. Sufficient. — "The denial is as broad as the allegation. If under the allegation that the demand was duly made on the premises — which amounts to no more than that the demand was made on the premises — the appellants were authorized to prove that the demand was made at a particular place on the premises; then under the denial in the answer the respondents might prove that such place was not the most notorious place on the premises. A demand, to be of any avail to work a forfeiture at common law, must be made at the proper time and place, and for the precise sum then falling due, and a denial of the demand puts the lessor upon proof of all the essentials of the demand; and if the lessor is authorized to allege generally, in any respect, the fact of the demand, the lessee would be authorized to make his denial in as general terms." McGlynn *v.* Moore, 25 Cal. 384.

42. Hardin *v.* Atchison & Neb. Ry. Co., 4 Neb. 521.

43. Miller *v.* Brumbaugh, 7 Kan. 343. But see Dole *v.* Burleigh, 1 Dak. 227, 46 N. W. 692.

44. Griffin *v.* Long Island R. Co., 101 N. Y. 348, 4 N. E. 740; Rawlings *v.* Alexander, 59 N. Y. St. 409, 28 N. Y. Supp. 748; Owens *v.* Hudnut, 35 N. Y. St. 567, 12 N. Y. Supp. 700; Kingsley *v.* Gilman, 12 Minn. 515; Leyd *v.* Martin, 16 Minn. 38; Smith *v.* Gratz, 59 How. Pr. 274; Ingle *v.* Jones, 43 Iowa 286; Crane *v.* Crane, 5 N. Y. Sup. Ct. 209; Tracy *v.* Baker, 45 N. Y. Sup. Ct. 263; Calhoun *v.* Hallen, 32 N. Y. Sup. Ct. 155.

But see to the contrary: Pomeroy's Rem. & Rem. Rights, §§ 633-636; McEncroe *v.* Decker, 58 How. Pr. 250; Potter *v.* Frail, 67 How. Pr. 445; Callanan *v.* Gilman, 67 How. Pr. 464; Long *v.* Long, 79 Mo. 644; Thierry *v.* Crawford, 40 N. Y. Sup.

matters in the complaint admitted, avoided or explained, must be clearly shown by other allegations in the answer, so that there can be no uncertainty as to the matters denied.[45]

Denial of Fraud. — The denial of fraud or fraudulent intent is of no avail and presents no issue of fact as against an admission in the same pleading of facts establishing the fraud.[46] But if fraud is alleged as a fact, a denial of the allegation has the same effect as the denial of any other fact.

Facts Admitted in One Count and Denied in Another. — The general rule is that a failure to deny, or an admission, in one count or paragraph of a pleading, is not conclusive on the party if the same fact is put in issue in another count or paragraph.[47] But there are authorities to the contrary.[48] And where the new matter set up is merely inconsistent with the fact alleged in the adverse pleading, and not in avoidance of it, the admission of the fact in one count should undoubtedly be held to be conclusive, as the setting up of the inconsistent new matter is no more than an indirect denial of a fact already admitted.[49] But if the admission in one count or paragraph is for the purpose of pleading a separate defense, the

Ct. 366; Hammond *v.* Earle, 5 Abb. N. C. 105; Millville Mfg. Co. *v.* Salter, 15 Abb. N. C. 305; Waters *v.* Curtis, 13 Daly (N. Y.) 179.

45. Miller *v.* McCloskey, 9 Abb. N. C. 303; Tracy *v.* Baker, 45 N. Y. Sup. Ct. 263.

46. Robinson *v.* Stewart, 10 N. Y. 189; Litchfield *v.* Pelton, 6 Barb. 187.

47. **Denial in One Count of Matter Admitted in Another.** — *United States.* — Whitaker *v.* Freeman, 1 Dev. (N. C. 271) 29 Fed. Cas. No. 17,527a; Glenn *v.* Sumner, 132 U. S. 152, 10 Sup. Ct. 41.

California. — Siter *v.* Jewett, 33 Cal. 92; McDonald *v.* Davidson, 30 Cal. 174.

Kansas. — McGrew *v.* Armstrong, 5 Kan. 284.

Massachusetts. — Blackington *v.* Johnson, 126 Mass. 21.

New Hampshire. — Larry *v.* Herrick, 58 N. H. 40.

New York. — Young *v.* Katz, 22 App. Div. 542, 48 N. Y. Supp. 187.

Texas. — Hart *v.* Blackburn, 20 Tex. 601.

Wisconsin. — McWilliams *v.* Bannister, 40 Wis. 489.

48. Dole *v.* Burleigh, 1 Dak. 227, 46 N. W. 692; Beard *v.* Tilghman, 49 N. Y. St. 508, 20 N. Y. Supp. 736; Fleischmann *v.* Stern, 90 N. Y. 110; Wood *v.* Whiting, 21 Barb. 190.

49. **Repugnant Allegations in Different Counts.** — West *v.* Am. Bank, 44 Barb. 175; Hartwell *v.* Paige, 14 Wis. 49. "Under the code a party may set up as many defenses as he chooses, but he cannot, by making repugnant allegations, compel the plaintiff, in order to avoid a denial in one part of the answer, prove a fact admitted in another. The object of the code was to compel the defendant to admit every part of the plaintiff's complaint which he could not conscientiously deny. Therefore, any fact sustaining the plaintiff's case admitted in one part of the answer is to be taken as true for all purposes in the case, and the plaintiff is not bound to prove it. In this case the answer is a general denial; second, a justification, and it is held not well pleaded. (Hartwell *v.* Paige, 14 Wis. 49.) Viewed in the light of these authorities, there was no error in rejecting the evidence of the plaintiff of the copy of the note declared on, or its contents." Dole *v.* Burleigh, 1 Dak. 227, 234, 46 N. W. 692. See as bearing on this subject, Lipscomb *v.* Lipscomb, 32 S. C. 243, 10 S. E. 929.

admission made for such purpose does not destroy the effect of a denial in another count of the same pleading.[50] And there are authorities holding that inconsistent statements of facts in different counts of a pleading are not competent evidence to contradict the testimony of the party, at the trial, as to the facts.[51]

Denial "In Manner and Form As Alleged" Insufficient. — Under the rule that a denial must be direct and positive, it is held to be insufficient to deny that the allegation is true "in manner and form as alleged" for the reason that such a denial goes to the *form* and not the substance of the adverse pleading.[52]

Negatives Pregnant. — A negative pregnant is "the statement of a negative proposition in such a form as may imply or carry with it the admission of an affirmative."[53] Such a denial admits the affirmative fact thus implied.[54]

50. Siter *v.* Jewett, 32 Cal. 92; Hart *v.* Blackburn, 20 Tex. 601; Young *v.* Katz, 22 App. Div. 542, 48 N. Y. Supp. 187; Kimball *v.* Bellows, 13 N. H. 58; Larry *v.* Herrick, 58 N. H. 40.

51. Larry *v.* Herrick, 58 N. H. 40.

52. Crane *v.* Morse, 49 Wis. 368, 5 N. W. 815; Dole *v.* Burleigh, 1 Dak. 227, 46 N. W. 692.

53. Anderson's Dict.

54. Negative Pregnant Admits the Facts. —*California.*—Landers *v.* Bolton, 26 Cal. 393; Bradbury *v.* Cronise, 46 Cal. 287; Larney *v.* Mooney, 50 Cal. 610; Lay *v.* Neville, 25 Cal. 545; Castro *v.* Wetmore, 16 Cal. 379; Leffingwell *v.* Griffing, 31 Cal. 231.

Colorado. — James *v.* McPhee, 9 Colo. 486, 13 Pac. 535.

Dakota. — Dole *v.* Burleigh, 1 Dak. 227, 46 N. W. 692.

Iowa. — But see to the contrary, Doolittle *v.* Greene, 32 Iowa 123.

Minnesota. — Pullen *v.* Wright, 34 Minn. 314, 26 N. W. 394; Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79; Dean *v.* Leonard, 9 Minn. 190; Steele *v.* Thayer, 36 Minn. 174, 30 N. W. 758; Frasier *v.* Williams, 15 Minn. 288; Burt *v.* McKinstry, 4 Minn. 204; McMurphy *v.* Walker, 20 Minn. 382.

Missouri. — Garth *v.* Caldwell, 72 Mo. 622; Emory *v.* Phillips, 22 Mo. 499.

Montana. — Harris *v.* Shoutz, 1 Mont. 212; Toombs *v.* Hornbuckle, 1 Mont. 286.

New York. — Baker *v.* Bailey, 16 Barb. 54; Moody *v.* Belden, 38 N. Y. St. 722, 15 N. Y. Supp. 119; Davidson *v.* Powell, 16 How. Pr. 467; Pfaudler Process etc. Co. *v.* McPherson, 20 N. Y. St. 473, 3 N. Y. Supp. 609; Elton *v.* Markham, 2 Barb. 343.

Utah. — Rock Springs Coal Co. *v.* Salt Lake Sanitarium Ass'n, 7 Utah 158, 25 Pac. 742.

Washington. — Gannon *v.* Dyke, 2 Wash. Ter. 266, 5 Pac. 845; Seattle Nat. Bank *v.* Meerwaldt, 8 Wash. 630, 36 Pac. 763.

Wisconsin. — Schaetzel *v.* Germantown F. M. Ins. Co., 22 Wis. 412; State *v.* McGarry, 21 Wis. 502.

Negative Pregnant. — "The fact that the building was burned is charged in the petition as having occurred November 28 1879, and the answer first 'denies the destruction of the property *as alleged*;' this admits the destruction of the house by fire, if the ordinary rules of pleading applicable to negatives pregnant are to prevail. It is tantamount to saying, 'the house was destroyed by fire, but not on the day, or in the way you say it was.' Schaetsell *v.* Ins. Co., 22 Wis. 413, and cases cited; Soeding *v.* Bartlett, 35 Mo. 90, and cases *infra*. And the answer then states that 'defendant avers that before said building was burned, as alleged,' and by further stating 'that at, and immediately before the time when said building was burned, mechanics were at work,' etc., thereby makes

Can Not Be a Negative Pregnant in a General Denial. — The rule that a negative pregnant admits the fact alleged has been held to apply to a general denial in case of an allegation of the value of property in controversy.[55] But the better rule is the other way.[56]

It is correctly held that a general denial is a negative pregnant only when a specific denial would be.[57]

Insufficiency of Denial, How Waived and Its Effect. — While the authorities are agreed that a pleading must be direct and positive, it is not always that a failure to plead in the manner required will have the effect to admit the truth of the fact intended and attempted to be controverted. In some of the cases it is held that a failure to traverse a fact by a direct and positive denial must be taken advantage of by an objection to the form of the denial, or it will be held at the trial to be sufficient to raise an issue.[58]

admission of the destruction of the building as charged in the petition. Hyeronimus *v.* Allison, 52 Mo. 103; Garth *v.* Caldwell, 72 Mo. 622." Breckinridge *v.* Am. Cent. Ins. Co., 87 Mo. 62.

But see to the contrary, Merchant's Nat. Bank *v.* Richards, 74 Mo. 77; Wynn *v.* Cory, 43 Mo. 301; First Nat. Bank *v.* Hogan, 47 Mo. 472; Ells *v.* Pacific Ry. Co., 55 Mo. 278.

It is said that the doctrine of a negative pregnant is not recognized in Missouri. Merchant's Nat. Bank *v.* Richards, 74 Mo. 77.

55. Dean *v.* Leonard, 9 Minn. 190; Hecklin *v.* Ess, 16 Minn. 51; Pottgieser *v.* Dorn, 16 Minn. 204; Moulton *v.* Thomson, 26 Minn. 120, 1 N. W. 836; Coleman *v.* Pearce, 26 Minn. 123, 1 N. W. 846; Peck *v.* McLean, 36 Minn. 228, 30 N. W. 759.

56. German Am. Bank *v.* White, 38 Minn. 471, 38 N. W. 361; Stone *v.* Quaale, 36 Minn. 46, 29 N. W. 326.

57. When General Denial a Negative Pregnant. — "The court below erred in holding the denial in the answer to be a negative pregnant, and therefore an admission of the allegations in the complaint. The statute provides that the answer shall contain 'a denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.' Under this, what is termed the 'general denial' has from the beginning been practiced and been sanctioned by this court. As usually expressed, this denial is of 'each and every allegation' of the whole, or of some clearly-indicated portion, of the pleading to which the denial is in answer, or of the whole or part of such pleading, with clearly and definitely expressed exceptions. However expressed it is sufficient if it clearly shows that the pleader intends to deny 'each and every' of the allegations in the whole or of the part of the opposite pleading referred to. This form of denying, instead of specific denials, was adopted from motives of convenience, and it has considerations of convenience to commend it. In effect, it is precisely the same as if each of the allegations so denied were specifically and separately referred to and denied. It is of no greater and no less effect. Is no better and no worse denial than such specific and separate denial would be. It puts in issue each allegation of fact to which it relates as fully as though each of such allegations were specifically denied." Stone *v.* Quaale, 36 Minn. 46, 29 N. W. 326.

58. How Insufficient Denial Waived. — *United States.* — Burley *v.* German Am. Bank, 111 U. S. 216, 4 Sup. Ct. 341.

California. — Perkins *v.* Brock, 80 Cal. 320, 22 Pac. 194.

Minnesota. — Schroeder *v.* Capehart, 49 Minn. 525, 52 N. W. 140.

New York. — Elton *v.* Markham,

Denial of Conclusion of Law. — The denial to be effective must be a denial of the *facts* alleged, and not the conclusion of law to be drawn from them. And if the conclusion alone is denied, the facts are admitted, but the conclusion is not.[59]

Denial of Indebtedness. — To deny that the defendant is indebted to the plaintiff is a denial of a legal conclusion resulting from the facts alleged showing such indebtedness, and is insufficient to raise an issue, and admits the facts which are alone material.[60] There are

20 Barb. 343; Wall *v.* Buffalo Water Works Co., 18 N. Y. 119; Pfaudler Process etc. Co. *v.* McPherson, 20 N. Y. St. 473, 3 N. Y. Supp. 609; Greenfield *v.* Mass. Mut. F. Ins. Co., 47 N. Y. 430; Dovan *v.* Dinsmore, 33 Barb. 86.

Ohio. — Woodward *v.* Sloan, 27 Ohio St. 592; Trustees of School Section *v.* Odlin, 8 Ohio St. 293.

59. Denial of Conclusion of Law. Pomeroy's Rem. & Rem. Rights, § 637.

United States. — Mills *v.* Duryee, 7 Cranch 481; Buller *v.* Sidell, 43 Fed. 116.

Arkansas. — Lawrence *v.* Meyer, 35 Ark. 104; Fain *v.* Goodwin, 35 Ark. 109; Moore *v.* Nichols, 39 Ark. 145.

California. — Nelson *v.* Murray, 23 Cal. 338; Kuhland *v.* Sedwick, 17 Cal. 123; Scott *v.* Umbarger, 41 Cal. 410; Lee *v.* Figg, 37 Cal. 328; Lightner *v.* Menzel, 35 Cal. 452; Bradbury *v.* Cronise, 46 Cal. 287; Wells *v.* McPike, 21 Cal. 216; Young *v.* Miller, 63 Cal. 302; Higgins *v.* Wortell, 18 Cal. 330; Curtis *v.* Richards, 9 Cal. 33; Kinney *v.* Osborne, 14 Cal. 112; People *v.* Hastings, 29 Cal. 449; People *v.* Board of Supervisors, 27 Cal. 655.

Colorado. — Watson *v.* Lemen, 9 Colo. 200, 11 Pac. 88.

Idaho. — Swanholm *v.* Reeser, 2 Idaho 1167, 31 Pac. 804.

Indiana. — Indianapolis etc. Ry. Co. *v.* Risley, 50 Ind. 60; Nicholson *v.* Caress, 76 Ind. 24.

Iowa. — Cottle *v.* Cole, 20 Iowa 481.

Kentucky. — Haggard *v.* Hay, 13 B. Mon. 175; Francis *v.* Francis, 18 B. Mon. 57; Templeton *v.* Sharp, 10 Ky. Law 499, 9 S. W. 507; Greer *v.* City of Covington, 83 Ky. 410.

Minnesota. — Downer *v.* Read, 17 Minn. 493; Freeman *v.* Curran, 1 Minn. 169.

Montana. — Higgins *v.* Germaine, 1 Mont. 230.

Nevada. — Skinner *v.* Clute, 9 Nev. 342.

New York. — Emery *v.* Baltz, 94 N. Y. 408; Edson *v.* Dillage, 8 How. Pr. 273; Seeley *v.* Enzell, 17 Barb. 530; McMurray *v.* Gifford, 5 How. Pr. 14; Kay *v.* Churchill 10 Abb. N. C. 83.

Ohio. — U. S. Rolling Stock Co. *v.* Atlantic etc. Ry. Co., 34 Ohio St. 450; Larimore *v.* Wells, 29 Ohio 13; Pennsylvania Co. *v.* Platt, 47 Ohio St. 366, 25 N. E. 1028.

Oregon. — Larsen *v.* Oregon Ry. & Nav. Co., 19 Or. 240, 23 Pac. 974; Boydston *v.* Giltner, 3 Or. 118; Simpson *v.* Prather, 5 Or. 86; Or. Cent. Ry. Co. *v.* Scoggin, 3 Or. 161.

Utah. — Dickert *v.* Weise, 2 Utah 350.

Washington.—Carpenter *v.* Ritchie (Wash.), 28 Pac. 380.

Wisconsin. — State *v.* McGarry, 21 Wis. 502.

60. Denial of Indebtedness Is a Denial of a Conclusion. —*California.* Kinney *v.* Osborne, 14 Cal. 112; Wells *v.* McPike, 21 Cal. 216.

Colorado. — Gale *v.* James, 11 Colo. 540, 19 Pac. 446.

Iowa. — Morton *v.* Coffin, 29 Iowa 235; Callanan *v.* Williams, 71 Iowa 363, 32 N. W. 383; Stuckslager *v.* Smith, 227 Iowa 286; Mann *v.* Howe, 9 Iowa 546.

Kentucky. — Francis *v.* Francis, 18 B. Mon. 57.

Minnesota. — Freeman *v.* Curran, 1 Minn. 169.

Missouri. — Engler *v.* Bates, 19 Mo. 543; Sapington *v.* Jeffries, 15 Mo. 628.

New York. — Edson *v.* Dillage, 8 How. Pr. 273; Fordick *v.* Groff, 22 How. Pr. 158; Hand *v.* Belcher

cases to the effect that a denial of a defendant that he owes the plaintiff the amount sued for, or any other sum, is a sufficient denial.[61]

Denial of Evidence. — It is a violation of the rules of pleading to set out the evidence of a fact or facts. It is the fact and not the evidence of it that is required to be stated. Therefore, if the evidence is pleaded, it is not necessary to deny it, and no admission material to the issues can result from a failure to make such denial.[62]

Denial of Non-Essential or Immaterial Averments Admits Such As Are Essential. — If the denial goes only to such allegations as are not essential to a recovery, merely, it is an admission of all the essential facts.[63]

Under the Codes, Form and Effect of Denials the Same in Actions at Law and in Equity. — Under the codes of the several states the distinction in practice and pleading, so far as they affect the question here under consideration, is abolished. Therefore, the form of the denial and its effect is the same whether the action would formerly have been one at law or in equity.[64]

What Sufficient Denial of Allegation of Damages. — Where damages, or an indebtedness, are alleged, a denial that the plaintiff suffered the amount of damages stated in the complaint is only a denial that the damages amount to the specific sum named, and is an admission of damages, and that he is entitled to recover any amount less than the sum specifically alleged and denied.[65]

Mosaic Glass Co., 30 N. Y. St. 389, 9 N. Y. Supp. 738; Drake *v.* Cockroft, 4 E. D. Smith 34.

Ohio. — Larimore *v.* Wells, 29 Ohio 13; Knox Co. Bank *v.* Lloyd's Admr's, 18 Ohio St. 353.

61. Westlake *v.* Moore, 19 Mo. 556; Godfrey *v.* Cruise, 1 Iowa 92; Heath *v.* White, 3 Utah 474, 24 Pac. 762; Dallas *v.* Ferneau, 25 Ohio St. 635.

Allegation of Indebtedness as a Fact, Denial of, Sufficient. — "The complaint alleges that defendants 'are indebted to the said plaintiffs for the work, labor, and services,' etc.;' and the answer denies 'that they, or either of them, are indebted to the said plaintiffs, or either of them, for work, labor, and services,' etc. If plaintiffs had pleaded the facts out of which the indebtedness resulted as a conclusion, a denial of such conclusion would have been insufficient to make an issue, but, having alleged the indebtedness as a fact, we think the defendants might so treat and so deny it in their answer. The substantial allegation of the complaint is that 'defendants are indebted,' and, if the answer had been in terms a general denial, it would have simply denied the indebtedness, and tendered the same issue as this answer does. Morrow *v.* Cougan, 3 Abb. Pr. 328; Quin *v.* Lloyd, 41 N. Y. 349." McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816.

62. Racouillat *v.* Rene, 32 Cal. 450; Moore *v.* Murdock, 26 Cal. 515.

63. Effect of Denial of Immaterial Fact. — Leffingwell *v.* Griffing, 31 Cal. 231; Castro *v.* Wetmore, 16 Cal. 379; Larimore *v.* Wells, 29 Ohio 13; Hunter *v.* Martin, 57 Cal. 365; Kamlah *v.* Salter, 6 Abb. Pr. (N. Y.) 226; Freeman *v.* Curran, 1 Minn. 169; Jones *v.* City of Petaluma, 36 Cal. 230; Manufacturers Nat. Bank *v.* Russell, 13 N. Y. Sup. Ct. 375.

64. Pomeroy's Rem. & Rem. Rights, § 35 *et seq.*

65. Effect of Denial of Damages. Huston *v.* Twin City etc. Tp. Co., 45 Cal. 550; Higgins *v.* Wortell, 18 Cal. 330; Scovill *v.* Barney, 4 Or.

Rule As to Allegations of Value. — The rule that a denial of the specific amount alleged admits the right to recover all but the full amount, has been held to apply to an allegation of the value of the property in controversy.[66] And this rule has been held to apply to a general denial.[67] But the better rule is certainly to the contrary.[68] But in some of the states, in actions of trover, trespass or replevin, it is not necessary for the defendant to deny the value or the amount of damages alleged.[69] So in other cases where the amount in value of property in controversy is not material.[70]

What Put in Issue by General Denial. — Independently of any statutory provision limiting its effect, a general denial puts in issue every material allegation of the pleading to which it is directed, and puts

288; Marsters *v.* Lash, 61 Cal. 622; Conway *v.* Clinton, 1 Utah 215; Dillon *v.* Spokane County, 3 Wash. Ter. 498, 17 Pac. 889.

66. Form of Denial of Value. Towdy *v.* Ellis, 22 Cal. 650; Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79.

"The denial, in this form, we think insufficient to put in issue the value of the property at the time of the assignment, and, where the value becomes a material question, must be held as an admission of the allegation in the complaint. It is a negative pregnant, as it involves an affirmative implication favorable to the plaintiff. (Gould Pl. 320, § 29.) For though the defendant denies that the property was worth seventy-five thousand dollars, it fails to state how much less, or what it was worth, and hence, though it should be worth only a dollar less, the answer might be held as literally true, while admitting the whole substance of the allegation of the complaint." Burt *v.* McKinstry, 4 Minn. 204.

67. Rule Applies to General Denial. — Dean *v.* Leonard, 9 Minn. 196; Hecklin *v.* Ess, 16 Minn. 51; Pottgieser *v.* Dorn, 16 Minn. 204; Moulton *v.* Thomson, 26 Minn. 120, 1 N. W. 836; Coleman *v.* Pearce, 26 Minn. 123, 1 N. W. 846; Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79.

68. General Denial of Value Sufficient.—"A general denial has as wide a scope as the allegations of the pleading which it denies, and puts in issue every fact alleged in it. Bliss, Code Pl. §332; 2 Wait. Pr. 419, 420, and cases cited. If such a denial is to be held a negative pregnant as to an allegation of value, on principle it should be also so held as to allegations of time, quantity, and the like. Secondly, any such rule of pleading puts us out of harmony with that which obtains in every other jurisdiction. In every other state, so far as we can ascertain, in which the code system of pleading prevails, a general denial is held a good traverse of every allegation of the pleading to which it is interposed. And, lastly, our rule works badly in practice. It has compelled attorneys, for greater safety, to resort to a prolix system of special denials, when a general one would, in briefer form, answer the same purpose; and, while it is now many years since this rule was laid own by this court, yet so in conflict is it with the generally understood principles of pleading, and with the rule which obtains elsewhere, that even at this late date, hardly a term of this court passes in which some case does not arise in which the pleaded has fallen into a trap by reason of having overlooked our decisions on this question. Inasmuch as it is not a rule of property, but merely one of practice, a change in which will not affect any vested rights, we are, for the reasons already given, of opinion that it should no longer be adhered to." German-Am. Bank *v.* White, 38 Minn. 471, 38 N. W. 361.

69. Jenkins *v.* Steanka, 19 Wis. 126.

70. Wood *v.* Steamboat Fleetwood, 19 Mo. 529; Field *v.* Barr, 27 Mo. 416.

the adverse party to the proof of all such allegations.[71] And under the codes, as shown above, where specific denials are required, of

71. What Put in Issue by General Denial. — Pomeroy's Rem. & Rem. Rights, §§ 642-682.

Alabama. —Mobile & M. Ry. Co. *v.* Gilmer, 85 Ala. 422, 5 So. 138; Equitable Acc. Ins. Co. *v.* Osborn, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267.

California. — Elder *v.* Spinks, 53 Cal. 293; Bruck *v.* Tucker, 42 Cal. 346; Clink *v.* Thurston, 47 Cal. 21; Woodworth *v.* Knowlton, 22 Cal. 164; Coles *v.* Soulsby, 21 Cal. 47; Hawkins *v.* Borland, 14 Cal. 413; Brown *v.* Kentfield, 50 Cal. 129

Colorado. — Colorado Cent. Ry. Co. *v.* Blake, 3 Colo. 417; Colorado Cent. Ry. Co. *v.* Mollandin, 4 Colo. 154.

Connecticut. — Page *v.* Merwin, 54 Conn. 426, 8 Atl. 675.

Georgia. — Causey *v.* Cooper, 41 Ga. 409; Dickson *v.* Saloshin, 54 Ga. 117; Woolfolk *v.* Beach, 61 Ga. 67.

Indiana. — City of Lafayette *v.* Mortman, 107 Ind. 404, 8 N. E. 277; Baker *v.* Kistler, 13 Ind. 63; Adams Exchange Co. *v.* Darnell, 31 Ind. 20, 99 Am. Dec. 582; Loeb *v.* Weis, 64 Ind. 285; Wilson *v.* Root, 43 Ind. 486; Board of Comrs. *v.* Hill, 122 Ind. 215, 23 N. E. 779; Hoosier Stone Co. *v.* McCain, 133 Ind. 231, 31 N. E. 956; Indianapolis & Cincinnati Ry. Co. *v.* Rutherford, 29 Ind. 82, 92 Am. Dec. 336; Ferguson *v.* Ramsey, 41 Ind. 511; Widener *v.* State, 45 Ind. 244; Radabaugh *v.* Silvers, 135 Ind. 605, 35 N. E. 104; Pootlitzer *v.* Wesson, 8 Ind. App. 472, 35 N. E. 1030; Day *v.* Wamsley 33 Ind. 145; Garrison *v.* Clark, 11 Ind. 369; Westcott *v.* Brown, 13 Ind. 83; Rhode *v.* Green, 26 Ind. 83; Bradley *v.* Bradley, 45 Ind. 67; Chicago C. & L. R. Co. *v.* West, 37 Ind. 211; Urton *v.* State, 37 Ind. 339; Port *v.* Russell, 36 Ind. 60, 10 Am. Rep. 5; Tewksbury *v.* Howard, 138 Ind. 103, 37 N. E. 355; Root *v.* Hibben, 66 Ind. 247; Trogden *v.* Deckard, 45 Ind. 572; Vanduyn *v.* Hepner, 45 Ind. 589; Wallace *v.* Exchange Bank, 126 Ind. 265, 26 N. E. 175; Clodfeller *v.* Lucas, 7 Ind. App. 379, 34 N. E. 828; Bash *v.* Young, 2 Ind. App. 297, 28 N. E. 344; Wickwire *v.* Town of Angola, 4 Ind. App. 253, 30 N. E. 917; Cain *v.* Hunt, 41 Ind. 466; Stuyter *v.* Union Cent. L. Ins. Co., 3 Ind. App. 312, 29 N. E. 608; Lafayette & Indianapolis R. Co. *v.* Ehman, 30 Ind. 83; Watkins *v.* Jones, 28 Ind. 124; Bate *v.* Sheets, 50 Ind. 329; Morgan *v.* Wattles, 69 Ind. 260; Wood *v.* Ostram, 29 Ind. 177.

Iowa. — Scott *v.* Morse, 54 Iowa 732, 6 N. W. 68, 7 N. W. 15; Walters *v.* Washington Ins. Co., 1 Iowa 404, 63 Am. Dec. 451; Dyson *v.* Ream, 9 Iowa 51; Johnson *v.* Pennell, 67 Iowa 669, 25 N. W. 874.

Kansas — Perkins *v.* Ermel, 2 Kan. 325.

Minnesota. — German Am. Bank *v.* White, 38 Minn. 471, 38 N. W. 361; Caldwell *v.* Bruggerman, 4 Minn. 270; Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93; Nash *v.* City of St. Paul, 11 Minn. 174; Stone *v.* Quaale, 36 Minn. 46, 29 N. W. 326; Bond *v.* Corbett, 2 Minn. 248.

Missouri. — Sargent *v.* St. Louis & S. F. Ry. Co., 144 Mo. 348, 21 S. W. 823, 19 L. R. A. 460; Ellet *v.* St. Louis etc. Ry. Co., 76 Mo. 518; Northrup *v.* Miss. Valley Ins. Co., 47 Mo. 435, 4 Am. Rep. 337; Farmers & Drovers Bank *v.* Williams, 61 Mo. 259; Girls Industrial Home *v.* Fritchey, 10 Mo. App. 344.

Nebraska. — Aultman *v.* Stichler, 21 Neb. 72, 31 N. W. 241; Donovan *v.* Fowler, 17 Neb. 247, 22 N. W. 424; Coole *v.* Roche, 15 Neb. 24, 17 N. W. 119; Jones *v.* Fruin, 26 Neb. 82, 42 N. W. 283, 18 Am. St. Rep. 766; School District *v.* Shoemaker, 5 Neb. 36; Richardson *v.* Steele, 9 Neb. 483, 4 N. W. 83; City of South Omaha *v.* Cunningham, 31 Neb. 316, 47 N. W. 930; Burlington & M. R. R. Co. *v.* Lancaster Co., 7 Neb. 33; Jones *v.* Seward Co., 10 Neb. 154, 4 N. W. 946; Broadwater *v.* Jacoby, 19 Neb. 77, 26 N. W. 629.

New York. — Rost *v.* Harris, 12 Abb. Pr. 446; Benedict *v.* Seymour, 6 How. Pr. 298; Newton *v.* Lee, 139 N. Y. 332, 34 N. E. 905; Wheeler *v.* Billings, 38 N. Y. 263; Griffin *v.*

course a general denial raises no issue but admits the material facts pleaded.[72]

Filing Wrong Pleading to Raise Certain Issues, Admits Them. — A party may admit a fact by a mistake made in filing the wrong pleading. For example, where a general denial or general issue is pleaded, such plea admits that the plaintiff has capacity to sue.[73] And it may be stated generally that where such a pleading only, is filed, as will put in issue a part of the matters alleged, all other facts well pleaded are admitted.

Withdrawal of Answer. — The withdrawal of an answer is an admission of the traversable allegations of the complaint or petition.[74]

Answer Stricken Out. — The effect is the same if the answer is stricken out. It leaves the case as if a default had been taken.[75]

Is a Pleading Competent Evidence in the Cause in Which it Is Filed. What has been said relates to the effect of the pleading, as a pleading in the cause, and not as evidence offered at the trial. It does not follow from the fact that a pleading contains express admissions or omits to deny an allegation, which amounts to the same thing, that it is necessary or even proper to admit it as evidence at the trial. It is before the court without being received in evidence, and may, by its admissions, render it unnecessary to offer any evidence on a given allegation. But this is its effect as a pleading and not as evidence. It seems to be entirely unnecessary and improper to receive as evidence a pleading in the cause, and it is not generally done.[76]

Long Island R. Co., 101 N. Y. 349, 4 N. E. 740; Weaver *v.* Barden, 49 N. Y. 286; Duncan *v.* Lawrence, 6 Abb. Pr. 304; Winne *v.* Sickles, 9 How. Pr. 217; Andrews *v.* Bond, 16 Barb. 633; Woolley *v.* Newcombe, 87 N. Y. 605; Schaus *v.* Manhattan Gas L. Co., 14 Abb. Pr. 371; Beaty *v.* Swarthout, 32 Barb. 293; Greenfield *v.* Mass. Mut. L. Ins. Co., 47 N. Y. 430; Sawyer *v.* Warner, 15 Barb. 282; Schwartz *v.* Oppold, 74 N. Y. 307; O'Brien *v.* McCann, 58 Y. 373; McKyring *v.* Bull, 16 N. Y. 297, 69 Am. Dec. 396; Boomer *v.* Koon, 13 N. Y. Sup. Ct. 645.

Texas.—Winns *v.* Mitchell, 1 Tex. 443; McKaughan *v.* Harrison, 25 Tex. 361; Fowler *v.* Davenport, 21 Tex. 626; Guess *v.* Lubbock, 5 Tex. 535; Towner *v.* Sayre, 3 Tex. 28; Robinson *v.* Brinson, 20 Tex. 438.

Wisconsin. — Dutcher *v.* Dutcher, 39 Wis. 651; McWilliams *v.* Bannister, 40 Wis. 489.

72. Pico *v.* Colimas, 32 Cal. 578; Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

73. Filing Wrong Pleading. Louisville & N. R. Co. *v.* Trammell, 93 Ala. 350, 9 So. 870.

74. Price *v.* Page, 24 Mo. 65.

75. Robinson *v.* Lawson, 26 Mo. 69.

76. Pleading in Action on Trial Competent Evidence. — Colter *v.* Calloway, 68 Ind. 219.

"The pleadings in a cause are before the court and constitute a part of its proceedings without being introduced in evidence. Admissions made in a pleading are denominated solemn admissions, or admissions *in judicio*, and are not required to be supported by evidence. Such admissions are taken as true against the party making them without further controversy. 1 Greenleaf Evidence, §§ 27, 205.

"In fact admissions in the pleadings cannot be either proved or disproved on the trial, but must be accepted for whatever they amount to in legal effect, without reference to any other evidence that may be adduced. 1

The right to have the admissions in a pleading considered without introducing it in evidence has been extended to original pleadings superseded by amended pleadings.[77]

In some of the states it is provided by statute that the pleadings shall not be competent evidence.[78] And in some cases it has been held that a pleading in the case may be read in evidence to prove admissions contained in it.[79] And in others that it is not a part of the evidence and cannot be so considered unless it is offered in evidence.[80] So it has been held that although the admissions in a pleading considered as a pleading are conclusive, they are not so when the same is offered in evidence.[81]

How Much of the Pleading Must Be Offered. — It has been held that a pleading as evidence of an admission in the action in which it is filed must be taken as a whole. And that a party cannot use a part of it, only, as an admission in his favor without the consideration by the court of the balance of the pleading.[82] But this rule should be confined to so much of the pleading as relates to the particular fact sought to be established. That is to say, if one party offers so much of a pleading as goes to admit a fact he desires to establish, the opposite party may offer any further part of the same pleading which will tend to counteract or explain the admission and no more.[83] Any other rule would permit the use of

Phillipps Evidence (4th Am. ed.) p. 795.

"This doctrine is, in general terms, fully recognized by our code.

"In 2 R. S. 1876, p. 186, § 372, it is provided that, 'where upon the statements in the pleadings one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party.'

"As the defendant's answer was already before the court as a portion of the pleadings in the cause, it necessarily follows that no error was committed in the refusal of the court to permit such answer to be formally read in evidence." New Albany etc. Plank Co. *v.* Stallcup, 62 Ind. 345.

77. Smith *v.* Pelott, 63 Hun 632, 18 N. Y. Supp. 301.

78. Walcott *v.* Kimball, 13 Allen (Mass.) 460; Brooks *v.* Wright, 13 Allen (Mass.) 72; Phillips *v.* Smith, 110 Mass. 61.

79. Cook *v.* Huges, 37 Tex. 343; Pence *v.* Sweeney, 2 Idaho 914; 28 Pac. 413; Young *v.* Katz, 22 App. Div. 542, 48 N. Y. Supp. 87.

80. Must Be Offered in Evidence. Gossler *v.* Wood, 120 N. C. 69, 27 S. E. 33; Smith *v.* Nimocks, 94, N. C. 243.

In the case of Pence *v.* Sweeney, 2 Idaho 914, 28 Pac. 413, an answer denying the allegations of the complaint had been filed by the attorneys of the defendant and subsequently the defendant himself made a verified answer admitting the allegations of the complaint. It does not appear that the answer had in fact been filed. If not it was not a pleading and stood upon the footing of any ordinary sworn admission.

81. Young *v.* Katz, 22 App. Div. 542, 48 N. Y. Supp. 187.

82. How Much of Pleading Must Be Offered. — Shrady *v.* Shrady, 42 App. Div. 9, 58 N. Y. Supp. 546.

83. Effect of Admissions in Answer. — "A brings an action against B, the maker of a promissory note. B admits making the note, and pleads accord and satisfaction, payment, etc. At the trial, A reads the admission in the answer, to avoid the necessity of proving the making of the note, and rests. To hold that this admits the whole answer, and is proof of every issuable fact stated in the answer, and in no wise qualify-

the party's own pleading in his favor, as original evidence, in violation of the well settled doctrine to the contrary.

Under the Codes Answer Not Evidence for the Defendant. — Under the codes while the answer is evidence against the defendant, often being conclusive, it is never evidence in his favor, but stands precisely on the footing of any other self-serving declaration.[84]

c. *In Other Actions Between Same Parties.* — It is not only admissions found in the pleadings in the action on trial that are admissible against the party. A pleading filed in another action, if so made and filed as to be his act and containing an admission material to the issue on trial, is competent evidence against him.[85]

ing the admission as to making the note, seems to us absurd. Such a rule would antagonize the whole theory of our system of code pleading, under which a fact admitted or alleged in the complaint, and not denied by the answer, is to be taken as true. To call the attention of the court to such admission, or failure to deny a material fact alleged, it is necessary to read it. For that purpose it is evidence. All other issuable facts set up in the answer are to be deemed in law as denied, and it is only those other statements in the pleadings which go to qualify the admission that are to be taken as a part of the evidence under such circumstances. . . . When the plaintiff offered in evidence so much of the answer of defendant as averred the execution of certain deeds of conveyance, it entitled the defendant to read as evidence in the case every fact averred in his answer going to explain, modify, or qualify the averments made evidence by the plaintiff; and, as the cause was tried by the court, it may have been proper to permit the whole answer to be read, to the end of determining whether or not any such explanations or qualifications were contained therein: but this did not have the effect of making the whole answer conclusive evidence in the case. In Loftus *v.* Fischer, 113 Cal. 288, 289, 45 Pac. 320, a portion of a verified complaint in another action was admitted in evidence on behalf of the defendant. Plaintiff's counsel thereupon offered in evidence all of that complaint, as was said, 'to explain the portion admitted.' The court, in excluding the whole complaint, said: 'If there is any portion that the other side (plaintiff) think will show how or why that was (the admission,) it is admissible.' Plaintiff on appeal contended that the whole complaint should have been admitted. This court dismissed the question as follows: 'The mere statement of the facts shows the unsoundness of the claim.'" Granite Gold Min. Co. *v.* Maginness, 118 Cal. 131, 50 Pac. 260.

84. Answer Not Evidence for Defendant. — Blakeman *v.* Vallejo, 15 Cal. 638; Sweitzer *v.* Claflin, 74 Tex. 667, 12 S. W. 395.

85 In Other Actions Between Same Parties. — Holland *v.* Spell, 111 Ind. 561, 42 N. E. 1014; Pope *v.* Allis, 115 U. S. 363, 6 Sup. Ct. 69; Rich *v.* City of Minneapolis, 40 Minn. 82, 41 N. W. 455; Howard *v.* Glenn, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156; Wadsworth *v.* Duncan, 164 Ill. 360, 45 N. E. 132; Gardner *v.* Meeker, 160 Ill. 40, 48 N. E. 307.

Admissibility of Papers in Another Case. — "It is urged also that the court erred in admitting in evidence the papers and decree in an injunction proceeding instituted and prosecuted by Holland against the town of New Castle and Daniel Harvey, its then marshal. That proceeding was to enjoin the entry of Holland's tract for the extension of said Vine street in 1884. One answer in that case was the condemnation proceedings and the payment to Holland of the $50. Holland replied, among other facts, that it was agreed between himself and the treasurer, who paid him the $50, that he would accept the same, 'and open said street, and give possession thereof, when the board of trustees procured the right of way

d. *In Other Actions Where Parties Not the Same.* — It is not necessary to the competency of a pleading, as an admission against the party, that it be one filed in an action between the same parties. A pleading filed in any action is competent against the party if he signed it or otherwise acquiesced in the statements contained in it if such statements are material and otherwise competent as evidence in the cause on trial, not by way of estoppel, but as evidence, open to rebuttal, that he admitted such facts.[86] The fact that the party

and opened said street through the lands . . . adjoining . . . on the east,' and alleging that the condition had not been complied with on the part of the town. The decree enjoined the opening of the street, upon the theory of this reply, 'until said defendant shall have first obtained a right of way . . . through and across the lands . . . adjoining,' etc. These papers were admissible, not as a former adjudication, but as Holland's solemn admission of the receipt of said money, and of the condition upon which he held it, and at the same time why he denied the right to occupy his land for the street. It was not mere hearsay evidence; it was the admission of the party, and one upon which he procured a decree in the court in which he now asks relief upon an inconsistent ground." Holland *v.* Spell, 144 Ind. 561, 42 N. E. 1014.

86. For What Purpose Pleading Competent. — 1 Whart. Ev., § 838; 1 Greenl. Ev., § 195.

United States. — Hyman *v.* Wheeler, 29 Fed. 347; Pope *v.* Allis, 115 U. S. 363, 6 Sup. Ct. 69.

Alabama. — McLemore *v.* Nuckolls, 37 Ala. 662; Royalls *v.* McKenzie, 25 Ala. 363.

California. — Shafter *v.* Richards, 14 Cal. 125.

Connecticut. — Fengar *v.* Brown, 57 Conn. 60, 17 Atl. 321.

Georgia. — Pantup *v.* Patton, 91 Ga. 422, 18 S. E. 311; Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92.

Illinois. —Robins *v.* Butler, 24 Ill. 387.

Indiana. — Cox *v.* Ratcliffe, 105 Ind. 374, 5 N. E. 5.

Iowa. — Ayres *v.* Hartford F. Ins. Co., 17 Iowa 176, 85 Am. Dec. 553.

Kansas. — Hobson *v.* Ogden, 16 Kan. 388; Solomon R. R. Co. *v.* Jones, 30 Kan. 601, 2 Pac. 657.

Kentucky. — Clarke *v.* Robinson 5 B. Mon. 55; Roberts *v.* Tennell, 3 T. B. Mon. 247; Eldridge *v.* Duncan, 1 B. Mon. 101; Ring *v.* Gray, 6 B. Mon. 368.

Louisiana. — Bore *v.* Quierry, 4 Mart. 545 6 Am. Dec. 713.

Maine. — Dunbar *v.* Dunbar, 80 Me. 152, 13 Atl. 578, 6 Am. St. Rep. 166; Parsons *v.* Copeland, 33 Me. 370, 54 Am. Dec. 628.

Maryland. — Garey *v.* Sangston, 64 Md. 31, 20 Atl. 1034.

Massachusetts. — City of Boston *v.* Richardson, 13 Allen 146; Bliss *v.* Nichols, 12 Allen 443; Gordon *v.* Parmelee, 2 Allen 212; Radclyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373; Central Bridge Co. *v.* City of Lowell, 15 Gray 106.

Minnesota. — O'Riley *v.* Clampet, 53 Minn. 539, 55 N. W. 740; Siebert *v.* Leonard, 21 Minn. 442.

Mississippi. — Henderson *v.* Cargill, 31 Miss. 367.

Missouri. — Snyder *v.* Chicago, S. F. etc. Ry. Co., 112 Mo. 527, 20 S. W. 885; Dowzelot *v.* Rawlings, 58 Mo. 75; Baum *v.* Fryrear, 85 Mo. 151; Warfield *v.* Lindell, 30 Mo. 272, 77 Am. Dec. 614; Bowman *v.* Globe Steam Heating Co., 80 Mo. App. 628.

New Jersey.—Tindall *v.* McIntyre, 24 N. J. Law 147.

New York. — Cook *v.* Barr, 44 N. Y. 156; Potter *v.* Ogden, 136 N. Y. 384, 33 N. E. 228.

North Carolina. — Adams *v.* Utley, 87 N. C. 356.

North Dakota. —Purcell *v.* St. Paul F. & M. Ins. Co., 5 N. D. 64, 64 N. W. 943.

Ohio. — Earl *v.* Shoulder, 6 Ohio 409; Broadrup *v.* Woodman, 27 Ohio St. 553.

Oregon. — Feldman *v.* McGuire, 34 Or. 309, 55 Pac. 872.

is a *feme covert* suing by next friend does not vary the principle on which such evidence is admissible.[87]

Must Be Signed, Sworn to, or Otherwise Authorized or Acquiesced in by the Party. — The pleading to be competent against a party in another action must contain an admission *made by him*. The mere fact that a pleading is filed as his pleading is not enough to bind him as an admission in another action. He must either have signed or sworn to it,[88] or authorized it to be signed as his plead-

Pennsylvania. — Rice, *v.* Bixler, 1 Watts & S. 445; Kline *v.* First Nat. Bank (Pa. St.) 15 Atl. 433; Limbert *v.* Jones, 136 Pa. St. 31, 19 Atl. 956; Truby *v.* Seybert, 12 Pa. St. 101.

Texas. — Buzard *v.* McAnulty, 77 Tex. 438, 14 S. W. 138; Hamilton *v.* Van Hook, 26 Tex. 302; Wheeler *v.* Styles, 28 Tex. 240.

Bill in Equity in Another Suit. "The rule upon this subject is stated as follows in 1 Whart. Ev. § 838. 'The pleadings of a party in one suit may be used in evidence against him in another, not as estoppel, but as proof, open to rebuttal and explanation, that he admitted certain facts. But, in order to bring such admission home to him, the pleading must be either signed by him, or it must appear that it was within the scope of the attorney's authority to admit such facts. Yet, even if such admissions are thus brought home to the party, they are entitled to little weight.' And see Cook *v.* Barr, 44 N. Y. 156; Siebert *v.* Leonard, 21 Minn. 442; Meade *v.* Black, 22 Wis. 244; Tabb *v.* Cabell, 17 Grat. 160; Gordon *v.* Parmelee, 2 Allen 215; Brown *v.* Jewett, 120 Mass. 215; Hobson *v.* Ogden, 16 Kan. 388; Bliss *v.* Nichols, 12 Allen, 443; Wheeler *v.* Styles, 28 Tex. 240. While we are not prepared to hold that a pleading not signed or sworn to by a party can be admitted as evidence against him in another suit, we think that, when it is so signed or sworn to, it may be. We can see no difference in this respect between a bill in equity and any other pleading. Such pleading, when introduced, cannot be held conclusive, and is open to explanation by the party." Buzard *v.* McAnulty, 77 Tex. 438, 14 S. W. 138.

Wisconsin. — Norris *v.* Cargill, 52 Wis. 251, 15 N. W. 251; Mead *v.* Black, 22 Wis. 241.

87. McLemore *v.* Nuckolls, 37 Ala. 662.

88. **Must Be Signed or Authorized By Party.** — *United States* — Board of Com'rs. *v.* Diebold Safe etc. Co., 133 U. S. 473, 10 Sup. Ct. 399; Combs *v.* Hodge, 21 How. 397.

Alabama.—Tennessee Coal etc. Co. *v.* Linn, 123 Ala. 112, 26 So. 245.

California. — Coward *v.* Clanton, 79 Cal. 23, 21 Pac. 359.

Kentucky. — Rankin *v.* Maxwell, 2 A. K. Marsh 828.

Massachusetts. — Johnson *v.* Russell, 144 Mass. 409, 11 N. E. 670; Brown *v.* Jewett, 120 Mass. 215; Denie *v.* Williams, 135 Mass. 28; Fare *v.* Bonillard, 172, Mass. 303, 52 N. E. 443.

Minnesota. — Burns *v.* Maltby, 43 Minn. 161, 45 N. W. 3.

Mississippi. — Meyer *v.* Blackemore, 54 Miss. 570; Crump *v.* Gerock, 40 Miss. 765; Co-operative L. Ins. Co. *v.* Leflore, 53 Miss. 1.

Missouri. — Anderson *v.* McPike, 86 Mo. 293.

New York. — Cook *v.* Barr, 44 N. Y. 156.

South Carolina. — Cooper *v.* Day, 1 Rich. Eq. 26.

Texas. — Buzard *v.* McAnulty, 77 Tex. 438, 14 S. W. 138; Dillon *v.* State, 6 Tex. 55; International & G. N. R. Co. *v.* Mulliken, 10 Tex. Civ. Apn. 663, 32 S. W. 152.

When Bill in Chancery Competent. "Answers in chancery, which are confessions, are strong evidence against the party who makes them. But a bill in chancery, wherein many of the facts are the mere suggestions of counsel, made for the purpose of extorting an answer from the defendant, will not be in evidence, except to show that such a bill did exist, and that certain facts were in issue between the parties in order to introduce the answer, or the deposition of

ing;[89] or in some other way acknowledged it as his;[90] or acquiesced in the statements contained in it.[91] But the equity rule that facts stated in a bill in equity signed by the attorney only are not the statements of the party, but mere suggestions of counsel, is not applicable under the codes; and therefore such pleadings signed by attorneys are competent evidence as admissions of the party.[92] And

witnesses. It is not admitted in courts of law as evidence to know any fact either alleged or denied in the bill. Lord Kenyon is reported to have admitted a bill in chancery, filed by an ancestor, to be evidence of a pedigree there stated, as a declaration in the family. But it was resolved by the judges, in the Banbury Peerage case, on a question put to them by the House of Lords, that a bill in equity or depositions, cannot be received in evidence in the courts of common law, on the trial of an ejectment against a party not claiming or deriving title in any manner under the plaintiff or defendant in the chancery suit, either as evidence of the facts therein deposed, or as declarations respecting pedigree. The law seems, therefore, to be now settled that a bill in chancery cannot be given in evidence as an admission of facts against the complainant himself, except in the case of pedigree, and not even then, except as a party who claims or derives title in some manner under the plaintiff or defendant in the chancery suit." Owens *v.* Dawson, 1 Watts 149, 26 Am. Dec. 49.

Must Be Signed or Authorized by the Party. — "The bill in equity filed by the plaintiffs against the defendant, was verified by affidavit. It is true, that a bill in equity, not verified, is regarded as containing rather the suggestions of counsel, than the deliberate statements of the complainant, and is not, in a collateral suit, admissible evidence against him of the facts stated in it. 1 Brick. Dig. 829, § 353. But, when it is verified, because of the solemnity and deliberateness attached to an oath taken in the course of judicial proceedings, a different rule obtains. The bill is then treated as a statement of facts admitted by the complainant, and becomes evidence against him in collateral suits. McRea *v.* Ins. Bank of Columbus, 16 Ala. 755; McLemore *v.* Nuckolls, 37 Ala. 662." Callan *v.* McDaniel, 72 Ala. 96.

89. Dowzelot *v.* Rawlings, 58 Mo. 75; Cook *v.* Barr, 44 N. Y. 156; Corbett *v.* Clough, 8 S. D. 176, 65 N. W. 1074; Brown *v.* Jewett, 120 Mass. 215.

90. Cook *v.* Barr, 44 N. Y. 156.

91. Corbett *v.* Clough, 8 S. D. 176, 65 N. W. 1074; Kamm *v.* Bank of Cal., 74 Cal. 101, 15 Pac. 765.

92. **Pleading Signed by Attorney Competent Evidence.** — "It has been laid down as a rule in England that, 'generally speaking, a bill in chancery cannot be received in evidence in a court of law to prove any facts either alleged or denied in such bill.' It will be remembered that under the ancient system of chancery practice the pleadings were prepared by experts who did not appear in courts. The pleadings themselves were framed upon a 'fictitious and hypothetically constructed' plan, for the purpose of eliciting fuller information by way of answer from the defendant. Our judiciary act of 1799 had for one of its main purposes the abolition of fictitious forms of pleading. It enacted that in suits at law the plaintiff should set forth his cause of action plainly, fully and distinctly, and that 'the ordinary proceeding in chancery shall be a bill, which shall be addressed to the superior court, or the judge presiding therein, and shall plainly set forth the ground of complaint,' etc. With the exception of the common-law forms in actions of ejectment and trover, those old fictions in pleadings have long been unknown in the system of pleading in Georgia. Our courts have followed the mandate of the enactment above recited, and have required suitors in both forums, to set forth plainly their grounds of complaint. The general term 'attorney' includes the powers and duties of the solicitor and barrister, and in our courts no distinction is recognized as to the

it is held that where an action is prosecuted in one's name and for his benefit, with his knowledge and consent, he will be presumed to know the facts alleged in the complaint, and to have assented to them.[93]

Authority of Attorney. — This involves necessarily the power and authority of an attorney to make admissions in pleadings, for his client, and to what extent the same are binding on the client. This will be considered farther along. But it must be obvious that there is a wide difference between the effect of a pleading signed by an attorney, and not by the client, for the purposes of the action in which it is filed and where it is offered as evidence in another action.[94]

Authority Presumed. — It is the better rule that where a pleading is signed by one as the attorney of the party, it will be presumed that he was authorized to sign and file the same, and that the party is bound by it when offered as evidence the same as if he had signed it himself, subject to his right to show that it was, in fact, signed without sanction or authority from him.[95] But there are cases

several branches of legal work which were in ancient times parceled out among several classes. The one license confers upon the attorney full power to conduct the cause for his clients through all its stages, and to bind them in all matters pertaining thereto, save where the law has expressly limited his authority. The constitution guarantees to a suitor the right to appear in person or by attorney, and either mode of appearance is as binding as the other. Hence, when the suitor elects to appear by counsel, and plainly sets forth his cause of complaint, all the allegations of fact, material and necessary to the complaint, made in the pleadings by the counsel, are, in legal contemplation, those of the complainant himself. Being such, they are declarations of the complainant, and, if against his interest, are admissible in evidence against him under the ordinary rules governing admissions. Like other admissions, they are subject to explanation and qualification, unless the circumstances render them estoppels under the law." Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92.

93. Kamm *v.* Bank of Cal., 74 Cal. 101, 15 Pac. 765.

94. Callan *v.* McDaniel, 72 Ala. 96.

95. Authority of Attorney Presumed. — Coward *v.* Clanton, 79 Cal. 23, 21 Pac. 359; Ayres *v.* Hartford F. Ins. Co., 17 Iowa 176, 85 Am. Dec. 553; Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92; Clark *v.* Randall, 76 Am. Dec. 252, 256, note; Vogel *v.* Osborne, 32 Minn. 167, 20 N. W. 129; Guy *v.* Manuel, 89 N. C. 83.

Presumption of Attorney's Authority. — "It is urged here that the answer was not verified, and was not signed by the respondent, but by his attorney. It is enough to say that this objection to its admission was not made in the court below, and this court will not presume, under such circumstances, that the attorney was acting without authority. There is some confusion in the cases as to the right to introduce a pleading in evidence, where the same is signed by an attorney, without first proving that it was pleaded with the knowledge and by the authority of the party. (Duff *v.* Duff, 71 Cal. 513, 521; Cook *v.* Barr, 44 N. Y. 156; Kamm *v.* Bank of California, 74 Cal. 191.)" Coward *v.* Clanton, 79 Cal. 23, 21 Pac. 359.

Extent of the Rule. — "The rule that the pleadings in a cause are not evidence on the trial, but allegations only, is limited to the suit in which they are pleaded. Outside of that, admissions and declarations of a party in his pleadings are competent against him; but they must appear to be the act of the party, and not merely of his attorney. When it is his personal act, as in an answer in chancery sworn by him, it is com-

holding that if a pleading is signed, or signed and verified, by the attorney, it must be clearly shown that the facts alleged were inserted at the instance of the party or under his direction, or were afterwards sanctioned by him, in order to constitute it an admission of the party.[96] And the facts and circumstances may be such as to remove any presumption of authority on the part of the attorney to submit the pleading containing the admission and thus show its incompetency.[97]

Must Be Within the Scope of the Attorney's Authority.— Of course an attorney cannot bind his client by everything he may insert in a pleading. On the contrary, as in all other cases of agency, he can only bind the party so long as he acts within the scope of his authority. It follows that the client is only bound by such statements in the pleading as are proper to be alleged in a pleading of the kind.[98]

Part of Pleading May Be Read in Evidence. — The party offering a pleading as an admission is not bound to offer the whole of it. He may offer so much of it as he deems necessary to prove the admission.[99] But this is subject, of course, to the right of the

petent. When it is a pleading, by attorney, of formal allegations, which may be presumed to have been made without special instructions from his client, it is not competent. But particular and specific allegations of matters of action or defense, which cannot be presumed to have been made under the general authority of the attorney, but obviously from specific instructions of the party, are competent. Dennie *v.* Williams, 135 Mass. 28, and cases there cited. The answer offered in evidence carries with it the presumption that it was made under the instructions of the defendant, and the testimony of the defendant, that he had never seen the answer and did not know its contents, without denying that he had given instructions for it, does not overcome the presumption; especially in view of the fact that the cause proceeded to trial and verdict under the answer. We think that the evidence should have been admitted." Johnson *v.* Russell, 144 Mass. 409, 11 N. E. 670.

96. Corbett *v.* Clough, 8 S. D. 176, 65 N. W. 1074; McDermott *v.* Mitchell, 47 Cal. 249; Dennie *v.* Wright, 135 Mass. 28.

97. Vogel *v.* Osborne, 32 Minn. 167, 20 N. W. 129.

98. Must Be Within Scope of Attorney's Authority. — International & G. N. R. Co. *v.* Mulliken, 10 Tex. Civ. App. 663, 32 S. W. 152; Brown *v.* Jewett, 120 Mass. 215; Clark *v.* Randall, 9 Wis. 135, 76 Am. Dec. 252.

"In this case it appears that the petition admitted was not signed by the petitioner, Frank S. Duff. His name was written at the end of the paper by his attorney. So far as appears, the authority of the attorney was to file a petition appropriate to the procurement of an order of court for letters of administration. This authority would not extend beyond the insertion of such allegations as the law required such application should contain. As is clear from the section of the statute above cited, a description of the property of the decedent's estate was not required, but only the value and character of such property. The character of the property would sufficiently appear by a statement in the petition that it was realty or personalty. The attorney was only authorized to file a petition stating the character and value of the property. In going beyond this, he was not acting within the scope of his authority, and therefore the statements in the petition describing the property were not on that ground admissible." Duff *v.* Duff, 71 Cal. 513, 11 Pac. 871.

99. Part Only of Pleadings May

opposite party to introduce the balance or any other part of the pleading explaining or otherwise affecting the part already offered.[100] And a part of a paragraph or sentence cannot be offered where the effect will be to pervert or render uncertain the sense of the pleading.[1]

Is Failure to Deny Allegation Evidence of Admission in Another Case. We have seen that for the purposes of the case in which it is filed, a failure to deny an allegation is an admission of its truth. It has been held that a pleading thus admitting an allegation is not competent evidence in another case of such admission.[2]

Be Read in Evidence. — Gossler *v.* Wood, 120 N. C. 69, 27 S. E. 33; McDonald *v.* McDonald, 16 Vt. 630.

100. Bompart *v.* Lucas, 32 Mo. 123; McDonald *v.* McDonald, 16 Vt. 630.

1. Gossler *v.* Wood, 120 N. C. 69, 27 S. E. 33.

How Much of Pleading Must Be Read. — "In general, the orator may read any portion of the defendant's answer as evidence, without making any other portion of the same answer evidence in favor of the defendant. It is said in some of the cases that the orator has no right to select parts of sentences, but must take entire sentences. This may be true, if, by taking parts of a sentence, the sense is perverted, or rendered uncertain, but beyond that I do not think the rule can be made of much significance, although found in the elaborate opinion of the chancellor in the well known case of Hart *v.* Ten Eyck, 2 Johns. Ch. 62, at the 91st page." McDonald *v.* McDonald, 16 Vt. 630.

"At the trial of this case, the plaintiff offered in evidence a portion of a sentence of the answer of Lucas in the previous case, and refused to read the remainder of the sentence, which materially qualified the effect of the portion read, and the court refused to compel him to read the remainder. This was manifestly wrong, and is only equalled by the case of the infidel who undertook to prove from the Scriptures the want of a deity by reading the words 'there is no God,' and omitting the preceding words, 'the fool hath said in his heart.' The defendant, however, read the whole answer as a part of his evidence, and we cannot say that any error was committed materially affecting the merits of the action." Bompart *v.* Lucas, 32 Mo. 123.

2. Effect in Another Action of Failure to Deny.—Bank of Metropolis *v.* Faber, 38 App. Div. 159, 56 N. Y. Supp. 542. In order to prove that defendant was, at a certain time, a director of the corporation, an answer filed by such corporation was offered in evidence, in which there was no denial of the fact alleged in the complaint, that the defendant was a director. The court say: "There was also offered in evidence a complaint in an action brought by the Ninth National Bank against this defendant and others, which alleged that the defendant, with others, was a director or trustee of the company, and a copy of the answer therein, purporting to show that in the original, signed and sworn to by the defendant, there was no denial of the allegation that he was a director. The court excluded the evidence, and we think properly, for the reason that, assuming, without deciding, that the copy was equally available as the original to prove any statement therein contained, we do not think that the failure in the answer to deny the allegation of the complaint as to the defendant's being a director was competent proof of that fact. The rule is well settled, as expressed in Cook *v.* Barr, 44 N. Y. 156, in regard to admissions contained in pleadings in another action between different parties:

"'When a party to a civil action has made admission of facts material to the issues in the action, it is always competent for the adverse party to give them in evidence; and it matters not whether the admissions were in writing or by parol, nor when nor to whom they were made.'"

Separate Pleadings, One Denying, Another Admitting Facts Alleged. A pleading may consist of different counts, one denying and the other admitting the facts alleged. In such case the count containing the admission is held not to be competent evidence of an admission as to another count.[3] But again it is held that where an admission in a pleading is coupled with an affirmative allegation, the adverse party cannot rely upon the admission unless he accepts it as modified by the accompanying allegation,[4] which is only another way of saying that the pleading must be taken as a whole.

Where Party Compelled to Elect Between Inconsistent Pleadings. Where a party setting up inconsistent pleadings is compelled to elect upon which he will rely and makes his election to proceed upon one of them, the other is held not to be competent evidence against him.[5]

Not Competent Evidence in Favor of the Pleader. — Where a pleading is offered in evidence in another action for the purpose of proving an admission, it stands upon the same footing as other admissions and cannot be used by the party himself in his own behalf.[6] And

3. Glenn *v.* Sumner, 132 U. S. 156, 10 Sup. Ct. 41.

Admission and Denial in Different Counts of Same Pleading. — Thus it has been held that where in an action for a libel a defendant pleaded not guilty, and a justification that the admission of the libel contained in the latter plea could not be used either to estop the defendant to insist on his denial or as evidence to prove a publication on the issue joined on the former plea.

Whitaker *v.* Freeman, 1 Dev. (N. C.) 271, 29 Fed. Cas. No. 17,527a.

So it was held in McDonald *v.* Southern Cal. Ry. Co. 101 Cal. 206, 35 Pac. 643, that an admission or averment in a verified answer, in a separate and distinct defense, as to the fact that the defendant was a consolidated corporation, is not evidence against the defendant upon issues tendered in other defenses contained in the same answer, consisting of denials only.

4. Vanderbilt *v.* Schreyer, 28 N. Y. Sup. Ct. 537.

5. **Party Compelled to Elect, Pleading Abandoned Not Competent.** "The appellants, in the first paragraph of their answer denied the speaking and publishing of the words alleged, and in the second paragraph admitted the publication and said the slanderous words were true. On motion of the plaintiff the defendants were required to elect and make their defense either on the first or second paragraph. They elected, reserving exceptions, the first paragraph as their defense, and when the plaintiff attempted to prove the words spoken by the wife, he was allowed, over the objections of the defendants, to read to the jury the second paragraph of the answer that had been rejected, as an admission by the defendants that the slanderous words were spoken as alleged. This was error. The defense, however properly, had been denied the right to rely on the plea of justification by being required to elect, and, with this defense cut off, the plaintiff was nevertheless permitted to read it to the jury as evidence establishing his cause of action, and the defense denied the right to show that the words spoken were true. It was clearly incompetent as against the defendants, or either of them, and for this error the judgment must be reversed as to both defendants. In Rooney *v.* Tierney, 82 Ky. 253, it is held that in slander, the pleas of not guilty and justification are inconsistent, and the case of Harper *v.* Harper, 10 Bush 447, is no longer the law." Lane *v.* Bryant, 100 Ky. 138, 36 L. R. A. 709, 37 S. W. 584.

6. Page *v.* Page, 15 Pick. 368; St. John *v.* O'Connel, 7 Porter (Ala.)

the rule is the same as to the competency of a pleading withdrawn by the party by whom it is filed.[7] But of course, like other writings offered to prove declarations against interest, if a part of the pleading is offered the party filing it is entitled to have all of it bearing on the question read in evidence.[8]

Any statement made in the pleading tending to explain or nullify the admission relied upon may be disproved by the party offering the pleading.[9]

Explanatory Parts of Other Pleadings Competent. — And so much of the other pleadings in the same case as may be necessary to explain and give effect to or limit the statements made in the pleading offered, and no more, is competent evidence in connection with it.[10]

Pleading Filed or Admissions Made Therein by Mistake. — The admissions contained in a pleading in another action are not conclusive. And the party may show that the facts were stated or the pleading filed by mistake. And it has been held that if an admission, made in a pleading, was decreed in the action in which the pleading was filed to have been made by mistake, it is not competent evidence.[11]

In Criminal Cases and Actions to Recover Penalties, Not Admissible. By statute of the United States no pleading of a party obtained by means of a judicial proceeding in this or any foreign country can be given in evidence or in any manner used against him or his property or estate in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture.[12]

466; Ellzey *v.* Lane, 4 Munf. (Va.) 66.

7 Sweetzer *v.* Claflin, 74 Tex. 667, 12 S. W. 395.

8. McNutt *v.* Dare, 8. Blackf. (Ind.) 35; Roberts *v.* Tennell, 3 T. B. Mon. (Ky.) 247; Gildersleeve *v.* Landon, 73 N. Y. 609; Bompart *v.* Lucas, 32 Mo. 123; McDonald *v.* McDonald, 16 Vt. 630.

9. **Different Statements Must Be Construed Together.** — Gildersleeve *v.* Landon, 73 N. Y. 609, was an action to recover certain personal property, which plaintiff claimed to have purchased in good faith from his son. The defendant admitted in his answer that plaintiff purchased, but alleged that he did so with knowledge of defendant's prior mortgage. It was held that the statements must be taken and construed together; and if relied on to establish the purchase, it must also be held as establishing that it was made by plaintiff with knowledge of the mortgage; but that plaintiff, if he relied on the admission, could, and it was incumbent upon him, to disprove the allegation of knowledge.

10. Roberts *v.* Tennell, 3 T. B. Mon. (Ky.) 247; Eldridge *v.* Duncan, 1 B. Mon. (Ky.) 101; Wheeler *v.* Styles, 28 Tex. 240; Clark *v.* Spears, 7 Blackf. (Ind.) 96.

How Much of Other Pleadings Competent. — Thus it was said in Clarke *v.* Robinson, 5 B. Mon. (Ky.) 55: "We are also of opinion that the court erred in permitting the plaintiff to read the record of the chancery suit above mentioned, as evidence to the jury, the same having been objected to by the defendant. The answer of the defendant was undoubtedly admissible against him; but the bill was only admissible so far as was necessary to explain the answer, and could not be made evidence by the plaintiff, who had filed it, even to disprove the answer read by him, and much less to prove its own statements; and the answer of the assignee could not be evidence against the assignor."

11. Currier *v.* Esty, 116 Mass. 577.

12. U. S. Rev. Stat. § 860; Johnson *v.* Donaldson, 3 Fed. 22; Daly *v.* Brady, 69 Fed. 285.

And it may be doubted whether, independently of such a prohibitory statute, such use of a pleading as evidence would be permitted.[13]

Lost Pleadings. — If a pleading containing an admission be lost, secondary evidence of its contents, by copy or otherwise, may be made.[14]

Judgment Founded on Pleading Held Void, or Action Dismissed, Pleading Still Competent Evidence. — The competency of a pleading as evidence of an admission does not depend upon the result of the action in which it was filed. Therefore, although the judgment or proceeding founded upon such pleading is decreed to be void, or the action is dismissed before reaching a judgment, still the pleading is competent to prove any admission contained in it.[15]

Equity Pleadings As Evidence in Actions at Law. — The effect of equity pleadings in suits in equity will be considered separately. But pleadings in suits in equity may be offered as evidence in an action at law. When they are they are usually held to be admissible on the same principle and under the same conditions, that pleadings in other actions at law are admitted.[16] But the authorities are not uniform on the subject. There are cases holding, for example, that a bill in equity is not admissible as evidence against the complainant in an action at law to prove any fact alleged or denied in it, but only to show that such a bill did exist, and that certain facts were in issue between the parties.[17]

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13. Johnson *v.* Donaldson, 3 Fed. 22.

14. Ponder *v.* Cheaves, 104 Ala. 307, 16 So. 145.

15. Starns *v.* Hadnot, 45 La. Ann. 318, 12 So. 561; Bore *v.* Quierry, 4 Mart. (La.) 545, 6 Am. Dec. 713.

16. **Equity Pleadings Competent in Action at Law.** — *Georgia.* — Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92.

Illinois. — Kankakee & S. R. Co. *v.* Horan, 131 Ill. 288, 23 N. E. 621; Fairbanks *v.* Badger, 46 Ill. App. 644; Wadsworth *v.* Duncan, 164 Ill. 360, 45 N. E. 132.

Indiana. — Boots *v.* Canine, 94 Ind. 408.

New York. — Ford *v.* Belmont, 7 Rob. 97.

North Carolina. — Kiddie *v.* Debrutz, 1 Hayw. 420.

Pennsylvania. — Kline *v.* First Nat. Bank, (Pa. St.,) 15 Atl. 433.

Texas. — Buzard *v.* McAnulty, 77 Tex. 438, 14 S. W. 138.

West Virginia. — Wilson *v.* Phoenix etc. Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

17. **Cases Holding Same Incompetent to Prove Admissions.** — Doe *v.* Syhourn, 7 T. R. 2; Page *v.* Page, 15 Pick. (Mass.) 368; Adams *v.* McMillan, 7 Port. (Ala.) 73; Duff *v.* Duff, 71 Cal. 513, 12 Pac. 570; McCormick *v.* Wilcox, 25 Ill. 247; Cooley *v.* State, 55 Ala. 162; Stetson *v.* Goldsmith, 30 Ala. 602; Meyer *v.* Blackemore, 54 Miss. 570; Rees *v.* Lawless, 4 Litt. (Ky.) 218.

"The question whether a bill in equity, or a libel in the admiralty, can be used in evidence as a confession by the party filing it, of the particular facts stated therein, has been the subject of much doubt. Mr. Phillips, though he admits there is a conflict of decisions, inclines to the opinion the evidence ought to be received. 1 Phil. Ev. 371; 2 Phil. Ev. 28. Mr. Greenleaf says it is admissible, though very feeble evidence, so far as it may be taken as the suggestion of counsel. 1 Greenl. Ev. 225; 3 Greenl. Ev. 263. Mr. Daniell, though he does not consider it evidence at law, declares it is so in equity. 2 Daniell, Ch. Pr. 976. On the other hand, Mr. Gurley (Eq. Ev., 2d Ed. 426,) denies that the statements of fact in a bill can be used

Only Competent As Evidence of a Disputable Admission. — A pleading filed in another suit is not a judicial admission, in the strict sense, as being conclusive. It stands rather on the footing of non-judicial admissions which may be disproved.[18] The strength of the admission may be increased by reason of the fact that it appears in a pleading, particularly if it is verified. But it is nevertheless open to dispute or explanation by the party filing it the same as any non-judicial admission. In this it differs materially from an admission made in a pleading in the action on trial.

Failure to Assert Cause of Action or Defense in Pleading in Another Action. — A pleading in another action may be competent not only for the purpose of proving an express admission contained in it, but it may be admissible to show that in another action where a party was called upon to, or might have made the same claim of a cause of action or defense that he is now asserting in the cause on trial, no such claim was made.[19] This is upon the theory that a failure to make a claim when an opportunity offers is an admission that no such claim exists. But to render a pleading competent to prove such omission it must appear that the claim whether of a cause of action or defense, was one that could properly have been made in that action, and was material in his behalf.[20]

against the complainant as confessions.

"In Boileau *v.* Rutlin, 2 Exch. 664, decided in 1848, the court of exchequer, after very careful examination of all the previous authorities, at law and in equity, in England and Ireland, came to the decision that a bill in chancery is not evidence of the truth of the facts stated in it, as against the party in whose name it is filed, even though his priority be shown; but is only admissible to show that a suit was instituted, and the subject-matter of it. I consider this decision to be in conformity with the weight of authority in this country. The American cases are collected by Cowen & Hill (volume 4, p. 48.) More recent decisions are Adams *v.* McMillan, 7 Fort. (Ala.) 73; Burden *v.* Cleveland, 4 Ala. 225; Isaac's Lessee *v.* Clarke, 2 Gill 1." Church *v.* Shelton, 2 Curt. 271, 5 Fed. Cas. No. 2714.

18. Starkweather *v.* Kittle, 17 Wend. (N. Y.) 20.

Is a Disputable Admission — Thus in Solomon Ry. Co. *v.* Jones, 30 Kan. 601, 2 Pac. 657, it is said: "And while an allegation in a verified petition in another case is not an estoppel and does not conclude the party making it—so the court instructed—it is competent evidence against him, just as a declaration or admission made by him in any other manner and place.

"So it has been held that allegations in a petition and an affidavit for an attachment are admissible only in evidence, but not conclusive in favor of one not a party to the suit, hence such allegations are open to amendment and correction by a proof of error."

Vredenburgh *v.* Baton Rouge Sugar Co., 52 La. Ann. 1666, 28 So. 122.

19. Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520.

20. **Failure to Plead in Another Action.** — In Melvin *v.* Whiting, 13 Pick. (Mass.) 184, one of the questions in the case was as to the right of the defendant to a several fishery in the Merrimac River. The pleadings in a former action, in which the defendant made other claims to the fishery, but did not allege or claim a several fishery therein, were offered in evidence. The pleadings were rejected. It was insisted that, having had an opportunity in a former action to plead a several fishery, and having failed to do so, it was tanta-

Competent to Prove a Fact As Well As an Admission of a Fact. — We are here considering pleadings as admissions only. But to avoid misunderstandings it should be noted that this is not the only purpose for which they may be admissible. On the contrary, they may be and frequently are competent as direct and original evidence of a fact in issue.[21]

And to Prove Former Adjudication. — So the pleadings in another action may be competent to prove a former adjudication which will be considered under other heads.[22]

Allegation of a Conclusion. — Like other admissions, such as are made in a pleading must be of some *fact* material to the issue to render the pleading competent. An allegation or statement of a conclusion of law is not competent as an admission.[23]

On a Subsequent Trial of the Same Cause. — Admissions may be made for the purposes of the trial only which will not be binding or even competent as evidence on a subsequent trial.[24] But as a rule this is not so of admissions in the pleadings. They are admissible against the party even where they are superseded by amended

mount to an admission on his part that he was not the owner of the several fishery in the river, but it was held that it was not material for the defendant in the prior action to set up a several and an exclusive fishery, and his omitting to plead it as such was not an admission that he had no such exclusive rights.

21. Competent as Independent Evidence of a Fact. — Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520. *See* "Pleadings."

Thus in Radclyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373, it was held that the pleadings in an action on a judgment are admissible in a subsequent action of *audita querela*, seeking to recover the amount paid on such judgment to show that the issues in both cases are the same.

So in Church *v.* Shelton, 2 Curt. 271, 5 Fed. Cas. No. 2714, it was held that ordinarily a libel, filed by a party to another suit, cannot be given in evidence against him as his confession. But if he brought the suit as a trustee, and recovered, the *cestui que* trust may put the whole record in evidence, to show the recovery and the title on which it rested.

Again it is held that the judgment roll in one action is admissible to show the election of the party to bring an action *ex contractu* as a bar to the maintenance of an action for tort. Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272, 18 Am. St. Rep. 803, 8 L. R. A. 216.

22. *See* "Pleadings;" "Res Adjudicata."

23. Stevens *v.* Crane, 116 Mo. 408, 22 S. W. 783.

24. Admission for the Purposes of the Trial. — In McKinney *v.* Town of Salem, 77 Ind. 213, it is said: "The court admitted in evidence an agreement made between the parties at the time the case was tried in the justice's court. This agreement recites that 'the parties to the above entitled cause, for the purpose of saving time and obviating the necessity of bringing witnesses to testify, do hereby agree that the following facts are true, for the purpose of trial before said justice, and that the same may be taken as true by him.' The recital limits the agreement to the trial before the justice, and restricts its operation to the purposes of that trial, and the court erred in admitting it in evidence upon the trial of the cause on appeal. Admissions made simply for the purposes of a particular trial, cannot be used against the party upon another and different trial. Wheat *v.* Ragsdale, 27 Ind. 191; Hays *v.* Hynds, 28 Ind. 531. For the error in admitting this evidence the judgment must be reversed."

pleadings or otherwise taken out of the case, as pleadings, between the first and subsequent trials.[25]

Pleadings of Third Parties in Other Actions Sometimes Competent. A pleading of a third party, in another action, may be competent for certain purposes, although generally any statements contained in such a pleading would be hearsay, and both incompetent and immaterial. They may be competent, however, not as admissions, but for the purpose of contradicting a witness,[26] or to prove a fact material to the issue on trial.[27] But the principles upon which such pleadings are admitted differ entirely, as will be seen, from those upon which the admissibility of pleadings by the parties to the action are rested.

e. *By Demurrer.* — The rules of law applicable to admissions by demurrer are materially different from those relating to admissions contained in other pleadings. A demurrer does not admit the facts alleged in the pleading to which it is addressed for the purposes of the trial, but only for the purposes of the demurrer, or as testing the sufficiency of such pleading. Therefore, although a demurrer admits for its own purpose that all of the facts alleged are true, if it is overruled the admission can be of no avail at the trial, but the facts thus and for such purpose admitted, may be controverted by subsequent pleadings and disproved, and the demurrer is no evidence as an admission of their truth.

Not Competent Evidence in Another Action. —It follows that a demurrer in one action is not competent in another as an admission.[28]

25. Bill of Particulars Withdrawn. — In Byrne *v.* Byrne, 47 Ill. 507, it was held that where the defendant originally pleaded the general issue, set-off, and the statute of limitations upon which the trial was had and a verdict found against him, and a new trial was awarded, and before such trial he withdrew the claim of set-off and bill of particulars filed therewith, such bill of particulars was nevertheless competent evidence against the defendant upon the second trial as showing a running account between the parties.

26. Meade *v.* Black, 22 Wis. 232.

27. Pleadings of Third Parties for What Purposes Competent. Barlow *v.* Dupuy, 1 Mart. (La.) 442.

Thus in an action involving title to real estate the plaintiff had testified that he had been in possession of the land by a third person mentioned, his tenant, and that said party had never made any claim of title in himself to the land. The pleadings in another action brought by the plaintiff against this same third party to recover possession of the same land were offered in evidence including an answer by such party claiming to be the owner and entitled to the possession of the land. The answer was held to be admissible to prove the *fact* that said third party *had* made claim of title to the property, thus contradicting the testimony of the plaintiff and on the further ground that it "tended to illustrate and explain the character of Odell's possession." Meade *v.* Black, 22 Wis. 232.

28. Auld *v.* Hepburn, 1 Cranch C. C. 122, 2 Fed. Cas. No. 650; Auld *v.* Hepburn, 1 Cranch C. C. 166, 2 Fed. Cas. No. 651.

Demurrer Not Competent As An Admission. — In Kankakee & S. R. Ry. Co. *v.* Horan, 131 Ill. 288, 23 N. E. 621, it is said: "It appeared that said bill was demurred to in the court where it was filed by the defendants thereto, and it is insisted that said demurrer should have the effect here of an admission that the allegations of the bill are true. This cannot be conceded. The demurrer,

f. *Pleading Not Filed.* — The filing of a pleading, if signed, verified, or authorized by the party, is not necessary to its competency as evidence of an admission. It is none the less an admission because not filed.[29] But a pleading sworn to by a party but not filed, prepared by his attorney on the client's statement to him of the facts, is privileged in the hands of the attorney, and is not admissible in evidence against the client.[30]

g. *Pleading Superseded by Amended Pleading Not Evidence As Existing Pleading.* — When an amended pleading is filed it supersedes and takes the place of the original pleading. Therefore the original pleading no longer exists *as a pleading in the cause.*[31]

Not Conclusive As an Admission. —It follows that not being a pleading in the cause on trial, any admissions it may contain are not conclusive as against the party filing the pleading, and it can only be treated as an admission in the case by introducing it in evidence.[32]

Is Evidence As an Admission. — But it does not follow that the pleading, thus superseded, is not competent evidence. On the contrary, it is competent in the cause in which it was filed, or any

it is true, was an admission of the truth of such matters in the bill as were well pleaded; but it was such admission only for the purpose of obtaining the judgment of the court as to the sufficiency of the bill on its face to entitle the complainant to relief, or, rather, it was a pleading by which the defendant demanded the judgment of the court whether he should be compelled to answer the bill or not. Story, Eq. Plead. § 436. For no other purpose can it be held to be an admission of the allegations in the bill, unless it appears, as it does not here, that the demurrer being held insufficient, the defendant elected to abide by his demurrer, and permitted a decree to go against him upon the facts thus admitted."

29. Burnham *v.* Roberts, 70 Ill. 19.

30. Burnham *v.* Roberts, 70 Ill. 19.

31. **Effect of Filing Amended Pleading.** — Gilman *v.* Cosgrove, 22 Cal. 356; Folger *v.* Boyington, 67 Wis. 447, 30 N. W. 715; Vogel *v.* Osborne, 32 Minn. 167, 20 N. W. 129; Holland *v.* Rogers, 33 Ala. 251; Boots *v.* Canine, 94 Ind. 408.

32. **Original Pleading Must Be Offered in Evidence.** — Mott *v.* Consumers Ice Co., 73 N. Y. 543; Holland *v.* Rogers, 33 Ark. 251; Vogel *v.* Osborne, 32 Minn. 167, 20 N. W. 12; Reeves *v.* Cress, 80 Minn. 466, 83 N. W. 443; Bailey *v.* O'Bannon, 28 Mo. App. 39; Fogg. *v.* Edwards, 27 N. Y. Sup. Ct. 90.

Thus in Folger *v.* Boyinton, 67 Wis. 447, 30 N. W. 715, where on an appeal from a justice's court, the complaint was amended, it was held that the defendant could not read the original complaint as before amendment, to the jury, the said complaint not having been offered in evidence, the court saying: "The pleadings in the cause may be referred to by counsel or the court, to ascertain the nature and scope of the action, and, if there is an answer, the real issues in the cause, and for no other purpose. But they cannot be referred to as proof of any fact, unless they are introduced in evidence on the trial, with at least some chance for explanation. The original complaint was sought to be read to the jury to show what the allegation of the plaintiffs was as to the contract. This was to prove the admissions of the plaintiffs as to what it was, and therefore should have been introduced as any other testimony in the case, so as to give the plaintiffs a chance to explain such an admission. But, that old complaint not then being the complaint in the cause, it should, of course, be introduced in evidence like the records in another case."

other action, not as a pleading, but as any other written instrument containing an admission against interest, provided it be signed or acquiesced in by the party, or be signed and filed by an attorney having authority to bind him by statements so made.[33]

It has been held that a pleading superseded by an amended pleading is not competent evidence as an admission.[34] But the cases cited

33. Pleading Superseded by Amended One Competent Evidence. *Alabama.* — Davidson *v.* Rothschild, 49 Ala. 104.

California. — Coward *v.* Clanton, 79 Cal. 23, 21 Pac. 359.

Dakota. — Gale *v.* Shillock, 4 Dak. 182, 29 N. W. 661.

Illinois. — McNail *v.* Welch, 26 Ill. 482.

Indiana. — Boots *v.* Canine, 94 Ind. 408; Baltimore O. & C. R. Co. *v.* Evarts, 112 Ind. 533, 14 N. E. 369.

Iowa. — Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356.

Kansas. — Juneau *v.* Stunkle, 40 Kan. 756, 20 Pac. 473.

Kentucky. — Edwards *v.* Mattingly, 21 Ky. Law 1045, 53 S. W. 1032.

Minnesota. — Vogel *v.* Osborne, 32 Minn. 167, 20 N. W. 129; Reeves *v.* Cress, 80 Minn. 466, 83 N. W. 443.

Missouri. — Spurlock *v.* Missouri Pac. Ry. Co., 125 Mo. 404, 28 S. W. 634; Schad *v.* Sharp, 95 Mo. 573, 8 S. W. 549; Walser *v.* Wear, 141 Mo. 443, 42 S. W. 928; Bailey *v.* O'Bannon, 28 Mo. App. 39.

Nebraska. — Miller *v.* Nicodemus, 58 Neb. 352, 78 N. W. 518.

New York. — Strong *v.* Dwight, 11 Abb. Pr. 319; Mott *v.* Consumers Ice Co., 73 N. Y. 543; Meyer *v.* Campbell, 1 Misc. 283, 20 N. Y. Supp. 705; Herzfeld *v.* Reinach, 44 App. Div. 326, 60 N. Y. Supp. 658; New York etc. Trans. Co. *v.* Hurd, 51 N. Y. Sup. Ct. 17; Fogg *v.* Edwards, 27 N. Y. Sup. Ct. 90.

North Carolina. — Adams *v.* Utley, 87 N. C. 356.

South Carolina. — Willis *v.* Tozer, 44 S. C. 1, 21 S. E. 617.

Texas. — Barrett *v.* Featherston (Tex. Civ. App.), 35 S. W. 11, 36 S. W. 245; Goodbar Shoe Co. *v.* Sims (Tex. Civ. App.), 43 S. W. 1065; Jordan *v.* Young (Tex. Civ. App.), 56 S. W. 762; Southern Pac. Co. *v.* Wellington (Tex. Civ. App.), 57 S. W. 856.

Utah. — Brown *v.* Pickard, 4 Utah 292, 9 Pac. 573; Kilpatrick etc. Co. *v.* Box, 13 Utah 494, 45 Pac. 628.

Washington. — Oregon Ry. & Nav. Co. *v.* Dacres, 1 Wash. 195, 23 Pac. 415.

Wisconsin. — Norris *v.* Cargill, 57 Wis. 251, 15 N. W. 148.

Reasons for the Rule. — A full exposition of the law on this subject and the reason for the rule will be found in Boots *v.* Canine, 94 Ind. 408.

34. Cases Holding Superseded Pleading Incompetent. — "But we think the court erred in admitting in evidence, against the objections of the defendants, the original answers filed by them in this action, and which had been superseded by the amended answers. The original answers were offered in evidence by the plaintiff as an admission by the defendants of their possession and occupation of the room in contest. Whilst it is true that pleadings in a cause containing admissions of facts dispense with the necessity of proving the facts admitted, the rule applies only to the subsisting pleadings on which the cause is tried, and not to defunct pleadings, for which other and amended pleadings have been substituted. It has doubtless often happened that a pleading contains admissions made under a misapprehension of the facts. In such case, if the party amends his pleading, stating the facts differently, he would reap no benefit from his amendment, if the adverse party were at liberty to use the first pleading as an admission to overthrow the amended pleading. It cannot be a sound rule of evidence which works such results and practically puts it out of the power of a party to avoid the effect of a mistake in the original pleading.

"The pleading on which a party goes to trial is the one on which he places

are not in harmony with the weight of authority, nor do they seem to be supported by sound reason. Of course the pleading ceases to be conclusive upon the party when it is superseded by an amended pleading, as above stated, but it is none the less competent as an admission if it contains a material admission, leaving it open to the party filing the pleading to disprove the fact admitted by any other competent evidence. And to that end he may show undoubtedly, that the admission was made by mistake or explain away the force of it in any legitimate way. Some of the cases are based upon the right given by statute to set up inconsistent causes of action or defenses. But a pleading superseded by an amended one, not being a pleading, cannot fall within the rule, if indeed an admission can be held, in any case, or for any reason, to be incompetent because another declaration by the party, inconsistent with it, has been subsequently made.[35]

his defense or cause of action, and he is bound by its admissions. But in many cases it would operate as a gross injustice to hold him to be bound by the admissions of a former pleading, made, perhaps, under a mistake of the facts, and which has become *functus officio* by the substitution of an amended pleading." Mecham *v.* McKay, 37 Cal. 154; Pfister *v.* Wade, 69 Cal. 133, 10 Pac. 369; Smith *v.* Davidson, 41 Fed. 172; Stern *v.* Loewenthal, 77 Cal. 340, 19 Pac. 579; Ponce *v.* McElvy, 51 Cal. 222; Holland *v.* Rogers, 33 Ark. 251; Little Rock & Ft. S. Ry. Co. *v.* Clark, 58 Ark. 490, 25 S. W. 504; Miles *v.* Woodward, 115 Cal. 308, 46 Pac. 1076; Southern Pac. Co. *v.* Wellington (Tex. Civ. App.), 36 S. W. 1114; McGregor *v.* Sima (Tex. Civ. App.), 44 S. W. 1021; Corley *v.* McKeag, 9 Mo. App. 38; Kimball *v.* Bellows, 13 N. H. 58.

35. Such Pleading Competent. In a later case in California it was held that such a pleading was competent for the purpose of contradicting the party as a witness in the cause. Johnson *v.* Powers, 65 Cal. 179, 3 Pac. 625.

So it has been held that a pleading superseded by an amended pleading is competent for the purpose of proving an independent fact in the case for example, that a tender and payment into court was made. Pfister *v.* Wade, 69 Cal. 133, 10 Pac. 369.

And in a still later case it was said: "The appellant offered in evidence an answer of the respondent in another action between the parties here, in which he alleged an indebtedness from the appellant to him for commissions for the sale of a part of this tract of land as *appellant's agent*. As the appellant was contending in this case that these sales were made by respondent as his agent, and not as a partner, it will be seen that the answer contained a material admission. But the respondent objected to the admission of the answer, on the ground that it was superseded by the filing of another answer in the case. This was no reason for excluding it as evidence. No matter if it had ceased to exist as a pleading in the cause, it was still binding upon the respondent as an admission. Coward *v.* Clanton, 79 Cal. 23, 21 Pac. 359.

Is Original Pleading Conclusive. Again it has been held that an original pleading filed by a party containing a material admission is conclusive upon the party unless it is shown that the admission was made by mistake. Oregon Ry. & Nav. Co. *v.* Dacres, 1 Wash. 195, 23 Pac. 415. But this case has no support in principle or on authority.

It is also held that an original pleading superseded by an amended one may be considered by the court without being formally read in evidence. Smith *v.* Pelott, 63 Hun 632, 18 N. Y. Supp. 301. But this is certainly open to grave question.

It has been held also that where the original pleading containing the admission was signed and verified by the attorney, and the amended one, verified by the party, denied and put in issue the fact admitted in the first pleading, the original, in the absence of any evidence that the first pleading was filed with the knowledge or under the direction of the party, was not competent as evidence.[36] It may properly be suggested that the denial in the amended pleading of the fact admitted in the original, went to the weight to be given to the admission rather than to the competency of the pleading as evidence. And this must be so, under the cases cited above, unless the fact of the denial in the last pleading was of itself evidence sufficient to show a want of authority on the part of the attorney to make the admission.

Competent Against Successors. — Such admissions are not only competent evidence as against the party filing the pleading, but against those who subsequently come into the suit as his successors in interest to the matter in litigation.[37] But unless the relations of the parties are such that one is bound by the admissions of another, as hereinafter shown, the pleading of one party is not competent evidence as against his co-plaintiff or defendant.[38]

36. "Of course it is elementary that an amended pleading entirely supersedes the original, which ceases to be a part of the record. The original has no longer any existence as a *pleading*; but this is not the question here. Although superseded as a pleading, may it still be introduced in *evidence* as an admission against the party who interposed it? If it was signed or verified by the party, or if it otherwise affirmatively appears that the facts stated therein were inserted with his knowledge or by his direction, we can see no reason why it is not as competent as any other admission made by him, although it has ceased to be a pleading in the case—not, of course, conclusive, but subject to explanation. To introduce such evidence when a party has thus changed front is a common practice, and we have no doubt a correct one. And even when the pleading is signed or verified only by the attorney, if the party stands by it by allowing it to remain the pleading in the case, so that it contains a solemn admission of record, it would perhaps be presumed that its allegations of fact were inserted by his authority, and hence admissible against him in other actions. The weight of authority seems to go that far. Gordon *v.* Parmelee, 2 Allen 212; Bliss *v.* Nichols, 12 Allen 443; Brown *v.* Jewett, 120 Mass. 215; Ayres *v.* Hartford F. Ins. Co., 17 Iowa 176; Truby *v.* Seybert, 12 Pa. St. 101. There is the greater reason for such a rule, under the present system, where technical forms are abolished, and pleadings are required to state the facts. There is no longer any reason for considering the allegations of a pleading as the mere suggestions of counsel. But where the party has substituted an amended pleading, thereby impliedly saying that the original was interposed under a mistake as to the facts, we think it would be going too far to admit in evidence against him the original, when not verified by him, or when it does not otherwise appear that its contents were inserted with his knowledge or sanction." Vogel *v.* Osborne, 32 Minn. 167, 20 N. W. 129.

37. Miller *v.* Nicodemus, 58 Neb. 352, 78 N. W. 618; 1 Greenl. Ev., § 178; Townsend *v.* McIntosh, 14 Ind. 57; Rust *v.* Mansfield, 25 Ill. 207.

38. Rust *v.* Mansfield, 25 Ill. 207; Townsend *v.* McIntosh, 14 Ind. 57; Penseneau *v.* Pulliam, 47 Ill. 58.

Original Pleading Verified by Guardian ad Litem. — It has been held that a complaint verified by a guardian *ad litem* who had no personal knowledge of the facts, and who was not a witness in the case, was incompetent where an amended complaint denying a material fact admitted in the original, had been filed.[39]

Fact Omitted in Original and Alleged in Amended Pleading. — The original pleading is not material as evidence merely because a fact alleged in the amended pleading is omitted from the original.[40]

h. *Pleadings Stricken Out.* — If a pleading is stricken out by the court it ceases to be a pleading in the case, and admissions contained in it are not conclusively binding upon the party pleading it. Like a pleading superseded by an amended one, it may be introduced in evidence to prove any admission made in it, but such admissions are not conclusive.[41]

39. Pleading Verified by Guardian Ad Litem. — "The original complaint contained a verified statement of the guardian *ad litem*. It did not contain any statement of the plaintiff herself. It could not be used to contradict the plaintiff's testimony, because she had not verified it, and there was nothing to show that she was in any way responsible for it. It was not material to contradict the guardian *ad litem*, because he was not sworn as a witness, and there was no pretense that he had any personal knowledge as to how the accident occurred. It was, therefore, entirely immaterial for any purpose so far as it might affect the evidence given upon the trial. Having been replaced by the amended complaint, it had ceased to be of any effect for any other purpose than as a declaration which might be used to contradict the person who had sworn to it if the occasion arose. As that occasion did not arise, it was not material, and the charge of the court was correct." Geraty *v.* National Ice Co., 16 App. Div. 174, 44 N. Y. Supp 659.

40. San Antonio & A. P. Ry. Co. *v.* Belt (Tex. Civ. App.), 46 S. W. 374.

41. *In re* Oregon B. P. Pub. Co., 18 Fed. Cas. No. 10,559. But see Dunson *v.* Nacogdoches Co., 15 Tex. Civ. App. 9, 37 S. W. 978.

Effect of Plea in Abatement. In Waters *v.* Parker (Tex.), 19 S. W. 1022, the question was as to the effect of a plea in abatement, and it was held that the admission of a defendant in a plea in abatement could not be relied upon where the plea was overruled, and he went to trial on his general denial.

Matters Stricken Out. — Again it is said: "In addition to this testimony, there were the written admissions of the defendants in their original answer, when they undertake to explain the condition of the goods on arrival by saying 'that it was owing to the inclemency of the weather, the bad condition of the roads, the necessity of unloading the goods, and their consequent exposure.' It will not do to say that these matters of excuse or discharge were struck out of the answer, and should not have been considered. They were still admissions tending to establish that the goods were received in good order and were damaged *in transitu*, and were as much evidence to be considered as any other admissions. It is true that the fact they were repudiated by the defendants striking them out may show that they were made under a misapprehension; but as the fact of that repudiation, like any other correction of an error in statement, was as fully before the court as the original admission itself, it was a proper matter for the consideration of the judge, and he no doubt reached the right conclusion." Bloomingdale *v.* DuRell, 1 Idaho 33.

So it has been held that the existence of a corporation may be proved by admissions contained in a

i. *Withdrawn or Abandoned Pleadings.* — The rule is the same where a party voluntarily withdraws or abandons a pleading, but not as an item of evidence against him.[42] But there are cases holding that a pleading withdrawn cannot be used as evidence.[43]

Pleadings Unauthorized by Law. — Where a pleading, or a document intended as and in the form of a pleading, is offered as evidence of an admission, it makes no difference that it is not a pleading authorized by law. Its competency does not depend upon its validity as a pleading. It is the declaration of the party, and for that reason competent evidence against him.[44]

j. *Averments on Information and Belief.* — Pleadings in other actions are admitted like non-judicial admissions on the ground that they are declarations against interest of facts within the knowledge

pleading, and stricken out; the court saying: "It is a well-settled rule, that parties are bound by their written admissions made in the progress of a cause as a substitute for proof of any material fact, and cannot repudiate them at pleasure. The admission of the existence of a corporation by pleading and setting forth the fact, comes within the rule, and is binding as between parties to the suit and in the same suit in which such admission is made. Carradine *v.* Carradine, 33 Miss. 698; Elwood *v.* Lannon's Lessee, 27 Md. 200. Harper & Co. in their original answer, alleged and admitted under oath the incorporation of the Peckham Iron Company. And the same admission was made in their amended answer. True, it was in both instances, from its juxtaposition, stricken out with other matter, on motion, as redundant. But though stricken out, the fact that the admission had been made under oath, was not thereby annulled." Peckham Iron Co. *v.* Harper, 41 Ohio St. 100.

Original Pleading Competent. So in Sayer *v.* Mohney, 35 Or. 141, 56 Pac. 526, it is said: "In Mecham *v.* McKay, 37 Cal. 154, it is held that admissions in an original answer cannot be used against the defendant after the filing of an amended answer omitting them; the court saying, 'if the party amends his pleading, stating the facts differently, he would reap no benefit from his amendment, if the adverse party were at liberty to use the first pleading as an admission to overthrow the amended pleading.' The rule thus announced has been constantly followed by the supreme court of California, but the great weight of judicial authority, in the absence of a statute on the subject, is the other way; and the correct rule, in our judgment, is stated as follows: 'Admissions made in pleadings will bind the party in the suit in which they are filed, though such pleadings have been stricken out or withdrawn.'"

42. Withdrawn or Abandoned Pleading. — *Colorado.* — Barton *v.* Laws, 4 Colo. App. 217, 35 Pac. 284.

Illinois. — Byrne *v.* Byrne, 47 Ill. 507; Daub *v.* Englebach, 109 Ill. 267.

Indiana. — Baltimore O. & C. R. Co. *v.* Evarts, 112 Ind. 533, 14 N. E. 369.

Louisiana. — Byrne *v.* Hibernia Nat. Bank, 31 La. Ann. 81.

Missouri. — Murphy *v.* St. Louis Type F., 29 Mo. App. 541.

North Carolina.—Brooks *v.* Brooks, 90 N. C. 142.

Texas. — Ryan *v.* Dutton (Tex. Civ. App.), 38 S. W. 546; Wright *v.* U. S. Mortg. Co. (Tex. Civ. App.), 54 S. W. 368; Jordan *v.* Young (Tex. Civ. App.), 56 S. W. 762.

Wisconsin. — Lindner *v.* St. Paul F. & M. Ins. Co., 93 Wis. 526, 67 N. W. 1125.

43. Little Rock & Ft. S. Ry. Co. *v.* Clark, 58 Ark. 490, 25 S. W. 504; Gilmore *v.* Borders, 2 How. (Miss.) 824; Medlin *v.* Wilkins, 1 Tex. Civ. App. 465, 20 S. W. 1026.

44. Warder *v.* Willyard, 46 Minn. 531, 49 N. W. 300, 24 Am. St. Rep. 250.

of the party making them. Therefore, it is held that a declaration made in a pleading in another action on information and belief merely, is not competent evidence.[45]

k. *Common Law Pleadings.* — There is quite a material difference between common law and code pleadings which is pointed out in many of the decided cases, viz., that the former are to a great extent fictitious and do not contain or profess to contain statements of facts, while the latter are required by the express terms of the codes to contain a plain and concise statement of the facts constituting the cause of action or defense. Nevertheless, although the code pleading may be more satisfactory and effective evidence, the common law pleading is competent as against the party pleading it for what it is worth.[46]

C. Pleadings in Suits in Equity. — a *Generally.* — In this article the effect of pleadings as evidence is considered only so far as they are or have been held to be or not be admissions. The answer in equity, being competent, as original evidence, in favor of the defendant, will be considered separately.[47]

b. *The bill.* — **(1.) Signed by Attorney, Not Evidence of Admission.**

45. On Information and Belief Not Competent in Another Action. Wood *v.* Bailey, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95.

"It is true that admissions in pleadings in an action between other and different parties have been received in evidence by the courts. The ground upon which these admissions have been received has been because they were admissions against the interest of the party making them, and because of the great probability that a party would not admit or state anything against himself or against his own interest unless it was true. And, furthermore, these admissions have been confined to those cases where the admissions contained the assertion of facts which from the nature of the case, if true, must have been within the knowledge of the party making the admission, and the pleading is verified by him. These rules are laid down in the case of Cook *v.* Barr, 44 N. Y. 157, and their application is apparent. Therefore an admission contained in pleadings between other parties, simply founded upon information and belief, where there is no presumption that the facts alleged or denied must have been within the knowledge of the party making the allegation or denial, and where the allegation or denial is not against the interest of the party making the same, cannot be received in evidence as establishing any fact. In the case at bar the alleged admission was not against the interest of the defendant, who was asserting a right in respect to a fact as to which there is no presumption that she had any personal knowledge whatever. Therefore the two elements which are necessary to exist in order to justify the admission of this allegation of the pleadings are conspicuously absent, and under no rule of evidence could it be admitted." Mayor etc. *v.* Fay, 53 Hun 553, 6 N. Y. Supp. 400, 23 Abb. Pr. (N. S.) 390.

Competent, Only Affects Weight. "When an averment is made on information and belief, it is nevertheless admissible as evidence, though not conclusive. Lord Ellenborough, in Doe *v.* Steel, 3 Camp. 115. The authority cited sustains the proposition that the fact that the averment is made on information and belief merely detracts from the weight of the testimony; it does not render it inadmissible." Pope *v.* Allis, 115 U. S. 363, 6 Sup. Ct. 69.

46. Soaps *v.* Eichberg, 42 Ill. App. 375. But see Whart. Ev., § 838.

47. *See* article, "Answers."

There are authorities holding that a bill in equity, signed by the attorney only, and not verified, is not an admission of the party, but the mere suggestion of the attorney;[48] that it is competent to prove that a suit was commenced, and the like,[49] but that it is not competent evidence of an admission of the complainant.[50]

(2.) Otherwise if Signed or Verified by Party. — But, if the bill is signed or verified by the party, it then becomes his statement and is competent evidence against him as such.[51]

(3.) Where Matter Directed by Him to Be Inserted. — So where it is shown that the matter relied upon was directed by the plaintiff to be inserted in the bill, or that he acquiesced in the statement of fact made, the statement becomes his statement and the bill is competent evidence.[52]

(4.) Authorities Holding it Competent. — Other cases are to the effect that a bill, whether signed or verified by the party or not, is competent evidence against the party filing it, like any other pleading.[53]

Not Competent in Favor of the Plaintiff. — The bill is not competent evidence in favor of the plaintiff,[54] except to show that such a bill

48. When Bill Not Competent. 1 Taylor Ev., § 784.

England. — Doe *v.* Sybourn, 7 T. R. 2.

United States.—Church *v.* Shelton, 2 Curt. 271, 5 Fed. Cas. No. 2714.

Alabama. — Adams *v.* McMillan, 7 Port. 73; Cooley *v.* State, 55 Ala. 162; Stetson *v.* Goldsmith, 30 Ala. 602.

California. — Duff *v.* Duff 71 Cal. 513, 12 Pac. 570.

Illinois. — McCormack *v.* Wilcox, 25 Ill. 247.

Kentucky. — Rees *v.* Lawless, 4 Litt. 219.

Massachusetts. — Page *v.* Page, 15 Pick. 368.

Mississippi. — Meyer *v.* Blackemore, 54 Miss. 570.

Pennsylvania.—Macley *v.* Work, 10 Serg. & R. 194.

When Bill Competent. — In Callan *v.* McDaniel, 72 Ala. 96, it is said: "The bill in equity filed by the plaintiffs against the defendant, was verified by affidavit. It is true, that a bill in equity, not verified, is regarded as containing rather the suggestions of counsel, than the deliberate statements of the complainant, and is not, in a collateral suit, admissible evidence against him of the facts stated in it. 1 Brick. Dig. 829, § 353. But, when it is verified, because of the solemnity and deliberateness attached to an oath taken in the course of judicial proceedings, a different rule obtains. The bill is then treated as a statement of facts admitted by the complainant, and becomes evidence against him in collateral suits. McRea *v.* Ins. Bank of Columbus, 16 Ala. 755; McLemore *v.* Nuckolls, 37 Ala. 662."

49. Daniels Chan. Pl. & Pr. 838.

50. Bill When Not Evidence of Admission. — Daniels Chan. Pl. & Pr. 838; Rees *v.* Lawless, 4 Litt. (Ky.) 219; Maclay *v.* Work, 10 Serg. & R. (Pa.) 194; Owens *v.* Dawson, 1 Watts (Pa.) 149; Callan *v.* McDaniel, 72 Ala. 96.

51. Competent if Signed or Verified by Party. — Robbins *v.* Butler, 24 Ill. 387; Callan *v.* McDaniel, 72 Ala. 96.

52. Daniels Chan. Pl. & Pr. 839.

53. Competent Whether Signed by Party or Not. — Soaps *v.* Eichberg, 42 Ill. App. 375; Robbins *v.* Butler, 24 Ill. 387.

54. Not Competent for Plaintiff. Daniels Chan. Pl. & Pr. 838; Lancaster *v.* Arendell, 2 Heisk. (Tenn.) 434; Pearce *v.* Petit, 85 Tenn. 724, 4 S. W. 526; Roberts *v.* Miles, 12 Mich. 297.

was filed;[55] or in support of an application for a temporary injunction,[56] or to prove pedigree.[56a]

c. *Answer.* — **(1.) Generally.** — The law of evidence relating to the answer differs most materially from that relating to answers under the common law and code systems of pleading.[57] The difference consists, mainly, in the fact that the plaintiff may, as a part of his bill, require the same or parts thereof, to be answered by the defendant, under oath, and that when he does, the answer becomes evidence against the plaintiff and in favor of the defendant making the answer required.[58] This phase of the subject is considered under "ANSWERS."[59]

(2.) Is Competent Evidence Against the Defendant. — An answer in chancery is admissible as evidence against the party pleading it, either in the suit in which it is filed or another action, and whether the parties are the same or not.[60]

55. Lancaster *v.* Arendell, 2 Heisk. (Tenn.) 434.

56. "A bill in chancery is never evidence in favor of complainant, whether sworn or unsworn. The oath of complainant verifying it is only needed where required by some statute or rule of practice, and can then only avail in obtaining an injunction or other preliminary relief. It is no evidence on the hearing, unless confessed or admitted" Roberts *v.* Miles, 12 Mich. 297.

56a. Owens *v.* Dawson, 1 Watts (Pa.) 149.

57. Mey *v.* Gulliman, 105 Ill. 272.

58. Beach Mod. Eq., § 366; Story's Eq. Pl., § 849a.

59. *See* article, "ANSWERS."

60. Is Competent Against the Defendant. —*Alabama.*—Julian *v.* Reynolds, 8 Ala. (N. S.) 680; Royall *v.* McKenzie, 25 Ala. 363.

Florida. — Randall *v.* Parramore, 1 Fla. 458.

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

Illinois. — Robbins *v.* Butler, 24 Ill. 387, 427; Daub *v.* Englebach, 109 Ill. 267.

Indiana. — McNutt *v.* Dare, 8 Blackf. 35.

Kentucky. — Clarke *v.* Robinson, 5 B. Mon. 55.

Michigan. — Durfee *v.* McClurg, 6 Mich. 223.

Mississippi. — Greenleaf *v.* Highland, 1 Miss. (Walker) 375.

New Jersey. — Manley *v.* Mickle, 55 N. J. Eq. 563, 37 Atl. 738.

North Carolina. — Kiddie *v.* Debrutz, 1 Hayw. 420.

Pennsylvania. — Maclay *v.* Work, 10 Serg. & R. 194; Hengst's Appeal, 24 Pa. St. 413.

Tennessee. — Wallen *v.* Huff, 5 Humph. 90.

Virginia. — Hunter *v.* Jones, 6 Rand. 541.

Admission of Execution of Deed. In Adams *v.* Shelby, 10 Ala. (N. S.) 478, it was held that the answer in chancery, admitting the correctness of a copy of a deed, made by another person, and to which there was no subscribing witness, is evidence both of the contents and execution of the deed, against the person making such admission, the court saying: "The objection to the answer in chancery is understood to be, that the execution of a deed cannot be proved by the admissions of the obligor. The deed in this case was made by one Holly, and the answer of the defendant admits that the copy exhibited with the bill was correct. If it had been his own deed, his answer would have been sufficient to prove its contents, the original being lost, and there being no subscribing witness to it. But being the deed of another person, as against himself, in such case as this, he certainly could admit both the contents and the execution of the deed, and this was the effect of his answer."

Answer in Chancery Offered in Action at Law. — The case of Rees *v.* Lawless, 4 Litt. (Ky.) 219, was an

(3.) And Against His Successors. — And against the successors in interest of the defendant, or one who claims under him.[61]

(4.) Bill Need Not Be Offered. — Exception. — It is not necessary to offer the bill in connection with the answer where the answer is not responsive, but in avoidance, and the bill is not necessary to explain the answer.[62] But it may be offered in connection with the answer where it is necessary to explain it, and no further.[63]

(5.) Evidence of Verbal Admissions, When Sufficient to Overcome. — It is held that the effect of the answer as evidence may be overcome by proof of contradictory verbal admissions made by the defendant, if made deliberately and considerately and established with reliable certainty, but not otherwise.[64]

action of ejectment. Rees offered in evidence a record of a suit in chancery, brought by Lawless against one Croghan, to obtain a conveyance of the land in controversy, which was rejected by the trial court. In speaking of this question, the court said: "The first question which occurs is, whether the circuit court erred in rejecting the record of the suit in chancery, as evidence. The record consists of the bill filed by Lawless, Croghan's answer, and the decree that Croghan should convey the land to Lawless. The bill was evidently not admissible; for it is well settled, that as the allegations of a bill are, in general, the mere suggestions of counsel, they cannot be taken as true against the complainant. And it is equally clear that the decree was inadmissible; for, against Rees who offered it in evidence, being no party to the suit, the decree could not have been admitted, and the rule is, that a judgment or decree cannot be evidence in favor of any one, against whom it cannot be used. The answer of Croghan is, no doubt, admissible evidence against him; and as Lawless derives title under Croghan subsequent to the filing of the answer, it ought, so far as it contains any admissions or confessions, which are competent to prove any material fact in controversy, to be considered as admissible against Lawless."

61. And Against His Successors. Rees *v.* Lawless, 4 Litt. (Ky.) 219; Townsend *v.* McIntosh, 14 Ind. 57; Julian *v.* Reynolds, 8 Ala. 680; Fitch *v.* Stamps, 6 How. (Miss.) 487; Osborn *v.* U. S. Bank, 9 How. (U. S.) 738. But see Morely *v.* Armstrong, 3 Mon. (Ky.) 287, in which it is held that an answer is not binding on one claiming under the defendant filing it unless it has in some way been adopted by him.

62. Bill Need Not Be Offered. Wallen *v.* Huff, 5 Humph. 90; Randall *v.* Parramore, 1 Fla. 458.

"But it is argued that the answer of complainant is not evidence against him, because the bill to which it responds is not produced. To this the answer is plain and explicit. The bill is filed to subject the land to the payment of the debt of complainant against Wallen. Huff answers and defends himself by an assertion of a right to the premises in himself, and not derived through his co-defendant, but by purchase from others, and a possession of more than nine years, making his title good by the operation of the statute of limitations. Huff's answer then, upon this point, sets up new matter in defense, and is not responsive to the bill. There is, then, no necessity to produce the bill for the complete understanding of his answer; and Wallen's answer referring to Huff's, and adopting it, stands in the same position. Huff's answer is necessary to the understanding of Wallen's, but the bill to neither." Wallen *v.* Huff, 5 Humph. (Tenn.) 90.

63. Clarke *v.* Robinson, 5 B. Mon. (Ky.) 55; Randall *v.* Parramore, 1 Fla. 458.

64. Verbal Admissions, Effect of. Conner *v.* Tuck, 11 Ala. (N. S.) 794; Garrett *v.* Garrett, 29 Ala. 439; Gillett *v.* Robbins, 12 Wis. 355.

May Be Overcome by Verbal Ad-

(6.) Must Be Taken As a Whole. — The complainant may use the

missions. — "There is no legal testimony contradicting the answer as to those allegations, save the proof of verbal admissions, represented to have been made by John Garrett. A positive responsive averment, in a sworn answer, may be overcome by mere proof of verbal admissions; but those admissions must appear to have been made deliberately and considerately, and must be established with reliable certainty, before an effect can be conceded to them equivalent to that of the testimony of two witnesses, or of one with corroborating circumstances. 'When a verbal admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature;' nevertheless, 'proof of mere verbal admissions of a party, unsustained by any other circumstances, should always be cautiously weighed, because of their liability to be misunderstood, the facility of fabricating them, and the difficulty of disproving them.' Hope *v.* Evans, 1 Smedes & Mar. Ch. R. 195; Conner *v.* Tuck, 11 Ala. 791; Bryan & McPhail *v.* Cowart, 21 Ala. 92; Love *v.* Braxton, 5 Call 537; Petty *v.* Taylor, 5 Dana. 598, 3 Greenl. on Ev., part VI., p. 281, § 289; 1 *Id.*, chap. XI., p. 263, § 200; Brandon *v.* Cabiness, 10 Ala. 155." Garrett *v.* Garrett, 29 Ala. (N. S.) 439, 440.

Goes to Weight and Not to Admissibility. — "The objections to the testimony which is relied upon to overcome the denials of the answer go to its character rather than to the number or credibility of the witnesses sworn. It consists in admissions made by the defendant at or about the time of the sale, to the effect that he purchased the land for the deceased, and with funds provided by him; and in proofs that the defendant had acquiesced in the occupancy and receipt of the rents of the land, by the deceased and those claiming under him, since the time of the sale, the same being a valuable mineral lot. It is insisted that such admissions ought not to be received for the purpose of disproving or rebutting the sworn statements of the answer; that in order to destroy its effect, the witnesses must testify to facts within their knowledge, and not to what they have heard the defendant say in relation to them; and that the positive testimony of three witnesses, to declarations directly contradicting the averments of the answer, and made at different times, and under different circumstances, are not equivalent to the evidence of two witnesses to the facts themselves, and are, therefore, not a compliance with the old chancery rule upon the subject. But two authorities (10 Vessey, Jr., 517, and 2 John. Ch. R., 412) are cited to support these positions, neither of which, in our opinion, does so. Both recognize the admissibility of such declarations, but admonish us that they are evidence of an unsatisfactory character, on account of the ease with which they may be fabricated, and the impossibility of contradicting them; and warn us against their being too readily accepted and believed. But with these cautions, we know of no rule which forbids them in any case. We know of no principle of law touching an answer in chancery which renders its statements so sacred or so infallible, that they may not be attacked, and overthrown according to the rules of evidence which govern other cases. The general principle which authorizes the reception of admissions, namely, that whatever a party, contrary to his own interests, voluntarily admits to be true, may reasonably be taken for the truth, seems to be as applicable to such a case as any other. We can see no reason for the exception. And if the admissions are clearly and satisfactorily proved, and are such as to convince the court of their truth, we are unable to see why they may not be acted upon. In this case, when taken in connection with the facts admitted in the answer, and the circumstances of possession and control of the land, they satisfactorily establish the allegations of the bill. The theory upon which it is thought to exclude them, would, if adopted, extend to their exclusion in all cases

answer of a defendant as evidence in his favor. But he must take the answer as a whole and not such parts of it only as are favorable to him.[65]

(7.) Conclusive on the Defendant. — While the complainant may dispute the answer, this cannot be done by the defendant. As to him it is conclusive in the suit in which the answer is filed.[66] It is conclusive not only in the action in which it is filed, but may be so in another action on the ground of estoppel.[67]

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where, according to the former system, there was an answer under oath, without regard to their character or the manner in which they are made; and it would follow that written admissions, contrary to the averments of the answer, no matter how many times repeated, if not under oath, would be of no avail to the plaintiff. Such, it seems to us, could not have been the law." Gillett *v.* Robbins, 12 Wis. 319.

65. Answer Must Be Taken as a Whole. — Miller *v.* Avery, 2 Barb. Ch. (N. Y.) 582; McNutt *v.* Dare, 8 Blackf. (Ind.) 35; Greenleaf *v.* Highland, 1 Miss. (Walker) 375; Ormond *v.* Hutchinson, 13 Ves. 47; Freeman *v.* Tatham, 5 Hare 329.

66. Conclusive on the Defendant. Home Ins. etc. Co. *v.* Myer, 93 Ill. 271; Knowles *v.* Knowles, 86 Ill. 1; Robinson *v.* Philadelphia R. R. Co., 28 Fed. 577; Lippencott *v.* Ridgway, 11 N. J. Eq. 526; Craft *v.* Schlag, (N. J. Eq.,) 49 Atl. 431. But see Greenleaf *v.* Highland, 1 Miss. (Walker) 375, in which it is held that matters in avoidance are subject to be supported or disproved by evidence *aliunde* on both sides.

And in Fant *v.* Miller, 17 Gratt. (Va.) 187, it is held that where an answer to a pure bill of discovery is offered as evidence in an action at law, it stands the same as the testimony of a witness and subject to be disproved by other evidence.

Would Avail Nothing if Not Binding. — "Pleadings would avail little or nothing if parties were not bound by them. They would be worse than useless, if parties were permitted to allege one thing in them and to prove another on the trial, or at the hearing. Instead of aiding the court and parties in the subsequent investigation, by narrowing the field of controversy, they would serve as a lure to mislead and entrap an adversary. That the evidence must be confined to the issue between the parties, is a rule so well settled as to admit of no controversy. An attempt was made on the argument to take the present case out of this rule. It was said that if Atwater chose to rest the question of mortgage or no mortgage on a statement of indebtedness less in amount than what was due him in fact, he was not bound by such statement in a subsequent reference after the question had been decided against him. I do not think the argument a sound one. I cannot admit that a fact material to the decision of a question in one stage of a cause, can afterwards be changed or proved to be different when used by the same party in a subsequent stage of the same cause." Emerson *v.* Atwater, 12 Mich. 314.

No Evidence Against Will Be Received. — It is said in Weider *v.* Clark, 27 Ill. 251: "The defendant, in his cross-bill, alleged that he was a householder, the head of a family, and resided on the premises in controversy, at the time when the notes and mortgage were executed. This was admitted by complainant's answer, and such portion of the evidence as shows, that he was not occupying the premises at the time cannot be considered, in opposition to that admission, so long as it remains. In determining the case, the admission must be regarded as true."

Immaterial Whether Verified or Not. — It makes no difference whether an answer under oath is called for, or whether the answer is actually sworn to or not, the admissions in the answer are conclusive upon the defendant in either case. Hyer *v.* Little, 20 N. J. Eq. 443.

67. McGee *v.* Smith, 16 N. J. Eq. 462. But see Morse *v.* Slason, 16 Vt. 319.

(8.) Need Not Be Sworn To to Render Competent Against Pleader. It is not necessary to the competency of the answer, as against the party pleading it, that it be sworn to by him. It is his declaration and competent as an admission whether verified or not.[68]

(9.) On Information and Belief. — And an answer on information and belief may be good as evidence *against* the defendant as an admission.[69]

(10.) Withdrawn or Otherwise Superseded Competent As Admission. The competency of an answer as evidence does not depend upon its being a valid and subsisting pleading. It is competent as a declaration of the party against interest, although it has never been filed, or where it has been withdrawn, or superseded by an amended answer.[70] But this may depend upon the reasons for withdrawing the answer.[71]

(11.) Not Filed Competent Against Defendant. — The filing of the answer is not necessary to its competency against the defendant. It is his declaration whether filed or not, and may be used against him.[72]

(12.) May Amount to Declaration of Trust. — It is held that an answer in a suit in equity may be so far an admission of a trust as to amount in itself to a declaration of the trust.[73]

68. Need Not Be Sworn To. *United States.* — Whittemore *v.* Patten, 81 Fed. 527.

Alabama. — Julian *v.* Reynolds, 8 Ala. (N. S.) 680.

Georgia. — Sims *v.* Ferrill, 45 Ga. 585.

Illinois. — Daub *v.* Englebach, 109 Ill. 267.

Michigan. — Durfee *v.* McClurg, 6 Mich. 223.

New Jersey. — Manley *v.* Mickle, (N. J. Eq.,) 37 Atl. 738; Symmes *v.* Strong, 28 N. J. Eq. 131; Hyer *v.* Little, 20 N. J. Eq. 443; Craft *v.* Schlag, (N. J. Eq.,) 49 Atl. 431.

Unverified Admissible. — So it is said in Morris *v.* Hoyt, 11 Mich. 9: "The merits of the case depend mainly upon the facts admitted by the pleadings, no proofs having been taken except upon the reference after the preliminary decree. The answer, being without oath, is but a pleading, and of no effect as mere evidence. So far as it admits the case made by the bill, as an admission in pleading, it relieves the complainant from proof; so far as it denies the facts, or controverts the case made by the bill, it puts the complainant to his proof. But so far as it alleges any new matter of avoidance, or any fact, the burden of proving which would naturally rest upon the defendants, it is of no effect without proof."

69. 1 Daniel's Ch. Pl. & Pr., 840.

70. Daub *v.* Englebach, 109 Ill., 267.

71. Withdrawn or Superseded Competent. — "On the hearing, the chancellor, over the objection of the defendants, allowed complainants to read the answers of the defendants first filed. As these answers had been for satisfactory reasons substantially declared by the chancellor to have been filed by counsel without the concurrence of defendants, and they were allowed to file other answers showing the facts in regard to the sale and transfer of said goods, we think they ought not to have been read as the admissions of parties when other answers were allowed to be filed upon the ground that the first filed were not, in fact, the statements of the parties themselves." Hurst *v.* Jones, 10 Lea 8.

72. Worth *v.* McConnell, 42 Mich. 477.

73. May Create a Trust. Hutchinson *v.* Tindall, 3 N. J. Eq. 357.

"It is sought in this case to estab-

(13.) Not Competent Against Co-Defendant. — Exceptions. — The answer of one defendant cannot be used as evidence against his co-defendant unless the co-defendant claims through him, or they are jointly interested, or their relations are such that for some other reason the admission of one is binding on the other.[74]

lish and define the trust, by the answer of the defendant. In that, as has been seen, he states what he alleges to be the true consideration of the conveyance; and proffers his willingness to execute a declaration of trust, or secure the interest of the wife and children in any way the court may direct. Can this answer of the defendant be recognized as competent and sufficient evidence to establish the trust? A declaration of trust requires no formality, so that it be in writing, and have sufficient certainty to be ascertained and executed. It may be in a letter, or upon a memorandum; and it is not material whether the writing be made as evidence of the trust or not. The recital in a deed has been held to be a sufficient disclosure. Bellamy *v.* Burrow, Ca. Tem. Talb., 97; Deg *v.* Deg, 2 P. W., 412; Kirk *v.* Webb, Prec. Ch. 84; Jeremy's Eq., 22.

74. Not Competent as Against Co-defendant, When. — 1 Greenl. Ev., § 178.

England. — Jones *v.* Turberville, 2 Ves. Jr. 11; Morse *v.* Royal, 12 Ves. 355; Anonymous, 1 P. Wms. 300; Hoare *v.* Johnstone, 2 Keen 553; Green *v.* Pledger, 3 Hare 165; Chervet *v.* Jones, 6 Madd. 267.

United States. — Clark *v.* Van Riemsdyk, 9 Cranch 153; Leeds *v.* Marine Ins. Co., 2 Wheat. 380; Field *v.* Holland, 6 Cranch 8; Lenox *v.* Notrebe, Hempst. 251, 15 Fed. Cas. No. 8246c.

Alabama. — May *v.* Barnard, 20 Ala. 200; Julian *v.* Reynolds, 8 Ala. (N. S.) 680; Morre *v.* Hubbard, 4 Ala. 187; Taylor *v.* Roberts, 3 Ala. 83; Singleton *v.* Gayle, 8 Port. 270; Collier *v.* Chapman, 2 Stew. 163; Cockerham *v.* Davis, 5 Port. 220; Danner L. & L. Co. *v.* Stonewall Ins. Co., 77 Ala. 184; Pearson *v.* Darrington, 32 Ala. 227; Halstead *v.* Shepard, 23 Ala. 558.

Arkansas. — Whiting *v.* Beebe, 12 Ark. 421; Dunn *v.* Graham, 17 Ark. 60; Baraque *v.* Siter, 9 Ark. 545; Blakeney *v.* Ferguson, 14 Ark. 640.

Delaware. — Pleasanton *v.* Raughley, 3 Del. Ch. 124.

Florida. — Stackpole *v.* Hancock (Fla.), 24 So. 914.

Georgia. — Lunday *v.* Thomas, 26 Ga. 537; Adkins *v.* Paul, 32 Ga. 219; Allen *v.* Holden, 32 Ga. 418; Clayton *v.* Thompson, 13 Ga. 902; Carithers *v.* Jarrell, 20 Ga. 842.

Illinois. — Rector *v.* Rector, 3 Gilm. 105; Martin *v.* Dryden, 6 Ill. (1 Gilm.) 187; Rust *v.* Mansfield, 25 Ill. 297; Personeau *v.* Pulliam, 47 Ill. 58; Hill *v.* Ormsbee, 12 Ill. 166.

Indiana. — McClure *v.* McCormick, 5 Blackf. 120; Townsend *v.* McIntosh, 14 Ind. 57.

Iowa. — Jones *v.* Jones, 13 Iowa 277; De France *v.* Howard, 4 Clarke 524; Williamson *v.* Haycock, 11 Iowa 40; Mobley *v.* Dubuque Gas L. Co., 11 Iowa 71.

Kentucky. — Rees *v.* Lawless, 4 Litt. 219; Winters *v.* January, Litt. Sel. Cas. 13; Moseley *v.* Armstrong, 3 Mon. 287; Harrison *v.* Edwards, 3 Litt. 340; Harrison *v.* Johnson, 3 Litt. 286; Hardin *v.* Baird, 1 Litt. Sel. Cas. 341; Turner *v.* Holman, 5 Mon. 410; Jones *v.* Bullock, 3 Bibb 467; Fanning *v.* Pritchett, 6 Mon. 79; Blight *v.* Banks, 6 Mon. 192; White *v.* Robinson, 1 A. K. Marsh. 423; Hunt *v.* Stephenson, 1 A. K. Marsh. 424; Davis *v.* Harrison, 2 J. J. Marsh. 190; Graham *v.* Sublett, 6 J. J. Marsh. 44; Bartlett *v.* Marshall, 2 Bibb 467.

Maine. — Gilmore *v.* Patterson, 36 Me. 544; Robinson *v.* Sampson, 23 Me. 388; Felch *v.* Hooper, 20 Me. 159.

Maryland. — Winn *v.* Albert, 2 Md. Ch. 169; Glenn *v.* Grover, 3 Md. 212; Stewart *v.* Stone, 3 Gill & J. 510; Glenn *v.* Baker, 1 Md. Ch. 73; Haywood *v.* Carroll, 4 Har. & J. 518; Powles *v.* Dilley, 9 Gill 222; Calwell *v.* Boyer, 8 Gill & J. 136; Harwood *v.* Jones, 10 Gill & J. 404; McKim *v.* Thompson, 1 Bland 150; Lingan *v.* Henderson, 1 Bland 236; Bevans *v.*

(14.) Not Competent in Another Action Against Representative. — So it is held that an answer of a defendant is not competent evidence in another action, relative to the same transactions, against his representatives.[75] And this is true whether the answer is one filed in the same action in which it is offered in evidence, or in a different action.[76] But an admission in an answer by one defendant may be sufficient to establish the facts as against other defendants.[77] And a party may so acquiesce in an answer, verified by another, as to render it a binding admission against him.[78]

(15.) Failure of One Defendant to Answer Not Competent Against

Sullivan, 4 Gill 383; Reese *v.* Reese, 41 Md. 554.

Massachusetts. — Chapin *v.* Coleman, 11 Pick. 330.

Michigan. — Emerson *v.* Atwater, 12 Mich. 314.

Mississippi. — Lockman *v.* Miller (Miss.), 22 So. 822; Hanover Nat. Bank *v.* Klein, 64 Miss. 141; Holloway *v.* Moore, 4 Smed. & M. 594.

New Jersey. — Vanderveer *v.* Holcomb, 17 N. J. Eq. 547; Hoff *v.* Burd, 17 N. J. Eq. 201; McElroy *v.* Ludlum, 32 N. J. Eq. 828.

New York.—Webb *v.* Pell, 3 Paige Ch. 368; Phoenix *v.* Dey, 5 Johns. 412; Judd *v.* Seaver, 8 Paige Ch. 548.

Pennsylvania. — Eckman *v.* Eckman, 55 Pa. St. 269.

Tennessee. — Turner *v.* Collier, 4 Heisk. 89.

Vermont. — Connor *v.* Chase, 15 Vt. 764; Porter *v.* Bank of Rutland, 19 Vt. 410.

Virginia. — Pettit *v.* Jennings, 2 Rob. 676; Dade *v.* Madison, 5 Leigh 401.

75. Drury *v.* Conner, 6 Har. & J. (Md.) 288.

76. Wells *v.* Stratton, 1 Tenn. Ch. 328; Dexter *v.* Arnold, 3 Sum. 152, 7 Fed. Cas. No. 3859.

77. Fergus *v.* Tinkham, 38 Ill. 407; Nix *v.* Winter, 35 Ala. 309.

Exception to Rule That Answer of One Not Good Against Another. In passing upon this question of the effect of an answer of one defendant upon his co-defendant, it was said in McLane *v.* Riddle, 19 Ala. 180: "It is a general rule with but few exceptions, that the answer of one defendant is not evidence against another. Yet when the right of the complainant as against one defendant is only prevented from being complete by some question between the plaintiff and the second defendant, the answer of the second defendant may be read as evidence. Thus, if a mortgage is assigned, and the assignee files a bill against both the mortgagor and the assignor, and the mortgage is proved and the assignor admits the assignment, the complainant will be entitled to a decree notwithstanding the mortgagor may deny all knowledge of the assignment. See 2 Dan. Ch. Pr. 982; 3 Hare 165. The reason of this is, that the mortgagor has no interest in the assignment, and as the answer of the assignor estops him, the equity of the assignee is complete. If the answer of the assignor is evidence to prove the assignment, his admissions made before the bill is filed *must* be evidence of the same fact. I admit that this view is inconsistent with the case of Moore et al *v.* Hubbard, 4 Ala. 187, but I am entirely satisfied that the decision in that case cannot be sustained."

So it is said in Whiting *v.* Beebe, 12 Ark. 421: "As a general rule, it is true that the answer of one defendant cannot be used against another. To this rule there are exceptions; one of which is thus laid down in Daniel's Chancery Pleading and Practice, vol. 2, page 982: 'In case, however, where the rights of the plaintiff, as against one defendant, are only prevented from being complete by some question between the plaintiff and a second defendant, it seems that the plaintiff is permitted to read the answer of such second defendant for the purpose of completing his claim against the first.'"

78. Dyett *v.* North Am. Coal Co., 20 Wend. (N. Y.) 570.

Another. — The failure of one defendant to answer which would amount to an admission against him of the truth of the allegations of the bill, cannot be taken as such admission as against a co-defendant.[79]

(16.) Admissions in the Answer. — Any admissions in the answer, whether under oath or not, are conclusively binding on the defendant in the action in which the answer is filed, and relieves the complainant from proving the fact admitted.[80] And the rule applies although discovery has been waived by the bill.[81] Therefore, no evidence will be heard from the defendant to dispute a fact thus

79. Effect of Failure of One Defendant to Answer. — Timberlake etc. *v.* Cobbs, 2 J. J. Marsh. (Ky.) 136; Blight *v.* Banks, 6 Mon. (Ky.) 192; Dickenson *v.* Railroad Co., 7 W. Va. 390; Harrison *v.* Johnson, 3 Litt. (Ky.) 286.

Limitation of the Rule. — But the rule is limited to matters in which the co-defendant is himself interested. Therefore, upon the matter in which he has no interest, the answer of his co-defendant is just as effective as if he were not a party to the suit. Blight *v.* Banks, 6 Mon. (Ky.) 192, in which it is said: "We have already seen that the title is established from the patentees to David and Burges Allison, and it has been insisted that as the bill is taken as confessed against the rest, the confession is sufficient as against them, and all concerned. It will be admitted that the confession is clear evidence against the defendants, who are silent, and indeed as to all others, whose interest can not be prejudiced by the confession.

"As the title has passed from Banks and Claibourne, it is evident that they have no right to interfere with the fact admitted by the answers or silence of other grantors, unless they shall make out a valid lien, and the admissions of the defendants against whom the bill is taken as confessed, shall operate against his lien, in which case, their silence cannot prejudice him."

80. Effect of Admissions in the Answer. — *United States.* — Tilghman *v.* Tilghman, 1 Baldw. 464, 23 Fed. Cas. No. 14,045; National etc. Co. *v.* Interchangeable etc. Co., 83 Fed. 26; Commonwealth T. I. & T. Co. *v.* Cummings, 83 Fed. 767; Robinson *v.* Philadelphia Ry. Co., 28 Fed. 577.

Alabama. — Toney *v.* Moore, 4 Stew. 347; Adams *v.* Shelby, 10 Ala. (N. S.) 478; Holmes *v.* State, (Ala.), 14 So. 51.

Arkansas. — Pelham *v.* Floyd, 9 Ark. 530; Pelham *v.* Moreland, 6 Eng. 442.

Georgia. — Imboden *v.* Etowah etc. Min. Co., 70 Ga. 86; Justices etc. *v.* Griffin, 15 Ga. 39.

Illinois. — Weider *v.* Clark, 27 Ill. 251; Fergus *v.* Tinkham, 38 Ill. 407; Miller *v.* Payne, 4 Ill. App. 112; Chickering *v.* Fullerton, 90 Ill. 520; McNail *v.* Welch, 26 Ill. App. 482; Higgins *v.* Curtiss, 82 Ill. 28; Wick *v.* Weber, 64 Ill. 167.

Kentucky. — Elliot *v.* Whaley, 1 A. K. Marsh. 460; Atwood *v.* Harrison, 5 J. J. Marsh. 329.

Michigan. — Morris *v.* Hoyt, 11 Mich. 9.

Mississippi. — Taylor *v.* Webb, 54 Miss. 36.

New Hampshire. — Hollister *v.* Barkley, 11 N. H. 500.

New Jersey. — Tate *v.* Field (N. J. Eq.), 37 Atl. 440; Lippencott *v.* Ridgway, 11 N. J. Eq. 526; Hyer *v.* Little, 20 N. J. Eq. 443.

New York. — Balchen *v.* Crawford, 1 Sandf. 380, 7 N. Y. Ch. 366.

Tennessee. — Yost *v.* Hudiburg, 2 Lea 627; Brown *v.* Brown, 10 Yerg. 84.

Vermont. — McDonald *v.* McDonald, 16 Vt. 630; Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Dec. 58.

West Virginia.—Jones *v.* Cunningham, 7 W. Va. 707.

81. Where the Bill Waives Discovery. — Imboden *v.* Etowah etc. Min. Co., 70 Ga. 86.

admitted.[82] And this effect has been given to the original answer where a supplemental answer has been filed.[83] But it must be limited to the exact admissions made.[84] And it is held that nothing will be regarded as admitted unless it is *expressly* admitted.[85] But

82. Defendant Cannot Dispute. Robinson *v.* Philadelphia Ry. Co., 28 Fed. 577; Weider *v.* Clark, 27 Ill. 251; Evans *v.* Huffman, 5 N. J. Eq. 354; Pharis *v.* Leachman, 20 Ala. 662; Hyer *v.* Little, 20 N. J. Eq. 443; Shirley *v.* Long, 6 Rand. (Va.) 764.

Admission Precludes All Inquiry. The case of Van Hook *v.* Somerville Mfg. Co., 5 N. J. Eq. 633, 45 Am. Dec. 401, involved the execution of a mortgage. In speaking to this question, the court said: "The first question for the consideration of the court is, whether the mortgage set forth in the bill of complaint is the deed of the company. So far as regards these parties, and under the pleadings in the cause, this can not be an open question. The answer of the defendants distinctly admits that the company executed the bond and mortgage in the manner set forth in the bill of complaint. This admission precludes all inquiry into the fact or the manner of the execution."

83. Effect of Original Where Supplemental Answer Filed. — "The original answer, until it is otherwise ordered, always remains a part of the record, and, while it so remains, the defendant is bound by its admissions, and a retraction of them in a supplemental answer is of no more use than so much waste paper. The court never allows its records to be incumbered with useless papers. If an admission has been made in an answer improvidently and by mistake, the court will relieve the party making it from its effect, by an order directing so much of the answer as contains the admission to be treated as no part of the record, but, before such an order will be made, the court must be satisfied by affidavit that the admission was made under a misapprehension or by mistake. Courts exercise a liberal discretion in relieving from the effect of admissions in answers not under oath, which are mere pleadings and are frequently signed by counsel; but where an answer is under oath, great caution is observed. If the relief sought is from an admission of law, it may be sufficient to show that he was erroneously advised by his solicitor in that regard; but where the relief sought is from an admission of fact, it should be shown that the answer was drawn with care and attention, stating upon information and belief such facts as were not within the defendant's own knowledge. No court ought to relieve a party from the consequences of a reckless misstatement under oath. It should also be shown that the fact misstated was not one within the defendant's own knowledge, and that he was erroneously informed in regard to it, and made oath to the answer, honestly believing such erroneous information." Maher *v.* Bull, 39 Ill. 530.

84. Limited to Exact Admissions. "At this stage, it will be convenient to dispose of a point made and insisted upon by the complainant, that inasmuch as the bill alleges that the deed was given for security, and the answers all admit that the grantors, Hunter, Leeds and Thorn, and their wives, 'made and executed a certain deed, or instrument in writing, of such date and of such purport and effect, as in the complainant's bill is mentioned and set forth,' this is an admission of the fact that the deed was made merely as and for a mortgage, and precludes all inquiry on the subject. But that position can not be maintained. The bill sets forth the deed *verbatim*, and the admission under consideration is merely that the instrument was given, and without admitting or denying that it was exactly as stated in the bill, conceded that it was indeed substantially so." Brown *v.* Balen, 33 N. J. Eq. 469.

85. Must Be Expressly Admitted. Morris *v.* Morris, 5 Mich. 171; Schwarz *v.* Sears, Walk. Ch. (Mich.) 19; White *v.* Wiggins, 32 Ala. 424; Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937.

as to this the cases are not agreed.[86]

The admission of facts in an answer may be sufficient to overcome its positive denials.[87] And where the facts alleged in the bill are admitted, and matter in avoidance alleged, the complainant need not prove the facts thus admitted, but the defendant must prove the matter in avoidance.[88] But the answer may admit the facts alleged in the bill and the complainant not be entitled to recover. This will be so where the bill fails to state facts sufficient to entitle the complainant to any relief.[89] And an admission of a fact by the answer will not avail the complainant unless put in issue by the bill.[90]

(17.) Where the Answer Neither Admits Nor Denies. — It is held

86. Higgins *v.* Curtiss, 82 Ill. 28; Taylor *v.* Webb, 54 Miss. 36; Lewis *v.* Knoxville F. Ins. Co., 85 Tenn. 117, 2 S. W. 17.

Modifications Result From Statutes. — But it should not be overlooked that in some cases the modification of the rule results in other statutory provisions. McAllister *v.* Clopton, 51 Miss. 257.

87. Thus it is said in Yost *v.* Hudiburg, 2 Lea (Tenn.) 627: "Had the answer stopped with a simple denial of the allegation that the money or means of A. S. Hudiburg paid for the property purchased from Coffman, the *onus* would have been upon the complainant to prove the allegation; but the answer having gone further, the complainant is entitled to the benefit of all the admissions; and while in the present attitude we must take the history of the transaction as stated in the answer, yet he is at liberty to draw any legitimate inference from those statements, even though it be to establish the existence of fraud in the face of the general denials of the answer."

88. Defendant Must Prove Matters in Avoidance.—Clarke *v.* White, 12 Pet. 178; Tilghman *v.* Tilghman, 1 Baldw. 464, 23 Fed. Cas. No. 14,045; Randall *v.* Phillips, 3 Mason 378, 20 Fed. Cas. No. 11,555.

89. Bill Must State Cause of Action or Admission Not Effective. In Belew *v.* Jones, 56 Miss. 342, it was held that, notwithstanding the facts alleged in the bill were admitted by the answer, the cause might be reversed on appeal, and the bill dismissed, where by the bill itself complainant was not entitled to any relief, the court saying: "In West Feliciana Railroad Company *v.* Stockett et al., 27 Miss. 743, 744, it was held that a decree founded on a *pro confesso* of the bill must stand or fall on its allegations; that if the complainant did not state a case for relief, the confession of it, by a failure to contest it, did not impart to it any new or additional virtue, and the decree must be reversed. The analogy between that case and one where the answer merely formally admits the truth of the matters alleged in the bill is complete. In the one case, the *pro confesso* operates as a conclusive admission by the defendant; in the other, the defendant appears, and, by his pleading, makes the formal admission. In either case, when the chancellor comes to make his decree, he looks to the record, and grants relief, or not, on the case which it presents. The question before him is like that of 'agreed facts,' or 'a special verdict,' before the common-law judge. The facts are *conclusively ascertained*, and the judge pronounces the sentence of the law upon them. So, when the chancellor comes to make up his decree on a bill, and an answer which admits the matters of fact alleged in the bill to be true, he finds the facts conclusively ascertained, and the function which he performs is to declare whether the complainant is entitled to relief or not."

90. Hoff *v.* Burd, 17 N. J. Eq. 201.

that where the answer neither admits nor denies the facts alleged in the bill, they must be proved.[91]

But again it is held that a material fact clearly and fully averred in the bill, and not denied or alluded to in the answer, must be taken as confessed.[92]

91. Where Answer Neither Admits Nor Denies. — *United States.* Young *v.* Grundy, 6 Cranch 51; Com. T. I. & T. Co. *v.* Cummings, 83 Fed. 767.

Alabama. — Bank of Mobile *v.* Planters and Merchants' Bank, 8 Ala. 772.

Arkansas. — Hardy *v.* Heard, 15 Ark. 184; Bonnell *v.* Roane, 20 Ark. 114.

Florida. — Stackpole *v.* Hancock, 40 Fla. 362, 24 So. 914.

Georgia. — Keaton *v.* McGwier, 24 Ga. 217.

Illinois. — Kitchell *v.* Burgwin, 21 Ill. 40; De Wolf *v.* Long, 2 Gilm. 679; Stacey *v.* Randall, 17 Ill. 467; Wilson *v.* Kinney, 14 Ill. 27; Nelson *v.* Pinegar, 30 Ill. 473; Trenchard *v.* Warner, 18 Ill. 142; Thomas *v.* Adams, 59 Ill. 223; Dooley *v.* Stipp, 26 Ill. 86; Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937.

Kentucky. — Kennedy *v.* Meredith, 3 Bibb 465; Owings *v.* Patterson, 1 A. K. Marsh. 325.

Maryland. — Briesch *v.* McCauley, 7 Gill 189.

Michigan. — Hardwick *v.* Bassett, 25 Mich. 149.

Mississippi. — Gartman *v.* Pendleton, 24 Miss. 234.

Missouri. — Gamble *v.* Johnson, 9 Mo. 605.

New York. — Brockway *v.* Copp, 3 Paige Ch. 539.

Tennessee. — Hill *v.* Walker, 6 Cold. 424, 98 Am. Dec. 465; Teil *v.* Roberts, 3 Hayw. 138; Wilson *v.* Carver, 4 Hayw. 90; Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 599.

Virginia. — Cropper *v.* Brerton, 5 Leigh 426; Coleman *v.* Lyne, 4 Rand. 454.

Affect of Allegation of Want of Knowledge. — "No answer, from any knowledge possessed by the respondent, is made to the allegation that the complainant acquired complete title to the land under the pre-emption laws of the United States, nor to the charge contained in the bill of complaint, that the deed was procured by threats of personal violence amounting to actual duress. On the contrary, the answer alleged that the respondent before the court was an utter stranger to all those matters and things, and that he could not answer concerning the same, because he had no information or belief upon the subject.

"Authorities are not wanting to the effect, that all matters well alleged in the bill of complaint, which the answer neither denies nor avoids, are admitted; but the better opinion is the other way, as the sixty-first rule adopted by this court provides that if no exception thereto shall be filed within the period therein prescribed, the answer shall be deemed and taken to be sufficient.

"Material allegations in the bill of complaint ought to be answered and admitted, or denied, if the facts are within the knowledge of the respondent; and if not, he ought to state what his belief is upon the subject, if he has any, and if he has none, and cannot form any, he ought to say so, and call on the complainant for proof of the alleged facts, or waive that branch of the controversy; but the clear weight of authority is, that a mere statement by the respondent in his answer, as in this case, that he has no knowledge that the fact is as stated, without any answer as to his belief concerning it, is not such an admission as is to be received as full evidence of the fact." Brown *v.* Pierce, 7 Wall. 205.

92. Alleging Want of Knowledge. — Sanborn *v.* Adair, 29 N. J. Eq. 338; Jones *v.* Knauss, 31 N. J. Eq. 609; Pinnell *v.* Boyd, 33 N. J. Eq. 190; Neale *v.* Hagthrope, 3 Bland (Md.) 551; Page *v.* Winston, 2 Munf. (Va.) 298. See also Mickle *v.* Maxfield, 42 Mich. 304; McAllister *v.* Clopton, 51 Miss. 257.

Failure to Deny Fact Clearly Alleged. — In Lee *v.* Stiger, 30 N. J.

(18.) Alleging Want of Knowledge. — And an answer professing a want of knowledge of the facts of the bill cannot be considered as evidence, but is sufficient to compel the complainant to establish them by proof.[93] In this the equity practice differs from the rule under the codes that all matters alleged in the complaint, and not denied in the answer, are admitted.[94] And the rule has been changed by statute in some of the states.[95]

(19.) Need Not Be Specific. — It is not necessary that the answer be specific as to each fact alleged in the bill: a general denial of matters not admitted is sufficient if not objected to.[96]

(20.) Matters Charged to Be Within Defendant's Knowledge. — Where there is a distinct charge in the bill that the matters are within the personal knowledge of the defendant, and he is asked to answer it, his failure to do so is an admission of its truth.[97] So it is held

Eq. 610, the court said: "The answer neither admits nor denies the averment of the bill that the mortgaged premises were conveyed to her subject to the lien of the mortgagee; nor does it contain any allusion to that fact. The bill on this point is unanswered and undisputed. A material and controlling fact, which is clearly and fully averred in the bill, and not denied or alluded to in the answer, must be taken as confessed. Sanborn v. Adair, 2 Stew. 338. As the pleadings now stand, it must be taken as an admitted fact that both the mortgagor and the defendant have recognized the mortgage in question as a valid lien."

Again it is said: "The bill distinctly charges that he took the mortgage with full notice of the trust. To this he has made no response whatever. He has even omitted to say whether or not an assignment was made to him, or whether or not he claims any right to, or interest in, the mortgage. He has not offered himself as a witness. That he is not an innocent purchaser, must be considered as admitted. A material and controlling fact, which is clearly and fully averred in the bill, and not denied or alluded to in the answer, must be taken as confessed." Jones v. Knauss, 31 N. J. Eq. 609.

93. Drury v. Conner, 6 Har. & J. (Md.) 288.

94. Colbert v. Henley, 64 Miss. 374.

95. Mead v. Day, 54 Miss. 58.

96. Stackpole v. Hancock, 40 Fla. 362, 24 So. 914; Core v. Bell, 20 W. Va. 169.

97. Where Bill Charges Matters To Be Within Defendant's Knowledge. — Tate v. Field, 56 N. J. Eq. 35, 37 Atl. 440; Smilley v. Siler, 35 Ala. 88; Ross v. Shurtleff, 55 Vt. 177; Lyon v. Bolling, 14 Ala. (N. S.) 753.

Facts Charged To Be Within Defendant's Knowledge. — It was held in Mead v. Day, 54 Miss. 58, that independently of the statute of that state, whenever the facts are charged in a bill in equity as being within the personal knowledge of the respondent, he must explicitly admit or deny them; and, if he fails to do so, they will be taken as admitted. But, if the allegations of the bill are not of that character, a failure to deny them is ground only of exception to his answer, and will not justify the complainant in treating them as admitted. With respect to the affect of the statute upon the question, the court said: "Let us see what change has been wrought in these principles by our statute. Sec. 1016, Code 1871, provides that 'the answer shall be responsive to all the material allegations of the bill;' and § 1024 declares that 'facts averred in the bill, and not denied by the answer, otherwise than by the general traverse, may be taken at the hearing as admitted.' These provisions are brought forward into our present code from the code of 1857, 547, arts. 44 and 45. They have been three times the subject of comment in this court. In Rey-

that where the facts are actually or *prima facie* within the knowledge, information or belief of the defendant, if in his answer he

nolds *v.* Nelson, 41 Miss. 83, it was said that the complainant might well have set down the case on bill and answer, 'for the answer does not deny a single allegation of the bill, but only alleges that the defendant has no knowledge of any of the facts stated in the bill, and demands strict proof.' In Cowen *v.* Alsop, 51 Miss. 158, the answer only declared that 'defendant does not admit' the charges made. The charges were not as to matters within the personal knowledge of the respondent. Peyton, C. J., thought that the facts could not be taken as admitted, but that exception should have been taken to the answer. Tarbell, J., thought, that under the statute they were admitted. Simrall, J., having been of counsel, took no part. In McAllister *v.* Clopton, 51 Miss. 259, the respondent answered that he had no personal knowledge, and required strict proof; and it was held that this was equivalent to an admission under the statute.

"We think that the statute intended to some extent to obviate the necessity of exceptions to answers, and to compel the respondent, at the risk of having the allegations of the bill taken for confessed, fairly to meet and join issue on the issues tendered by the bill. In doing so, he is compelled to do something more than disclaim personal knowledge of the fact charged. A man's personal knowledge is frequently limited within a very narrow range, and we all act every day with the utmost confidence, and in the most important concerns of life, upon the informations of others, and the belief thereby engendered in ourselves. To this sort of information and belief, upon the part of the respondent, the complainant is entitled, when he puts him upon his corporal oath touching the matters in dispute between them; and the respondent cannot avoid a disclosure by a mere declaration that he knows nothing about the allegations made. Independently of our statute, such an answer would be liable to exception for insufficiency. Under the statute, the charges may be treated as having been admitted. Under no system is the vicious and too common habit of neither admitting nor denying anything, but calling for strict proof of everything, admissible."

Facts Presumed To Be Within Defendant's Knowledge. — The same rule is declared in Hardy *v.* Heard, 15 Ark. 184, in which it is said: "As a defendant in chancery, submitting to answer, must answer fully and fairly, he has no right to say he is not willing to admit any particular fact or facts, and rest his defense there; nor can he take shelter behind sweeping and broad denials, or vague generalities. (3 B. Mon. 17, 18.) Such a practice would thwart the end to be attained by courts of equity, which is to arrive at the real justice of the case by appealing to the conscience of the defendant. And this brings us to the question as to the consequences of a failure to answer a fact charged, and presumed to be within the knowledge of the defendant. The general rule as to answering in chancery, was elaborately discussed by this court in Blakeney *v.* Ferguson, decided at January term, 1854. The fact in that case was, that the complainants alleged themselves to be, and claimed as widow and heirs at law of Joseph Ferguson, deceased. Blakeney, in answering, entirely omitted to notice or answer that statement, and there was no proof of it at the hearing. It was neither charged, nor could it be presumed, to be within his knowledge. On this state of case, quite different from the one now involved, the court very correctly and properly applied the general rule, that the failure of Blakeney to answer that statement could not amount to an implied admission of its truth, and as the complainants had omitted to prove it, the decree could not be sustained. That rule is well supported by authority, and with it we are entirely satisfied; and think it should govern in all cases, where the fact is neither charged, nor could be presumed within the knowledge of the defendant.

fails to deny them, or express his belief of their falsity, and does not state that he cannot form any belief respecting their truth, they must be considered as admitted."[98]

"But, it has now become to be a clear exception to that rule, which we feel disposed to recognize and enforce, that where the bill charges the fact to be within the knowledge of the defendant, and which may fairly be presumed to be so; or without so charging, the fact may reasonably be said to be within the defendant's knowledge, if the answer is silent as to that fact, or it is answered evasively, it amounts to an *implied admission* of the facts thus stated; and no further proof is necessary to warrant a decree against the defendant upon it. (Scott *v.* Hume, Lit. Sel. Cas. 379; Lewis *v.* Stafford, 4 Bibb. 318; Moore *v.* Lockett, 2 Bibb. 69; McCampbell *v.* Gill, 4 J. J. Marsh. 90; Price adm. *v.* Boswell, 3 B. Mon. 17, 18; Mitchell *v.* Maupin, 3 Mon. 187; Bright *v.* Wagle, 3 Dana 256; Armitage *v.* Wickliffe, 12 B. Mon. 488; Neale *v.* Haythorp, 3 Bland 551.) Evasion is worse than silence; because the former may be the result of carelessness or inattention, while the latter springs from design, and is entitled to no favor whatever.

"This exception and qualification of the general rule are only applicable in cases of knowledge, either charged or presumed; and if a fact should be charged to be within the knowledge of the defendant, which in the very nature of things could not be, or it was extremely improbable it should be so, there could of course be no implied admission arising from either silence or evasion. Before the complainant can have the benefit of the implied admission, it must appear reasonable that the fact is within the knowledge of the defendant."

Where Knowledge Cannot Be Presumed. — And again: "The failure of T. T. Bolling to answer as to the indebtedness of his father to the complainant, cannot be regarded as an admission of the fact. It is not alleged in the bill that this defendant was informed of the payments made by the complainant to McVoy, and it cannot be presumed that he possessed other knowledge or information in respect to them than the bill affords. The rule then, 'that whatever is specifically averred in a bill, and not denied in the answer, must be taken as admitted,' does not apply." Lyon *v.* Bolling, 14 Ala. (N. S.) 753.

98. Where in Fact Within His Knowledge. — Smilley *v.* Siler, 35 Ala. 88; Moseley *v.* Garrett, 1 J. J. Marsh. (Ky.) 212; Thorington *v.* Carson, 1 Port. (Ala.) 257; Clark *v.* Jones, 41 Ala. 349; Kirkman *v.* Vanlier, 7 Ala. 217; Kennedy *v.* Meredith, 3 Bibb (Ky.) 465; Cowan *v.* Price, 1 Bibb (Ky.) 172.

Facts Prima Facie Within Defendant's Knowledge. — In Grady *v.* Robinson, 28 Ala. 289, it is said: "Where material matters are stated in the bill, which, *prima facie*, are within the knowledge, information, or belief of the defendant, if in his answer he fails to deny them, or to express his belief of their falsity, and does not state that he cannot form any belief respecting their truth, they must be considered as admitted, without any order taking them for confessed. McClain *v.* Waters, 9 Dana 55; Bailey *v.* Wilson, 1 Dev. & Batt. Eq. Rep. 187. A vague manner of denial of such matters is always received unfavorably. A defendant is not at liberty thus to put in issue allegations, which he may *know* or fully *believe*, to be true. If he expresses himself obscurely, and leaves to the court the task of divining his meaning, the court adopts that construction of his language which is strongest against him. He cannot be allowed to shelter himself behind equivocal, evasive, or doubtful terms, and thus mislead the complainant; nor behind a literal denial which amounts to no more than a negative pregnant, or an evasion of the point of substance."

Effect of Equivocal Answer. So it is held that where a bill makes an allegation of a fact, which, if true,

(21.) By Failure to Answer. — If a defendant is duly served with the subpoena and fails to answer, he thereby admits the allegations of the bill, but no more.[99]

(A.) By Failure to File Replication. — In order to put in issue the allegations of the answer, the plaintiff must file a replication thereto. If he does not, his failure amounts to an admission of the truth of the facts alleged in the answer.[100]

must be within the knowledge of the defendant, he should respond to it positively. If the answer is equivocal, the bill will be taken as true. Pierson *v.* Meaux, 3 A. K. Marsh. (Ky.) 4.

Charged or Presumed To Be Within Defendant's Knowledge. In Moore *v.* Lockett, 2 Bibb (Ky.) 67, it is further said: "If an answer is silent as to a matter charged in the bill to be within the defendant's knowledge, or which may be fairly presumed so to be, the matter ought to be considered as admitted; but ought not, where the matter is not so charged, or cannot reasonably be presumed to be within his knowledge. This appears to us the most equitable rule upon the subject; for if the defendant files an insufficient answer, the complainant can except, and compel a better one. But were he permitted to consider as admitted every fact not particularly denied by the answer, it would frequently produce surprise on the defendant; and moreover, oftentimes occasion decrees contrary to the real justice of the cause, upon implied admissions, false in fact."

99. Effect of Failure to Answer. Atwood *v.* Harrison, 5 J. J. Marsh. (Ky.) 329; Robinson *v.* Townshend, 3 Gill. & J. (Md.) 413; Blakeney *v.* Ferguson, 14 Ark. 640.

100. By Failure to Reply. *United States.* — Reynolds *v.* Crawfordsville Nat. Bank, 112 U. S. 405; Gettings *v.* Burch, 9 Cranch 372.

Alabama. — McGowan *v.* Young, 2 Stew. 276; Lucas *v.* Bank of Darien, 2 Stew. 280.

Illinois. — Trout *v.* Emmons, 29 Ill. 433, 81 Am. Dec. 326; Buntain *v.* Wood, 29 Ill. 504; Prettyman *v.* Barnard, 37 Ill. 105; De Wolf *v.* Long, 2 Gilm. 679.

Indiana. — Hale *v.* Plummer, 6 Ind. 121.

Kentucky. — Mason *v.* Peck, 7 J. J. Marsh. 301.

Michigan. — Hardwick *v.* Bassett, 25 Mich. 149.

New Jersey. — Thomas *v.* De Baum, 14 N. J. Eq. 37; Bunker *v.* Anderson, 32 N. J. Eq. 35.

North Carolina. — Fleming *v.* Murph, 6 Jones Eq. 59.

Vermont. — Wright *v.* Bates, 13 Vt. 341; Doolittle *v.* Gookin, 10 Vt. 265.

Virginia. — Pickett *v.* Chilton, 5 Munf. 467.

Effect of Failure to File Replication. — In Sneed *v.* Town, 9 Ark. 535, in passing upon the effect of the failure to file a replication, the court said: "That objection is, that, inasmuch as the record presents upon its face, no replication to the answers, the law confines the hearing to the bill, answers and exhibits, and thus the depositions will be excluded. And such is undoubtedly the law of which our statute, referred to by the appellants, is but a declaration or affirmance; and in such case the answer must be taken as true in all things, whether the matter contained in it be responsive or not, or whether it be negative or affirmative, for the reason, not only that the complainant in the bill thereby intimates his admission of all these facts, but also that by his omission he prevents the respondents from proving such of them as he would otherwise have to establish by evidence, by paralyzing his authority to sue out a commission to examine witnesses, which neither party can do until after an issue shall have been formed by the pleadings, unless for aged and infirm witnesses, and in other cases which are within the range of the exception to this rule."

But the filing of the replication may be waived, or its filing allowed by the court *nunc pro tunc*.[1]

(B.) The Filing of Necessary Pleading May Be Waived. — If the parties go to trial without the filing of a pleading necessary to form an issue, and thereby treat the case as at issue, the failure to file the pleading will not amount to an admission.[2]

(C.) Refusal to Answer. — It is held that the refusal to answer by the defendant is not to be taken as an admission of the allegations of the bill that have not been answered.[3]

(D.) Admissions Against Infants. — The rule is that no admission, binding upon him, can be made by an infant, but that, notwithstanding such admission on his part, the complainant must prove his case.[4]

(22.) **Guardian Ad Litem Cannot Bind By.** — And that no binding admission can be made for an infant by a guardian *ad litem*.[5]

1. Filing Replication May Be Waived. — *United States.* — Reynolds *v.* Crawfordsville F. Nat. Bank, 112 U. S. 405; Brown *v.* Pierce, 7 Wall. 205.

Arkansas. — Jordan *v.* Bronough, 11 Ark. 702.

Illinois. — Marple *v.* Scott, 41 Ill. 50; Jones *v.* Neely, 72 Ill. 349.

Kentucky. — Scott *v.* Clarkson, 1 Bibb 277.

Maryland. — Glenn *v.* Hebb, 12 Gill. & J. 271.

Michigan. — Hardwick *v.* Bassett, 25 Mich. 149.

New Jersey. — Gaskill *v.* Sine, 13 N. J. Eq. 130.

North Carolina. — Fleming *v.* Murph, 6 Jones Eq. 59.

2. Waiver of Necessary Pleading. — Stark *v.* Hillibert, 19 Ill. 344; Webb *v.* Alton M. & F. Ins. Co., 5 Gilm. (Ill.) 223; Jameson *v.* Conway, 5 Gilm. (Ill.) 227; Marple *v.* Scott, 41 Ill. 50; Scott *v.* Clarkson, 1 Bibb (Ky.) 277; Gaskill *v.* Sine, 13 N. J. Eq. 130.

3. McDowell *v.* Goldsmith, 2 Md. Ch. 370.

4. Admissions in Pleadings of Infants. — McClay *v.* Norris, 4 Gilm. (Ill.) 370; Hitt *v.* Ormsbee, 12 Ill. 166; Tompkins *v.* Tompkins, 18 N. J. Eq. 303; Masterson *v.* Wiswould, 18 Ill. 48; Tuttle *v.* Garrett, 16 Ill. 354; Kent *v.* Taneyhill, 6 Gill. & J. (Md.) 1; Harris *v.* Harris, 6 Gill. & J. (Md.) 111; Watson *v.* Godwin, 4 Md. Ch. 25; Benson *v.* Wright, 4 Md. Ch. 278; Wrotterfly *v.* Bendish, 3 P. Wms. 235.

5. Guardian Ad Litem Cannot Admit. — *United States.* — Lenox *v.* Notrebe, Hempst. 251, 15 Fed. Cas. No. 8246c.

Illinois. — Cochran *v.* McDowell, 15 Ill. 10.

Maryland. — Kent *v.* Taneyhill, 6 Gill. & J. 1.

Virginia. — Bank of Alexandria *v.* Patton, 1 Rob. 528.

Admission by Guardian Ad Litem. In Carr *v.* Fielden, 18 Ill. 77, a guardian *ad litem* put in an answer substantially admitting the allegations of the bill, and no proof in support of certain material allegations of the bill was made. The court held that full proof was necessary in equity proceedings against an infant no matter what answer might be made by his guardian *ad litem*.

Bill Against Infant Not Taken as Confessed. — "It has been held in Virginia, and in this state, that it was error to proceed to decree against infant defendants until they shall have answered by guardian *ad litem*. The policy of the law, and the rules and principles governing courts of chancery, has never been to take bills for confessed by infants for the want of an answer. Infants are deemed and taken to be incapable of making contracts or admissions in civil transactions, ordinarily, that are binding upon them. And it is because of the legally supposed want of proper understanding and discretion of the infant that he is not permitted to sue in his own name; and when he is sued in civil proceedings, that he is

D. In Divorce Cases. — a. *Case Not Made Out by Admissions in Pleadings.* — The rule as to admissions by the pleadings, either expressly, or by a failure to deny the facts alleged in the adverse pleading is entirely different in divorce cases from that prevailing in ordinary civil actions. The case of the plaintiff cannot be made by such admissions by the defendant. Every fact necessary to make out a cause of action must be proved, no matter

required to defend or answer by guardian *ad litem*. Generally, the appointment of a guardian *ad litem* has been regarded as a mere matter of form, and the answer to be filed by him is also almost universally merely formal, asking the court to protect the interest of the infant. Generally, the guardian *ad litem* has no personal knowledge of material matters alleged in the bill, and he can neither admit nor deny the allegations in relation thereto. Infants are regarded as the wards of the court, and this is peculiarly so with respect to a court of equity in causes before it involving their interests, to which they are parties. The mere omission or neglect of a guardian *ad litem* to file a proper answer cannot he allowed to prejudice the infant. And I apprehend that ordinarily the admissions of the guardian *ad litem*, made in the answer, would not have the force of evidence against the infant. It would certainly be destructive and ruinous to infants and their rights and estates to take material allegations of a plaintiff's bill as confessed by them for the purposes of the suit, which are not expressly denied or controverted in the answer made for them by their guardian *ad litem*." Laidley *v.* Kline, 8 W. Va. 218.

Admission Does Not Affect Infant. In McClay *v.* Norris, 4 Gilm. (Ill.) 370, the court say: "It is entirely clear that the answer of a guardian *ad litem*, even if it shall admit the truth of the charges in the complainant's bill, can in no case affect the infant's rights; and with respect to him, all allegations must be proved with the same strictness, as if the answer had interposed a direct and positive denial of their truth. No default or decree *pro confesso* can be entered against him."

Full Proof Must Be Made. Again it is said: "It is a well settled principle often recognized by this court, that before a decree can pass against an infant defendant in chancery, full proof must be made against him, and that proof preserved in the record or decree. No presumption can be indulged, that proof was made against the infant defendant, unless it is shown by the record. The answer of a guardian *ad litem*, admitting the truth of the charges in the bill, cannot affect the infant's rights, but with respect to him all the allegations must be proved with the same strictness as if the answer had interposed a direct and positive denial of their truth, nor can a default or a decree *pro confesso* be entered against an infant." Chaffin *v.* Kimball, 23 Ill. 33.

Infant Not Bound by Answer of Guardian. — It is said in Wright *v.* Miller, 1 Sandf. 103: "The answer of an infant by his guardian is in truth the answer of the guardian, and not of the infant. Wrottesley *v.* Bendish, 3 P. Wms. 336. Hence, the infant is not bound by his answer, it cannot be read against him, and no decree can be made on the admission of facts which it contains. 1 Dan. Ch. Pr. 236, 238; 1 Hoffm. Ch. Pr. 232, 243, note 1, and cases cited. Where there are infant defendants, and it is necessary in order to entitle the complainant to the relief he prays, that certain facts should be before the court, such facts, although they might be the subject of admission on the part of the adults, must be proved against the infants. 1 Dan. Ch. Pr. 238; Mills *v.* Dennis, 3 Johns Ch. 367. In Wilkinson *v.* Beal, 4 Madd. 408, Sir John Leach refused to receive the admission in an infant's answer as evidence against him, that one of his co-defendants was out of the jurisdiction of the court."

whether they are admitted by the pleadings of the defendant or not.[6]

b. *Verbal Admissions or Confessions Insufficient.* — In most of the states the granting of a divorce on the admissions or confessions of the parties to the suit is forbidden.

(1.) Held Not to Be Competent Evidence. — And in some of the cases it is held that, not only by the terms of the statute, but as matter of public policy, such admissions are not competent evidence.[7]

(2.) Other Cases Hold Them Competent. — But in others it is held, notwithstanding the provision of the statute that a divorce cannot be granted on the admissions of the parties, that their admissions or confessions are competent to be proved and considered with other evidence as establishing the right to a divorce.[8]

6. *Alabama.* — Hughes *v.* Hughes, 44 Ala. 698.

California. — Bennett *v.* Bennett, 28 Cal. 599.

Illinois. — Shillinger *v.* Shillinger, 14 Ill. 147.

Indiana. — Scott *v.* Scott, 17 Ind. 309.

Kentucky. — Stibbins *v.* Stibbins, 1 Met. (Ky.) 476.

Massachusetts. — Baxter *v.* Baxter, 1 Mass. 346.

Minnesota. — True *v.* True, 6 Minn. 458.

New York. — Palmer *v.* Palmer, 1 Paige Ch. 276; Barry *v.* Barry, Hopk. Ch. 118; Fowler *v.* Fowler, 29 Misc. 673, 61 N. Y. Supp. 108.

Pennsylvania. — Kilborn *v.* Field, 78 Pa. St. 194.

Texas. — Stafford *v.* Stafford, 41 Tex. 111; Hanna *v.* Hanna, 3 Tex. 51, 21 S. W. 720.

Virginia. — Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340.

Admissions in Pleadings, Effect of. It is said in Schmidt *v.* Schmidt, 29 N. J. Eq. 496, that to permit parties in divorce suits to establish, merely by the allegations and corresponding admissions of bill or petition and answer, the facts necessary to give the court jurisdiction would be to practically annul important provisions of the law, and leave to simple unverified averment and admission facts which the legislature intended should be established by proof.

7. Stafford *v.* Stafford, 41 Tex. 111; Sheffield *v.* Sheffield, 3 Tex. 79; Hanna *v.* Hanna, 3 Tex. 51, 21 S. W. 720; Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340.

Mere Silence Under Charge, Effect Of. — In True *v.* True, 6 Minn. 458, it was held that independently of any statute to that effect a divorce could not be granted upon the mere silence of a defendant under the charge made against him.

Admission or Confession Incompetent. — In Viser *v.* Bertrand, 14 Ark. 267, Mr. Justice Scott used this language: "The marital tie, although a civil contract in the eye of the law, differs from all other civil contracts in one essential particular. The parties can never annul it by means either direct or indirect. Hence the inflexible rule of law that the confessions of either party are wholly incompetent as evidence."

Conviction Under Plea of Guilty. In Endick *v.* Endick, 61 Tex. 559, the record of conviction of the husband on a criminal charge of having assaulted the wife, based upon a plea of guilty, was held to be incompetent on the ground that it was in effect an admission, and as such inadmissible.

8. *See* "DIVORCE."

Alabama. — King *v.* King, 28 Ala. 315.

California. — Baker *v.* Baker, 13 Cal. 87; Cooper *v.* Cooper, 88 Cal. 45.

Illinois. — Lenning *v.* Lenning, 176 Ill. 180, 52 N. E. 46.

Indiana. — McCulloch *v.* McCulloch, 8 Blackf. 60.

Kansas. — Burk *v.* Burk, 44 Kan. 307, 24 Pac. 466.

Kentucky. — Stibbins *v.* Stibbins, 1 Met. 476.

Maine. — Vance *v.* Vance, 8 Greenl. (Me.) 132.

Massachusetts. — Baxter *v.* Baxter,

(3.) And Others That Divorce May Be Granted On, Alone. — And some go to the extent of holding that a divorce may properly be granted on the admissions or confessions of the party where it appears that there was no collusion or imposition on the court.[9]

c. *Cannot Be Granted on Stipulation.* — What the parties cannot do by their admissions or silence they cannot do by express consent or agreement; therefore, a divorce cannot be granted on the stipulation of the parties.[10]

d. *Necessary Allegations, Not Ground for Divorce, Effect of Admissions.* — It has been held that the rule against accepting the admissions in the answer as evidence extends only to "facts alleged as grounds of divorce," and not to other necessary allegations, such as the marriage of the parties.[11]

E. ADMISSIONS IN OPEN COURT. —a. *Generally.*—Admissions are often made in open court, generally for the purpose of avoiding the necessity of proving the facts admitted at the trial. When so made they stand in the place of absolute proof of the facts admitted, at

1 Mass. 346; Holland *v.* Holland, 2 Mass. 154.

Mississippi. — Armstrong *v.* Armstrong, 32 Miss. 279.

New Jersey. — Clutch *v.* Clutch, 1 N. J. Eq. 474; Miller *v.* Miller, 2 N. J. Eq. 139; Lindsay *v.* Lindsay, 42 N. J. Eq. 150, 7 Atl. 666; Derby *v.* Derby, 21 N. J. Eq. 36.

New York. — Doe *v.* Roe, 1 Johns. Ch. 25; Betts *v.* Betts, 1 Johns. Ch. 197; Stewart *v.* Stewart, 51 N. Y. St. 629, 65 N. Y. Supp. 927.

Pennsylvania. —Matchin *v.* Matchin, 6 Pa. St. 332, 47 Am. Dec. 466; Baker *v.* Baker, 195 Pa. St. 407, 46 Atl. 96.

Other Proof Necessary. —In Evans *v.* Evans, 41 Cal. 103, evidence of admissions made by the defendant was excluded by the court below. It was held that the statute required other proof to warrant the granting of a divorce, but did not prohibit the proof of admissions in connection with other proof.

9. Lyon *v.* Lyon, 42 Barb. (N. Y.) 138.

Admissions Competent. — In Baker *v.* Baker, 13 Cal. 87, it was held that the statute providing that a divorce shall not be granted on the confessions of the party alone does not render such confessions incompetent evidence, and that the statute is only affirmatory of the well established common law, and of the English Ecclesiastical law which has been recognized from the earliest period, both in England and in the several states of the Union, and that the object of the rule is to prevent collusion between the parties. See also Andrews *v.* Andrews, 120 Cal. 184, 52 Pac. 298; Smith *v.* Smith, 119 Cal. 183, 48 Pac. 730.

Divorce Granted on Confession Alone. — In Billings *v.* Billings, 11 Pick. (Mass.) 461, the ground for divorce was adultery, and the only evidence was the confession of the defendant contained in a letter to his wife. It was held that the reason for requiring other evidence is, in general, to prevent collusion, and that, as in that case it appeared by other evidence that there could be no collusion, the divorce was properly granted upon the confession alone.

10. Robinson *v.* Robinson, 16 Mich. 79.

11. Allegations That May Be Admitted. — In Fox *v.* Fox, 25 Cal. 587, it was directly held that a failure to deny in the answer the allegation of the marriage of the parties, was an admission of the fact that rendered proof of it unnecessary.

Not Jurisdictional Facts. — But a different rule was declared in Bennett *v.* Bennett, 28 Cal. 599, in respect of the allegation of the residence of the plaintiff, on the ground that the latter was a jurisdictional fact that could not be admitted but must be proved.

least for the purposes of the trial, in and as a part of which they are made, and no evidence to the contrary can be heard.[12]

b. *When Issues Are Changed.* — It is held that a change in the issues after an admission has been made does not affect its binding effect.[13]

c. *For the Purposes of the Trial.* — Where admissions are made only for the purposes of the trial they are not competent to be proved against the party making them in any other action.[14] Nor

12. *United States.* — Scaife *v.* Western N. C. Land Co., 90 Fed. 238, 33 C. C. A. 47; Lyman *v.* Kansas City & A. R. Co., 101 Fed. 636.

California.—Hearn *v.* DeYoung, 111 Cal. 373, 43 Pac. 1108.

Colorado.—Rockwell *v.* Graham, 9 Colo. 36, 10 Pac. 284.

Illinois.—Wineteer *v.* Simonson, 75 Ill. App. 653; Wilson *v.* Spring, 64 Ill. 14.

Indiana.—Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Kansas.—Central Branch U. P. R. Co. *v.* Shoup, 28 Kan. 394.

Maryland. — Farmers' Bank *v.* Sprigg, 11 Md. 389.

Massachusetts.—Blake *v.* Sawin, 10 Allen 340.

Missouri.—Moliny *v.* Barnard, 65 Mo. App. 600.

New Hampshire. — Burbank *v.* Rockingham Mutual Ins. Co., 24 N. H. 550, 57 Am. Dec. 300.

Oklahoma.—Consolidated S. & W. Co. *v.* Burnham, 8 Okla. 514, 58 Pac. 654.

Vermont.—Commercial Bank *v.* Clark, 28 Vt. 325.

Facts Conceded by Counsel.—In Oscanyan *v.* Arms Co., 103 U. S. 261, the court said: "The power of the court to act in the disposition of a trial upon facts stated by counsel is as plain as its power to act upon the evidence produced. . . . In the trial of the cause the admissions of counsel as to matters to be proved are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set off claimed. Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof."

13. That issues have been changed does not affect admissibility.—In Jones *v.* Clark, 37 Iowa 586, 588, it was claimed that the issues had been changed since the admission was signed. The court said: "This may be, but the paper was signed with reference to the fact admitted and not the issue in the case. It can be used for any purpose in the case, and would be admissible, even in another action."

To the same effect, see Langley *v.* Oxford, 1 M. & W. 508.

Admission Binding Although When Made it Was Not Within the Issues. — Schlussel *v.* Willett, 34 Barb. (N. Y.) 615.

14. *Alabama.*—Holman *v.* Bank of Norfolk, 12 Ala. 369.

California.—Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64.

Indiana.—Hays *v.* Hynds, 28 Ind. 531.

Kansas.—Central Branch U. P. R. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163.

Michigan.—Isabelle *v.* Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613.

Missouri.—Nichols *v.* Jones, 32 Mo. App. 657.

New York.—Owen *v.* Cawley, 36 N. Y. 600.

Oklahoma.—Blankinship *v.* Oklahoma Co., 4 Okla. 242, 43 Pac. 1088.

Vermont.—Commercial Bank *v.* Clark, 28 Vt. 325.

Washington.—Edmunds *v.* Black, 13 Wash. 490, 43 Pac. 330.

Wisconsin.—Weisbrod *v.* Chicago & N. W. Ry. Co., 20 Wis. 441.

Not Admissible in Another Case. In Holman *v.* Bank of Norfolk, 12 Ala. 369, 408, it was agreed between the attorneys upon a former trial, that no objection should be made;

upon a subsequent trial of the same cause, without consent.[15]

d. *When Not Limited.* — If admissions made are general and not limited to the purposes of the trial, they may be proved at a subsequent trial of the same case, or in another action.[16]

that a party named had hitherto been permitted to represent the party to that suit. This stipulation was offered in evidence in another suit, with which the counsel making the stipulation had no connection. With respect to the competency of such a stipulation, the court said: "As the representatives of their clients, counsel have doubtless power to admit the existence of the facts; but such admission, as proof of the existence of the fact, is available only in that particular case. It would be a most alarming doctrine, that an admission made by counsel, in the progress of a cause, was proof of the fact so admitted, through all future time. The authority of counsel is confined to the case in which he is employed; he has no power to bind his client, beyond the effect of the admission, in the particular case in which it was made."

15. Weisbrod *v.* Chicago & N. W. Ry. Co., 20 Wis. 441; Hays *v.* Hynds, 28 Ind. 531; McKinney *v.* Salem, 77 Ind. 213; Wheat *v.* Ragsdale, 27 Ind. 191.

When Understood to be Limited to Trial.—In Weisbrod *v.* Chicago & N. W. Ry. Co., 20 Wis. 441, it is said that such admissions are frequently made for the purpose of saving time where counsel are confident of success on some other point; and when so made they are *always understood* to have reference to the trial then pending, and not as stipulations which shall bind at any future trial.

"The bill of exceptions which contained an admission of the counsel for the defendant on a former trial was properly ruled out. The admission was made only on and for the trial at the time it was made, and could not be used on a subsequent trial without the consent of defendants." Hardin *v.* Forsythe, 99 Ill. 312, 324.

But *compare* King *v.* Shepherd, 105 Ga. 473, 30 S. E. 634; Taylor *v.* State Ins. Co., 107 Iowa 275, 77 N. W. 1032.

16. *England.*—Langley *v.* Oxford, 1 M. & W. 508.

Illinois.—Home Ins. Co. *v.* Field, 53 Ill. App. 119.

Iowa.—Jones *v.* Clark, 37 Iowa 586.

Kansas.—Central Branch U. P. R. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163.

Maine.—Woodcock *v.* Calais, 68 Me. 246; Holley *v.* Young, 68 Me. 215, 28 Am. Rep. 40.

Maryland. — Farmers' Bank *v.* Sprigg, 11 Md. 389; Elwood *v.* Lannon, 27 Md. 200; Merchants' Bank *v.* Bank, 3 Gill (Md.) 96, 43 Am. Dec. 300.

Oklahoma.—Blankinship *v.* Oklahoma &c. Co., 4 Okla. 242, 43 Pac. 1088; Consolidated S. & W. Co. *v.* Burnham, 8 Okla. 514, 58 Pac. 654.

Pennsylvania.—Truby *v.* Seybert, 12 Pa. St. 101.

Party Acting in Representative Capacity.—The rule is the same where the admission is by a party acting in a representative capacity, for instance as administrator. Phillips *v.* Middlesex, 127 Mass. 262.

Oral Admissions of Counsel Not Limited.—In Central Branch U. P. R. Co. *v.* Shoup, 28 Kan. 394, it was claimed that mere oral admissions made by counsel were necessarily made for the purposes of the trial only, and were not competent to be proved against the party at a subsequent trial. But both the court below and the supreme court held the contrary.

Unlimited Competent on Another Trial. — The rule is thus stated in Home Ins. Co. *v.* Field, 53 Ill. App. 119, 123: "On the first trial it was admitted that Scott was the agent of the company. On the last, plaintiff offered in evidence the official stenographer's notes to prove that admission, and he was permitted, over defendant's objection, to read from them the following:

Whether General, or for Purposes of the Trial, a Question of Fact. Whether the admission was made generally, or only for the purposes of the trial, has been held to be a question of fact to be determined by the jury.[17]

But the rule is stated with reservations. It would seem to be a question as to the *competency* of the evidence, and if it is, it must be a question for the court.[18]

Court Should Determine.—And it may safely be said to be the better rule that the court in which the admission is offered should determine, as matter of law, whether the admission is such, and made under such circumstances as to be properly provable against the party at a subsequent trial or the trial of a different case. It is treated in the decided cases as a question of the competency of the evidence, and not of its weight or effect.[19]

c. *By an Attorney Must Be Distinct and Formal.* — Admissions of an attorney to bind his client must be distinct and formal, and

'It is admitted by both parties that Mr. Scott was the agent of this company.' The ground of objection was that the admission, according to the evidence offered, was not that of the defendant, but of both the parties, and must be presumed to have been intended to be for that trial only. It was not in terms so limited, nor do we perceive in the fact that it was the admission of both, a reason for holding it any the less effective as against the defendant. The law seems to be that such formal and solemn admissions are in general conclusive, and may be given in evidence even upon a new trial." 1 Greenl. on Ev., Sections 27, 186.

17. Central Branch U. P. R. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163.

On a Former Trial Competent. Plaintiff offered to prove that at a former trial defendants' counsel admitted certain facts. Defendants objecting, offered to show that those facts were admitted for the purposes of the former trial only, and that plaintiff before the present trial had notice that the same matters would now be denied. The appellate court said: "The court admitted the testimony, and we think correctly. . . . If at a former trial certain facts were admitted as true . . . that such an admission was made may be proved as a fact. . . . But the circumstances surrounding the admission, the purposes for which it was made, and the conditions attached to it, may be fully shown. It may not infrequently happen that a party will not be bound by an admission, and will not be estopped from denying its truth. And in view of the showing on both sides, allowing each party to prove the whole truth, it will be for the triers to determine how the proof stands on the facts in controversy, on which the admission is claimed to bear." Perry *v.* Simpson Waterproof Manf. Co., 40 Conn. 313, 317.

18. Central Branch U. P. R. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163.

Admission Obviously Intended for the Trial Only.—It is said in the Kansas case cited that it is true that sometimes the waiver or admission may be so obviously intended for that trial alone that the court may properly so instruct the jury, and it may also be so obviously intended as a general admission that the court may instruct the jury to treat it as such, for instance, where the parties sign an agreed statement of facts."

19. Hays *v.* Hynds, 28 Ind. 531; Lord *v.* Bigelow, 124 Mass. 185; Isabelle *v.* Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613.

And see Price *v.* Bank, 17 Ala. 374, where the appellate court refused to review a ruling that a certain admission had been made.

made for the express purpose of dispensing with formal proof of the fact at the trial.[20]

Made by Counsel in One Case not Admissible in Another. — Admissions of fact, made by counsel in the trial of one case, are held not to be competent evidence against his client in another action.[21]

20. Greenl. Ev., § 186.

England.—Young *v.* Wright, 1 Camp. 139.

Alabama.—Ryan *v.* Beard, 74 Ala. 306; Price *v.* Bank, 17 Ala. 374.

Arkansas.—Flynn *v.* State, 43 Ark. 289.

California.—*In re* Jessup, 81 Cal. 408, 21 Pac. 976, 6 L. R. A. 594.

Georgia.—Central R. R. Co. *v.* Gamble, 77 Ga. 584, 3 S. E. 287.

Illinois.—Carthage *v.* Buckner, 8 Ill. App. 152.

Iowa.—Treadway *v.* The S. C. & St. P. R. R. Co., 40 Iowa 526.

Kentucky.—Talbot *v.* McGee, 4 T. B. Mon. 375.

Maine.—McKeen *v.* Gammon, 33 Me. 187.

New Hampshire.—Alton *v.* Gilmanton, 2 N. H. 520.

New York.—King *v.* Masonic L. Ass'n, 87 Hun 591, 34 N. Y. Supp. 563; Sullivan *v.* Dunham, 35 App. Div. 342, 54 N. Y. Supp. 962; Anderson *v.* McAlleenan, 15 Daly 444, 8 N. Y. Supp. 483; Voisen *v.* Commercial Mut. Ins. Co., 51 N. Y. St. 635, 22 N. Y. Supp. 348.

North Carolina.—Fleming *v.* Wilmington &c. Co., 115 N. C. 676, 20 S. E. 714; Davidson *v.* Gifford, 100 N. C. 18, 6 S. E. 718.

Oklahoma.—Blankinship *v.* Oklahoma &c. Co., 4 Okla. 242, 43 Pac. 1088.

Ohio.—Garrett *v.* Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L. R. A. 321.

South Carolina.—Cooke *v.* Pennington, 7 Rich. 385; Brown *v.* Pechman, 55 S. C. 555, 33 S. E. 732.

West Virginia. — McGinnis *v.* Curry, 13 W. Va. 29.

Compare Pratt *v.* Conway, 148 Mo. 291, 49 S. W. 1028, and Walsh *v.* Mo. P. R. Co., 102 Mo. 582, 14 S. W. 873 and 15 S. W. 757.

After Trial and Before Decision. It is held that an admission made by an attorney after the trial, but before the final decision, and in answer to an inquiry by the judge before whom the case is pending for decision, is binding on the client. Holderness *v.* Baker, 44 N. H. 414.

See also The Harry, Fed. Cas. No. 6147.

21. *England.*—Doe *v.* Bird, 7 Car. & P. 6, 32 Eng. C. L. 415.

Alabama.—Holman *v.* Bank, 12 Ala. 369.

California.—Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64.

Illinois.—Hardin *v.* Forsythe, 99 Ill. 312; Contra. Home Ins. Co. *v.* Field, 53 Ill. App. 119, and Carthage *v.* Buckner, 8 Ill. App. 152.

Indiana.—Hays *v.* Hynds, 28 Ind. 531.

Kansas.—Central Branch U. P. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163.

Louisiana.—Shipman *v.* Haynes, 15 La. 363.

Maryland.—Dorsey *v.* Gassoway, 2 H. & J. 402, 3 Am. Dec. 557.

Michigan.—Isabelle *v.* Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613.

Missouri.—Nichols *v.* Jones, 32 Mo. App. 657.

New York.—Owen *v.* Cawley, 36 N. Y. 600; Anderson *v.* McAlleenan, 15 Daly, 444, 8 N. Y. Supp. 483.

Wisconsin.—Weisbrod *v.* Chicago & N. W. Ry. Co., 20 Wis. 441.

By Attorney Not Admissible in Another Action.—An attorney, in all matters relating to the progress and trial of the cause, may bind his client. And so admissions made by the attorney, for the purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact, at the trial, are binding upon the client, for the purposes of the cause in which they are made. 1 Greenl. Pac. 925, 16 Am. St. Rep. 185, 5 L. R. Mo. App. 657, 664.

But see to the contrary, Voisen *v.* Commercial Mut. Ins. Co., 51 N. Y.

At Hearing of Rule to Show Cause.—It is held that an admission made by counsel on the hearing of an order to show cause cannot be used at the trial.[22] But the correctness of this holding may be questioned.[23]

Unless Made With Knowledge of Client. — Admissions of the attorney are competent if it is shown that they were made with the knowledge and consent of the party, or that he acquiesced in them.[24]

In Argument.—Statements of counsel in argument are not binding on the client as admissions.[25]

St. 635, 22 N. Y. Supp. 348; Truby *v.* Seybert, 12 Pa. St. 101; Central B. U. P. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163.

Only Binding at the Trial at Which Made.—In Isabelle *v.* Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613, it is said: "The stipulation of facts made in another case by the attorneys therein was not admissible in this. The only ground upon which its reception could be based was that it contained admissions of the party of the existence of certain facts. Attorneys, as the agents of parties whom they represent in a cause, have authority, by virtue of such agency, to make admissions which are binding upon the parties in that particular case; but they have no authority, by reason of such relation, to bind a party generally by admission of facts. Their agency is for a special purpose, and for a specified transaction, and their admissions made with reference thereto are binding upon the party they represent. But admissions so made cannot bind the party in other suits or proceedings between other parties. 1 Greenl. Ev., Secs. 113-115; Elling *v.* Scott, 2 Johns. 157, 163; Harrison's Devisees *v.* Baker, 5 Litt. 250; Baylor *v* Smithers, 1 T. B. Mon. 6; Tompkins *v.* Ashley, Mood & M. 32; Brittingham *v* Stephens, 1 Hall (N. Y. S. C.) 379."

22. State *v.* Buchanan, Wright (Ohio) 233.

23. Shippman *v.* Haynes, 15 La. 363.

24. Lord *v.* Bigelow, 124 Mass. 185.

Acquiescence Must Be Shown. The attorney's power is not general but special and confined to the particular case in which it is employed, and his admissions cannot be received outside of said case unless the client has made the admissions his own by acquiescing in them. Nichols *v.* Jones, 32 Mo. App. 657, 664.

Contra.—Voisen *v.* Insurance Co., 51 N. Y. St. 635, 22 N. Y. Supp. 348; Truby *v.* Seybert, 12 Pa. St. 101; Central, etc., Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163.

Express Acquiescence Required. A stipulation made by an attorney in one action will not bind his client in another unless the latter expressly acquiesces in it in the second suit, much less will it estop his assignee. *Compare* Truby *v.* Seybert, 12 Pa. St. 101 and Overholzer *v.* McMichael, 10 Pa. St. 139.

Made by Counsel Without Authority.—When it appeared, as in this case, that the admission was limited to the trial then pending, merely to save time, and that the client had no knowledge of the admission, and never expressly authorized it, and when the opposite party was put on his guard by timely notice that the fact would not again be admitted, it seems to us that it was error to allow the evidence of the previous concession to go to the jury. It would, as a rule, tend to defeat rather than promote justice; would discourage the making of concessions upon *nisi prius* trials, as to facts not deemed necessary to contest, and thereby contract them, and render them more expensive and vexatious; and all this would be compensated by no good results whatever." Hays *v.* Hynds 28 Ind. 531.

25. Sanderson *v.* State (Tex.), 44 S. W. 1103.

f. *Admissions in Opening Statement Not Binding.* — The admission to be binding must be so made as to be a part of the evidence in the case, or formally made to avoid or excuse the making of proof. Therefore, the mere admission or statement of counsel in an opening statement is not such as to amount to a binding admission.[26]

But there may be exceptions to this rule. Indeed, it has been held that an admission made by counsel, in the opening statement, may be conclusive of the case, and warrant a judgment without further proceedings.[27]

By Counsel in Criminal Case. —It is held that an admission of a fact by his attorney is not binding on the defendant in a criminal case.[28] But the weight of authority seems to be the other

When Offered in Evidence in Another Action.—Adee *v.* Howe, 15 Hun (N. Y.) 20.

Especially if in one action client is agent and in the other principal. Moffit *v.* Witherspoon, 10 Ired. (Law N. C.) 185.

26. 1 Greenl. Ev., Sec. 186; Lake Erie & W. R. Co. *v.* Rooker, 13 Ind. App. 600, 41 N. E. 470; Flynn *v.* State, 43 Ark. 289; Ferson *v.* Wilcox, 19 Minn. 449; Lyman *v.* Kansas City & A. R. Co., 101 Fed. 639.

Opening Statement Made in Former Trial.—In Evans *v.* Montgomery, 95 Mich. 497, 55 N. W. 362, it is said: "On cross-examination, defendant sought to show statements made by plaintiff's counsel in the opening before the jury upon a former trial, as tending to show that plaintiff there contended for a different state of facts. We know of no case going to the extent of holding that such statements amount to admissions."

See also Butler *v.* Nat'l Home, 144 U. S. 64, 12 Sup. Ct. 581.

27. Pratt *v.* Conway, 148 Mo. 291, 49 S. W. 1028; Walsh *v.* Mo. P. Co., 102 Mo. 582, 14 S. W. 873, 15 S. W. 757.

Effect of Admission in Opening Statement.—Thus in Oscanyan *v.* Arms Co., 103 U. S. 261, the action was to recover commissions for the sale of firearms to the Turkish government, effected through the plaintiff's influence. It appeared from the opening statement of counsel that the sales for which the commissions were claimed were made whilst the plaintiff was an officer of the Turkish government, and the influence which he exerted upon its agent sent to this country to examine and report in regard to the purchase of arms. The facts as detailed in the statement were such as to convince the trial court that the contract was void as corrupt and against public policy. The defendant moved the court, on the statement made, to direct a verdict for it without taking testimony. The motion was granted, an appeal taken and the judgment affirmed.

See also Denefeld *v.* Baumann, 40 App. Div. 502, 58 N. Y. Supp. 110; Garrison *v.* McCullough, 28 App. Div. 467, 51 N. Y. Supp. 128; Missouri Pac. Ry. Co. *v.* Hartman, 5 Kan. App. 581, 49 Pac. 109; Lindley *v.* Atchison, T. & S. F. R. Co., 47 Kan. 432, 28 Pac. 201.

Compare, Kapischki *v.* Koch, 180 Ill. 44, 54 N. E. 179.

28. Counsel Cannot Admit in Criminal Case. — "The prisoner's counsel had no authority to make any statement or admission to supply the place or have the force of evidence against him. No confession of theirs could bind or affect him. Their admissions could not in law prejudice or affect his rights; nor could they be in any wise jeopardized by the assumption of any grounds whatever upon which his defense may have been placed by his counsel. Whether those grounds were correct or incorrect, true or false, was wholly immaterial. That

way.[29]

g. *How Must Be Made.* — To be a part of the evidence in the case they must be made as a part of the evidence at the trial, or be proved to have been made.[30]

F. By Stipulation. — a. *Generally.* — The parties may stipulate that certain matters put in issue by the pleadings are true, and thus avoid the necessity of making proof of them. For the purposes of the trial and any appeal taken from a judgment or decree rendered as a result of the trial, such stipulations are not only binding upon the parties, but they are conclusive.[31]

was not the question for the consideration of the jury, whose duty it was to decide the question of the guilt or innocence upon the law as given them by the court, and the evidence as given by the witnesses, irrespective of any admissions by the prisoner's counsel, or any grounds upon which they may have rested his defense." Nels *v.* State, 2 Tex. 280. Approved in Clayton *v.* State, 4 Tex. App. 515.

Admission Made in Summing up Not Binding.—Sanderson *v.* State, (Tex. Crim.), 44 S. W. 1103.

Admission Must be Distinct and Formal. — "Without determining what rights an attorney can waive for a prisoner on trial for a felony, we feel sure that the fact of the waiver or admission should be distinct and formal, and made for that purpose in order to bind the prisoner." Flynn *v.* State, 43 Ark. 289.

29. A Rule Contrary to that Stated in the Text has been Announced.—In People *v.* Garcia, 25 Cal. 531, it was held that a solemn admission made by counsel to avoid a continuance, and entry on the records of the court having been made, in defendant's presence, must be presumed to have been made with his consent, and might properly be considered by the jury.

See also Com. *v.* Young, 165 Mass. 396, 43 N. E. 118.

Admissions Made After Case is Closed.—Admissions made by counsel before the parties rest are binding, but otherwise, if made afterwards. *In re* Noah, 3 City Hall Rec. (N. Y.) 13.

Submission on Agreed Statement. Pisar *v.* State, 56 Neb. 455, 76 N. W. 869; People *v.* Hall, 86 Mich. 132, 48 N. W. 869.

Whether Intent can be Stipulated. "It is said that the issue of criminal intent was, at least, for the jury, . . . But he (the defendant) is conclusively presumed to know the law, and, if an actual unlawful intent is essential, that presumption supplies it." Pisar *v.* State, 56 Neb. 455, 76 N. W. 869. In that case the jury were given instructions that amounted to directing a verdict of guilty, and it was held that this was not error because the criminal intent followed from the facts agreed upon.

But in People *v.* Hall, 86 Mich. 132, 48 N. W. 869, the court remarked: "A conviction in a criminal case, involving the question of intent, cannot be predicated upon the admissions of counsel, and it is error in such cases to instruct that the jury must find the defendant guilty.

30. Lowrie *v.* Verner, 3 Watts (Pa.) 317; Commercial Bank *v.* Clark, 28 Vt. 325; Advance Elevator Co. *v.* Eddy, 16 Ill. App. 263; Hearne *v.* De Young, 111 Cal. 373, 43 Pac. 1108.

31. *Alabama.*—Stark *v.* Kenan, 11 Ala. 818.

California.—Haight *v.* Green, 19 Cal. 113; Donner *v.* Palmer, 51 Cal. 629; Taylor *v.* Randall, 5 Cal. 80; Hearn *v.* De Young, 111 Cal. 373, 43 Pac. 1108.

Colorado.—Water Supply Co. *v.* Larimer &c. Co., 25 Colo. 87, 53 Pac. 386, 46 L. R. A. 322; Rockwell *v.* Graham, 9 Colo. 36, 10 Pac. 284.

Illinois.—Wilson *v.* Spring, 64 Ill. 14; City of Chicago *v.* Drexel, 141 Ill. 89, 30 N. E. 774; Culver *v.* Cougle, 165 Ill. 417, 46 N. E. 242.

b. *Made for Purposes of the Trial.* — But as a rule such admissions by stipulation are made for the purposes of the trial only, and if they are, they are not competent as evidence for or against the parties in any other action, or in a subsequent trial of the same action.[32]

c. *Made Without Limitation.* — But it is held that if the stipulation is made generally, and without qualification, it is binding at a subsequent trial, or in any other case.[33]

Iowa.—Jones *v.* Clark, 37 Iowa 586.

Indiana.—People &c. Soc. *v.* McKay, 141 Ind. 415, 39 N. E. 231, 40 N. E. 910.

Massachusetts.—Lewis *v.* Sumner, 13 Met. 269; Leonard *v.* White, 5 Allen 177.

Michigan.—Alexander *v.* Rice, 52 Mich. 451, 18 N. W. 214.

Minnesota.—Bingham *v.* Board, 6 Minn. 136, 8 Minn. 441.

Missouri.—Alder *v.* Wagner, 47 Mo. App. 25; Hanna *v.* Baylor, 23 Mo. App. 302.

New Hampshire. — Burbank *v.* Rockingham &c. Co., 24 N. H. 550, 57 Am. Dec. 300; Alton *v.* Gilmanton, 2 N. H. 520.

New York.—Ayvard *v.* Powers, 25 Misc. 476, 54 N. Y. Supp. 984; Butler *v.* Walsh, 48 App. Div. 459, 62 N. Y. Supp. 913; Jacklin *v.* National L. Ass'n, 75 Hun 595, 27 N. Y. Supp. 1112; Brewster *v.* Manning, 6 Hun 530; Penniman *v.* La Grange, 23 Misc. 653, 52 N. Y. Supp. 27; Auburn Savings Bank *v.* Bunkerhoff, 44 Hun 142.

New Jersey.—Union L. & E. Co. *v.* Erie R. R. Co., 37 N. J. Law, 23.

North Dakota.—Mooney *v.* Williams, (N. Dak.), 83 N. W. 237.

Oklahoma.—Consolidated Steel & Wire Co. *v.* Burnham, 8 Okla. 514, 58 Pac. 654.

South Carolina. — Cooke *v.* Pennington, 7 Rich. 385; Daniel *v.* Ray, 1 Hill (Law), 32.

Texas.—Strippelman *v.* Clark, 11 Tex. 296.

Vermont. — Commercial Bank *v.* Clark, 28 Vt. 325.

Wisconsin.—Whorton *v.* Webster, 56 Wis. 356.

32. Hardin *v.* Forsythe, 99 Ill. 312; Hays *v.* Hynds, 28 Ind. 531; Holman *v.* Bank of Norfolk, 12 Ala. (N. S.) 369, 407; Kinney *v.* Salem, 77 Ind. 213; Wheat *v.* Ragsdale, 27 Ind. 191; Isabelle *v.* Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613.

Stipulation Admissible but Not Conclusive.—Although a stipulation is made for the purposes of a particular trial, and afterwards withdrawn, it is nevertheless admissible in evidence against the party making it in a subsequent trial of the same cause, but is not conclusive, and may be disproved, rebutted or explained. King *v.* Shepard, 105 Ga. 473, 30 S. E. 634.

Burden of Proof.—The burden is upon the party objecting to the use of the stipulation to show that it was to be used only on the first trial. Brown *v.* Pechman, 55 S. C. 555, 33 S. E. 732.

Admission Made at First Trial. An admission made by counsel at the first trial is not admissible against his client at the second trial. Weisbrod *v.* Ry. Co., 20 Wis. 441; Hardin *v.* Forsythe, 99 Ill. 312; Dorsey *v.* Gassoway, 2 H. & J. (Md.) 402, 3 Am. Dec. 557.

Contra.—Home Ins. Co. *v.* Field, 53 Ill. App. 119 and Carthage *v.* Buckner, 8 Ill. App. 152.

33. *England.*—Doe *v.* Bird, 7 Car. & P. 6, 32 Eng. C. L. 472; Langley *v.* Oxford, 1 M. & W. 508.

Illinois.—Home Ins. Co. *v.* Field, 53 Ill. App. 119.

Iowa.—Jones *v.* Clark, 37 Iowa 586.

Maryland.—Elwood *v.* Lannon, 27 Md. 200; Farmers' Bank *v.* Sprigg, 11 Md. 389.

Minnesota. — Merchants' National Bank *v.* Stanton, 62 Minn. 204, 64 N. W. 390.

Missouri. — Nichols *v.* Jones, 32 Mo. App. 657; Hammontree *v.* Huber, 39 Mo. App. 326.

d. *How Must Be Made or Proved.* — The stipulation, to be a part of the evidence, must be made in the presence of the court or jury, as a part of the trial, or, if not so made, must be proved at the trial to have been entered into, or it is not available.[34]

e. *Change of Issue Immaterial.* — It makes no difference that the issues in the case are changed after the stipulation is filed if the admission is of facts material to the issues newly formed.[35]

G. AGREED CASE. — *a. Generally.* — An agreed case is an agreement between the parties as to what the facts are, such facts to be taken as if alleged in proper pleadings, and proved at the trial.[36]

b. *Is Conclusive.* — The case thus agreed is conclusive against the parties as to the truth of the facts stated in the absence of any showing of fraud, accident or mistake.[37]

c. *Made for Purposes of Case Not Competent in Another Case.* But if the agreed case is expressly made for the purpose of the case in which it is made, it is not competent evidence against the parties, or either of them, in another action.[38]

New York.—Foster *v.* Milliner, 50 Barb. 385.

Oklahoma.—Consolidated Steel & Wire Co. *v.* Bunham, 8 Okla. 514, 58 Pac. 654.

Vermont.—Commercial Bank *v.* Clark, 28 Vt. 325.

That Certain Matters Shall Not be Litigated.—Stipulations to the effect that matters presented by the pleadings are not and shall not be litigated in the action may be used on the trial of another action where the judgment in the first cause is offered in evidence to show a former adjudication, to prove that the matter in controversy and covered by the stipulation was not adjudicated. Foster *v.* Milliner, 50 Barb. 385.

Stipulation Competent on Subsequent Trial.—In Merchants' Nat. Bank *v.* Stanton, 62 Minn. 204, 64 N. W. 390, the court said: "The first trial was had upon a written stipulation of facts, signed by both parties. On the last trial a part of this stipulation, reciting and admitting the existence of certain of these facts, relevant to the issues, was offered and received in evidence against plaintiff's objection and acceptance. This stipulation was clearly competent evidence on the subsequent trial. 1 Thomp. Trials, Sec. 361."

Admissible but Not Conclusive. Luther *v.* Clay, 100 Ga. 236, 28 S. E. 46.

34. Lowrie *v.* Verner, 3 Watts (Pa.) 317; Hearne *v.* De Young, 111 Cal. 373, 43 Pac. 1108.

35. Jones *v.* Clark, 37 Iowa 586; Penniman *v.* LaGrange, 23 Misc. 653, 52 N. Y. Supp. 27.

36. Pennsylvania R. R. Co. *v.* Niblack, 99 Ind. 149; Day *v.* Day, 100 Ind. 460; Hawks *v.* Mayor, 144 Ind. 343, 43 N. E. 304; Fearing *v.* Irwin, 55 N. Y. 486; Royall *v* Eppes, 2 Munf. (Va.) 479.

37. Page *v.* Brewster, 54 N. H. 184; Levy *v.* Sheehan, 3 Wash. 420, 28 Pac. 748; Ex Parte Hayes, 92 Ala. 120, 9 So. 156; Van Wart *v.* Wolley, R. & M. 4, 21 Eng. C. L. 366.

38. Page *v.* Brewster, 58 N. H. 126.

Reasons for the Rule.—Chief Justice Gibson, ruling that an agreed case is not admissible except in the proceeding in which it is drawn, said: "It is supposed to have acquired a degree of credit from the bare statement of the case as an admission of the facts. For what purpose, and on what condition was that admission? Exclusively to have a judgment of the court on the facts submitted, and not to give them effect for any other purpose. Each may have been willing to put the law upon the circumstances without intending to admit, or even without believing them to be an accurate representation of the truth; and

But an agreed case, for the purpose of the "suit" is binding, not only for the purpose of determining the question of law involved, but for the purposes of all subsequent proceedings in that action.[39]

H. AGREED STATEMENT. — Where the parties agree to a statement of the facts in an action, such statement takes the place of any and all evidence that might have been given, in whole or in part, and the parties are each bound as having admitted the facts to be as stated for the purposes of the trial, and any appeal that may be taken from any judgment rendered upon the facts as agreed upon.[40]

without consenting to be bound by them in another proceeding." McLughan *v.* Bovard, 4 Watts (Pa.) 308.

See also Hart's Appeal, 8 Pa. 32; Harrison's Devisees *v.* Baker, 5 Litt. (Ky.) 250; Frye *v.* Gragg, 35 Me. 29.

39. Made for Purpose of Suit. "The agreement in question was entered into for the purposes of the *suit*, and not merely for the *case* that was transferred. An agreement entered into for the purposes of the *suit*, must mean not only for determining the questions of law raised by the case, but for any and all subsequent proceedings to the close of the suit. There was no provision inserted that the facts should be considered as agreed to only for the purposes of that case, or that they should not be used as evidence before the jury, as is usual where such is the intention of the parties. It is to be presumed that only such facts were agreed to as were necessary to determine the questions then raised, and that if the defendants should elect a trial by jury such other competent testimony as either party might wish to introduce would be offered for the consideration of the jury. It will hardly be pretended that the facts stated were untrue, or that a fictitious case has been presented to the court. The court certainly would not encourage such a practice." Page *v.* Brewster, 54 N. H. 184, 187.

40. Luther *v.* Clay, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95; Callin *v.* Ins. Co., 83 Ill. App. 40; State *v.* Connor, 86 Tex. 133, 23 S. W. 1103; Morgan *v.* Davenport, 60 Tex. 230; Adams v. Erchenberger, (Ark.) 18 S. W. 853; Ish *v.* Crane, 13 Ohio St. 574; Consolidated Steel & Wire Co. *v.* Burnham, 8 Okla. 514, 58 Pac. 654.

Does Not Exclude Other Evidence. An agreed statement does not, unless so specified, exclude other evidence, not inconsistent therewith. Burnham *v.* Railroad Co., 88 Fed. 627; Dillon *v.* Cockcroft, 90 N. Y. 649.

Unlimited Binding Generally. "The primary question to be considered is whether, on a subsequent trial, this statement of facts was admissible, and its operation and effect as evidence. . . . Such agreements are sometimes made to avoid continuances, or for some specific purpose, and, by their terms, are limited to the particular occasion or purpose, and, of course, lose all force when the occasion has passed, or the purpose has been accomplished. But if by their terms they are not limited, and are unqualified admissions of facts, the limitation is not implied, and they are receivable on any subsequent trial between the parties. Wetherell *v.* Boyd, 7 Car. & P. 6; Langley *v.* Oxford, 1 Mees. & W. 507; Holley *v.* Young, 68 Me. 215; Railroad Co. *v.* Shoup, 28 Kan. 394. Speaking of admissions of this character made by counsel of record, Mr. Greenleaf terms them 'solemn admissions,' and says, 'they are, in general, conclusive, and may be given in evidence on a new trial.' 1 Greenl. Ev., Sec. 186. . . . Upon such agreements or admissions, made verbally, every court is necessitated to act daily. . . . And when made in open court, and

It differs from the statutory "agreed case" in that the agreed statement of facts is not the "case," but only evidence of the facts.[41]

Where Not Limited to the Trial.—And it is held that if the admissions so made are not limited to the purposes of the present trial, they are binding on the parties at any subsequent trial of the case.[42]

It is not necessary that the agreed statement of facts be in writing or, if in writing, that it be signed.[43]

Case Stated.—Under the practice in some of the states a "case stated" is provided for or allowed, which is a statement of the

reduced to writing, intended to be used, and used as an instrument of evidence, and is without limitation as to time or occasion, it cannot be withdrawn or retracted at the mere will of either party. . . . The admission of the facts dispensing with evidence, if it could be disregarded by either party on any subsequent trial, in the event of inability to produce witnesses to establish them, would often convert such admissions into instruments of fraud and injury. When they are made deliberately and intelligently, in the presence of the court, and reduced to writing, they are of the best species of evidence; and parties cannot be permitted to retract them, as they are not permitted at pleasure to retract admissions of fact made in any form. If they are made improvidently and by mistake, and the improvidence and mistake be clearly shown, the court has a discretion to relieve from their consequences—a discretion which should be exercised sparingly and cautiously, 1 Greenl. Ev. Sec. 206; Harvey *v.* Thorpe, 28 Ala. 250." Prestwood *v.* Watson, 111 Ala. 604, 20 So. 600.

41. In Pennsylvania Co. *v.* Niblack, 99 Ind. 149, the agreement was: "For the purposes of the trial of this case, it is agreed by plaintiff and defendant that the facts are as follows:" and the facts as agreed upon were set out. The court said: "This was not an agreed case under Section 553 R. S. 1881, but it was a trial upon an agreed statement of facts used merely as evidence."

42. Prestwood *v.* Watson, 111 Ala. 604, 20 So. 600; Merchants' Bank *v.* Marine Bank, 3 Gill (Md.) 96, 43 Am. Dec. 300; Doe *v.* Bird, 7 Car. & P. 6, 32 Eng. C. L. 472; Farmers' Bank *v.* Sprigg, 11 Md. 389; Woodruff *v.* Munroe 33 Md. 146; Elwood *v.* Lannon, 27 Md. 200; Consolidated Steel & Wire Co. *v.* Burnham, 8 Okla. 514, 58 Pac. 654; *Ex parte* Hayes, 92 Ala. 120, 9 So. 156.

Admissible but Not Conclusive. In Luther *v.* Clay, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95, it is held that agreed statements of facts upon which a case was tried, though not thereafter absolutely binding and conclusive upon the parties in the trial of another case, involving the same issues, is, in such trial admissible in evidence at the instance of one against the other, subject to the latter's right to disprove, rebut, or explain any statement therein contained, the court saying: "When parties to a case agree to submit the same for decision upon an agreed statements of facts, and nothing is said in the agreement to the contrary, each party is absolutely bound and concluded by the statements of fact thus agreed to, so far as the trial in which the stipulation is made is concerned. Where the agreement is not expressly limited to use in the trial in which it is made, it is admissible in evidence as an admission in any other trial or litigation between the same parties, where the same issues are involved; but it is not absolutely binding and conclusive upon the parties. When it is used against such parties in another trial of the same case, or in any other case, either party has the right to attack any statement of fact made therein either by disproving or rebutting the same or explaining it away.

43. Prestwood *v.* Watson, 111 Ala. 604, 20 So. 600.

facts in the case to procure a decision of a court on such facts. Such a statement of the facts can be used only for the purpose indicated, and is not competent as evidence of the truth of the facts stated therein for any other purpose.[44]

Abandoned Not Competent.—And if the case stated is abandoned it ceases to be competent as evidence for any purpose.[45]

I. BILL OF EXCEPTIONS. — A bill of exceptions is the statement of the court and not of a party, and cannot, therefore, be used as an admission. Furthermore, the bill contains a statement of the facts proved at the trial, for the purposes of an appeal, only, and cannot be used as evidence establishing the facts of a subsequent trial.[46]

44. Hart's Appeal, 8 Pa. St. 32; Wheeler *v.* Ruckman, 35 How. Pr. (N. Y.) 350; McLughan *v.* Bovard, 4 Watts (Pa.) 308; Neilson *v.* Columbia Ins. Co., 1 Johns. (N. Y.) 301; Elting *v.* Scott, 2 Johns. (N. Y.) 157; Castleman *v.* Sherry, 16 Tex. 228.

Case Not Competent on Second Trial.—"The defendant's counsel offered a copy of the case, prepared on the appeal from the judgment on a former trial of this action claimed to be in the handwriting of the plaintiff, which, the case before us states, showed an entire different statement by him from that made on the present trial. The fact that the case was in his handwriting can make no difference as to the admissibility of the evidence. The case itself is no evidence of what took place on the trial." Wheeler *v.* Ruckman, 35 How. Pr. 350, 355.

Reason for Such Limitation. So again it is said: "Independent of the effect imparted to it by those terms, it is supposed to have acquired a degree of credit from the bare statement of the case as an admission of the facts. For what purpose and on what condition was that admission? Exclusively to have the judgment of the court on the facts submitted, and not to give them effect for any other purpose. . . . A counsel, confident that the law of the case depends entirely on a particular fact, which, if found, would be decisive for him, might be willing to say to his antagonist, 'give me that fact and make the rest of the case as you please;' yet a statement immaterial in point of legal effect, which could well be risked before a court, might expose the party to the most inveterate prejudices of a jury; and if the consequences of admissions thus made were to follow him on subsequent occasions into an inquiry by another tribunal, there would be an end of agreements to settle facts by consent." McLughan *v.* Bovard, 4 Watts (Pa.) 308, 313.

45. McLughan *v.* Bovard, 4 Watts (Pa.) 308.

46. Beeler *v.* Young, 3 Bibb (Ky.) 520; Leeser *v.* Boekhoff, 38 Mo. App. 445; Baylor *v.* Smithers, 1 T. B. Mon. (Ky.) 6; Hardin *v.* Forsythe, 99 Ill. 312.

Not Competent on Subsequent Trial.—"But as the cause will have to be remanded to the court below for a new trial, it is proper we should notice an objection to the decision of that court in refusing to permit a bill of exceptions taken on a former trial by Beeler to be used as evidence to prove his infancy. In that bill of exceptions it is stated to have been on that trial proven Beeler was an infant when he executed the obligation; but as that statement was made for the purpose of obtaining a decision on a question of law in the progress of the cause, we apprehend it should be considered as true only for the purpose of a decision on that question, and cannot conclude the parties on the trial of an issue of fact at a subsequent trial; for if a statement in a former bill of exceptions of what was then proven, was received as evidence of the fact, it would be nugatory to call a jury to ascertain the truth of the fact, and would be attended with the absurd

But the contrary has been held.[47]

And in some of the states a bill of exceptions is made competent by statute, to prove the facts contained therein.[48]

Statement of Case.—In some states a statement of the case, or statement on appeal, similar in its object and effect to bills of exceptions, is authorized. And to these like rules, as to their admissibility as evidence, must prevail, as in case of bills of exceptions.[49]

J. Petitions and Affidavits. — a. *Generally.* — Admissions made by a party in petitions filed or affidavits made in the course of a trial or the proceedings in a cause are competent against him the same as statements or declarations made in pleadings: not conclusive as pleadings in the cause on trial, therefore, they may, as a general rule, be disproved or explained, but are nevertheless competent evidence if they contain admissions material to the issue.[50]

consequence of enabling either party by an exception not only to have a decision on the point of law, but also draw from the jury to the court a trial of the facts." Beeler *v.* Young, 3 Bibb (Ky.) 520, 522.

47. Bill of Exeeptions Admissible. In Scaife *v.* Western N. C. Land Co., 90 Fed. 238, the bill of exceptions was offered to prove a former admission of the fact, signed by an attorney of record on the trial, and in passing upon the question as to its admissibility, the court said: "The fifth assignment of error relates to the admission of a bill of exceptions in the former trial signed by counsel for the plaintiff and by the presiding judge, wherein it was admitted that S. H. Flemming was the agent of the defendant company. This paper, which is stated by the court to be a 'record in this cause,' was offered by the defendant to prove that the plaintiff had admitted Flemming's agency. Admissions by a party are always competent evidence against him, and there seems to be no reason why a distinct and formal admission signed by an attorney of record upon a former trial, and not withdrawn or modified, should not be competent evidence. We are of opinion that there was no error in admitting this record."

48. Padley *v.* Catterlin, 64 Mo. App. 629.

49. Statement on Motion for New Trial Not Competent.—A statement upon motion for a new trial and appeal is made for the purpose of explaining the errors upon which the moving party and appellant will rely. If it contains the evidence introduced at the trial, it is for this purpose. Counsel frequently agree to the correctness of a statement, or that it contains all of the evidence given at the trial, and these agreements are accepted as true for the purpose for which they are made. But, in fact, notwithstanding stipulations of this nature, statements rarely embody more of the evidence of rulings than counsel consider necessary to illustrate the errors assigned; and matter upon which no question is made, although a part of the history of the case, is set aside as unnecessary. A document prepared in this way, it is scarcely necessary to say, should not be received without preliminary proof that its report of the evidence is correct." Ferraris *v.* Kyle, 19 Nev. 435, 14 Pac. 529.

50. *England.*—Rex *v.* Clarke, 8 T. R. 220.

United States.—National S. S. Co. *v.* Tugman, 143 U. S., 36, 28 L. Ed. 87, 12 Sup. Ct. 361; Chicago &c. Ry. Co. *v.* Ohle, 117 U. S. 123, 6 Sup. Ct. 632; Gannan *v.* U. S., 34 Ct. Claims, 237.

Alabama.—Penn *v.* Edwards, 50 Ala. 63; Hallett *v.* O'Brien, 1 Ala. 585.

California.—Shafter *v.* Richards, 14 Cal. 125.

Delaware.—Hall *v.* Cannon, 4 Har. (Del.) 360.

The rule extends to voluntary affidavits.[51]

Copies of Affidavits When Competent.—Copies of affidavits shown to have been recognized as true copies by the affiant may be used as the originals might be used as an admission.[52]

Illinois.—Stone *v.* Cook, 79 Ill. 424; Ill. Cent. R. Co. *v.* Cobb, 64 Ill. 143; Snydacker *v.* Brosse, 51 Ill. 357.

Indiana.—Springer *v.* Drosch, 32 Ind. 486, 2 Am. Rep. 356; Behler *v.* State, 112 Ind. 140, 13 N. E. 272; Ohio & M. Ry. Co. *v.* Levy, 134 Ind. 343, 32 N. E. 815, 34 N. E. 20;

Iowa.—Asbach *v.* Chicago B. & Q. Ry. Co., 86 Iowa 101, 53 N. W. 90; Davenport *v.* Cummings, 15 Iowa 219.

Louisiana.—Michel *v.* Davis, 6 La. 470; Flower *v.* O'Connor, 8 Mart. (La.) N. S. 555.

Massachusetts.—Knight *v.* Rothschild, 172 Mass. 546, 52 N. E. 1062; Dodge *v.* Nichols, 5 Allen, 548; Brigham *v.* Fayerweather, 140 Mass. 411, 5 N. E. 265.

Missouri.—State *v.* Hayes, 78 Mo. 307.

New York.—Morrell *v.* Cawley, 17 Abb. Pr. 76; Forrest *v.* Forrest, 6 Duer, 102; Hadden *v.* N. Y. S. Co., 1 Daly 388; Furniss *v.* Ins. Co., 46 N. Y. Super. Ct. 467; Stickney *v.* Ward, 20 Misc. 605, 46 N. Y. Supp. 382.

North Carolina.—Long *v.* Fitzgerald, 97 N. C. 39, 1 S. E. 844; Mushat *v.* Moore, 4 Dev. & B. 124; Albertson *v.* Williams, 97 N. C. 264, 1 S. E. 841.

Oregon.—Tippin *v.* Ward, 5 Or. 451.

Pennsylvania.—Kline *v.* First Nat. Bank, (Pa.) 15 Atl. 433; Bowen *v.* DeLattre, 6 Whar. 430.

Texas.—Wyser *v.* Calhoun, 11 Tex. 323; Galveston H. & S. A. Ry. Co. *v.* Eckles, (Tex. Civ. App.), 54 S. W. 651.

Vermont.—Rome *v.* Hulett, 50 Vt. 637.

Virginia.—Fulton *v.* Gracey, 15 Gratt. 314.

It was doubted whether a petition for probate of a will was competent in another proceeding as an admission by petitioner of the testator's sanity. Brigham *v.* Fayerweather, 140 Mass. 411, 5 N. E. 265.

But Not Against Co-Defendants. Hyman *v.* Wheeler, 29 Fed. 347.

Affidavit by Married Woman is Competent as Admission. — Morrell *v.* Cawley, 17 Abb. Pr. 76, 82.

Admissible as Affiant's Declarations.—A rule is thus declared in Tippin *v.* Ward, 5 Or. 451: "The admission in evidence of the affidavit of the appellant, made before the county judge, in a proceeding to have the respondent placed in the county poorhouse, was not error. The making of that affidavit, although subsequent in date to the alleged breach of contract, was an act of the appellant, and the statements contained in the affidavit were his declarations and admissions relating to the subject matter of the contract involved in this litigation, and as such were clearly admissible in evidence."

Insufficient Affidavit Admissible. held that a petition of a party to set aside the entry of satisfaction of a judgment alleging that another person had an interest in the judgment, jointly with him, was competent in favor of the defendant in a subsequent action on the judgment in support of a plea of partial payment to the party so alleged to have an interest in the judgment. Penn *v.* Edwards, 50 Ala. 63.

Insufficient Affidavit Admissible.— It makes no difference that the affidavit is not made in accordance with the statute authorizing such a showing. Davenport *v.* Cummings, 15 Iowa 219.

51. Hallett *v.* O'Brien, 1 Ala. (N. S.) 585; Bowen *v.* DeLattre, 6 Whar. (Pa.) 430; Maxwell *v.* Harrison, 8 Ga. 61, 52 Am. Dec. 385.

52. Copies May Be Used, When. Copies served by affiant may be used as originals. Judge Spencer said that, "the originals were on file and the copies offered in evidence as between H. and the plaintiff, were authenticated by H. himself. He served them as true copies on the

Affidavit for Change of Venue.—It has been held that an affidavit for a change of venue cannot be used against the party making it as an admission.[53] But the correctness of this exception to the rule has not gone unchallenged.[54]

b. *Affidavit of Third Party Procured by Party to Suit.*—An affidavit made by a third party may be competent against one who, as a party to the suit, procured the affidavit to be made,[55] or knowing the contents of such affidavit, admits its truth.[56] But not otherwise.[57]

plaintiff's attorney and cannot be listened to in saying they are not true copies, they were equivalent to office copies." Jackson *v.* Harrow, 11 Johns. (N. Y.) 434. To same effect Natl. S. S. Co. *v.* Tugman, 143 U. S., 28; 36 L. Ed. 32; 12 Sup. Ct. 361.

53. An affidavit for a change of venue is authorized by law and the right to a change is not one to be embarrassed or burdened by permitting the adverse party to use the affidavit as an instrument of evidence. Ohio & M. Ry. Co. *v.* Levy, 134 Ind. 343, 32 N. E. 815 and 34 N. E. 20. See also Behler *v.* State, 112 Ind. 140, 13 N. E. 272.

The Supreme Court of Illinois had little doubt that such an affidavit could be used as an admission of the affiant's. Kankakee etc. Co. *v.* Horan, 131 Ill. 288, 23 N. E. 621.

54. Kankakee &c. Co. *v.* Horan, 131 Ill. 288, 23 N. E. 621.

55. Trustees of Wabash etc. Canal *v.* Bledsoe, 5 Ind. 133; Hargis *v.* Price, 4 Dana (Ky.) 79; Brickell *v.* Hulse, 34 Eng. C. L. 454.

Affidavit of Third Party; When Competent.—In Trustees of Wabash etc. Canal *v.* Bledsoe, 5 Ind. 133, 135, it is said: "Had the affidavit been made by the trustees, or one of them, it cannot be doubted that its statements would have been admissions binding upon them. It was made by their chief engineer, and was adopted and presented to the court by them as containing the truth, and a continuance was obtained upon it. They thus made its statements their own, obtained an advantage upon them, and they must not now repudiate them, when, as evidence, they may work to their disadvantage.

Ex Parte Affidavit by Third Party. The affidavit of a third party contained in a record read by defendant is not evidence against defendant, the evidence being *ex parte* and the affiant in court, and, if evidence at all, it is not conclusive. Hargis *v.* Price, 4 Dana (Ky.) 79.

56. Where a Party Admits Affidavit of Another to Be True.—In Knight *v.* Rothschild, 172 Mass. sonalty. The attorney was only auaffidavit stated that he knew the contents of an affidavit made by his attorney, and that the statements therein made were true; the court said: "These statements thus became admissions of the defendant, and they tended to establish the plaintiff's contention that McKeon was insolvent, and the defendants had reasonable cause to believe that he was insolvent, and that the goods were delivered as a preference."

57. Housten *v.* Bruner, 59 Ind. 25.

Unauthorized Affidavit by Attorney.—"We must not be understood as deciding that every affidavit made by a third person in the progress of a cause would be evidence on its trial. In a case, for example, where the party was absent, and the attorney representing him, not being fully advised, but believing certain facts could be proved, should make an affidavit setting forth in it the circumstances under which it was made, and should obtain a continuance upon it, we do not say the party himself would be bound by its statements. But here, one of the trustees resided in the town where the suit was pending, and another of them near by, and we presume, nothing appearing to the contrary, that they were superintending the suit." Trustees of Wabash etc. *v.* Bledsoe, 5 Ind. 133.

c. *Made by an Agent.* — So if made by an agent within the scope of his authority.[58]

d. *Made by One Not Having Authority.* — Either a petition or affidavit made without the direction of a party, or containing matter not authorized to be inserted therein, is not binding upon him, and is therefore inadmissible to prove an admission by him.[59]

e. *Not Admissible As Secondary Evidence, When.* — A petition or affidavit when offered to establish a fact stated therein, is parol evidence and cannot be used to establish a fact that must be proved by a record or other written evidence.[60]

f. *Must Be Offered in Evidence.* — The affidavit, although made in and as a part of the proceedings in the cause, must be offered in evidence to be available. It cannot be noticed as an item of evidence unless introduced as such.[61]

58. Asbach *v.* Chicago B. & Q. Ry. Co., 86 Iowa 101, 53 N. W. 90.

Made by an Agent.—In Rememan *v.* Blair, 96 Pa. St. 155, the court referring to an affidavit made in another action by the agent of a party, and now offered against the latter, said: "That it was not made by the plaintiff, but by his agent, may weaken the effect of it with the jury. But it was made for the plaintiff, presumably with his knowledge, and he has had the benefit of it. It was not the mere affidavit of one who could be called as a witness; it was a defence set up by the plaintiff to a suit against him by the contractor for these very repairs."

Contra.—An affidavit for continuance made by the president of a corporation is held not admissible against the corporation in another action, the affiant being in court; the court saying that he ought to have been sworn as a witness and subject to cross-examination. Kemp *v.* Ins. Co., 2 Gill & J. (Md.) 108.

59. By Attorney Without Authority.—In Duff *v.* Duff, 71 Cal. 513, 12 Pac. 570, a petition was subscribed in petitioner's name, but by his attorney, whose authority was to file a petition appropriate to the procurement of an order of court for letters of administration. The court said: "This authority would not extend beyond the insertion of such allegations which the law required such application should contain. As is clear from the section of the statute above cited, a description of the property of the decedent's estate was not required, but only the value and character of such property. The character of the property would sufficiently appear by a statement in the petition that it was realty or personality. The attorney was only authorized to file a petition stating the character and value of the property. In going beyond this, he was not acting within the scope of his authority, and therefore the statements in the petition describing the property were not on that ground admissible."

60. Cannot Prove Contents of Written Instrument.—In Phillips *v.* Cooper, 50 Miss. 722, the contest was to determine the right of the parties to certain personal property that had been taken on execution. One of the parties had claimed the property as his, and given bond as required by statute. At the trial the affidavit and bond were offered in evidence for the purpose of proving the judgments, executions and levy, relied upon by the plaintiff in the action, and it was held, first: that the affidavit did not state the existence of the judgment and execution, but only recited facts of such judgment and execution as were necessary under the statute, and second: that the existence of such judgment and execution could not be proved by such affidavit.

61. Osterman *v.* Goldstein, 26 Misc. 847, 55 N. Y. Supp. 1005.

Must Be Offered in Evidence. Thus it is said in Wyser *v.* Calhoun

g. *Whole Must Be Read.* — If a part of an affidavit is offered by one party, the other party is entitled to have read all, or so much of it as may be relevant to the part already offered.[62]

The fact that an affidavit is made on information and belief affects its weight but not its competency as an admission.[63]

K. Admission, to Avoid Continuance, That Absent Witness Will Testify to Certain Facts. — In some of the states it is provided by statute that where a continuance on account of the absence of a witness is applied for, the facts to which the witness would testify if present, must be shown, and that, if it is admitted by the opposite party that the witness would so testify if present, the continuance must be denied. Such an admission gives the party applying for the continuance the benefit of the testimony of the witness, as if he were present and testified to the facts. But it is not an admission that the facts stated are true, nor can the admission be used at any other trial as an admission.[64]

11 Texas 323: "The affidavit complained of, as affecting the legality of the judgment, was made to obtain an attachment, which appears to have been abandoned. No question, therefore, arises upon the sufficiency of the affidavit. The only use which could have been made of it, by the defendant, was to have given it in evidence, to disprove the plaintiff's right to recover in the right in which they sued. But it was not given in evidence; nor was the plaintiff's right so to recover, questioned in the court below. That the defendant had evidence which he might have adduced, but, did not, cannot now avail him as an objection to the legality of the judgment."

Held, Might Be Read at Argument Without Being Offered in Evidence. But in Cross *v.* Garrett, 35 Iowa 480, it was held proper for the counsel for plaintiff in his closing argument, to read to the jury and comment upon the motion of defendant for a continuance, filed in a case where such motion had not been introduced in evidence, at the trial of the case holding that the motion for continuance was a part of the record and a proper matter of comment by the opposite party, without being formally offered in evidence.

And this case seems to be approved in the later case of Asbach *v.* Chicago, B. & Q. Ry Co., 86 Iowa 101, 53 N. W. 90.

62. Forrest *v.* Forrest, 6 Duer (N. Y.) 102.

Truth of Entire Affidavit not Conceded.—Although one whose affidavit is used against him may require that the whole affidavit be read, yet the party offering it does not by so reading it concede the truth of all of it. State *v.* Hayes, 78 Mo. 307.

63. Chicago &c. Ry Co. *v.* Ohle, 117 U. S. 123, 6 Sup. Ct. 632. But in Mittnacht *v.* Bache, 16 App. Div. 426, 45 N. Y. Supp. 81, there was offered as an admission an affidavit reading, "*I now understand* that certain money belonged to an estate, and in support of such belief I refer to the demand made," etc. The court held this not competent, saying that it was evident that affiant had no personal knowledge on the subject and did not pretend to have.

64. **Made to Avoid Continuance.** At a former term of the court defendants submitted an affidavit for a continuance, in which they set forth what they expected to prove by a witness, who had been summoned, but did not attend. For the purpose of obtaining a trial, plaintiff's counsel admitted that the witness, if present, would testify as therein set forth. The party making such admission is not even held to admit either the competency of the witness or of the testimony. It is an admission that he would so testify. The party admitting may, however, object to the competency of the wit-

L. In Testimony Given As a Witness. — a. *Generally.* — Testimony given by a party containing material admission is always competent against him in any action, whether the same be given orally or in written answers to interrogatories propounded.[65]

ness and to the legality of the evidence, or any part of it. So, he may disprove of the facts the admitted testimony tends to prove. Such affidavit can in no case be used in a subsequent trial without the consent of opposing counsel. Its whole power and efficiency expire with the trial it is intended to accelerate. Ryan *v.* Beard, 74 Ala. 306, 309.

It must appear that a continuance was applied for and denied on agreement by the adverse party; that the witness named would testify as stated in the affidavit. Dempster etc. Co. *v.* Fitzwater, 6 Kan. App. 24, 49 Pac. 624.

But in Prosecutions for Crime. In absence of a witness, the state must not only admit that the witness would testify as alleged, but must admit the absolute truth of such testimony. Newton *v.* State, 21 Fla. 53, and see also People *v.* Vermilyea, 7 Cow. (N. Y.) 369; State *v.* Brette, 6 La. Ann. 652, where it is held, however, that if it appears from the record that the jury did, in fact, give full credit to the statement of the expected testimony, the error is without prejudice. De Warren *v.* State, 29 Tex. 465; People *v.* Diaz, 6 Cal. 248; Wassels *v.* State, 26 Ind. 30; McLaughlin *v.* State, 8 Ind. 281; Miller *v.* State, 9 Ind. 340; Hyde *v.* State, 16 Tex. 445; 67 Am. Dec. 630; Van Meter *v.* People, 60 Ill. 168.

Contra.—Hamilton *v.* State, 3 Ind. 552.

Such Affidavit Used Against Affiant.—But an affidavit for continuance may be used as an admission of any fact therein averred and as a basis for inferences against affiant from such facts, and this even in a criminal action. Behler *v.* State, 112 Ind. 140, 13 N. E. 272; Kemp *v.* Ins. Co., 2 Gill. & J. (Md.) 108; Pledger *v.* State, 77 Ga. 242, 53 S. E. 320; State *v.* Young, 99 Mo. 666, 12 S. W. 879; Greenley *v.* State, 60 Ind. 141; State *v.* Hayes, 78 Mo. 307; Farrell *v.* People, 103 Ill. 17; Newton *v.* State, 21 Fla. 53; De Warren *v.* State, 29 Tex. 465.

65. *Alabama.*—Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17.

California.—Lorenzana *v.* Camarillo, 45 Cal. 125.

Colorado.—Omaha &c. Smelting & Ref. Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, L. R. A. 236; Buddee *v.* Spangler, 12 Colo. 216, 20 Pac. 760.

Connecticut.—Benedict *v.* Nichols, 1 Root (Conn.) 434.

Georgia.—Maxwell *v.* Harrison, 8 Ga. 61, 52 Am. Dec. 385.

Illinois.—Wheat *v.* Summers, 13 Ill. App. 444; Chase *v.* Debolt, 2 Gilm. 371.

Indiana.—Jones *v.* Dipert, 123 Ind. 594, 23 N. E. 944; McKenzie *v.* Reneau, 8 Blackf. 410.

Kentucky.—Louisville & N. Ry. Co. *v.* Miller, 19 Ky. L. Rep. 1665, 44 S. W. 119.

Massachusetts.—Lynde *v.* McGregor, 13 Allen 182, 90 Am. Dec. 188; Judd *v.* Gibbs, 3 Gray 539.

Missouri.—Wiseman *v.* St. Louis &c. Ry. Co., 30 Mo. App. 516; Utley *v.* Tolfree, 77 Mo. 307; Glenn *v.* Lehnen, 54 Mo. 45.

Nebraska.—Lowe *v.* Vaughn, 48 Neb. 651, 67 N. W. 464; German Nat. Bank *v.* Leonard, 40 Neb. 676, 59 N. W. 107.

New York.—Lormore *v.* Campbell, 60 Barb. 62; Dusenbury *v.* Dusenbury, 63 How. Pr. 349; Fisher *v.* Monroe, 2 Misc. 326, 21 N. Y. Supp. 995; McAndrews *v.* Santee, 57 Barb. 193; Pickard *v.* Collins, 23 Barb. 444.

Pennsylvania.—Tams *v.* Bullitt, 35 Pa. St. 308.

Rhode Island.—Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681.

South Carolina.—State *v.* Senn, 32 S. C. 392, 11 S. E. 292.

Vermont.—Johnson *v.* Powers, 40 Vt. 611.

Evidence on Former Trial Competent as Admission.—A party offered the testimony of his opponent,

b. *Offers of Letter Admission of Its Correctness.* — So a letter or other writing offered by a party in his own behalf, at another trial, is competent evidence against him as an admission of the correctness of its contents.[66]

given as a witness at the trial of another action; it was objected that this testimony was given for the purposes of the other action only. But the court said: "It is not competent for a witness to limit or restrict his testimony to the particular trial for which it is offered. He is bound, by the obligations of his oath, to tell the truth. And that his evidence, thus elicited, in a judicial proceedings, or even in a voluntary affidavit, may be used as evidence against him, as an admission of the facts contained therein, is well settled by all authorities." Maxwell *v.* Harrison, 8 Ga. 61, 52 Am. Dec. 385.

Testimony in the Trial of Another Case Competent.—The rule is thus stated in Pickard v. Collins, 23 Barb. 444, 456: "The testimony of the plaintiff, on the trial of another case, which was proposed to be proved, to the effect that no gas tar had been put on the fence after he moved on the premises occupied by him, which is directly contrary to his testimony on the trial of this case, regarded as an admission, was relevant evidence in this case on the issue joined upon the first cause of action; and the defendant clearly had a right to prove that testimony as an admission, by any competent witness other than the plaintiff."

But see Carter *v.* Edwards, 16 Ind. 238; Carter *v.* Buckner, 3 Blackf. (Ind.) 314; Mulliken *v.* Green, 5 Mo. 489.

Statements in Arbitration Proceeding.—Statements assented to or acquiesced in by a party to an arbitration may be introduced against him at the trial of a subsequent action at law. Tams *v.* Bullitt, 35 Pa. St. 308.

Admissible Against Executor.—Admissions made by a party at the first trial are admissible against his executor at the second trial. Graffenreid *v.* Kundert 31 Ill. App. 394.

Testimony Before a Justice Held Not Admissible on Appeal.—In Carter *v.* Buckner, 3 Blackf. (Ind.) 314, it was offered to prove by a witness what had been testified to by the plaintiff on the trial before the justice, but the evidence offered was excluded. In ruling upon the question on appeal, the court said: "The plaintiff was in court, and could have been required to answer to the plea on oath. This was not done, but a witness is offered to prove his admissions made under oath before the justice. This was inadmissible.

"Other admissions or confessions of the plaintiff would have been received, or if he had been examined in the Circuit Court, it would have been competent to have proved contradictions, discrepancies, or variances occurring in his examination before the Justice of the Peace, and that in the Circuit Court. It is true the admissions of a party may be given in evidence against him. These admissions may either be *in pais* or of record; they, however, relate to the party, without violating any rules of evidence which apply when the party is constituted by statute a witness."

See explanation of this ruling in McKenzie *v.* Reneau, 8 Blackf. 314.

And in Carter *v.* Edwards, 16 Ind. 238, it was held that admissions made by a party examined under oath, on the trial before the justice, could not be proved in an appellate court, the party being in court on the trial on appeal, and not then examined.

See also Martien *v.* Barr, 5 Mo. 102.

66. Effect of Offering Letter in Evidence at Previous Trial. — In Maclay *v.* Work, 10 Serg. & R. (Pa.) 194, it is said: "The letter of Casper Weitzel had been procured, and at a former trial given in evidence by the plaintiff, as containing facts undoubtedly true, and as those on which, among others, he relied for recovery. Can it therefore be questioned that by the very act of giving it in evidence, he admitted

c. *To Prove Omission to Make Claim.* — And his testimony may be used to prove an omission on his part to claim something in the former case that he is now claiming, in which case the whole of the testimony must be read, although not material to the issue.[67]

d. *That Party Was Compelled to Testify Immaterial.* — It makes no difference in respect of the admissibility of the testimony of a party that he was forced by legal process to become a witness and give such testimony;[68] nor that such testimony was illegally

that every fact it contained was true? And if it cannot, is it not as little to be questioned that his antagonist might use this admission against him as soon as the effect of those facts was ascertained to be different from what it was first supposed to be? If the plaintiff were mistaken as to the truth of such assertion, he would be permitted to disprove it, and that is all he could reasonably require; but that the letter was competent and proper to go to the jury I have not the slightest doubt."

67. Offer of Testimony to Show Omission to Make Claim.—In Eaton *v.* Telegraph Co., 68 Me. 63, the disclosure made by a party to a suit as trustee in another action, was offered in evidence against him to show that he omitted to claim therein to be the owner of the property he was suing to recover, and the evidence was held to be competent, the court saying: "But the admissibility of the testimony upon which the verdict was founded is contested by the plaintiff. First, the trustee disclosure was objected to. We have no doubt that it was legally admitted. It is insisted that it laid before the jury many matters foreign to the issue. But it must be borne in mind that the point was to show what the disclosure did not contain rather than what it did contain, and therefore the whole of it was to be read in order to render the point available."

68. Chase *v.* Debolt, 2 Gil. (Ill.) 371; Lilley *v.* Mutual Ben. L. Ins. Co., 92 Mich. 153, 52 N. W. 631.

Statute Forbidding Use of Testimony.—But by a federal statute evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country cannot be given in evidence, or in any manner used against him or his property or estate in any criminal proceeding or for the enforcement of any penalty or forfeiture. U. S. Rev. Stat., Sec. 860; Johnson *v.* Donaldson, 3 Fed. 22; Daly *v.* Brady, 69 Fed. 285.

And it is held that independently of such a statute it would be contrary to all precedent and the rules of law, to allow evidence so obtained to be used for such purposes. Johnson *v.* Donaldson, 3 Fed. 22; Atwill *v.* Ferrett, 2 Fed. Cas. No. 640.

Similar statutes may be found in some of the states. Lapham *v.* Marshall, 20 N. Y. St. 795, 3 N. Y. Supp. 601; Uhler *v.* Maulfair, 23 Pa. St. 481; Dusenbury *v.* Dusenbury, 63 How. Pr. 349.

Examination in Supplementary Proceedings.—With respect to the provisions of the Code of New York, prohibiting the use of answers to interrogatories in proceedings supplementary to execution in other actions, it was held in Lapham *v.* Marshall, 20 N. Y. St. 795, 3 N. Y. Supp. 601, that the statements made by a witness under examination in a supplementary proceeding were privileged; and under the code and its amendments could not be used either in a civil or criminal action, but, by the amendment of 1881, the inhibition was removed so far as it related to civil actions, thereby making the statements of the witness competent evidence upon the trial of another civil action; and that, as in that case, the party had testified before the amendment of the statute, she was protected by the statute then in force, from the use of her testimony in the civil action.

Contra.—In criminal actions, Barber *v.* People, 17 Hun (N. Y.) 366.

taken,[69] nor that the party is present in court and might be called as a witness,[70] nor that the testimony given on the former trial was incompetent.[71]

e. *How Proved.* — The proof of his previous testimony may be made by the party himself, or by any one else that heard it.[72]

69. McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123.

Statute Forbidding use of Testimony.—In Uhler *v.* Maulfair, 23 Pa. St. 481, it was held that the object of the legislature of that state in passing the act, forbidding the use of testimony given in answer to any bill seeking a discovery in relation to any fraud, or to answer as a witness in relation to such fraud was to remove every temptation to falsify from every person called upon to answer as to such fraud, and that upon that ground the answers given and offered in evidence were properly rejected.

Testimony Illegally Taken Competent as Admission.—In Lilley *v.* Mut. Ben. Life Ins. Co., 92 Mich. 153, 52 N. W. 631, one had been examined orally in the probate court, contrary to the statute which provided for written interrogatories; and upon the objection that testimony was illegally taken, and could not be afterwards introduced as an admission, the court said, that he gave his evidence as any witness would have done, and did not seem to have been scared or misled into saying anything to his detriment. There was no reason to suppose that his evidence was different from what it would have been had he testified at his own free will, although he had objected to the jurisdiction of the court.

Testimony of a Married Woman Illegally Elicited Before a Grand Jury.—In Wilson *v.* Hill, 13 N. J. Eq. 143, it is held that what a party testifies before a grand jury, appearing there under a subpœna and compelled to testify, the testimony being illegal because given against her own husband, cannot afterwards be offered against her as an admission. But see Carter *v.* Buckner, 3 Blackf. (Ind.) 314; Carter *v.* Edwards, 16 Ind. 238; McKenzie *v.* Reneau, 8 Blackf. (Ind.) 411.

70. Biddee *v.* Spangler, 12 Colo. 216, 20 Pac. 760; Lorenzana *v.* Camarillo, 45 Cal. 125; Phoenix Mut. L. Ins. Co. *v.* Clark, 58 N. H. 164.

71. Maclay *v.* Work, 10 Serg. & R. (Pa.) 194.

72. Pickard *v.* Collins, 23 Barb. 444; German Nat. Bank *v.* Leonard, 40 Neb. 676, 59 N. W. 107.

How Former Testimony May be Proved.—In the case of Chase *v.* Debolt, 2 Gil. (Ill.) 371, the suit was originally brought before a justice of the peace, and was appealed to the Circuit Court, and there tried. On the trial before the justice, Chase became a witness. On the trial in the Circuit Court, the court permitted the justice to testify to what Chase had sworn on the trial before him, and this was assigned as error. In passing upon the admissibility of this evidence, the court said: "One witness cannot testify to what another witness had sworn on a former trial, especially when that witness is alive and may be called, for this would be hearsay, if offered as evidence in chief. But the rule does not extend to the admissions of the party. What the party may have stated, although under oath as a witness, is most clearly admissible as an admission, although compulsory. 2 Stark. Ev. 22; 1 Camp. 30; 4 Jo. 10; 4 Esp. C. 172, 212; Atk. 200; Cook 200; 11 Ves. 521; 1 Stark. C. 366; 3 Eng. Com. Law R. 385; 1 Phil. Ev. 89; 2 Phil. Ev. 161, note 170.

"The decision in 3 Blackf. 315, to the contrary, I do not regard as sound law, nor reconcilable with principle or the books. Surely the additional solemnity and sanction of an oath to the admission ought not to destroy its credit or its admissibility; otherwise, all answers to bills of discovery, and analagous cases, would be excluded as incompetent. An examination, therefore, although compulsory, will not exclude the admission that may be made."

Minutes of Defendant's Testimony

The minutes of the stenographer are not competent unless proved to be correct.[73]

f. *Evidence Improperly Taken Competent.* — It makes no difference as to the competency of the evidence that the testimony was not taken in the manner required by law.[74]

g. *Party Need Not Be Called to Testify.* — It is not necessary to call the party himself, or to direct his attention to the testimony given by him. It is not impeaching but original evidence against him, and provable like any other admission.[75]

h. *Testimony of Third Party Not Competent.* — As a rule the testimony of a third party is not competent, being, like other decla-

on Former Trial.—In Johnson *v.* Powers, 40 Vt. 611, the plaintiff offered to read the minutes of the defendant's own testimony, given at a former trial, which minutes the counsel testified were correct, except that they did not contain the cross-examination; and it was held that the defendant, being present at the trial under revision, and not showing that the cross-examination qualified the examination in chief, such minutes were admissible.

Minutes of the Judge as Evidence of Testimony Given.—In Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64, 75 Am. Dec. 681, it was permitted to prove testimony of a witness by the judge's minutes, the court saying that such minutes are taken by every judge as a necessary part of his duty, not only to enable him to instruct the jury, or to sum up to the jury, but for use on motions for new trial. That to apply to such minutes the strictest rule with regard to voluntary memoranda would be to prevent the use of them as a source of evidence for the numerous and important purposes for which they are needed; for no judge, speaking generally, could testify farther than to identify his minutes as written by him at the time, and that he believed them to be correct. The presumption is that they are correct and should be admitted as evidence with such verification as in the nature of things is possible.

Record of Other Action Need Not be Produced.—When the evidence of a witness on a former trial, who is dead or absent, is proper to be introduced as evidence between the same parties on another trial upon the same subject matter, the record must of necessity be introduced to show the fact of the trial and of the identity of the parties and of the subject matter.

But that principle has no application where the testimony of the party is offered to show his own admission. The witness in narrating such testimony of the party, must state it from memory and cannot read his notes as evidence, or must state that on recurring to his notes they contain substantially what the party said. Kutzmeyer *v.* Ennis, 27 N. J. Law 371.

73. Misner *v.* Darling, 44 Mich. 438, 7 N. W. 77.

Reporter's Notes Not the Best Evidence.—In German Nat. Bank *v.* Leonard, 40 Neb. 676, 59 N. W. 107, the question arose as to the proper manner of proving what had been testified to by a witness on a former trial. It was offered to prove what was said by a witness who heard the testimony given. This was objected to on the ground that the testimony was taken down by a shorthand reporter, and that his notes of the testimony given were the best evidence. But it was held that the reporter's notes were not the best evidence, as claimed, and that the offered evidence was competent.

74. Lilley *v.* Mut. Ben. L. Ins. Co., 92 Mich. 153, 52 N. W. 631.

75. Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17; Fisher *v.* Monroe, 2 Misc. 326, 21 N. Y. Supp. 995; Eddings *v.* Boner, 1 Ind. Ter. 173, 38 S. W. 1110; Louisville & N. Ry. Co. *v.* Miller, 19 Ky. L. Rep. 1665, 44 S. W. 119.

rations of third parties, mere hearsay.[76]

i. *Exceptions.* —**Assent of Party to Correctness.**—But the party may give his assent to statements testified to by another in such way as to make them his own admissions. In such case they are competent upon a showing of such assent to, or acknowledgment of their truth.[77] The mere fact that he heard the testimony of another in a case of his own, and expressed no dissent, is not enough to render the testimony competent.[78]

j. *For Purpose of Impeachment.* — As against one not a party, but a witness only, testimony given by him at another time may be given in evidence, the proper foundation being laid therefor, not as an admission, but for the purpose of impeachment.[79]

k. *Testimony on Trial Not an Admission.* — The testimony of a party to the suit cannot be taken as an admission, in that action, of the truth of any fact, but only as evidence, like that of any other witness in the case.[80]

76. Beeckman *v.* Montgomery, 14 N. J. Eq. 106, 80 Am. Dec. 229; Lormore *v.* Campbell, 60 Barb. 62.

77. Beeckman *v.* Montgomery, 14 N. J. Eq. 106, 80 Am. Dec. 229; State *v.* Gilbert, 36 Vt. 145.

Testimony of an Agent or Employee, given at a former trial, is not generally competent against the principal at a subsequent trial. Savannah &c. Ry. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183; Denver &c. Co. *v.* Watson, 6 Colo. App. 429, 40 Pac. 778.

Admission of Truth of Testimony of Third Party.—Thus it is said in State *v.* Gilbert, 36 Vt. 145: "But if a party who has heard a witness testify admits that what the witness testified is true, he may thereby make that testimony evidence against him, not as independent evidence, but as explanatory of the admission. It becomes by reference a part of the admission and it admissible for the purpose of interpreting it. A letter written by another would not be evidence against a party; but if the party on reading it, says that the facts stated in it are true, it becomes evidence in connection with the admission, not as evidence of the truth of the statements it contains, but to show what the party admitted."

Testimony of a Third Party Competent if Acquiesced In. In Beeckman *v.* Montgomery, 14 N. J. Eq. 106, 80 Am. Dec. 229, the court in passing upon this question said: "The examination of Andrew Montgomery, taken in a cause wherein he was defendant at the suit of these complainants, by virtue of an order of a justice of the Supreme Court, under the act to prevent fraudulent trusts and assignments (Nix. Dig. 251) is not *per se* competent evidence. It is not competent as the testimony of a deceased witness in a former action, for the cause is not between the same parties; nor as an admission of a privy in blood, or in estate. . . .

The examination is, however, rendered competent by the subsequent examination of Ebenezer Montgomery, who was present at and heard read the examination of his father, and assented to the truth of its statements. The facts stated, therefore, by the father, so far as they are within the knowledge of the defendant, are admitted by him to be true."

78. Sheridan *v.* Smith, 2 Hill (N. Y.) 538.

79. McAndrews *v.* Santee, 57 Barb. 193; Omaha &c. Smelting & Ref. Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236.

80. Ephland *v.* Mo. Pac. Ry. Co., 57 Mo. App. 147, 71 Mo. App. 507.

Testimony of Parties in Case on Trial Not Admissions. In Matthews *v.* Storey, 51 Ind. 417, the parties to the action testified therein as witnesses. The court below, in an in-

Statutes Forbidding Use of Testimony. — In some cases statutory provisions, rendering testimony given in one action or proceeding incompetent in another, have been enacted the better to insure free and candid disclosures by the party examined.[81]

M. In Depositions. — a. *Generally.* —Any statements made by a party in a deposition given by him, material as admissions, may be introduced as evidence of such admissions, in the cause in which the deposition was taken, or in any other action.[82]

struction, treated the statements of the parties as witness as admissions of the fact testified to.

In passing upon the correctness of this instruction, the court said: "This testimony of the two parties would go to the jury as evidence tending to prove the facts therein stated, but not as facts admitted or to take the place of facts as proved, as the court in the instruction complained of stated. The testimony of parties to a suit must be regarded as evidence, not as facts admitted. It seems to us that the court committed an error in giving the instruction to the jury." But see Coit *v.* Waples, 1 Minn. 134; Cal. Elec. Wks. *v.* Finck, 47 Fed. 583; Mason *v.* Poulson, 43, Md. 161; De Clercq *v.* Mungin, 46 Ill. 112.

81. Uhler *v.* Maulfair, 23 Pa. St. 481; Lapham *v.* Marshall, 20 N. Y. St. 795, 3 N. Y. Supp. 601; Dusenbury *v.* Dusenbury, 63 How. Pr. 349; Johnson *v.* Donaldson, 3 Fed. 22; Atwill *v.* Ferrett, 2 Fed. Cas. No. 640; Daly *v.* Brady, 69 Fed. 285.

82. *United States.*—Lastrapes *v.* Blanc, 3 Woods 134, 14 Fed. Cas. No. 8,100; Cambioso *v.* Moffett, 2 Wash. C. C. 98, 4 Fed. Cas., No. 2, 330.

Alabama.—Hallett *v.* O'Brien, 1 Ala. (N. S.) 585.

Kansas.—Moore *v.* Brown, 23 Kan. 269.

Massachusetts. — Knowlton *v.* Mosely, 105 Mass. 136; Judd *v.* Gibbs, 3 Gray 539.

Missouri.—Charleson *v.* Hunt, 27 Mo. 34; Kritzer *v.* Smith, 21 Mo. 296; Bogie *v.* Nolan, 96 Mo. 85; Padley *v.* Catterlin, 64 Mo. App. 629; State *v.* Bank, 80 Mo. 626; Zimmer *v.* McLaran, 9 Mo. App. 591.

New Hampshire. — Brewer *v.* Hyndman, 18 N. H. 9; Phoenix Mut. L. Ins. Co. *v.* Clark, 58 N. H. 164.

New York.—Lapham *v.* Marshall, 51 Hun 36, 3 N. Y. Supp. 601.

South Carolina. — McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123.

Texas.—Edwards *v.* Norton, 55 Tex. 405; Chaddick *v.* Haley, 81 Tex. 617, 17 S. W. 233; Bilger *v.* Buchanan (Tex.) 6 S. W. 408; Parker *v.* Chancellor, 78 Tex. 524, 15 S. W. 157.

Virginia.—Hatcher *v.* Crews, 78 Va. 460.

For What Purpose Admissible in Another Action.—In Lastrapes *v.* Blanc, 3 Woods 134, 14 Fed. Cas. No. 8,100, it was held that the deposition of the defendant, taken in another cause, was admissible either to contradict as oral evidence given on the trial or as an admission by him.

A Deposition in Insolvency Proceeding by one not in custody and not then charged with crime, is admissible against him in a criminal proceeding. People *v.* Wieger, 100 Cal. 352, 34 Pac. 826.

Statement in Deposition Admissible Although Party Has Testified State *v.* Bank, 80 Mo. 626.

Deposition May be Explained, and it may be shown that certain statements made were for some reason omitted from the deposition, the deposition, like other admissions, is not conclusive. Boardman *v.* Wood, 3 Vt. 570.

Deposition of Party Since Deceased.—In Chaddick *v.* Haley, 81 Tex. 617, 17 S. W. 233, it was held that a deposition of the testator taken in another action was properly admitted on the contesting of his will, to show the cause of his estrangement from his disinherited child; and that it was immaterial whether the deposition was prop-

b. *When Deposition Incompetent As Such.* — And the statements made in a deposition may be read in evidence against a party upon proof that he made such statements, although the deposition has been suppressed and is no longer competent evidence as a deposition, or is incompetent as a deposition for other reasons.[83]

c. *Where Party in Court.* — And although the party is in court and might be called as a witness,[84] or might legally have declined

erly taken or not where no objection was raised on the ground that the statements therein contained were not made by the testator.

83. Parker *v.* Chancellor, 78 Tex. 524, 15 S. W. 157; Moore *v.* Brown, 23 Kan. 269; Hatch *v.* Brown, 63 Me. 410; McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123; Carr *v.* Griffin, 44 N. H. 510; Bilger *v.* Buchanan (Tex.), 6 S. W. 408; Faunce *v.* Gray, 21 Pick. (Mass.) 243; Zimmer *v.* McLaran, 9 Mo. App. 591.

Not Properly Taken Admissible as Admission.—The rule is thus stated in Bilger *v.* Buchanan (Tex.) 6 S. W. 408: "Objection was made to reading Bilger's depositions in the case between O'Hara and Bonner. The objection amounted to this: That the depositions were not properly taken, as is required in case of depositions given under the statutes. It is not objected that the statements of Bilger were not proven by the testimony of the officer before whom they were made. Bilger's admissions made in those depositions were good testimony against himself. It mattered not that there was no commission, or whether they were made under oath before a proper officer. If they had been made privately to an individual, they should have been received, if proven by the party in whose presence they were made. . . . They were properly admitted."

84. Meyer *v.* Campbell, 48 N. Y. St. 666, 20 N. Y. Supp. 705; Phoenix Mut. L. Ins. Co. *v.* Clark, 58 N. H. 164; Bogie *v.* Nolan, 96 Mo. 85, 9 S. W. 14; State *v.* Bank, 80 Mo. 626.

Presence of Party in Court Immaterial.—In Charleson *v.* Hunt, 27 Mo. 34, plaintiff was permitted to read in evidence the deposition of a defendant who was present in court under a subpoena and ready to testify, the court holding that the statute which gives the right to examine an adverse party as a witness did not exclude ordinary means of proof, and that it is competent to prove, as admission, oral or written statements of the party, though he might be called as a witness.

Where Cause for Using Deposition No Longer Exists.—In Hatch *v.* Brown, 63 Me. 410 it is said that Revised Statutes, Chap. 107, Sec. 17, providing that a deposition shall not be used at a trial if the adverse party shows that the cause for taking it no longer exists, simply means that it shall not be used as a deposition; that the enactment has no application to the deposition of a party. It was only as a paper containing his written deposition that the paper was offered and received.

However obtained they are competent evidence subject to such explanations or additions as he might be able to make.

Deposition Incompetent as Such. In Meyer *v.* Campbell, 48 N. Y. St. 666, 20 N. Y. Supp. 705, it is said: "Defendant's counsel also offered in evidence plaintiff's deposition, taken *de bene esse*. . . . This also was excluded, under objection and exception by defendant's counsel. The deposition was, as a matter of course, not competent in plaintiff's favor, since he was present on the trial; but the same principle which rendered the allegations of the original complaint competent evidence for defendant as declarations made by plaintiff at variance with his claim on the trial applied to the deposition, and its exclusion was therefore error."

to depose as a witness,[85] or was incompetent to testify.[86]

d. *Not Conclusive.* — But when the statements made in a deposition are offered as an admission they are not conclusive, but may be disproved or explained like any other admission.[87]

e. *Whole Must Be Read.* — The general rule is that the whole of the deposition must be offered.[88]

f. *Exceptions to the Rule.* — An exception to the rule admitting depositions as admissions has been made, in some cases, by statute, where the deposition has been taken to perpetuate testimony.[89]

g. *Party Need Not Be Called.* — If the deposition is of a party to the suit, it is not necessary to call his attention to it, or to ask him if he made such statements as it contains. It is competent as evidence of an admission, and not for the purposes of impeachment only.[90]

N. Answers to Interrogatories. — Answers of a party to interrogatories in an action in which he is a party are competent as admissions against him, not only in that action, but in any other action to which he is a party, where the statements made in such answers are material to the issues in the cause on trial.[91]

85. Where Party Might Have Refused to Depose.—In Helm *v.* Handley, 1 Litt. (Ky.) 219, it is said the law, in some instances, indulges witnesses in the privilege of not denosing, where their own interest may be affected; but wherever they do depose to facts which may affect them in another controversy, we are aware of no rule which precludes their testimony from being used against them in such controversy.

86. Where Deponent Incompetent as a Witness.—In Faunce *v.* Gray 21 Pick. (Mass.) 243, it appeared that a deposition had not been taken in compliance with the statute, and it was the deposition of a defendant who was incompetent as a witness, and the court said: "But the confessions of executors and administrators are competent evidence against themselves in any suit by or against them in their representative character. Emerson *v.* Thompson, 16 Mass. R. 429; Atkins *v.* Sanger, 1 Pick. 192; Hill *v.* Buckminster, 5 Pick. 391. And we can discover no reason for excluding the written statement of the defendant from the operation of this rule."

87. Boardman *v.* Wood, 3 Vt. 570

88. Whole Deposition Must be Read.—In Kritzer *v.* Smith, 21 Mo. 296, 301, it is said: "As the deposition was read as an admission, regularly, the party reading it should have read the whole. The distinction is that, when an answer is read as part of the pleadings in the cause in which it is filed, only such parts may be read as the party desires; but when it is taken from the cause in which it is filed and read in another proceeding, as an admission, there the whole of it must be read by the party offering it.

89. Dwinel *v.* Godfrey, 44 Me. 65. But this is only by virtue of a statute to that effect. The general rule applies to depositions taken for such purpose. Faunce *v.* Gray, 21 Pick. (Mass.) 243; McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123.

90. Phoenix Mut. L. Ins. Co. *v.* Clark, 58 N. H. 164.

91. *Alabama.*—Gay *v.* Rogers, 100 Ala. 624, 20 So. 37.

Florida.—Jacksonville T. & K. Ry. Co. *v.* Peninsula L. T. & M. Co., 27 Fla. 1,157, 9 So. 661, 17 L. R. A. 33.

Georgia.—Whitlock *v.* Crew, 28 Ga. 280.

Louisiana. — Alford *v.* Hughes, 14 La. Ann. 727; Murison *v.* Butler, 18 La. Ann. 107.

Maine.—Jewett *v.* Rines, 30 Me. 9; Morrell *v.* Rogers, 1 Greenl. 328.

Massachusetts.—Williams *v.* Che-

And they may become competent and material for the purpose of contradicting the party making the answers, as a witness in that or any other case, whether a party to the action or not.

O. Bills of Particulars.—A bill of particulars furnished by one party to a suit to another is competent evidence of an admission.[92]

P. By Default. — **Generally.** — Where a defendant, after legal service, fails to answer, and thereby suffers a default, he admits or confesses all of the material allegations of the complaint well pleaded, except the amount of damages alleged.[93]

ney, 3 Gray 215; Nichols *v.* Allen, 112 Mass. 23.

Missouri.—Utley *v.* Tolfree, 77 Mo. 307.

Pennsylvania.—Maloney *v.* Davis, 48 Pa. St. 512.

92. Lee *v.* Heath, 61 N. J. Law, 250, 39 Atl. 729.

93. *England.* — Green *v.* Hearne, 3 D. & E. 301; Skelton *v.* Hawling, 1 Wilson 258.

United States. — Dickson *v.* Wilkinson, 3 How. 57; Clements *v.* Berry, 11 How. 398; Miller *v.* U. S., 11 Wall. 268; McAllister *v.* Kuhn, 96 U. S. 87; Oregon Ry. Co. *v.* Oregon Ry. & Nav. Co., 28 Fed. 505.

Alabama. — Powell *v.* Washington, 15 Ala. 803; Garrow *v.* Emanuel, 3 Stew. 285; McGehee *v.* Childress, 2 Stew. 506; Maund *v.* Loeb, 87 Ala. 374, 6 So. 376; Ledbetter, etc. *v.* Vinton, 108 Ala. 644, 18 So. 602.

Arkansas. — Johnson *v.* Pierce, 12 Ark. 509; Hershy *v.* MacGreevy, 46 Ark. 498.

California. — Hutchings *v.* Ebeler, 46 Cal. 557; Himmelmann *v.* Spanagel, 39 Cal. 401; McGregor *v.* Shaw, 11 Cal. 47; Curtis *v.* Herrick, 14 Cal. 117; Rowe *v.* Table Mt. Water Co., 10 Cal. 441.

Colorado. — Hoyt *v.* Macon, 11 Colo. 113; Weese *v.* Barker, 7 Colo. 178, 2 Pac. 919.

Connecticut. — Shepard *v.* New Haven, etc. Co., 45 Conn. 54; Havens *v.* Hart. & N. H. R. Co., 28 Conn. 69; Martin *v.* New York & N. E. R. Co., 62 Conn. 331, 25 Atl. 239; Welch *v.* Wadsworth, 30 Conn. 149; Star Cash, etc. Co. *v.* Starr, 69 Conn. 440, 37 Atl. 1057.

Delaware. — Randell *v.* Chesapeake & Del. Canal, 1 Harr. 233; Macklin *v.* Ruth, 4 Harr. 87.

Florida. — Russ *v.* Gilbert, 19 Fla. 54.

Illinois. — Tucker *v.* Hamilton, 108 Ill. 464; Binz *v.* Tyler, 79 Ill. 248; Morton *v.* Bailey, 1 Scam. 213; Greenup *v.* Woodworth, Breese 232; Peck *v.* Wilson, 22 Ill. 205; Cook *v.* Skelton, 20 Ill. 107; Underhill *v.* Kirkpatrick, 26 Ill. 85; Rietzell *v.* People, 72 Ill. 416; Madison County *v.* Smith, 95 Ill. 328; Garrison *v.* People, 21 Ill. 535; Phoenix Ins. Co. *v.* Hendrick, 73 Ill. App. 601; Cutright *v.* Stanford, 81 Ill. 240.

Indiana. — Cravens *v.* Duncan, 55 Ind. 347; Fisk *v.* Baker, 47 Ind. 534; Briggs *v.* Sneghan, 45 Ind. 14; People *v.* County Court, 10 Ind. 19; Hubbard *v.* Chappel, 14 Ind. 601; Emery *v.* Evansville I. C. R. Co., 13 Ind. 143; Goble *v.* Dillon, 86 Ind. 327.

Iowa. —Greeley *v.* Sample, 22 Iowa 338; Pfantz *v.* Culver, 13 Iowa 312; Johnson *v.* Mantz, 69 Iowa 710, 27 N. W. 467; Warthen *v.* Himstreet, 112 Iowa 605, 84 N. W. 702.

Kansas. — Brenner *v.* Bigelow, 8 Kan. 496.

Maine. — Thompson *v.* Gilmore, 50 Me. 428; Ellis *v.* Jameson, 17 Me. 235.

Maryland. — Kiersted *v.* Rogers, 6 Har. & J. 282.

Massachusetts. — Folger *v.* Fields, 12 Cush. 93; Gardner *v.* Field, 1 Gray 151.

Minnesota. —Doud *v.* Duluth Milling Co., 55 Minn. 53, 56 N. W. 463; Exley *v.* Berryhill, 37 Minn. 182, 33 N. W. 567.

Mississippi. — Claiborne *v.* Planters' Bank, 2 How. 727; Winn *v.* Levy, 2 How. 902.

Missouri. — Moore *v.* Sauborin, 42 Mo. 490.

Montana. — Second Nat. Bank *v.* Kleinschmidt, 7 Mont. 146, 14 Pac. 667.

Nebraska. — Hardy *v.* Miller, 11 Neb. 395, 9 N. W. 475; German Am.

Exceptions to the general rule are sometimes made by statute.[94]

When Equivalent to Confession of Judgment. — In some of the

Bank *v.* Stickle, 59 Neb. 321, 80 N. W. 910; Slater *v.* Skirving, 51 Neb. 108, 70 N. W. 493.

Nevada. — Ewing *v.* Jennings, 15 Nev. 379.

New Hampshire. — Toppan's Petition, 24 N. H. 43; Huntress *v.* Effingham, 17 N. H. 584; Parker *v.* Roberts, 63 N. H. 431.

New Jersey. — Creamer *v.* Dikeman, 39 N. J. Law 195.

New Mexico. — Metzger *v.* Waddell, 1 N. M. 400.

New York. — McGuire *v.* Ulrich, 2 Abb. Pr. 28; Stelle *v.* Palmer, 11 Abb. Pr. 62.

North Carolina.—McDowell *v.* Asbury, 66 N. C. 444; Parker *v.* Smith, 64 N. C. 291.

Ohio. — McKinzie *v.* Perrill, 15 Ohio St. 162.

South Carolina. — Frean *v.* Cruikshanks, 3 McCord 84.

Tennessee. — Mississippi, etc. R. Co. *v.* Green, 9 Heisk. 588; Hall *v.* Mount, 3 Cold. 73; Union Bank *v.* Hicks, 23 Tenn. 326.

Texas. — Watson *v.* Newsham, 17 Tex. 437; Boles *v.* Linthicum, 48 Tex. 220; Guest *v.* Rhine, 16 Tex. 549; Willard *v.* Conduit, 10 Tex. 213; Long *v.* Wortham, 4 Tex. 381; Johnson *v.* Stallcup, 41 Tex. 529; Clark *v.* Compton, 15 Tex. 32; Focke *v.* Sterling, 18 Tex. Civ. App. 8, 44 S. W. 611; Hawkins *v.* Haney, 1 Tex. App. 395; Johnson *v.* Dowling, 1 Tex. App. 615; Belcher *v.* Ross, 33 Tex. 12.

What Default Admits. — In Binz *v.* Tyler, 79 Ill. 248, it is said: "The remaining objection urged, that the verdict was contrary to the evidence can not be considered. The judgment was on the demurrer, for default of plea. The defendant, by permitting judgment thus to be given, was so far out of court that he was entitled to cross-examine witnesses for the purpose of reducing the damages, only, and it was not admissible for him to make a defense to the action. The demurrer admitted every material allegation in the declaration, and nothing was left to be inquired into but the amount of damages sustained by the plaintiff. Morton *v.* Bailey, *et al.*, 1 Scam. 213; Cook *v.* Skelton, 20 Ill. 107."

By Married Woman. — The default admits that a woman sued is a *feme sole* and subject to judgment as such. Focke *v.* Sterling, 18 Tex. Civ. App. 8, 44 S. W. 611.

Capacity of Plaintiff to Sue. — And the capacity of the plaintiff to sue. Starr Cash etc. Co. *v.* Starr, 69 Conn. 440, 37 Atl. 1057.

Not Delivery and Value of Goods. In Parker *v.* Smith, 64 N. C. 291, an action for goods sold and delivered, it was held that a default admitted a cause of action, and entitled the plaintiff to nominal damages, but did not relieve him of the necessity of proving the delivery of the goods and their value.

Not Validity of Contract. — Again it is held that a default does not admit the right to recover upon a contract void as usurious, but only admits the contract and submits the validity of it to the judgment of the court. Morely *v.* Smith, 21 Tex. 441; Campbell *v.* State Bank, 1 Tex. 160.

Instrument Sued on Must Be Produced. — In Kiersted *v.* Rogers, 6 Har. & J. (Md.) 282, it is held that in an action of assumpsit on a promissory note, a default is an admission of the cause of action, and the defendant's liability to the amount of the note; but that the note sued on must be produced at the trial, that it may be seen whether any part of it has been paid, but that it need not be proved. See also Green *v.* Hearne, 3 D. & E. 301; Anonymous, 3 Wilson 155; West *v.* Flemming, 36 Fla. 298, 18 So. 587.

Default of Married Woman. — In Griffith *v.* Clarke, 18 Md. 457, it is held that a judgment by default against a *feme covert* in a suit at law, on a promissory note, is void.

Production Required by Statute. In some of the states a production of the instrument is required by statute generally, or in certain cases, or in certain courts. Strock *v.* Com., 90 Pa. St. 272.

94. State *v.* Ownby, 10 Mo. 71.

decided cases it is held that where a defendant withdraws his answer and suffers judgment to go against him for the want of an answer, it is equivalent to a confession of judgment.[95]

But the entry and withdrawal of an answer differs in this respect from a failure to answer at all.[96]

Only Facts Well Pleaded. — This effect of a default is confined to facts well pleaded, or as is sometimes said, the issuable facts,[97] and does not extend to allegations of conclusions of law.[98]

Confined to Facts Alleged. — And the default is confined to the facts alleged in the pleading.[99]

Rule the Same at Law and in Equity. — The rule that a default admits the facts well pleaded applies equally to actions at law and suits in equity,[1] and in admiralty;[2] and to the averments in a *scire facias* upon a recognizance to appear and answer,[3] and to a petition for a *supersedeas* of an execution.[4] But not in a proceeding by

95. Grier *v.* Powell, 14 Tex. 320; Storey *v.* Nichols, 22 Tex. 87; Gilder *v.* McIntyre, 29 Tex. 89; Cartwright *v.* Roff, 1 Tex. 78; Burton *v.* Lawrence, 4 Tex. 373; Creamer *v.* Dikeman, 39 N. J. Law 195; Eaton *v.* Harris, 42 Ala. 491; Clements *v.* Johnson, 3 Stew. & P. (Ala.) 269; Mount *v.* Stewart, 86 Ala. 365, 5 So. 582.

96. Storey *v.* Nichols, 22 Tex. 87; Gilder *v.* McIntyre, 29 Tex. 89; Goodlet *v.* Stamps, 29 Tex. 121; Wheeler *v.* Pope, 5 Tex. 262; Janson *v.* Bank of Republic, 48 Tex. 599; Grigsby *v.* Ford, 3 How. (Miss.) 184; Clements *v.* Johnson, 3 Stew. & P. (Ala.) 269; Wheeler *v.* Roberts, 2 Tex. App. 124.

97. Harlan *v.* Smith, 6 Cal. 173; Bragg *v.* City of Chicago 73 Ill. 152; Stelle *v.* Palmer, 11 Abb. Pr. (N. Y.) 62; Peck *v.* Wilson, 22 Ill. 205; Johnson *v.* Mantz, 69 Iowa 710, 27 N. W. 467; Doud *v.* Duluth Milling Co., 55 Minn. 53, 56 N. W. 463.

98. Hollis *v.* Richardson, 13 Gray (Mass.) 302.

99. Thompson *v.* Dearborn, 107 Ill. 87; Doud *v.* Duluth Milling Co., 55 Minn. 53, 56 N. W. 463.

Admits Only Facts Alleged.—"But no presumption arises from the default, whether the defendant has appeared or not, that he admits the existence of other facts, not in any manner stated in the writ. And, from the provisions of the statute which we are considering, it is manifest, under the construction already referred to, that a judgment *in rem* cannot be rendered against the property, without proof of other facts, which, from the nature of the case, cannot be alleged in the writ. The attachment of the property is necessarily subsequent to the purchase of the writ. Whether the property attached and returned is identical with that, in all respects, on which the labor was performed, as the basis of the lien, although it may have marks in common with that which is not attached, the officer's return has no tendency to establish. The identity must be proved *aliunde*. Hence this latter proof cannot be supplied by a default of any one, who can be treated as a party, at any stage of the proceedings." Thompson *v.* Gilmore, 50 Me. 428.

Admits Only the Allegations of the Complaint. — In Chaffin *v.* McFadden, 41 Ark. 42, the question arose as to the effect of a default, where the complaint failed to state facts sufficient to entitle the plaintiff to a mechanic's lien. In passing upon the question, the court said: "Mrs. Chaffin, by her default, did not admit that a lien had been fixed on the lots for the debt, for the necessary facts to constitute a lien were not alleged in the complaint."

1. Ricks *v.* Pinson, 21 Tex. 507; Thompson *v.* Dearborn, 107 Ill. 87

2. Miller *v.* U. S., 11 Wall 268.

3. Garrison *v.* People, 21 Ill. 535; State *v.* Gilmore, 81 Me. 396, 17 Atl. 315.

4. Powell *v.* Washington, 15 Ala 803.

motion to compel a sheriff to pay over money,[5] nor in proceedings for the settlement of decedents' estates.[6]

In Case of Constructive Service. — In some of the cases it is held that in case of notice by publication, a failure to answer is not such an admission of the facts as to dispense with proof on the part of the plaintiff.[7]

By Infant Admits Nothing. — There can be no judgment against an infant as upon an admission by default, but the case must be fully proved whether the infant answers or not.[8]

May Be Competent in Another Action. — The mere fact that a party has been charged in one case, and suffered a default, may amount to an admission of the truth of the fact in another case where the judgment on the default would not be competent as an adjudication of the fact.[9]

When Admits Amount of Damages. — A default admits the amount of damages only where they are certain and liquidated. If the damages are unliquidated and uncertain, they must be proved, notwithstanding the default.[10]

5. Todd *v.* Caines, 18 B. Mon. (Ky.) 620; Terrill *v.* Cecil, 3 Met. (Ky.) 347.

6. Hendrix *v.* Hendrix, 46 Tex. 6.

7. Beach *v.* Mosgrove 16 Fed. 305.

8. Chaffin *v.* Kimball, 23 Ill. 33; Greenough *v.* Taylor, 17 Ill. 602. See *Ante*, p. 460.

9. Toppan's Petition, 24 N. H. 43.

Admission of Co-Partnership. — Thus it has been held that when parties are charged to be co-partners and suffer a default, thus admitting the fact, their conduct in allowing a default to be taken may be proved in another case as tending to show that they were co-partners. Ellis *v.* Jameson, 17 Me. 235; Millard *v.* Adams, 1 Misc. 431, 21 N. Y. Supp 424.

10. *England.* — Longman *v.* Fenn 1 Blk. 541; Green *v.* Hearne, 3 D. & E. 301.

United States.—Clements *v.* Berry 11 How. 398.

Alabama.— Cater *v.* Hunter, 3 Ala. 30; Maund *v.* Loeb, 87 Ala. 374, 6 So. 376; Ledbetter etc. *v.* Vinton, 108 Ala. 644, 18 So. 692.

Connecticut. — Havens *v.* Hartford & N. H. R. Co., 28 Conn. 69; Welch *v.* Wadsworth, 30 Conn. 149.

Delaware. — Randel *v.* Chesapeake & Del. Canal, 1 Harr. 233.

Florida. — Parkhurst *v.* Stone, 36 Fla. 456, 18 So. 596; Russ *v.* Gilbert, 19 Fla. 54.

Georgia. — Kaiser *v.* Brown, 98 Ga. 19, 25 S. E. 925.

Illinois. — O'Connor *v.* Mullen, 11 Ill. 116; Binz *v.* Tyler, 79 Ill. 248; Greenup *v.* Woodworth, Breese 232; Cook *v.* Skelton, 20 Ill. 107; Town of South Ottawa *v.* Foster, 20 Ill. 296; Phoenix Ins. Co. *v.* Hedrick, 73 Ill. App. 601; Hemington *v.* Stevens, 26 Ill. 298; Chicago & Rock Island Co. *v.* Ward, 16 Ill. 522.

Indiana. — May *v.* State Bank, 9 Ind. 233; Marion & Logansport R. Co. *v.* Lomax, 7 Ind. 406; Goble *v.* Dillon, 86 Ind. 327.

Kansas. — Cooper *v.* Brinkman 38 Kan. 442, 17 Pac. 157.

Kentucky. — Burchett *v.* Herald, 98 Ky. 530, 33 S. W. 85.

Maryland. — Kiersted *v.* Rogers, 6 Har. & J. 282.

Minnesota. — Exley *v.* Berryhill, 37 Minn. 182, 33 N. W. 567.

Nebraska. — Slater *v.* Skirving, 51 Neb. 108, 70 N. W. 493.

New Hampshire. — West *v.* Whitney, 26 N. H. 314.

New Mexico. — Metzger *v.* Waddell, 1 N. M. 400.

New York. — Bates *v.* Loomis, 5 Wend. 134; Anderson *v.* Brooklyn Heights R. Co., 32 App. Div. 266, 52 N. Y. Supp. 984; Bullard *v.* Sherwood, 85 N. Y. 253; Lazzarone *v.*

Some of the cases go farther and hold, generally, that the *amount*

Oishei, 49 N. Y. St. 520, 21 N. Y. Supp. 267.

North Carolina.—Faucette *v.* Ludden, 117 N. C. 170, 23 S. E. 173; Cowles *v.* Cowles, 121 N. C. 272, 28 S. E. 476; McLeod *v.* Nimocks, 122 N. C. 437, 29 S. E. 577; Parker *v.* Smith, 64 N. C. 291; Rogers *v.* Moore, 86 N. C. 85.

Pennsylvania. — Ernest *v.* Hoskins, 100 Pa. St. 551.

Tennessee. — Williams *v.* President & Directors, 1 Cold. 43.

Texas. — Swift *v.* Faris, 11 Tex. 18; Niblett *v.* Shelton, 28 Tex. 548; Storey *v.* Nichols, 22 Tex. 87; Gilder *v.* McIntyre, 29 Tex. 89; Ricks *v.* Pinson, 21 Tex. 507; Guest *v.* Rhine, 16 Tex. 549; Clark *v.* Compton, 15 Tex. 32; Cartwright *v.* Roff, 1 Tex. 78; Burton *v.* Lawrence, 4 Tex. 373; Mississippi Mills *v.* Bauman, 12 Tex. Civ. App. 312, 34 S. W. 681.

Effect of As to Allegation of Damages. — The general rule on the subject is stated in Ricks *v.* Pinson, 21 Tex. 507, as follows: "The general rule has been qualified and its extent shown in some of the cases above cited. A judgment by default on liquidated demands admits the whole of the claim, and if there be a mistake or omission apparent upon the instrument, the clerk has competent authority and should make the correction. (10 Tex. R. 241.) Where the demand is unliquidated, the judgment 'admits that something is due, but disputes the amount.' Hence in 'an action of assumpsit for goods sold or work done, and materials found on various occasions, a plaintiff is not, in strictness, by a judgment by default, relieved from the necessity of proving the delivery of each article, or the extent of the work done,' etc. (3 Chitty's Gen'l Prac. 673.) Formerly judgments by default, in England, were final only in an action of debt, but in other actions the courts were strict in limiting the cases in which reference to the master would be substituted for a writ of inquiry. It was allowed in actions on bills of exchange, promissory notes, etc., where it was only necessary to compute the amount of the principal and interest. But it was refused where the action was on a bill of exchange for foreign money, or on foreign judgments, etc. But by the Common Law Procedure Act of 1852, in actions where the damages are substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry, but the judge may direct the amount to be ascertained by a master of the court. (Wayne on Damages, 320, 19 Law Library, 6th series.)"

Distinction Between Liquidated and Unliquidated Damages. — The doctrine is thus stated in Clements *v.* Berry, 11 How. (U. S.) 398: "Now a judgment by default is interlocutory or final. When the action sounds in damages, as covenant, trover, trespass, etc., it is only interlocutory that the plaintiff ought to recover his damages, leaving the amount of them to be afterwards ascertained. 1 Tidd's Pr. 568. But where the amount of the judgment is entered by the calculation of the clerk, no further steps being necessary, by a jury or otherwise, to ascertain the amount, the judgment is final. And of this character was the judgment entered on the 8th of March. The action was debt, brought upon several notes of hand; the default admitted the execution of the notes, and the judgment which followed was final, leaving the clerk to make it up in form. The affirmance of this judgment on the 10th of March was unnecessary, as the judgment of the court on the 8th concluded the matter in controversy. It was a mere clerical duty to make the calculation and enter the judgment in form; and the entry on the 10th can be considered, in regard to the lien in question, in effect as nothing more than the performance of this clerical duty, which had been authorized by the entry on the 8th. It was an affirmance of that which already had been fixed, by the judgment of the court. What remained to be done was matter of form, as it added nothing to the legal effect of the judgment by default."

See also Parker *v.* Smith, 64 N. C. 291; Rogers *v.* Moore, 86 N. C. 85; West *v.* Whitney, 26 N. H. 314.

Liquidated Damages. — Again it is

the plaintiff is entitled to recover is not admitted to be as alleged in the complaint, but may be controverted and disproved.[11]

Controlled by Statutory Provisions. — It should not be overlooked that many of the cases cited on this subject are founded upon statu-

said in Niblett *v.* Shelton, 28 Tex. 548: "In this case the plaintiff's cause of action being liquidated, that is, the amount due by an instrument in writing, it was not necessary to call a jury for the purpose of assessing the amount due the plaintiff. The jury is necessary only when the damages of the plaintiff are unliquidated. A judgment by default amounts to an admission of the truth of the facts charged; the facts set out in the petition are to be taken as proved and admitted, (4 Tex. 381; 21 *Id.* 508); and there is nothing to prevent the court from making a decree without reference to a jury. (3 Tex. 305; 10 *Id.* 213; 16 *Id.* 549; 17 *Id.* 438.)"

11. Briggs *v.* Sneghan, 45 Ind. 14.

Does Not Admit Amount of Damages. — In Goble *v.* Dillon, 86 Ind. 327, it is said: "A default admits the cause of action and all the material and traversable averments of the complaint. As to the amount sued for in such an action as that of Hobbs, which was upon a *quantum meruit*, a default admits that something is due the plaintiff from the defendant, but no more than a nominal amount. Upon an assessment of damages after a default, the defendant can not, for the purpose of defeating a recovery, prove that the contract sued on was not performed, or any substantive defense as such, so as to secure a judgment for the defendant as to the cause of action. Evidence which, under a general denial, might defeat a recovery by the plaintiff, will not, after a default, have that effect."

Rights of Party After Default. The doctrine as to the rights of a party after default taken against him is thus declared in Loeber *v.* Delahaye, 7 Clark (Iowa) 478: "A defendant, being in default, admits the right of the plaintiff to recover. While in this attitude, his rights are exceedingly circumvented by the express language of the code. The proceeding is substantially in the hands of the plaintiff. While the default continues, the plaintiff has nothing to do, but to prove his damages. In doing this, his proof will, of course, vary according to the nature of his cause. If a defendant is in default, however, he cannot claim that plaintiff is entitled to recover nothing. He is, at least, entitled to nominal damages. In the adjudication of the question, whether he is entitled to more, the defendant is given the right to appear and cross-examine witnesses. If he would do more, he must first remove the default. These remarks are made in view of the objection of appellants, that the petition is insufficient to authorize the judgment. We are clear that it is not so wanting in substance, as that the objection can avail a party in default."

And in Frabue *v.* Stonum, 20 Tex. 453, it is said that "if the claim set forth be in writing and liquidated, the amount to be recovered by the plaintiff is still an open question to be determined by the clerk, unless a jury is asked for by either party." The action was one in which the clerk was, by statute, authorized to assess the damages in case of default.

Rights of Defendant After Default. — In Fisk *v.* Baker, 47 Ind. 534, it is held that "a party who has suffered a judgment to be rendered against him by default has no standing in court except for two purposes. The one is to have the default set aside and the other is to appear and contest the amount of damages."

Damages Assessed by Clerk. — In some of the states provision is made for the assessment, or ascertainment of the damages by the clerk. But this is confined to cases where the amount can be ascertained from the complaint; is a purely ministerial act, and must rest upon the rule that, being certain and liquidated, the amount is admitted by the default. Alexander *v.* McDow, 108 Cal. 25, 41 Pac. 24.

tory provisions relating to the effect of a default, and the power of the clerk to enter judgment without proof.[12]

Special Defense, When Allowed. — Under the statutes of some of the states a defendant, resting under default, is permitted to interpose a special defense affecting the damages and reducing the amount of the recovery to a nominal sum.[13]

Value Not Admitted. — In actions for damages for a tort, or other actions involving the value of property, a default does not admit the value alleged, but the value must be proved.[14]

When Admits Cause of Action. — If the declaration or complaint states facts sufficient to constitute a cause of action, and withstand a general demurrer, the default admits a cause of action, and a judgment may be rendered on such admission, but not otherwise.[15]

12. Bullard *v.* Sherwood, 85 N. Y. 253; McMullin *v.* Mackey, 25 N. Y. St. 265, 6 N. Y. Supp. 885; Lazzarone *v.* Oishei, 49 N. Y. St. 520, 21 N. Y. Supp. 267; Vorzimer *v.* Shapiro, 6 Misc. 143, 26 N. Y. Supp. 53; Cole *v.* Hoeburg, 36 Kan. 263, 13 Pac. 275; Cobb *v.* Dunkin, 19 How. Pr. (N. Y.) 164.

13. Brennan *v.* Berlin Iron Bridge Co., 71 Conn. 479, 42 Atl. 625; Ockershausen *v.* New York, N. H. & H. R. Co., 71 Conn. 617, 42 Atl. 650.

14. Warren *v.* Kennedy, 1 Heisk. (Tenn.) 437; City of Guthrie *v.* Harvey Lumber Co., 5 Okla. 774, 50 Pac. 84; Slater *v.* Skirving, 51 Neb. 108, 70 N. W. 493; Parker *v.* Smith, 64 N. C. 291; Haley *v.* Eureka Co. Bank, 21 Nev. 127, 26 Pac. 64.

What Default Admits. — In Rose *v.* Gallup, 33 Conn. 338, the rule is stated as follows: "A default in such a case would admit no more than what would be sufficient to decide the case in favor of the plaintiff, upon the plea of the general issue. It is simply an admission, on the part of the defendant, that he is unable to make a complete defense.

"We are satisfied that no case can be found which goes farther than this, that in a case like the present a default admits a liability for the removal of some one of the articles described in the declaration, and without further proof nominal damages only can be given. Havens *v.* Hartford & New Haven R. R. Co., 28 Conn. 69; Bolles *v.* Loomis, 5 Wend. 134; Green *v.* Hearne, 3 T. R. 301.

"It would seem to follow, as a necessary consequence, that if nominal damages only can be given without further proof, the defendant may contest his liability, so far as the plaintiff seeks by proof to enhance the damages beyond a nominal sum."

15. *England.* — Bowdell *v.* Parsons, 10 East 359.

United States. — Cragin *v.* Lovell, 109 U. S. 194; McAllister *v.* Kuhn, 96 U. S. 87.

Alabama. — Randolph *v.* Cook, 2 Port. 286; Napper *v.* Noland, 9 Port. 218; Cater *v.* Hunter, 3 Ala. 30; McGehee *v.* Childress, 2 Stew. 506.

Arkansas. — Chaffin *v.* McFadden, 41 Ark. 42; Johnson *v.* Pierce, 12 Ark. 599.

California. — Harlan *v.* Smith, 6 Cal. 173; People *v.* Rains, 23 Cal. 127; Hammon *v.* Ashmead, 60 Cal. 439; Hunt *v.* San Francisco, 11 Cal. 250.

Colorado. — Hoyt *v.* Macon 11 Colo. 113.

Connecticut. — Shepard *v.* New Haven etc. Co., 45 Conn. 54; Whipple *v.* Fuller, 11 Conn. 582.

Delaware. — Macklin *v.* Ruth, 4 Harr. 87.

Florida. — Russ *v.* Gilbert, 19 Fla. 54; Hellen *v.* Steinwender, 28 Fla. 191, 10 So. 207.

Illinois. — Bragg *v.* City of Chicago, 73 Ill. 152; Madison Co. *v.* Smith, 95 Ill. 328; Chicago & N. W. R. Co. *v.* Coss, 73 Ill. 394; Cutright *v.* Stanford, 81 Ill. 240; Thompson *v.* Dearborn, 107 Ill. 87.

Indiana. — Smith *v.* Carley, 8 Ind. 451; Globe Acc. Ins. Co. *v.* Reid, 19 Ind. App. 203, 47 N. E. 947; Sloan

But the default does waive mere defects or irregularities in the

v. Faurot, 11 Ind. App. 689, 39 N. E. 539.

Iowa. — Loeber *v.* Delahaye, 7 Clarke 478; Warthen *v.* Himstreet, 112 Iowa 605, 84 N. W. 702; Whittey *v.* Douge, 9 Iowa 507; Bosch *v.* Kassing, 64 Iowa 312, 20 N. W. 454.

Kansas. — St. Louis & S. F. Ry. Co. *v.* McReynolds, 24 Kan. 368; Zane *v.* Zane, 5 Kan. 134.

Kentucky. — Gould *v.* Bonds, 1 Bush 189.

Massachusetts.—Hollis *v.* Richardson, 13 Gray 392.

Mississippi.—Claiborne *v.* Planters' Bank, 2 How. 727; Winn *v.* Levy, 2 How. 902; Winston *v.* Miller, 12 Smed. & M. 550.

Missouri. — Robinson *v.* Missouri R. etc. Co., 53 Mo. 435.

Nebraska. — Slater *v.* Skirving, 51 Neb. 108, 70 N. W. 493.

Nevada. — Ewing *v.* Jennings, 15 Nev. 379.

New York. — Argall *v.* Pitts, 78 N. Y. 239; Shields *v.* Clement, 67 N. Y. St. 370, 33 N. Y. Supp. 676.

Oregon. — Bailey *v.* Malheur etc. Ins. Co. (Or.), 57 Pac. 910; Mitchell *v.* Silver Lake Lodge, 29 Or. 294, 45 Pac. 798.

Tennessee. — Miss. etc. R. Co. *v.* Green, 9 Heisk. 588.

Texas. — Hall *v.* Jackson, 3 Tex. 305; Goodlett *v.* Stamps, 29 Tex. 121; Boles *v.* Lithicum, 48 Tex. 220; Ishmel *v.* Potts (Tex. Civ. App.), 44 S. W. 615; Andrews *v.* Union Cent. L. Ins. Co., 92 Tex. 584, 50 S. W. 572; McCullan *v.* Worchison (Tex.), 40 S. W. 545; Thighen *v.* Mundine, 24 Tex. 282.

When Complaint Does Not State a Cause of Action. — In Hall *v.* Jackson, 3 Tex. 305, it is said: "That the present was a judgment by default, cannot alter the case, or dispense with the rule which requires that the proofs shall conform to the allegations; and that the latter must be sufficient to constitute a legal basis on which to predicate the judgment. The defendants, not having appeared, can be deemed to have waived nothing which was essential to the plaintiff's title and right to recover.

"In Virginia, it has even been held, that the statute of *jeofails*, does not apply to cure errors and defects in the proceedings, in cases of judgments by defaults; and that defects which would be cured by verdict in other cases, will, in these, be held fatal. (3 Leigh, 270.) But without going quite this length, it may safely be asserted, that to maintain a judgment by default, the petition must set forth a cause of action with substantial accuracy (3 Scammon, 258,) and with sufficient certainty, to inform the court what judgment to render, without looking for information to proofs not within the allegations, since 'the court cannot judicially act upon such proofs' as a ground for its decision."

Declaration Must Be Sufficient. "As a general rule, a default regularly taken admits the cause of action, but then there must be a declaration or complaint, containing such a statement of facts as will, when admitted, in point of law authorize a judgment against the defendant." Smith *v.* Carley, 8 Ind. 451.

Where Complaint Is Insufficient. In Bosch *v.* Kassing, 64 Iowa 312, 20 N. W. 454, the court said: "A default is an admission of the cause of action stated in the petition, and that something is due to the plaintiff. But where no cause of action is stated in the petition a default can have no such effect. It is true that a defendant may be concluded by a default where the facts stated in the petition do not constitute a good cause of action in law, or where the petition is so defective as to be vulnerable to a demurrer; but, where the petition omits the necessary averment to show liability against the defendant, the court may and should, even upon default, refuse to enter judgment."

Does Not Admit Cause of Action. "The default admits the facts averred in the petition to be true, but does not admit that the facts in law entitle petitioner to relief. If the facts thus admitted to be true do not authorize or require the relief, the court has no power to grant it. Plaintiff, on a default, is not entitled to a judgment unless he,

complaint if a cause of action is stated.[16] And some cases have gone so far as to hold that a default may admit a cause of action when the complaint does not state a good cause of action in law,[17] and when there is an "omission of any allegation or averment, on account of which omission a demurrer could have been maintained."[18]

Admits Cause of Action Alleged. — In some of the cases it is said in terms, that the default "admits the cause of action," and that the party can only contest the amount of damages.[19] But by this must be meant the cause of action "as disclosed in the declaration,"[20] and not that a recovery may be had as upon an admission, by default, of a cause of action, when none is alleged in the declaration or complaint.

Admits Truth of Complaint but Not Its Sufficiency. — The effect of a default is to admit the truth of the facts alleged in the pleading, but not that the pleading or the facts thus admitted are sufficient to entitle the pleader to recover.[21]

by his declaration, has shown a right of recovery. If, on looking through the record, the court sees that there are grounds for arresting the judgment, the court should refuse judgment, notwithstanding the default.

"To recover, the plaintiff must show a sufficient cause of action, and this is true whether there be a trial or a default. The default confers no more rights than a finding of a jury. And all know that if the facts found by a jury do not authorize a recovery, the court will refuse to enter a judgment. So, in this case, if the facts averred in the petition do not authorize the relief sought, the judgment must be reversed." Madison Co. *v.* Smith, 95 Ill. 328.

In Case of Insufficient Declaration. In Winston *v.* Miller, 12 Smed. & M. (Miss.) 550, it is said: "It is insisted, however, that our statute in regard to amendments, cures this defect after a judgment by default. Its words are, 'No judgment after verdict, or by *nil dicit*, shall be reversed for any defect in the writ or for any defect whatsoever, in the declaration or pleading, either of form or of substance, which might have been taken advantage of by a demurrer.' Hutch. Code, 847. These terms are very comprehensive, and cure almost every conceivable defect in the proceedings. But we do not think they embrace a case in which the writ and declaration show, that, at the time of the commencement of the suit, the cause of action had not accrued. That is a defect which arises above the writ and declaration, and is not inherent in them. It shows the party had no right to sue out either, and the utmost perfection of their form could not aid the total absence of cause of action."

16. Warthen *v.* Himstreet, 112 Iowa 605, 84 N. W. 702; Miller Brewing Co. *v.* Capital Ins. Co., 111 Iowa 520, 82 N. W. 1023; Askren *v.* Squire, 29 Or. 228, 45 Pac. 779.

17. Bosch *v.* Kassing, 64 Iowa 312, 20 N. W. 454; Miller Brewing Co. *v.* Capital Ins. Co., 111 Iowa 520, 82 N. W. 1023; Warthen *v.* Himstreet, 112 Iowa 605, 84 N. W. 702; Askren *v.* Squire, 29 Or. 228, 45 Pac. 779; Moore *v.* Martin, 124 Ala. 291, 27 So. 252.

18. Robinson *v.* Mo. Ry. etc. Co., 53 Mo. 434.

19. Briggs *v.* Sneghan, 45 Ind. 14; Fisk *v.* Baker, 47 Ind. 534; Goble *v.* Dillon, 86 Ind. 327; Whitney *v.* Douge, 9 Iowa 507; Union Bank *v.* Hicks, 23 Tenn. 326.

20. Hunt *v.* Burton, 18 Ark. 188; Shepard *v.* New Haven etc. Co., 45 Conn. 54; Whipple *v.* Fuller, 11 Conn. 581; Argall *v.* Pitts, 78 N. Y. 239; Chaffin *v.* McFadden, 41 Ark. 42; Doud *v.* Duluth Milling Co., 55 Minn. 53, 56 N. W. 463.

21. Thompson *v.* Dearborn, 107 Ill. 87.

When it Will Be Presumed Cause of Action Was Stated. — In case of a collateral attack upon the judgment on default, it will be presumed that a cause of action was stated.[22]

Confined to Relief Prayed For. — The default only admits and authorizes judgment for the relief prayed for in the complaint.[23]

And Relief Must Be Warranted by Facts Alleged. — It is not enough that the relief is prayed for, however. It must be within the allegations of the complaint. The default admits that the plaintiff is entitled to such relief as the facts properly alleged authorize.[24]

Not an Admission That Plaintiff Is Entitled to Recover. — The effect of a default as an admission is clearly stated in Johnson *v.* Pierce, 12 Ark. 509. "'Default,' says Tidd, 'is an admission of the cause of action and therefore, when founded on a contract, the defendant cannot prove the contract fraudulent. And so when the action is on a note or bill, no proof of their execution is required.' Tidd's Pr. 522. So that, when Tidd says, 'Default is an admission of the cause of action,' we see from the examples given by him what he means by 'admitting the cause of action.' It evidently cannot, upon principle, mean more than that the facts alleged in the declaration are admitted, or, in other words, are considered as though they were proven. And this is the extent to which we understand the case cited by counsel in 4 Humphries Reports, to go.

"But suppose, when they are all admitted as fully as if proven, and still fail to show a legal right in the plaintiffs to recover after allowing the benefit of the statute of *jeofails* and amendments, shall we say that they are entitled to recover? Most clearly not; unless we could suppose that a default would not only confess the facts alleged, but also furnish additional facts by intendment to be confessed."

22. Cutright *v.* Stanford, 81 Ill. 240.

23. Johnson *v.* Stallcup, 41 Tex. 529; Alexander *v.* McDow, 108 Cal. 25, 41 Pac. 24; Pickett *v.* Handy, 9 Colo. 357, 48 Pac. 820; Staacke *v.* Bell, 125 Cal. 309, 57 Pac. 1012; Parszyk *v.* Mach, 10 S. D. 555, 74 N. W. 1027; Johnson *v.* Mantz, 69 Iowa 710, 27 N. W. 467.

Relief Confined to Prayer of Complaint. — The rule is thus stated in Burling *v.* Goodman, 1 Nev. 266: "We think both grounds of objection are well taken, and that the judgment as it stands is erroneous. Where judgment is taken by default, the plaintiff is confined to a recovery of the particular amount or thing demanded in the prayer of the complaint. If the prayer be for judgment of one thousand dollars, the plaintiff cannot legally take judgment for a greater amount. Or if he pray for the possession of specific personal property, he cannot have judgment for the return of property of a different kind. The reason and fairness of the rule are obvious.

"The defendant by his default admits the justice of the claim, and thus consents that judgment be taken against him for what is prayed for in the first instance. Whereas, if a greater sum or a different relief were demanded, he may appear and contest the claim as unjust and unreasonable. It would seem to follow, and indeed is embraced within this rule, that where the demand is for judgment in federal currency generally, that is, in dollars and cents, a party cannot recover a judgment upon a default payable in a specific kind of money — gold coin, for instance — especially if the latter kind of money exceed the former in *actual* value. A different rule would prove a trap and snare for debtors, however honest they may be, and certainly could never receive the sanction of courts of justice."

24. Argall *v.* Pitts, 78 N. Y. 239; Chicago & N. W. Ry. Co. *v.* Coss, 73 Ill. 394; Sloan *v.* Faurd, 11 Ind. App. 689, 39 N. E. 539; Hall *v.* Jackson, 3 Tex. 305; Chaffin *v.* McFadden, 41 Ark. 42; Thompson *v.* Dearborn, 107 Ill. 87.

Admission of Part of Cause of Action. — Where separate causes of action are alleged in separate counts, a default as to one entitles the plaintiff to judgment thereon, although an answer is filed to the other.[25]

Where Some Counts Good, Others Bad. — So, if the complaint is good as to some of its counts, and bad as to others, a default as to all of them is an admission of the cause of action stated in the good counts, but not as to the others.[26]

Against Part of Parties Jointly Sued. — Where the cause of action is joint, a default by one only admits the joint liability and does not authorize a judgment against the party defaulting until the right to such judgment is established as against his co-defendant.[27]

Default of One of Several Not Jointly Liable. — Even where the cause of action is not joint, or the relief sought the same against all of the defendants, a default by one does not necessarily entitle the plaintiff to a judgment against him. The defendant or defendants not defaulting, may make such defense as to prevent a recovery against such other defendant, notwithstanding his default.[28]

Default As to Part of the Issues. — It may happen that a party has defaulted as to a part of the issues, only, by a failure to plead to such part. If so the effect of such default extends only to those issues.[29]

Effect of in Divorce Cases. — The rule that a default admits the allegations of the bill or complaint does not apply to proceedings for divorce. In such cases the plaintiff must prove his case notwithstanding the default.[30]

But it is held that even in divorce cases a default dispenses with the necessity of findings of fact by the court.[31]

Q. Offer to Confess Judgment or Suffer Default. — In many of the states provision is made by which the defendant in an action is allowed to offer to confess judgment after suit brought for such sum as he believes to be due, which, if accepted, is binding upon him for the amount offered. But this cannot be regarded as an admission, but a mere offer, which, if not accepted, amounts to nothing, unless the plaintiff fails to recover a greater sum which

25. Curran *v.* Kerchner, 117 N. C. 264, 23 S. E. 177.

26. Hunt *v.* San Francisco, 11 Cal. 250.

27. Kincaid *v.* Purcell, 1 Ind. 324; Davis *v.* Graniss, 5 Blackf. (Ind.) 79; Finance Co. *v.* Hanlon, 75 Ill. App. 188; McDonald *v.* Mayor etc. (Cal.), 55 Pac. 600; Brigs *v.* Greinfeild, 1 Strange (Eng.) 606.

For an interesting discussion of the proper mode of assessing damages where some defendants sued on a joint cause of action plead to issue and others suffer default, see Cridland *v.* Floyd, 6 Serg. & R. (Pa.) 412.

28. Pierson *v.* David, 4 Clarke (Iowa) 410; Perrin *v.* Johnson, 16 Ind. 72.

29. Snyder *v.* Quarton, 47 Mich. 211; Hunt *v.* San Francisco, 11 Cal. 250.

30. *Ante*, p. 461; Welch *v.* Welch, 16 Ark 527; Stibbins *v.* Stibbins, 1 Met. (Ky.) 476; Shillinger *v.* Shillinger, 14 Ill. 147; Linden *v.* Linden, 36 Barb. (N. Y.) 61.

31. Fox *v.* Fox, 25 Cal. 588; *In re* Cook, 77 Cal. 220.

casts him for the costs, and if accepted, it becomes in legal effect a contract to pay that sum which is consummated by the rendition of a judgment for the sum offered.[32]

Offer to Be Defaulted. — It has been held that an offer to be defaulted under some of the statutes is equivalent to bringing money into court, and as a confession of an indebtedness, leaving only the amount due to be determined.[33]

But again it is held that a mere offer to suffer default does not admit the contract sued on.[34]

R. Confession of Judgment. — A confession of judgment is an admission of the facts necessary to establish the right thereto, and is competent evidence of such admission.[35]

Admits the Law As Well As the Facts.—And the admission extends to the law as well as the facts involved in the claim and judgment.[36]

Is Conclusive. — And the general rule is that the judgment by confession, based upon the admission of the party, is conclusive, and the confessor estopped to go behind it.[37]

Competent in Another Action. — And the admission may be shown as such, in another action, but in such case it is not conclusive.[38]

Admission of Amount Due in the Answer. — A like effect has been given to an admission in the answer of a defendant, of an amount due, where the money is in court.[39]

32. Wentworth *v.* Lord, 39 Me. 71; Gilman *v.* Pearson, 47 Me. 352; Courtright *v.* Staggers, 15 Ohio St. 511.

33. Fogg *v.* Hill, 21 Me. 529. But see Jackson *v.* Hampden, 20 Me. 37.

34. Jackson *v.* Hampden, 20 Me. 37.

In Maine, where this practice prevailed, it was later provided by statute that an offer to be defaulted, if not accepted, should not be taken as an admission. Wentworth *v.* Lord, 39 Me. 70.

It is not equivalent in its effect to a default. Pitkin *v.* New York & N. E. R. Co., 64 Conn. 482, 30 Atl. 772.

35. *Iowa.* — Troxel *v.* Clarke, 9 Iowa 201; Plummer *v.* Douglas, 14 Iowa 69, 81 Am. Dec. 456.

Kentucky. — Bonta *v.* Clay, 1 Litt. 27.

Louisiana. — Skinner *v.* Dameron, 5 Rob. 447.

Maryland. — McMechen *v.* Mayor of Baltimore, 2 Har. & J. 41; Huston *v.* Ditto, 20 Md. 305.

New Jersey. — Seward *v.* Payne, 4 N. J. Law 101.

Pennsylvania. — Earnest *v.* Hoskins, 100 Pa. St. 551; Bradde *v.* Brownfield, 4 Watts 474.

Virginia. — Honaker *v.* Howe, 19 Gratt. 50.

Wisconsin. — Buffalo *v.* Barb Wire Co., 64 Wis. 338, 25 N. W. 208.

36. Troxel *v.* Clarke, 9 Iowa 201; Plummer *v.* Douglas, 14 Iowa 69, 81 Am. Dec. 456; Trimmer *v.* Winsmith, 23 S. C. 449.

Admits the Law As Well As the Facts. — In Bonta *v.* Clay, 1 Litt (Ky.) 27, it is held that a confession of judgment admits the law as well as the facts to be against the party confessing.

Estops to Attack Note for Usury. So it is held that a confession of judgment for the full amount of principal of a note, usurious on its face, estops the party from going behind the judgment to purge it of illegal interest.

37. Troxel *v.* Clarke, 9 Iowa 201; Burchett *v.* Casady, 18 Iowa 342.

38. Earnest *v.* Hoskins, 100 Pa St. 551.

39. Merritt *v.* Thompson, 1 Abb. Pr. (N. Y.) 223, 10 How. Pr. 428; Quintard *v.* Secor, 1 Abb. Pr. (N. Y.) 393; Jackson *v.* Hampden, 20 Me. 37.

Binding Until Time for Acceptance — The offer is binding on the defendant for the time within which the plaintiff is allowed to accept it, and in the meantime cannot be withdrawn.[40]

S. Payment of Money Into Court. — The voluntary payment of money into court, upon a claim made against a party therefor, is an admission of the cause of action to recover that sum and no more.[41]

Where Action Is on Contract Admits the Contract. — And where the action is upon a special contract, payment into court admits the contract and liability thereon in the amount of the sum paid in.[42] But this has been doubted.[43]

The payment may be made as upon a particular count, in which case the admission extends no farther than to the confession of a cause of action upon that count.[44]

Is a Payment on Account. — The bringing in of the money is in effect a payment as of that date, on account of the sum claimed.[45]

Is a Confession of a Cause of Action. — But in Fogg *v.* Hill, 21 Me. 529, it is held that an offer, under the statute of that state, to be defaulted, is equivalent to bringing the money into court, and must be regarded as a confession of the cause of action, but not the amount due.

40. Walker *v.* Johnson, 8 How. Pr. (N. Y.) 240.

41. Monroe *v.* Chaldeck, 78 Ill. 420; Sweetland *v.* Tuthill, 54 Ill. 215; Seaton *v.* Benedict, 5 Bing. 28, 15 Eng. C. L. 454; Gutteridge *v.* Smith, 2 Black. 374; Rucker *v.* Palsgrave, 1 Taunt. 419; Story *v.* Finnis, 3 Eng. Law & Eq. 548; Stapleton *v.* Norvell, 6 M. & W. 9.

What Payment Into Court Admits. In Greenl. Ev., vol. I, § 205, it is said: "There is still another class of judicial admissions, made by the *payment of money into court*, upon a rule granted for that purpose. Here, it is obvious, the defendant conclusively admits that he owes the amount thus tendered in payment; that it is due for the cause mentioned in the declaration; that the plaintiff is entitled to claim it in the character in which he sues; that the court has jurisdiction of the matter; that the contract described is rightly set forth, and was duly executed; and that it has been broken in the manner and to the extent declared; and if it was a case of goods sold by sample, that they agreed with the sample. In other words, the payment of money into court admits conclusively every fact which the plaintiff would be obliged to prove in order to recover that money."

42. Dyer *v.* Ashton, 1 Barn. & C. 2, 8 Eng. C. L. 2; Leggett *v.* Cooper, 2 Stark. 102, 3 Eng. C. L. 335; Cox *v.* Brain, 3 Taunt. 95; Bennett *v.* Francis, 2 B. & P. 550.

Extent of Admission. — In Seaton *v.* Benedict, 5 Bing. 28, 15 Eng. C. L. 454, it is held that where the action is upon a special contract, payment into court admits the contract and liability thereon in the sum paid in. But that in common *indebitatus assumpsit* the payment admits no more than that the sum paid is due.

43. Gutteridge *v.* Smith, 2 Black. 374.

44. Gutteridge *v.* Smith, 2 Black. 374; Cox. *v.* Brain, 3 Taunt. 95; Stapleton *v.* Norvell, 6 M. & W. 9.

45. The effect of bringing money into court is thus stated in Boyden *v.* Moore, 5 Mass. 365: "The bringing money into court is a practice adopted to relieve the defendant against an unexpected suit for money, which he is willing to pay, but which he has not tendered to the plaintiff before the commencement of the suit. After the defendant has brought in as much money as he thinks proper, and the plaintiff has refused to receive it in satisfaction, the defendant is entitled to have the

In Cases of Tort. — The rule is the same in cases of tort. The payment into court admits a cause of action for the amount paid in.[46]

III. TO WHOM MAY BE MADE.

1. Generally. — In respect of the mere question of the competency of admissions, as evidence, it is immaterial as a rule, whether they are made to a party in interest or to a stranger. But as we shall see farther along, it may be quite material in respect of their weight as against the party making them. If made to an adverse party in interest they may be conclusive, but not so if made to a stranger.[47]

And as to their competency, it may be quite material whether they are made to an attorney or other person sustaining a confidential relation towards the party making them under such circumstances as to render them privileged, in which case they are not competent.[48]

2. To Adverse Party or His Agent. — It may be stated as a general rule that all admissions made to the adverse party to the controversy, or his agent, if material to the issue, are competent unless made in an effort to arrive at a compromise.[49]

3. To Attorney or Agent. — As to admissions made to one's own attorney or agent, they are competent to be proved against the party making them unless made under such circumstances as to render them confidential and, for that reason privileged.[50]

If made to the attorney or agent of the adverse party respecting a matter in which he is then engaged as such attorney or agent, it is the same as if made to the principal. If made to him when not so engaged, it is the same as if made to a stranger. If made to one's own agent it is competent.[51]

4. To Third Party. — The competency of an admission does not, as a rule, depend upon the person to whom it is made. Therefore, if made to a stranger having no interest in the controversy, it is just as competent as if made to a party in interest.[52]

same considered as a payment made on the day on which it was brought in, and he is answerable only for further damages. He then stands on the same ground as if, on tendering money before the action, the plaintiff had refused to receive it, but had commenced his action, in which the tender was pleaded."

46. Story *v.* Finnis, 3 Eng. Law & Eq. 548.

47. Brown *v.* Mathews, 79 Ga. 1, 4 S. E. 13; Gregory *v.* Com., 121 Pa. St. 611, 15 Atl. 452.

48. See succeeding sections.

49. *Post*, p. 596; Gregory *v.* Com. 121 Pa. St. 611, 15 Atl. 452.

50. *Post*, p. 600; Brown *v.* Mathews, 79 Ga. 1, 4 S. E. 13.

51. Cramer *v.* Gregg, 40 Ill. App. 442; Winebrenner *v.* Brunswick-Balke etc. Co., 82 Iowa 741, 47 N. W. 1089.

52. *Georgia.* — Brown *v.* Mathews, 79 Ga. 1, 4 S. E. 13.

Illinois.—Brown *v.* Calumet River Ry. Co., 125 Ill. 600, 18 N. E. 283.

Massachusetts. — Hosmer *v.* Groat, 143 Mass. 16, 8 N. E. 431.

Missouri.—Hinters *v.* Hinters, 114 Mo. 26, 21 S. W. 456; Meier *v.* Meier, 105 Mo. 411, 16 S. W. 223.

North Carolina. — Carpenter *v.* Tucker, 98 N. C. 316, 3 S. E. 831.

Pennsylvania. — Gregory *v.* Com., 121 Pa. St. 611, 15 Atl. 452; Reed *v.* Reed, 46 Pa. St. 239.

Vermont. — Abbott *v.* Pratt, 16 Vt. 626.

In Secor *v.* Pestana, 37 Ill. 525, it

By Acquiescence. — With respect to admissions by acquiescence in what is said by another, the inference to be drawn from silence, when a statement is made by a stranger is not so strong as if made by one adversely interested, because the obligation to speak or the inducement to make answer is not so great.[53]

IV. BY WHOM MAY BE MADE.

1. Parties to the Record. — A. Generally. — The general rule is that every material fact must be proved by testimony on oath and not by declarations or admissions not on oath.[54] One of the exceptions to this rule is that the declarations of a party to the record, or of one identified in interest with him against his interest, are, as against such party, admissible in evidence.[55]

is said: "As to the fourth instruction, it was properly refused, because the admissions and declarations of appellant were admissible no matter to whom made, as confessions relating to the character and extent of his tenancy. There is no rule of law requiring such admissions, to be available, that they should be made to the party or his agent."

To Stranger Competent. — When a relevant fact or act is to be accounted for, a conversation had with one of the litigating parties with a third person, in the absence of the other, may account for it, or serve as a link in the chain of explanation. If so it is admissible in evidence. But the application of this rule must be carefully guarded." Brown *v.* Matthews, 79 Ga. 1, 4 S. E. 13.

53. *Ante*, p. 379; Larry *v.* Sherborne, 2 Allen (Mass.) 34; Com. *v.* Kenney, 12 Metc. (Mass.) 235, 46 Am. Dec. 672; Hackett *v.* Callender, 32 Vt. 97; Bentley's Appeal, 99 Pa. St. 500.

54. Lancaster *v.* Longenecker, 6 Binn. (Pa.) 1.

55. *England.* — Spargo *v.* Brown, 9 Barn. & C. 935, 17 Eng. C. L. 412.

United States. — The Stranger, 23 Fed. Cas. No. 13,525.

Alabama. — Humes *v.* O'Bryan, 74 Ala. 64; Frank *v.* Thompson, 105 Ala. 211, 16 So. 634.

Arkansas. — Phelan *v.* Bonham, 9 Ark. 389; Southern Ins. Co. *v.* White, 58 Ark. 277, 24 S. W. 425.

California. — Moore *v.* Campbell, 72 Cal. 251, 13 Pac. 689; White *v.* Merrill, 82 Cal. 14, 22 Pac. 1129; Robinson *v.* Dugan (Cal.), 35 Pac. 902; Wright *v.* Carillo, 22 Cal. 595.

Colorado. — Wilson *v.* Morris, 4 Colo. App. 242, 36 Pac. 248; Holman *v.* Boston L. & S. Co., 20 Colo. 7, 36 Pac. 797; Plummer *v.* Struby-Estabrooke M. Co., 23 Colo. 190, 47 Pac. 294; Teller *v.* Ferguson, 24 Colo. 432, 51 Pac. 429.

Connecticut. — White *v.* Reed, 15 Conn. 457; Bassett *v.* Shares, 63 Conn. 39, 27 Atl. 421; Plant *v.* McEwen, 4 Conn. 544; Pierce *v.* Roberts, 57 Conn. 31, 17 Atl. 275.

Georgia. — Ingram *v.* Hilton etc. L. Co., 108 Ga. 194, 33 S. E. 961.

Illinois. — Cramer *v.* Gregg, 40 Ill. App. 442.

Indiana. — Miller *v.* Cook, 124 Ind. 101, 24 N. E. 577; Denman *v.* McMahin, 37 Ind. 241.

Iowa. — Winebrenner *v.* Brunswick-Balke C. Co., 82 Iowa 741, 47 N. W. 1089; Bullard *v.* Bullard, 112 Iowa 423, 84 N. W. 513.

Kansas. — Pope *v.* Bowzer, 1 Kan. App. 727, 41 Pac. 1048.

Maine. — Laughlin *v.* Eaton, 54 Me. 156.

Maryland. — Pierce *v.* Roberts, (Md.), 17 Atl. 275.

Massachusetts. — Green *v.* Gould, 3 Allen 465; Abbott *v.* Andrews, 130 Mass. 145; Hosmer *v.* Groat, 143 Mass. 16, 8 N. E. 431; Heywood *v.* Heywood, 10 Allen 105; Atkins *v.* Sanger, 1 Pick. 192.

Michigan.—Evans *v.* Montgomery, 95 Mich. 497, 55 N. W. 362; Reiser *v.* Portere, 106 Mich. 102, 63 N. W. 1041; Ford *v.* Savage, 111 Mich.

Identity With Party Must Be Shown. — Therefore, in order to render such admissions competent, if not made by the party himself, the identity of interest of the person making them with the party to the suit must be shown.[55]

144, 69 N. W. 240; Baxter *v.* Reynolds, 112 Mich. 471, 70 N. W. 1039.

Minnesota. — Potter *v.* Mellen, 41 Minn. 487, 43 N. W. 375; Hosford *v.* Hosford, 41 Minn. 245, 42 N. W. 1018; Towle *v.* Sherer, 70 Minn. 312, 73 N. W. 180.

Mississippi. — Hall *v.* Waddill, 78 Miss. 16, 28 So. 831.

Missouri. — Meier *v.* Meier, 105 Mo. 411, 16 S. W. 223; McLaughlin *v.* McLaughlin, 16 Mo. 242; Wiseman *v.* St. L. A. & T. Ry. Co., 30 Mo. App. 516.

Nebraska. — Bartlett *v.* Cheesebrough, 32 Neb. 339, 49 N. W. 360.

New Hampshire. — Tenney *v.* Evans, 14 N. H. 343, 40 Am. Dec. 194.

New York. — Bronson *v.* Wiman, 8 N. Y. 182; Potter *v.* Ogden, 136 N. Y. 384, 33 N. E. 228; Larrison *v.* Payne, 52 Hun 612, 5 N. Y. Supp. 221; Reed *v.* McCord, 18 App. Div. 381, 46 N. Y. Supp. 407; Newcombe *v.* Hyman, 16 Misc. 25, 37 N. Y. Supp. 649; Marvin *v.* Richmond, 3 Denio 58; Doyle *v.* St. James Church, 7 Wend. 178.

North Carolina. — Tredwill *v.* Graham, 88 N. C. 208.

Pennsylvania. — Silvis *v.* Ely, 3 Watts & S. 420; Wilson *v.* Wilson, 137 Pa. St. 269, 20 Atl. 644.

Rhode Island. — Fay *v.* Feeley, 18 R. I. 715, 30 Atl. 342; State *v.* Littlefield, 3 R. I. 124.

South Carolina. — Hodges *v.* Tarrant, 31 S. C. 608, 9 S. E. 1038; McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123.

Texas. — Hardy *v.* De Leon, 5 Tex. 211; Ellis *v.* Stone, 4 Tex. Civ. App. 157, 23 S. W. 405; Wells *v.* Fairbanks, 5 Tex. 582; Clapp *v.* Engledow, 72 Tex. 252, 10 S. W. 462; Galveston H. & S. A. Ry. Co. *v.* Hertzig, 3 Tex. Civ. App. 296, 22 S. W. 1013; Extence *v.* Stewart, (Tex. Civ. App.), 26 S. W. 896; Shelburne *v.* McCrocklin (Tex. Civ. App.), 42 S. W. 329.

Vermont. — Robinson *v.* Hutchinson, 31 Vt. 443; Bennett *v.* Camp, 54 Vt. 36; McCann *v.* Hallock, 30 Vt. 233; Hill *v.* Powers, 16 Vt. 516; Goodnow *v.* Parsons, 36 Vt. 46; Barber *v.* Bennett, 58 Vt. 476, 4 Atl. 221, 1 L. R. A. 224.

Virginia. — Barton *v.* Scott, 3 Rand. 399.

Wisconsin. — Hunter *v.* Gibbs, 79 Wis. 70, 48 N. W. 257.

In Proof of Marriage. — The fact of marriage may be established by the admissions of the parties. Greenawaldt *v.* McEnneley, 85 Pa. St. 352.

So the declarations of defendant in an action for criminal conversation is held to be competent to prove the marriage of the woman against whom the offense is committed. Forney *v.* Hallacher, 8 Serg. & R. (Pa.) 159, 11 Am. Dec. 590.

Party Not Served. — In some of the states under statutory provisions it is held that the admissions of a party not served are inadmissible as against a party who has appeared. Derby *v.* Rounds, 53 Cal. 659; Griswold *v.* Burroughs, 60 Hun 558, 15 N. Y. Supp. 314.

Where Not Made Upon Personal Knowledge. — And his admissions made without any personal knowledge of the fact admitted may be proved against him. Reed *v.* McCord, 160 N. Y. 330, 54 N. E. 737.

56. *England.* — Spargo *v.* Brown, 9 Barn. & C. 935, 17 Eng. C. L. 412; Wise *v.* Charlton, 4 Ad. & E. 786, 31 Eng. C. L. 346; Beauchamp *v.* Parry, 1 Barn. & C. 89, 20 Eng. C. L. 408; Barough *v.* White, 4 Barn. & C. 325, 10 Eng. C. L. 600; Phillips *v.* Cole, 10 Ad. & E. 106, 37 Eng. C. L. 79.

United States. — Lamar *v.* Micou, 112 U. S. 452.

Alabama. — Harrison *v.* Mock, 16 Ala. (N. S.) 616; Jones *v.* Norris, 2 Ala. 526; Mahone *v.* Williams, 39 Ala. 202.

California. — Kilburn *v.* Ritchie, 2 Cal. 145, 56 Am. Dec. 326; Dean *v.* Ross, 105 Cal. 227, 38 Pac. 912.

Colorado. — Davis *v.* Johnson, 4 Colo. App. 545, 36 Pac. 887.

Cannot Be Shown by Admissions of the Party. — As against another the admissions of a party cannot be received to show his interest in property in controversy.[57] And it is not enough in case of per-

Connecticut. — Plant v. McEwen, 4 Conn. 544.

Georgia. — Pool v. Morris, 29 Ga. 374, 74 Am. Dec. 68.

Idaho. — Deasey v. Thurman, 1 Idaho 775.

Illinois. — Hauley v. Erskine, 19 Ill. 265.

Massachusetts. — Noyes v. Morrill, 108 Mass. 396; Baker v. Briggs, 8 Pick. 122, 10 Am. Dec. 311.

Michigan. — Campau v. Dubois, 39 Mich. 274.

New York. — Smith v. Webb, 1 Barb. 230; Gardner v. Barden, 7 N. Y. 433; Bullis v. Montgomery, 50 N. Y. 352; Mercadante v. Manhattan Ry. Co., 82 Hun 555, 31 N. Y. Supp. 540.

Pennsylvania. — Hill v. Roderick, 4 Watts & S. 221; Continental Ins. Co. v. Delpeuch, 82 Pa. St. 225.

South Carolina.—Agnew v. Adams, 26 S. C. 101, 1 S. E. 414; De Bruhl v. Patterson, 12 Rich. (Law) 363.

Vermont. — Warner v. McGary, 4 Vt. 507; Orr. v. Clark, 62 Vt. 136, 19 Atl. 929.

By a Co-Distributee. — In Prewett v. Coopwood, 30 Miss. 369, the question was as to the competency of admissions made by one distributee of an estate as against other distributees, and the court said, in passing upon the question:

"The object of the evidence was to create a presumption that the defendant had not received so much of the estate at least as belonged to the widow. If she had been the only distributee, and the estate owing no debts, as is proved in this case, the evidence would have been admissible on the ground that, being the sole beneficiary in the estate, she could make admissions or do any other act affecting her interest, which a legal owner of property could make or do. But she could make no admission affecting the rights of a co-distributee, because she had no power over his interest."

By Contractor for construction of building against owner. Dickenson College v. Church, 1 Watts. & S. (Pa.) 462.

Statement of the Rule. — It is well settled that the declarations of third persons, not parties to the record, cannot be admitted in evidence, except in those cases where they have a joint interest with the plaintiff or defendant, or where some legal relation such as that of partners, exists. Kilburn v. Ritchie, 2 Cal. 145, 56 Am. Dec. 326.

By Assignor for Benefit of Creditors. — In the case of Bullis v. Montgomery, 50 N. Y. 352, the assignment was by an insolvent debtor for the benefit of his creditors and his admissions were offered in evidence as against the assignee, and in support of the offer it was urged that there was such privity between the assignor and the assignee as to let in such admissions against the latter. But it was held by the court that there was no identity of interest between an insolvent assignor in trust for his creditors and his assignee, but that the assignee holds primarily for the creditors, and for those in hostility to the assignor.

Must Be Identity of Interest. — In Fitch v. Chapman, 10 Conn. 8, the court said: "It is said that the plaintiff is identified with John Chapman because he claims through him. The indorsee of a promissory note, claims through the indorser; but it does not therefore follow, that the declarations of that indorser can be given in evidence; as was observed in Barough v. White, above cited. I should think the identity spoken of in the books, referred rather to those cases where the nominal plaintiff was suing, in fact, for the benefit of a third person; and this identified their interests."

By Executor Before His Appointment. — So it is held that the admissions of one sued as executor, before he became such, are inadmissible because the judgment if recovered would affect the creditors and heirs of the testator to whom the executor was a stranger. Plant v. McEwen, 4 Conn. 544.

57. Backnam v. Barnum, 15 Conn. 67.

sonal property to show merely that the party to the action claims through the party whose admission is offered.[58]

Foundation for Proof of, Not Necessary. — The evidence of admissions by a party is not necessarily impeaching, although it may have that effect, and it is not necessary to lay a foundation for the proof by asking the party with respect to it as in case of impeachment.[59]

After Action Brought. — It makes no difference in respect of the competency of admissions by a party that they were made after the commencement of the action if they relate to matters occurring before suit brought.[60]

a. *By One of Two or More.* — Where two or more defendants are joined, the admissions of any one of them are admissible, as against him, but not against his co-defendants except where such a joint interest is shown as will render his admissions binding on the other defendant as shown farther along.[61]

b. *Other Declarations to Explain Inadmissible.* — Where admissions are proved against a party, it is not competent for him to prove other declarations of his in his own interest contradictory or explanatory of such admissions.[62] The rule is different where the counter-

58. Fitch *v.* Chapman, 10 Conn. 8; Smith *v.* Webb, 1 Barb. 230; Christie *v.* Bishop, 1 Barb. Ch. 105.

59. Bullard *v.* Bullard, 112 Iowa 423, 84 N. W. 513; Teller *v.* Ferguson, 24 Colo. 432, 51 Pac. 429; Louisville & N. R. Co. *v.* Miller, 19 Ky. Law 1665, 44 S. W. 119; Bartlett *v.* Cheesebrough, 32 Neb. 339, 49 N. W. 360; Hunter *v.* Gibbs, 79 Wis. 70, 48 N. W. 257; Garr Scott & Co. *v.* Shaffer, 139 Ind. 191, 38 N. E. 811; Salter *v.* Edw. Hines L. Co., 77 Ill. App. 97.

60. Dole *v.* Young, 24 Pick. (Mass.) 250.

61. *England.* — Rex. *v.* Inhabitants of Hardwick, 11 East. 578.

Alabama. — Polly *v.* McCall, 37 Ala. 20; Palmer *v.* Severance, 9 Ala. 751; Falkner *v.* Leith, 15 Ala. (N. S.) 9; Goodman *v.* Walker, 30 Ala. (N. S.) 482, 68 Am. Dec. 134; Smith *v.* Rogers, 1 Stew. & P. 317; Lewis *v.* Lee, 66 Ala. 480.

California. — White *v.* Merrill, 82 Cal. 14, 22 Pac. 1129; Spanagel *v.* Dellinger, 38 Cal. 278.

Georgia. — Kiser *v.* Dannenberg, 88 Ga. 541, 15 S. E. 17.

Illinois. — Rogers *v.* Suttle, 19 Ill. App. 163.

Indiana. — Hayes *v.* Burkam, 67 Ind. 359; Smith *v.* Meiser, 11 Ind. App. 468, 38 N. E. 1092.

Kansas. — Boynton *v.* Hardin, 9 Kan. App. 156, 58 Pac. 1007.

Massachusetts. — Hubbell *v.* Bissell, 2 Allen 196; Hodges *v.* Hodges, 2 Cush. 455; Edgerton *v.* Wolf, 6 Gray 453; Phelps *v.* Hartwell, 1 Mass. 71.

Missouri. — Enders *v.* Richards, 33 Mo. 598.

New York. — Christie *v.* Bishop, 1 Barb. Ch. 105.

North Carolina. — Tredwell *v.* Graham, 88 N. C. 208.

Pennsylvania. — Continental Ins. Co. *v.* Delpench, 82 Pa. St. 225.

South Carolina. — De Bruhl *v.* Patterson, 12 Rich. (Law) 363.

Texas. — Shelborn *v.* McCrocklin (Tex. Civ. App.), 42 S. W. 329.

West Virginia. — Dickinson *v.* Clarke, 5 W. Va. 280.

Inadmissible Against Party Making Them, When. — In McMillen *v.* McDill, 110 Ill. 47, it was held that the admissions of one party were not admissible even as against him where the effect of the admissions must go to defeat the action as to his co-parties as well as himself.

Unless in the Presence of the Others. — Crippen *v.* Morse, 49 N. Y. 63. But see Rogers *v.* Suttle, 19 Ill. App. 163.

62. Nutter *v.* O'Donnell, 6 Colo. 253; Harding *v.* Clark, 15 Ill. 30;

declarations are made as a part of the same conversation or in the same letter, or other writing, or correspondence. There the whole conversation, instrument or correspondence must be heard and taken together.[63]

B. Proper Parties. — If one made a party to the suit is a proper party, his admissions are admissible, at least as against him.[64]

C. Of Nominal Parties. — a. *Generally Incompetent.* — The test of the competency of statements made as admissions, if otherwise competent and material, is whether or not such statements were against interest. If a party to the suit is a merely nominal party, having no interest in the result, his declarations are not within the reason of the rule and are inadmissible.[65] But it has been held that

Blight *v.* Ashley, Pet. C. C. 15, 3 Fed. Cas. No. 1541.

63. Bailey *v.* Pardridge, 35 Ill. App. 121; Lippus *v.* Columbus Watch Co., 26 N. Y. St. 620, 13 N. Y. Supp. 319; Ellen *v.* Ellen, 18 S. C. 489.

64. Edwards *v.* Derrickson, 28 N. J. Law 39; Gibson *v.* Winter, 5 Barn. & A. 96, 27 Eng. C. L. 50; Hogan *v.* Sherman, 5 Mich. 60; Sargeant *v.* Sargeant, 18 Vt. 371; Smith *v.* Vincent, 15 Conn. 1, 38 Am. Dec. 52.

By One Joined but Not a Proper Party. — The admissions of a party to the suit are inadmissible where it appears that he has no interest in the matter in controversy, and is for that reason not a proper party. Wright *v.* Cornelius, 10 Mo. 174.

65. *England.* — Webb *v.* Smith, R. & M. 106, 21 Eng. C. L. 712; Rex. *v.* Inhabitants of Hardwick, 11 East 578.

United States. — Palmer *v.* Cassin, 2 Cranch C. C. 66, 18 Fed. Cas. No. 10,687.

Alabama. — Graham *v.* Lockhart, 8 Ala. (N. S.) 9; Chisholm *v.* Newton, 1 Ala. 371; Head *v.* Shaver, 9 Ala. (N. S.) 791; Roberts *v.* Trawick, 13 Ala. 68; Thompson *v.* Drake, 32 Ala. 99; Gary *v.* Colgin, 11 Ala. 514; Sally *v.* Gooden, 5 Ala. (N. S.) 78; Copeland *v.* Clark, 2 Ala. (N. S.) 388; Brown *v.* Foster, 4 Ala. 282.

California. — Spanagel *v.* Dellinger, 38 Cal. 278.

Illinois. — Dazey *v.* Mills, 5 Gilm. 67.

Indiana. — McSweeney *v.* McMillen, 96 Ind. 298.

Maine. — Butler *v.* Millett, 47 Me. 492; Foster *v.* Gilman, 29 Me. 136; Carle *v.* Bearce, 33 Me. 337.

Massachusetts. — Bagley *v.* Bryant, 24 Pick. 198; Tyler *v.* Ulmer, 12 Mass. 163; Wing *v.* Bishop, 3 Allen 456.

Minnesota. — State *v.* Olson, 55 Minn. 118, 56 N. W. 585.

New York. — Frear *v.* Evertson, 20 Johns. 142.

Pennsylvania. — Mertz *v.* Detweiler, 8 Watts & S. 376; Morton *v.* Morton, 13 Serg. & R. 107.

Tennessee. — Moyers *v.* Inman, 2 Swan 80.

Texas. — Thompson *v.* Johnson (Tex. Civ. App.) 56 S. W. 591.

Vermont. — Sargeant *v.* Sargeant, 18 Vt. 371.

Of Nominal Plaintiff Not Admissible. — The rule is thus stated in the case of Chisholm *v.* Newton, 1 Ala. 371: "The general principle on which the competency of admissions as evidence rests, is the interest which the party making them has in the suit, or its subject matter. From this it would seem that the admissions of one who has no interest in a suit, ought not to be allowed to control it. It is said by Mr. Starkie in his compilation of the rules of evidence (2 Starkie on Ev., 40,) that the admission of a *party on the record* is always evidence, though he be but a trustee for another, and although it appear from the admission itself that he is such: for this he cites the case of Bowerman *v.* Rodenius (7 Term, 663). This case when examined, does not support the rule in its great extent, as stated by the commentator. It was an action brought in the name of one

the question, whether such party has an interest in the result or not, is a question for the jury.[66]

The declarations of one not a party on the record cannot be received to show that he has an interest.[67] But the admissions of the alleged nominal party are competent to show that he has an interest.[68]

b. *Of Record Held Competent.* — And there are cases holding that the admissions of a party of record, although only a nominal party, are competent. This was the common law rule.[69] The

person, when the actual interest was in another; *to prove the interest of the latter, in order to let in an admission made by him*, a letter from the nominal plaintiff was offered, which the judge at *nisi prius* rejected; but which was afterwards ruled by the Court of King's Bench to be competent evidence.

"This decision, then, was merely that the admission of the plaintiff of record, was proper evidence to show the actual interest in the suit was in another, whose admissions ought then to have been allowed to control the case. This case evidently does not warrant the conclusion that the admission of the plaintiff on the record will be allowed to control the case against the interest of the actual plaintiff, after that interest is disclosed. Indeed, the reverse of the principle laid down by Mr. Starkie was ruled in the case of Cowling *v.* Ely (2 Star. cases 366) where it was held that the admission of a guardian who was the plaintiff on the record, was not evidence against the infant."

Made After Parting with Interest. In Sally *v.* Gooden, 5 Ala. (N. S.) 78, it is held, that declarations made by a nominal party after parting with his interest are inadmissible; otherwise, if made before.

Admissions of a Trustee Plaintiff in the Action. — The rule is thus stated in Sargeant *v.* Sargeant, 18 Vt. 371:

"One question made in this case is, whether the admissions of the plaintiff of record are to be received in evidence. At common law the declarations and admissions of the party of record, although a mere trustee, are always admissible: Gibson *v.* Winter, 5 B. & Ad. 96 (27 E. C. L. 50) where the subject is fully discussed and the cases are cited and commented upon by Ch. J. Denman. But in this state a different rule has long prevailed. We do not allow the admissions of a mere trustee to go to the jury. The payee of a promissory note, which is put in suit by some other person as holder, but to whom the note is not indorsed, is perhaps *prima facie* to be regarded in that light. His admissions were, then, correctly enough excluded."

66. Campbell *v.* Day, 16 Vt. 558; Hogan *v.* Sherman, 5 Mich. 60.

67. Ryan *v.* Merriman, 4 Allen (Mass.) 77.

68. Thompson *v.* Drake, 32 Ala. 99.

69. *England.* — Gibson *v.* Winter, 5 Barn. & A. 96, 27 Eng. C. L. 50.

Connecticut. — Bulklev *v.* Landon, 3 Conn. 76; Plant *v.* McEwen, 4 Conn. 544; Coit *v.* Tracy, 8 Conn. 268, 20 Am. Dec. 110.

Maine. — Hatch *v.* Dennis, 10 Me. 244.

Maryland. — Beatty *v.* Davis, 9 Gill. 211.

Michigan. — Hogan *v.* Sherman, 5 Mich. 60.

Missouri. — Dillon *v.* Chouteau, 7 Mo. 386.

New Hampshire. — Tenney *v.* Evans, 14 N. H. 343, 40 Am. Dec. 194.

Pennsylvania. — Johnson *v.* Kerr, 1 Serg. & R. 25.

Vermont. — Sargeant *v.* Sargeant, 18 Vt. 371.

Of Party to Record Competent. The cases holding that the admissions of a party of record, tending to show that he has no cause of action competent, proceed upon the theory that he must be regarded for the purposes of the action, as having an interest, or he could not maintain

extent or nature of his interest, whether joint or several, is immaterial so long as the admission is offered as against the party making it.[70]

2. Of Persons Interested in Result, but Not Parties Competent. A party having an interest in the suit, and particularly one in whose behalf the suit is being prosecuted by a nominal party, is, in respect of this question, in legal effect a party, and his admissions are competent.[71]

3. By Party in Possession Affecting Title. — A. Generally. The general rule is that declarations of a party in disparagement of title to property of which he is in possession, claiming to be the owner, or otherwise interested therein, are competent.[72]

B. Grantors, Former Owners and Privies.—a. *Of Grantor Admissible Against Him and Claimants Under Him.* — The admissions of the owner of property in possession are admissible, not only against him, but against subsequent purchasers from or claimants under him, if such admissions affect his title to the property and are against his interest.[73]

the action. Bulkley *v.* Landon, 3 Conn. 76.

Exception to the Rule. — But where the admissions of an executor, made before his appointment, were offered, it was held that as it appeared that they were made when he had no interest, they were inadmissible. Plant *v.* McEwen, 4 Conn. 544.

Where Party Has Parted with His Interest. — In Dillon *v.* Chouteau, 7 Mo. 386, it is held to be the incontrovertible rule that the admissions of the plaintiff on the record are admissible evidence, and that his ceasing to be a party to the record does not affect the question of the competency of the evidence, and that the fact that the party is since deceased does not affect the question. But the rule is in this case placed upon the ground that the party being a party to the record, he could not be examined as a witness.

70. Black *v.* Lamb, 12 N. J. Eq. 108; Foster *v.* Gilman, 29 Me. 136.

71. Carlton *v.* Patterson, 29 N. H. 580; 1 Greenl. Ev., § 180; Bigelow *v.* Foss, 59 Me. 102; Richardson *v.* Field, 6 Green. (Me.) 303; Proctor *v.* Lainison, 7 Car. & P. 629, 32 Eng. C. L. 703; Eaton *v.* Corson, 59 Me. 510; Barber *v.* Bennett, 58 Vt. 476, 4 Atl. 231, 1 L. R. A. 224; Grimshaw *v.* Paul, 76 Ill. 164; Pike *v.* Wiggin, 8 N. H. 356.

Must Be Interested at the Time. In Boston *v.* Scott, 3 Rand. (Va.) 399, it is held that to render declarations competent they must have been made while such interest existed and that if made before the party acquired an interest they were inadmissible.

72. 2 Whart. Ev. § 1156.

England. — Woolway *v.* Rowe, 1 Ad. & E. 114, 28 Eng. C. L. 76.

Connecticut. — Smith *v.* Martin, 17 Conn. 399.

Indiana. — McSweeney *v.* McMillen, 96 Ind. 298.

Massachusetts. — Plimpton *v.* Chamberlain, 4 Gray 320.

Minnesota. — Hosford *v.* Hosford, 41 Minn. 245, 42 N. W. 1018.

Missouri. — Meier *v.* Meier, 105 Mo. 411, 16 S. W. 223; Anderson *v.* McPike, 86 Mo. 293.

Pennsylvania. —Morrison *v.* Funk, 23 Pa. St. 421; Grant *v.* Levan, 4 Barr 393.

Texas. — Ellis *v.* Stone, 4 Tex. Civ. App. 157, 23 S. W. 405; Hays *v.* Hays, 66 Tex. 606, 1 S. W. 895.

Vermont. — Wood *v.* Willard, 36 Vt. 82, 84 Am. Dec. 659.

Virginia. — Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974.

73. *England.* — Brown *v.* Rawlins, 7 East 409; Doe *v.* Pettett, 5 Barn. & A. 223, 7 Eng. C. L. 129; Doe *v.* Coyle, 6 Car. & P. 359, 25 Eng. C. L. 474; Doe *v.* Austin, 9 Bing. 41, 23 Eng. C. L. 477; Wise

v. Charlton, 4 Ad. & E. 786, 31 Eng. C. L. 346.

United States. — Bowen v. Chase, 98 U. S. 254; Henderson v. Wanamaker, 79 Fed. 736.

Alabama. — Brewer v. Brewer, 19 Ala. 481; Pearce v. Nix, 34 Ala. 183; Alexander v. Caldwell, 55 Ala. 517; Bancam v. George, 65 Ala. 259; Beasley v. Clarke, 102 Ala. 254, 14 So. 744; Wisdom v. Reaves, 110 Ala. 418, 18 So. 13; Mahone v. Williams, 39 Ala. 202; Goodgame v. Coles, 12 Ala. (N. S.) 77.

Arizona. — Rush v. French, 1 Ariz. 99, 25 Pac. 816.

Arkansas — Allen v. McGaughey, 31 Ark. 252.

California. — Bollo v. Navarro, 33 Cal. 459; People v. Blake, 60 Cal. 497; Lord v. Thomas (Cal.), 36 Pac. 272; Stanley v. Green, 12 Cal. 148; McFadden v. Ellmaker, 52 Cal. 348; Tompkins v. Crane, 50 Cal. 478; Austin v. Andrews, 71 Cal. 98, 16 Pac. 546; Smith v. Glenn (Cal.), 62 Pac. 180.

Connecticut.—Norton v. Pettibone, 7 Conn. 319, 18 Am. Dec. 116; Rogers v. Moore, 10 Conn. 13; Peck v. Atwater Mfg. Co., 61 Conn. 31, 23 Atl. 699; Potter v. Waite, 55 Conn. 236, 10 Atl. 563; Smith v. Martin, 17 Conn. 399.

Georgia. — Lamar v. Pearre, 90 Ga. 377, 17 S. E. 92; Yonn v. Pittman, 82 Ga. 637, 9 S. E. 667; Power v. Savannah etc. Ry. Co., 56 Ga. 471; Ozment v. Anglin, 60 Ga. 242; Ogden v. Dodge Co., 97 Ga. 461, 25 S. E. 321.

Illinois. — Mueller v. Rebhan, 94 Ill. 142; Cline v. Jones, 111 Ill. 563; Stumpf v. Osterhage, 111 Ill. 82; Randegger v. Ehrshardt, 51 Ill. 101; Gage v. Eday, 179 Ill. 492, 53 N. E. 1008.

Indiana. — Joyce v. Hamilton, 111 Ind. 163, 12 N. E. 294; McSweeney v. McMillen, 96 Ind. 298.

Indian Territory. — McCurtain v. Grady, 1 Ind. Ter. 107, 38 S. W. 65.

Iowa. — Robinson v. Robinson, 22 Iowa 427; Wilson v. Patrick, 34 Iowa 362.

Kansas. — Anderson v. Kent, 14 Kan. 207.

Maryland. — Dorsey v. Dorsey, 3 Har. & J. 410, 6 Am. Dec. 506; Hale v. Monroe, 28 Md. 98; Keener v. Kauffman, 16 Md. 296.

Massachusetts. — Pickering v. Reynolds, 119 Mass. 111; Plimpton v. Chamberlain, 4 Gray 320; Blake v. Everett, 1 Allen 248; Hyde v. Middlesex Co., 2 Gray 267; Foster v. Hall, 12 Pick. 89; Bridge v. Eggleston, 14 Mass. 244; White v. Loring, 24 Pick. 319; Proprietors of the Church, etc. v. Bullard, 2 Mete. 363; Davis v. Spooner, 3 Pick. 283; Tyler v. Mather, 9 Gray 177.

Michigan. — Jones v. Pashby, 67 Mich. 459, 35 N. W. 152.

Mississippi. — Graham v. Bushy, 34 Miss. 272; Whitfield v. Whitfield, 40 Miss. 352.

Missouri. — Wilson v. Albert, 89 Mo. 537, 1 S. W. 209; Wood v. Hicks, 36 Mo. 326; Dickerson v. Chrisman, 28 Mo. 134; Johnson v. Quarlles, 46 Mo. 423; Meier v. Meier, 105 Mo. 411, 16 S. W. 823.

Nebraska.—Cunningham v. Fuller, 35 Neb. 58, 52 N. W. 836.

New Hampshire. — Dow v. Jewel, 18 N. H. 340, 45 Am. Dec. 371; Baker v. Haskell, 47 N. H. 470, 93 Am. Dec. 455; Pike v. Hayes, 14 N. H. 19, 40 Am. Dec. 171; Hulburt v. Wheller, 40 N. H. 73; Smith v. Powers, 15 N. H. 546; State v. Mills, 63 N. H. 4; Smith v. Forrest, 49 N. H. 230.

New Jersey. — Edwards v. Derrickson, 28 N. J. Law 39; Van Blarcom v. Kip, 26 N. J. Law 351; Townsend v. Johnson, 3 N. J. Law 279; N. J. Zinc etc. Co. v. Lehigh Zinc etc. Co., 59 N. J. Law 189, 35 Atl. 915.

New York. — Bingham v. Hyland, 53 Hun 631, 6 N. Y. Supp. 75; Lyon v. Ricker, 141 N. Y. 225, 36 N. E. 189; Pitts v. Wilder, 1 N. Y. 525; Jackson v. Bard, 4 Johns. 230; Keator v. Dimmick, 46 Barb. 158; Spaulding v. Hallenbeck, 35 N. Y. 204; Chadwick v. Fonner, 69 N. Y. 404; Jackson v. McCall, 10 Johns. 377, 6 Am. Dec. 343; Vrooman v. King, 36 N. Y. 477.

North Carolina. — Newlin v. Osborne, 4 Jones (Law) 157, 67 Am. Dec. 269; Roberts v. Preston, 100 N. C. 243, 6 S. E. 574; McCauless v. Reynolds, 67 N. C. 268; Gidney v. Moore, 86 N. C. 484; Harshaw v. Moore, 12 Ired. Law 247; Hedrick v. Gobble, 63 N. C. 48; Headen v. Womack, 88 N. C. 468; Magee v.

Blankenship, 95 N. C. 563; Cansler *v.* Fite, 5 Jones 424.

Pennsylvania. — Morrison *v.* Funk, 23 Pa. St. 421; Patton *v.* Goldsborough, 9 Serg. & R. 47; Pierce *v.* McKeehan, 3 Pa. St. 136; Hugus *v.* Walker, 12 Pa. St. 173; Sergeant *v.* Ingersoll, 15 Pa. St. 343; St. Clair *v.* Shale, 20 Pa. St. 105; Dawson *v.* Mills, 32 Pa. St. 302; Grant *v.* Levan, 4 Pa. St. 303; Penrose *v.* Griffith, 4 Binn. 231; Grubb *v.* Grubb, 74 Pa. St. 25; Alden *v.* Grove, 18 Pa. St. 377; Gibblehouse *v.* Toug, 3 Rawl. 436.

South Carolina — Ellen *v.* Ellen, 18 S. C. 489.

Tennessee. — Dunn *v.* Eaton, 92 Tenn. 743, 23 S. W. 163.

Texas. — Ellis *v.* Stone, 4 Tex. Civ. App. 157, 23 S. W. 405; Snow *v.* Starr (Tex.,) 12 S. W. 673; Hancock *v.* Tram Lumber Co., 65 Tex. 225; Hurt *v.* Evans, 49 Tex. 311; Wilson *v.* Simpson (Tex.), 16 S. W. 40; Coughran *v.* Alderete (Tex. Civ. App.), 26 S. W. 109; Hays *v.* Hays, 66 Tex. 606, 1 S. W. 895; Titus *v.* Johnson, 50 Tex. 224.

Utah. — McCormick *v.* Sadler, 14 Utah 463, 47 Pac. 667; Harrington *v.* Chambers, 3 Utah 94, 1 Pac. 362.

Vermont. — Wood *v.* Willard, 36 Vt. 82, 84 Am. Dec. 659; Hale *v.* Rich, 48 Vt. 217; Oakman *v.* Walker, 69 Vt. 344, 38 Atl. 63.

Virginia. — Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974.

West Virginia. — Fry *v.* Feamster, 36 W. Va. 454, 15 S. E. 253; Houston *v.* McCluney, 8 W. Va. 135.

As Against Grantees. — The admission, is confined in some of the cases, in respect of purchasers, to grantees not shown to be innocent purchasers for value, and to admissions made prior to the purchase. Ellis *v.* Stone, 4 Tex. Civ. App. 157, 23 S. W. 405; Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974.

As to Existence of Homestead. Where the existence of a homestead is in question, the admissions of a former claimant, while in possession, in disparagement of the claim, are competent in favor of one claiming adversely. Anderson *v.* Kent, 14 Kan. 207.

Reason of the Rule. — The grounds upon which such admissions are held to be competent are thus stated in Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974: "The principle more fully expressed, upon which such declarations are admissible as original evidence, is that the declarant probably knew the truth, and that his own interest, which would naturally influence him not to make untrue admissions to the prejudice of his title, is a sufficient security against falsehood; and not only are such admissions admissible against the declarant, but equally so against persons subsequently deriving title through or from him, because of the privity of estate or identity of interest that subsists between the parties."

See to the same effect, Chadwick *v.* Former, 69 N. Y. 404.

Of Widow in Possession. — In Doe *v.* Pettett, 5 Barn. & A. 223, 7 Eng. C. L. 120, it was held that the declarations of the widow in possession of premises, that she held them for life, and that after her death they would go to the heirs of her husband, were admissible in evidence to negative the fact of her having had twenty years' adverse possession, the court saying: "All questions of evidence must be considered with reference to the particular circumstances under which it is offered. Here, the question was, whether the widow had occupied the premises adversely for more than twenty years, and her declarations are offered in evidence to rebut the statute of limitations; and for that purpose, I think they were admissible. They were not used to show the *quantum* of her estate, but only to explain the nature of her possession."

Who Are Privies in Estate. — As to who are privies in estate within this rule of evidence, see Pool *v.* Morris, 29 Ga. 374, 74 Am. Dec. 68.

Of Mistake in Deed. — The admission of a grantor of a mistake in a deed is competent against a subsequent purchaser. Allen *v.* McGaughey, 31 Ark. 252.

Tenant by Courtesy. — In Orr *v.* Clark, 62 Vt. 136, 19 Atl. 929, the court said: "The testimony of Andrews as to the admissions of Whitcomb was properly excluded. Whitcomb occupied the land after his

b. *And Against Strangers.* — And against strangers.[74] The fact that the party making the declarations is still alive does not affect the competency of the evidence.[75] But it is held that the admissions of living former owners should be confined, as against strangers, to cases where they are part of the *res gestae*.[76] Nor is it affected by the fact that the declarant is a competent witness.[77]

c. *Against Whom Not Admissible.* — (1.) **Prior Grantees.** — Such admissions are not competent against a prior grantee.[78]

wife's decease, with his daughters' consent. He was a tenant by courtesy without their consent. What he supposed about the title while he was thus occupying could not give construction to the writing, or affect the title of his daughters or of their legal representatives."

By Expected Heir of an Estate. In Morton *v.* Massie, 3 Mo. 482, it was held that declarations made by one likely to become an heir of an estate, in the lifetime of the intestate, as to the condition of his property, were not competent after his death as evidence.

By Administrator of Predecessor. The admissions of the administrator of a predecessor in title are not competent as against the present claimant. Lawrence *v.* Wilson, 160 Mass. 304, 35 N. E. 858.

Of Ancestor Against Heir. — It is held in general terms that whenever the admission of an ancestor would have been admissible against him, if living, it is admissible against an heir claiming under him by descent. Davis *v.* Melson, 66 Iowa 715, 24 N. W. 526; McSweeney *v.* McMillen, 96 Iowa 298; Wallis *v.* Luhring, 134 Ind. 447, 34 N. E. 231; Hodges *v.* Hodges, 2 Cush. (Mass.) 455.

For What Purpose Admissible. In Stanley *v.* Green, 12 Cal. 148 it is held that it matters not whether the declarations relate to the limits of a party's own premises or the extent of his neighbor's, or to the boundary line between them or to the nature of the title he asserts, if their purport is to restrict his own premises or lessen his own title, they are admissible.

Must Be Privity of Estate. — Such admissions are admissible only against one claiming under the same title held by the predecessor at the time the admissions were made and cannot affect a title subsequently acquired by the person making them. Noyes *v.* Morrill, 108 Mass. 396.

74. Anderson *v.* McPike, 86 Mo. 293; McLeod *v.* Swain, 87 Ga. 156, 13 S. E. 315, 27 Am. St. Rep. 229; Lyon *v.* Ricker, 141 N. Y. 225, 36 N. E. 189.

By Equitable Owner. — The rule extends to declarations of one in possession under an equitable title; for example, where he holds under a bond for a deed. Niles *v.* Patch, 13 Gray (Mass.) 254.

Competent Whoever May Be Parties. — In Payne *v.* Crawford, 102 Ala. 387, 14 So. 854, it is held that such declarations may be given in evidence in an issue of disputed ownership, no matter who may be the parties to the suit.

75. Woolway *v.* Rowe, 1 Ad. & E. 114, 28 Eng. C. L. 76.

76. Anderson *v.* McPike, 86 Mo. 293.

Recitals in Deeds. — And see Penrose *v.* Griffith, 4 Binn. (Pa.) 231, in which it is held that recitals in deeds are not admissible against strangers.

77. Sandifer *v.* Hoard, 59 Ill. 246; Bridge *v.* Eggleston, 14 Mass. 244.

Waiver by Calling Declarant As a Witness. — But in Merrick *v.* Parkman, 18 Me. 407, it is held that if the party entitled to prove the admissions calls the party making them as his own witness to prove the facts, he thereby waives the right to prove the admissions.

78. Alexander *v.* Caldwell, 55 Ala. 517.

Recitals in Deeds. — It was said in Penrose *v.* Griffith, 4 Binn. (Pa.) 231: "The rule of law is, that a deed containing a recital of another deed, is evidence of the recited deed, against the grantor and all persons

(2.) Or Subsequent Grantee if Made After the Grant. — Nor against his grantee, or subsequent claimants if made after the grant;[79]

claiming by title derived from him *subsequently*. What is the reason of this rule? It is this, the recital amounts to a confession of the party, and that confession is evidence against himself and those who stand in his place. But such confession can be no evidence against a stranger It can be no evidence against one who claims by title derived from the person making the confession, *before* the confession made, because he does not stand in the place of the person making the confession: he claims paramount the confession. One who has conveyed his right, can by no subsequent confession affect the right which he has conveyed. Nor can any confession by him alter the general rule of evidence with respect to the person to whom he has conveyed."

While Mortgage Is Subsisting Which Is Subsequently Foreclosed. In Flagg *v.* Mason, 141 Mass. 64, 6 N. E. 702, the admissions offered were made during the existence of a mortgage on the land which was subsequently foreclosed and through which foreclosure the demandant derived title. The admissions were held to be competent.

79. *United States.* — Grimes Dry Goods Co. *v.* Malcolm, 58 Fed. 670; Clements *v.* Moore, 6 Wall. 299.

Alabama. — Abney *v.* Kingsland, 10 Ala. 355, 44 Am. Dec. 491; Gregory *v.* Walker, 38 Ala. (N. S.) 26; Anonymous, 34 Ala. 430, 73 Am. Dec. 461.

Arkansas. — Crow *v.* Watkins, 48 Ark. 169, 2 S. W. 659.

California. — Spanagel *v.* Dellinger, 38 Cal. 278; Kilburn *v.* Ritchie, 2 Cal. 145, 56 Am. Dec. 326; Thompkins *v.* Crane, 50 Cal. 478; Hyde *v.* Buckner, 108 Cal. 522, 41 Pac. 416.

Connecticut. — Nichols *v.* Hotchkiss, 2 Day 121.

Georgia. — Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254; Settle *v.* Allison, 8 Ga. 201, 52 Am. Dec. 393.

Illinois. — Hart *v.* Randolph, 142 Ill. 521, 32 N. E. 517; Myers *v.* Kinzie, 26 Ill. 36; Simpkins *v.* Rogers, 15 Ill. 397; Dunaway *v.* School Directors, 40 Ill. 247; Bentley *v.* O'Bryan, 111 Ill. 53; Randegger *v.* Ehrhardt, 51 Ill. 101; Gridley *v.* Bingham, 51 Ill. 153; Wheeler *v.* McCorristen, 24 Ill. 41; Durand *v.* Weightman, 108 Ill. 489; City of Elgin *v.* Beckwith, 119 Ill. 367, 10 N. E. 558; Shea *v.* Murphy, 164 Ill. 614, 45 N. E. 1021.

Indiana. — McSweeney *v.* McMillen, 96 Ind. 298; Burkholder *v.* Casad, 47 Ind. 418; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638; Kennedy *v.* Divine, 77 Ind. 490; Harness *v.* Harness, 49 Ind. 384; Robbins *v.* Spencer, 140 Ind. 483, 38 N. E. 522.

Iowa. — Cedar Rapids Nat. Bank *v.* Lavery, 110 Iowa 575, 81 N. W. 775.

Kentucky. — Sharp *v.* Wickliffe, 3 Litt. 10, 14 Am. Dec. 37; Beall *v.* Barclay, 10 B. Mon. 261; Ring *v.* Gray, 6 B. Mon. 368; Christopher *v.* Covington, 2 B. Mon. 357; Meriweather *v.* Herran, 8 B. Mon. 162.

Maryland. — Hum *v.* Saper, 6 Har. & J. 276; Worthington *v.* Worthington (Md.), 20 Atl. 911.

Massachusetts. — Holbrook *v.* Holbrook, 113 Mass. 74; Chase *v.* Horton, 143 Mass. 118, 9 N. E. 31; Warren *v.* Carey, 145 Mass. 78, 12 N. E. 999; Bartlett *v.* Delprat, 4 Mass. 702; Stearns *v.* Hendersass, 9 Cush. 497; Gates *v.* Mowry, 15 Gray 564.

Michigan. — Dawson *v.* Hall, 2 Mich. 390.

Minnesota. — Kurtz *v.* St. Paul & D. R. Co., 61 Minn. 18, 63 N. W. 1; Derby *v.* Gallup, 5 Minn. 119; Burt *v.* McKinstry, 4 Minn. 204.

Mississippi. — Ferriday *v.* Selser, 4 How. 506.

Missouri. — Stewart *v.* Thomas, 35 Mo. 202; Weinrich *v.* Porter, 47 Mo. 203; Davis *v.* Evans, 102 Mo. 164, 14 S. W. 875; Carin *v.* Smith, 24 Mo. 221; Current River L. Co. *v.* Cravens, 54 Mo. App. 216; Sammons *v.* O'Neill, 60 Mo. App. 530.

Nevada. — Hirschfeld *v.* Williamson, 18 Nev. 66, 1 Pac. 201.

New Hampshire. — Baker *v.* Haskell, 47 N. H. 479, 93 Am. Dec. 455.

New Jersey. — Boylan *v.* Meeker, 28 N. J. Law 274.

New York. — Vrooman *v.* King, 36 N. Y. 477; Hutchins *v.* Hutchins, 98

although the grantor is still in possession when the declaration is made;[80] unless the admissions fall within some of the exceptions,

N. Y. 56; Jones *v.* Jones, 63 Hun 630, 17 N. Y. Supp. 905; Duane *v.* Paige, 82 Hun 139, 31 N. Y. Supp. 310; Williams *v.* Williams, 142 N. Y. 156, 36 N. E. 1053.

North Carolina. — Headen *v.* Womack, 88 N. C. 469; Melvin *v.* Bullard, 82 N. C. 33; Gadsby *v.* Dyer, 91 N. C. 311.

Pennsylvania.—Packer *v.* Gonsalus, 1 Serg. & R. 526; Ferguson *v.* Staver, 33 Pa. St. 411; Posters *v.* Posters, 3 Watts & S. 127; McLaughlin *v.* McLaughlin, 91 Pa. St. 462; Baldwin *v.* Stier, 101 Pa. St. 432, 43 Atl. 326; McCullough *v.* Cumberland Val. R. Co., 186 Pa. St. 112, 40 Atl. 404.

Tennessee. — Vance *v.* Smith, 2 Heisk. 343.

Texas. — Thompson *v.* Herring, 27 Tex. 282; Hilburn *v.* Harrell (Tex. Civ. App.), 29 S. W. 92[illegible] Bevill *v.* Jones, 74 Tex. 148, 11 S. W. 1128; Smith *v.* Gillam (Tex.), 15 S. W. 794; Wilcox *v.* Simpson, 68 Tex. 306, 4 S. W. 829; Carleton *v.* Baldwin, 27 Tex. 572; Hinron *v.* Walker, 65 Tex. 103; Stephens *v.* Johnson (Tex. Civ. App.), 45 S. W. 328; Bland *v.* Chesley (Tex. Civ. App.), 35 S. W. 842; Smith *v.* James (Tex. Civ. App.), 42 S. W. 792.

Utah. — Snow *v.* Rich, 22 Utah 123, 61 Pac. 336.

Vermont. — Denton *v.* Perry, 5 Vt. 382; Shepherd *v.* Hayes, 16 Vt. 486; Brackett *v.* Wait, 6 Vt. 411.

Virginia. — Thornton *v.* Gaar, 87 Va. 315, 12 S. E. 753; Sam *v.* Brock (Va.), 23 S. E. 224.

West Virginia. — Houston *v.* McCluney, 8 W. Va. 135; Crothers *v.* Crothers, 40 W. Va. 169, 20 S. E. 927; Casto *v.* Fry, 33 W. Va. 449, 10 S. E. 799.

Wisconsin. — Matteson *v.* Hartmann, 91 Wis. 485, 65 N. W. 58.

To Show Adverse Possession. — A different rule may prevail with respect to declarations in case of a claim of adverse possession. For example: in the case of Stearns *v.* Hendersass, 9 Cush. (Mass.) 497, 57 Am. Dec. 64, the declarations of a grantor, made after his grant, were held to be competent as bearing upon the question of adverse possession under a claim of right, as it tended to establish such adverse possession, with the knowledge of the grantor, and to show his acquiescence in such an adverse claim.

Made at Time of Execution of Deed. — Declarations made at the time of the execution of a deed, which is in evidence, are held to be competent as a part of the *res gestae*, and are therefore admissible not only as admissions against those claiming under him, but in their favor. *See* "DECLARATIONS;" "RES GESTAE;" Kenney *v.* Phillipy, 91 Ind. 511; Potter *v.* McDowell, 31 Mo. 62; Branch *v.* Makeig, 9 Tex. Civ. App. 284, 28 S. W. 1050; State *v.* Andrews, 39 W. Va. 35, 19 S. E. 385.

Between Signing and Delivery. In Denton *v.* Perry, 5 Vt. 382, it was held that admissions made by a grantor between the date of the deed and its acceptance by the grantee were competent as against such grantee.

By Mortgagor After Execution of Mortgage. — The declarations of a mortgagor after the execution of the mortgage in disparagement of the validity of the instrument are not admissible against the mortgagee. Grimes Dry Goods Co. *v.* Malcolm, 58 Fed. 670; Duane *v.* Paige, 82 Hun 139, 31 N. Y. Supp. 310.

Deed of Gift. — The rule excluding declarations of the grantor, made after the sale or conveyance, applies to deeds or other transfers by way of gift. Newman *v.* Wilbourne, 1 S. C. Eq. 10; Julian *v.* Reynolds, 8 Ala. (N. S.) 680.

But see Wormouth *v.* Johnson, 58 Cal. 621, in which it is held that in case of a deed of gift the declarations of the grantor made after the conveyance were competent against the grantee.

To Establish Trust. — Such declarations made after the conveyance cannot be received to convert an absolute deed into a trust for the benefit of a stranger. Crow *v.* Watkins, 48 Ark. 169, 2 S. W. 670.

80. Williams *v.* Williams, 142 N. Y. 156, 36 N. E. 1053; Gordon *v.*

for example, *res gestae* or conspiracy between the grantor and grantee.[81]

(3.) By Testator After Execution of Will. — The rule excluding admissions made after a party has parted with his interest, has been applied to declarations of a testator made after the execution of his will.[82]

Ritenour, 87 Mo. 54; Gates *v.* Mowry, 15 Gray (Mass.) 564; Vrooman *v.* King, 36 N. Y. 477; Robinson *v.* Pitzer, 3 W. Va. 335; Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303.

Where Grantor Is Still in Possession. — "It would be strange indeed if one could make declarations in derogation of the title he had already conveyed that would be evidence against his grantee and upon the ground that the grantor had not yet surrendered actual possession of the premises to his grantee." Hart *v.* Randolph, 142 Ill. 521, 32 N. E. 517.

Exception. But see Williamson *v.* Williams, 11 Lea (Tenn.) 355, where it is held that the admissions of the grantor remaining in possession are competent where the possession is inconsistent with the deed.

To the same effect is Trotter *v.* Watson, 6 Humph. (Tenn.) 500, in which the declarations are held to be competent as part of the *res gestae*. See also Robbins *v.* Spencer, 140 Ind. 483, 38 N. E. 52; Jones *v.* King, 86 Ill. 225.

Of Grantor Remaining in Possession Competent. — In the case of Pier *v.* Duff, 63 Pa. St. 59, a different rule was declared, it being held that where the grantee permits the grantor to remain in actual possession, the grantor's declarations whilst so in possession may be given in evidence, but that the rule does not extend to a mere constructive possession.

See to the same effect Richardson *v.* Mounce, 19 S. C. 477; Mobile Sav. Bank *v.* McDonnell, 89 Ala. 434, 8 So. 137.

Where the Question Is Whether Grant Was Made or Not. — In Robbins *v.* Spencer, 140 Ind. 483, 38 N. E. 522, the issue was as to whether the deceased had executed a deed to certain property, reserving therein a life estate to herself. It was claimed in that case that as the question whether a deed was made or not was the very question involved, the declarations of the alleged grantor were competent to show as against the alleged grantee that no such deed was, in fact, made, but the court held to the contrary.

But see to the contrary, Know *v.* Raymond, 73 Ga. 749; Magee *v.* Blankenship, 95 N. C. 563; Hilliard *v.* Phillips, 81 N. C. 99; Woodley *v.* Hassell, 94 N. C. 157.

81. Noyes *v.* Morris, 56 Hun 501, 10 N. Y. Supp. 561; Adams *v.* Davidson, 10 N. Y. 309; Newlin *v.* Lyon, 49 N. Y. 661; Williams *v.* Williams, 142 N. Y. 156, 36 N. E. 1053; Potter *v.* McDowell, 31 Mo. 62; Weinrich *v.* Porter, 47 Mo. 293.

Where There Is a Conspiracy Between Grantor and Grantee. — In Daniels *v.* McGinnis, 97 Ind. 549, it is said: "As a general rule the declarations of the grantor made after he has parted with his title are not admissible in evidence to impeach the title of anyone claiming under him. There are exceptions to this rule. One of the exceptions is where the grantor and grantee conspire together to defraud third persons. In such case, the statement of either is admissible against the other."

See also to the same effect, Tedrome *v.* Esher, 56 Ind. 443.

To Show Deed a Mortgage. — But see Webb *v.* Rice, 1 Hill (N. Y.) 606, where it was held that the declarations of a grantor made subsequent to the conveyance were competent against the grantee to show that the deed was in fact a mortgage.

82. **To Prove Advancements.** The declarations of the testator are admissible to show that money received from him by his children were received as advancements but not to prove the fact that they did receive the money. Dilley *v.* Love, 61 Md. 603; Cadmus *v.* Vreeland,

(4.) Of Ancestor As Between His Heirs. — The declarations of an ancestor, affecting the title, must be against his interest, and must, where a transaction on his part affecting the title as between his heirs is involved, be made before the transaction,[83] or if afterwards so near the time as to be a part of the *res gestae*.[84]

(5.) By Tenant in Possession. — The rule making such declarations competent is not confined to owners of the fee, but extends to a tenant in possession, as well as the owner.[85]

Writings Within the Rule. — The rule making such admissions competent is not confined to oral admissions, but extends to maps, recitals in deeds, monuments and boundaries of which an owner during his ownership was author;[86] including recitals in deeds.[87]

d. *To Show Character of Possession.* — Such declarations are competent as against the party in possession and those claiming under him, to show the character of his possession, and by what title he claims.[88]

28 N. J. Eq. 356; Boylan *v.* Meeker, 28 N. J. Law 274; Schierbaum *v.* Schemme, 157 Mo. 1, 57 S. W. 526.

83. Harness *v.* Harness, 49 Ind. 384.

Where Question Is One of Gift or Advancement. — In Thistlewaite *v.* Thistlewaite, 132 Ind. 355, 31 N. E. 946, the question was between heirs in a partition of real estate, as to whether certain property received from the ancestor was by way of gift or advancement, and it was held that declarations of the ancestor that the property was made over to the respective respondents as an absolute gift, and not as an advancement, made after the transaction, were incompetent.

84. Harness *v.* Harness, 49 Ind. 384.

But see to the contrary, Woolery *v.* Woolery, 29 Ind. 249, 95 Am. Dec. 630, in which it was held that the declarations of the ancestor made after the transaction were competent. Adhered to in Hamlyn *v.* Nesbit, 37 Ind. 284.

85. Beecher *v.* Parmele, 9 Vt. 352.

By Tenant for Life. — In Roe *v.* Rollings, 7 East 279, the admission sought to be proved was contained in a letter from a confidential agent to a tenant for life, indorsed by the latter "A particular of my estate" etc., and handed down to the succeeding tenant for life, by which it was handed down amongst the muniments of the estate to the first tenant in tail, the said tenant for life having a limited power for leasing. It was held that the paper was evidence for the tenant in tail against a lessee of one of the tenants for life, to show that the rent reserved was less than the ancient rent which was reserved at the time to which such paper referred.

Not Against Claimant Under Paramount Title. — But such admissions are competent only against the tenant or one claiming under him and not against one claiming under a paramount title. Hill *v.* Roderick, 4 Watts & S. (Pa.) 221; Grant *v.* Levan, 4 Barr (Pa.) 393.

By Tenant From Year to Year Against Reversioner. — Nor are the admissions of a tenant from year to year competent as against the reversioner. Papendick *v.* Bridgewater, 5 E. & B. 166, 85 Eng. C. L. 166.

86. Dunn *v.* Eaton, 92 Tenn. 743, 23 S. W. 163.

87. Grubb *v.* Grubb, 74 Pa. St. 25; Penrose *v.* Griffith, 4 Binn. (Pa.) 231; Noble *v.* Worthy, 1 Ind. Ter. 458, 45 S. W. 137.

88. *England.* — Doe *v.* Pettett, 5 Barn. & A. 223, 7 Eng. C. L. 129.

United States. — Dodge *v.* Freedmans S. & T. Co., 93 U. S. 379.

Alabama. — Kirkland *v.* Trott, 66 Ala. 417.

California. — Phelps *v.* McGloan, 42 Cal. 298; Hayne *v.* Hermann, 97 Cal. 259, 32 Pac. 171.

Georgia. — White *v.* Moss, 92 Ga.

e. *Not Competent to Disprove Record Title.* — But parol admissions are inadmissible to prove or disprove a written record title to real estate;[89] or to vary or prove the purpose and object of a deed

244, 18 S. E. 13; O'More *v.* Wood, 53 Ga. 114.

Illinois. — Hart *v.* Randolph, 142 Ill. 521, 32 N. E. 517.

Indiana. — Creighton *v.* Hoppis, 99 Ind. 369.

Iowa. — Taylor *v.* Lusk, 9 Iowa 444.

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

Michigan. — Bower *v.* Earl, 18 Mich. 367.

Missouri. — Mississippi Co. *v.* Vowles, 101 Mo. 225, 14 S. W. 282; Martin *v.* Bonsack, 61 Mo. 556; Harper *v.* Morse, 114 Mo. 317, 21 S. W. 517; Gordon *v.* Ritenour, 87 Mo. 54; Sutton *v.* Casselleggi, 5 Mo. App. 111.

New Hampshire. — Hunt *v.* Havens, 56 N. H. 87.

New Jersey. — Outcalt *v.* Ludlow, 32 N. J. Law 239.

New York. — Pitts *v.* Wilder, 1 N. Y. 525.

North Carolina. — Roberts *v.* Roberts, 82 N. C. 29; Melvin *v.* Bullard, 82 N. C. 33.

Pennsylvania. — Feig *v.* Meyers, 102 Pa. St. 10; Bennett *v.* Biddle, 150 Pa. St. 420, 24 Atl. 738.

South Carolina. — Turpin *v.* Brannon, 3 McCord 160.

Texas. — Mooring *v.* McBride, 62 Tex. 309; Hays *v.* Hays, 66 Tex. 606, 1 S. W. 895.

Vermont. — Hale *v.* Rich, 48 Vt. 217; Carpenter *v.* Hollister, 13 Vt. 552.

Tenants in Possession. — This rule that declarations explaining the character of possession are admissible is particularly applicable to one holding as a tenant. Peabody *v.* Hewett, 52 Me. 33.

Affecting Claim of Adverse Possession. — So where the question is, whether a holding is adverse or not, declarations of the party in possession tending to show the nature of the possession and claim are admissible. Doe *v.* Pettett, 5 Barn. & A. 223, 7 Eng. C. L. 129; Outcalt *v.* Ludlow, 32 N. J. Law 239.

To Explain Nature of Possession. Speaking of the admissibility of declarations for this purpose, it was said by the supreme court of Michigan, in Bower *v.* Earl, 18 Mich. 367: "They, certainly, could not be any proof of title. But they were introduced for no such purpose. They were properly received to explain the nature of Mundy's possession, and were receivable on the same principle which allows statements as part of *res gestae*. They create no right, but simply explain a fact, which is not in itself conclusive of anything, and which derives its legal character from its intent and circumstances. Voorhees' claim while in possession was in disparagement of his own title to the strip in suit; but we agree with Mr. Greenleaf, that such statements and claims to explain possession are admissible for what they are worth, whether in disparagement of title or not."

See also, Martin *v.* Bonsack, 61 Mo. 556; Mississippi Co. *v.* Vowles, 101 Mo. 225, 14 S. W. 282.

Reason for Excluding Such Declarations. — "The fallacy of the idea allowing the testimony to be received, consists in looking upon the former owner as a witness in the cause. The first declarations were made by him while standing in a condition the same as if a party to the present suit. His admissions against his own title were of the same quality of evidence as if spoken by the plaintiff himself. If a man's conversation in his favor be admitted against what he has said against his interest, then he would certainly be allowed to corroborate one statement by consistent statements made at other times, and no limit could be fixed in respect to such evidence. Opening the door so widely would lead to mischievous results." Royal *v.* Chandler, 79 Me. 265, 9 Atl. 615.

89. *United States.* — Bowen *v.* Chase, 98 U. S. 254; Dodge *v.* Freedmans S. & T. Co., 93 U. S. 379.

Alabama.—Walker *v.* Blassingame, 17 Ala. (N. S.) 810.

California. — Ord *v.* Ord, 99 Cal. 523, 34 Pac. 83; Spanagel *v.* Dellinger, 38 Cal. 278; Bury *v.* Young,

98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186.

Georgia. — White *v.* Moss, 92 Ga. 244, 18 S. E. 13.

Illinois. — Bentley *v.* O'Bryan, 111 Ill. 53; Francis *v.* Wilkinson, 147 Ill. 370, 35 N. E. 150; Hart *v.* Randolph, 142 Ill. 521, 32 N. E. 517.

Maine. — Richardson *v.* Field, 6 Green. 303.

Maryland. — Dorsey *v.* Dorsey, 3 Har. & J. 410, 6 Am. Dec. 506.

Massachusetts. — Clark *v.* Waite, 12 Mass. 438; Hodges *v.* Hodges, 2 Cush. 455; Paine *v.* McIntier, 1 Mass. 69.

Missouri. — Johnson *v.* Quarlles, 46 Mo. 423; Sutton *v.* Casselleggi, 5 Mo. App. 111.

New Hampshire. — Perkins *v.* Fowle, 59 N. H. 583.

New York.—Jackson *v.* Shearman, 6 Johns. 19; Jackson *v.* Vosburgh, 7 Johns. 186; Jackson *v.* Miller, 6 Cow. 751; Gibney *v.* Marchay, 34 N. Y. 301; Jackson *v.* McVey, 15 Johns. 234; Keator *v.* Dimmick, 46 Barb. 158; Sanford *v.* Sanford, 61 Barb. 293; Tabor *v.* Van Tassel, 86 N. Y. 642.

Pennsylvania. — Payne *v.* Craft, 7 Watts & S. 458.

Texas. — Mooring *v.* McBride, 62 Tex. 309.

Vermont. — Carpenter *v.* Hollister, 13 Vt. 552.

Not Competent to Destroy Title. "The declarations of a party in possession are admissible in evidence against the party making them, or his privies in blood or estate, not to attack or destroy the title, for that is of record and of a higher and stronger nature than to be attacked by parol evidence. They are competent simply to explain the character of the possession in a given case." Gibney *v.* Marchay, 34 N. Y. 301.

Competent Only When Parol Evidence Would Be Competent. — The true test is that an admission of a fact is competent only when parol evidence would be competent to prove the same fact. Keator *v.* Dimmick, 46 Barb. (N. Y.) 158.

For What Purpose Competent. In Dodge *v.* Freedman's S. & T. Co., 93 U. S. 379, the court said: "The declarations of a party in possession of land are competent evidence: 1st, As against those claiming the land under him. Warring *v.* Warren, 1 Johns. 340; Jackson *v.* Cale, 10 *Id.* 377. The Freedman's Bank claim nothing under Huntington. They insist that they are the legal holders of the notes, and as such are entitled to avail themselves of the security given for their payment. 2d, Such declarations are competent only to show the character of the possession of the person making them, and by what title he holds, but not to sustain or to destroy the record title. Pitts *v.* Wilder, 1 N. Y. 525; Gibney *v.* Marchay, 34 *Id.* 301; Jackson *v.* Miller, 6 Cowen 751; Jackson *v.* McVey, 15 J. R. 234. To show that the party went into possession under the lessors is a common instance of the admissibility of such declarations. Jackson *v.* Dobbin, 3 Johns. 223."

Not to Disparage His Own Deed. The declarations of a grantor made subsequently will not be heard to disparage or defeat his own deed. Bury *v.* Young., 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; Ord *v.* Ord, 99 Cal. 523, 34 Pac. 83; Clark *v.* Waite, 12 Mass. 438; Guild *v.* Hull, 127 Ill. 523, 20 N. E. 665.

To Show Title Never Vested. While the declarations and admissions of a party are not competent to divest a legal title to real estate, they may be competent to show that the title never vested for the reason that the instrument relied upon was void or was never delivered, or was delivered merely as an escrow, or was obtained by fraud or duress or the like. Jackson *v.* Titus, 11 Wen. (N. Y.) 533.

Not to Prove Title. — In Mooring *v.* McBride, 62 Tex. 309, the court says: "We know of no case in which such declarations were admitted for the purpose of showing title in the declarant."

By Tenant Cannot Affect Title of Landlord. — So it is held that declarations of a tenant in possession cannot be heard to affect his landlord's title. Mooring *v.* McBride, 62 Tex. 309.

But Will Be Received to Sustain It. — Ord *v.* Ord, 99 Cal. 523, 34 Pac. 83; Dean *v.* Parker, 88 Cal. 283, 26 Pac. 91.

of conveyance.[90] The fact that the grantor is dead, at the time of the trial, does not alter the case.[91]

f. *To Establish Fraud in Conveyance.* — There are cases holding that the declarations of the grantor are inadmissible to show, as against the grantee, that the transfer was fraudulent.[92]

To Defeat Title by Prescription. In White *v.* Moss, 92 Ga. 244, 18 S. E. 13, it was held that admissions made by a person while owner of five-sixths of a tract of land, that the remaining one-sixth belonged to another, are not binding upon *bona fide* purchasers for value to whom he subsequently sold and conveyed the entire tract, and who had no knowledge or notice of the fact that such admissions had been made by their grantor, they standing now upon his conveyance as color of title, supported by their own personal possession for more than seven years, but it was further held that had the defendants relied either wholly or partially upon the possession of such grantor, and not exclusively upon their own possession to raise a prescriptive title, his admissions, made pending his possession, would be evidence against them, whether they had notice of the same or not.

90. Roberts *v.* Roberts, 82 N. C. 29; Claremont *v.* Carlton, 2 N. H. 369, 9 Am. Dec. 88; Hodge *v.* Thompson, 9 Ala. (N. S.) 131; Sanford *v.* Sanford, 61 Barb. 293.

To Prove Purpose and Consideration. — But in Parkhunt *v.* Higgins, 38 Hun 113, it is held that the actual purpose and consideration of a mortgage may be proved by the admissions of the mortgagee.

91. Clark *v.* Waite, 12 Mass. 438.

92. *Alabama.* — Murphy *v.* Butler, 75 Ala. 381.

California. — Spanagel *v.* Dellinger, 38 Cal. 278.

Connecticut. — Pettibone *v.* Phelps, 13 Conn. 445, 35 Am. Dec. 88, 92 note; Partelo *v.* Harris, 26 Conn. 480; Beach *v.* Colbin, 4 Day 284, 4 Am. Dec. 221; Tibballs *v.* Jacobs, 31 Conn. 428.

Georgia. — Bush *v.* Rogan, 65 Ga. 320.

Indiana. — Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Kentucky. — Boli *v.* Irwin, 21 Ky. Law 366, 51 S. W. 444.

Louisiana. — Guidry *v.* Grivot, 2 Mart. (N. S.) 13, 14 Am. Dec. 193.

Massachusetts. — Stockwell *v.* Blamey, 129 Mass. 312.

Nevada. — Hirschfeld *v.* Williamson, 18 Nev. 66, 1 Pac. 201.

New York. — Williams *v.* Williams, 142 N. Y. 156, 36 N. E. 1053; Bush *v.* Roberts, 111 N. Y. 278, 18 N. E. 732.

Pennsylvania. — Reichert *v.* Castator, 5 Binn. 109, 6 Am. Dec. 402.

Declarations of Grantor Inadmissible. — In Beach *v.* Colbin, 4 Day (Conn.) 284, 4 Am. Dec. 221, the doctrine against the admissibility of such admissions is thus strongly stated:

"It was formerly the practice to admit what was said by a fraudulent grantor respecting his intent to defraud his creditors prior to the conveyance, as evidence in an action against the supposed fraudulent grantee, though he had no knowledge of it, but this practice can not be warranted on principle, for the grantee ought not to be affected by the declarations of a grantor unless they come to his knowledge, and though a grantor may have a fraudulent intent, this may be wholly unknown to the grantee, and the transaction may be *bona fide* on his part."

And this statement of the rule was quoted with approval in the later case of Partelo *v.* Harris, 26 Conn. 480.

By One Acting As a Medium of Transfer Only. — The case of Stockwell *v.* Blamey, 129 Mass. 312, is peculiar. There the conveyance was made by a party to whom a conveyance was made by a husband and wife, to be by him immediately conveyed to the wife, which was done. His declarations were offered to show a fraudulent intent on the part of Blamey and his wife, and they were

But others hold that such admissions are competent to prove the one necessary fact of fraudulent intent on the part of the grantor, but not to show fraud or knowledge of the fraud on the part of the grantee.[93] In most of the cases, however, the admission of such evidence is limited to declarations made before the transfer and while the grantor was in possession of the property.[94] But this has

held to be incompetent for that purpose.

93. *California.* — Ross *v.* Wellman, 102 Cal. 1, 36 Pac. 402.

Connecticut. — Sisson *v.* Roath, 30 Conn. 15; Tibbals *v.* Jacobs, 31 Conn. 428.

Indiana. — Hall *v.* Bishop, 78 Ind. 370.

Iowa. — Thomas *v.* McDonald, 102 Iowa 564, 71 N. W. 572.

Kansas. — Sherman Co. Bank *v.* McDonald, 57 Kan. 358, 46 Pac. 703.

Maine. — Fisher *v.* True, 38 Me. 535; Howe *v.* Reed, 12 Me. 515; White *v.* Chadbourne, 41 Me. 149.

Massachusetts. — Foster *v.* Hall, 12 Pick. 89; Bridge *v.* Eggleston, 14 Mass. 244.

Missouri. — Sammons *v.* O'Neill, 60 Mo. App. 530.

Nebraska. — Armagost *v.* Rising, 54 Neb. 763, 75 N. W. 534.

Nevada. — Gregory *v.* Frothingham, 1 Nev. 253.

New York. — Crary *v.* Sprague, 12 Wend. 41.

North Carolina. — Harshaw *v.* Moore, 12 Ired. 247; Burbank *v.* Wiley, 79 N. C. 501.

Pennsylvania. — McElfatrick *v.* Hicks, 21 Pa. St. 402.

Louisiana. — Martin *v.* Reeves, 3 Mart. (N. S.) 22, 15 Am. Dec. 154.

To Show Fraudulent Intent of Grantor or Vendor. — It will be seen that the cases cited holding the declarations of the grantor to be competent are to the effect that they are competent to prove his fraudulent intent but not to establish fraud or knowledge on the part of the grantee.

See "INTENT." Foster *v.* Hall, 12 Pick. 89.

This is equivalent to holding that the declarations of the grantor are admissible against him, but not against his grantee. Tibbals *v.* Jacobs, 31 Conn. 428.

Must Be Confined to Fraud of Vendor. — In Sammons *v.* O'Neill, 60 Mo. App. 530, it is held that the admissions of the vendor made after the transfer must be confined strictly to proof of the fraud of the vendor.

In Wooley *v.* Honell, 94 N. C. 157, the admissions of the grantor are held to be admissible where the grantor remains in possession.

94. *United States.* — Winchester & C. Mfg. Co. *v.* Cleary, 116 U. S. 161.

California. — Ross *v.* Wellman, 102 Cal. 1, 36 Pac. 402; Briswaller *v.* Palomares, 66 Cal. 259, 5 Pac. 226; Spanagel *v.* Dellinger, 38 Cal. 278.

Indiana. — Kennedy *v.* Divine, 77 Ind. 490; Tedrome *v.* Esher, 56 Ind. 443; Daniels *v.* McGinnis, 97 Ind. 549.

Iowa. — Thomas *v.* McDonald, 102 Iowa 564, 71 N. W. 572; Cedar Rapids Nat. Bank *v.* Lavery, 110 Iowa 757, 81 N. W. 775.

Kansas. — Crust *v.* Evans, 37 Kan. 263, 15 Pac. 214; Sherman Co. Bank *v.* McDonald, 57 Kan. 358, 46 Pac. 703.

Kentucky.—Christopher *v.* Covington, 2 B. Mon. 357.

Maryland. — Glenn *v.* Glover, 3 Md. 212.

Massachusetts. — Taylor *v.* Robinson, 2 Allen 562; Holbrook *v.* Holbrook, 113 Mass. 74; Aldrich *v.* Earle, 13 Gray 578; Bridge *v.* Eggleston, 14 Mass. 245; Foster *v.* Hall, 12 Pick. 89; Winchester *v.* Charter, 97 Mass. 140.

Michigan. — Dawson *v.* Hall, 2 Mich. 390.

Minnesota. — Burt *v.* McKinstry, 4 Minn. 146.

Missouri. — Sutter *v.* Lackman, 39 Mo. 91.

New Jersey. — Boylan *v.* Meeker, 28 N. J. Law 274.

New York. — Strauss *v.* Murray, 31 Misc. 69, 63 N. Y. Supp. 201.

North Carolina. — Harshaw *v.* Moore, 12 Ired. 247; Ward *v.* Saunders, 6 Ired. 382; Burbank *v.*

been limited to declarations constituting a part of the *res gestae*, and not subsequent statements of the nature of the transaction.[95]

Where Grantor Is a Party. — If the grantor is himself a party to the suit, there is no reason why his admissions are not competent as against him.[96]

g. *Must Be Made When in Possession.* — The declarations are not admissible against others, although the party was a former owner, unless made at the time he held possession and affecting his then present interest. If made either before or after they are incompetent as against others.[97]

Wiley, 79 N. C. 501; Williams *v.* Clayton, 7 Ired. 442.

Pennsylvania. — Souder *v.* Suhechterly, 91 Pa. St. 83.

West Virginia. — Casto *v.* Fry, 33 W. Va. 449, 10 S. E. 799.

Subsequent Statement of a Party's Motives. — In Dawson *v.* Hall, 2 Mich. 390, the general rule is thus stated: "Subsequent statements of party's motives or intentions will not be received to affect the rights of others, or to explain a transaction. It is only the intention declared at the time of such transaction, which is a part of the *res gestae*, and can bind the defendants. An exception to this rule exists only when the statements are made to a party to be affected by them under circumstances from which his acquiescence in their truth can be fairly inferred, if not expressed."

And in some cases declarations made after the conveyance are held admissible where the grantor remains in possession. Richardson *v.* Mounce, 19 S. C. 477; Pier *v.* Duff, 63 Pa. St. 59.

Distinction As to Effect of Admissions Made by a Grantor of Real Estate and of a Vendor of Personal Property. — But a distinction between the admissions of a grantor of real estate and a vendor of personal property is made in the case of Roberts *v.* Medbery, 132 Mass. 100, in which the court says: "How far the declarations of a former owner and seller of a chattel are in this commonwealth competent to impeach his sale to the purchaser as fraudulent, is a question which is subject to more apparent than real difficulty. His declarations in disparagement of his grant of real estate are never admissible.

"Where, however, a party has made conveyance of a personal chattel, his relation to the subject is different. The title to a chattel may pass without any written grant. Mere delivery, for that purpose, passes the title, and the possession of the chattel is in itself, if uncontrolled and unqualified by any evidence, sufficient to prove title in him who has the possession. If the seller retains possession, his acts and declarations accompanying that possession and giving character to it, are often competent.'

In Case of Conspiracy to Defraud. It is held that in case of conspiracy on the part of grantor and grantee to defraud creditors, the admissions of either are admissible against the other and that admissions made by the grantor before the parties became actors in the conspiracy are competent. Daniels *v.* McGinnis, 97 Ind. 549; Hartman, *v.* Diller, 62 Pa. St. 37; Souder *v.* Suhechterly, 91 Pa. St. 83; Kennedy *v.* Divine, 77 Ind. 490; Tedrome *v.* Esher, 50 Ind. 443.

95. To Show Grantor's Condition of Mind. — The declarations of a grantor near the time of the transaction in question may be received to show his mental condition when his capacity to contract is in issue. But they are not admissible to establish the facts stated. Sanford *v.* Ellithorp, 95 N. Y. 48; Waterman *v.* Whitney, 11 N. Y. 157; Boylan *v.* Meeker, 28 N. J. Law 274; Roach *v.* Zehring, 59 Pa. St. 74.

96. Tibbals *v.* Jacobs, 31 Conn. 428; Hall *v.* Bishop, 78 Ind. 370; Talliaferro *v.* Evans (Mo.,) 61 S. W. 185.

97. *England.* — Doe *v.* Pettett, 5 Barn. & A. 223, 7 Eng. C. L. 129.

(1.) Otherwise As Against Heirs or Devisees. — They are competent as against his heirs claiming by descent or devisees whenever they would have been competent against him, if living, whether in possession of the property in controversy at the time or not, if at the time against his interest.[98]

Alabama.—Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13.

California. — Tompkins *v.* Crane, 50 Cal. 478.

Georgia. — Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254; Settle *v.* Alison, 8 Ga. 201; Harrell *v.* Culpepper, 47 Ga. 635.

Indiana. — McSweeney *v.* McMillen, 96 Ind. 298.

Iowa. — Benson *v.* Lundy, 52 Iowa 265, 3 N. W. 149.

Maryland. — Hurn *v.* Soper, 6 Har. & J. 276.

Massachusetts. — Noyes *v.* Morrill, 108 Mass. 396; Bartlett *v.* Emerson, 7 Gray 174; Lyman *v.* Gipson, 18 Pick. 422; Dodge *v.* Nichols, 5 Allen 548.

Missouri. — Davis *v.* Evans 102 Mo. 164, 14 S. W. 875; Current River L. Co. *v.* Cravens, 54 Mo. 216.

New Hampshire. — Baker *v.* Haskell, 47 N. H. 479.

New York. — Hutchins *v.* Hutchins, 98 N. Y. 56.

North Carolina. — Headen *v.* Womack, 88 N. C. 468; Melvin *v.* Bullard, 82 N. C. 33; Williams *v.* Clayton, 7 Ired. 442.

Texas. — Ellis *v.* Stone, 4 Tex. Civ. App. 157, 23 S. W. 405; O'Brien *v.* Hilburn, 22 Tex. 616; Stephens *v.* Johnson (Tex. Civ. App.), 45 S. W. 328.

Virginia. — Smith *v.* Betty, 11 Gratt. 752.

Mere Possession Not Sufficient. In Noyes *v.* Morrill, 108 Mass. 396, it was held that it is not sufficient to warrant the receipt of such declarations to show that the party was the occupant of the land.

98. *California.* — McFadden *v.* Wallace, 38 Cal. 51; Tompkins *v.* Crane, 50 Cal. 478.

Indiana. — Wallis *v.* Luhring, 134 Ind. 447, 34 N. E. 231.

Iowa. — Davis *v.* Melson, 66 Iowa 715, 24 N. W. 526.

Massachusetts.—Hodges *v.* Hodges, 2 Cush. 455.

New Jersey. — Outcalt *v.* Ludlow, 32 N. J. Law 239.

New York. — Spaulding *v.* Hallenbeck, 35 N. Y. 204; Belts *v.* Jackson, 6 Wend. 173.

Pennsylvania.—Hunt's Appeal, 100 Pa. St. 590.

By Ancestor Against Heir. — The case of Hodges *v.* Hodges, 2 Cush. (Mass.) 455, was one for the partition of real estate, and involving the question as to whether a deed delivered to a part only of the grantees therein was surrendered by such grantees without the consent of other grantees named therein, and declarations of the grantor, then deceased, were offered, as against his heirs, to show that he had made such a deed. The court said: "It is true that the declarations of a grantor impeaching his grant are not admissible; and it may be true, that his declarations in support of his grant are only admissible against himself and his heirs and devisees; and then only after proof of the loss or destruction of the deed. But in the present case, it was proved that the deed had been given up to the grantor, and his declarations against his interest were therefore clearly admissible, after his death, in an action against his heirs or devisees. Such declarations might have been proved in an action against him; and upon principle, and the authorities cited by counsel, the same evidence was rightly admitted in the present suit against his devisees."

In an Action of Dower. — In an action of dower, by the widow, the husband's declarations tending to show that he obtained an agreement barring the wife of her right to dower are admissible. Wentwort *v.* Wentworth, 71 Me. 72.

By Legatee Against His Heir. — It is held that the declarations of a deceased legatee as to the capacity of the testator to make a will and tending to show undue influence,

h. *Must Be Against Interest.* — To warrant the admissions of a previous owner, he must have had an interest in the controversy or in the property, title to which is involved, and the declaration must be against such interest.[99] Therefore, declarations as to the source or manner of acquiring title or other narrations of past transactions are incompetent.[1]

i. *Of Fiduciary in Possession.* — To render his admissions competent the party must be in possession claiming title in his own right. He cannot, while in possession in a fiduciary capacity, as guardian, for example, make admissions affecting the title of the beneficiary.[2]

j. *In One's Own Interest, When Admissible.* — If declarations in one's own interest are a part of the same conversation in which the declarations against interest proved were made and tend to qualify

being against interest, are admissible against his heir made a party in his stead and representing his interest. Wallis *v.* Luhring, 134 Ind. 447, 34 N. E. 231.

99. *Alabama.* — Mahone *v.* Williams, 39 Ala. 202.

Arkansas. — Leach *v.* Fowler, 22 Ark. 143.

Illinois. — Cochran *v.* McDowell, 15 Ill. 10.

Indiana. — Thistlewaite *v.* Thistlewaite, 132 Ind. 355, 31 N. E. 946.

Maine. — Ware *v.* Ware, 8 Greenl. 42.

Massachusetts. — Blake *v.* Everett, 1 Allen 248; Tyler *v.* Mather, 9 Gray 177.

Minnesota. — Beard *v.* First Nat. Bank, 41 Minn. 153, 43 N. W. 8.

New York. — Clason *v.* Baldwin, 56 Hun 326, 9 N. Y. Supp. 609.

North Carolina. — Enloe *v.* Sherill, 6 Ired. 212.

Texas. — Hays *v.* Hays, 66 Tex. 606, 1 S. W. 895.

1. *See* DECLARATIONS;" Ray *v.* Jackson (La.), 7 So. 747; McBride *v.* Thompson, 8 Ala. (N. S.) 650; Bancum *v.* George, 65 Ala. 259; Creighton *v.* Hoppis, 99 Ind. 369; Abney *v.* Kingsland, 10 Ala. (N. S.) 355, 44 Am. Dec. 491.

When Part of Res Gestae. — But the exception to the general rule, viz.: that declarations made by a party explanatory of an act done in dealing with the property are competent, as a part of the *res gestae*, should not be overlooked. They are not competent as admissions, necessarily, and belong to the subject of declarations. Creighton *v.* Hoppis, 99 Ind. 369; Gamble *v.* Johnston, 9 Mo. 605.

2. By Guardian in Possession. In Westenfelder *v.* Green, 24 Or. 448, 34 Pac. 23, it is said: "The general rule is well settled that the declarations of one in possession of real property, characterizing his possession, are admissible in evidence against him, and those claiming under him, where title is asserted by adverse possession. 1 Rice, Ev. § 423. But this action is not against Sedlack, or any one claiming under him. He was not in possession of the property claiming any right in himself, but in a representative capacity, and under his appointment as guardian, and therefore his possession was, in legal contemplation, the possession of his wards. A tenant in possession cannot by his admissions injure the title of his landlord, (Hurley *v.* Lockett, 72 Tex. 261, 12 S. W. 212;) nor can a guardian the title of his wards. Having accepted the trust, and entered into possession of the property to carry out its provisions, he could not dispute the title of his wards, or assert that he is holding the property in any other capacity so long as that relationship existed, nor could he change the character of his holding by any admissions or declarations he might make."

or explain them, they are competent;[3] but not if they are a part of a subsequent conversation, although explanatory of admissions made in the first.[4]

k. *While in Possession of Personal Property.* — (1.) **Generally.** The declarations of a party while in possession of and dealing with personal property, in disparagement of title, are competent as admissions against him and those claiming under him,[5] and in explanation of the possession, but not necessarily as admissions.[6] If, however,

3. Ellen *v.* Ellen, 18 S. C. 489; Postens *v.* Postens, 3 Watts & S. (Pa.) 127; Wilson *v.* Woodruff, 5 Mo. 40, 31 Am. Dec. 194.

4. Wilson *v.* Woodruff, 5 Mo. 40, 31 Am. Dec. 194; Lewis *v.* Adams, 61 Ga. 559.

Subsequent Conversation Inadmissible. — In Perry *v.* Graves, 12 Ala. (N. S.) 246, it is said: "It may be the declarations made subsequently were offered with a view to explain and do away the force of those previously made; but even in this view they were entirely inadmissible, as they were not parts of the same conversation, and as he would be directly interested to sustain the right of the plaintiff: and also on the ground that these declarations were mere hearsay."

Where Ancestor Is Dead. — The fact that the prior owner is dead does not render such declarations admissible. Smith *v.* Powers, 15 N. H. 546.

5. *England.* — Grocers, etc. *v.* Donne, 3 Bing. 34, 32 Eng. C. L. 25.

Alabama. — Lide *v.* Lide, 32 Ala. 449; Moses *v.* Dunham, 71 Ala. 173; Arthur *v.* Gayle, 38 Ala. 259; McBride *v.* Thompson, 8 Ala. (N. S.) 650; Mobley *v.* Barnes, 26 Ala. (N. S.) 718; Jennings *v.* Blockers, 25 Ala. (N. S.) 415.

California.—Gallagher *v.* Williams, 23 Cal. 331, 83 Am. Dec. 114.

Connecticut. — Avery *v.* Clemons, 18 Conn. 306, 46 Am. Dec. 323.

Georgia. — Horn *v.* Ross, 20 Ga. 210, 65 Am. Dec. 621; Jones *v.* Morgan, 13 Ga. 515.

Illinois. — Waggoner *v.* Cooley, 17 Ill. 239; First Nat. Bank *v.* Strang, 138 Ill. 347, 27 N. E. 903; Vennum *v.* Thompson, 38 Ill. 143; Randegger *v.* Ehrhardt, 51 Ill. 101.

Indiana. — Kuhns *v.* Gates, 92 Ind. 66; Bunberry *v.* Brett, 18 Ind. 343; Durham *v.* Shannon, 116 Ind. 403, 19 N. E. 190; Tyres *v.* Kennedy, 126 Ind. 523, 26 N. E. 394; McConnell *v.* Hannah, 96 Ind. 102; Garr, Scott & Co. *v.* Shaffer, 139 Ind. 119, 38 N. E. 811.

Iowa. — Taylor *v.* Lusk, 9 Iowa 444.

Kentucky.—Carrel *v.* Early, 4 Bibb 270.

Maine. — McLanathan *v.* Patten, 39 Me. 142; Beedy *v.* Macomber, 47 Me. 451; White *v.* Chadbourne, 41 Me. 149.

Missouri. — Carin *v.* Smith, 24 Mo. 221; Burgess *v.* Quimby, 21 Mo. 508; Criddle *v.* Criddle, 21 Mo. 522.

New Hampshire. — Putnam *v.* Osgood, 52 N. H. 148.

North Carolina. — Johnson *v.* Patterson, 2 Hawks. 183, 11 Am. Dec. 756; Kirbey *v.* Masten, 70 N. C. 540.

Pennsylvania. — *In re* Gracie's Estate, 158 Pa. St. 521, 27 Atl. 1083.

Tennessee.— Peoples *v.* Devault, 11 Heisk. 431.

Texas. — Fellman *v.* Smith, 20 Tex. 99.

Vermont. — Alger *v.* Andrews, 47 Vt. 238; Hayward Rubber Co. *v.* Duncklee, 30 Vt. 29; Downs *v.* Belden, 46 Vt. 674.

By Mortgagor of Chattels. — Thus, it is held that the admissions of a mortgagor of personal property are admissible against the mortgagee in an action for possession founded on the mortgage. Tyres *v.* Kennedy, 126 Ind. 523, 26 N. E. 394.

6. *See* "DECLARATIONS;" "RES GESTÆ."

Alabama. — Webster *v.* Smith, 10 Ala. (N. S.) 429; Mobley *v.* Barnes, 26 Ala. 718; Mobley *v.* Bilberry, 17 Ala. (N. S.) 428.

Colorado. — Stone *v.* O'Brien, 7 Colo. 458, 4 Pac. 792.

they are in the nature of admissions against his title, they are admissible, not only as against the party making them, but against one claiming under him.[7] They may be, as in other cases, by acquiescence in what is said by another.[8] The fact that the party is not a competent witness does not affect the question of the admissibility of his admissions.[9] They must, however, be made while the party is in possession of the property, or be accompanied by some corresponding act relating to the property.[10]

Must Be in Disparagement of Title. — And they must, even where the party is in possession at the time, be either in disparagement of his title or explanatory of his possession to be admissible.[11]

In some cases such declarations, made in favor of the party in possession and not against his interest, are held to be wholly inadmissible as hearsay.[12] And the rule allowing them seems to be without the shadow of reason.[13]

(2.) As Against the Vendee. — If offered against the vendee they must have been made before the sale,[14] unless they fall within some

Connecticut. — Avery *v.* Clemons, 18 Conn. 306, 46 Am. Dec. 323.

Indiana. — Garr, Scott & Co. *v.* Shaffer, 139 Ind. 191, 38 N. E. 811.

Iowa. — Murray *v.* Cone, 26 Iowa 276; Taylor *v.* Lusk, 9 Iowa 444; Sweet *v.* Wright, 57 Iowa 510, 10 N. W. 870; Stephens *v.* Williams, 46 Iowa 540; Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200; Blake *v.* Graves, 18 Iowa 312.

New York. — McIntyre *v.* Costello, 53 Hun 636, 6 N. Y. Supp. 397.

Texas. — O'Brien *v.* Hilburn, 22 Tex. 616.

Vermont. — Hale *v.* Rich, 48 Vt. 217.

Wisconsin. — Roebke *v.* Andrews, 26 Wis. 311.

7. *Connecticut.* — Avery *v.* Clemons, 18 Conn. 306, 46 Am. Dec. 323.

Illinois. — Randegger *v.* Ehrhardt, 51 Ill. 101.

Indiana. — King *v.* Wilkins, 11 Ind. 347; Bunberry *v.* Brett, 18 Ind. 343.

Louisiana. — Leefe *v.* Walker, 18 La. (O. S.) 362.

Maine. — McLanathan *v.* Patten, 39 Me. 142; White *v.* Chadbourne, 41 Me. 149; Parker *v.* Marston, 34 Me. 386.

Missouri. — Darrett *v.* Donnelly, 38 Mo. 492.

New Hampshire. — Putnam *v.* Osgood, 52 N. H. 148.

Tennessee. — Holmark *v.* Molin, 5 Cold. 482; Guy *v.* Hall, 3 Humph. 150.

Vermont. — Hayward Rubber Co. *v.* Duncklee, 30 Vt. 29; Downs *v.* Belden, 46 Vt. 674.

Virginia. — Walthal *v.* Johnson, 2 Call 275.

Only Against Him and His Immediate Representatives. — Simpson *v.* McKay, 3 Hun (N. Y.) 316.

8. Carrel *v.* Early, 4 Bibb (Ky.) 270.

9. Hatch *v.* Denis, 10 Me. 244; Webster *v.* Smith, 10 Ala. (N. S.) 429.

10. O'Brien *v.* Hilburn, 22 Tex. 616; McIntyre *v.* Costello, 53 Hun 636, 6 N. Y. Supp. 397; Alexander *v.* Jennings, 10 Lea (Tenn.) 419; Bunker *v.* Green, 48 Ill. 243; Sumner *v.* Cook, 12 Kan. 162; Benson *v.* Lundy, 52 Iowa 265, 3 N. W. 149; Mobley *v.* Barnes, 26 Ala. (N. S.) 718; Vaughan *v.* Winckler, 4 Munf. (Va.) 136.

11. Mobley *v.* Barnes, 26 Ala. (N. S.) 718; Abney *v.* Kingsland, 10 Ala. (N. S.) 355, 44 Am. Dec. 491.

12. King *v.* Frost, 28 Minn. 417, 10 N. W. 423; Olson *v.* Swensen, 53 Minn. 516, 55 N. W. 596; McGough *v.* Wellington, 4 Allen (Mass.) 502.

13. Sweet *v.* Wright, 57 Iowa 510, 10 N. W. 870.

14. *United States.* — U. S. *v.* 1,01 of Jewelry, 13 Blatchf. 60, 26 Fed. Cas. No. 15,026; Winchester etc. Co. *v.* Cleary, 116 U. S. 161.

Alabama. — Taylor *v.* Bank of Huntsville, 14 Ala. 633.

of the exceptions to the rule; for example, where they are part of the *res gestae,* or there is a conspiracy to defraud on the part of

Arkansas. — Smith *v.* Hamlet, 43 Ark. 320; Clinton *v.* Estes, 20 Ark. 216; Rector *v.* Danley, 14 Ark. 304.

California. — Cohn *v.* Mulford, 15 Cal. 50; Hutchings *v.* Castle, 48 Cal 152; Visher *v.* Webster, 13 Cal. 58; Paige *v.* O'Neal, 12 Cal. 483; Banning *v.* Marleau, 121 Cal. 240, 53 Pac. 692.

Georgia. — James *v.* Kirbey, 29 Ga. 684.

Illinois. — Randegger *v.* Ehrhardt, 51 Ill. 101; Myers *v.* Kinzie, 26 Ill 36; Edwards *v.* Hamilton, 19 Ill App. 340; Bunker *v.* Green, 48 Ill. 243; Hessing *v.* McCloskey, 37 Ill. 341; Milling *v.* Hillenbrand, 156 Ill. 310, 40 N. E. 941; Miner *v.* Phillips, 42 Ill. 123.

Indiana. — King *v.* Wilkins, 11 Ind. 347; Campbell *v.* Coon, 51 Ind. 76; Keith *v.* Kerr, 17 Ind. 284; Garner *v.* Graves, 54 Ind. 188.

Iowa. — Gray *v.* Earl, 13 Iowa 188; McCormicks *v.* Fuller, 56 Iowa 43, 8 N. W. 800; Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906.

Kansas.—Sumner *v.* Cook, 12 Kan. 162.

Kentucky. — Brashear *v.* Burton, 3 Bibb 9, 6 Am. Dec. 634; Gatlif *v.* Rose, 8 B. Mon. 629.

Maine. — White *v.* Chadbourne, 41 Me. 149.

Maryland. — Garther *v.* Martin, 3 Md. 146; Cooke *v.* Cooke, 29 Md. 538; Hall *v.* Hinks, 21 Md. 406.

Massachusetts. — Parry *v.* Libbey, 166 Mass. 112, 44 N. E. 124.

Michigan. — Lewis *v.* Rice, 61 Mich. 97, 27 N. W. 867; Muncey *v.* Sun Ins. Office, 109 Mich. 542, 67 N. W. 562.

Minnesota. — Holland *v.* Fuller, 8 Minn. 50; Zimmerman *v.* Lamb, 7 Minn. 421; Beard *v.* First Nat. Bank, 41 Minn. 153, 43 N. E. 8; Derby *v.* Gallup, 5 Minn. 119.

Missouri. —Carin *v.* Smith, 24 Mo. 221; Milliken *v.* Greer, 5 Mo. 489; Farrar *v.* Snyder, 31 Mo. App. 93.

Nebraska. — Farmer's L. & T. Co. *v.* Montgomery, 30 Neb. 33, 46 N. W. 214; Williams *v.* Eikenberry, 25 Neb. 721, 41 N. W. 770; Zobel *v.* Bauersachs, 55 Neb. 20, 75 N. W. 43.

New York. — Taylor *v.* Marshall, 14 Johns. 204; Jacobs *v.* Remsen, 36 N. Y. 668; Sprague *v.* Kneeland, 12 Wend. 161; Hurd *v.* West, 7 Cow. 752; Roeber *v.* Borne, 30 Hun 379; German-Am. Bank *v.* Slade, 15 Misc. 287, 36 N. Y. Supp. 983.

North Carolina. — Hicks *v.* Forrest, 6 Ired. 528.

South Carolina. — Land *v.* Lee, 2 Rich. 168; Crawley *v.* Tucker, 4 Rich. 560.

Tennessee.—McClellan *v.* Cornwell, 2 Cold. 298; McCasland *v.* Carson, 1 Head 117; Holmark *v.* Molin, 5 Cold. 482.

Texas. — Hinson *v.* Walker, 65 Tex. 103; Garrahy *v.* Green, 32 Tex. 202; Grooms *v.* Rust, 27 Tex. 231; Copp *v.* Swift (Tex. Civ. App.,) 26 S. W. 438; Smith *v.* Dunham (Tex. Civ. App.,) 29 S. W. 713; D'Arrigo *v.* Tex. Produce Co. (Tex. Civ. App.,) 31 S. W. 713; Dallas Nat. Bank *v.* Davis, 78 Tex. 362, 14 S. W. 706.

Vermont. — Bullard *v.* Billings, 2 Vt. 309.

Wisconsin. — Selsby *v.* Redlon, 19 Wis. 18; Grant *v.* Lewis, 14 Wis. 487, 30 Am. Dec. 785.

Wyoming. — Toms *v.* Whitmore, 6 Wyo. 220, 44 Pac. 56.

When Vendor's Statements Admissible.—In Orr & Lindsley Shoe Co. *v.* Needles, 67 Fed. 990, the court said: "It is undeniable that declarations made to third parties by a vendor of property after the sale and delivery thereof have been consummated, are not admissible against the vendee to impair the latter's title, unless there is independent evidence to show that the vendor and vendee have entered into a fraudulent conspiracy of some sort, so that the statements of one are admissible against the other, or unless the vendor's statements are authorized, or subsequently ratified by the vendee."

Where They Accord With Those of Vendee. — But see Hunter *v.* Jones, 6 Rand. (Va.), in which it is held that the declarations of the vendor made after the sale are competent where they accord with the acknowl-

the vendor and vendee or other relations between them rendering the admissions of one binding upon the other;[15] and in some cases, it is held to be the general rule that declarations of a vendor of personal property going to defeat the title are not admissible against his vendee in good faith and for value whether made before or after the sale.[16]

(3.) By Donor Against Donee. — So it is held that the declarations of a donor, in case of a gift of personal property, for the purpose of showing the gift to be fraudulent, are inadmissible against the donee if made after the gift;[17] so if offered to defeat the gift on other grounds.[18]

(4.) To Show Fraud in the Transfer. — The rule as to the competency of admissions of the vendor to show fraud in the transfer is the same, generally, as the case of grantor and grantee of real estate, considered above, some cases holding such admissions to be inadmissible;[19] others holding them to be competent to show fraudu-

edgments of the vendee previously made.

15. *See* "DECLARATIONS;" RES GESTAE;" Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906.

For Purpose of Impeachment. — It should be borne in mind also, that such declarations may be admissible, the foundation being laid, for the purpose of impeaching the vendor if he becomes a witness. But in such case, they are not admissible as admissions. Williams *v.* Eikenberry, 25 Neb. 721, 41 N. W. 770; Selsby *v.* Redlon, 19 Wis. 18.

16. *United States.* — Dodge *v.* Freedmen's S. & T. Co., 93 U. S. 379; Orr & Lindsley Shoe Co. *v.* Needles, 67 Fed. 990.

Alabama.—Walker *v.* Blassingame, 17 Ala. 810; Garner *v.* Bridges, 38 Ala. (N. S.) 276; Murphy *v.* Butler, 75 Ala. 381; McKenzie *v.* Hunt, 1 Port. 37; Smith *v.* Rogers, 1 Stew. & P. 317; Weaver *v.* Yeatman, 15 Ala. 539; Borland *v.* Mayo, 8 Ala. (N. S.) 104.

California. — Spanagel *v.* Dellinger, 38 Cal. 278; Silva *v.* Serpa, 86 Cal. 241, 24 Pac. 1013; Walden *v.* Purvis, 73 Cal. 518, 15 Pac. 91; Garlick *v.* Bowers, 66 Cal. 122, 4 Pac. 1138; Briswalter *v.* Palomaris, 66 Cal. 259, 5 Pac. 226.

Maine. — Hatch *v.* Dennis, 10 Me. 244.

Massachusetts. — Short *v.* Tinsley, 1 Metc. 397, 71 Am. Dec. 482.

Mississippi.– Wilkeson *v.* Moffett-West Drug Co. (Miss.), 21 So. 564.

New York. — Flannery *v.* Van Tassel, 127 N. Y. 631, 27 N. E. 393; Paige *v.* Cagwin, 7 Hill 361, 42 Am. Dec. 68; Bullis *v.* Montgomery, 50 N. Y. 352; Gardner *v.* Barden, 34 N. Y. 433; Tilson *v.* Terwilliger, 56 N. Y. 273; Hart *v.* West, 7 Cow. 752; Morris *v.* Wells, 54 Hun 634, 7 N. Y. Supp. 61.

Vermont. — Sherwin *v.* Bugbee, 17 Vt. 337.

Except Where Part of the Res Gestae. — Squire *v.* Greene, 47 App. Div. 636, 62 N. Y. Supp. 48.

17. Walden *v.* Purvis, 73 Cal. 518, 15 Pac. 91; Strong *v.* Brewer, 17 Ala. 706.

18. Julian *v.* Reynolds, 8 Ala. (N. S.) 680.

19. Whiting *v.* Johnson, 11 Serg. & R. (Pa.) 328; 14 Am. Dec. 633; Winchester Mfg. Co. *v.* Creary, 116 U. S. 161; Paige *v.* O'Neal, 12 Cal. 483; Tapley *v.* Forbes, 2 Allen (Mass.) 20; Parry *v.* Libbey, 166 Mass. 112, 44 N. E. 124; Orr etc. *v.* Needles, 67 Fed. 990.

By Mortgagor Against Mortgagee. The declarations of a mortgagor made after the execution of the mortgage tending to show its fraudulent character are inadmissible as against the mortgagee. Silva *v.* Serpa, 86 Cal. 241, 24 Pac. 1013; Farmer's L. & T. Co. *v.* Montgomery, 30 Neb. 33, 46 S. W. 214.

By Vendor of Personal Property. In Garner *v.* Bridges, 38 Ala. 276,

lent intent on the part of the vendor only, leaving knowledge of or participation in the fraud by the vendee to be established by other evidence,[20] and others limiting the rule to admissions made before the transfer.[21]

it was held that the declarations of the vendor of a slave made several months before the sale not explanatory of his position or title and not made in the presence of the purchaser were not competent evidence against the purchaser.

20. Gallagher *v.* Williams, 23 Cal. 331, 83 Am. Dec. 114; Foster *v.* Hall, 12 Pick. (Mass.) 89; Guidry *v.* Grivot, 2 Mart. (La.) (N. S.) 13, 14 Am. Dec. 103; Hinson *v.* Walker, 65 Tex. 103.

For What Purpose Admissible. In a note to Horton *v.* Smith, 8 Ala. 73, 42 Am. Dec. 628, the editor makes this statement, followed by the citation of numerous authorities: "The declarations and acts of a vendor made or done before the execution of a conveyance which is attacked on the ground of fraud are admissible in evidence against the vendee to show such fraud on the part of the vendor; but to render the same operative against the vendee, such evidence must be followed by testimony tending to prove knowledge or notice of the vendor's fraudulent intent by the vendee. This rule is one of frequent application, and although decisions may be found to the contrary, its correctness is established by an overwhelming weight of authorities."

21. *United States.* — Winchester etc. Mfg. Co. *v.* Creary, 116 U. S. 161.

Alabama. — Bilberry *v.* Mobley, 21 Ala. 277; Weaver *v.* Yeatmans, 15 Ala. (N. S.) 539.

California. — Cohn *v.* Mulford, 15 Cal. 50; Jones *v.* Morse, 36 Cal. 205; Paige *v.* O'Neal, 12 Cal. 483; Visher *v.* Webster, 13 Cal. 58.

Illinois. — Wheeler *v.* McCorristen, 24 Ill. 41.

Iowa. — Fowler Co. *v.* McDowell, 100 Iowa 526, 69 N. W. 873.

Kansas. — Smith *v.* Wilson, 5 Kan. App. 379, 48 Pac. 436.

Maine. — Dennison *v.* Benner, 41 Me. 332.

Massachusetts. — Horrigan *v.* Wright, 4 Allen 514.

Minnesota. — Holland *v.* Fuller, 8 Minn. 50.

Nevada. — Hirschfeld *v.* Williamson, 18 Nev. 66, 1 Pac. 201.

Ohio. — Ohio Coal Co. *v.* Davenport, 37 Ohio St. 194.

Pennsylvania. — Hartley *v.* Weideman, 175 Pa. St. 309, 34 Atl. 625.

South Carolina.—Kittles *v.* Kittles, 4 Rich. 422.

Wisconsin. — Bogert *v.* Phelps, 14 Wis. 88.

Except in Case of Independent Evidence of Conspiracy. —In the case of Winchester, etc. Mfg. Co. *v.* Creary, 116 U. S. 161, the rule is thus stated:

"It is, however, insisted that Webb's declarations after the sale were admissible in support of the charge of combination or conspiracy to defraud the defendants Hayner & Co., and other creditors. Without extending this opinion by a review of the adjudged cases in which there was proof of concert or collusion between vendor and vendee to defraud creditors, and in which the subsequent declarations of the vendor were offered in evidence against the vendee to prove the true character of the sale, it is sufficient to say that such declarations are not admissible against the vendee, unless the alleged common purpose to defraud is first established by independent evidence, and unless they have such relation to the execution of that purpose that they fairly constitute a part of the *res gestae*. There was no such independent evidence in this case, and there is no foundation for the charge of a conspiracy between the vendors and the vendee to hinder creditors, outside of certain statements which Webb is alleged to have made after his firm had parted with the title and surrendered possession."

See also, Caldwell *v.* Williams, 1 Ind. 405; Ewing *v.* Gray, 12 Ind. 64;

By Debtor As Between Purchaser and Attaching Creditor. — Declarations of a debtor cannot be received to show a fraudulent intent on the part of such debtor in an action between a purchaser for value without notice and an attaching or execution creditor, where such declarations were made anterior to the sale claimed to have been fraudulent;[22] nor can the admissions of the execution plaintiff or defendant made pending the proceedings for sale under attachment or execution, be received to defeat the title of the purchaser;[23] nor to show a valuable consideration for the purchase.[24] But ordi-

Weaver *v.* Yeatman, 15 Ala. (N. S.) 530.

Where the Vendor Retains Possession of the Property. — The effect upon the rule excluding such declarations made after the sale of the retention of the property by the vendor is thus stated in McClellan *v.* Cornwell, 2 Cold. (Tenn.) 298: "But, in cases where the transaction itself is attacked, upon the ground of fraud, if the vendor retains the possession of the property, inconsistently with the terms of the contract, and, consequently, in hostility to the rights of the purchaser, this rule is relaxed, and his statements in the absence of the purchaser, in reference to the ownership, or contract, or terms upon which he holds possession of the property, may be received as evidence against the purchaser, as part of the *res gestae*, because such possession of the property is a badge of fraud, which, of itself, connects him with the purchaser, in the suspicion of a confederate to defeat creditors. But the bare fact of possession by the vendor, is not, of itself sufficient; for if his possession be consistent with the rights of the purchaser, and according to the terms of the contract, his statements, in the absence of the purchaser, are inadmissible as against the purchaser."

See also Boyd *v.* Jones, 60 Mo. 454; Grant *v.* Lewis, 14 Wis. 487, 30 Am. Dec. 785.

To Explain the Nature of His Possession. — In Mobley *v.* Bilberry, 17 Ala. 428, it is held that subsequent declarations of the vendee while retaining possession are admissible to explain the nature of his possession.

Where Vendor Remains in Possession. — But it is held that where the vendor remains in possession after the sale his declarations are admissible. Gallick *v.* Bordeaux, 22 Mont. 470, 56 Pac. 961; Lehmann *v.* Chapel, 70 Minn. 496, 73 N. W. 402.

22. Waggoner *v.* Cooley, 17 Ill. 239; Tabor *v.* Van Tassel, 86 N. Y. 642; Jones *v.* Norris, 2 Ala. 526; Murphy *v.* Butler, 75 Ala. 381.

Admissions of Debtor. — Thus it is said in Moses *v.* Dunham, 71 Ala. 173: "Out of this has grown a well considered and well settled principle of evidence, namely: That in such contests, which most usually arise in 'trials of the right of property'—a proceeding under our statutes—the admissions and declarations of the debtor, made anterior to the sale, under which the claimant asserts title, are not admissible evidence against him to show a fraudulent intent on the part of such debtor in making the sale, provided the sale was on valuable consideration, and the purchaser is not chargeable with knowledge of the fraudulent intent."

Of Bankrupt Against His Assignee. — It is held that in *replevin* by the assignee of a bankrupt the defendant may give in evidence the statements of the bankrupt, made before his application for the benefit of the bankrupt law, to prove the property to be in a stranger, but that the assignee could not prove admissions of such stranger that the property belonged to the bankrupt. Compton *v.* Fleming, 8 Blackf. (Ind.) 153.

23. Vandyke *v.* Bastedo, 15 N. J. Law 224; Renshaw *v.* Steamboat Pawnee, 19 Mo. 532; Brown *v.* Upton, 12 Ga. 505.

24. Berry *v.* Hardman, 12 Ala. (N. S.) 604; Falkner *v.* Leith, 15 Ala. (N. S.) 9.

Of Debtor to Show Consideration

narily there is no difference between one claiming under an execution and a grantee of the prior owner, in this respect, and the admissions of the possessor of property made while in possession are admissible against an attaching or execution creditor.[25]

Must Be Made Before Lien Attaches. — Like the case of a sale by the owner, the admission to be competent as against the attaching creditor must have been made before the lien attaches either by levy or judgment.[26]

Of Debtor to Show Bona Fides of Transaction.— Where the question arises between two creditors the admissions of the debtor in support of the good faith of the transaction with one of the claimants may be admissible.[27]

of the Purchase. — In Hooper *v.* Edwards, 18 Ala. (N. S.) 280, it was held that in a contest between the existing creditor and a purchaser from the debtor, the statements of such debtor were not admissible to prove the consideration of the purchase.

To Establish a Demand Against Property Attached. — In Renshaw *v.* Steamboat Pawnee, 19 Mo. 532, it was held that the demands of the owner of the boat, made after the boat had been seized and ordered to be sold, were not competent to establish a demand presented for allowance as a lien upon the proceeds of the sale of the boat.

25. *Alabama.* — Dubose *v.* Young, 14 Ala. 139.

Arkansas.—Allen *v.* McGaughey, 31 Ark. 252.

California.—Gallagher *v.* Williams, 23 Cal. 331, 83 Am. Dec. 114.

Georgia. — Horn *v.* Ross, 20 Ga. 210, 65 Am. Dec. 621.

Indiana. — King *v.* Wilkins, 11 Ind. 347.

Massachusetts. — Pickering *v.* Reynolds, 119 Mass. 111.

New Hampshire. — Putnam *v.* Osgood, 52 N. H. 148.

Pennsylvania. — Biddle *v.* Moore, 3 Pa. St. 161; Magee *v.* Raiguel, 64 Pa. St. 110.

South Carolina. — Crawley *v.* Tucker, 4 Rich. 560.

Tennessee. — Mulholland *v.* Ellitson, 1 Cold. 307.

Texas.—Martel *v.* Somers, 26 Tex. 551.

By Debtor Against Execution Creditor. — Mulholland *v.* Ellitson, 1 Cold. (Tenn.) 307, was an action of trespass brought by the plaintiff against the defendant who had recovered judgment and sold property claimed by each of the parties. The plaintiff offered to prove admissions against the execution defendant to the effect that he had sold the property in question to the plaintiff prior to the levying of the execution. The evidence was excluded by the court below, and, in passing upon the question on appeal, the court said: "Manifestly, in a contest between the plaintiff and the said Michael, in regard to the title of this property, these admissions would be competent *against him*, upon the principle of a declaration against his interest; and also in a contest between the plaintiff and a third party, claiming this property under a purchase made by him of said Michael, at a period *subsequent* to the admissions, they would be admissible, because the purchaser is in *privity* with his vendor, and takes the property encumbered with his declarations. They are offered as coming from a *privy in estate*, and, therefore, in *law*, from the party himself."

Against Attaching Officer. — In Hayward Rubber Co. *v.* Duncklee, 30 Vt. 29, it was held that admissions made by one while in possession of personal property against his title were admissible against the officer attaching the property in an action of trespass involving the title to the property.

26. Mulholland *v.* Ellitson, 1 Cold. (Tenn.) 307.

27. Lambert *v.* Craig, 12 Pick. (Mass.) 199.

In Case of Collusion Between Debtor and His Vendee. — The rule making the admissions of one co-conspirator admissible against another is applicable here.[28]

By Officers of Corporations. — And the rule extends to declarations made by officers of a corporation in the performance of their duties in respect of the title to property in the possession of the corporation.[29]

C. Assignors and Assignees. — a. *Of Assignor Before Assignment Admissible.* — The admissions of an assignor made before the assignment are admissible against his assignee or others claiming under him.[30]

(1.) Exception. — Negotiable Paper. — An exception to the rule is made in favor of the holder of negotiable paper,[31] but not where

Of Debtor to Establish Good Faith of Transaction. — Thus, in Strong *v.* Wheeler, 5 Pick. (Mass.) 410, where two creditors of the defendant attach the same property, the second attaching creditor being admitted under the statute providing therefor to defend against the first suit, it was held that "the plaintiff might give any evidence and confession of the debtor that his demand was *bona fide*, and for a valuable consideration."

28. O'Neil *v.* Glover, 5 Gray (Mass.) 144.

29. Bingham *v.* Hyland, 53 Hun 631, 6 N. Y. Supp. 75.

30. *Connecticut.*—Bulkley *v.* Landon, 3 Conn. 76.

Illinois. — Merrick *v.* Hulbert, 15 Ill. App. 606; Thorp *v.* Goewey, 85 Ill. 611; Saudifer *v.* Hoard, 59 Ill. 246; Williams *v.* Judy, 3 Gilm. 282, 44 Am. Dec. 699; Anderson *v.* So. Chicago Brewing Co., 173 Ill. 213, 50 N. E. 655.

Indiana. — Abbott *v.* Muir, 5 Ind. 444; Stoner *v.* Ellis, 6 Ind. 152; Blount *v.* Riley, 3 Ind. 471.

Kentucky. — Scott *v.* Coleman, 5 Litt. 349, 15 Am. Dec. 71.

Louisiana. — Smith *v.* McWalters, 7 La. Ann. 144.

Maine. — Parker *v.* Marston, 34 Me. 386.

Maryland. — Clary *v.* Grimes, 12 Gill & J. 31; Robinett *v.* Wilson, 8 Gill 179.

Massachusetts. — Bond *v.* Fitzpatrick, 4 Gray 89.

Minnesota. — Anderson *v.* Lee, 73 Minn. 307, 76 N. W. 21.

Mississippi. — Brown *v.* McGraw, 12 Smed. & M. 267; Millsaps *v.* M. Bank, 71 Miss. 361, 13 So. 903.

Missouri. — Murray *v.* Oliver, 18 Mo. 405; Robb *v.* Schmidt, 35 Mo. 290; Hazell *v.* Bank of Tipton, 95 Mo. 60, 8 S. W. 173.

New York. — Merkle *v.* Beidleman, 30 App. Div. 14, 51 N. Y. Supp. 916.

Pennsylvania. — Magee *v.* Raiguel, 64 Pa. St. 110; Kellogg *v.* Krauser, 14 Serg. & R. 137; Brindle *v.* McIlvaine, 10 Serg. & R. 282.

South Carolina. — McClendon *v.* Wells, 20 S. C. 514; Crayton *v.* Collins, 2 McCord 271; Sharp *v.* Smith, 7 Rich. 2; Westbury *v.* Simmons, 57 S. C. 467, 35 S. E. 764.

Vermont. — Alger *v.* Andrews, 47 Vt. 238.

To Show Illegal Consideration. In Sharp *v.* Smith, 7 Rich. (S. C.) 2, the payee had on the day after the note bore date admitted that it was given for a gaming consideration and this admission was held to be competent where the action was by the transferee.

31. *England.* — Smith *v.* De Wrintz, R. & M. 212, 21 Eng. C. L. 735; Beauchamp *v.* Parry, 1 Barn. & A. 89, 20 Eng. C. L. 408; Barough *v.* White, 4 Barn. & C. 325, 10 Eng. C. L. 600; Shaw *v.* Broom, 4 D. & R. 730, 16 Eng. C. L. 220.

Connecticut. — Roe *v.* Jerome, 18 Conn. 138.

Illinois. — Merrick *v.* Hulbert, 15 Ill. App. 606; Williams *v.* Judy, 3 Gilm. 282, 44 Am. Dec. 699.

Massachusetts. — Butler *v.* Damon, 15 Mass. 222; Produce Ex. Trust Co. *v.* Beiberbach, 177 Mass. 137, 58 N. E. 162.

the transfer and admissions are made after maturity.[32] In some of the states, this exception has been removed by statute.[33]

And the general rule that admissions of the assignor or endorser against his title or right to recover are admissible against his assignee is denied in numerous cases,[34] and in some the rule is

Mississippi. — Brown *v.* McGraw, 12 Smed. & M. 267.

Missouri. — Murray *v.* Oliver, 18 Mo. 405; Blancjour *v.* Tatt, 32 Mo. 576.

New York.—Smith *v.* Schanck, 18 Barb. 344.

32. *England.* — Beauchamp *v.* Parry, 1 Barn. & C. 89, 20 Eng. C. L. 408.

Illinois. — Sandifer *v.* Hoard 59 Ill. 246; Williams *v.* Judy, 3 Gilm. 282, 44 Am. Dec. 699; Kane *v.* Torbit, 23 Ill. App. 311; Curtiss *v.* Martin, 20 Ill. 557.

Indiana. — Blount *v.* Riley, 3 Ind. 471.

Maine. — Hatch *v.* Dennis, 10 Me. 244; Eaton *v.* Corson, 59 Me. 510; Merrick *v.* Parkman, 18 Me. 407; Shirley *v.* Todd, 9 Greene 83.

Massachusetts. — Bond *v.* Fitzpatrick, 4 Gray 89.

Missouri. — Robb *v.* Schmidt, 35 Mo. 290.

New York. — Paige *v.* Cagwin, 7 Hill 361, 42 Am. Dec. 68.

Vermont.—Miller *v.* Bingham, 29 Vt. 427.

Assigned After Admissions Before Maturity. — In Robb *v.* Schmidt, 35 Mo. 290, it is held that where the assignment is made after maturity but the admissions were made before, they are admissible against the assignee.

33. Brown *v.* McGraw, 12 Smed. & M. (Miss.) 267; Stoner *v.* Ellis, 6 Ind. 152; Millsaps *v.* M. Bank, 71 Miss. 361, 13 So. 903.

34. *United States.* — Dodge *v.* Freedman's Sav. & Trust Co., 93 U. S. 379.

Alabama. — Jones *v.* Norris, 2 Ala. (N. S.) 526.

Idaho. — Deasey *v.* Thurman, 1 Idaho 775.

Massachusetts. — Holbrook *v.* Holbrook, 113 Mass. 74.

Montana. — Shober *v.* Jack, 3 Mont. 351.

New York. — Paige *v.* Cagwin, 7 Hill 361, 42 Am. Dec. 68; Truax *v.* Slater, 86 N. Y. 630; Flannery *v.* Van Tassel, 127 N. Y. 631, 27 N. E. 393; Bullis *v.* Montgomery, 50 N. Y. 352; Gardner *v.* Barden, 34 N. Y. 433; Whitaker *v.* Brown, 8 Wend. 490; Jones *v.* East Society, 21 Barb. 161; Bristol *v.* Dann, 12 Wend. 142; Booth *v.* Swezey, 8 N. Y. 276; Topping *v.* Van Pelt, Hoff. 545; Tousley *v.* Berry, 16 N. Y. 497; Foster *v.* Beals, 21 N. Y. 247; Edington *v.* Mut. Life Ins. Co., 67 N. Y. 185; Kent *v.* Walton, 7 Wend. 256; Clews *v.* Kehr, 90 N. Y. 633; Stark *v.* Boswell, 6 Hill 405, 41 Am. Dec. 752; Barhydt *v.* Valk, 12 Wend. 145, 27 Am. Dec. 124; Smith *v.* Webb, 1 Barb. 230; Van Aernam *v.* Granger, 86 Hun 476, 33 N. Y. Supp. 885; Osborn *v.* Robbins, 37 Barb. 481.

Pennsylvania.—Eckert *v.* Cameron, 43 Pa. St. 120.

Of Assignor Not Admissible Against Assignee. — In Traux *v.* Slater, 86 N. Y. 630, it is said: "The conversation inquired about does not appear to have been a part of any *res gestae*, and it was clearly incompetent to bind or affect the plaintiff. The mere declarations of an assignor of a chose in action, forming no part of any *res gestae*, are not competent to prejudice the title of his assignee, whether the assignee be one for value, or merely a trustee for creditors, and whether such declarations be antecedent or subsequent to the assignment."

And again in Flannery *v.* Van Tassel, 127 N. Y. 631, 27 N. E. 393: "Ordinarily the declaration of a vendor, when not a party, made to a stranger in the absence of the vendee, is not competent as evidence affecting the title of a purchaser of personal property, in good faith and for value, either before or after its transfer. To this rule there are exceptions, as, for instance, where a conspiracy between the vendor and vendee to defraud is first shown to have existed;

declared to be that such admissions are not admissible against a subsequent purchaser or assignee for value.[35]

or where the party holds as a privy by representation, or in such a representative character as between whom and the declarant there is a community of interest in the event of the suit; or when the vendor after the sale still continues in possession, exercising acts of ownership over the property, thus raising the presumption that the sale was fraudulent."

So in Dodge *v.* Freedman's Sav. & Trust Co., 93 U. S. 379, the court said: "Evidence of this character was given by each party, and admitted, notwithstanding the objection of the other. No principle can be found to justify the admission of this evidence. It has long been settled that the declarations made by the holder of a chattel or promissory note, while he held it, are not competent evidence in a suit upon it, or in relation to it, by a subsequent owner. This was settled in the state of New York in the case of Paige *v.* Cagwin, 7 Hill 361, and is now admitted to be sound doctrine; and that the party is since deceased makes no difference (Beach *v.* Wise, 1 Hill 612); or that the transfer is made after maturity (Paige *v.* Cagwin, *supra*). The same is true of the declarations of a mortgagor (Earl *v.* Clute, 2 Abb. Ct. App. Dec. 1); or of the assignor of a judgment (16 N. Y. 497); or of an indorser (Anthon's N. P. 141); or of a judgment debtor (1 Denio 202). Assuming that Hunter was the owner or holder of these notes, his declarations are not thereby made competent evidence."

Where Part of Res Gestae. — But the exception authorizing proof of such declarations when a part of the *res gestae*, and particularly when they tend to show fraud in the transfer, should be kept in mind.

See "DECLARATIONS;" "RES GESTAE;" Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250; Adams *v.* Davidson, 10 N. Y. 309; Newlin *v.* Lyon, 49 N. Y. 661.

But not admissions of fraudulent intent by the assignor not part of the *res gestae*. Jones *v.* Norris, 2 Ala. 526.

In Case of Conspiracy. — So the declarations may be admissible on the showing of conspiracy between the assignor and assignee. Noyes *v.* Morris, 56 Hun 501, 10 N. Y. Supp. 561.

Assigned As Collateral Security. In Miller *v.* Bingham, 29 Vt. 82, the assignment was as collateral security for becoming surety for the assignor who had paid nothing as such security, and the admissions of the assignor were held competent as against such assignee.

35. Schenck *v.* Warner, 37 Barb. 258; Paige *v.* Cagwin, 7 Hill 361, 42 Am. Dec. 68; Von Sachs *v.* Kretz, 72 N. Y. 548; Crews *v.* Kehr, 99 N. Y. 633; McKean *v.* Adams, 11 Misc. 387, 32 N. Y. Supp. 281; Truax *v.* Slater, 86 N. Y. 630; Vidvard *v.* Powers, 34 Hun 221.

Not Competent As Against a Subsequent Purchaser or Assignee for Value. — The law is thus stated in Schenck *v.* Warner, 37 Barb. (N. Y.) 258:

"Our courts in this state, however, have uniformly held that the admissions of a former owner of chattels, or choses in action, are not admissible, as against a subsequent purchaser or assignee, from such owner for value, whether such owner were living or dead at the time the evidence was offered. This is the extent to which the courts have gone, and all the cases are of this character. (Foster *v.* Beals, 21 N. Y. R. 247; Tousley *v.* Barry, 16 *Id.* 497; Booth *v.* Swezey, 4 Seld. 276; Smith *v.* Webb, 1 Barb. 230; Paige *v.* Cagwin, 7 Hill 361; Beach *v.* Wise, 1 *Id.* 612; Whitaker *v.* Brown, 8 Wend. 490; Kent *v.* Walton, 7 *Id.* 256.) There are several other cases, but they are all of this description; and no case can be found in our reports carrying the rule of exclusion, or rather limiting the exception, beyond this precise point. And even this has been said by several of our judges to be a departure from a well estab-

b. *To Show Fraud in the Transfer.* — So it is held in some of the cases that where the question of good faith in the transfer arises, the admissions of the indorser or assignor are competent to show fraud or fraudulent intent on his part, but that the fraud or knowledge of the fraud on the part of the assignee must be established by other evidence.[36]

c. *By Assignor After Assignment Inadmissible.* — The declarations of an assignor after he has made the assignment and thus parted with his interest, are not competent as against the assignee as admissions,[37] and this is true although the action is brought in the

lished rule, and to have carried the doctrine quite far enough. (Bronson, J., in Beach *v.* Wise, *supra.* Walworth, Ch., in Christie *v.* Bishop, 1 Barb. Ch. R., 115, 116. Ruggles, Ch. J. in Jermain *v.* Denniston, 2 Seld. 278.)"

36. Roe *v.* Jerome, 18 Conn. 138; Peckham *v.* Potter, 1 Car. & P. 232, 12 Eng. C. L. 111; Frankel *v.* Coots, 41 Mich. 75, 1 N. W. 940.

Knowledge of Assignee Must Be Shown. — So it is held that if the jury is instructed that the declarations cannot affect the assignee unless it is shown by other evidence that he had knowledge of the fraud, the case is properly presented.

Where Common Purpose Is Shown. If a common purpose on the part of the vendor and vendee to defraud others by the transfer is shown, then the admissions of one are admissible against the other. Weinrich *v.* Porter, 47 Mo. 293.

Assignee's Knowledge Must First Be Shown. — But it is held in Phillips *v.* Cole, 10 Ad. & E. 106, 37 Eng. C. L. 79, that before the declarations of the former holder can be heard, the knowledge of the assignee, or his then identification in interest with such holder must be established by other evidence than that of such admissions. Newlin *v.* Lyon, 49 N. Y. 661.

37. *England.* — Shaw *v.* Broom, 4 D. & R. 730, 16 Eng. C. L. 220.

United States.—Clements *v.* Moore, 6 Wall. 209; Many *v.* Jagger, 1 Blatchf. 372, 16 Fed. Cas. No. 9055.

Arkansas. — Patton *v.* Gee, 36 Ark. 506; Gallett *v.* Lamberton, 6 Ark. 109; Humphries *v.* McCraw, 9 Ark. 91; State *v.* Jennings, 5 Eng. 428.

California. — Taylor *v.* Cent. Pac. Ry. Co., 67 Cal. 615, 8 Pac. 436.

Connecticut. — Scripture *v.* Newcomb, 16 Conn. 588.

Georgia. — Nat. Bank *v.* Exchange Bank, 110 Ga. 692, 36 S. E. 265.

Illinois. — Dazey *v.* Mills, 5 Gilm. 67; Thorp *v.* Goewey, 85 Ill. 611; Myers *v.* Kinzie, 26 Ill. 36.

Indiana. — Wynne *v.* Glidewell, 17 Ind. 446; Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106; Harcourt *v.* Harcourt, 89 Ind. 104; Lister *v.* Baker, 6 Blackf. 430; Fleming *v.* Newman, 5 Blackf. 220.

Kentucky. — Crane *v.* Gunn, 4 B. Mon. 10.

Louisiana. — Dowty *v.* Sullivan, 19 La. Ann. 448.

Maine. — Hatch *v.* Dennis, 10 Me. 244; Mathews *v.* Houghten, 10 Me. 420; Hackett *v.* Martin, 8 Greene 77.

Massachusetts. — Bond *v.* Fitzpatrick, 4 Gray 89.

Michigan. — Frankel *v.* Coots, 41 Mich. 75, 1 N. W. 940.

Missouri. — Wemrich *v.* Porter, 47 Mo. 293; Garland *v.* Harrison, 17 Mo. 282; Porter *v.* Moore, 6 Mo. 48; Eyermann *v.* Piron, 151 Mo. 107, 52 S. W. 229; Enders *v.* Richards, 33 Mo. 598.

New Hampshire. — Forsaith *v.* Stickney, 16 N. H. 575.

New Jersey. — Kinna *v.* Smith, 3 N. J. Eq. 14.

New Mexico. — Pearce *v.* Strickler, 9 N. M. 467, 54 Pac. 748.

New York. — Holmes *v.* Roper, 141 N. Y. 64, 36 N. E. 180; Van Gelder *v.* Van Gelder, 81 N. Y. 625; Christie *v.* Bishop, 1 Barb. Ch. 105; Feare *v.* Evertson, 20 Johns. 142; Coyne *v.* Weaver, 84 N. Y. 386; Ogden *v.* Peters, 15 Barb. 560; Peck *v.* Crouse,

name of the assignor if prosecuted for the benefit of the assignee;[38] but it is otherwise if the assignment is merely colorable and the assignor still remains the owner of the thing assigned as between the parties. In that case his admissions are competent.[39] And

36 Barb. 151; People v. Grattan, 50 How. Pr. 143; Harlan v. Green, 31 Misc. 261, 64 N. Y. Supp. 709; Flagler v. Schoffel, 40 Hun 178.

North Carolina. — Wooten v. Outlaw, 113 N. C. 281, 18 S. E. 252; Maddox v. Atl. & N. C. Ry. Co., 115 N. C. 624, 20 S. E. 190.

Pennsylvania. — Eby v. Eby, 5 Pa. St. 435; Camp v. Walker, 5 Watts 182; Morton v. Morton, 13 Serg. & R. 107; Bailey v. Clayton, 20 Pa. St. 205; Pringle v. Pringle, 59 Pa. St. 281.

South Carolina. — Clayton v. Collins, 2 McCord (Law) 271; De Buhl v. Patterson, 12 Rich. (Law) 363.

Texas. — Reed v. Herring, 37 Tex. 160; Ricker Nat. Bank v. Brown (Tex. Civ. App.), 43 S. W. 999.

Vermont.—Washburn v. Ramsdell, 17 Vt. 299; Halloran v. Whitcomb, 43 Vt. 306.

Virginia. — Ginter v. Breeden, 90 Va. 565, 19 S. E. 656; Strother v. Mitchell, 80 Va. 149.

Wisconsin. — Welch v. Town of Sugar Creek, 28 Wis. 618.

By Assignor After Assignment. In Holmes v. Roper, 141 N. Y. 64, 36 N. E. 180, the court said: "The general rule is that a former owner of a chattel or a chose in action, who has transferred his interest to another by an absolute sale or assignment, cannot, by his subsequent admissions, affect the right of the purchaser. In some cases such admissions may be admissible, but only where there is an identity of interests between the assignor and assignee which is deemed to exist where the transfer is merely colorable or nominal, and where a party claims through another by representation, and the declaration is not excluded by some other rule of evidence."

Inadmissible for Any Purpose. In the case of Many v. Jagger, 1 Blatchf. 372, 16 Fed. Cas. No. 9055, it was held in broad terms that the declarations and admissions of an assignor, after he had parted with his interest in personal property, are inadmissible either to show a want of title in him, or to affect the quality of the article, or to impair the right of the purchaser in any respect.

But see on this subject, Carnes v. White, 15 Gray (Mass.) 378.

By Assignor After Assignment. In Morton v. Morton, 13 Serg. & R. (Pa.) 107, it is held that declarations made by an assignor before the assignment are competent, but not such as are made after the assignment, and in that case, the action was brought in the name of the assignor for the use of the assignee.

Where Assignor Continues in Possession. — Such admissions have been admitted when made after the assignment where the question of the good faith of the assignment was in question and the assignor remained in continuous possession. Adams v. Davidson, 10 N. Y. 309; McKean v. Adams, 11 Misc. 387, 32 N. Y. Supp. 281; Frankel v. Coots, 41 Mich. 75, 1 N. W. 940; Dodge v. Goodell, 16 R. I. 48, 12 Atl. 236; Morrissey v. Broomal, 37 Neb. 766, 56 N. W. 383.

38. Morton v. Morton, 13 Serg. & R. (Pa.) 107; Sargeant v. Sargeant, 18 Vt. 371; Frear v. Everston, 20 Johns. (N. Y.) 142; Halloran v. Whitcomb, 43 Vt. 306. But see Gibson v. Winter, 5 Barn. & A. 96, 27 Eng. C. L. 50.

39. **Where Assignment is Merely Colorable.** — In Gardner v. Barden, 34 N. Y. 433, it was held that the declarations of the assignor were not admissible against the assignee; and further, that such declarations are only admissible where the interests of the parties remain unchanged by the apparent transaction and where an "identity of interest exists between the assignor and the assignee," the court saying: "The principle is no doubt sound, that where a transfer is made to a nominal party merely, and the interests of the parties remain unchanged by the ap-

where the question whether there has been an assignment or not is involved, the admissions should be received and the question left to the jury.[40]

While Held by Another for Value. — The rule excluding such admissions applies to a case where the paper is held by another as collateral security or otherwise leaving a contingent interest in the payee.[41]

d. *By Assignor in Bankruptcy.* — The rule is that the admissions of an assignor in bankruptcy made before the Act of Bankruptcy are competent against the assignee.[42] And they may be competent against one claiming adversely to the assignee in bankruptcy.[43] But they are not admissible if made after the assignment.[44]

For Benefit of Creditors. — The same rule is applicable to assignments for the benefit of creditors,[45] and has been extended to decla-

parent transaction, where an 'identity of interest exists between the assignor and the assignee,' the party making the transfer is still the party in interest, and his declarations are admissible." See also McKean *v.* Adams, 11 Misc. 387, 32 N. Y. Supp. 281.

40. Where the Assignment Is Controverted.—In Hogan *v.* Sherman, 5 Mich. 60, the court said: "But we do not regard the law as in any way establishing the doctrine that the admissions of a plaintiff of record are to be excluded, even where there is evidence of an assignment. The declarations of a party in interest are always admissible in derogation of his own title. The plaintiff of record generally stands (except in official suits and like cases) as the ostensible party in interest. If it is objected to the admissibility of his declarations that he has parted with his interest that fact is open to controversy, and its decision belongs, not to the court, but to the jury. If the fact of such assignment appears in his admissions, it is for the jury to determine how much of the admission is credible, and how much to be disregarded. 1 Greenl. Ev. § 201. If a court assumes to reject his statements because there is evidence that he has parted with his interest, it is encroaching upon the province of the jury, by deciding upon a fact which is important in arriving at a verdict. There are, it is true, some cases which seem to hold that such declarations are inadmissible, and should be rejected; but we do not perceive the force of their reasoning. No such ruling is necessary to save the rights of assignees. That object may be fully obtained by leaving all the facts to the jury, under instructions from the court, that if they find a proper and valid transfer of interest to have been made, they shall disregard all subsequent declarations of the assignors. This is the only way whereby the rights of all parties can be preserved."

41. Russell *v.* Doyle, 15 Me. 112.

42. Von Sachs *v.* Kretz, 72 N. Y. 548. But see Flagler *v.* Schoffel, 40 Hun (N. Y.) 178.

43. In Favor of Assignee.—Thus it has been held that the admissions of a bankrupt are competent against one claiming adversely to the assignee, where a conspiracy to defraud as between such adverse claimant and bankrupt is shown. *In re* Clark, 9 Blatchf. 379, 5 Fed. Cas. No. 2802.

44. Barber *v.* Terrell, 54 Ga. 156; Brock *v.* Schradsky, 6 Colo. App. 402, 41 Pac. 512.

45. Adams *v.* Davidson, 10 N. Y. 309; Ogden *v.* Peters, 15 Barb. (N. Y.) 560; Carleton *v.* Baldwin, 27 Tex. 572; Savery *v.* Spaulding, 8 Iowa 230, 74 Am. Dec. 300; Brock *v.* Schradsky, 6 Colo. App. 402, 41 Pac. 512; Vidvard *v.* Powers, 34 Hun (N. Y.) 221.

Held Inadmissible. — But there are cases holding that there is no such identity of interest between the as-

rations made after the assignment where the assignor has remained in possession;[46] but the general rule is that declarations made by the assignor after the assignment are inadmissible.[47]

4. By Agents or Other Representatives. — A. GENERALLY. — The declarations of an agent or other authorized representative of another are, within the scope of his authority, and while acting as such, the declarations of the person represented, and if against interest, may be proved as admissions.[48]

signor and assignee for the benefit of creditors as will render the admissions of the former competent as against the latter. Bullis *v.* Montgomery, 50 N. Y. 352; Vidvard *v.* Powers, 34 Hun 221.

46. Adams *v.* Davidson, 10 N. Y. 309.

47. Wynne *v.* Glidewell, 17 Ind. 446; Burt *v.* McKinstry 4 Minn. 146; Myers *v.* Kinzie, 26 Ill. 36.

Except in Case of Collusion. — The rule does not apply where a fraudulent combination on the part of the assignor and assignee is shown. Cuyler *v.* McCartney, 33 Barb. (N. Y.) 165.

Or Where Assignor Remains in Possession. — Dodge *v.* Goodell, 16 R. I. 48, 12 Atl. 236.

48. *United States.* — American Fur Co. *v.* U. S., 2 Pet. 358; Aiken *v.* Bemis, 3 Woodb. & M. 348, 1 Fed. Cas. No. 109.

Alabama. — Buchanan *v.* Collins, 42 Ala. 419; Williams *v.* Shackelford, 16 Ala. (N. S.) 318.

Connecticut. — Thill *v.* Perkins Elec. L. Co., 63 Conn. 478, 29 Atl. 13; Mather *v.* Phelps, 2 Root 150, 1 Am. Dec. 65; Arnold *v.* Lane, 71 Conn. 61, 40 Atl. 921.

Georgia. — Central R. R. & B. Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017; Banks *v.* Gidrot, 19 Ga. 421.

Illinois. — Hungate *v.* Rankin, 20 Ill. 639; Merchants' Dispatch Trans. Co. *v.* Leyser, 89 Ill. 43; Cook *v.* Hunt, 24 Ill. 536; Miles *v.* Andrews, 153 Ill. 262, 38 N. E. 644; Prickett *v.* Madison Co., 14 Ill. App. 454; Cheney *v.* Beaty, 56 Ill. App. 90.

Indiana. — Grand Rapids & R. Co. *v.* Diller, 110 Ind. 223, 9 N. E. 710; Hudspeth *v.* Allen, 26 Ind. 165; Toledo & Wabash R. Co. *v.* Goddard, 25 Ind. 185; Pavey *v.* Wintrode, 87 Ind. 379; Crowder *v.* Reed, 80 Ind. 1.

Iowa. — Kelly *v.* Norwich F. Ins. Co., 82 Iowa 137, 47 N. W. 986; Gault *v.* Sickles, 85 Iowa 266, 52 N. W. 206.

Kentucky. — Covington & Co. R. Co. *v.* Ingles, 15 B. Mon. 637.

Maine. — Lamb *v.* Barnard, 16 Me. 361; Hammatt *v.* Emeron, 27 Me. 308.

Maryland — City Bank *v.* Bateman, 7 Har. & J. 104; Thomas *v.* Sternheimer, 29 Md. 268.

Massachusetts. — Cooley *v.* Norton, 4 Cush. 93.

Missouri. — Peck *v.* Ritchey, 66 Mo. 111; Malecek *v.* Tower Grove & Co. R. Co., 57 Mo. 17.

New Hampshire. — Webster *v.* Clark, 30 N. H. 245; Town of Alton *v.* Town of Gilmanton, 2 N. H. 520.

New Jersey. — Sussex Co. Mut. Ins. Co. *v.* Woodruff, 26 N. J. Law 541.

New York. — Eppens & Co. *v.* Littlejohn, 27 App. Div. 22, 50 N. Y. Supp. 251.

North Carolina. — Primmix *v.* McAdoo, 68 N. C. 56; McComb *v.* N. C. R. Co., 70 N. C. 178.

Oregon. — North Pac. Lum. Co. *v.* Willamette S. M. L. & Co., 29 Or. 219, 44 Pac. 286.

Pennsylvania. — Grim *v.* Bonnell, 78 Pa. St. 152; Baker *v.* Westmoreland & C. Nat. Gas Co., 157 Pa. St. 593, 27 Atl. 789; Stockton *v.* Demuth, 7 Watts 39, 32 Am. Dec. 735; Union R. & Trans. Co. *v.* Riegel, 73 Pa. St. 72; O'Toole *v.* Post Printing & Pub. Co., 179 Pa. St. 271, 36 Atl. 288.

Tennessee. — Senance Min. Co. *v.* McMahon, 1 Head 582.

Texas. — Western U. Beef Co. *v.* Kirchevalle (Tex. Civ. App.,) 26 S.

B. Agents and Employees. — The general rule is that admissions made by agents or employees in the regular course of duty are competent as against the principal if they would be competent and material if made by the principal himself.[49]

W. 147; Barbee *v.* Spivey (Tex. Civ. App.,) 32 S. W. 435.

Statement of the Rule. — The general rule is well expressed in Covington, etc., R. R. Co. *v.* Ingles, 15 B. Mon. (Ky.) 637, in which it is said: "The doctrine is well settled that where the acts of the agent will bind the principal, there his representations and statements respecting the subject matter will also bind him, if made at the same time, and constituting a part of the *res gestae*. Wherever what the agent did is admissible in evidence, then whatever he said on the subject while doing it is also evidence against the principal."

49. *Alabama.* — Williams *v.* Shackelford, 16 Ala. (N. S.) 318.

Colorado. — Denver & R. G. R. Co. *v.* Wilson, 4 Col. App. 355, 36 Pac. 67.

Georgia. — Hines *v.* Poole, 56 Ga. 638.

Illinois. — Wagoner *v.* Cooley, 17 Ill. 239; Cook *v.* Hunt, 24 Ill. 536; Holley *v.* Knap, 45 Ill. App. 372.

Indiana. — Grand Rapids & Co. R. Co. *v.* Diller, 110 Ind. 223, 9 N. E. 710; Rahm *v.* Deig, 121 Ind. 283, 23 N. E. 141; Cleveland C. C. & I. Ry. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159.

Iowa. — Home Machine Co. *v.* Snow, 32 Iowa 433; Black *v.* Des Moines Mfg. & S. Co. (Iowa,) 77 N. W. 504.

Kentucky. — Plotz *v.* Miller, 21 Ky. Law 257, 51 S. W. 176.

Maryland. — City Bank *v.* Bateman, 7 Har. & J. 104.

Massachusetts. — Baring *v.* Clark, 19 Pick. 220; Allin *v.* Whittemore, 171 Mass. 259, 50 N. E. 618.

Minnesota. — Cumbey *v.* Lovett, 76 Minn. 227, 79 N. W. 99.

Missouri. — Hawk *v.* Applegate, 37 Mo. App. 32.

New Jersey. — Gifford *v.* Landrine, 37 N. J. Eq. 127.

New York. — Seymour *v.* Matterson, 42 How. Pr. 496; Miller *v.* King, 84 Hun 308, 32 N. Y. Supp. 332; Morgan *v.* Short, 13 Misc. 270, 34 N. Y. Supp. 10.

Ohio. — Globe Ins. Co. *v.* Boyle, 21 Ohio St. 110.

Texas. — Hinson *v.* Walker, 65 Tex. 103.

Vermont. — Churchill *v.* Smith, 16 Vt. 560.

Washington. — Selber *v.* Springbrook Trout Farm, 19 Wash. 49, 52 Pac. 238.

Wisconsin. — Smith *v.* Wallace, 25 Wis. 55.

Where Agent Is Competent Witness. — The fact that the agent is competent and might be called as a witness does not affect the right to prove his admissions. Baring *v.* Clark, 19 Pick. (Mass.) 220.

By Contractor to Construct Building. — In Dickinson College *v.* Church, 1 Watts & S. (Pa.) 462, it was held, in an action to enforce a mechanic's lien against the owner of a building, that the declarations of the contractor for the construction of the building, as to the material received and amount due, were competent, but should be received with great caution.

But in Philibert *v.* Schmidt, 57 Mo. 211, a contrary rule is declared. See also Happy *v.* Mosher, 48 N. Y. 313; Grace *v.* Nesbitt, 109 Mo. 9, 18 S. W. 1118; Carthage Marble & Co. *v.* Bauman, 55 Mo. App. 204; Treusch *v.* Shryock, 51 Md. 162.

Of the Architect. — The architect of a building is, as a rule, the agent of the owner, and, as such, his admissions are competent evidence against the owner as in other cases. Wright *v.* Reusens, 133 N. Y. 298, 31 N. E. 215.

Master of Vessel. — The master of a vessel is the general agent of the owner, and as such, his admissions are competent evidence against such owner. Eads *v.* Bacon, 1 Newb. 274, 8 Fed. Cas. No. 4232; Gerke *v.* Cali-

Rule Applies to Criminal As Well As Civil Cases.—The rule that the declarations of the agent, within his authority, and while acting as such, are the declarations of the principal, and binding upon him, applies as well to criminal actions and criminal liability as to civil cases.[50]

a. *Must Be While Acting As Such and Within Authority.*— To render one's admissions admissible as an agent they must be made as such, and while acting for the principal and within his authority as such agent.[51]

fornia S. Nav. Co., 9 Cal. 251, 70 Am. Dec. 650; Collins *v.* Davis, 32 Ohio St. 76.

50. Cliquot's Champagne, 3 Wall. 114; American Fur Co. *v.* U. S., 2 Pet. 358.

51. *United States.*—Packet Co. *v.* Clough, 20 Wall. 528; Vicksburg & M. R. Co. *v.* O'Brien, 119 U. S. 99, 7 Sup. Ct. 118; Maltby *v.* The R. R. Kirkland, 48 Fed. 760; Goddard *v.* Crefield Mills, 75 Fed. 818.

Alabama.—Ricketts *v.* Birmingham St. R. Co., 85 Ala. 600, 5 So. 353; Mitcham *v.* Schnessler, 98 Ala. 635, 13 So. 617; Danner Land Co. *v.* Stonewall Ins. Co., 77 Ala. 184; Huntsville Belt Line Co. *v.* Corpening, 97 Ala. 681, 12 So. 295; Mobile & M. R. Co. *v.* Ashcroft, 48 Ala. 15; Smith *v.* Tallahassee Branch, etc., 30 Ala. (N. S.) 650; Winter *v.* Burt, 31 Ala. 33; Memphis & C. R. Co. *v.* Maples, 63 Ala. 601; Bohannan *v.* Chapman, 13 Ala. 641.

Arkansas.—Levy *v.* Mitchell, 6 Ark. 138; Gould *v.* Tatum, 21 Ark. 329; Byers *v.* Fowler, 14 Ark. 86.

California.—Birch *v.* Hale, 99 Cal. 209, 33 Pac. 1088; Hewes *v.* Germain Fruit Co., 106 Cal. 441, 39 Pac. 853; Hutchinson *v.* Castle, 48 Cal. 152; Beasley *v.* San Jose F. P. Co., 92 Cal. 388, 28 Pac. 485; Garfield *v.* Knight's Ferry W. Co., 14 Cal. 35; Clunie *v.* Sacramento Lumber Co., 67 Cal. 313, 7 Pac. 708.

Colorado.—Edmunds *v.* Curtis, 8 Colo. 605, 9 Pac. 793; T. & H. Pueblo Bldg. Co. *v.* Klein, 5 Colo. App. 348, 38 Pac. 608.

Connecticut.—Charter *v.* Lane, 62 Conn. 121, 25 Atl. 464; Fairfield Co. T. Co. *v.* Thorp, 13 Conn. 173.

Georgia.—Small *v.* Williams, 87 Ga. 684, 13 S. E. 589; Hematite Min. Co. *v.* East Tennessee & G. R. Co., 92 Ga. 268, 18 S. E. 24; Claflin *v.* Ballance, 91 Ga. 411, 18 S. E. 309; Adams *v.* Humphries, 54 Ga. 496; Newton Mfg. Co. *v.* White, 53 Ga. 395; Mason *v.* Croom, 24 Ga. 211; Griffen *v.* Montgomery, 26 Ga. 111; East Tenn. & G. R. Co. *v.* Duggan, 51 Ga. 212.

Illinois.—Jenks *v.* Burr, 50 Ill. 450; Hovey *v.* Middleton, 56 Ill. 468; School Directors *v.* Wallace, 9 Ill. App. 312; Cleveland C. C. & St. L. R. Co. *v.* Jenkins, 75 Ill. App. 17; Beusley *v.* Brockway, 27 Ill. App. 410; Central Warehouse Co. *v.* Sargeant, 40 Ill. App. 438; Bernstein *v.* Bernstein, 11 Ill. App. 238; Covenant Mut. B. A. *v.* Conway, 10 Ill. App. 348; Ehrler *v.* Worthern, 47 Ill. App 550; Chicago B. & Q. R. Co. *v.* Lee, 60 Ill. 501; Whiteside *v.* Margarel, 51 Ill. 507; Michigan Cent. Ry. Co. *v.* Gougar, 55 Ill. 503; Waterman *v.* Peet, 11 Ill. 648.

Indiana.—Rowell *v.* Klien, 44 Ind. 290, 15 Am. Rep. 235; Lafayette R. Co. *v.* Ehman, 30 Ind. 83; Bellefontain R. Co. *v.* Hunter, 33 Ind. 335, 5 Am. Dec. 201; LaRose *v.* Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805.

Iowa.—Osgood *v.* Bauder, 82 Iowa 171, 47 N. W. 1001; Phelps *v.* James, 86 Iowa 398, 53 N. W. 274, 41 Am. St. Rep. 497; Yordy *v.* Marshall Co., 113 Iowa 340, 53 N. W. 208; Wiggins *v.* Leonard, 9 Iowa 194; Ayres *v.* Hartford Fire Ins. Co., 17 Iowa 176, 85 Am. Dec. 553; Wood Mowing Mach. & R. Co. *v.* Crow, 70 Iowa 340, 30 N. W. 609; Verry *v.* B. C. R. & M. R. Co., 47 Iowa 549; Osgood *v.* Bringolf, 32 Iowa 265; McPherin *v.* Jennings, 66 Iowa 622, 24 N. W. 242.

Kansas.—Kilpatrick Koch Dry Goods Co. *v.* Kahn, 53 Kan. 274, 36

b. *What Is Part of Res Gestae.* — As to what will be regarded

Pac. 327; Swengon v. Aultman, 14 Kan. 273; Donnell v. Clark, 12 Kan. 154; Acme Harvester Co. v. Madden, 4 Kan. App. 708, 46 Pac. 319.

Kentucky. — Clay v. Smith, 4 Bibb 255; Davis v. Whitesides, 1 Dana 177, 25 Am. Dec. 138; Parker v. Green, 8 Metc. 137; Roberts v. Borks, Litt. Sel. Cas. 411, 12 Am. Dec. 325; Murphy v. May, 9 Bush 33; Stiles v. Western R. Co., 8 Metc. 44.

Louisiana. — Reynolds v. Rowley, 2 La. Ann. 890.

Maine. — Gooch v. Bryant, 13 Me. 386; Craig v. Gilbreth, 47 Me. 416; Franklin Bank v. Steward, 37 Me. 519; Heath v. Joaquith, 68 Me. 433; Merrow v. Goodrich, 92 Me. 393, 42 Atl. 797, 69 Am. St. Rep. 512.

Maryland. — Franklin Bank v. Pa. D. & M. Steam Nav. Co., 11 Gill. & J. 28, 33 Am. Dec. 687; Owings v. Low, 5 Gill & J. 134; Mayor etc. v. Lobe, 90 Md. 310, 45 Atl. 192.

Massachusetts. — Geary v. Stevenson, 169 Mass. 23, 47 N. E. 508; Tyler v. Old Colony R. Co., 157 Mass. 336, 32 N. E. 227; Wilson v. Bowden, 113 Mass. 422; Cooley v. Norton, 4 Cush. 93; Blanchard v. Blackstone, 102 Mass. 343; Creed v. Creed, 161 Mass. 107, 36 N. E. 739; Wellington v. Boston & M. R., 15 Mass. 185, 33 N. E. 393; Dorne v. Southwork Mfg. Co., 11 Cush. 205; Gilmore v. Millineague Paper Co., 169 Mass. 471, 48 N. E. 623.

Michigan. — Pittsburg & L. S. Iron Co. v. Kirkpatrick, 92 Mich. 252, 52 N. W. 628; Patterson v. Wabash etc. R. Co., 54 Mich. 91, 19 N. W. 761; North v. Metz, 57 Mich. 612, 24 N. W. 759; Converse v. Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Mabley v. Kittleberger, 37 Mich. 360; Andrews v. Tamarack Min. Co., 114 Mich. 375, 72 N. W. 242.

Minnesota. — Van Doren v. Bailey, 48 Minn. 305, 51 N. W. 375; Leroy v. Harris, 12 Minn. 255.

Mississippi. — Doe v. Robinson, 44 Miss. 688.

Missouri. — Caldwell v. Garner, 31 Mo. 131; Price v. Thornton, 10 Mo. 135; Rogers v. McCune, 19 Mo. 557; McDermott v. Hannibal & St. J. R. Co., 73 Mo. 516, 39 Am. Rep. 526; Scoville v. Glassner, 79 Mo. 449; Ready v. Steamboat Highland Mary, 20 Mo. 264; Kelly v. Chicago & A. R. Co., 88 Mo. 534; Lackey v. Schreiber, 17 Mo. 146; Midland L. Co. v. Kreeger, 52 Mo. 418; Hawk v. Applegate, 37 Mo. App. 32.

Nebraska. — McCormick v. Dennary, 10 Neb. 515, 7 N. W. 283; Bowman v. Griffith, 35 Neb. 361, 53 N. W. 140.

New Hampshire.—Low v. Railroad, 45 N. H. 370; Batchelder v. Emery, 20 N. H. 165; Demeritt v. Meserve, 30 N. H. 521.

New Jersey. — Runk v. Ten Eyck, 24 N. J. Law 756; Ashmore v. Penn. S. & T. Co., 38 N. J. Law 13.

New York. — Anderson v. Rome N. & O. R. Co., 54 N. Y. 334; Wakefield Rattan Co. v. Tappan, 70 Hun 405, 24 N. Y. Supp. 430; Gutchers v. Gutchers, 66 Barb. 483; Morgan v. Short, 13 Misc. 279, 34 N. Y. Supp. 10; Thallhimer v. Brinckerhoff, 4 Wend. 394, 21 Am. Dec. 155; Fogg v. Child, 13 Barb. 246; White v. Miller, 71 N. Y. 118; Thompkins v. Sheehan, 82 Hun 345, 31 N. Y. Supp. 225; Strong v. Union Trans. & S. Co., 11 Misc. 430, 32 N. Y. Supp. 124; Warner v. Warner, 1 N. Y. 228; Kelly v. Morehouse, 25 App. Div. 359, 49 N. Y. Supp. 552; Fimm v. Rose Co., 21 Misc. 337, 47 N. Y. Supp. 150; Vail v. Judson, 4 E. D. Smith 165; Clark v. Anderson, 14 Daly 464.

North Carolina. — Williams v. Southern Bell T. & T. Co., 116 N. C. 558, 21 S. E. 298; McComb v. N. C. R. C., 70 N. C. 178; Smith v. N. C. R. Co., 68 N. C. 107; Stenhouse & Co. v. Charlotte C. & C. R. Co., 70 N. C. 542.

Pennsylvania. — Hough v. Doyle, 4 Rawl. 291; Jordan v. Stewart, 23 Pa. St. 244; Woodwell v. Brown, 44 Pa. St. 121; Clark v. Baker, 2 Whart. 340; Huntingdon R. & C. Co. v. Decker, 82 Pa. St. 119; Hannay v. Stewart, 6 Watts 487; Glaser v. Reno, 6 Serg. & R. 206; Fawcett v. Rigley, 59 Pa. St. 411; Pennsylvania

R. Co. *v.* Books, 57 Pa. St. 339, 98 Am. Dec. 229; Grim *v.* Bonnell, 78 Pa. St. 152; Rigley *v.* Williams, 80 Pa. St. 107; Am. S. S. Co. *v.* Landreth, 102 Pa. St. 131; Bank of Northern Liberties *v.* Davis, 6 Watts 285; Roberson *v.* Schuylkill Nav. Co., 3 Grant 186; Patton *v.* Minesinger, 25 Pa. St. 393; Brigley *v.* Williams, 80 Pa. St. 107; Northwestern Mut. L. Ins. Co. *v.* Roth, 87 Pa. St. 409.

South Carolina. — Patterson *v.* Railroad Co., 4 S. C. 153; Raiford *v.* French, 11 Rich. 367.

South Dakota. — Plymouth Co. Bank *v.* Gilman, 3 S. D. 70, 52 N. W. 869; Wendt *v.* Chicago, St. P. & M. O. R. Co., 4 S. D. 476, 57 N. W. 226.

Tennessee. — Cobb *v.* Johnson, 2 Sneed 73, 62 Am. Dec. 457.

Texas. — McAlpin *v.* Cassidy, 17 Tex. 449; Hinson *v.* Walker, 65 Tex. 103; Atchison T. & S. F. R. Co. *v.* Bryan (Tex. Civ. App.), 28 S. W. 98; Goodbar *v.* City Nat. Bank, 78 Tex. 461, 14 S. W. 851; Belo *v.* Fuller, 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75; Gulf C. & S. F. R. Co. *v.* Southwick (Tex. Civ. App.), 30 S. W. 592; Laughlin *v.* Fidelity Mut. L. Ins. Ass'n., 8 Tex. Civ. App. 448, 28 S. W. 411.

Vermont. — Warner *v.* McGary, 4 Vt. 507; Styles *v.* Town of Danville, 42 Vt. 282.

Virginia. — Smith *v.* Betty, 11 Gratt. 752.

Washington. — Weideman *v.* Tacoma R. & M. Co., 7 Wash. 517, 35 Pac. 414.

Wisconsin. — Hazelton *v.* Union Bank, 32 Wis. 34.

When Admissible. — The rule is thus stated in Verry *v.* B. C. R. & M. R. Co., 47 Iowa 549:

"To make the declarations of an agent admissible against his principle, such admissions must be a part of the *res gestae*. It is said the doctrine is well settled that where the acts of the agent will bind the principal, there his representations and statements respecting the subject matter will also bind him, if made at the same time, and constituting a part of the *res gestae*."

And in Hough *v.* Doyle, 4 Rawl. (Pa.) 291, it is said:

"The general rule is this: When it is proved that one is the agent of another, whatever the agent does, or says, or writes, in the making of a contract, as agent, is admissible in evidence against the principal, because it is part of the contract which he makes for his principal, and which, therefore, binds him, but it is not admissible as the agent's account of what passes. For example, the declaration of a servant, employed to sell a horse, is evidence to charge the master with warranty, if made at the time of sale; if made at any other time, the facts must be proved by the servant himself. The admissions of an agent, not made at the time of the transaction, but subsequently, are not evidence. Thus, the letters of an agent to his principal, containing a narrative of the transaction, in which he had been employed, are not admissible in evidence against the principal."

Rule Applies to Written the Same As to Parol Admissions. — The rule that the admissions, to be admissible, must be made at the time the agent is acting, and within his authority, is just as applicable to written admissions made by him as to those resting in parol. Hematite Min. Co. *v.* East Tennessee B. & G. R. Co., 92 Ga. 268, 18 S. E. 24.

Accounts Subsequently Rendered to Principal. — Letters written by the agent to the principal giving an account of a past transaction or subsequent accounts rendered of his previous acts are inadmissible. Ballard *v.* Beveridge, 44 App. Div. 477, 61 N. Y. Supp. 648.

By Officers of a Bank Holding Note for Collection. — It is held in Wilson *v.* Bowden, 113 Mass. 422, that the declarations of an officer of a bank in which a note has been lodged for collection, made before its maturity, are not admissible to affect the title of the holder on the ground that the bank officers were agents for the purpose of collection only, and that such declarations could not bind the holder of a note unless expressly authorized by him.

as a part of the *res gestae* in respect of this question of letting in admissions of the agent, see authorities cited below.[52]

Must Be Part of Res Gestae. — To say that admissions must be made while acting as agent is equivalent to saying that it must be a part of the *res gestae*, and it has been so held. Lowry *v.* Harris, 12 Minn. 255; Bonnell, 78 Pa. St. 152; Bensley *v.* Brockway, 27 Ill. App. 410; Anderson *v.* Rome N. & O. R. Co., 54 N. Y. 334.

Not if Made Before or After. The declarations if made before the agency was created or after its termination are inadmissible.

United States. — Blight *v.* Ashley, 3 Fed. Cas. No. 1541.

California. — Mutler *v.* I. X. L. Lime Co. (Cal.), 42 Pac. 1068.

Georgia. — Griffin *v.* Montgomery, 26 Ga. 111; Harris *v.* Collins, 75 Ga. 97.

Illinois. — Wallace *v.* Goold, 91 Ill. 15; Union Nat. Bank *v.* Post, 64 Ill. App. 404.

Iowa. — Phelps *v.* James, 86 Iowa 398, 53 N. W. 274.

Kansas. — Greer *v.* Higgins, 8 Kan. 519.

Louisiana. — Reynolds *v.* Rowley, 3 Rob. 201, 38 Am. Dec. 233.

New York. — Tinum *v.* Rose Co., 21 Misc. 337, 47 N. Y. Supp. 150; Morris *v.* Brooklyn Heights R. Co., 20 App. Div. 557, 47 N. Y. Supp. 242; Niles Tool Works Co. *v.* Reynolds, 4 App. Div. 24, 38 N. Y. Supp. 1028; Congdon Co. *v.* Sheehan, 11 App. Div. 456, 42 N. Y. Supp. 255; Vail *v.* Judson, 4 E. D. Smith 165.

North Carolina. — Craven *v.* Russell, 118 N. C. 564, 24 S. E. 361; Darlington *v.* Western Union Tel. Co., 127 N. C. 448, 37 S. E. 479; Stenhouse Co. *v.* Charlotte C. & A. R. Co., 70 N. C. 542.

Pennsylvania. — Clark *v.* Baker, 2 Whart. 340; Fawcett *v.* Rigley, 59 Pa. St. 411.

South Dakota.—Estey *v.* Birnbaum, 9 S. D. 174, 68 N. W. 290.

Texas. — Brigham *v.* Carr, 21 Tex. 142.

In Case of Alleged Fraud. — An apparent exception to the general rule will be found in Jones *v.* Jones, 120 N. Y. 589, 24 N. E. 1016, where the transaction was tainted with fraud growing out of the confidential relations of the agent with the other parties.

In Connection With Act of Agent. It has been held that where the question is whether an act has been done by an agent or not, his declaration previously made that he was going to do the act is competent but not as an admission. Dodge *v.* Bache, 57 Pa. St. 421.

52. *England.* — Laughom *v.* Allnutt, 4 Taunt. 511, 13 Rev. Rep. 663.

United States. — Anvil Min. Co. *v.* Humble, 153 U. S. 540, 14 Sup. Ct. 876; Zenia Bank *v.* Stewart, 114 U. S. 224; Packet Co. *v.* Clough, 20 Wall. 528; Dentz *v.* The Faunood, 61 Fed. 523; St. Louis & S. F. R. Co. *v.* McClelland, 62 Fed. 116; Vicksburg & M. R. Co. *v.* O'Brien, 119 U. S. 99, 7 Sup. Ct. 118.

Alabama. — Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 15; Williams *v.* Shackelford, 16 Ala. (N. S.) 318; Baldwin *v.* Ashby, 54 Ala. 82.

Arkansas. — Carter *v.* Burnham, 31 Ark. 212.

California. — Geake *v.* California S. Nav. Co., 9 Cal. 251, 70 Am. Dec. 650; Abbott *v.* The Seventy-six Land Co., 87 Cal. 323, 25 Pac. 693; Silveira *v.* Iverson, 128 Cal. 187, 60 Pac. 687.

Colorado. — Union Pac. Ry. Co. *v.* Hepner, 3 Colo. App. 313, 33 Pac. 72; T. & H. Pueblo Bldg Co. *v.* Klein, 5 Colo. App. 348, 33 Pac. 608; Edmunds *v.* Curtis, 8 Colo. 605, 9 Pac. 793.

Connecticut. — Rockwell *v.* Taylor, 41 Conn. 55; Charter *v.* Lane, 62 Conn. 121, 25 Atl. 464; Toll Bridge Co. *v.* Betsworth, 30 Conn. 380.

Georgia. — Central R. Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017; Southern Ex. Co. *v.* Duffey, 48 Ga. 358; Galceran *v.* Noble, 66 Ga. 367; Robinson *v.* Lane, 19 Ga. 337; Small *v.* Williams, 87 Ga. 681, 13 S. E. 589; Claflin *v.* Ballance, 91 Ga. 411, 18

c. *Agency and Authority Must Be Proved.* — Of course to render admissions competent on the ground of agency, it must first be

S. E. 309; Akers *v.* Kirke, 91 Ga. 590, 18 S. E. 366.

Illinois. — Bernstein *v.* Bernstein, 11 Ill. App. 238; Mix *v.* Osby, 62 Ill. 193; Chicago B. & Q. R. Co. *v.* Lee, 60 Ill. 501; Mobile & O. R. Co. *v.* Klein, 43 Ill. App. 63.

Indiana. — Toledo & Wabash Ry. Co. *v.* Goddard, 25 Ind. 185; Lafayette R. Co. *v.* Ehman, 30 Ind. 83; Bellefontaine R. Co. *v.* Hunter, 33 Ind. 335, 5 Am. Dec. 201.

Iowa.—Pray *v.* Farmers' Creamery, 89 Iowa 741, 56 N. W. 443; Des Moines & D. L. & T. Co. *v.* Polk Co. Homestead & T. Co., 82 Iowa 603, 45 N. W. 773; Golden *v.* Newbrand, 52 Iowa 59, 2 N. W. 537, 35 Am. Rep. 257.

Kansas. — St. Louis & S. F. R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; St. Louis Wire-Mill Co. *v.* Consolidated Barb Wire Co., 46 Kan. 773, 27 Pac. 118.

Kentucky. — Louisville & N. R. Co. *v.* Foley, 94 Ky. 220, 21 S. W. 866; Louisville H. & St. L. R. Co. *v.* Beauchamp (Ky.), 55 S. W. 716.

Maine. — Franklin Bank *v.* Steward, 37 Me. 519.

Maryland. — Franklin Bank *v.* Pa. D. & M. Steam Nav. Co., 11 Gill & J. 28, 33 Am. Dec. 687; Dietrich *v.* Baltimore & H. S. R. Co., 58 Md. 347.

Massachusetts.—Wellington *v.* Boston & M. R., 158 Mass. 185, 33 N. E. 393; McGenners *v.* Adriatic Mills, 116 Mass. 177.

Minnesota. — Cumbey *v.* Lovett, 76 Minn. 227, 79 N. W. 99.

Missouri. — Beardslee *v.* Steinmesch, 38 Mo. 168; Price *v.* Thornton, 10 Mo. 135; Northrup *v.* Miss. Valley Ins. Co., 47 Mo. 435, 4 Am. Rep. 337.

New York. — Miller *v.* King, 84 Hun 308, 32 N. Y. Supp. 332; Morgan *v.* Short, 13 Misc. 279, 34 N. Y. Supp. 10; Elsner *v.* Prudential Ins. Co., 13 Misc. 395, 34 N. Y. Supp. 246; Wakefield Rattan Co. *v.* Tappan, 70 Hun 405, 24 N. Y. Supp. 430; McCotter *v.* Hooker, 8 N. Y. 497; Price *v.* Powell, 3 N. Y. 433; Anderson *v.* Rome N. & O. R. Co., 54 N. Y. 334; Thompkins *v.* Sheehan, 82 Hun 345, 31 N. Y. Supp. 225; Hyland *v.* Sherman, 2 E. D. Smith 234; Carrere *v.* Dun. 18 Misc. 18, 41 N. Y. Supp. 34; Ballard *v.* Beveridge, 44 App. Div. 477, 61 N. Y. Supp. 648.

North Dakota. — Short *v.* Northern Pac. Elev. Co., 1 N. D. 159, 45 N. W. 706.

Pennsylvania. — Baker *v.* Westmoreland & C. Nat. Gas. Co., 157 Pa. St. 593, 27 Atl. 789; Stockton *v.* Demuth, 7 Watts 39, 32 Am. Dec. 735; Hanover Ry. Co. *v.* Coyle, 55 Pa. St. 396; Brigley *v.* Williams, 80 Pa. St. 107; Am. S. S. Co. *v.* Landreth, 102 Pa. St. 131, 48 Am. Rep. 196.

South Carolina. — Mars *v.* Virginia Home Ins. Co., 17 S. C. 514; Patterson *v.* Railroad Co., 4 S. C. 153.

South Dakota. — Plymouth Co. Bank *v.* Gilman, 3 S. D. 170, 52 N. W. 869.

Tennessee. — Moore *v.* Bettis, 11 Humph. 67 Am. Dec. 771.

Texas. — Gilmour *v.* Heinze, 85 Tex. 76, 19 S. W. 1075; Atchison T. & S. F. Ry. Co. *v.* Bryan (Tex. Civ. App.), 28 S. W. 98; Western U. Beef Co. *v.* Kirchevalle (Tex. Civ. App.), 26 S. W. 147; Laredo Elec. L. & M. Co. *v.* U. S. Elec. L. Co. (Tex. Civ. App.), 26 S. W. 310; Tuttle *v.* Turner, 28 Tex. 759; Belo *v.* Fuller, 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75; Texas & P. Ry. Co. *v.* Lester, 75 Tex. 56, 12 S. W. 955.

Utah. — Marks *v.* Taylor (Utah), 63 Pac. 897.

West Virginia. — Coyle *v.* B. & O. R. Co., 11 W. Va. 94.

Wisconsin. — Smith *v.* Wallace, 25 Wis. 55; Hooker *v.* Chicago M. & St. P. R. Co., 76 Wis. 542, 44 N. W. 1085.

When Acts Are Binding, So Are Admissions. — The general rule is that where the acts of the agent will bind the principal then his admissions relating thereto and made at the time will also bind him. Linblom *v.* Ramsey, 75 Ill. 246; Dick-

shown by competent and sufficient evidence, that he was, at the time, the agent of the party against whom they are offered.[53] And

man *v.* Williams, 50 Miss. 500; Kasson *v.* Mills, 8 How. Pr. (N. Y.) 377; Strawbridge *v.* Spann, 8 Ala. (N. S.) 820; Hinson *v.* Walker, 65 Tex. 103; Covington etc. R. R. Co. *v.* Ingles, 15 B. Mon. (Ky.) 637.

53. *United States.*—Southern Exp. Co. *v.* Todd, 56 Fed. 104.

Alabama. — Galbreath *v.* Cole, 61 Ala. (N. S.) 139; Wailes *v.* Neal, 65 Ala. 59.

California. — Smith *v.* Liverpool etc. Ins. Co., 107 Cal. 432, 40 Pac. 540; Grigsby *v.* Clear Lake Water Co., 40 Cal. 396; Garfield *v.* Knight's Ferry W. Co., 14 Cal. 35; Durkee *v.* Central Pac. R. Co., 69 Cal. 533, 11 Pac. 130, 58 Am. Dec. 562; Union Transp. Co. *v.* Bassett, 118 Cal. 604, 50 Pac. 754.

Connecticut.—Burns *v.* Fredericks, 37 Conn. 86.

Georgia. — East Tenn. V. & G. R. Co. *v.* Duggan, 51 Ga. 212.

Illinois. — Rouse *v.* Mohr, 29 Ill. App. 321, 81 Am. Dec. 310; Reynolds *v.* Ferree, 86 Ill. 570; Fairbanks Canning Co. *v.* Weill, 35 Ill. App. 366; Whiteside *v.* Margaret, 51 Ill. 507; Schoenhofen Brewing Co. *v.* Wengler, 57 Ill. App. 184.

Indiana. — Coon *v.* Gurley, 49 Ind. 199; Ohio & M. Ry. Co. *v.* Levy, 134 Ind. 343, 34 N. E. 20; Breckinridge *v.* McAfee, 54 Ind. 141.

Kansas. — McCormick *v.* Roberts, 36 Kan. 552, 13 Pac. 827.

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

Maine. — Bennett *v.* Talbot, 90 Me. 229, 38 Atl. 112.

Maryland. — Atwell *v.* Miller, 11 Md. 348, 69 Am. Dec. 206.

Massachusetts.—Manilla *v.* Houghton, 154 Mass. 465, 28 N. E. 784; Johnson *v.* Trinity Church, 11 Allen 123; Haney *v.* Donnelly, 12 Gray 361.

Minnesota. — Lowry *v.* Harris, 12 Minn. 255; Woodbury *v.* Larned, 5 Minn. 339.

Missouri. — Caldwell *v.* Henry, 76 Mo. 254; Ahern *v.* Boyce, 26 Mo. App. 558.

Nebraska. — Chicago B. & Q. R. Co. *v.* Starmer, 26 Neb. 630, 42 N. W. 706.

New Hampshire. — Low *v.* Railroad, 45 N. H. 370.

New Jersey. — Gifford *v.* Landrine, 37 N. J. Eq. 127.

New Mexico.—Kirchner *v.* Laughlin, 5 N. M. 365, 23 Pac. 175.

North Carolina. — Williams *v.* Williamson, 6 Ired. (Law) 281, 45 Am. Dec. 494; Francis *v.* Edwards, 77 N. C. 271.

Pennsylvania. — Long *v.* North British & M. F. Ins. Co., 137 Pa. St. 335, 20 Atl. 1014, 21 Am. St. Rep. 879; Robeson *v.* Schuylkill Nav. Co., 3 Grant 186.

South Carolina.—Renneker *v.* Warren, 17 S. C. 139.

South Dakota. — Roberts *v.* Minneapolis etc. Co., 8 S. D. 579, 67 N. W. 607, 59 Am. St. Rep. 777.

Tennessee. — Moore *v.* Bettis, 11 Humph. 67, 53 Am. Dec. 771.

Texas. — Walker *v.* Leonard, 89 Tex. 507, 35 S. W. 1045.

Order of Proof in Discretion of Court. — But, although proof of agency should precede evidence of the admissions, the court may, in its discretion, permit the admissions to be proved first and the agency afterwards. Woodbury *v.* Larned, 5 Minn. 339.

May Be Proved By Circumstances. In Galbreath *v.* Cole, 61 Ala. 139, it is held that "the declarations or conduct of one professing to act as the agent of another, are inadmissible evidence against the principal, without independent proof of his authority. The authority may, like any other fact, be proved by circumstances. Express, direct evidence, that it was conferred, is not indispensable. The circumstances must be such as are capable of affording a reasonable presumption of it; and if they are not, they are not only insufficient, but inadmissible."

Error Cured by Subsequent Proof of Agency. — While it is well settled that the agency must first be proved,

that the agency was such as to authorize the making of the admissions sought to be proved.[54]

(1.) Cannot Be Proved by Admissions of Agent. — It follows that the fact of agency or the extent of his authority cannot be established by the admissions or declarations of the party alleged to be such agent.[55] Nor by his acts done without the knowledge of his prin-

before admitting evidence of the admissions, it is held that error in receiving such admissions first is cured by subsequent proof of the agency. Rowell *v.* Klien, 44 Ind. 290, 15 Am. Rep. 235; Trustees of Wabash Canal *v.* Bledsoe, 5 Ind. 132; McCormick *v.* Roberts, 36 Kan. 552, 13 Pac. 827; Mix *v.* Osby, 62 Ill. 193.

When Authority Will Be Presumed. — In Peden *v.* Chicago R. I. & P. R. Co., 78 Iowa 131, 42 N. W. 625, an offer was made of records in two other cases in which admissions were made by the agents of the corporation defendant. It was objected that the admissions in those cases were made by agents of the defendant, and could not be used in any other case. But it was held by the court that it must presume, until the contrary appears, that the agents were duly authorized to make the admissions in the other cases, and that they were in effect the admissions of their principals, and as such, admissible in other cases.

See also Richmond Iron Works *v.* Hayden, 132 Mass. 190.

As Between Husband and Wife. In Rowell *v.* Klien, 44 Ind. 290, 15 Am. Rep. 235, where it was claimed that the husband had acted as the agent of the wife, it was held that the wife might constitute the husband her agent, but that to establish this, the evidence must be clear and satisfactory, and sufficiently strong to explain and remove the equivocal character in which she is placed by reason of her relation of wife.

54. *United States.* — Chicago, St. L. M. & O. R. Co. *v.* Belliwith, 83 Fed. 437.

Illinois. — Schoenhofen Brewing Co. *v.* Wengler, 57 Ill. App. 184.

Indiana. — Coon *v.* Gurley, 49 Ind. 109.

Massachusetts.—McGregor *v.* Wait, 10 Gray 72, 69 Am. Dec. 305.

Nebraska. — Bowman *v.* Griffith, 35 Neb. 361, 53 N. W. 140.

Oregon. — Mattis *v.* Hosmer, 37 Or. 523, 62 Pac. 17.

Pennsylvania. — Hough *v.* Doyle, 4 Rawl. 291; Farmers' Bank *v.* McKee, 2 Pa. St. 318.

South Carolina. — Mars *v.* Virginia Home Ins. Co., 17 S. C. 514.

Texas. — Latham *v.* Pledger, 11 Tex. 439; Goodbar *v.* City Nat. Bank, 78 Tex. 461, 14 S. W. 851; Missouri Pac. Ry. Co. *v.* Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643.

55. *United States.* — James *v.* Stookey, 1 Wash. C. C. 330, 13 Fed. Cas. No. 7184; Mechanics' Bank *v.* Banks of Columbia, 5 Wheat. 326.

Alabama. — Strawbridge *v.* Spann, 8 Ala. (N. S.) 820.

California. — Smith *v.* Liverpool etc. Ins. Co., 107 Cal. 432, 40 Pac. 540; Grigsby *v.* Clear Lake Water Co., 40 Cal. 396; Savings & L. Soc. *v.* Gerichten, 64 Cal. 520, 2 Pac. 405.

Colorado. — Union Coal Co. *v.* Edman, 16 Colo. 438, 27 Pac. 1060.

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

Georgia. — Haris Loan Co. *v.* Elliot Typewriter Co., 110 Ga. 302, 34 S. E. 1003.

Illinois. — Whiteside *v.* Margarel, 51 Ill. 507; Proctor *v.* Tows, 115 Ill. 138, 3 N. E. 569; Osgood *v.* Pacey, 23 Ill. App. 116; Mellor *v.* Carithers, 52 Ill. App. 86; Schoenhofen Brewing Co. *v.* Wengler, 57 Ill. App. 184; Cleveland C. C. & St. L. R. Co. *v.* Jenkins, 75 Ill. App. 17.

Indiana. — Trustees of Wabash Canal *v.* Bledsoe, 5 Ind. 132.

Iowa. — Wood Mowing Mach. Co. *v.* Crow, 70 Iowa 340, 30 N. W. 609.

Kansas. — Donaldson *v.* Everhart, 50 Kan. 718, 32 Pac. 405; Howe Machine Co. *v.* Clark, 15 Kan. 402;

cipal.[56] Otherwise if his acts as agent are known and acted upon by the principal.[57] Nor by declarations of another agent of the same principal unless such agent is authorized to make them and is acting, at the time within his authority.[58]

Where Alleged Agent Denies the Fact As a Witness. — If the alleged agent is called as a witness and denies the agency, his previous admissions of the fact may be proved, not to establish the fact, but to impeach the witness, the proper foundation having been laid.[59]

(2.) Proof of Agency for the Court. — The evidence to establish the agency being the foundation for proof of the admission of the alleged agent, is for the court and not for the jury.[60]

McCormick *v.* Roberts, 36 Kan. 552, 13 Pac. 827; Missouri Pac. Ry. Co. *v.* Johnson, 55 Kan. 344, 40 Pac. 641.

Maryland. — Harker *v.* Dement, 9 Gill 7, 52 Am. Dec. 670.

Massachusetts.—Brigham *v.* Peters, 1 Gray 139; Haney *v.* Donnelly, 12 Gray 361.

Michigan. — Bacon *v.* Johnson, 56 Mich. 182, 22 N. W. 276; Hatch *v.* Squires, 11 Mich. 185; North *v.* Metz, 57 Mich. 612, 24 N. W. 759.

Minnesota. — Sencerbox *v.* McGrade, 6 Minn. 484.

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

Missouri. — Craighead *v.* Wells, 21 Mo. 404; Peck *v.* Ritchey, 66 Mo. 144.

New York. — Ellis *v.* Messervil, 11 Paige Ch. 467.

Oregon. — Wictorwitz *v.* Farmers' Ins. Co., 31 Or. 569, 51 Pac. 75.

Pennsylvania. — Grim *v.* Bonnell, 78 Pa. St. 152; Central Pennsylvania T. & S. *v.* Thompson, 112 Pa. St. 118, 3 Atl. 436; Jordan *v.* Stewart, 23 Pa. St. 244.

Texas. — Latham *v.* Pledger, 11 Tex. 439; Waller *v.* Leonard, 89 Tex. 507, 35 S. W. 1045.

When Part of Res Gestae. — But declarations of his own as to his authority have been held admissible when they formed a part of the *res gestae*. Boone *v.* Thompson, 17 Tex. 605.

Must Be Proved by Independent Evidence. — Wailes *v.* Neal, 65 Ala. 59.

Accompanied by Acts. — The fact that the declarations are accompanied by acts does not render them admissible to prove the extent of his authority. Brigham *v.* Peters, 1 Gray (Mass.) 139.

By Admissions of Principal. — The agency may be proved by the admissions of the principal. Mix *v.* Osby, 62 Ill. 193.

56. *United States.* — Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326.

Kansas. — St. Louis & S. F. R. Co. *v.* Brown, 3 Kan. App. 260, 45 Pac. 118.

Michigan. — North *v.* Metz, 57 Mich. 612, 24 N. W. 759.

Missouri. — Craighead *v.* Wells, 21 Mo. 404.

Pennsylvania. — Whiting *v.* Lake, 91 Pa. St. 349; Central Pennsylvania T. & S. Co. *v.* Thompson, 112 Pa. St. 118, 3 Atl. 436.

57. Woodwell *v.* Brown, 44 Pa. St. 121.

58. Hirsch *v.* Oliver, 91 Ga. 554, 18 S. E. 354.

59. Strawbridge *v.* Spann, 8 Ala. (N. S.) 820; Shafer *v.* Lacock, 168 Pa. St. 497, 32 Atl. 44, 29 L. R. A. 254.

Other Means of Proving Agency. The means by which the existence of the relation of principal and agent may be established other than by admissions of the fact, do not fall within the scope of this article, but will be found under "PRINCIPAL AND AGENT."

60. Porter *v.* Robertson, 34 Ill. App. 74; Cliquot's Champagne, 3 Wall. 114; Munroe *v.* Stutts, 9 Ired. Law (N. C.) 49.

But see to the contrary Robinson

(3.) Degree of Proof Required. — The general rule is that if some evidence of the agency is produced, the admissions will be received and the question left to the jury.[61]

d. *Proof of Ratification Sufficient.* — If the alleged principal, with full knowledge of the facts, subsequently ratifies the acts of the party assuming to act for him, this is equivalent to a prior authorization.[62]

C. General Agents. — The rule that the admissions of an agent are admissible against his principal, only when acting as such, and within his authority, applies to general agents.[63] But in case of a general as distinguished from a special agent, the principal may be bound by his acts, and therefore by his admissions also, against his private instructions.[64]

In respect of the admissibility of his admissions, he differs from a special agent only in the extent of his authority, and the consequent enlargement of the scope of his power to bind his principal.[65]

v. Walton, 58 Mo. 380; Wendell *v.* Abbott, 45 N. H. 349.

Whether Agency Has Ceased or Not. — Where proof has been made of the agency and the admissions received, it is held that the question, whether the agency had ceased before the admissions were made, must be left to the jury with instructions to disregard such admissions if the agency had terminated. Stewartson *v.* Watts, 8 Watts (Pa.) 392.

61. Stewartson *v.* Watts, 8 Watts (Pa.) 392; Central Pennsylvania T. & S. Co. *v.* Thompson, 112 Pa. St. 118, 3 Atl. 436; Wendell *v.* Abbott, 45 N. H. 349; Cole *v.* Bean, 1 Ariz. 377; Minard *v.* Stillman, 35 Or. 259, 57 Pac. 1022.

62. Union Gold M. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565; Woodbury *v.* Larned, 5 Minn. 339; Bacon *v.* Johnson, 56 Mich. 182, 22 N. W. 276; Hatch *v.* Squires, 11 Mich. 185; Chattanooga R. & C. Co. *v.* Davis, 89 Ga. 708, 15 S. E. 626; Neely *v.* Naglee, 23 Cal. 152.

Ratification by Acquiescence. — And the ratification may be established by proof of acquiescence on the part of the alleged principal in the acts done or declarations made for him or in his name. Kelsey *v.* National Bank, 69 Pa. St. 426.

See "Principal and Agent."

63. Mitcham *v.* Schnessler, 98 Ala. 635, 13 So. 617; Willard *v.* Buckingham, 36 Conn. 395; White *v.* Miller, 71 N. Y. 118; Randall *v.* Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419; Hauen *v.* Brown, 7 Greenl. (Me.) 421; Ashmore *v.* Pennsylvania S. & T. Co., 38 N. J. Law 13; Smith *v.* N. C. R. Co., 68 N. C. 107; Louisville Ins. Co. *v.* Monarch, 18 Ky. Law 444, 36 S. W. 563.

64. Mussey *v.* Beecher, 3 Cush. (Mass.) 511; Lobdell *v.* Baker, 1 Mete. (Mass.) 193, 35 Am. Dec. 358.

65. Willard *v.* Buckingham, 36 Conn. 395; Lohnes *v.* Ins. Co. of N. A., 121 Mass. 439; Swanee *v.* McMahon, 1 Head (Tenn.) 582; Louisville & N. R. Co. *v.* Tift, 100 Ga. 86, 27 S. E. 765.

By General Agent Made Subsequently May Be Admissible. — A different rule is declared with respect to general agents in the case of Webb *v.* Smith, 6 Colo. 365, in which it is said, with respect to the power of the superintendent and secretary of a mining company to bind the company by admissions made subsequent to the transaction in controversy:

"The declarations objected to had reference to a past transaction. They were admissions of a debt previously contracted; therefore they were not admissible as a part of the *res gestae*. They could not bind the company in the way of an estoppel, but being

D. Special Agents. — If one is appointed for a special purpose, his declarations, amounting to admissions, are competent only so far as they are within this special authority and relate thereto.[66]

E. Public Officers or Agents. — a. *Generally.* —Public officers are but agents of the state or municipality they serve, and admissions made by them, in the performance of their duties and within their authority, are admissible against such state or municipality.[67] But not admissions made in conversation not in the presence of the

made by its general agents and representatives concerning an indebtedness clearly within their power to contract and pay, they were admissible under an exception to the rule excluding the declarations of an agent made subsequent to the transaction to which they related."

66. *United States.* — Lambert *v.* Smith, 1 Cranch C. C. 361, 14 Fed. Cas. No. 8028.

Alabama. — Wailes *v.* Neal, 65 Ala. 59; Singer Mfg. Co. *v.* McLean, 105 Ala. 316, 16 So. 912.

Arkansas. — Carter *v.* Burnham, 31 Ark. 212.

California. — Hutchinson *v.* Castle, 48 Cal. 152.

Georgia. — Akers *v.* Kirke, 91 Ga. 590, 18 S. E. 366; Lewis *v.* Equitable M. Co., 94 Ga. 572, 21 S. E. 224.

Illinois. — Reynolds *v.* Ferree, 86 Ill. 570; Central Warehouse Co. *v.* Sargeant, 40 Ill. App. 438; Thomas *v.* Rutledge, 67 Ill. 213.

Indiana. — Rowell *v.* Klien, 44 Ind. 290, 15 Am. Rep. 235; Baker *v.* Carr, 100 Ind. 330.

Kansas. — Kilpatrick-Koch Dry-goods Co. *v.* Kahn, 53 Kan. 274, 36 Pac. 327.

Massachusetts. — Blanchard *v.* Blackstone, 102 Mass. 343; Rowe *v.* Canney (Mass.), 29 N. E. 219; Manilla *v.* Houghton, 154 Mass. 465, 28 N. E. 784; Creed *v.* Creed, 161 Mass. 107, 36 N. E. 749; Johnson *v.* Trinity Church, 11 Allen 123; Lohnes *v.* Ins. Co. of N. A., 121 Mass. 439.

Michigan. — Hogsett *v.* Ellis, 17 Mich. 351.

Missouri. — Pomeroy *v.* Fullerton, 131 Mo. 581, 33 S. W. 173.

Nebraska. — Chicago B. & Q. R. Co. *v.* Starmer, 26 Neb. 630, 42 N. W. 706.

New Hampshire. — Demeritt *v.* Meserve, 39 N. H. 521.

New York.—Hyland *v.* Sherman, 2 E. D. Smith 234.

Pennsylvania. — Monocacy Bridge Co. *v.* American Iron Co., 83 Pa. St. 517.

Authority Can Not Be Enlarged by Agent's Declarations. — If the agency is, in fact, limited, the principal is not bound by any admissions or declarations of the agent's enlarging such authority. Thus it is said in Mussey *v.* Beecher, 3 Cush. (Mass.) 511:

"But an agent can not enlarge his authority any more by his declarations than by his other acts, and the rule is clear that the acts of an agent not within the scope of his authority do not bind the principal."

See also Bacon *v.* Johnson, 56 Mich. 182, 22 N. W. 276; Stollenwerck *v.* Thatcher, 115 Mass. 224.

67. *England.*—Reg. *v.* Inhabitants of Adderbury East, 5 Ad. & E. (N. S.) 187, 48 Eng. C. L. 186.

United States. — Los Angeles City Water Co. *v.* City of Los Angeles, 88 Fed. 720.

Connecticut. — Sharon *v.* Salisbury, 29 Conn. 113.

Iowa. — Yordy *v.* Marshall Co., 113 Iowa 340, 53 N. W. 298.

Massachusetts. — Blanchard *v.* Blackstone, 102 Mass. 343.

Missouri. — Blackmore *v.* Boardman, 28 Mo. 420.

New Hampshire. — Gray *v.* Rollingsford, 58 N. H. 253; Glidden *v.* Town of Unity, 33 N. H. 571.

Ohio. — Youngstown *v.* Moore, 30 Ohio St. 133.

others where the officer is only authorized to act with others as a body.[68]

b. *Admissible Only While Within Authority.* — The admissions of a public officer are admissible only when made in the performance of his duty as such officer, and within his authority.[69]

c. *Must Be About the Act Done.* — It is not enough that he is still in office when the admission is made. The rule that it must be a part of the *res gestae* applies. Therefore, the declaration, to be admissible, must be made in connection with and must relate to the official act in question.[70]

68. La Salle Co. *v.* Simmons, 5 Gill (Md.) 513; Yordy *v.* Marshall Co., 113 Iowa 340, 53 N. W. 298; Keough *v.* Scott Co., 28 Iowa 337; West Jersey Trac. Co. *v.* Camden Horse R. Co. (N. J. App.), 35 Atl. 49; Thornton *v.* Campton, 17 N. H. 338; Chicago *v.* Greer, 9 Wall. (U. S.) 726; Davis *v.* Town of Rochester, 66 Hun 629, 21 N. Y. Supp. 215; Walker *v.* Dunspaugh, 20 N. Y. 170; Jex *v.* Board of Education, 1 Hun (N. Y.) 157; Weir *v.* Borrough of Plymouth, 148 Pa. St. 566, 24 Atl. 94; Salado College *v.* Davis, 47 Tex. 131; Low *v.* Perkins, 10 Vt. 532, 33 Am. Dec. 217.

69. *United States.* — Lee *v.* Munroe, 7 Cranch 366; U. S. *v.* Martin, 2 Paine 68, 26 Fed. Cas. No. 15,732.

Illinois. — County of La Salle *v.* Simmons, 5 Gilm. 513.

Indiana. — Holton *v.* Board of Com'rs, 55 Ind. 194.

Iowa. — Yordy *v.* Marshall Co., 113 Iowa 340, 53 N. W. 298; Peters *v.* City of Davenport, 104 Iowa 625, 74 N. W. 6.

Maine. — Brighton *v.* St. Albans, 77 Me. 177; Mitchell *v.* Rockland, 41 Me. 363, 66 Am. Dec. 252; Smith *v.* Bangor, 72 Me. 249; Corinna *v.* Exeter, 13 Me. 321; Foss *v.* Whitehouse, 94 Me. 491, 48 Atl. 109.

Massachusetts.—Burgess *v.* Wareham, 7 Gray 345; Weeks *v.* Inhabitants of Needham, 156 Mass. 289, 31 N. E. 8.

New York. — Cortland Co. *v.* Herkimer Co., 44 N. Y. 22; Stone *v.* Town of Poland, 58 Hun 21, 11 N. Y. Supp. 498.

Pennsylvania. — Green *v.* North Buffalo Tp., 56 Pa. St. 110.

Vermont. — Green *v.* Town of Woodbury, 48 Vt. 5.

Only Competent to Explain the Acts of Officers. — In Brighton *v.* St. Albans, 77 Me. 177, it is held that it is the acts and not the words of the officer that are evidence, and that their words are only admissible when accompanying and as a part of their acts, and therefore the mere casual remark of an officer unconnected with any act is not competent as an admission.

Must Be at The Time of Doing the Acts. — The admission must be at the time of and connected with the act done. Burgess *v.* Inhabitants of Wareham, 7 Gray (Mass.) 345.

Contractor for City. —Declarations of a contractor for a public corporation as to the character of the work done, where a question of negligence is involved, are inadmissible against the corporation. Moore *v.* Hazelton Tp., 118 Mich. 425, 76 N. W. 977.

70. Cortland Co. *v.* Herkimer Co., 44 N. Y. 22; Blanchard *v.* Blackstone, 102 Mass. 343.

By Public Officer, When Competent. — In Burgess *v.* Inhabitants of Wareham, 7 Gray (Mass.) 345, the offer was made to prove the declarations of a surveyor of a highway uttered while he was still in office, but some time after the work to which the declarations related was done, and the court said:

"And when it is said that his declarations are competent made whilst his agency continues, we understand it to mean not whilst he continues to hold the office in respect to which he made the contract, but

d. *Of Deputy Against His Principal.* — Where a public officer is sought to be made liable, the admissions of his deputy by whom he was represented in the transaction are provable against him like that of any other agent, acting within his authority, but not otherwise.[71] But if the default or wrongful act was that of the deputy himself for which the officer is sued, the admissions of the deputy are competent as a party in interest.[72]

e. *By Party to Action Against Sheriff.* — There are cases in which a sheriff failing in his duty under a writ is held bound by admissions made by a party to the suit.[73]

F. Officers and Employees of Private Corporations. — a. *Generally.* — The rule that the admission of the agent is the admission of the principal is, with like limitations, applicable to private corporations.[74]

during the negotiation or execution of the contract. After the particular negotiation or transaction out of which the controversy grows has ceased and terminated, though the agent continues to hold the same office and the same delegated authority, the declarations of the agent are not binding on the principal. His declarations would be mere hearsay, like those of any other."

After Term Expires. — The admissions of a public officer made after the expiration of his term of office are inadmissible. School Directors *v.* Wallace, 9 Ill. App. 312.

71. *England.* — Snowball *v.* Goodricke, 4 Barn. & A. 541, 24 Eng. C. L. 112; Underhill *v.* Wilson, 6 Bing. 697, 19 Eng. C. L. 208.

Maine. — Smith *v.* Bodfish, 39 Me. 136; Savage *v.* Balch, 8 Greenl. 27.

Maryland. — Somerville *v.* Hunt, 3 H. & McH. 113.

Massachusetts. — Tyler *v.* Ulmer, 12 Mass. 163.

New York. — Barker *v.* Binniger, 14 N. Y. 270.

Pennsylvania. — Wheeler *v.* Hambright, 9 Serg. & R. 390.

Vermont. — Lyman *v.* Lull, 20 Vt. 349.

Must Be While Acting As Deputy. Statements made by the deputy after he has ceased to be such are inadmissible. Smith *v.* Bodfisb, 39 Me. 136; Barker *v.* Brinniger, 14 N. Y. 270.

And Within His Authority. — Grimshaw *v.* Paul, 76 Ill. 164.

72. Tyler *v.* Ulmer, 12 Mass. 164.

73. Williams *v.* Bridges, 2 Stark. 42, 3 Eng. C. L. 235.

74. *United States.* — Zenia Bank *v.* Stewart, 114 U. S. 224; Anvil Min. Co. *v.* Humble, 153 U. S. 540, 14 Sup. Ct. 876; St. Louis & S. F. R. Co. *v.* McLelland, 66 Fed. 116; Vicksburg & M. R. Co. *v.* O'Brien, 119 U. S. 99, 7 Sup. Ct. 118; *In re* Oregon Pub. Co., 13 N. B. R. 503, 18 Fed. Cas. No. 10,559; Walrath *v.* Champion Min. Co., 63 Fed. 552; Atchison T. & S. F. R. Co. *v.* Parker, 55 Fed. 595; Insurance *v.* Mahone, 21 Wall. 152.

Alabama. — Ricketts *v.* Birmingham St. Ry. Co., 85 Ala. 600, 5 So. 353; Smith *v.* Tallahassee Branch etc., 30 Ala. 650; Danner Land Co. *v.* Stonewall Ins. Co., 77 Ala. 184; Huntsville Belt Line Co. *v.* Corpening, 97 Ala. 681, 12 So. 295; Alabama Great S. R. Co. *v.* Hill, 76 Ala. 303; Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 15.

Arkansas. — St. Louis & S. F. R. Co. *v.* Barger, 52 Ark. 78, 12 S. W. 156; St. Louis & M. S. R. Co. *v.* Sweet, 57 Ark. 287, 21 S. W. 587; St. Louis I. M. *v.* Kelley, 61 Ark. 52, 31 S. W. 884.

California. — Bullock *v.* Consumers Lumber Co. (Cal.), 31 Pac. 367; Green *v.* Ophir C. S. & G. M. Co., 45 Cal. 522; Abbott *v.* The Seventy-six Land Co., 87 Cal. 322, 25

b. *Narrations of Past Transactions Inadmissible.* — But the rule

Pac. 693; Geake *v.* Cal. S. Nav. Co., 9 Cal. 251, 7 Am. Dec. 650; Beasely *v.* San Jose F. P. Co., 92 Cal. 388, 28 Pac. 485; Durkee *v.* Central Pac. R. Co., 69 Cal. 533, 11 Pac. 130, 58 Am. Dec. 562.

Colorado. — Denver & R. G. R. Co. *v.* Wilson, 4 Colo. App. 355, 36 Pac. 67; Union Pac. R. Co. *v.* Hepner, 3 Colo. App. 313, 33 Pac. 72.

Connecticut. — Toll Bridge Co. *v.* Betsworth, 30 Conn. 380; Norwich & W. R. Co. *v.* Cahill, 18 Conn. 484.

Florida. — Jacksonville T. & K. R. Co. *v.* Lockwood, 33 Fla. 573, 15 So. 327.

Georgia. — Hematite Min. Co. *v.* East Tennessee V. & G. R. Co., 92 Ga. 268, 18 S. E. 24; Chattanooga R. & C. R. Co. *v.* Davis, 89 Ga. 708, 15 S. E. 626; East Tenn. V. & G. R. Co. *v.* Maloy, 77 Ga. 237, 2 S. E. 941; East Tenn. V. & G. R. Co. *v.* Duggan, 51 Ga. 212; Southern Ex. Co. *v.* Duffey, 48 Ga. 358; Georgia R. R. Co. *v.* Smith, 76 Ga. 634.

Illinois. — Lake Shore & M. S. R. Co. *v.* Baltimore & O. C. R. Co., 149 Ill. 272, 37 N. E. 91; Chicago B. & Q. R. Co. *v.* Coleman, 18 Ill. 297, 68 Am. Dec. 544; Chicago B. & Q. R. Co. *v.* Lee, 60 Ill. 501; Chicago B. & Q. R. Co. *v.* Riddle, 60 Ill. 534; Grand Prairie Ass'n *v.* Riordan, 61 Ill. App. 457; Merchant's Dispatch Co. *v.* Leysor, 89 Ill. 43.

Indiana. — Mut. Benefit L. Ins. Co. *v.* Cannon, 48 Ind. 264; Cleveland C. C. & I. R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754; Heller *v.* Crawford, 37 Ind. 279; Bellefontaine R. Co. *v.* Hunter, 33 Ind. 335, 5 Am. Dec. 201; Lafayette R. Co. *v.* Ehman, 30 Ind. 83; Ohio & M. R. Co. *v.* Stein, 133 Ind. 243, 31 N. E. 180, 19 L. R. A. 733; Tipton Fire Ins. Co. *v.* Barnheisel, 92 Ind. 88; Adams Ex. Co. *v.* Harris, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214; Indianapolis R. Co. *v.* Jewett, 16 Ind. 273; Pennsylvania R. Co. *v.* Weddle, 100 Ind. 138.

Iowa. — Peden *v.* Chicago R. I. & P. R. Co., 78 Iowa 131, 42 N. W. 625, 4 L. R. A. 101; Ayres *v.* Hartford Fire Ins. Co., 17 Iowa 176, 85 Am. Dec. 553; Verry *v.* B. C. R. & M. R. Co., 47 Iowa 549; Sioux Valley Bank *v.* Kellogg, 81 Iowa 124, 46 N. W. 859; Deere *v.* Wolf, 77 Iowa 115, 41 N. W. 588; Des Moines & D. L. Co. *v.* Polk Co. H. & T. Co., 82 Iowa 663, 45 N. W. 773.

Kansas. — Donnell *v.* Clark, 12 Kan. 154; Union Pac. R. Co. *v.* Fray, 35 Kan. 700, 12 Pac. 98; Atchison T. & S. F. R. Co. *v.* Wilkinson, 55 Kan. 83, 39 Pac. 1043; Amazon Ins. Co. *v.* Briesen, 1 Kan. App. 758, 41 Pac. 1116.

Kentucky. — Louisville & N. R. Co. *v.* Foley, 94 Ky. 220, 21 S. W. 866; Chesapeake & O. R. Co. *v.* Reeves, 11 Ky. Law 14, 11 S. W. 464; McLead *v.* Ginther, 80 Ky. 399.

Maine. — Barnham *v.* Grand Trunk R. Co., 63 Me. 298; Linne Rock Bank *v.* Hewett, 52 Me. 531; Franklin Bank *v.* Steward, 37 Me. 519.

Maryland. — Merchants' Nat. Bank *v.* Marine Bank, 3 Gilm. 96, 43 Am. Dec. 300; Baltimore & O. R. Co. *v.* State, 62 Md. 479.

Massachusetts. — Blanchard *v.* Blackstone, 102 Mass. 343; Richmond Iron Works *v.* Hayden, 132 Mass. 190; Wellington *v.* Boston M. & R. Co., 158 Mass. 185, 33 N. E. 393; Robinson *v.* Fitchburg R. Co., 7 Gray 92; Grinnell *v.* Western U. Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; Tripp *v.* New Metallic Pac. Co., 137 Mass. 499; Lane *v.* Boston & A. R. Co., 112 Mass. 455.

Michigan. — McCammon *v.* Detroit L. & N. R. Co., 66 Mich. 442, 33 N. W. 728; Sisson *v.* Cleveland R. Co., 14 Mich. 489, 96 Am. Dec. 252; Peek *v.* Detroit Novelty Works, 29 Mich. 313; Kalamazoo M'f'g Co. *v.* McAlister, 36 Mich. 327.

Mississippi. — Moore *v.* Chicago R. Co., 59 Miss. 243.

Missouri. — Northrup *v.* Miss. Valley Ins. Co., 47 Mo. 435, 4 Am. Rep. 337; Malecek *v.* Tower Grove R. Co., 57 Mo. 17; Kelly *v.* Chicago & A. R. Co., 88 Mo. 534; Western Boatmen's B. A. *v.* Kribben, 48 Mo. 37; Costigan

v. Michael Trans. Co., 38 Mo. App. 219.

New Hampshire. — Low *v.* Railroad, 45 N. H. 370; Pemigewassett Bank *v.* Rogers, 18 N. H. 255.

New Jersey. — Halsey *v.* Lehigh Valley R. Co., 45 N. J. Law 26; Stults *v.* East Brunswick Tp. Co. (N. J.), 9 Atl. 193; Agricultural Ins. Co. *v.* Potts, 55 N. J. Law 158, 26 Atl. 27.

New York. — Bingham *v.* Hyland, 53 Hun 631, 6 N. Y. Supp. 75; McCotter *v.* Hoaker, 8 N. Y. 497; Anderson *v.* Rome N. & O. R. Co., 54 N. Y. 334; First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278; White *v.* Miller, 71 N. Y. 118; Com'rs *v.* Plank Road Co., 7 How. Pr. 94; Luby *v.* Hudson River R. Co., 17 N. Y. 131; Furst *v.* Second Ave. R. Co., 72 N. Y. 542; Pierson *v.* Atlantic Nat. Bank, 77 N. Y. 304; Bank of New York *v.* American Dock Co., 148 N. Y. 339, 38 N. E. 713; Alexander *v.* Caldwell, 83 N. Y. 480; Niagara Falls Co. *v.* Bachman, 66 N. Y. 261; Wild *v.* New York Min. Co., 59 N. Y. 644; Matteson *v.* N. Y. Cent. R. Co., 62 Barb. 364; Trustees First Baptist Church *v.* Brooklyn Fire Ins. Co., 18 Barb. 69.

North Carolina. — Porter *v.* Richmond & D. R. Co., 97 N. C. 46, 2 S. E. 374.

Oregon.—Nichols *v.* Southern Pac. Co., 23 Or. 123, 31 Pac. 296, 18 L. R. A. 55.

Pennsylvania. — Long *v.* North British & M. F. Ins. Co., 137 Pa. St. 335, 20 Atl. 1014, 21 Am. St. Rep. 879; Stewart *v.* Huntingdon Bank, 11 Serg. & R. 267, 14 Am. Dec. 628; Spalding *v.* Bank of Susquehanna, 9 Pa. St. 28; Hanover R. Co. *v.* Coyle, 55 Pa. St. 396; Huntingdon R. Co. *v.* Decker, 82 Pa. St. 119; Pennsylvania R. Co. *v.* Books, 57 Pa. St. 339, 98 Am. Dec. 229; Magill *v.* Kaufman, 4 Serg. & R. 317, 8 Am. Dec. 713; Pennsylvania R. Co., *v.* Titesville Co., 71 Pa. St. 350; Erie & W. V. R. Co. *v.* Smith, 125 Pa. St. 259, 17 Atl. 443; Custar *v.* Titesville G. & W. Co., 63 Pa. St. 38; Harrisburg Bank *v.* Tyler, 3 Watts & S. 373.

South Carolina. — Simmons Hardware Co. *v.* Bank of Greenwood, 41 S. C. 177, 19 S. E. 502; Aiken *v.* Telegraph Co., 5 Rich. 358; Beckham *v.* So. R. Co., 50 S. C. 25, 27 S. E. 611.

South Dakota.—Wendt *v.* Chicago, St. P. M. & M. O. R. Co., 4 S. D. 476, 57 N. W. 226.

Tennessee. — Sewell *v.* McMahon, 1 Head 582.

Texas. — Laredo Elec. L. & M. Co. *v.* U. S. Elec. L. Co. (Tex. Civ. App.), 26 S. W. 310; Texas Pac. R. Co. *v.* Lester, 75 Tex. 56, 12 S. W. 955; Gulf C. & S. F. R. Co. *v.* Southwick (Tex. Civ. App.), 30 S. W. 592; Blain *v.* Pac. Ex. Co., 69 Tex. 74, 6 S. W. 679; Western Union Tel. Co. *v.* Bennett, 1 Tex. Civ. App. 558, 21 S. W. 699; Houston E. & W. T. R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2.

Utah. — Idaho Forwarding Co. *v.* Fireman's Fund Ins., 8 Utah 41, 29 Pac. 826; 17 L. R. A. 586; Burton *v.* Winsor & U. S. M. Co., 2 Utah 240.

Virginia. — Baltimore & O. R. Co. *v.* Gallahue, 12 Gratt. 655, 65 Am. Dec. 254.

Washington. — Weideman *v.* Tacoma R. & M. Co., 7 Wash. 517, 35 Pac. 414.

West Virginia. — Mulheman *v.* National Ins. Co., 6 W. Va. 508.

Wisconsin.—Hooker *v.* Chicago M. & St. P. R. Co., 76 Wis. 542, 44 N. W. 1085.

Wyoming. — Rock Spring Nat. Bank *v.* Luman, 5 Wyo. 159, 38 Pac. 678.

By Agent of a Corporation. — In Denver & R. G. R. Co. *v.* Wilson, 4 Colo. App. 355, 36 Pac. 67, it is said: "A corporation can act only through its officers and agents. Their acts done within the scope of their authority, are its own acts. The original book was made by the defendant's agent in the course of his duties. In the same capacity he made the time sheet, and sent it to the superintendent, who made the copy for preservation in his office, as pertaining to the affairs of his division, and it is immaterial whether it was made by a letter-press, or by a slower and more tedious process. It was still a copy made by him as superintendent of the company. The time book,

time sheet and impression book were therefore the time book, time sheet and impression book of defendant; and either might be used in evidence as the defendant's admission of the same fact."

Admissions by Acquiescence.—The failure of an officer of a corporation having authority in the premises to deny a material fact stated in his presence will amount to an admission by acquiescence. Paulson Mercantile Co. *v.* Seaver, 8 N. D. 215, 77 N. W. 1001.

By President of a Corporation. The case of Ricketts *v.* Birmingham St. R. Co., 85 Ala. 600, 5 So. 353, was to recover for personal injuries charged to have resulted from the negligence of the defendant. Certain declarations of the president of the company made after the injury was inflicted were offered as admissions against the company. In passing upon the question as to the admissibility of this evidence, the court said: "The declarations of Morris, the president of the defendant corporation, are not shown to have been made while he was in the performance of his duties as such officer, or while acting for the company, or while transacting any business contemporaneous with the declarations, which they served to elucidate or explain. The declarations were not within the scope of his authority, and are not binding on the defendant."

And in Danner Land Co. *v.* Stonewall Ins. Co., 77 Ala. 184, it is said: "The declarations of Danner, who was president and business manager of the Danner Land and Lumber Company, made to Davis and others, several days after the delivery of the deed in question, were inadmissible against either the company or the defendant Strong, its assignee, for the purpose of showing that the contracting parties intended such deed to operate either as a mortgage or a conditional sale. The declarations and admissions of an agent of a corporation stand clearly on the same footing with those of an agent of a natural person. 'To bind the principal, they must be within the scope of the authority confided to the agent, and must accompany the act or contract which he is authorized to make.'"

United States. — Goetz *v.* Bank of Kansas City, 119 U. S. 551, 7 Sup. Ct. 318; Tuthill Spring Co. *v.* Shaver Wagon Co., 35 Fed. 644; Jesup *v.* Ill. Cent. R. Co., 43 Fed. 483.

Alabama. — Henry *v.* Northern Bank, 64 Ala. 527.

Illinois. — Chicago B. & Q. Co. *v.* Coleman, 18 Ill. 297, 68 Am. Dec. 544; Lake Shore & M. S. R. Co. *v.* Baltimore & O. and C. R. Co., 149 Ill. 272, 37 N. E. 91.

Iowa. — Hamilton Buggy Co. *v.* Iowa Buggy Co., 88 Iowa 364, 55 N. W. 496; First Nat. Bank *v.* Booth, 102 Iowa 333, 71 N. W. 238.

Maine. — Lime Rock Bank *v.* Hewett, 52 Me. 51.

Maryland. — City Bank *v.* Bateman, 7 Har. & J. 104.

Massachusetts.—Robinson *v.* Fitchburg, etc. R. Co., 7 Gray 92.

Missouri. — Northrup *v.* Miss. Valley Ins. Co., 47 Mo. 435, 4 Am. Rep. 337; Costigan *v.* Michael Trans. Co., 38 Mo. App. 219.

New Hampshire. — Low *v.* Railroad, 45 N. H. 370.

New Jersey. — Halsey *v.* Lehigh Valley R. Co., 45 N. J. Law 26.

Pennsylvania. — Spalding *v.* Bank of Susquehanna, 9 Pa. St. 28.

South Carolina. — Charleston & S. R. R. Co. *v.* Blake, 12 Rich. 634.

Tennessee. —Ward Courtney & Co. *v.* Tennessee C. & I. R. Co. (Tenn. App.), 57 S. W. 103.

Wisconsin. — Hazelton *v.* Union, 32 Wis. 34.

Must Be Engaged in Performance of His Duty. — The president of a corporation may bind the company by his admissions only when engaged in the performance of his duties as such president as in case of other agents. Flour City Nat. Bank *v.* Grover, 88 Hun 4, 34 N. Y. Supp. 496.

Must Be Authorized by the Board of Directors. — In the case of Stewart *v.* Huntingdon Bank, 11 Serg. & R. (Pa.) 267, 14 Am. Dec. 628, it was held that the declarations of the officers of a bank were not evidence against it if unauthorized by the

excludes narrations of past transactions. Such declarations are

board of directors. Goetz *v.* Bank of Kansas City, 119 U. S. 551, 7 Sup. Ct. 318; Cunningham *v.* Cochran, 18 Ala. 479, 52 Am. Dec. 230; Tuthill Spring Co. *v.* Shaver Wagon Co., 35 Fed. 644. See also as to the authority of the president of a corporation to make admissions admissible against his company, Chicago B. & Q. R. Co. *v.* Coleman, 18 Ill. 297, 68 Am. Dec. 544; Farmers' Bank *v.* McKee, 2 Pa. St. 318; Halsey *v.* Lehigh Valley R. Co., 45 N. J. Law 26. But see Costigan *v.* Michael Trans. Co., 38 Mo. App. 219; First Nat. Bank *v.* Booth, 102 Iowa 533, 71 N. W. 238.

Ordinary Affairs of Corporation. The rule that the president must be authorized by the board of directors does not apply to the ordinary business affairs of the company that fall within the duties of the president, and are usually performed by him. Chicago B. & Q. R. Co. *v.* Coleman, 18 Ill. 297, 68 Am. Dec. 544.

By Conductor of Railroad Train. In Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 15, an action for damages for injury to the plaintiff alleged to have resulted from the negligence of the defendant railroad company, it was offered to prove the statements of the conductor of the train to a passenger a moment before the accident, of the bad condition of the road, and that his train had run off the track five consecutive times next preceding the present trip; but the court held the evidence to be inadmissible, saying: "It is true there is a difference between the agent of a corporation and the agent of an individual, because the corporation, if it act or speak at all, can do so only through an agent. Some of its agents are, in some instances, the corporation itself, and others its mere employees or servants. It would be equally unjust to charge it with all the statements of its agents, or to relieve it entirely from responsibility for such declarations. If the statements of the conductor had been made the day before the accident, they would not be supposed to be the admissions of the defendant, or to be a part of the *res gestae*. Their coincidence alone, without other connection, can not change their character." See also Moore *v.* Chicago R. Co., 59 Miss. 243; Furst *v.* Second Av. R. Co., 72 N. Y. 542; Gulf C. & S. F. R. Co. *v.* Southwick, (Tex. Civ. App.), 30 S. W. 592.

It is otherwise if the declarations are made while engaged in and as a part of his duty as conductor. Sisson *v.* Cleveland, etc. R. Co., 14 Mich. 489, 90 Am. Dec. 252.

After an Accident.—The same rule applies if statements are made by a conductor after an accident has occurred. Jamnison *v.* Chesapeake & O. R. Co., 92 Va. 327, 23 S. E. 758; Nebonne *v.* Concord R. Co., 67 N. H. 531, 38 Atl. 17; Reem *v.* St. Paul City R. Co., 77 Minn. 503, 80 N. W. 638.

The Rule Extends to Ticket Agents. Acts and admissions of ticket agents within the scope of their authority, and while acting therein, are within the rule. Burnham *v.* Grand Trunk R. Co., 63 Me. 298.

By a Brakeman. — In Patterson *v.* Wabash, etc. R. Co., 54 Mich. 91, 19 N. W. 761, it was held that a brakeman's admission that he caused a railway accident, was inadmissible in an action arising therefrom against the company by which he was employed, where the statement was not made in the execution of his duty, or while the act to which it referred was in progress, and that such an admission could not bind the company where it did not appear that the act done was in the line of his duty. See also Kelly *v.* Chicago & A. R. Co., 88 Mo. 534.

Subsequent Statement Sometimes Admissible. — In Malecek *v.* Tower Grove etc. R. Co., 57 Mo. 17, it was held, in a case for damages for ejecting a passenger from a street car, that the statements of the superintendent of the street car company, made three days later, admitting and justifying the act of the driver were competent.

inadmissible.[75]

c. *Reports Made to Superior Officers.* — The fact that the statements of employees are contained in reports made to superior officers prepared after the transaction, although required by the company to be made, does not change the rule. They are inadmissible as admissions.[76]

d. Must Be Acting As Agent. — The admission of an officer of a corporation is not admissible merely because he sustains that relation to the company. He must be acting in the capacity of an agent with authority to bind it, and in the line of his duty.[77]

75. *United States.* — Goetz *v.* Bank of Kansas City, 119 U. S. 551, 7 Sup. Ct. 318.

Alabama. — Commercial F. Ins. Co. *v.* Morris, 105 Ala. 498, 18 So. 34.

Arkansas. — St. Louis, I. M. & S. R. Co. *v.* Kelley, 61 Ark. 52, 31 S. W. 884; St. Louis, I. M. & S. R. Co. *v.* Sweet, 57 Ark. 287, 21 S. W. 587.

California. — Durkee *v.* Cent. Pac. R. Co., 69 Cal. 533, 11 Pac. 130, 58 Am. Dec. 562; Silversa *v.* Iverson, 128 Cal. 187, 60 Pac. 687; Hewes *v.* German F. Co., 106 Cal. 441, 39 Pac. 853.

Georgia. — Hermatite Min. Co. *v.* East Tenn., V. & G. R. Co., 92 Ga. 268, 18 S. E. 24.

Indiana. — Bellefontaine R. Co. *v.* Hunter, 33 Ind. 335, 5 Am. Dec. 201; Ohio & M. R. Co. *v.* Stein, 133 Ind. 243, 31 N. E. 180, 19 L. R. A. 733.

Kansas. — Union Pac. R. R. Co. *v.* Fray, 38 Kan. 700, 12 Pac. 98; Acme Harvester Co. *v.* Madden, 4 Kan. App. 598, 46 Pac. 319.

Kentucky. — Graddy *v.* Western Union Tel. Co., 19 Ky. Law 1455, 43 S. W. 468; Chesapeake & O. R. Co. *v.* Reeves, 11 Ky. Law 14, 1 S. W. 464; East Tenn. Tel. Co. *v.* Simms, 18 Ky. Law 761, 38 S. W. 131.

Maine. — Franklin Bank *v.* Cooper, 36 Me. 179.

Michigan. — Hall *v.* Murdock, 119 Mich. 389, 78 N. W. 329; Peek *v.* Detroit Novelty Works, 29 Mich. 313.

New Hampshire. — Pemigewassett Bank *v.* Rogers, 18 N. H. 255.

North Carolina. — Branch *v.* Wilmington & W. R. Co., 88 N. C. 573; Williams *v.* Williams, 6 Ired. (Law) 281.

Pennsylvania. — Pennsylvania R. Co. *v.* Books, 57 Pa. St. 339, 98 Am. Dec. 229.

76. Reports to Superior Officers. The case of Carroll *v.* East Tennessee, V. & G. R. Co., 82 Ga. 452, 10 S. E. 163, was an action for damages for personal injuries received in an accident. Reports of the accident were made to the general manager of the defendant company by the superintendent, by the conductor, supported by his affidavit, and others, embracing engineer, fireman, flagman, brakeman, and another conductor, the latter reports being transmitted from the superintendent and along with his report to the general manager. It was held by the court that these reports having had their origin many days after the happening of the event to which they related, were no part of the *res gestae* of the cause of action on trial, but mere narrative touching past occurrences, and were, therefore, inadmissible. But see to the *contrary*, Rogers *v.* Trustees of N. Y. & B. Bridge, 11 App. Div. 141, 42 N. Y. Supp. 1046, *affirmed*, 54 N. E. 1094.

77. *United States.* — Fidelity & Dep. Co. *v.* Courtney, 103 Fed. 599.

Alabama. — Huntsville Belt Line, etc. Co. *v.* Corpening, 97 Ala. 681, 12 So. 295; Mobile & G. R. Co. *v.* Cogsbill, 85 Ala. 456, 5 So. 188; Ricketts *v.* Birmingham St. R. Co., 85 Ala. 600, 5 So. 353; Postal Tel. Co. *v.* Lenoir, 107 Ala. 640, 18 So. 266.

Arkansas. — Pacific Mut. L. Ins. Co. *v.* Walker, 67 Ark. 147, 53 S. W. 675.

California. — Green *v.* Ophir C. S. & G. M. Co., 45 Cal. 522.

G. Attorneys-at-Law. — a. *Are Agents of Clients.*—Attorneys-at-law are the agents of their clients and may, unless restrained by statutory limitations, bind them by their admissions the same as

Colorado. — Emerson *v.* Burnett, 11 Colo. App. 86, 52 Pac. 752.

Connecticut. — Hartford Bank *v.* Hart, 3 Day 491.

Georgia. — Hematite Min. Co. *v.* East Tenn., V. & G. R. Co., 92 Ga. 268, 18 S. E. 24.

Illinois. — Hodgerson *v.* St. L., C. & St. P. R. Co., 160 Ill. 430, 43 N. E. 614.

Indiana. — Lafayette R. Co. *v.* Ehman, 30 Ind. 83.

Iowa. — Mundheck *v.* Cent. Iowa R. Co., 57 Iowa 718, 11 N. W. 656.

Kentucky. — Bank of Kentucky *v.* Todd, 1 A. K. Marsh. 116; Chesapeake & O. R. Co. *v.* Smith, 18 Ky. Law 1079, 39 S. W. 832; Graddy *v.* Western Union Tel. Co., 19 Ky. Law 1455, 43 S. W. 468.

Maine. — Pallets *v.* Ocean Ins. Co., 14 Me. 141.

Maryland. — Merchants' Bank *v.* Marine Bank, 3 Gill. 964, 43 Am. Dec. 300; Rowe *v.* Baltimore & O. R. Co., 82 Md. 493, 33 Atl. 761; Baltimore & O. R. Co. *v.* State, 62 Md. 479; Phelps *v.* George's Creek & C. R. Co., 60 Md. 536; Dietrich *v.* Baltimore & H. S. R. Co., 58 Md. 347.

Massachusetts. — Pratt *v.* Ofdensburg & L. C. R. Co., 102 Mass. 557; Boston & M. R. Co. *v.* Ordway, 140 Mass. 510, 5 N. E. 627.

Michigan. — Grand Trunk R. Co. *v.* Nichols, 18 Mich. 170.

Minnesota.—Halverson *v.* Chicago, M. & St. P. R. Co., 57 Minn. 142, 58 N. W. 871; Doyle *v.* St. Paul & M. R. Co., 42 Minn. 79, 43 N. W. 787.

Missouri. — Midland Lumber Co. *v.* Kreeger, 52 Mo. App. 418; Bangs Milling Co. *v.* Burns, 152 Mo. 350, 53 S. W. 923.

Nebraska. — Columbia Nat. Bank *v.* Rice, 48 Neb. 428, 67 N. W. 165.

Nevada. — Meyer *v.* Virginia & T. R. Co., 16 Nev. 341.

New York. — Comrs. *v.* Plank Road Co., 7 How. Pr. 74; Hay *v.* Platt, 66 Hun 448, 21 N. Y. Supp. 362; Saper *v.* Buffalo & R. Co., 19 Barb. 310; Van Wagenan *v.* Genesee Falls S. S. Ass'n., 88 Hun 43, 34 N. Y. Supp. 491; Drake *v.* New York Cent. & H. R. Co., 80 Hun 490, 30 N. Y. Supp. 671; Strong *v.* Wheaton, 38 Barb. 616.

North Carolina. — Brauch *v.* Wilmington & W. R. Co., 88 N. C. 573.

Oregon.—Wicktorwitz *v.* Farmers' Ins. Co., 31 Or. 569, 51 Pac. 75; First Nat. Bank *v.* Linn Co. Nat. Bank, 30 Or. 296, 47 Pac. 614.

Pennsylvania. — Baltimore & O. R. Ass'n. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 2 L. R. A. 44.

South Carolina. — Waldrop *v.* Greenville L. & S. R. Co., 28 S. C. 57, 5 S. E. 471; Mars *v.* Va. Home Ins. Co., 17 S. C. 514.

South Dakota. — Plymouth Co. Bank *v.* Gilman, 3 S. D. 170, 52 N. W. 869.

Texas. — Salado College *v.* Davis, 47 Tex. 131; Long *v.* Moore, 19 Tex. Civ. App. 363, 48 S. W. 43.

Wisconsin. — Scott *v.* Home Ins. Co., 53 Wis. 238, 10 N. W. 387.

Different Rule Where Question One of Notice. — The rule that an officer of a corporation must, in order to make his admissions admissible against the corporation, be acting in the line of his duty, does not apply where the question is one of notice to the corporation. There it is immaterial as to any conversations with such officer relating to the mere question of notice or knowledge, whether he was then acting in his official capacity and in the line of his duty or not. Garretson *v.* Merchants' & Bankers' Ins. Co., 92 Iowa 293, 60 N. W. 540; Hopkins *v.* Boyd, 18 Ind. App. 63, 47 N. E. 480. See also Rogers *v.* Trustees N. Y. & B. Bridge Co., 11 App. Div. 141, 42 N. Y. Supp. 1046.

But in such case the officer must be one having authority in the premises. Ohio & M. R. Co. *v.* Levy, 134 Ind. 343, 32 N. E. 815; Nelson *v.* Southern Pac. Co., 15 Utah 325, 49 Pac. 644.

When Authority Will Be Presumed.

other agents.[78] Their authority in respect of judicial admissions

Sometimes the authority of the agent to bind the corporation by his admissions will be presumed. Peden *v.* Chicago, R. I. & P. R. Co., 78 Iowa 131, 42 N. W. 625, 4 L. R. A. 401; Amazon Ins. Co. *v.* Briesen, 1 Kan. App. 758, 41 Pac. 1116.

By Director or Stockholder.—"The next question presented, relates to the admission of the declarations of Benjamin Knight, a stockholder and one of the directors of the company. The declaration was not made while acting in the business of the company, but after the loss happened; and it purports to state the knowledge of the company at the time the insurance was effected. Such declarations cannot be received as coming from an agent of the company, when he was not acting in that character. Haven *v.* Brown, 7 Greenl. 421. The rights of all corporate bodies would be wholly insecure, and at the mercy of each corporator, if the admissions or declarations of one corporator could charge the corporation. The principle cannot be admitted. And the testimony must be regarded as improperly received. 2 Stark Ev. 580; 3 Day, 491, Hartford Bank *v.* Hart." Polleys *v.* Ocean Ins. Co., 14 Me. 141.

By Organizers of Corporation Before They Became Officers. — Statements made by persons proposing to organize a corporation, and who subsequently become its officers, are inadmissible against the corporation organized subsequent to the making of such statements. Fogg *v.* Pew, 10 Gray (Mass.) 409, 71 Am. Dec. 662.

78. *United States.* — The Harry, 9 Ben. 524, 11 Fed. Cas. No. 6147.

Alabama. — McRea *v.* Ins. Bank, 16 Ala. (N. S.) 755; Rosenbaum *v.* State, 33 Ala. 354.

California. — People *v.* Garcia, 25 Cal. 531.

Connecticut. — Perry *v.* Simpson Waterproof Mfg. Co., 40 Conn. 313.

Illinois. — Wilson *v.* Spring, 64 Ill. 14.

Indiana. — Blessing *v.* Dodds, 53 Ind. 95; Miller *v.* Palmer, 25 Ind. App. 357, 58 N. E. 213.

Kansas. — Central Branch U. P. R. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163.

Massachusetts. — Loomis *v.* New York etc. R. Co., 159 Mass. 39, 34 N. E. 82.

New Hampshire. — Hanson *v.* Hoitt, 14 N. H. 56.

New York. — Tredwell *v.* Don Court, 18 App. Div. 219, 45 N. Y. Supp. 946; Stinesville etc. Co. *v.* White, 32 Misc. 135, 65 N. Y. Supp. 609.

Pennsylvania.—Douglass *v.* Mitchell, 35 Pa. St. 440.

South Carolina. — Cooke *v.* Remington, 7 S. C. 385.

Wisconsin. — Knapp *v.* Runals, 37 Wis. 135.

Not an Agent in the Ordinary Sense. — In Anderson *v.* McAleenan, 29 N. Y. St. Rep. 406, 8 N. Y. Supp. 483, it is said: "The rule that declarations of an agent, made within the scope of his authority, will bind the principal, has no application here. A man's counsel is in one sense his agent, but the special work which the counsel has to perform is to make the most favorable showing possible upon facts as well as law. He is an advocate with unlimited powers of discretion. He is not like an ordinary agent whose express duties and methods of procedure are laid out beforehand, so that the principal may justly be held liable for what he originates, though its execution be intrusted to another. An advocate's statements are always supposed to be adapted to the exigencies of the case on trial, and colored by what he conceives his client's best interests demand at that particular time, and under those peculiar circumstances. Acts and statements that would seem disingenious, or even culpably misleading, in other relations of life are pardoned in a professional advocate because of his necessary attitude towards his client and towards the enemy. There is every reason, therefore why the oral statements

has been somewhat considered.[79] And the general authority of attorneys as it relates to evidence, will be considered under the head of "ATTORNEY AND CLIENT."[80]

b. *Admissions Competent Only When Within Their Authority.* Their power to bind by their admissions, is confined, like that of other agents, to admissions made in and as a part of the performance of their duties and within the scope of their authority.[81]

of counsel upon a judicial inquiry of any sort, no matter what their purport may be, should not be taken as solemn admissions of fact which the client may not afterwards gainsay."

Acts as Attorney and Ordinary Agent Distinguished. — Burraston *v.* First Nat. Bank, 22 Utah 328, 62 Pac. 425.

79. *Ante*, p. 426.

80. *See* "ATTORNEY AND CLIENT."

81. *England.* — Doe *v.* Richards, 2 Car. & K. 216, 61 Eng. C. L. 215; Watson *v.* King, 3 M. G. & S. 608, 54 Eng. C. L. 608; Wagstaff *v.* Wilson, 4 Barn. & A. 339, 24 Eng. C. L. 7.

Alabama. — Floyd *v.* Hamilton, 33 Ala. 235.

California. — Wilson *v.* Southern Pac. R. Co., 53 Cal. 725.

Connecticut. — Rockwell *v.* Taylor, 41 Conn. 55.

Georgia. — Cassels *v.* Usry Sturgis & Co., 51 Ga. 621; Thomas *v.* Kinsey, 8 Ga. 421.

Illinois. — Chicago City R. Co. *v.* McMeen, 70 Ill. App. 220.

Indiana. — Morley *v.* Hineman, 6 Ind. App. 240.

Maryland. — Dorsey *v.* Gassaway, 2 Har. & J. 402, 3 Am. Dec. 557.

Massachusetts. — Saunders *v.* McCarthy, 8 Allen 42; Proctor *v.* Old Colony R. Co., 154 Mass. 251, 28 N. E. 13; Murray *v.* Chase, 134 Mass. 92.

Michigan. — Fletcher *v.* Chicago & N. W. R. Co., 109 Mich. 363, 67 N. W. 330; Farmers' Mut. F. Ins. Co. *v.* Bowen, 40 Mich. 147.

Minnesota. — Gray *v.* Minn. Tribune Co., 81 Minn. 333, 84 N. W. 113.

Missouri. — Walden *v.* Bolton, 55 Mo. 405; Nichols, Shepard Co. *v.* Jones, 32 Mo. App. 657.

New Jersey. — Janeway *v.* Skerritt, 30 N. J. Law 97.

New York. — Lewis *v.* Duane, 69 Hun 28, 23 N. Y. Supp. 433; O'Brien *v.* Weiler, 68 Hun 64, 22 N. Y. Supp 627; Breck *v.* Ringler, 56 Hun 623, 13 N. Y. Supp. 501; Adee *v.* Howe, 15 Hun 20; Smith *v.* Bradhurst, 18 Misc. 546, 41 N. Y. Supp. 1002.

Vermont. — Underwood *v.* Hart, 23 Vt. 120.

Wisconsin. — Weisbrod *v.* Chicago & N. W. R. Co., 20 Wis. 419.

Limitation of Authority to Make Admissions. — In Wilson *v.* S. P. R. Co., 53 Cal. 725, the action was brought in conformity with a statutory provision to recover the value of property alleged to have been stored in the defendant's warehouse. After the defendant had answered, the plaintiff served upon the attorney of the defendant a demand to be informed of the circumstances under which the count for injury mentioned in the complaint grew. In reply to this demand the attorney of the defendant addressed a letter to the attorney for the plaintiff which was offered in evidence. In passing upon the question of the admissibility of the statements of attorneys as admissions, the court said: "The section authorizes a written or oral demand for information upon the depositary. It provides for a statement *in pais* which may be taken before or after an action has been commenced, and it is not within the province or authority of an *attorney at law* employed by the depositary to defend an action brought by the depositor for the destruction of the deposit to make *in pais* admissions or statements in respect to the circumstances under which the destruction occurred which are binding upon the depositary."

c. *Not Competent to Prove That He Was Attorney.* — The admissions of the alleged attorney are not competent to prove that he was attorney for the party against whom they are offered.[82]

d. *By General Attorney.* — The fact that an attorney is employed generally does not change the rule. To warrant proof of his admissions, they must have been made in and about, and while engaged in the transaction in controversy.[83]

e. *Oral Admissions Out of Court.* — As a rule, mere oral admissions made out of court are inadmissible to bind the client.[84] There are authorities holding that such statements, within the scope of his employment, are admissible.[85] In some cases, the rule excluding such admissions has been extended to oral admissions in court.[86] But the authority to make them must be confined to admissions made for the purposes of the action in which the attorney is engaged.[87]

f. *Made in One Case Inadmissible, in Another Exception.*—Therefore, it is generally held that an admission, made in one case, is not admissible in another, usually upon the ground that no authority existed by reason of his employment in one case, to make admissions

82. Morley *v.* Hineman, 6 Ind. App. 240.

83. Ohio & M. R. Co. *v.* Levy, 134 Ind. 343, 34 N. E. 20.

By a County Attorney. — In Holton *v.* Board of Com'rs., 55 Ind. 194, an offer was made to prove the declarations of the county attorney, but it was held that as the general attorney of the county, such attorney had no power to make any promise binding upon the county.

84. Saunders *v.* McCarthy, 8 Allen (Mass.) 42; Underwood *v.* Hart, 23 Vt. 120; Chicago City Ry. Co. *v.* McMeen, 70 Ill. App. 220; Smith *v.* Bradhurst, 18 Misc. 541, 41 N. Y. Supp. 1002; Cassells *v.* Usry, 51 Ga. 621.

Admissions Made Out of Court. In Smith *v.* Bradhurst, 18 Misc. 546, 41 N. Y. Supp. 1002, it is said: "His admissions could only bind his client in matters relating to the progress of the trial. The statements which he made out of court, in conversations with the opposing counsel, although they may have related to the facts in controversy, were not admissible in evidence against Mrs. Bradhurst." The reason of the distinction is that the attorney's authority extends only to the management of the cause in court, and he has no right to go beyond that authority, unless expressly authorized by his client."

Narrative of Events by, Not Competent. — In Chicago City R. Co. *v.* McMeen, 70 Ill. App. 220, it was held that what an attorney says is not evidence against his client unless it be in the nature of a stipulation as to the conduct of the cause, and that even then it is not his narrative of events or his opinion as to anybody's rights or disabilities that binds his client, but his agreement as to the conduct of the cause.

Letters Written in the Conduct of Business. — But in Stinesville & B. Stone Co. *v.* White, 32 Misc. 135, 65 N. Y. Supp. 609, it is held that letters written by an attorney in the conduct of business within his authority are competent as admissions against his client. See also Holderness *v.* Baker, 44 N. H. 414.

Authority to Write Must Be Shown. — Cassells *v.* Usry, 51 Ga. 621.

85. Lord *v.* Bigelow, 124 Mass. 185.

86. Anderson *v.* McAleenan, 29 N. Y. St. 406, 8 N. Y. Supp. 483.

87. Wilson *v.* Southern Pac. R. Co., 53 Cal. 725.

for the purposes of another case.[88]

Exception Where Made With Express Authority of Client. — But if the admission is made without limitation and with the authorization or acquiescence of the client, it will be admissible for all purposes, as if made directly by the client.[89]

g. *Must Be Distinct and Formal.* — The general rule is that admissions, made by an attorney, to be available against his client, must be distinct and formal.[90]

h. *Generally Not Conclusive.* — Admissions of an attorney have no greater binding effect than those of other agents. Therefore, unless they are of such a nature as to be conclusive, they are not so when made by an attorney, but may be explained or disproved by other evidence.[91]

i. *Made to Attorney.* — Admissions made to an attorney, if made to him by a client and while acting as attorney, are inadmissible to be proved by the attorney the same as other confidential communications.[92]

H. Persons Referred to for Information. — a. *Generally.* A party by referring to another for information thereby, in effect, authorizes such person to state the facts, and any admissions made within the scope of the reference are competent to be proved against him, as his own.[93]

88. Dawson *v.* Schloss, 93 Cal. 194, 29 Pac. 31; Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64; Nichols, Shepard Co. *v.* Jones, 32 Mo. App. 657; State *v.* Buchanan, Wright (Ohio) 233.

Admissions at Former Trial Admissible. — In Scaife *v.* Western N. C. Land Co., 90 Fed. 238, it is held that distinct and formal admissions of fact signed by an attorney of record on a trial, are competent evidence on a subsequent trial of the same case.

Where Intended to Be General. So in Central Branch U. P. R. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163, it is held that an oral admission made by an attorney binds the client on a second trial if it appears to have been intended to be general.

89. City of Rockland *v.* Farnsworth, 89 Me. 481, 36 Atl. 989.

90. Treadway *v.* S. C. & St. P. R. Co., 40 Iowa 526; McKeen *v.* Gammon, 33 Me. 187; Ferson *v.* Wileox, 19 Minn. 449; Davidson *v.* Gifford, 100 N. C. 18, 6 S. E. 718; Adee *v.* Howe, 15 Hun (N. Y.) 20.

Incidental Statement of Counsel. In Lake Erie & W. R. Co. *v.* Rooker, 13 Ind. App. 600, 41 N. E. 470, it is held that the incidental statement of counsel, in opening a case, of a fact as he expects to prove it, is not an admission of such fact so as to relieve the opposite party of the burden of proof if that fact is relied on by him.

91. Douglass *v.* Mitchell, 35 Pa. St. 440; McRea *v.* Ins. Bank, 16 Ala. (N. S.) 755.

92. City of Indianapolis *v.* Scott, 72 Ind. 196;

93. 1 Greenl. Ev., 16th Ed. 182.

England. — Hood *v.* Reeve, 3 Car. & P. 532, 14 Eng. C. L. 432; Williams *v.* Innes, 1 Camp. 364, 10 Rev. Rep. 702; Daniel *v.* Pitt, 1 Camp. 366, 10 Rev. Rep. 706.

Connecticut. — Chadseye *v.* Green, 24 Conn. 562.

Kansas. — Linton *v.* Housh, 4 Kan. 535.

Kentucky. — Sullivan *v.* Kuykendall, 82 Ky. 483, 56 Am. Rep. 901.

Maine. — Chapman *v.* Twitchell, 37 Me. 59, 58 Am. Dec. 773.

Missouri. — Price *v.* Lederer, 33 Mo. App. 426.

b. *Must Be Such Reference As to Make Referee an Agent.* — It is not every reference to another for information that will have the effect stated. It must be such a reference as will authorize the referee to make the admission offered to be proved for and on behalf of the party.[94]

c. *Must Be Within Authority Given.* — And the admission to be competent must be within the authority given by the reference.[95]

1. HUSBAND AND WIFE. — a. *Generally.* — There is no difference as to the admissibility of admissions, because of the existing relation

New Hampshire. — Folsom *v.* Batchelder, 22 N. H. 47.

New York. — Lehman *v.* Frank, 19 App. Div. 442, 46 N. Y. Supp. 761.

South Carolina. — Click *v.* Hamilton, 7 Rich. 65; Deleshire *v.* Greenland, 1 Bay 458.

Wisconsin. — Nadeau *v.* White River Lum. Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29.

Statement of the Rule. — After stating that the admissions of a third person are receivable in evidence against the party who had expressly referred another to him for information in regard to an uncertain or disputed matter, Mr. Greenleaf states the rule thus:

"In such cases, the party is bound by the declarations of the person referred to in the manner and to the same extent as if they were made by himself." 1 Greenl. Ev., § 182.

Limitation of the Rule. — In commenting upon this statement of the rule by Mr. Greenleaf, it is said, in Rosenbury *v.* Angell, 6 Mich. 508:

"It is observable that Mr. Greenleaf entirely ignores the idea of any agency of the party referred to, and yet he calls the declarations of the persons referred to '*admissions of third persons.*' Now, this term '*admissions*' in such a connection would seem to imply that the person making the admissions must stand in some confidential relation to or be interested for or represent the interests of the party making the reference; in short, to have authority in the nature of an agency to speak for the party making the reference. Upon any other hypothesis it would seem to be a confusion of ideas to call the declarations of such third persons his *admissions*, or the *admissions* of the party referring to him."

Interpreter. — In Nadeau *v.* White River Lum. Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29, statements made by an interpreter were held to be within the rule, the court saying:

"The person speaking through an interpreter virtually says to such other person: 'You listen to what the interpreter says and he will tell you what I say,' and what the interpreter says is to be taken as the language of the person speaking through him, and may, therefore, be admitted in evidence against him under the rule that the statement of a third person is receivable in evidence against the party who has expressly referred another to him for information as to any matter."

But not where the interpreter is one appointed by the court to interpret for a witness. Schearer *v.* Harber, 36 Ind. 536.

Not the Admissions of an Agent. In Linton *v.* Housh, 4 Kan. 535, it is held that such statements are not admitted on the ground of agency but "by adoption of the representations."

94. Barnard *v.* Macy, 11 Ind. 536; Rosenbury *v.* Angell, 6 Mich. 508; Hood *v.* Green, 3 Car. & P. 532, 14 Eng. C. L. 432; Allen *v.* Killinger, 8 Wall. 480; Lehman *v.* Frank, 19 App. Div. 442, 46 N. Y. Supp. 761; Robertson *v.* Hamilton, 16 Ind. App. 328, 45 N. E. 46, 59 Am. St. Rep. 319.

95. Duval *v.* Covenhoven, 4 Wend. 561; Allen *v.* Killinger, 8 Wall. 480; Cohn *v.* Goldman, 76 N. Y. 284; Adler-Goldman Com. Co. *v.* Adams Ex. Co., 53 Mo. App. 284.

of husband and wife. They are, in respect of this question, the same as strangers, unless the declarations offered as admissions are confidential communications and for that reason inadmissible.[96]

And the rule as to the admissibility of a wife's admissions against the husband is not changed by the fact that they were married after the declarations were made.[97]

b. *Must Be Otherwise Competent.* — The mere fact that the relation of husband and wife exists does not render the admissions of one competent as against the other. They must be competent for some other reason to be admissible.[98]

96. *Alabama.*—Walker *v.* Elledge, 65 Ala. 51; Lide *v.* Lide, 32 Ala. 449; Rochelle *v.* Harrison, 8 Port. 351; Murphree *v.* Singleton, 37 Ala. 412; Brunson *v.* Brooks, 68 Ala. 248; Davis *v.* Orme, 36 Ala. 540.

Arkansas. — Burnett *v.* Burkhead, 21 Ark. 77. 76 Am. Dec. 358.

California. — Brennan *v.* Wallace, 35 Cal. 108.

Connecticut. — Turner *v.* Coe, 5 Conn. 94.

Georgia. — Ernest *v.* Merritt, 107 Ga. 61. 32 S. E. 898.

Illinois. — Pierce *v.* Harbsouck, 49 Ill. 23.

Indiana. — Coryell *v.* Stone, 62 Ind. 307; Kingen *v.* State, 50 Ind. 557.

Iowa. — Claussen *v.* La Franz, 1 Clarke 226; Whitescarver *v.* Bonny, 9 Iowa 480; Cedar Rapids Nat. Bank *v.* Lavery, 110 Iowa 575, 81 N. W. 775, 80 Am. St. Rep. 325.

Kansas. — Donaldson *v.* Everhart, 50 Kan. 718, 32 Pac. 405; Van Zandt *v.* Schuyler, 2 Kan. App. 118, 43 Pac. 295.

Kentucky. — Cook *v.* Burton, 5 Bush 64; Bonney *v.* Rearden, 6 Bush 34; Manhattan L. Ins. Co. *v.* Myers, 22 Ky. Law 875, 59 S. W. 30; Burgen *v.* Tribble, 2 Dana 383.

Massachusetts. — Aldrich *v.* Earle, 13 Gray 578; Hunt *v.* Poole, 139 Mass. 224; Broderick *v.* Higginson, 169 Mass. 482, 48 N. E. 269, 61 Am. St. Rep. 296.

Michigan. — Hunt *v.* Strew, 33 Mich. 85; Dawson *v.* Hall, 2 Mich. 390; Rose *v.* Chapman, 44 Mich. 312, 6 N. W. 681; Burns *v.* Kirkpatrick, 91 Mich. 364, 51 N. W. 893, 30 Am. St. Rep. 485.

Minnesota. — Keller *v.* Sioux City & St. P. R. Co., 27 Minn. 178.

Mississippi. — Cameron *v.* Lewis, 59 Miss. 134; Sharp *v.* Maxwell, 30 Miss. 589.

Missouri. — Fox *v.* Windes, 127 Mo. 502, 30 S. W. 323; Bruce *v.* Bombeck, 79 Mo. App. 231.

Nebraska. — Norfolk Nat. Bank *v.* Wood, 33 Neb. 113, 49 N. W. 958.

New York. — Dewey *v.* Goodenough, 16 Barb. 54; Platner *v.* Platner, 78 N. Y. 90; Keenan *v.* Getsinger, 1 App. Div. 172. 37 N. Y. Supp. 826.

Pennsylvania. — Smith *v.* Scudder, 11 Serg. & R. 325; Martin *v.* Rutt, 127 Pa. St. 380, 17 Atl. 993; Evans *v.* Evans, 155 Pa. St. 572, 26 Atl. 755; Lee *v.* Newell, 107 Pa. St. 283; Hackman *v.* Flory, 16 Pa. St. 196.

South Carolina. — Williams *v* Cockran, 7 Rich. 45.

Tennessee. — Fidelity Mut. L. Ins. Ass'n *v.* Winn, 96 Tenn. 224, 33 S. W. 1045.

Texas. — McKay *v.* Treadwell, 8 Tex. 176; Clapp *v.* Engledow, 82 Tex. 290, 18 S. W. 146; Hurley *v.* Lockett, 72 Tex. 262, 12 S. W. 212.

Vermont. — Curtis *v.* Ingham, 2 Vt. 287; Murray *v.* Mattison, 67 Vt. 553, 32 Atl. 479; Gilson *v.* Gilson, 16 Vt. 464.

97. Churchill *v.* Smith, 16 Vt. 560.

98. *Georgia.* — Virgin *v.* Dunwody, 93 Ga. 104, 19 S. E. 84.

Indiana. — Stanfield *v.* Stilz, 93 Ind. 249; Allen *v.* Davis, 101 Ind. 187; City of Indianapolis *v.* Scott, 72 Ind. 196.

Iowa. — Cedar Rapids Nat. Bank *v.* Lavery, 110 Iowa 575, 81 N. W. 775.

c. *Does Competency As Witness Affect the Question.* — There are cases, however, in which the admissibility of the husband's or wife's admissions is made to turn upon the question whether, if called as witnesses, they would be competent to testify to the admitted facts.[99]

Michigan. — Rose *v.* Chapman, 44 Mich. 312, 6 N. W. 681; Glover *v.* Alcott, 11 Mich. 470; Whelpley *v.* Stoughton, 112 Mich. 594, 70 N. W. 1098.

Mississippi. — Cameron *v.* Lewis, 59 Miss. 134.

Missouri. — Fox *v.* Windes, 127 Mo. 502, 30 S. W. 323; State *v.* Chatham Nat. Bank, 10 Mo. App. 482.

Nebraska.—Woodruff *v.* White, 25 Neb. 745, 41 N. W. 781.

New York. — Stillwell *v.* New York Cent. R. Co., 34 N. Y. 29; Post *v.* Smith, 54 N. Y. 648; La Grae *v.* Peterson, 2 Sandf. 338; Gillespie *v.* Walker, 56 Barb. 185.

North Carolina. — Towles *v.* Fisher, 77 N. C. 437.

Pennsylvania. — Jones *v.* McKee, 3 Pa. St. 496, 45 Am. Dec. 661; Fleming *v.* Parry, 24 Pa. St. 47; Gardner's Appeal (Pa. St.), 8 Atl. 176.

South Carolina.—Park *v.* Hopkins, 2 Bailey 408.

Texas. — Clapp *v.* Engledow, 82 Tex. 290, 18 S. W. 146; McKay *v.* Treadwell, 8 Tex. 176; Owens *v.* New York & T. Land Co., 11 Tex. Civ. App. 284, 32 S. W. 189; La Master *v.* Dickinson, 17 Tex. Civ. App. 473, 43 S. W. 911.

Vermont. — Pierce *v.* Pierce, 66 Vt. 369, 29 Atl. 364.

99. *United States.* — Vuyton *v.* Brenell, 1 Wash. C. C. 467, 28 Fed. Cas. No. 17,026.

Alabama. — Hussey *v.* Elrod, 2 Ala. 339, 36 Am. Dec. 420.

Arkansas. — Funkhouser *v.* Pogue, 13 Ark. 295; Burnett *v.* Burkhead, 21 Ark. 77, 76 Am. Dec. 358.

Indiana. — Bevins *v.* Cline, 21 Ind. 37; Laselle *v.* Brown, 8 Blackf. 221; Casteel *v.* Casteel, 8 Blackf. 240, 44 Am. Dec. 763; Brown *v.* Laselle, 6 Blackf. 147, 38 Am. Dec. 135.

Iowa. — Cedar Rapids Nat. Bank *v.* Lavery, 110 Iowa 575, 81 N. W. 775.

Maine. — White *v.* Holman, 12 Me. 157.

Michigan. — Dawson *v.* Hall, 2 Mich. 390.

Missouri. — Fourth Nat. Bank *v.* Nichols, 43 Mo. App. 385.

New Jersey. — Ross *v.* Winners, 6 N. J. Law 366.

New York. — Hopkins *v.* Clark, 90 Hun 4, 35 N. Y. Supp. 360; La Grae *v.* Peterson, 2 Sandf. 338; Macondray *v.* Wardle, 7 Abb. Pr. 3.

North Carolina. — May *v.* Little, 3 Ired. Law 27, 38 Am. Dec. 707.

Ohio. — Thomas *v.* Hargrave, Wright 595.

South Carolina. — Hawkins *v.* Hatton, 2 Nott & McC. 374.

Where Husband or Wife Is Incompetent as a Witness. — In Macondray *v.* Wardle, 7 Abb. Pr. (N. Y.) 3, the court after holding that the wife was incompetent as a witness to testify to certain facts, says further: "The admissions of the wife to the same effect were offered in evidence. The objection which has been considered to her testimony under oath would apply with much greater force to admissions made not under oath. The point has been considered in La Grae *v.* Peterson, 2 Sandf. 338, in which we concur."

And in Underwood *v.* Linton, 44 Ind. 72, it is said that "it is a general rule that the declarations or admissions of the wife are not legal evidence for or against the husband."

Admissions by Acquiescence. — In Fourth Nat. Bank *v.* Nichols, 43 Mo. App. 385, it is held that statements made by the wife in the presence of the husband and not denied by him cannot be proved to show his acquiescence in the fact stated, placing the ruling on the ground of her incompetency to testify against him.

General Rule Stated. — In Daw-

d. *As Agents for Each Other.* — If the relation of principal and agent exists between them, their admissions are competent as in other cases of agency.[1]

(1.) Must Be Within Scope of Authority. — But as in case of any other agency their admissions are competent only when made in and about the acts done as such agent and within the scope of their authority.[2]

son *v.* Hall, 2 Mich. 390, it is held to be the well settled rule that the declarations of husband and wife are subject to the same rules of exclusion which govern their testimony as witnesses.

Where Wife Is Administratrix of Husband's Estate. — The fact that the husband has since died and the wife is the administratrix of his estate does not render her admissions made before his death competent, there being no proof of agency. May *v.* Little, 3 Ired. Law (N. C.) 27, 38 Am. Dec. 707.

Of Matters Occurring Before Marriage. — The fact that the wife is incompetent to testify does not render competent admissions made by her after marriage relating to business transacted by her before marriage. Churchill *v.* Smith, 16 Vt. 559.

Made Before Marriage. — Admissions made before marriage, if otherwise competent, are admissible. Willis *v.* Snelling, 6 Rich. (S. C.) 280.

1. *England.* — Clifford *v.* Burton, 1 Bing. 199, 8 Eng. C. L. 294.

Alabama. — Mitcham *v.* Schnessler, 98 Ala. 635, 13 So. 617.

Indiana. — Casteel *v.* Casteel, 8 Blackf. 240, 44 Am. Dec. 763; Underwood *v.* Linton, 44 Ind. 72.

Iowa. — Gault *v.* Sickles, 85 Iowa 266, 52 N. W. 206.

Kansas. — Van Zandt *v.* Schuyler, 2 Kan. App. 118, 43 Pac. 295.

Louisiana. — Smalley *v.* Lawrence, 9 Rob. 211.

Maine. — White *v.* Holman, 12 Me. 137.

Massachusetts. — Barker *v.* Mackay, 175 Mass. 485, 56 N. E. 614.

Missouri. — Bates *v.* Holladay, 31 Mo. App. 162.

New Hampshire. — Chamberlain *v.* Davis, 33 N. H. 121; Pickering *v.* Pickering, 6 N. H. 120.

New York. — Riley *v.* Suydam, 4 Barb. 222; Fenner *v.* Lewis, 10 Johns. 38; Barton *v.* Lynch, 69 Hun 1, 23 N. Y. Supp. 217; La Grae *v.* Peterson, 2 Sandf. 338.

North Carolina. — State *v.* Lemon, 92 N. C. 790; Hughes *v.* Stokes, 1 Hayw. 372.

Ohio. — Thomas *v.* Hargrave, Wright 595.

Oregon. — Minard *v.* Stillman, 35 Or. 259, 57 Pac. 1022.

Pennsylvania. — Murphy *v.* Hubert, 16 Pa. St. 50.

South Carolina. — Colgan *v.* Phillips, 7 Rich. 359.

Vermont. — Churchill *v.* Smith, 16 Vt. 560; Felker *v.* Emerson, 16 Vt. 653, 42 Am. Dec. 532; Gilson *v.* Gilson, 16 Vt. 464.

2. Goodrich *v.* Tracy, 43 Vt. 313; Livesley *v.* Lasalette, 28 Wis. 38; Jordan *v.* Hubbard, 26 Ala. 433; Mitcham *v.* Schnessler, 98 Ala. 635, 13 So. 617; Underwood *v.* Linton, 44 Ind. 72; Evans *v.* Purinton, 12 Tex. Civ. App. 158, 34 S. W. 350; Logue *v.* Link, 4 E. D. Smith (N. Y.) 63.

Must Be Within Scope of Authority. — In Goodrich *v.* Tracy, 43 Vt. 314, it is said:

"The only ground upon which it can be claimed that the acts or admissions of Mrs. Goodrich could be given in evidence against the plaintiff is that she was the agent of the plaintiff, so as to be competent to bind him by such acts and admissions. We do not think the evidence shows any such agency. Her agency only extended to the performance of certain specific acts, and the admissions sought to be proved were not so connected with the performance of those acts as to make them binding upon her principal. Her authority was special

e. *Confidential Communications Inadmissible.* — If the statement offered to be proved as an admission constitutes a confidential communication between husband and wife, it is, of course, inadmissible.[3]

J. Trustees and Beneficiaries. — a. *Of Trustee When Admissible Against Cestui Que Trust.* — A trustee may make admissions, provable against the beneficiary for whom he acts, if made in the transaction of the trust business and within his authority as such trustee.[4]

b. *Of Trustee Without Beneficial Interest.* — But this rule does not extend to a mere trustee to sell property under a mortgage or trust deed;[5] or to one who has no beneficial interest in the property.[6]

and limited, and when she exceeded that authority, the principal was not bound."

In Action for Wages of Wife. In an action by husband and wife for her wages which belong to the husband, her admission of payment for the services rendered, made after the suit was commenced, was held inadmissible. Jordan *v.* Hubbard, 26 Ala. 433.

3. Greenl. Ev., § 254; Van Zandt *v.* Schuyler, 2 Kan. App. 118, 43 Pac. 295.

4. *England.* — Gibson *v.* Winter, 5 Barn. & A. 96, 27 Eng. C. L. 47.

Georgia. — Know *v.* Raymond, 73 Ga. 749.

Maine. — Franklin Bank *v.* Cooper, 36 Me. 179.

Michigan. — Hogan *v.* Sherman, 5 Mich. 60; Chipman *v.* Kellogg, 60 Mich. 438, 27 N. W. 592.

New Hampshire. — Tenney *v.* Evans, 14 N. H. 343, 40 Am. Dec. 194.

Tennessee. — Helm *v.* Steele, 3 Humph. 472.

Of Deceased Trustee. — In Chipman *v.* Kellogg, 60 Mich. 438, 27 N. W. 592, it was held that books of a trust kept by a deceased trustee and his declarations and admissions on the subject were admissible to show the condition of the fund, and the recognition of the claim if not barred.

As Part of the Res Gestae. Such admissions are received as constituting a part of the *res gestae.* Know *v.* Raymond, 73 Ga. 749.

5. Eitelgeorge *v.* Mutual etc. Ass'n, 69 Mo. 52.

6. *United States.* — Waterman *v.* Wallace, 13 Blatchf. 128, 29 Fed. Cas. No. 17,261.

Alabama. — Graham *v.* Lockhart, 8 Ala. (N. S.) 9; Thompson *v.* Drake, 32 Ala. 99.

Arkansas. — Ludlow *v.* Flournoy, 34 Ark. 451; Fargison *v.* Edrington, 49 Ark. 207, 4 S. W. 763.

Connecticut. — Townsend Sav. Bank *v.* Todd, 47 Conn. 190.

Illinois. — Bragg *v.* Geddes, 93 Ill. 39; Thomas *v.* Bowman, 30 Ill. 84.

Kentucky. — Allen *v.* Everett, 12 B. Mon. 371.

Massachusetts. — Stratton *v.* Edwards, 174 Mass. 374, 54 N. E. 886.

Missouri. — Eitelgeorge *v.* Mut. House B. Ass'n, 69 Mo. 52.

Vermont. — Sargeant *v.* Sargeant, 18 Vt. 371; Barber *v.* Bennett, 62 Vt. 50, 19 Atl. 978, 1 L. R. A. 224.

West Virginia. — Caldwell *v.* Prindle, 19 W. Va. 604.

Admissions Incompetent. — In Bragg *v.* Geddes, 93 Ill. 39, it is held that a party defending as a trustee cannot make any admission to the prejudice of the trust fund and against the *cestui que* trust. See to the same effect Thomas *v.* Bowen, 29 Ill. 426; Sargeant *v.* Sargeant, 18 Vt. 371.

"As a general rule, the naked admissions of a trustee having no beneficial interest in the property conveyed to him, cannot be given in evidence to affect his *cestui que* trust. It is his duty to protect the interest of his *cestui que* trust, and he will not be allowed to betray that interest and the confidence placed in him. Not having any beneficial interest, his admissions or

But his declarations are competent, as against him, to show that he has an interest.[7]

c. *Must Be Part of Res Gestae.* — The mere fact that one is a trustee holding title to property gives him no right to make admissions respecting or affecting it. To make his admission competent he must, like any other agent, be then doing some act, as such trustee, and the declaration must be connected with and relate to such act.[8]

d. *Narrative of Past Transactions Inadmissible.* — Therefore a mere narrative by the trustee of past transactions connected with the trust is inadmissible as against the *cestui que* trust.[9]

e. *When Party to Record.* — As we have seen some cases hold that the admissions of the party of record are always admissible to defeat his action or defense,[10] which would of course include trustees.[11] But a distinction is made between trustees made so by voluntary act of the parties, and such as become trustees by operation of law.[12]

declarations not made in the interest of his beneficiary are hearsay. Fargison *v.* Edrington, 49 Ark. 207, 4 S. W. 763.

Not to Enlarge His Own Right or Estate. — A written declaration of a trustee in a conveyance to a third person of property which has been previously conveyed to the trustee in trust, cannot be used against the *cestui que* trust to determine the intent of the parties in making the original conveyance, or to show the extent of the interest which the *cestui que* trust intended to convey thereby. Waterman *v.* Wallace, 13 Blatchf. 128, 39 Fed. Cas. No. 17,261.

7. Thompson *v.* Drake, 32 Ala. 99.

8. Fargison *v.* Edrington, 49 Ark. 207, 4 S. W. 763; Hogan *v.* Sherman, 5 Mich. 60.

Where Party Has Voluntarily Made Trustee the Ostensible Principal. — In Hogan *v.* Sherman, 5 Mich. 60, it is held that where a party has voluntarily made his trustee or agent the ostensible principal, and the only one capable of legal action, he will be bound by the admissions of such trustee or agent.

9. Ludlow *v.* Flournoy, 34 Ark. 451; Fargison *v.* Edrington, 49 Ark. 207, 4 S. W. 763.

10. *Ante*, p. 509; Beatty *v.* Davis, 9 Gill. (Md.) 211; Tenney *v.* Evans, 14 N. H. 343.

11. Beatty *v.* Davis, 9 Gill. (Md.) 211; Dent *v.* Dent, 3 Gill. (Md.) 482.

12. **By Executor.** — Thus in Plant *v.* McEwen, 4 Conn. 544, where declarations of an executor, made before his appointment as such were offered, the court said: "On general principles, the declarations and acts of the party on record, whether he had, or had not an interest in the subject, at the time of making or performing them, are admissible in evidence against him. There is hardly any rule so universal as to be free from exception; for a case without the reason of the rule, cannot be considered as embraced within the provision. The declarations or acts of a person, who has become a party to the record, ought to affect him personally; and upon the same principle, it is reasonable, that they should act upon those who derive their property through him, or who have confided their interests to his care. The latter comprises the case of a trustee, whose acts and declarations are operative against the *cestui que* trust. But Charles McEwen is not the trustee of the heirs or creditors of his deceased father, nor is the estate derived through him to the heirs: he is merely the agent of the law. To them he is as

f. *By Party Creating the Trust.* — The admissions of a party conveying in trust made before the conveyance was executed, are competent as against the *cestui que* trust.[13] But not if made after the execution of the trust deed.[14]

(1.) **To Establish Trust.** — Independently of any statutory provision to the effect that a trust can be created only by writing, such trust may be established by proof of admissions.[15] But not where the trust is required to be created by writing.[16]

g. *By Cestui Que Trust.* — Whether the admissions of the *cestui que* trust may be received to affect the title of the trustee has been doubted.[17] And it has been expressly held that the admissions of one of several beneficiaries under the trust are inadmissible against another.[18]

K. GUARDIANS. — a. *Against Themselves.* — Guardians are held like others by admissions made against their own personal interests in matters between them and their wards.[19]

b. *Against the Ward, Not Admissible.* — We have seen that guardians cannot bind their wards by judicial admissions.[20]

much a stranger as a creditor would be who had taken out administration on the estate of the deceased; and upon any principle which would authorize the proof of an act or contract of his, anterior to the acceptance of the trust of executor, to affect the estate committed to his care, a similar act or contract of a creditor would be equally admissible, and with equal effect, if he should become an administrator."

See also Sargeant *v.* Sargeant, 18 Vt. 371.

13. Head *v.* Halford, 5 Rich. (S. C.) 128; Gidney *v.* Logan, 79 N. C. 214.

To Show the Trust Deed Fraudulent. — Thus it is held that the admissions of the grantor in trust made before the conveyance are competent to show that the transaction was fraudulent. Head *v.* Halford, 5 Rich. (S. C.) 128. But see to the contrary, Hodge *v.* Thompson, 9 Ala. (N. S.) 131.

14. *Ante*, p. 514; Weaver *v.* Yeatmans, 15 Ala. (N. S.) 539.

Where Trustor Remains in Possession. — But see Gidney *v.* Logan, 79 N. C. 214, in which it is held that where the trustor remains in possession, his declarations are competent to prove and qualify the fact and purpose of the possession.

15. Williard *v.* Williard, 56 Pa. St. 119; Lide *v.* Lide, 32 Ala. 449; Hamsburg Bank *v.* Tyler, 3 Watts & S. (Pa.) 373.

But see Phillips *v.* South Park Com'rs, 119 Ill. 626, 10 N. E. 230, where the admissions contained in letters were held to be insufficient to establish the alleged trust.

16. Hayne *v.* Herman, 97 Cal. 259.

17. Pope *v.* Devereux, 5 Gray 409.

18. Pope *v.* Devereux, 5 Gray 409; Doan *v.* Dow, 8 Ind. App. 324.

19. **Admission by a Guardian.** In an action by a ward against his guardian to set aside certain allowances made the guardian, it was held that the presiding judge was competent to testify concerning the statements made by the guardian to procure the allowance of his claims, and also that the same facts might be proved by an attorney who was not at the time of the transaction testified to, but had been the attorney of the guardian, and that the declarations of the guardian as to the amount of the ward's estate, or what he expected it to be, were admissible in evidence against him. Doan *v.* Dow, 8 Ind. App. 324.

20. *Ante*, p. 460.

It is likewise true that they cannot, as a rule, bind their wards by non-judicial admissions.[21]

(1.) **Exception. — Res Gestae.** — But where the guardian is engaged in the transaction of business, as such, his admissions, made at the time, and a part of the *res gestae*, are admissible.[22]

c. *When Party to the Record.* — Under the rule laid down in some of the cases that the admissions of a party to the record are always admissible, it is held that where the guardian is a party, his admissions are competent.[23]

d. *Affecting Ward's Title to Land Inadmissible.* — The guardian in possession of land, as such, cannot bind the ward by admissions made in disparagement of title thereto.[24]

L. Guardians Ad Litem. — Admissions made by the guardian *ad litem* are not binding upon the infant for whom he acts.[25]

M. Personal Representatives. — a. *Of Executors and Administrators When Admissible.* — Admissions by executors or administrators made in the transaction of their business, as such, are competent to be proved against the estate represented by them.[26] But

21. Westenfelder *v.* Green, 24 Or. 448, 34 Pac. 23; Chisholm *v.* Newton, 1 Ala. 371; Neal *v.* Lapleine, 48 La. Ann. 424, 19 So. 261.

22. Tenney *v.* Evans, 14 N. H. 343, 40 Am. Dec. 194.

Made Before His Appointment Inadmissible. — Admissions made by a guardian before his appointment as such cannot be proved against the ward. Phillips *v.* Herndon, 78 Tex. 378, 14 S. W. 857; Moore *v.* Butler, 48 N. H. 161.

23. *Ante*, p. 509; Tenney *v.* Evans, 14 N. H. 343, 40 Am. Dec. 194.

24. Westenfelder *v.* Green, 24 Or. 448, 34 Pac. 23.

25. *Ante*, p. 460; Mathews *v.* Dowhing, 54 Ala. 202; Cooper *v.* Mayhew, 40 Mich. 528; Cochran *v.* McDowell, 15 Ill. 10; Hiatt *v.* Brooks, 11 Ind. 508; Hammer *v.* Pierce, 5 Harr. (Del.) 304; Buck *v.* Maddock, 167 Ill. 219, 47 N. E. 208.

By Prochien Ami Before Acting as Such. — In Metz *v.* Detweiler, 8 Watts & S. (Pa.) 376, the court below admitted the admissions of the *prochien ami* made before he became such, which was held error.

Admissions of "Next Friend" Inadmissible. — Buck *v.* Maddock, 167 Ill. 219, 47 N. E. 208.

26. *Georgia.* — Planters and Miners' Bank *v.* Neel, 74 Ga. 576; Horkan *v.* Benning, 111 Ga. 126, 36 S. E. 432.

Indiana. — Eckert *v.* Triplett, 48 Ind. 174.

Iowa. — Schmidt *v.* Kriesmer, 31 Iowa 479.

Massachusetts.—Heywood *v.* Heywood, 10 Allen 105; Hill *v.* Buckminister, 5 Pick. 390; Faunce *v.* Gray 21 Pick. 243.

New York. — Whiton *v.* Snyder, 88 N. Y. 299.

Ohio. — Matoon *v.* Heirs of Clapp, 8 Ohio 248.

Pennsylvania. — Lobb *v.* Lobb, 26 Pa. St. 327; Hunt's Appeal, 100 Pa. St. 590.

South Carolina. — Haylyburton *v.* Kershaw, 3 Des. Eq. 104.

Tennessee. — Helm *v.* Steele, 3 Humph. 472; Lashlee *v.* Jacobs, 28 Tenn. 718.

Not Admissible Against Joint Contractor With Intestate. — Marshall *v.* Adams, 11 Ill. 37.

Appraisement by Administratrix Inadmissible Against Estate. — In Morrison *v.* Burlington, C. R. & N. R. Co., 84 Iowa 663, 51 N. W. 75, it was held that the appraisement of the property of the estate returned by the administratrix was not competent as evidence of the value of

there are cases holding to the contrary.[27] And against them personally when sought to be held liable.[28] But the declarations of an administrator of a predecessor in title to real estate are not competent, as admissions, against the present claimant to the title.[29]

b. *Must Be Made When Transacting Business of Estate.* — The admission to be admissible must be made in and about the settlement of the estate. If it is not, it is incompetent.[30]

c. *Respecting Claims Against the Estate.* — The admissions of an executor or administrator may be received to establish a claim against the estate.[31]

d. *Affecting Title to Land.* — The admissions of an administrator cannot be heard to affect the title to property of the intestate.[32]

e. *By One of Several, Admissible.* — An admission made by one administrator of an estate where there is more than one, is admis-

the property appraised in an action against the estate.

Made Before Appointment.— Admissions made by an administrator or executor before his appointment as such are inadmissible, even as against him, after his appointment, and in his representative capacity. Prudential L. Ins. Co. *v.* Fredericks, 41 Ill. App. 419; Gooding *v.* U. S. L. Ins. Co., 46 Ill. App. 307; Brooks *v.* Goss, 61 Me. 307; Niskern *v.* Haydock, 23 App. Div. 175, 48 N. Y. Supp. 895.

27. Allen *v.* Allen, 26 Mo. 327; Leeper *v.* McGuire, 57 Mo. 360.

28. Potter *v.* Ogden, 136 N. Y. 384, 33 N. E. 228; Cayuga Co. Bank *v.* Bennett, 5 Hill (N. Y.) 236; Taylor *v.* Adams, 2 Serg. & R. (Pa.) 534, 7 Am. Dec. 665; Church *v.* Howard, 79 N. Y. 415.

29. Lawrence *v.* Wilson, 160 Mass. 304, 35 N. E. 858.

30. 1 Greenl. Ev., § 179.

Alabama. — Roberts *v.* Trawick, 13 Ala. 68.

Connecticut. — Knapp *v.* Hanford, 6 Conn. 170; Plant *v.* McEwen, 4 Conn. 544.

Illinois. — Gooding *v.* U. S. L. Ins. Co., 46 Ill. App. 307; Prudential L. Ins. Co. *v.* Fredericks, 41 Ill. App. 419.

New York. — Church *v.* Howard, 79 N. Y. 415; Whiton *v.* Snyder, 88 N. Y. 299; Dan *v.* Brown, 4 Cow. 483, 15 Am. Dec. 395.

Ohio. — Hueston *v.* Hueston, 2 Ohio St. 489.

Vermont.—Wheelock *v.* Wheelock, 5 Vt. 433.

Thus if the admission relates to the validity of the will and is offered in a proceeding to determine its validity in which the executor has no interest, his admission is not admissible, although he is the nominal plaintiff in the action. Roberts *v.* Trawick, 13 Ala. 68; Shailer *v.* Bumstead, 99 Mass. 112.

Otherwise Where Executor Is Party in Interest. — Atkins *v.* Sanger, 1 Pick. (Mass.) 192; Peeple *v.* Stevens, 8 Rich. Law (S. C.) 198, 64 Am. Dec. 750.

Must Relate to His Own Acts. It is held that his admissions are only competent evidence of his own acts, after he became clothed with the trust, and not to prove what was told him by his testator during life. Godbee *v.* Sapp, 53 Ga. 283.

Not Where the Declarations Were Made Before His Appointment As Such. — Plant *v.* McEwen, 4 Conn. 544.

31. Lashlee *v.* Jacobs, 28 Tenn. 718; Hueston *v.* Hueston, 2 Ohio St. 489; Hill *v.* Buckminster, 5 Pick. (Mass.) 390; Faunce *v.* Gray, 21 Pick. (Mass.) 243; Heywood *v.* Heywood, 10 Allen (Mass.) 105. But see discussion of this point in Allen *v.* Allen, 26 Mo. 327.

32. Lawrence *v.* Wilson, 160 Mass. 304, 35 N. E. 858.

sible.[33] But it is not conclusive upon the other administrator or the estate, but may be disproved.[34]

(1.) Of Executor Against Co-Executor, Held Inadmissible. — In some cases, it is held, broadly, that the admissions of an executor or administrator cannot be received in evidence against his co-executors or co-administrators,[35] or the estate he represents, if made in the absence of his co-executor.[36]

(2.) Must Be About Their Joint Interests, and Within Their Authority. The admission of one executor or administrator to be admissible against another must be within their joint authority and about their joint interests.[37]

f. *By Former Administrator.* — So it is held that admissions of a former administrator are competent against his successor in litigation affecting the estate.[38]

g. *As Against Heirs and Devisees Inadmissible.* — Generally speaking the executor or administrator does not represent either the heirs or devisees of the estate, has no joint interest with them, and his admissions cannot be proved against either of them.[39] But where he does represent such heirs or devisees in the settlement of the estate his admissions are competent as against them.[40]

h. *By Testator or Intestate.* — In actions for or against an estate the admissions of the deceased are competent as against his executor or administrator in all cases where they would have been competent

33. McIntire *v.* Morris, 14 Wend. (N. Y.) 90, 12 N. Y. Com. L. 548; James *v.* Hackley, 16 Johns. (N. Y.) 2736 N. Y. Com. L. 138; Cayuga Co. Bank *v.* Bennett, 5 Hill (N. Y.) 236, 16 N. Y. Com. L. 115.

Not to Establish Original Demand. — In Hammon *v.* Huntley, 4 Cow. (N. Y.) 493, it is held that in matters which relate to the delivery, gift, sale, payment, possession or release of the testator's goods, the acts or admission of one executor is deemed the act of all, but not to establish an original demand against the estate.

34. James *v.* Hackley, 16 Johns. (N. Y.) 273, 6 N. Y. Com. L. 138.

35. Elwood *v.* Deifendorf, 5 Barb. (N. Y.) 398; Cayuga Co. Bank *v.* Bennett, 5 Hill (N. Y.) 236; Hammon *v.* Huntley, 4 Cow. (N. Y.) 493; Potter *v.* Green, N. Y. Supp. 605; Finnem *v.* Hinz, 38 Hun (N. Y.) 465.

36. Berden *v.* Allan, 10 Ill. App. 91; Potter *v.* Greene, 20 N. Y. St. 410, 3 N. Y. Supp. 605; Bruyn *v.* Russell, 22 N. Y. St. 374, 4 N. Y. Supp. 784; Cayuga Co. Bank *v.* Bennett, 5 Hill (N. Y.) 236; Hammon *v.* Huntley, 4 Cow. (N. Y.) 493.

37. Fox *v.* Waters, 12 Ad. & E. 43, 40 Eng. C. L. 18; Church *v.* Howard, 79 N. Y. 415.

38. Eckert *v.* Triplett, 48 Ind. 174, 17 Am. Rep. 735; Newhouse *v.* Redwood, 7 Ala. 598; Lashlee *v.* Jacobs, 9 Humph. (Tenn.) 718; Emerson *v.* Thompson, 16 Mass. 429.

But see to the contrary Rogers *v.* Grannis, 20 Ala. 247, in which it is held that the admissions of the administrator in chief were not competent as against the administrator *de bonis non.*

See also McLaughlin *v.* Nelms, 9 Ala. (N. S.) 925; More *v.* Finch, 48 N. Y. St. 23, 20 N. Y. Supp. 164.

39. Elwood *v.* Deifendorf, 5 Barb. (N. Y.) 398; Osgood *v.* Manhattan Co. 3 Cow. (N. Y.) 612, 15 Am. Dec. 304; Jennings *v.* Kee, 5 Ind. 257; Prater *v.* Frezier, 6 Eng. (Ark.) 249.

40. 1 Greenl. Ev., § 179.

against him if living.[41] But not in his favor unless they are a part of the *res gestae*.[42]

N. Insured and Beneficiary. — a. *Of Insured Against Beneficiary.* — The admissions of the insured, made after the issuance of the policy, are not admissible to affect the rights of the beneficiary under the policy.[43]

41. *England.* — Grocers etc. *v.* Doune, 3 Bing. 34, 32 Eng. C. L. 25.
Alabama. — Lide *v.* Lide, 32 Ala. 449.
California. — Byrne *v.* Reed, 75 Cal. 277, 17 Pac. 201.
Connecticut. — Wainwright *v.* Talcott, 60 Conn. 43, 22 Atl. 484; Allen *v.* Hartford Ins. Co., 72 Conn. 693, 45 Atl. 955; Rowland *v.* Philadelphia & B. R. Co., 63 Conn. 415, 28 Atl. 102.
Illinois. — Riggs *v.* Powell, 142 Ill. 453, 32 N. E. 482; Penn *v.* Oglesby, 89 Ill. 110.
Indiana. — Slade *v.* Leonard, 75 Ind. 171; Bevins *v.* Cline, 21 Ind. 37; Knight *v.* Knight, 6 Ind. App. 268, 33 N. E. 456; Kettry *v.* Thumma, 9 Ind. App. 498, 36 N. E. 919; Clouser *v.* Rickman, 104 Ind. 588, 4 N. E. 202.
Maine. — Dale *v.* Gower, 24 Me. 563; Wentworth *v.* Wentworth, 71 Me. 72.
Massachusetts. — Fellows *v.* Smith, 130 Mass. 378; Crossman *v.* Fuller, 17 Pick. 171; Heywood *v.* Heywood, 10 Allen 105.
Minnesota. — Hosford *v.* Hosford, 41 Minn. 245, 42 N. W. 1018.
Missouri. — McLaughlin *v.* McLaughlin, 16 Mo. 242.
New Hampshire. — Morrill *v.* Foster, 33 N. H. 379.
New York. — Baird *v.* Baird, 145 N. Y. 659, 40 N. E. 222, 28 L. R. A. 375; Swan *v.* Morgan, 88 Hun 378, 34 N. Y. Supp. 829; Ackley *v.* Ackley, 66 Hun 636, 21 N. Y. Supp. 877; Hurlbart *v.* Hurlbart, 128 N. Y. 420, 28 N. E. 650.
North Carolina.—Hughes *v.* Boone, 102 N. C. 137, 9 S. E. 286.
Pennsylvania.—Gordner *v.* Heffley, 49 Pa. St. 163; Hunt's Appeal, 100 Pa. St. 590; Albert *v.* Ziegler, 29 Pa. St. 50; Johnson *v.* McCain, 145 Pa. St. 531, 22 Atl. 979; Perkins *v.* Harbrouck, 155 Pa. St. 494, 26 Atl. 695.
Texas. — Schmidt *v.* Huff (Tex.), 19 S. W. 131.
Vermont. — Wheeler *v.* Wheeler, 47 Vt. 637.
Wisconsin. — Pritchard *v.* Pritchard, 69 Wis. 373, 34 N. W. 506.
By Intestate Against Administrator. — In Slade *v.* Leonard, 75 Ind. 171, it was held in general terms that the declarations of an intestate are admissible against the administrator of his estate or any other claiming in his right. And in Dale *v.* Gower, 24 Me. 563, that if the declarations of an intestate would be good evidence against him, were he hiring, and the action brought by him, they are admissible when the action is brought by his administrator.

42. *See* "Declarations."
Illinois. — Treadway *v.* Treadway, 5 Ill. App. 478.
Maine. — Holmes *v.* Sawtelle, 53 Me. 179.
Massachusetts. — Fellows *v.* Smith, 130 Mass. 378.
Michigan. — Wilson *v.* Wilson, 6 Mich. 9; Ward *v.* Ward, 37 Mich. 253.
Missouri. — Perry *v.* Roberts, 17 Mo. 36.
New York. — Graves *v.* King, 15 Hun 367.
Ohio. — Kyle *v.* Kyle, 15 Ohio St. 15.
Washington. — Reese *v.* Murman, 5 Wash. 373, 31 Pac. 1027.
West Virginia.—Crothers *v.* Crothers, 40 W. Va. 169, 20 S. E. 927.
Wisconsin. — Jilson *v.* Stebbins, 41 Wis. 235.

43. *See* "Declarations;" Res Gestae;" Brown *v.* Kenyon, 108 Ind. 283, 9 N. E. 283.
See "Executors and Administrators."

b. *Exception. — Where Insured May Change Beneficiary.* — A different rule is declared where the insured has the right under the policy to change the beneficiary at his will.[44]

c. *Made Before Insurance Is Affected.* — And it is held that admissions made by the insured before the insurance is procured are admissible.[45]

d. *By Beneficiary.*—The beneficiary, being the real party in interest, his admissions are of course admissible against him.[46]

5. By Strangers. — A. Generally Inadmissible. — The general rule is that declarations of strangers, having no interest in the action or its subject matter, although against their interest, are hearsay and incompetent.[47]

44. *Indiana.* — Pennsylvania Mut. L. Ins. Co. *v.* Wiler, 100 Ind. 92, 50 Am. Rep. 769.

Iowa. — Goodwin *v.* Providence Sav. L. Assur. Soc., 97 Iowa 266, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473.

Kansas. — Washington L. Ins. Co. *v.* Haney, 10 Kan. 525.

New York. — McGinley *v.* U. S. L. Ins. Co., 8 Daly 390.

Tennessee. — Southern L. Ins. Co. *v.* Booker, 9 Heisk. 606, 24 Am. Rep. 344.

Texas. — Thies *v.* Mut. L. Ins. Co., 13 Tex. Civ. App. 280, 35 S. W. 676.

West Virginia. — Schwarzbach *v.* Ohio Valley P. U., 25 W. Va. 622, 52 Am. Rep. 227.

Contrary Rule Declared. — In Manhattan L. Ins. Co. *v.* Myers, 22 Ky. Law 875, 59 S. W. 30, it is held that the acts and declarations of the insured in regard to the payment of the premium and his final conclusion not to pay it but to let the policy lapse were clearly competent against the beneficiary.

Unless Part of Res Gestae. Mobile L. Ins. Co. *v.* Morris, 3 Lea (Tenn.) 101, 31 Am. Rep. 631.

Not to Contradict Statements in Application. — Schwarzbach *v.* Ohio Valley P. U., 25 W. Va. 622, 52 Am. Rep. 227; Steinhausen *v.* Preferred Mut. Acc. Ass'n, 13 N. Y. Supp. 36; Smith *v.* Nat. Ben. Soc., 22 N. Y. St. 852, 4 N. Y. Supp. 521, 25 N. E. 197.

Where Insured May Change Beneficiary. — It is provided by statute in New York that "membership in any corporation, association or society transacting the business of life or casualty insurance or both, upon the co-operative or assessment plan shall give to any member thereof the right at any time, with the consent of such corporation, association or society to make a change in his payee or payees, beneficiary or beneficiaries, without requiring the consent of such payee or beneficiary."

Under this statute it is held that the original beneficiary named gets no separate standing by his designation as such in the policy before the date of the death, and that by designating such beneficiary the deceased did not make a case to exclude evidence of his declarations. Steinhousen *v.* Preferred Mut. Acc. Ass'n, 13 N. Y. Supp. 36.

45. To Show Falsity of Statements in Application. — In McGowan *v.* Supreme Court of the I. O. O. F., 104 Wis. 173, 80 N. W. 603, it was held that the declarations and admissions of the insured made prior to the application were competent to show his knowledge of the falsity of his answers in his demand for the insurance.

46. Allen *v.* Hartford Ins. Co., 72 Conn. 693, 45 Atl. 955.

Where Policy Payable to Estate of Insured. — Where the policy is payable to the estate of the insured, an heir of the insured is not such a party in interest as to render his admissions competent. Merchants' Life Ass'n *v.* Yoakum, 98 Fed. 251.

47. *See* "Declarations."

Connecticut. — Fitch *v.* Chapman,

B. Exception to Rule. — a. *Deceased Persons.* — An exception to the rule that the declarations of one having no interest in the suit or its subject matter are incompetent, is made in case of one deceased who, having peculiar means of knowledge, has made declarations against his interest.[48] The exception extends to book accounts of deceased persons.[49]

b. *One Who Cannot Be Compelled to Testify.* — The exception has also been extended to persons so situated that they could not be witnesses or could not be compelled to testify.[50]

c. *Interest Must Be Pecuniary.* — But to render such admissions admissible they must be against the pecuniary interest of the party making them.[51]

6. Persons Jointly Interested. — A. Generally. — The rule is that where a number of persons have a joint interest or privity of design, or are jointly liable, the admission of one relating to such

10 Conn. 8; Town of North Stonington, 31 Conn. 412.

Illinois. — Montgomery *v.* Brush, 121 Ill. 513, 13 N. E. 230.

Iowa. — Ibbitson *v.* Brown, 5 Iowa 532.

Maryland. — Atwell *v.* Miller, 11 Md. 348, 69 Am. Dec. 206.

Massachusetts. — Lyman *v.* Gipson, 18 Pick. 422.

Minnesota. — Lundberg *v.* Northwestern E. Co., 42 Minn. 37, 43 N. W. 685.

Missouri. — Bain *v.* Clark, 39 Mo. 252.

48. 1 Greenl. Ev., § 147.

England. — Higham *v.* Ridgway, 10 East 109; Roe *v.* Rawlings, 7 East 279.

Alabama. — Hart *v.* Kendall, 82 Ala. 144, 3 So. 41.

Georgia. — Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92; Cunningham *v.* Schley, 41 Ga. 426.

Illinois. — Friberg *v.* Donovan, 23 Ill. App. 58.

Iowa. — County of Mahaska *v.* Ingalls, 16 Iowa 81.

New York. — Lyon *v.* Ricker, 141 N. Y. 225, 36 N. E. 189.

Pennsylvania. — Taylor *v.* Gould, 57 Pa. St. 152.

Vermont. — Warner *v.* McGarry, 4 Vt. 507.

To Establish Identity. — In Reynolds *v.* Staines, 2 Car. & K. 745, 61 Eng. C. L. 744, it was held that where a witness went to a tavern and asked the waiter for a certain person, and on the person's coming out to the witness, the latter asked him who he was, and he said his name was S——; that such proof of this statement was competent and some evidence of the fact that the party was the person that he acknowledged himself to be.

49. *See* "Book Accounts;" Lassone *v.* Boston & L. R. Co., 66 N. H. 345, 24 Atl. 902, 17 L. R. A. 525.

No Difference Between Written and Oral Admissions. — There is no distinction between books of account or other written admissions, and such as are oral, merely, in respect of their competency. County of Mahaska *v.* Ingalls, 16 With. (Iowa) 81; Cunningham *v.* Schley, 41 Ga 426.

50. Fitch *v.* Chapman, 10 Conn. 8.

51. By Deceased Person. — In Friberg *v.* Donovan, 23 Ill. App. 58, the court say: "One of the exceptions to the rule excluding hearsay evidence is the case of declarations of a deceased person's having peculiar means of knowing a fact, made against his pecuniary interest, the law being that such declarations are admissible even in suits in which neither such deceased person nor those claiming under him was or is a party, provided such deceased person could have been examined in regard to the matter in his lifetime."

joint matter is, in the absence of fraud, competent against all.[52] But not admissions made after the joint interest has been severed by

52. *United States.* — Forsyth *v.* Dolittle, 120 U. S. 73, 7 Sup. Ct. 408; Howard *v.* Cobb, 3 Day 309, 12 Fed. Cas. No. 6755.

Alabama. — Camp *v.* Dill, 27 Ala. 553.

Arkansas. — Dudney *v.* State, 22 Ark. 251; Rolan *v.* Nichols, 22 Ark. 244.

California. — Kilburn *v.* Ritchie, 2 Cal. 145, 56 Am. Dec. 326.

Florida. — Bacon *v.* Green, 36 Fla. 313, 18 So. 870.

Illinois. — McMillan *v.* McDill, 110 Ill. 47.

Indiana. — Wonderly *v.* Booth, 19 Ind. 169; Chapel *v.* Washburn, 11 Ind. 393.

Louisiana. — State *v.* Hogan, 3 La. Ann. 714.

Maine. — Davis *v.* Keene, 23 Me. 69.

Maryland. — Pierce *v.* Roberts (Md.), 17 Atl. 275.

Massachusetts. — Martin *v.* Root, 17 Mass. 222.

Michigan. — Mathews *v.* Phelps, 61 Mich. 327, 28 N. W. 108.

Missouri.—Hurst *v.* Robinson, 13 Mo. 82, 53 Am. Dec. 134; Armstrong *v.* Farrar, 8 Mo. 627; St. Louis Paint Co. *v.* Mepham, 30 Mo. App. 15.

New Hampshire. — Burnham *v.* Sweatt, 16 N. H. 418; Lee *v.* Lamprey, 43 N. H. 13.

New Jersey. — Black *v.* Lamb, 12 N. J. Eq. 108; Walling *v.* Rosevelt, 16 N. J. Law 41.

New Mexico. — Lockhart *v.* Wills, 9 N. M. 263, 50 Pac. 318.

New York. — Barrick *v.* Austin, 21 Barb. 241; Costelo *v.* Care, 2 Hill 528, 27 Am. Dec. 404; Brandt *v.* Van Cortlandt, 17 Johns. 335; Jackson *v.* McVey, 18 Johns. 330.

North Carolina.—Knight *v.* Houghtalling, 85 N. C. 17; Young *v.* Griffith, 79 N. C. 201.

Pennsylvania. — Souder *v.* Schlechterly, 91 Pa. St. 83.

South Carolina. — Bell *v.* Coiel, 2 Hill Ch. 108, 27 Am. Dec. 448, Dillard *v.* Dillard, 2 Strob. 89.

Texas. — Hardy *v.* DeLeon, 5 Tex. 211.

Vermont. — Bank of U. S. *v.* Lyman, 20 Vt. 666.

West Virginia. — Dickinson *v.* Clarke, 5 W. Va. 280.

By One Not a Party to the Record. — In Dickinson *v.* Clarke, 5 W. Va. 280, it is intimated that admissions made by one jointly interested, but not a party to the record, are inadmissible.

Not to Create New Contract or Enlarge the Old. — The power of a joint contractor is confined to admissions affecting the liability of all of the contractors upon their joint contract and his admissions will not be heard to create a new contract or enlarge or extend the old one. Bank of U. S. *v.* Lyman, 20 Vt. 666; Thompson *v.* Richards, 14 Mich. 172. The Lussex Peerage, 11 C. & F. (Eng.) 85; Corleleys *v.* Ripley, 22 W. Va. 154.

Of Persons Without Interest. But in some cases it is held to be enough if the party in possession was without interest one way or the other or where nothing appears to show an interest to deceive or misrepresent. Corleleys *v.* Ripley, 22 W. Va. 154; Bartlett *v.* Emerson, 7 Gray (Mass.) 174; Daggett *v.* Shaw, 5 Metc. (Mass.) 223; Long *v.* Colton, 116 Mass. 414.

Respecting Boundaries. — Many, if not most of the cases, bearing upon this subject relate to boundaries and will be considered under that head. *See* "Boundaries."

It is generally held that such declarations are competent only when accompanied by the act of pointing out the boundary in dispute. Long *v.* Colton, 116 Mass. 414.

Party Without Interest. — "In regard to this exception, many authorities have been cited by the counsel for the demandant, to prove that these declarations are only to be received as admissions of a party in possession, when made against his interest. But we think the rule, as it has been practiced upon in this commonwealth, is not so restricted;

death or otherwise,[53] or before the joint liability attached.[54] And in some cases it is directly held that such admissions are not competent if made by one obligor who is bound to indemnify or contribute to the others.[55]

B. By One of Several Owners Inadmissible. — The rule that the admissions of one jointly interested is admissible against others jointly interested with him must be limited to those acting together and not those merely owning property jointly.[56]

and that the declarations of ancient persons, made while in possession of land owned by them, pointing out their boundaries on the land itself, and who are deceased at the time of the trial, are admissible in evidence, where nothing appears to show that they were interested to misrepresent in thus pointing out their boundaries; and it need not appear affirmatively that the declarations were made in restriction of, or against, their own rights." Daggett *v.* Shaw, 5 Metc. (Mass.) 223.

Where Jointly Sued. — It is not enough that the parties be jointly sued. There must be a joint liability or interest to render their admissions competent for or against each other. Koplan *v.* Boston Gas L. Co., 177 Mass. 15, 58 N. E. 183.

Only Where the Relation of Agency Exists. — In Wallis *v.* Randall, 81 N. Y. 164, it is held that a joint debtor has no authority to bind any person jointly liable with him by his statements or admissions, unless he is the agent, or, in some other way, the representative of such person; and that the mere fact that he is a joint debtor never gives the authority. See also Baker *v.* Briggs, 8 Pick. (Mass.) 121, 19 Am. Dec. 311; Osborne *v.* Bell, 62 Mich. 214, 28 N. W. 841; Warner *v.* Price, 3 Wend. (N. Y.) 397.

Joint Liability Must First Be Shown. — To render the admission competent, the joint liability must first be established. Stringfellow *v.* Montgomery, 57 Tex. 349.

53. Lane *v.* Doty, 4 Barb. (N. Y.) 530; Blakeney *v.* Ferguson, 14 Ark. 640; Hitt *v.* Allen, 13 Ill. 592.

54. Eckert *v.* Cameron, 43 Pa. St. 120.

55. Rapier *v.* Louisiana Eq. L. Ins. Co., 57 Ala. 100.

56. *Connecticut.* — Dale's Appeal, 57 Conn. 127, 17 Atl. 757.

Illinois. — McMillan *v.* McDill, 110 Ill. 47.

Indiana. — Hayes *v.* Burkam, 67 Ind. 359.

Iowa. — Ames *v.* Blades, 51 Iowa 596, 2 N. W. 408; Dye *v.* Young, 55 Iowa 433, 7 N. W. 678.

Massachusetts. — Phelps *v.* Hartwell, 1 Mass. 71; Shailer *v.* Bumstead, 99 Mass. 112.

Michigan. — O'Connor *v.* Madison, 98 Mich. 183, 57 N. W. 105.

Mississippi. — Prewett *v.* Coopwood, 30 Miss. 369.

Pennsylvania. — Boyd *v.* Eby, 8 Watts 66; Clark *v.* Morrison, 25 Pa. St. 453; Nussear *v.* Arnold, 13 Serg. & R. 323.

South Carolina. — Dillard *v.* Dillard, 2 Strob. 89.

West Virginia. — Forney *v.* Ferrell, 4 W. Va. 720.

But see to the contrary Allen *v.* Allen, 26 Mo. 327; Milton *v.* Hunter, 13 Bush (Ky.) 163; Beal *v.* Cunningham, 1 B. Mon. (Ky.) 399; Armstrong *v.* Farrar, 8 Mo. 627.

By Acquieseence. — But one may be bound by acquiescence in what is said by the other owner. Caldwell *v.* Augur, 4 Minn. 217, 77 Am. Dec. 515.

Identity of Interest. — The rule is sometimes broadly declared that if there be an identity of interest in respect to the subject matter of the suit, the admission of one party with relation thereto is, in general, evidence against all the parties. Irby *v.* Brigham, 28 Tenn. 750; Tuttle *v.* Turner, 28 Tex. 759.

Interest Must Be Joint. — It is not enough to show a community of

a. *By Stockholders of a Corporation.* — The admissions of stockholders or members of a corporation are not admissible against such corporation.[57]

C. To Take Debt Out of Statute of Limitations. — Upon the question whether the admissions or acknowledgments of one joint obligor may be received as against another, to take the debt out of the Statute of Limitations, the authorities are conflicting, some holding that they may,[58] others that they may not.[59]

interest. The interest must be joint to admit the admissions. Shailer *v.* Bumstead, 99 Mass. 112.

57. Hartford *v.* Hart, 3 Day (Conn.) 491, 3 Am. Dec. 274; Fairfield Co. Tp. Co. *v.* Tkorp, 13 Conn. 173.

Admissions of Each Competent as Against Him. — But the admissions of each is competent as against him and the admissions of all may establish the case against all. Trego *v.* Lewis, 58 Pa. St. 463.

58. *England.* — Perham *v.* Raynal, 2 Bing. 306, 9 Eng. C. L. 413.

Connecticut. — Bound *v.* Lathrop, 4 Conn. 336, 10 Am. Dec. 147; Caldwell *v.* Sigourney, 19 Conn. 36; Austin *v.* Bostwick, 9 Conn. 496, 25 Am. Dec. 42.

Georgia.—Cox *v.* Bailey, 9 Ga. 467, 54 Am. Dec. 358.

Maine. — Dinsmore *v.* Dinsmore, 21 Me. 433; Getchell *v.* Heald, 7 Greenl. 26; Lincoln Academy *v.* Newhall, 38 Me. 179; Shepley *v.* Waterhouse, 22 Me. 497.

Massachusetts. — White *v.* Hale, 3 Pick. 291, 15 Am. Dec. 209; Hunt *v.* Bridgham, 2 Pick. 581; Sigourney *v.* Drury, 14 Pick. 387.

Minnesota. — Whitaker *v.* Rice, 9 Minn. 9.

New York. — Johnson *v.* Beardslee, 15 Johns. 3, 5 N. Y. Com. L. 990.

Pennsylvania. — Houser *v.* Irvine, 3 Watts & S. 345.

South Carolina. — Beitz *v.* Fuller, 1 McCord 541.

Vermont. — Bank of U. S. *v.* Lyman, 20 Vt. 666; Wheelock *v.* Doolittle, 18 Vt. 440, 46 Am. Dec. 163; Carlton *v.* Coffin, 27 Vt. 496.

Reason for the Rule. — The cases holding that one joint obligor may continue the liability in force by his acknowledgment of the debt proceed upon the ground of agency between the parties. Those holding the contrary maintain that the acknowledgment is a new promise that the joint contractor has no power to make as agent or otherwise. Shoemaker *v.* Benedict, 11 N. Y. 176, 62 Am. Dec. 95.

Must Be Express and Unequivocal. Holme *v.* Green, 1 Stark. 488, 2 Eng. C. L. 479.

59. *United States.* — Bell *v.* Morrison, 1 Pet. 351.

Connecticut. — Coit *v.* Tracy, 8 Conn. 268, 20 Am. Dec. 110.

Kansas.—Steele *v.* Souder, 20 Kan. 39.

New York.— Shoemaker *v.* Benedict, 11 N. Y. 176, 62 Am. Dec. 95; Littlefield *v.* Littlefield, 91 N. Y. 203; Dunham *v.* Dodge, 10 Barb. 566.

North Carolina. — Rogers *v.* Clements, 92 N. C. 81.

Ohio. — Hance *v.* Hair, 25 Ohio St. 349.

Pennsylvania. — Bush *v.* Stowell, 71 Pa. St. 208; Coleman *v.* Fobes, 22 Pa. St. 156; Meade *v.* McDowell, 5 Binn. 195.

See on this subject note to Chardon *v.* Oliphant, 6 Am. Dec. 572.

Admissible if Party to the Action. In Coit *v.* Tracy, 8 Conn. 268, 20 Am. Dec. 110, the admissions were held to be *admissible* because the party making them was a party to the record but that they were *insufficient* to prevent the bar of the statute as against the other joint contractor.

Where Joint Liability Has Ceased. It is held that where the liability has ceased to be joint by the death of one of the parties the admissions of the survivor made thereafter are inadmissible. Bloodgood *v.* Bruen, 8 N. Y. 362; Lane *v.* Doty, 4 Barb. (N. Y.) 530.

D. PARTNERS. — a. *Admissible Against the Firm.* — The rule is that the admissions of one co-partner in respect of the joint business, are competent against the firm and its members.[60]

Admissions by Administrator of Estate. — An administrator cannot by his admissions or default in making defense, deprive other makers of a note of the right of defense of the statute of limitations. Dawes *v.* Shed, 15 Mass. 6, 8 Am. Dec. 80; Bloodgood *v.* Bruen, 8 N. Y. 362; Hathaway *v.* Haskell, 9 Pick. (Mass.) 42.

Rule Changed by Statute. — In some of the states, it is provided by statute that declarations of one promissor shall not have the effect of taking the case out of the statute of limitations. Amherst Bank *v.* Root, 2 Metc. (Mass.) 522; Lincoln Academy *v.* Newhall, 38 Me. 179; Shepley *v.* Waterhouse, 22 Me. 497; Marienthal *v.* Mosler, 16 Ohio St. 566; Hance *v.* Hair, 25 Ohio St. 349; Rogers *v.* Anderson, 40 Mich. 290; Faulkner *v.* Bailey, 123 Mass. 588; Carlton *v.* Coffin, 27 Vt. 496; Bailey *v.* Corlis, 51 Vt. 366; Steele *v.* Souder, 20 Kan. 39.

60. *United States.* — Van Reimsdyk *v.* Kane, 1 Gall. 630, 28 Fed. Cas. No. 16,872; Garrett *v.* Woodward, 2 Cranch C. C. 190, 10 Fed. Cas. No. 5253.

Alabama. — Fail *v.* McArthur, 31 Ala. (N. S.) 26; Smitha *v.* Cureton, 31 Ala. (N. S.) 652; Kenan *v.* Starkie, 6 Ala. (N. S.) 773; Fricklin *v.* Minor, 34 Ala. 33; Hutchins *v.* Childress, 4 Stew. 34; Clark *v.* Taylor, 68 Ala. 453; Cochran *v.* Cunningham, 16 Ala. 448, 50 Am. Dec. 186.

California. — Dennis *v.* Kohm, 131 Cal. 91, 63 Pac. 141.

Colorado. — Kindel *v.* Hall, 8 Colo. App. 63, 44 Pac. 781.

Connecticut. — Pierce *v.* Roberts, 57 Conn. 31, 17 Atl. 275; Munson *v.* Wickwire, 21 Conn. 513; Brown *v.* Lawrence, 5 Conn. 397.

Georgia. — Thompson *v.* Mallory, 108 Ga. 797, 33 S. E. 986; Perry *v.* Butt, 14 Ga. 699; Dennis *v.* Ray, 9 Ga. 449.

Illinois. — Hurd *v.* Haggerty, 24 Ill. 172.

Indiana. — Britton *v.* Britton, 19 Ind. App. 638, 49 N. E. 1076.

Kentucky. — Boyce *v.* Watson, 3 J. J. Marsh. 498.

Maine. — Frickett *v.* Swift, 41 Me. 65, 66 Am. Dec. 214; Davis *v.* Keene, 23 Me. 69; Phillips *v.* Purington, 15 Me. 425; Stockwell *v.* Dillingham, 50 Me. 442, 79 Am. Dec. 621; Gilmore *v.* Patterson, 36 Me. 544; Foster *v.* Fifield, 29 Me. 136.

Maryland. — Folk *v.* Wilson, 21 Md. 538, 83 Am. Dec. 599.

Massachusetts. — Vinal *v.* Burrill, 16 Pick. 401; Cady *v.* Shepherd, 11 Pick. 400; Odiorne *v.* Maxcy, 15 Mass. 39; Collett *v.* Smith, 143 Mass. 473, 10 N. E. 173; Shaw *v.* Stone, 1 Cush. 228; Chapin *v.* Coleman, 11 Pick. 330; Nickerson *v.* Russell, 172 Mass. 584, 53 N. E. 141.

Michigan. — Towle *v.* Dunham, 84 Mich. 268, 47 N. W. 683.

Minnesota. — Lindhjean *v.* Mueller, 42 Minn. 307, 44 N. W. 203; Coleman *v.* O'Neil, 26 Minn. 123, 1 N. W. 846.

Mississippi. — Lea *v.* Guice, 13 Smed. & M. 656.

Missouri. — Dowzelot *v.* Rawlings, 58 Mo. 75; Cunningham *v.* Sublette, 4 Mo. 224; Rainwater *v.* Burr, 55 Mo. App. 468; Henslee *v.* Cannefax, 49 Mo. 295; Cady *v.* Kyle, 47 Mo. 346.

New Hampshire. — Rich *v.* Flanders, 39 N. H. 304; Pierce *v.* Wood, 23 N. H. 519; Tucker *v.* Pearlee, 36 N. H. 167; Webster *v.* Stearns, 44 N. H. 498.

New Jersey. — Ruckman *v.* Decker, 23 N. J. Eq. 283; Dunnell *v.* Henderson, 23 N. J. Eq. 174.

New Mexico. — First Nat. Bank *v.* Lesser, 9 N. M. 604, 58 Pac. 345.

New York. — Schroeder *v.* Frey, 37 N. Y. St. 945, 14 N. Y. Supp. 71; Hotopp *v.* Huber, 16 App. Div. 327, 44 N. Y. Supp. 617; Klock *v.* Beekman, 18 Hun 502; Randall *v.* Knevals, 27 App. Div. 146, 50 N. Y. Supp. 748.

North Carolina. — Brown Chem.

(1.) Must Be Acting As a Partner.—But to render such admissions competent he must be acting as a partner about a partnership mat-

Co. *v.* Atkinson, 91 N. C. 389; Hall *v.* Younts, 87 N. C. 285.

Ohio. — McKee *v.* Hamilton, 33 Ohio St. 7; Goodenow *v.* Duffield, Wright 456; Benninger *v.* Hess, 41 Ohio St. 64.

Tennessee. — Fisk *v.* Copeland, 1 Tenn. 383.

Texas. — Wills Point Bank *v.* Bates, 72 Tex. 137, 10 S. W. 348; American F. Ins. Co. *v.* Stuart (Tex. Civ. App.), 38 S. W. 395; Hunter *v.* Hubbard, 26 Tex. 537.

Wisconsin. — Western Assurance Co. *v.* Towle, 65 Wis. 247, 26 N. W. 104; Fisk *v.* Tank, 2 Wis. 276, 78 Am. Dec. 737.

To Be Admissible Need Not Be Party to Suit. — In Munson *v.* Wickwire, 21 Conn. 513, evidence of the admissions of a partner was objected to on the ground that the said partner was not a party to the suit, but it was held that this did not affect the competency of his admissions, the court saying:

"But we think that the question of their admissibility is not varied by the circumstance that he has thus ceased to be a party. The rule as to the admissions of partners is not confined to those who are parties to the suit. The declarations of one partner are not received against another because he is a joint party in the suit, but on the ground that their unity of interest constitutes them, for this purpose, virtually one person. Therefore, the admission by one partner may be received against another though he be not served with process or a *nolle prosequi* be entered against him."

See also Cady *v.* Kyle, 47 Mo. 346; Boyce *v.* Watson, 3 J. J. Marsh. (Ky.) 498.

Answer in Chancery Competent. An answer in chancery of one of the partners is admissible as in case of other admissions. Hutchins *v.* Childress, 4 Stew. & P. (Ala.) 34.

Letter by One Partner to Another. In Wills Point Bank *v.* Bates, 72 Tex. 137, 10 S. W. 348, the question was as to the admission of a letter written by one partner to another, and in passing upon the admissibility of such letter as evidence, the court said:

"The letter was an admission, made by one member of the firm, shown to have been present at the time the transaction with Gugenheim & Co. was consummated, tending to show what its real nature was, and in reference to which either partner could be compelled to testify. Such declarations or admissions, made by one partner to another, have never been recognized as privileged communications. The fact of partnership being shown to have existed at the time the letter was written, and at the time the transaction to which it referred occurred, the writing of the letter and its contents might be proved by any person having knowledge of those facts. The fact that Williams testified after the dissolution of the partnership does not affect the admissibility of the evidence, showing an admission or declaration made by one member of the firm prior to dissolution."

The Rule Applies to Silent Partners. — Weed *v.* Kellogg, 6 McLean 44, 29 Fed. Cas. No. 17,345.

One Cannot Change Contract of Firm. — Moore *v.* Gano, 12 Ohio 300.

To Show Claim to Be a Partnership Debt. — While the admissions of an alleged partner cannot be heard to establish the partnership, they are competent to show that the claim sued on is a partnership debt. Lea *v.* Guice, 13 Smed. & M. (Mass.) 656; Garrett *v.* Woodward, 2 Cranch C. C. 190, 10 Fed. Cas. No. 5253; Phillips *v.* Purington, 15 Me. 425; Dodds *v.* Rogers, 68 Ind. 110.

But it has been held directly to the contrary. Ostrom *v.* Jacobs, 9 Metc. (Mass.) 454; Atwood *v.* Brooks (Tex. Civ. App.), 16 S. W. 535; Cooper *v.* Wood, 1 Colo. App. 101, 27 Pac. 884.

Must Be Against Interest. — The admission to be admissible must be

ter,[61] or the admission must be made in relation to matters within the scope of the partnership.[62]

(2.) By Partner Since Deceased. — The declarations of an alleged partner since deceased, made against his interests and going to the question of the existence of the partnership, are competent.[63] They have been held competent also, to show that the claim was a partnership debt.[64]

b. *Made After Dissolution Inadmissible.* — The general rule, established by the weight of authority, is that the power of a partner to make admissions binding upon the firm, ceases upon the dissolution of the partnership.[65]

against the interest of the partner making it and will not be received when in his own favor but against the interest of his co-partner. Lewis *v.* Allen, 17 Ga. 300; Edgell *v.* Macqueen, 8 Mo. App. 71.

61. *Illinois.* — Hahn *v.* St. Clair, S. & I. Co., 50 Ill. 456.

Indiana. — Boor *v.* Lowrey, 103 Ind. 468, 3 N. E. 151; Hickman *v.* Reineking, 6 Blackf. 387.

Kentucky. — Stockton *v.* Johnson, 6 B. Mon. 408.

Massachusetts. — Taft *v.* Church, 162 Mass. 527, 39 N. E. 283.

Michigan. — Welch *v.* Palmer, 85 Mich. 310, 48 N. W. 552.

Minnesota. — Slipp *v.* Hartley (Minn.), 52 N. W. 386.

Nevada. — Jones *v.* O'Farrell, 1 Nev. 354.

New York. — Thorn *v.* Smith, 21 Wend. 365, 13 N. Y. Com. L. 1122; Elliott *v.* Dudley, 19 Barb. 326; Union Nat. Bank *v.* Underhill, 102 N. Y. 336, 7 N. E. 293.

Wyoming. — Hester *v.* Smith, 5 Wyo. 291, 40 Pac. 310.

That His Own Debt Was a Debt of the Firm. — A partner cannot by his admissions, render his co-partner liable for his individual debt. Elliot *v.* Dudley, 19 Barb. (N. Y.) 326; White *v.* Gibson, 11 Ired. Law (N. C.) 283.

Admission After Transaction. In White *v.* Gibson, 11 Ired. Law (N. C.) 283, it is held that the declaration of a partner, after the purchase of an article, that he had purchased it for and on account of the firm is not sufficient to make his co-partners liable.

62. Slipp *v.* Hartley (Minn.), 52 N. W. 386; Low *v.* Arnstein, 73 Ill App. 215.

63. Humes *v.* O'Bryan, 74 Ala. 64.

64. Dodds *v.* Rogers, 68 Ind. 110. Story Partn. §§ 323, 324.

65. *England.*—Henderson *v.* Wild, 2 Camp. 561.

United States. — Bispham *v.* Patterson, 2 McLean 87, 3 Fed. Cas. No. 1441; Thompson *v.* Bowman, 6 Wall. 316.

California. — Brums *v.* McKenzie, 23 Cal. 101.

Colorado. — Cooper *v.* Wood, 1 Colo. App. 101, 27 Pac. 884.

Illinois. — Winslow *v.* Newlan, 45 Ill. 145; Miller *v.* Neimerick, 19 Ill. 171.

Indiana. — Yandes *v.* Lefavour, 2 Blackf. 371; Boor *v.* Lowry, 103 Ind. 468, 3 N. E. 151.

Kentucky. — Bentley *v.* White, 3 B Mon. 263, 38 Am. Dec. 186; Craig *v.* Alverson, 6 J. J. Marsh. 609; Daniel *v.* Nelson, 10 B. Mon. 316; Hamilton *v.* Summers, 12 B. Mon. 11.

Louisiana. — Johnson *v.* Marsh, 2 La. Ann. 772; Conery *v.* Hayes, 19 La. Ann. 325; White *v.* Kearney, 9 Rob. 495; Dupre *v.* Richard, 11 Rob. 497; Lachomette *v.* Thomas, 5 Rob. 172; Lambeth *v.* Vawter, 6 Rob. 127; Clarke *v.* Jones, 1 Rob. 78.

Maine. — Foster *v.* Fifield, 29 Me. 136.

Maryland. — Newman *v.* McComas, 43 Md. 70; Ward *v.* Howell, 5 Har. & J. 60; Owings *v.* Low, 5 Gill. & J. 134.

Massachusetts.—Ostrom *v.* Jacobs, 9 Metc. 454.

Minnesota. — First Nat. Bank *v.* Strait, 65 Minn. 162, 67 N. W. 987;

(1.) **Contrary Rule Declared.** — But it seems to have been the rule in England, adopted in some of the states in this country, that the

Nat. Bank *v.* Meader, 40 Minn. 325, 41 N. W. 1043.

Missouri. — Pope *v.* Risley, 23 Mo. 185; Brady *v.* Hill, 1 Mo. 315; American Iron Co. *v.* Evans, 27 Mo. 552.

New York.—Baker *v.* Stackpoole, 9 Cow. 420, 18 Am. Dec. 508; Gleason *v.* Clark, 9 Cow. 57, 9 N. Y. Com. L. 565; Hackley *v.* Patrick, 3 Johns. 536, 3 N. Y. Com. L. 695; Walden *v.* Sherburne, 15 Johns. 409, 5 N. Y. Com. L. 1139; Brisban *v.* Boyd, 4 Paige Ch. 17, 3 N. Y. Com. L. 322; Nichols *v.* White, 85 N. Y. 531; Williams *v.* Manning, 41 How. Pr. 454; Hopkins *v.* Banks, 7 Cow. 650, 9 N. Y. Com. L. 252; Graham *v.* Selover, 59 Barb. 313.

Pennsylvania. — Mair *v.* Beck (Pa.), 2 Atl. 218; Hogg *v.* Orgill, 34 Pa. St. 344; Levy *v.* Cadet, 17 Serg. & R. 126, 17 Am. Dec. 650.

Texas. — Cohen *v.* Adams, 13 Tex. Civ. App. 118, 35 S. W. 303.

Powers Cease With Dissolution. In Miller *v.* Neimerick, 19 Ill. 171, a leading case on the subject, the court said:

"The question is broadly presented whether admissions of one partner made *after* the dissolution of the partnership, relating to partnership transactions arising prior to the dissolution, are admissible to charge the several members of the dissolved firm. In the case of Wood *v.* Braddick, 1 Taunton R. 104, such admissions were held competent to charge all the members of the firm, and that ruling seems to have been followed in England until finally avoided by act of Parliament. The same rule has been recognized in several states of this union, but in many of them the opposite doctrine prevails.

"In view of the conflict of authority upon the question, we are at liberty to adopt such rule as is most consonant with the reason and analogies of the law, and best adapted to the security of private rights. It is true, that during the existence of the partnership, each partner may act for the whole, upon the ground that all have delegated to each, authority to act for them in matters of joint concern; but this plenary power of the several members of the partnership continues no longer than the partnership out of which it arises. Therefore, when the partnership has terminated, the several partners lose their authority to act for the whole, and can no longer bind them by any undertaking in the partnership name; and their powers become limited to the adjustment of the partnership affairs and the winding up of the partnership. For such purposes each may receive and release debts due the partnership, and apply the assets to the liquidation of the firm debts—the pre-existing rights of their persons remaining unaffected by the dissolution—but the power to bind the several members of the dissolved firm, by the creation of new liabilities and obligations, falls with the partnership."

Admissions After Dissolution. In Cooper *v.* Wood, 1 Colo. App. 101, 27 Pac. 884, the authorities on the subject are cited and reviewed. In that case the court said: "Another important question, which, as far as I can ascertain, has not been determined in this court is presented in this case, viz., whether, under any circumstances after the dissolution of the partnership, the admissions or acknowledgments of a former partner are admissible to establish a cause of action against a former partner. In England, the rule for years was well settled that such admissions are competent, not only to take the case out of the statute of limitations, but to establish or create a firm indebtedness. It was based upon the opinion of Lord Mansfield in Whitcomb *v.* Whiting, 2 Doug. 652, and what Judge Story (Story Partn. 323) did not hesitate to call an unreasoned decision. The case has been severely criticised in the English courts. See opinion of Lord Kenyon in Clarke *v.* Bradshaw, 3 Esp. 155; of Lord Ellenborough in Brandram *v.* Warton, 1 Barn. &

power of one partner to bind another by his admissions does not, with respect to past transactions or liability growing out of such transactions, cease with the dissolution of the partnership, but that admissions, made thereafter, are competent.[66]

Ald. 463; and Lord Tenterden in Atkins *v.* Tredgold, 2 Barn. & C. 23; and the doctrine has been limited and partially overturned by late acts of Parliament. In the United States, considerable diversity of opinion is expressed in the different courts, some few states adhering to and following the old English decisions; but in federal courts the English doctrine has been overruled, and the admission held inadmissible, first in the case of Clementson *v.* Williams, 8 Cranch 72, followed by Judge Story in Bell *v.* Morrison, 1 Pet. 373. In Bispham *v.* Patterson, 2 McLean 87, the learned judge, after reviewing the authorities, expressed his conviction in favor of the English rule but yielded to American precedents, and decided the case in harmony with them. The American rule, overruling early English decisions, has since been followed in those courts. See Thompson *v.* Bowman, 6 Wall. 316. In a great majority of state courts the English doctrine has been overruled; first in the state of New York, and followed by at least twenty other state courts. In New York the English rule was repudiated as early as Walden *v.* Sherburne, 15 Johns. 409, which has since been followed in Van Keuren *v.* Parmelee, 2 N. Y. 523, in which the decisions of the different states are carefully and ably reviewed in the court of appeals, resulting again in overruling the English doctrine. The principal authorities on the subject will be found collected in 3 Kent Com. 49-51. The power of an individual partner to bind the firm during its existence arises only from the fact that each is the agent of the firm, and, it seems difficult upon principle to perceive how they can be any more than the declarations or acts or acknowledgments of any other agent of the partnership would be after his agency has ceased. Story, Partn. 323, and see Ellicott *v.* Nichols, 7 Gill. 85; Thompson *v.* Bowman, 6 Wall. 316. There is certainly great authority, as well as reason for adopting the American rule."

Rule the Same as in Case of Other Agents. — In Boor *v.* Lowrey, 103 Ind. 468, 3 N. E. 151, it is held that neither the admissions nor declarations of a partner made after the event to which they refer has transpired, can properly be received in evidence to bind the other, unless so immediately connected with the event as to become a part of the *res gestae*, and that in this respect declarations of a partner made in the absence of the other partners stand upon the same footing with the declarations of other agents.

Except to Take Debt Out of Statute of Limitations. — In Hopkins *v.* Banks, 7 Cow. (N. Y.) 650, it is held that admissions made after dissolution are not binding except to *avoid the statute of limitations*. See also Ward *v.* Howell, 5 Har. & J. (Md.) 60; Shelton *v.* Cocke, 3 Munf. (Va.) 191; Tappan *v.* Kimball, 30 N. H. 136; Warner *v.* Allee, 1 Del. Ch. 49.

66. *United States.* — Bell *v.* Morrison, 1 Pet. 351.

Alabama. — Cochran *v.* Cunningham, 16 Ala. (N. S.) 448; Barringer *v.* Sneed, 3 Stew. 201, 20 Am. Dec. 74.

Illinois. — Hitt *v.* Allen, 13 Ill. 592.

Indiana. — Kirk *v.* Hiatt, 2 Ind. 322.

Maine. — Darling *v.* Leonard, 22 Me. 184; Parker *v.* Merrill, 6 Greenl. 41.

Massachusetts. — Vinal *v.* Burrill, 16 Pick. 401; Cady *v.* Shepherd, 11 Pick. 400, 22 Am. Dec. 379; Harding *v.* Butler, 156 Mass. 34, 30 N. E. 168; Bridge *v.* Gray, 14 Pick. 55, 25 Am. Dec. 35; Ide *v.* Ingraham, 5 Gray 106.

Michigan. — Pennoyer *v.* David, 8 Mich. 407.

(A.) Admissible Against the Party Making It. — The admission is competent as against the party making it, and is properly admitted, although not binding, upon the firm or other partners.[67]

(B.) Must Relate to Past Business. — Admissions made after dissolution, if admissible at all, must relate to business done by the firm previous to such dissolution.[68]

(2.) Where Partner Made Agent to Close Up the Business. — If one partner is authorized by the other to close up the business after the dissolution, he is then made the agent of the firm for that purpose, and his admissions in furtherance of his agency are admissible against the other partner.[69]

(3.) Where Has Assigned to Co-Partner. — If one partner has, after dissolution, assigned his interest to the other, his admissions after such assignment are not admissible against the assignee.[70] But the rule does not apply where he still retains an interest in the business.[71]

(4.) Not to Create New Obligation. — The authority of a partner after dissolution, will make binding only such admissions as relate to the closing up of the partnership business, and they cannot be heard to create new or extend or increase the old liabilities.[72]

Mississippi. — Curry *v.* Kurtz, 33 Miss. 24.

New Hampshire. — Mann *v.* Locke, 11 N. H. 246.

New Jersey. — Casebolt *v.* Ackerman, 46 N. J. Law 169.

Ohio. — Myers *v.* Standart, 11 Ohio St. 29.

Pennsylvania. — Houser *v.* Irvine, 3 Watts & S. 345.

South Carolina. — Fripp *v.* Birnie, 14 S. C. 502; Simpson *v.* Geddes, 2 Bay 533; Beckham *v.* Peay, 1 Bailey 121.

Texas. — Nalle *v.* Gates, 20 Tex. 315.

Vermont.—Woodworth *v.* Downer, 13 Vt. 522; Wheelock *v.* Doolittle, 18 Vt. 440; Loomis *v.* Loomis, 26 Vt. 198.

Admission After Dissolution of Partnership. — In Vinal *v.* Burrill, 16 Pick. (Mass.) 401, the court said: "The confessions of one partner after the dissolution of the partnership in relation to the concerns of the partnership are competent, though not conclusive evidence against a co-partner, the joint contract being proved *aliunde*. This rule does not enable a partner, after the dissolution, to create a new debt or obligation. In regard to all contracts made before the dissolution, the joint liability continues after the dissolution."

Distinguished From Ordinary Joint Contract. — In this respect, partnership contracts are distinguished from joint ordinary contracts. Hitt *v.* Allen, 13 Ill. 592.

Cannot Create New Obligation. A distinction is made between an admission as to an existing obligation and an acknowledgment that will create a new liability. Kirk *v.* Hiatt, 2 Ind. 322; Lansing *v.* Gaine, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422; Ellicott *v.* Nichols, 7 Gill (Md.) 85.

67. Boynton *v.* Hardin, 9 Kan. App. 166, 58 Pac. 1007; Creath *v.* Distilling Co., 70 Mo. App. 296.

68. Taylor *v.* Hillyer, 3 Blackf. (Ind.) 433, 26 Am. Dec. 430.

69. Reppert *v.* Colvin, 48 Pa. St. 248; Ide *v.* Ingraham, 5 Gray (Mass.) 106; Hogg *v.* Orgill, 34 Pa. St. 344.

70. Gillighan *v.* Tebbetts, 33 Me. 360.

71. Foster *v.* Fifield, 29 Me. 136.

72. *United States.* — Bell *v.* Morrison, 1 Pet. 351.

Alabama. — Wilson *v.* Torbert, 3 Stew. 296.

California. — Curry *v.* White, 51 Cal. 530.

Kentucky. — Merritt *v.* Pollys, 16

c. *Partnership Must Be Proved.* — As the competency of admissions of one person as against another depends, in this case, upon the fact of the existence of the partnership, the fact of partnership between the two parties must be first shown to render the evidence admissible.[73]

(1.) Cannot Be Proved by Admissions of One Alleged Partner. — And the rule is that the fact of partnership cannot as against another be proved by the declarations of the alleged partner, but must be established by other evidence.[74] nor can the fact that a party was a

B. Mon. 355; Wagnon *v.* Clay, 1 A. K. Marsh. 257.

Michigan. — Pennoyer *v.* David, 8 Mich. 407.

Missouri. — Flowers *v.* Helm, 29 Mo. 324.

Pennsylvania. — Shoneman *v.* Fegley, 7 Pa. St. 433; Levy *v.* Cadet, 17 Serg. & R. 126.

South Carolina. — Chardon *v.* Oliphant, 3 Brev. 183, 6 Am. Dec. 572.

To Take Debt Out of Statute of Limitations. — It is held that the acknowledgment of a partnership debt by one of the partners, after dissolution and after the statute has run, is competent to take the debt out of the statute of limitations as to all of the members of the firm.

Connecticut. — Austin *v.* Bostwick, 9 Conn. 496, 25 Am. Dec. 42; Beardsley *v.* Hall, 36 Conn. 270; Bissell *v.* Adams, 35 Conn. 299.

Maine. — Greenleaf *v.* Quincy, 12 Me. 11, 28 Am. Dec. 145.

Massachusetts. — Harding *v.* Butler, 156 Mass. 34, 30 N. E. 168; Buxton *v.* Edwards, 134 Mass. 567; Sage *v.* Ensign, 2 Allen 245.

Missouri.—McClurg *v.* Howard, 45 Mo. 365, 100 Am. Dec. 378.

New Jersey. — Casebolt *v.* Ackerman, 46 N. J. Law 169; Merritt *v.* Day, 38 N. J. Law 32.

New York. — Patterson *v.* Choate, 7 Wend. 441, 11 N. Y. Com. L. 100.

Vermont. — Wheelock *v.* Doolittle, 18 Vt. 440, 46 Am. Dec. 163.

But see to the contrary, Reppert *v.* Colvin, 48 Pa. St. 248; Levy *v.* Cadet, 17 Serg. & R. (Pa.) 126, 17 Am. Dec. 650; Pennoyer *v.* David, 8 Mich. 407; Graham *v.* Selover, 59 Barb. (N. Y.) 313; Chardon *v.* Oliphant, 3 Brev. (S. C.) 183, 6 Am. Dec. 572; Hathaway *v.* Haskins, 9 Pick. (Mass.) 42; Van Keuren *v.* Parmelee, 2 N. Y. 523, 51 Am. Dec. 322.

73. *Arkansas.* — Campbell *v.* Hastings Britton Co., 29 Ark. 512.

Georgia. — McCutchin *v.* Bankston, 2 Ga. 244; Boswell *v.* Blackman, 12 Ga. 591.

Illinois. — Bartlett *v.* Wilcox, 68 Ill. App. 142.

Iowa. — Holmes *v.* Budd, 11 Iowa 186.

Maine. — Jennings *v.* Estes, 16 Me. 323.

Massachusetts. — Alcott *v.* Strong, 9 Cush. 323.

Maryland. — Atwell *v.* Miller, 11 Md. 348, 69 Am. Dec. 206.

Missouri. — Rimel *v.* Hayes, 83 Mo. 200; Bank of Osceola *v.* Outhwaite, 50 Mo. App. 124.

Nebraska. — McCann *v.* McDonald, 7 Neb. 305.

New Jersey. — Faulkner *v.* Whitaker, 15 N. J. Law 438; Flanagin *v.* Champion, 2 N. J. Eq. 51.

North Carolina. — McFadyen *v.* Harrington, 67 N. C. 29.

Pennsylvania. — Slaymaker *v.* Gundacker, 10 Serg. & R. 75.

Of Subsequent Ratification of Acts. A showing of subsequent ratification of acts done as a partner may let in the admissions. Drumright *v.* Philpot, 16 Ga. 424, 60 Am. Dec. 738.

Prima Facie Showing Sufficient. Dennis *v.* Kohm, 131 Cal. 91, 63 Pac. 141.

74. *Alabama.* — Clark *v.* Taylor, 68 Ala. 453; Cross *v.* Langley, 50 Ala. 8.

Arkansas. — Campbell *v.* Hastings, Britton Co., 29 Ark. 512; Berry *v.* Lathrop, 24 Ark. 12.

Georgia. — Thompson *v.* Mallory, 108 Ga. 797, 33 S. E. 986.

member of a co-partnership be proved by the admissions of members of the firm to that effect,[75] nor can one's admissions be proved by the other alleged partner to disprove the partnership.[76]

(A.) Admissible Against Party Making It. — But such an admission is competent to prove the partnership, as against the party making it.[77]

Illinois. — Hurd *v.* Haggerty, 24 Ill. 172; Couley *v.* Jennings, 22 Ill. App. 547; Hahn *v.* St. Clair S. & I. Co., 50 Ill. 456.

Indiana.—King *v.* Barbour, 70 Ind. 35; Pierce *v.* McConnell, 7 Blackf. 170.

Massachusetts. — Alcott *v.* Strong, 9 Cush. 323; Dutton *v.* Woodman, 9 Cush. 255, 57 Am. Dec. 46; Tuttle *v.* Cooper, 5 Pick. 414; Smith *v.* Collins, 115 Mass. 388; Winchester *v.* Whitney, 138 Mass. 549.

Missouri. — Rimel *v.* Hayes, 83 Mo. 200; Bank of Osceola *v.* Outhwaite, 50 Mo. App. 124.

New Jersey. — Faulkner *v.* Whitaker, 15 N. J. Law 438.

New Hampshire. — Grafton Bank *v.* Moore, 13 N. H. 99, 38 Am. Dec. 478.

New York. — Whitney *v.* Ferris, 10 Johns. 66; Kirby *v.* Hewitt, 26 Barb. 607.

North Dakota. — Carson *v.* Gillett (N. D.), 50 N. W. 710.

Ohio. — Cowan *v.* Kinney, 33 Ohio St. 422.

Pennsylvania. — Porter *v.* Wilson, 13 Pa. St. 641; Edwards *v.* Tracy, 62 Pa. St. 374.

South Carolina. — McCorkle *v.* Doby, 1 Strob. Law 396, 47 Am. Dec. 560.

Admissions by Alleged Partner. In Faulkner *v.* Whittaker, 15 N. J. Law 438, it was said in a case involving the right to prove the declarations of an alleged partner: "That one man cannot be bound by the admissions or declarations of another, unless such a relation is previously, and by other evidence, proved to exist between them, as will enable the one to involve the other in liabilities, is a position, so plain upon reason and principle, as to require no arguments or authorities to sustain it. If the latter is desired, they may be found collected or referred to, in 2 Saud. on Pl. and Evid. 258, top page, 709, marg. and in 5 Law Lib. Cary on Partnership, 136 and *seq.* and see Ballinger *v.* Sherron, 2 Green's R. 144 and cases there cited."

75. Carson *v.* Gillitt, (N. D.,) 50 N. W. 710.

76. Clark *v.* Huffaker, 26 Mo. 264; Champlin *v.* Tilley, 3 Day 303, 5 Fed. Cas. No. 2586.

To Prove Another Not a Partner. But see Danforth *v.* Carter, 4 Clarke (Iowa) 230, in which it is held that the declarations of members of a firm may be heard to show that another person was not a partner with them.

77. *Alabama.* —Central R. etc. Co. *v.* Smith, 76 Ala. 572.

Illinois. — Couley *v.* Jennings, 22 Ill. App. 547; Rogers *v.* Suttle, 19 Ill. App. 163.

Indiana. — Bennett *v.* Holmes, 32 Ind. 108; Pierce *v.* McConnell, 7 Blackf. 170.

Iowa. — Holmes *v.* Budd, 11 Iowa 186.

Maine. — Jennings *v.* Estes, 16 Me. 323.

Massachusetts. — Smith *v.* Collins, 115 Mass. 388.

New Hampshire. — Grafton Bank *v.* Moore, 13 N. H. 99, 38 Am. Dec. 478.

New York. — Kirby *v.* Hewitt, 26 Barb. 607.

Ohio. — Cowan *v.* Kinney, 33 Ohio St. 422.

Pennsylvania. — Edwards *v.* Tracy, 62 Pa. St. 374; Reed *v.* Kremer, 111 Pa. St. 482; Lenhart *v.* Allen, 32 Pa. St. 312; Bowers *v.* Still, 49 Pa. St. 65; Painter *v.* Austin, 37 Pa. St. 458; Taylor *v.* Henderson, 17 Serg. & R. 453; Crossgrove *v.* Himmelrich, 54 Pa. St. 203; Haujhey *v.* Stickler, 2 Watts & S. 411; Johnston *v.* Warden, 3 Watts 101.

(2.) Question of Partnership One for the Court. — If the admissibility of an offered admission depends upon the question of partnership, the latter is a question for the court.[78]

E. PRINCIPAL AND SURETY. — a. *Of Principal Against Surety.* The admissions of the principal made in connection with and relating to the matter of suretyship, are competent to establish his liability and thus, incidentally, the liability of his surety.[79]

South Carolina. — McCorkle *v.* Doby, 1 Strob. Law 396, 47 Am. Dec. 560.

Wyoming. — Carr *v.* Wright, 1 Wyo. 157.

78. Dennis *v.* Kohm, 131 Cal. 91, 63 Pac. 141; Hilton *v.* McDowell, 87 N. C. 364.

Question of Partnership One for Court. — In Harris *v.* Wilson, 7 Wend. (N. Y.) 57, it is said: "The defendant contended that whether he was then a partner or not was a fact for the jury. This would have been so if the fact had been in issue on the merits of this case, but it was not. It was incidentally raised in relation to the question about admitting or rejecting evidence. The evidence offered was as the judge conceived admissible, if the plaintiff was a partner in 1820; otherwise, not; he was therefore obliged, in order to determine the question of the admissibility of the evidence, to pass on the fact of the plaintiff's being a partner at that time."

Decision Conclusive. — There is no appeal from the decision of the court as to the sufficiency of the evidence of partnership to admit the declarations. Hilton *v.* McDowell, 87 N. C. 364.

79. *England.* — Middleton *v.* Melton, 10 Barn. & C. 317, 21 Eng. C. L. 84.

United States. — Ingle *v.* Collard, 1 Cranch C. C. 134, 13 Fed. Cas. No. 7042.

Alabama. — Bondurant *v.* State Bank, 7 Ala. (N. S.) 830; Walker *v.* Forbes, 25 Ala. 139; Casky *v.* Haviland, 13 Ala. 314; Dumas *v.* Patterson, 9 Ala. (N. S.) 484; Walling *v.* Morgan Co., 126 Ala. 326, 28 So. 433.

Arkansas. — State *v.* Newton, 33 Ark. 276.

California. — Placer Co. *v.* Dickerson, 45 Cal. 12.

Georgia. — Dobbs *v.* The Justices, 17 Ga. 624; Stephens *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680.

Illinois. — Guarantee Co. *v.* Mutual B. & L. Ass'n., 57 Ill. App. 254; Schureman *v.* People, 55 Ill. App. 629; Magner *v.* Knowles, 67 Ill. 325.

Indiana. — Parker *v.* State, 8 Blackf. 292.

Kentucky.—Amherst Bank *v.* Root, 2 Metc. 522.

Maryland. — McShane *v.* Howard Bank, 73 Md. 135, 20 Atl. 776.

Massachusetts. — Williamsburg City F. Ins. Co. *v.* Frothingham, 122 Mass. 39; McKim *v.* Blake, 139 Mass. 593; Sigourney *v.* Drury, 14 Pick. 387; Singer Mfg. Co. *v.* Reynolds, 168 Mass. 588, 47 N. E. 438.

Minnesota. — Whitaker *v.* Rice, 9 Minn. 13; Hall *v.* U. S. F. & G. Co., 77 Minn. 24, 79 N. W. 590.

Mississippi. — Montgomery *v.* Dillingham, 3 Smed. & M., 647; State *v.* Stewart, 36 Miss. 652.

Missouri. — Union Sav. Ass'n. *v.* Edwards, 47 Mo. 445.

New Hampshire. — Hinkley *v.* Davis, 6 N. H. 210, 25 Am. Dec. 457.

New York. — Eichhold *v.* Tiffany, 20 Misc. 680, 46 N. Y. Supp. 534.

Pennsylvania. — Respublica *v.* Davis, 3 Yeates 128, 2 Am. Dec. 366; Com. *v.* Kendig, 2 Pa. St. 448; Bachman *v.* Killinger, 55 Pa. St. 414; Deardorf *v.* Hildebrand, 2 Rawl. 226.

Rhode Island. — Atlas Bank *v.* Brownell, 9 R. I. 168.

South Carolina. — State *v.* Teague, 9 S. C. 149.

Virginia. — Walker *v.* Pierce, 21 Gratt. 722.

Vermont. — Wilson *v.* Green, 25 Vt. 450, 60 Am. Dec. 279; Brown *v.* Munger, 16 Pt. 12.

Where Principal and Surety Are Sued Together. — In Amherst Bank *v.* Root, 2 Metc. (Mass.) 522, the court say: "The last exception is

(1.) Must Be Made at Time of Transaction. — But to be binding upon the surety the admissions of the principal must be made at the time of the transaction, or act to which they relate.[80]

that evidence was received of the admissions and declarations of Luther Root, the cashier, to charge the sureties. This is a case where the cashier and his sureties are sued on their joint obligation. Whatever may be the law when one becomes guarantor or surety for another by a separate obligation, we think where the principal and surety are all bound by a joint obligation, the declarations and admissions of the principal are evidence against the sureties in a joint action against them." See also Atlas Bank *v.* Brownell, 9 R. I. 168.

Are Prima Facie Evidence Against Surety. — In Stephen *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680, it is held in an action on an official bond that the admissions of the principal are *prima facie* evidence against the surety, and casts the *onus* on him.

To Show Insolvency of Principal. In Daniel *v.* Ballard, 2 Dana (Ky.) 296, it was held that the answer of the principal was not competent against the surety to show the principal's insolvency.

Where Principal Is Dead. — The fact that the principal is dead does not affect the admissibility of his admissions. Walker *v.* Pierce, 21 Gratt. (Va.) 722.

In Case of Guaranty. — In Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498, a case of guaranty, it was held that the principal debtor's statement made pending the negotiations for the goods, "that he had been unfortunate, and was without means," was admissible as tending to show the fact that the credit was given to the guarantor, and not to the principal debtor. See also Eichhold *v.* Tiffany, 20 Misc. 680, 46 N. Y. Supp. 534.

80. *United States.* — U. S. *v.* Cutter, 2 Curt. 617, 25 Fed. Cas. No. 14,911.

Alabama. — Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498; Bondurant *v.* State Bank, 7 Ala. 830; Lewis *v.* Lee Co., 73 Ala. 148; Dumas *v.* Patterson, 9 Ala. (N. S.) 484.

Arkansas. — State *v.* Newton, 33 Ark. 276.

Colorado. — Jenness *v.* City of Black Hawk, 2 Colo. 578.

Georgia. — Dobbs *v.* Justices, 17 Ga. 624.

Illinois. — Guarantee Co. *v.* Mutual B. & L. Ass'n., 57 Ill. App. 254; Kirkpatrick *v.* Hawk, 80 Ill. 122.

Indiana. — Lane *v.* State, 27 Ind. 108; Hotchkiss *v.* Lyon, 2 Blackf. 222; Shelvy *v.* Governor, 2 Blackf. 289.

Kansas. — Lee *v.* Brown, 21 Kan. 458.

Kentucky. — Pollard *v.* Louisville C. & L. R. Co., 7 Bush 597; Com. *v.* Brassfield, 7 B. Mon. 447; Lucas *v.* Chamberlain, 8 B. Mon. 276.

Maine. — Foxcroft *v.* Nevens, 4 Greenl. 72.

Massachusetts. — Dexter *v.* Clemans, 17 Pick. 175.

Minnesota. — Hall *v.* U. S. F. & G. Co., 77 Minn. 24, 79 N. W. 590.

Missouri. — Union Sav. Ass'n. *v.* Edwards, 47 Mo. 445; Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; Cheltenham Co. *v.* Cook, 44 Mo. 29.

New York. — Hatch *v.* Elkins, 65 N. Y. 489; Eichhold *v.* Tiffany, 20 Misc. 680, 46 N. Y. Supp. 534; Tenth Nat. Bank *v.* Darragh, 1 Hun (8 Sup. Ct.) 111; Ayer *v.* Getty, 46 Hun (53 N. Y. Sup. Ct.) 287.

Ohio. — Stetson *v.* City Bank, 2 Ohio St. 167.

Pennsylvania. — Nickols *v.* Jones, 166 Pa. St. 599, 31 Atl. 329.

Tennessee. — Wheeler *v.* State, 9 Heisk. 393; White *v.* German Nat. Bank, 9 Heisk. 475; Trousdale *v.* Phillips, 2 Swan 384.

Virginia. — Hodnett *v.* Pace, 84 Va. 873, 6 S. E. 217.

Must Be at the Time of the Transaction. — In Hatch *v.* Elkins, 65 N. Y. 489, it was held that the declarations of the principal made during the transaction of the business for which the surety was

(2.) In Case of Bond of Officer After Term Expires.—It is held that the admissions of an officer after his term has expired, of defalcations in office, are inadmissible against his surety on his bond as such officer, sued alone.[81] If sued jointly with his sureties on a

bound, so as to be a part of the *res gestae*, were competent, but that his declarations subsequently made were inadmissible. But see Drabek *v.* Grand Lodge, 24 Ill. App. 82.

Where Principal Is Dead.—The admissions of the principal may be proved in case of his death the same as those of other deceased persons in actions between third parties and for the same reasons. County of Mahaska *v.* Ingalls, 16 With. (Iowa) 81; Middleton *v.* Melton, 10 Barn. & C. 317, 21 Eng. C. L. 85.

81. Action on Official Bonds.—It is held in Foxcroft *v.* Nevens, 4 Greenl. (Me.) 72, an action upon an official bond for the faithful performance of the duties of an office, that the declarations of the principal were to be taken as true against him alone, and that the sureties were not thereby precluded from any matter proper for their defense. See also Bocard *v.* State, 79 Ind. 270.

Made After Breach of the Contract.—In Lucas *v.* Chamberlain, 8 B. Mon. (Ky.) 276, it is held that an admission of the principal, after the breach of the contract has occurred, is inadmissible against the surety. See also Bocard *v.* State, 79 Ind. 270.

By Official Against Surety on His Bond.—In Union Savings Ass'n. *v.* Edwards, 47 Mo. 445, it is said: "Therefore, the admissions which Edwards made to Rutherford, the president of the bank, when the default was first discovered, were competent evidence against him and his sureties, because they formed a part of the *res gestae*, and were made while acting in the course of his official duty, but they could not be competent against the sureties after his official duties had ceased."

Entries Made in Course of Duty. Entries made by the principal in course of his duty, respecting matters covered by the bond sued on, are admissible. Pollard *v.* Louisville C. & L. R. R. Co., 7 Bush (Ky.) 597; Whitnash *v.* George, 8 Barn. & C. 556, 15 Eng. C. L. 295; Singer Mfg. Co. *v.* Coon, 9 Misc. 465, 30 N. Y. Supp. 232; McKim *v.* Blake, 139 Mass. 593; Williamsburg City F. Ins. Co. *v.* Frothingham, 122 Mass. 391; Jenness *v.* City of Black Hawk, 2 Colo. 578; Chelmsford Co. *v.* Demarest, 7 Gray (Mass.) 1; Board of Supervisors *v.* Bristol, 15 Hun (22 N. Y. Sup. Ct.) 116. But see to the contrary, Jenness *v.* City of Black Hawk, 2 Colo. 578.

In Shelby *v.* Governor, 2 Blackf. (Ind.) 289, it was held that the acknowledgment of the sheriff that he had collected money on an order of sale could not be proved to sustain an action for the money against the surety, unless his acknowledgment was made whilst the sheriff was acting officially in relation to the receipt of the money, the court saying: "If Weathers, while officially acting in relation to the receipt of this money, stated that he had received it, such statement would form a part of the *res gestae* and would be evidence to prove the act of receiving, and would, therefore, be admissible against his sureties; but declarations made by him at any subsequent period would have no connection with the act, and could not be introduced as evidence of the act, so as to bind his sureties; for it is his acts, and not his admissions or declarations, for which his sureties are bound. As the statement of Weathers that he had collected this money is not connected by the testimony with any act of his relative to this order of sale, or any money collected by him on this order, it was inadmissible as evidence against the defendant in this case."

Reports in Performance of Official Duty.—But a contrary rule is announced in respect of statements made by a public officer in pursuance of his duties as such made after his defalcation, and removal for misconduct, but during the period covered by the bond. Father Mathew Young

joint bond, his admissions, not part of the *res gestae*, are held to be competent.[82]

Otherwise as to the surety if the bond is joint and several.[83]

(3.) When Conclusive. — It is held that the sureties on the bond of a public officer are estopped to deny the correctness of public records kept and reports made by the officer in the performance of his duties.[84]

But a different rule applies to private books of account kept by the principal.[85]

(4.) Confession of Judgment by Principal. — It is held that a judgment confessed by the principal is competent evidence against the surety not a party to the suit.[86]

b. *Of Surety Against Principal.* — It is held that the admissions of the surety are inadmissible against the principal.[87] But taken as a general rule of evidence this may well be doubted.[88]

c. *Of One Surety Inadmissible Against Another.* — The admissions of one surety are inadmissible against his co-surety.[89]

d. *Guarantor and Guarantee.* — The admissions of a party on whose account a guaranty has been made, are held not competent evidence against the guarantor.[90]

But in other cases a different rule is declared.[91]

F. Co-Conspirators. — a. *In Furtherance of Conspiracy Admissible.* — The declarations of co-conspirators in furtherance of the conspiracy, and in connection therewith, against the interest of the conspirators, are competent as against all of them.[92]

Soc. *v.* Fitzwilliam, 84 Mo. 406; State *v.* Newton, 33 Ark. 276; County of Tompkins *v.* Bristol, 99 N. Y. 316, 1 N. E. 878; Barry *v.* Screwmens Ass'n, 67 Tex. 250, 3 S. W. 261.

Board of Supervisors *v.* Bristol, 15 Hun (22 N. Y. Sup. Ct.) 116. So of receipts given by the principal after the expiration of his term of office. Placer Co. *v.* Dickerson, 45 Cal. 12.

82. Union Sav. Ass'n *v.* Edwards, 47 Mo. 445.

83. Lee *v.* Brown, 21 Kan. 458.

84. Doll *v.* People, 48 Ill. App. 418; Schureman *v.* People, 55 Ill. App. 629.

85. Schureman *v.* People, 55 Ill. App. 629.

86. Iglehart *v.* State, 2 Gill & J. (Md.) 235.

87. Thurman *v.* Blankenship-Blake Co., 79 Tex. 171, 15 S. W. 387.

88. Chapel *v.* Washburn, 21 Ind. 363.

89. Very *v.* Walkins, 23 How. (U. S.) 469.

90. Griffith *v.* Turner, 4 Gill (Md.) 111.

91. Meade *v.* McDowell, 5 Binn. (Pa.) 195.

Judgment Confessed by Principal. In Drummond *v.* Prestman, 12 Wheat. 514, it was held that a judgment confessed by the principal was competent evidence against the guarantor.

92. *England.* — Rex *v.* Inhabitants of Hardwick, 11 East 578.

United States. — *In re* Clark, 9 Blatchf. 379, 5 Fed. Cas. No. 2802; American Fur Co. *v.* U. S., 2 Pet. 358; Nudd *v.* Burrows, 91 U. S. 427; Lincoln *v.* Claflin, 7 Wall. 132; Rea *v.* Missouri, 17 Wall. 532; Jones *v.* Simpson, 116 U. S. 609; Drake *v.* Stewart, 76 Fed. 140.

Alabama. — Weaver *v.* Yeatmans, 15 Ala. 539; Phoenix Ins. Co. *v.* Moog, 78 Ala. 284; Stewart *v.* State, 26 Ala. 44; Smith *v.* State, 52 Ala. 407.

b. *Conspiracy Must Be Shown.* — But, as the competency of the evidence of such admissions, as against one not making them,

Arkansas. — Gray *v.* Nations, 1 Ark. 557; Clinton *v.* Estes, 20 Ark. 216.

California. — People *v.* Collins, 64 Cal. 293, 30 Pac. 847; Barkly *v.* Copeland, 86 Cal. 483, 25 Pac. 1; Lacey *v.* Porter, 103 Cal. 597, 37 Pac. 635; Howe *v.* Scannell, 8 Cal. 325.

Connecticut. — Colt *v.* Eves, 12 Conn. 243; Cowles *v.* Coe, 21 Conn. 220.

Florida. — Williams *v.* Dickerson, 28 Fla. 90, 9 So. 847.

Georgia. — Ernest *v.* Merritt, 107 Ga. 61, 32 S. E. 898; McRae *v.* State, 71 Ga. 96.

Illinois. — Chicago R. I. & P. R. Co. *v.* Collins, 56 Ill. 212; Philpot *v.* Taylor, 75 Ill. 309; Snyder *v.* Laframboise, Breese 343.

Indiana. — Hall *v.* Bishop, 78 Ind. 370; Daniels *v.* McGinnis, 97 Ind. 549; Caldwell *v.* Williams, 1 Ind. 405; Ewing *v.* Gray, 12 Ind. 64; Williams *v.* State, 47 Ind. 568; Roberts *v.* Kendall, 3 Ind. App. 339, 29 N. E. 487; Wolfe *v.* Pugh, 101 Ind. 293; Smith *v.* Freeman, 71 Ind. 85; Barkley *v.* Tapp, 87 Ind. 25.

Iowa. — Miller *v.* Dayton, 57 Iowa 423, 10 N. W. 814.

Kentucky. — Smithern *v.* Waddle, 19 Ky. Law 1418, 43 S. W. 453.

Maine. — Aldrich *v.* Warren, 16 Me. 465.

Massachusetts. — O'Neil *v.* Glover, 5 Gray 144; Com. *v.* Brown, 14 Gray 419.

Michigan. — People *v.* Pitcher, 15 Mich. 397; Mawich *v.* Elsey, 47 Mich. 10; Edgell *v.* Francis, 63 Mich. 303, 33 N. W. 501.

Mississippi. — Mask *v.* State, 32 Miss. 405; Trimble *v.* Turner, 13 Smed. & M. 348, 53 Am. Dec. 90.

Missouri. — Weinrich *v.* Porter, 47 Mo. 293; State *v.* Danbert, 42 Mo. 239; State *v.* Ross, 29 Mo. 32; Exchange Bank *v.* Russell, 50 Mo. 531; Boyd *v.* Jones, 60 Mo. 454.

Montana. — Harrington *v.* Butte & B. Min. Co., 19 Mont. 411, 48 Pac. 758; Pincus *v.* Reynolds, 19 Mont. 564, 49 Pac. 145.

New Hampshire. — Lee *v.* Lamprey, 43 N. H. 13; State *v.* Pike, 51 N. H. 105; Page *v.* Parker, 40 N. H. 47.

New Jersey. — Patton *v.* Freeman, 1 N. J. Law 134.

New York. — Waterbury *v.* Sturtevant, 18 Wend. 353; Legg *v.* Olney, 1 Denio 202, 16 N. Y. Com. L. 768; Galle *v.* Tode, 56 N. Y. St. 851, 26 N. Y. Supp. 633; Flagler *v.* Newcome, 36 N. Y. St. 755, 13 N. Y. Supp. 299; Moers *v.* Martens, 8 Abb. Pr. 257; Apthorp *v.* Comstock, 2 Paige Ch. 482, 2 N. Y. Ch. 997; Dart *v.* Walker, 3 Daly 136; Cuyler *v.* McCartney, 33 Barb. 165.

North Carolina. — State *v.* George, 7 Ired. 321; Barnhart *v.* Smith, 86 N. C. 473.

Oregon. — Pacific Live Stock Co. *v.* Gentry, 38 Or. 275, 61 Pac. 422; Sheppard *v.* Yocum, 10 Or. 402.

Pennsylvania. — Com. *v.* Eberle, 3 Serg. & R. 9; Souder *v.* Schechterly, 91 Pa. St. 83; Burns *v.* McCabe, 72 Pa. St. 309; Kelsey *v.* Murphy, 26 Pa. St. 78; Deakers *v.* Temple, 41 Pa. St. 234; Jackson *v.* Summerville, 13 Pa. St. 359; Kehoe *v.* Com., 85 Pa. St. 127; Price *v.* Junkins, 4 Watts 85, 28 Am. Dec. 685; Scott *v.* Baker, 37 Pa. St. 330; Peterson *v.* Speer, 29 Pa. St. 478; McKee *v.* Gilchrist, 3 Watts 230; McCabe *v.* Burns, 66 Pa. St. 356; Sommer *v.* Gilmore, 160 Pa. St. 129, 28 Atl. 654; Palmer *v.* Gilmore, 148 Pa. St. 48, 23 Atl. 1041; Lowe *v.* Dalrymple, 117 Pa. St. 564, 12 Atl. 567.

Tennessee. — Strady *v.* State, 5 Cold. 300; Harrison *v.* Wisdom, 7 Heisk. 99.

Texas. — Phillips *v.* State, 6 Tex. App. 364; Taylor *v.* State, 3 Tex. App. 169.

Virginia. — Claytor *v.* Anthony, 6 Rand. 285.

Vermont. — State *v.* Thibeau, 30 Vt. 100; Jenne *v.* Joslyn, 41 Vt. 478; Quin *v.* Halbert, 57 Vt. 178.

West Virginia. — Ellis *v.* Dempsey, 4 W. Va. 126.

The Reason for the Rule. — The reason for the rule is thus stated in Moers *v.* Martens, 8 Abb. Pr. (N.

depends upon the fact that the parties are acting together, the conspiracy must be first shown or the declarations are inadmissible.[93]

Y.) 257, 258: "And the acts and declarations of the other conspirators are admitted as evidence against each, upon the principle, that by the act of conspiring together they have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design, a part of the *res gestae*, and therefore the acts of all." It is the same principle of identity with each other that governs in regard to the acts and admissions of agents when offered in evidence against their principals, and of partners against the partnership." Scott *v.* Baker, 37 Pa. St. 330; Lacey *v.* Porter, 103 Cal. 597, 37 Pac. 635.

Rule Stated. — "The rule is well settled, that where a community of design is established, the acts of each of the parties, and their declarations made at the time of the prosecution of those acts are evidence against all." Colt *v.* Eves, 12 Conn. 243.

The Time He Became a Party Immaterial. — The time when a party became a party to the conspiracy does not affect the question. By becoming such party, after its partial consummation, he makes the previous declarations of his co-conspirators his own. Den *v.* Johnson, 18 N. J. Law 87.

93. *England.* — Rex *v.* Inhabitants of Hardwick, 11 East 578.

United States. — Winchester Mfg. Co. *v.* Creary, 116 U. S. 161, 6 Sup. Ct. 369.

Alabama. — Weaver *v.* Yeatmans, 15 Ala. (N. S.) 539.

Georgia. — Foster *v.* Thrasher, 45 Ga. 517.

Indiana. — Wolfe *v.* Pugh, 101 Ind. 293.

Iowa. — State *v.* Nash, 7 Iowa 346; Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34; Wiggins *v.* Leonard, 9 Iowa 194.

Louisiana. — Reid *v.* Louisiana State Lottery, 29 La. Ann. 388; State *v.* Hogan, 3 La. Ann. 714.

Massachusetts. — Blanchette *v.* Holyoke St. R. Co., 175 Mass. 51, 55 N. E. 481; Burke *v.* Miller, 7 Cush. 547.

Michigan. — Mawich *v.* Elsey, 47 Mich. 10; Hamilton *v.* People, 29 Mich. 195.

Mississippi. — Browning *v.* State, 30 Miss. 656.

Missouri. — Hart *v.* Hicks, 52 Mo. App. 177, 31 S. W. 351; Wright *v.* Cornelius, 10 Mo. 174; Boyd *v.* Jones, 60 Mo. 454.

New York. — Douglass *v.* McDermott, 21 App. Div. 8, 47 N. Y. Supp. 336; Hoguet *v.* Beekman, 25 N. Y. St. 562, 6 N. Y. Supp. 214; Jones *v.* Horlburt, 39 Barb. 403; Pfeffer *v.* Kling, 58 App. Div. 170, 68 N. Y. Supp. 641; Lent *v.* Shear, 160 N. Y. 462, 55 N. E. 2.

North Carolina. — State *v.* George, 7 Ired. 321.

Ohio. — Preston *v.* Bowers, 13 Ohio St. 1, 82 Am. Dec. 430.

Pennsylvania. — Com. *v.* Eberle, 3 Serg. & R. 9; Rogers *v.* Hall, 4 Watts 359; Benford *v.* Sanner, 40 Pa. St. 9, 80 Am. Dec. 545; Helser *v.* McGrath, 58 Pa. St. 458; Gaunce *v.* Backhouse, 37 Pa. St. 350; Bredin *v.* Bredin, 3 Pa. St. 81; McDowell *v.* Rissell, 37 Pa. St. 164.

Tennessee. — Girdner *v.* Walker, 1 Heisk. 186.

Texas. — Ft. Worth Live Stock Co. *v.* Hitson, (Tex. Civ. App.,) 46 S. W. 915; Phoenix Ins. Co. *v.* Padgitt, (Tex. Civ. App.,) 42 S. W. 800.

Vermont. — Windover *v.* Robbins, 2 Tyler 1.

West Virginia. — Carskadon *v.* Williams, 7 W. Va. 1.

Slight Evidence of Conspiracy Sufficient. — It is held in Souder *v.* Schechterly, 91 Pa. St. 83, that where the *bona fides* of a conveyance of property is assailed by creditors, on the ground of fraud, the declarations of the grantor made after the conveyance are admissible against the grantee if there is some evidence of collusion. See also McDowell *v.* Rissell, 37 Pa. St. 164.

Not Sufficient to Allege It in Complaint. — It is not enough to let in the admissions to allege the conspiracy in the complaint. It must be proved. Wright *v.* Cornelius, 10 Mo. 174.

(1.) Cannot Be Proved by Admissions of One Conspirator. — But the conspiracy, or collusion, cannot be proved by the admission of one of the alleged conspirators as against the other,[94] unless such declarations were themselves in execution of, or for the promotion of the common design.[95]

(2.) Of Each Admissible Against Him. — The admissions of each are competent against him, for that purpose, and the admissions of all may thus establish the conspiracy as against all.[96]

Must More Than Raise a Suspicion. — Hart *v.* Hopson, 52 Mo. App. 177.

Least Degree of Collusion Sufficient. — So it is held in Rogers *v.* Hall, 4 Watts (Pa.) 359, that the least degree of conceit or collusion between parties to an illegal transaction makes the act of one the act of all, and their admissions competent one against the other. See also Phillips *v.* State, 6 Tex. App. 364; Confer *v.* McNeal, 74 Pa. St. 112; Kelsey *v.* Murphy, 26 Pa. St. 78.

May Be Proved by Circumstances. Direct evidence of the conspiracy is not necessary. It may be established by circumstances. Redding *v.* Wright, 49 Minn. 322, 51 N. W. 1056; Kelley *v.* People, 55 N. Y. 565, 14 Am. Rep. 342; Miller *v.* Dayton, 57 Iowa 423, 10 N. W. 814; Drake *v.* Stewart, 76 Fed. 140.

In Case of Fraud. — If fraud is charged, the party against whom the admissions are offered must be shown to have participated in the fraud to render them admissible. Triplett *v.* Goff, (Va. App.,) 3 S. E. 525.

Least Degree of Conceit or Collusion Sufficient. — The degree in which the party is implicated is immaterial. Any degree of conceit or collusion will render the admissions of his confederate competent against him. Rogers *v.* Hall, 4 Watts (Pa.) 359.

Cannot Be Proved by Mere Opinion Evidence. — The conspiracy cannot be proved by opinion, but must be established by facts. Laytham *v.* Agnew, 70 Mo. 48.

94. *England.* — Rex *v.* Inhabitants of Hardwick, 11 East 578.

United States. — Winchester Mfg. Co. *v.* Cleary, 116 U. S. 161, 6 Sup. Ct. 369.

California. — Barkly *v.* Copeland, 86 Cal. 483, 25 Pac. 1.

Indiana. — Roberts *v.* Kindall, 3 Ind. App. 339, 29 N. E. 487.

Kentucky. — Metcalf *v.* Conner, Litt. Sel. Cas. 497, 12 Am. Dec. 340.

Mississippi. — Browning *v.* State, 30 Miss. 656.

New York. — Cuyler *v.* McCartney, 33 Barb. 165.

North Carolina. — Bryce *v.* Butler, 70 N. C. 585.

Ohio. — Preston *v.* Bowers, 13 Ohio St. 1, 82 Am. Dec. 430.

Oregon. — Osmun *v.* Winters, 30 Or. 177, 46 Pac. 780.

Can Not Be Proved by Admissions. "Evidence of an admission made by one of several defendants in trespass, will not, it is true, establish the others to be co-trespassers, but if they be established to be co-trespassers by other competent evidence, the declaration of the one as to the motives and circumstances of the trespass will be evidence against all who are proved to have combined together for the common object." Rex *v.* Inhabitants of Hardwick, 11 East 578.

95. Clawson *v.* State, 14 Ohio St. 234; Roberts *v.* Kendall, 3 Ind. App. 339; 29 N. E. 487.

96. St. Paul Distilling Co. *v.* Pratt, 47 N. W. 789; Preston *v.* Bowers, 13 Ohio St. 1, 82 Am. Dec. 430; Miller *v.* Barber, 66 N. Y. 558.

Of Each Co-Conspirator Against Himself. — The rule is thus stated in St. Paul Distilling Co. *v.* Pratt, 45 Minn. 215, 47 N. W. 789: "So in a case like this, evidence of the alleged conspiracy is admissible, even though the same evidence do not connect all the defendants with the conspiracy. If it were not so, it would be nearly impossible to try such cases, certainly cases in which

(3.) Order of Proof. — The conspiracy need not, in the discretion of the trial court, be proved first. The admission may be proved first and the conspiracy established afterwards, although it is a practice not to be encouraged.[97]

c. *Question of Conspiracy One for the Court.* — The question of the conspiracy, as a foundation for proof of admissions, is one to be determined by the court.[98]

Weight of Evidence Left to the Jury. — But it is held that if there is any evidence of the conspiracy the admissions should be received, and the question whether there was or was not a conspiracy left to the jury under proper instructions to disregard the proof of such admissions, if there was not.[99]

d. *Made Before or After Conspiracy, Inadmissible.* — The admissions, to be competent against a co-conspirator, must have been made pending and in furtherance of the conspiracy. If made before or afterwards they are inadmissible,[1] unless made at the instance or

the conspiracy is planned by some of the defendants, and the others afterward join it. If, when the evidence is all in, it does not connect one of the defendants with the conspiracy, his proper course is to move for a dismissal, or for an instruction to find a verdict in his favor. There was no error in overruling the appellant's objections to the evidence."

97. Miller *v.* Barber, 66 N. Y. 558; Dole *v.* Wooldredge, 142 Mass. 161, 7 N. E. 832.

Order of Proof in Discretion of Court. — In Miller *v.* Barber, 66 N. Y. 558, it is said: "The order of proof is in general a matter of discretion, and we are of opinion that no legal error was committed in allowing the declarations of Barber to be given in evidence, as against his co-defendant before proof of his connection with the conspiracy had been made. If the proof subsequently had failed to connect Schermerhorn with the fraud, it would have been the duty of the court to have instructed the jury to disregard them in considering his liability."

98. Jones *v.* Hurlbart, 39 Barb. (N. Y.) 403; Com. *v.* Brown, 14 Gray (Mass.) 419; Phoenix Ins. Co. *v.* Moog, 78 Ala. 284; State *v.* Nash, 7 Clarke (Iowa) 347; Brown *v.* Chenoworth, 51 Tex. 469.

99. Oldham *v.* Bentley, 6 B. Mon. (Ky.) 428; Miller *v.* Dayton, 57 Iowa 243, 10 N. W. 814.

1. *Alabama.* — Phoenix Ins. Co. *v.* Moog, 78 Ala. 284; Stewart *v.* State, 26 Ala. 44.

Arkansas. — Clinton *v.* Estes, 20 Ark. 216.

California. — People *v.* English, 52 Cal. 212; People *v.* Moore, 45 Cal. 19.

Indiana. — Roberts *v.* Kendall, 3 Ind. App. 339, 29 N. E. 487; Hogue *v.* McClintock, 76 Ind. 205; Wiler *v.* Manley, 51 Ind. 169.

Louisiana. — State *v.* Jackson, 29 La. Ann. 354; Reid *v.* Louisiana State Lottery, 29 La. Ann. 388.

Maine. — Strout *v.* Packard, 76 Me. 148, 49 Am. Rep. 601.

Minnesota. — Nicolay *v.* Mallery, 62 Minn. 119, 64 N. W. 108.

Mississippi. — Lynes *v.* State, 36 Miss. 617.

Missouri. — State *v.* Duncan, 64 Mo. 262; Poe *v.* Stockton, 39 Mo. App. 550.

Nebraska. — Stratton *v.* Oldfield, 41 Neb. 702, 60 N. W. 82.

New Hampshire. — State *v.* Pike, 51 N. H. 105.

New Jersey. — Ferguson *v.* Reeve, 16 N. J. Law 193.

New York. — Scofield *v.* Spalding, 54 Hun 523, 7 N. Y. Supp. 927; Apthorp *v.* Comstock, 2 Paige Ch. 482; Dart *v.* Walker, 3 Daly 136; Douglass *v.* McDermott, 21 App. Div. 8, 47 N. Y. Supp. 336.

with the knowledge and consent of the co-conspirator.[2]

e. *Must Be in Furtherance of or Connected With the Conspiracy.* The admissions to be competent must not only be made at the time of the conspiracy or its execution, but must relate thereto.[3]

7. Persons Under Disability or Restraint. — A. GENERALLY. — It may be stated as a general rule that the mere fact that a party is laboring under some legal disability which deprives such party of the right or power to contract, or protects him from his contracts, if made, does not render his admissions incompetent.

B. INFANTS. — a. *Generally.* — We have seen that admissions by an infant in his pleadings do not warrant a judgment against him.[4]

But it does not follow that his admissions may not be proved subject to be controverted, as in case of admissions made by adults. His admissions are admissible against him as a rule.[5]

b. *In Actions for Injuries Causing His Death.* — His admissions are competent, however, only where the action is for or against him in his own right. Therefore, it is held that in an action by the father for damages for injuries causing the death of his infant son, under a statute giving the right of action to the father, the admis-

Ohio.—Preston *v.* Bowers, 13 Ohio St. 1, 82 Am. Dec. 430.

Oregon. — Sheppard *v.* Yocum, 10 Or. 402.

Pennsylvania. — Benford *v.* Sanner, 40 Pa. St. 9; McCaskey *v.* Graff, 23 Pa. St. 321, 62 Am. Dec. 336.

Tennessee. — Strady *v.* State, 5 Cold. 300; Lyons *v.* Wattenbarger, 1 Heisk. 193.

Virginia. — Danville Bank *v.* Waddill, 31 Gratt. 469.

2. Mathews *v.* Herdtfelder, 39 N. Y. St. 486, 15 N. Y. Supp. 165; State *v.* Frederics, 85 Mo. 145; State *v.* Ah Tom, 8 Nev. 213; Helser *v.* McGrath, 58 Pa. St. 458; Owens *v.* State, 16 Lea (Tenn.) 1; Benford *v.* Sanner, 40 Pa. St. 9, 80 Am. Dec. 555; U. S. *v.* Hartwell, 3 Cliff. 221, 26 Fed. Cas. No. 15,318.

3. Fouts *v.* State, 7 Ohio St. 472; Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34; Ferguson *v.* Reve, 16 N. J. Law 193.

4. *Ante,* p. 460.

5. Haile *v.* Lillie, 3 Hill 149; McCoon *v.* Smith, 3 Hill (N. Y.) 147, 38 Am. Dec. 623; Crapster *v.* Griffith, 2 Bland (Md.) 5; Ackerman *v.* Runyon, 3 Abb. Pr. (N. Y.) 111.

Admissions of Infants Competent. So it was said in Haile *v.* Lillie, 3 Hill (N. Y.) 149: "The only point in the case is, whether the admissions of the plaintiff, an infant, were admissible in evidence against him. There can be no doubt they were; though the effect of such admissions may frequently be controlled by the infant's incompetency to bind himself by contract. It is the daily practice to receive the confessions of infants in criminal proceedings, and in actions for wrongs committed by them for which they are personally responsible, as in actions of trespass, etc. The only privilege of an infant who has arrived at years of discretion, even in civil cases, is an exemption at common law from liability upon most of his contracts. Independently of this privilege he stands in court upon the same footing of an adult."

Giving Receipt. — It is held that a receipt given by an infant is competent evidence. Crapster *v.* Griffith, 2 Bland (Md.) 5.

Inadmissible. — But it has been directly held that an infant is incapable of making an admission which will affect his rights. Barker *v.* Hamilton, 3 Colo. 291; Lunday *v.* Thomas, 26 Ga. 537.

sions of the son are inadmissible.[6]

C. Under Guardianship. — The fact that one is under guardianship does not render his admissions inadmissible.[7]

D. Non Compos. — It has been said to be the admitted law that the declarations of a lunatic, not a party to the action, are admissible as between third parties, where they have been made against his interest.[8]

E. Married Women. — a. *Generally.* — As a general rule married women are bound by their admissions the same as other persons.[9]

b. *For What Purposes Inadmissible.* — If a married woman is disabled by reason of her coverture to render herself liable by direct contract, she cannot do so by her parol admissions.[10]

F. Under Duress. — a. *When Admissible.* — If the admission is not voluntary, but is compelled by duress or under threats made, it should be received if at all, with great caution.[11]

The definition of an admission provable against a party requires the admission to be voluntary.[12]

And it is held that an admission not voluntary, but extorted from the party making it, should not be considered.[13]

6. Louisville E. & St. L. R. Co. *v.* Berry, 2 Ind. App. 427, 28 N. E. 714.

7. McNight *v.* McNight, 20 Wis. 446.

Under Guardianship. — In Hoyt *v.* Underhill, 10 N. H. 220, 34 Am. Dec. 148, the court said: "A promise by the defendant, after he was placed under guardianship, or after suit, would be insufficient; but an admission, after suit, of a promise made before the suit, would be competent evidence where no guardianship existed; and the guardianship does not change all the ordinary rules of evidence. The defendant might be charged for any tortious acts notwithstanding the guardianship; and those acts might be proved, we think, by his confessions; and if so, he may make declarations in relation to his previous transactions, which will be competent to be weighed by the jury."

8. Jones *v.* Henry, 84 N. C. 320, 37 Am. Rep. 624.

9. Hollinshead *v.* Allen, 17 Pa. St. 275; McLemore *v.* Nuckolls, 37 Ala. (N. S.) 662; Morrell *v.* Cawley, 17 Abb. Pr. (N. Y.) 76; Poole *v.* Gerrard, 9 Cal. 593; Lindner *v.* Sahler, 51 Barb. (N. Y.) 322.

Married Woman's Admissions Admissible Against Her. — In Hollinshead *v.* Allen, 17 Pa. St. 275, the court said: "The question is, does her position as a married woman exclude her admissions in such a case as this? Where there is any probability that a wife acts under the constraint of her husband, or in such way as to enure to his benefit, we should be very guarded about receiving her admissions against herself. But where there can be no such suspicion, and her admissions are most palpably against her own interest and directly affecting her separate property, I know of no principle of policy that would exclude them. In the case of McKee *v.* Jones, 6 Pa. St. 425, her admissions were received in just such a case as this; and it is impossible to see that the fact of the husband's presence in that case was an element essential to their competency, as against herself. It cannot be doubted that in an equity suit to establish the trust, she would be compelled to answer."

10. McGregor *v.* Wait, 10 Gray (Mass.) 72, 69 Am. Dec. 305.

11. Fidler *v.* McKinley, 21 Ill. 308.

12. *Ante*, p. 357.

13. Scott *v.* Home Ins. Co., 1

But the mere fact that the party was forced by judicial process to become a witness and testify, does not render his statements as a witness inadmissible.[14]

A distinction is made between mere constraint and actual duress.[15]

V. WHAT ADMISSIONS NOT RECEIVABLE.

1. Generally. — A declaration may in some instances be admissible against the party making it as an admission, but will not be received on the ground of public policy, as, for example, where it will have the effect of disclosing state secrets, jury secrets, or statements between persons so related towards each other as to render communications between them confidential and privileged.[16]

These are only noticed here in a general way. They will be considered more in detail under their appropriate heads.

2. Admissions of Law. — The general rule is that admissions of law or the legal effect of a written instrument, are not competent.[17]

3. For Sake of Compromise. — A. GENERALLY INADMISSIBLE. The general rule is that offers made in an effort to compromise cannot be proved as admissions.[18]

Hughes 163, 21 Fed. Cas. No. 12,535; City Bank *v.* Foucher, 9 La. 405.

14. *Ante,* p. 357; Rex *v.* Merceron, 2 Stark. 366, 3 Eng. C. L. 385.

15. 1 Greenl. Ev. § 193.

While Under Arrest. — The fact that the party was, at the time of making the admission, under arrest, and arraignment does not render it inadmissible. Notara *v.* DeKamalaris, 22 Misc. 337, 49 N. Y. Supp. 216.

16. Greenl. Ev., chap. XIII.

17. Boston Hat Mfg. Co. *v.* Messinger, 2 Pick. (Mass.) 223; Roberts *v.* Roberts, 82 N. C. 29; Crockett *v.* Morrison, 11 Mo. 3; Rice *v.* Ruddiman, 10 Mich. 125.

Must Be Admission of Facts. Folk *v.* Schaeffer, 180 Pa. St. 613, 37 Atl. 104.

Mixed Law and Fact Admissible. Lewis *v.* Harris, 31 Ala. 689. But see Summersett *v.* Adamsson, 1 Bing. 72, 8 Eng. C. L. 255.

18. *England.* — Paddock *v.* Forrester, 3 M. & G. 903, 42 Eng. C. L. 470; Jardine *v.* Sheridan, 2 Car. & K. 24, 61 Eng. C. L. 24.

United States. — Gibbs *v.* Johnson, 3 App. Conn. Pat. 255; 10 Fed. Cas. No. 5384; Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527; West *v.* Smith, 101 U. S. 263.

Alabama. — Jackson *v.* Clopton, 66 Ala. 29; Wood *v.* Wood, 3 Ala. 756; Collier *v.* Coggins, 103 Ala. 281, 15 So. 578; Feibelman *v.* Manchester F. A. Co., 108 Ala. 180, 19 So. 540; East Tennessee, V. & G. Ry. Co. *v.* Davis, 91 Ala. 615, 8 So. 349.

Colorado. — Patrick *v.* Crowe, 15 Colo. 543, 25 Pac. 985; Chicago B. & Q. R. Co. *v.* Roberts, 26 Colo. 329, 57 Pac. 1076.

Georgia. — Emery *v.* Atlanta R.-E. Exch., 88 Ga. 321, 14 S. E. 556; Keaton *v.* Mayo, 71 Ga. 649; Mayor of Montezuma *v.* Minor, 73 Ga. 484.

Idaho. — Sebree *v.* Smith, 2 Idaho 329, 16 Pac. 915.

Illinois. — Paulin *v.* Howser, 63 Ill. 312; Chicago E. & L. S. R. Co. *v.* Catholic Bishop, 119 Ill. 525, 10 N. E. 372; Malthressen *v.* Ferris, 72 Ill. App. 684; Hamson *v.* Frickett, 57 Ill. App. 575.

Indiana. — Dailey *v.* Coons, 61 Ind. 545.

Iowa. — Kassing *v.* Walter (Iowa), 65 N. W. 832; Houdeck *v.* Merchants' & Bankers' Ins. Co., 102 Iowa 303, 71 N. W. 354.

Kansas. — Myers *v.* Goggerty (Kan.), 63 Pac. 296.

Maryland. — Pentz *v.* Pennsylvania F. Ins. Co., 92 Md. 444, 48 Atl. 139.

Massachusetts. — Harrington *v.* Inhab. of Lincoln, 4 Gray 563, 64 Am. Dec. 95; Gay *v.* Bates, 99 Mass. 263; Draper *v.* Hatfield, 124 Mass. 53; Upton *v.* South Reading B. R. Co., 8 Cush. 600.

Michigan. — Montgomery *v.* Allen, 84 Mich. 656, 48 N. W. 153; Pelton *v.* Schmidt, 104 Mich. 345, 62 N. W. 552, 53 Am. St. Rep. 462; Ward *v.* Munson (Mich.), 75 N. W. 440.

Minnesota. — Person *v.* Bowe, 79 Minn. 238, 82 N. W. 480.

Mississippi. — Garner *v.* Myrick, 30 Miss. 448.

Missouri. —Huetteman *v.* Vresselman, 48 Mo. App. 582; Moore *v.* H. Gaus & Sons' Mfg. Co., 113 Mo. 98, 20 S. W. 975.

Nebraska. — Kierstead *v.* Brown, 23 Neb. 595, 37 N. W. 471; Callen *v.* Rose, 47 Neb. 638, 66 N. W. 639; Wright *v.* Morse, 53 Neb. 3, 73 N. W. 211; Hanover F. Ins. Co. *v.* Stoddard, 52 Neb. 745, 73 N. W. 291; Boyce *v.* Palmer, 55 Neb. 389, 75 N. W. 849; Aultman & Co. *v.* Martin, 49 Neb. 103, 68 N. W. 340.

Nevada.—Quinn *v.* White (Nev.), 62 Pac. 995.

New Hampshire.—Perkins *v.* Concord R. R., 44 N. H. 223; Hamblett *v.* Hamblett, 6 N. H. 333; Greenfield *v.* Kennett, 69 N. H. 419, 45 Atl. 233; Sanborn *v.* Neilson, 4 N. H. 501; Jenness *v.* Jones, 68 N. H. 475, 44 Atl. 607.

New Jersey. — Wrege *v.* Westcott, 30 N. J. Law 212; Miller *v.* Halsey, 14 N. J. Law 48; Scheurle *v.* Husbands, 65 N. J. Law 40, 46 Atl. 759; International Pottery Co. *v.* Richardson (N. J. App.), 43 Atl. 692.

New York. — Smith *v.* Satterlee, 130 N. Y. 677, 29 N. E. 225; Williams *v.* Thorp, 8 Cow. 201; Gommersall *v.* Crew, 14 N. Y. Supp. 922; Slingerland *v.* Norton, 35 N. Y. St. 426, 12 N. Y. Supp. 647; Doyle *v.* Levy, 89 Hun 350, 35 N. Y. Supp. 434; Roos *v.* Dicke, 34 Misc. 168, 68 N. Y. Supp. 790; Tennant *v.* Dudley, 144 N. Y. 504, 39 N. E. 644.

Oregon. — Cochran *v.* Baker, 34 Or. 555, 56 Pac. 641.

Pennsylvania. — Fisher *v.* Fidelity Mut. L. Ins. Co., 188 Pa. St. 1, 41 Atl. 467.

South Carolina. — Gibbes *v.* McCraw, 45 S. C. 184, 22 S. E. 790; Frick & Co. *v.* Wilson, 36 S. C. 65, 15 S. E. 331; Chandler *v.* Geraty, 10 S. C. 304; Norris *v.* Hartford F. Ins. Co., 57 S. C. 358, 35 S. E. 572; Robertson *v.* Blair, 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543.

South Dakota. — Reagan *v.* McKibben, 11 S. D. 270, 76 N. W. 943.

Tennessee. — Strong *v.* Stewart, 9 Heisk. 137.

Texas. — International & G. N. Ry. Co. *v.* Ragsdale, 67 Tex. 24, 2 S. W. 515; Western U. Tel. Co. *v.* Thomas, 7 Tex. Civ. App. 105, 26 S. W. 117; Darby *v.* Roberts, 3 Tex. Civ. App. 427, 22 S. W. 529; San Antonio & A. P. Ry. Co. *v.* Stone, (Tex. Civ. App.,) 60 S. W. 461.

Vermont. — Whitney Wagon Wks. *v.* Moore, 61 Vt. 230, 17 Atl. 1007.

Wisconsin. — State Bank *v.* Dutton, 11 Wis. 371.

Rule Extends to Offers to Confess Judgment. — Kelley *v.* Combs, 22 Ky. Law 365, 57 S. W. 476.

Otherwise as to a Deposit in Court. Low *v.* Griffen, (Tex. Civ. App.,) 41 S. W. 73.

Exclusions of Such Admissions Not Favored. — The leaning of the courts against the exclusion of offers of compromise is thus stated in Grubbs *v.* Nye, 13 Smed. & M. (Miss.) 443: "The courts of late, and especially in this country, have leaned against the exclusion of offers of compromise as testimony. 1 Greenl. Ev., 232, p. 192, and notes. The overture in this instance was not stated to have been confidential, nor to be made without prejudice. It was not an offer of a sum of money to buy peace in a controverted state of case. There was, at the time, no denial of the execution of the note in the pleadings. There was no treaty pending for a compromise, but it was a voluntary and unsolicited offer of the defendant. It evinced no willingness to submit to a sacrifice, or to make a concession, to terminate litigation. On the contrary, the offer was only to be considered obligatory, provided the plaintiff obtained a judgment. It was then but a proposition to obtain time after the suit should have terminated against him. The admission

B. Rule Does Not Apply to Criminal Cases. — The rule has no application to criminal cases.[19]

in the letter of a distinct fact, fell within none of the rules for the exclusion of propositions of compromise, and was properly permitted to go to the jury."

But see to the contrary Berggren *v.* Fremont etc. Co., 23 Neb. 620, 37 N. W. 471.

Made Voluntarily Without Pending Negotiations. — In Gibbs *v.* Johnson, 3 App. Comr. Pat. 255, 10 Fed. Cas. No. 5384, this limitation of the rule is stated: "If the admissions are by way of compromise and without the admission of any particular independent facts, this would be considered as inadmissible, but if the offer be so made voluntarily without any pending negotiation, and without stating it to be made without prejudice the rule does not apply."

See also International Pottery Co. *v.* Richardson (N. J. App.), 43 Atl. 692; Teasley *v.* Bradley, 110 Ga. 407, 35 S. E. 782, 78 Am. St. Rep. 113.

Offers to Arbitrate Within the Rule. — Mundhenk *v.* C. I. R. Co., 57 Iowa 718, 11 N. W. 656; Duff *v.* Duff, 71 Cal. 513, 12 Pac. 570.

Competent Where Results in Making of Contract Sued On. — Stuht *v.* Sweesey, 48 Neb. 767, 67 N. W. 748.

To be privileged must be part of negotiations for compromise. Broschart *v.* Tuttle, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33.

Competent to Contradict the Party. In Taylor *v.* Bay City St. R. Co., 101 Mich. 140, 59 N. W. 447, the court said: "Propositions for a compromise are of course inadmissible, but, if a party during such negotiations make statements not in harmony with his claim for damages, such statements are competent to contradict him when he has testified that he suffered damages. Any statement made by either of the plaintiffs in this case, whether during negotiations for a settlement or otherwise, which tended to show that he considered the railroad a benefit rather than injury, was clearly competent."

Must Be Offered as a Compromise. In Hood *v.* Tyner, 3 Ind. App. 51, 28 N. E. 1033, it was offered to show that the defendant offered to give the plaintiff a horse and a certain amount to boot as a settlement of the claim made against him. The evidence was held to be competent, the court saying: "This conversation occurred upon an occasion when the appellee went to the house of the appellant to collect his account. The latter said that he did not have the money to pay him at that time; hence the talk about the sale of a horse. There was no element of compromise in the negotiation. No treaty of peace was pending between the parties, and the proposition to sell the horse was not an overture of pacification, but was suggested as a means of paying a debt which the debtor was unable to pay in cash."

What Amounts to Offer of Compromise. — As to what will or will not amount to an offer of compromise or admissions made in course of negotiations therefor, in such sense as to protect a party from their disclosure as privileged, see the following cases:

Colorado. — Chicago B. & Q. R. Co. *v.* Roberts, 10 Colo. App. 87, 49 Pac. 428; Chicago B. & Q. R. Co. *v.* Roberts, 26 Colo, 329, 57 Pac. 1076.

Connecticut. — Hartford Bridge Co. *v.* Granger, 4 Conn. 142.

Illinois. — McKenzie *v.* Stretch, 53 Ill. App. 184.

Indiana. — Hood *v.* Tyner, 3 Ind. App. 51, 28 N. E. 1033.

Iowa. — Houdeck *v.* Merchants & Bankers Ins. Co., 102 Iowa 303, 71 N. W. 354.

Suggestion of Compromise Between Parties Jointly Interested. — The suggestion of compromise by one party to another jointly liable or charged with him is not privileged. It must be an offer or negotiations with the opposite party. Smith *v.* Whittier, 95 Cal. 279, 30 Pac. 529.

19. State *v.* Soper, 16 Me. 293, 33 Am. Dec. 665.

C. Must Be Made to Purchase Peace. — Offers of compromise are privileged only where made to purchase peace in a controversy where the party making the offer does not admit his liability.[20]

D. Question for the Court. — As the question is one of the admissibility of evidence, the court should determine whether the admissions offered were or were not so made as to be privileged.[21]

E. Admission of Facts Competent. — While offers of compromise cannot be proved as admissions, a distinct admission of a *fact* in the course of negotiations therefor are held to be admissible.[22]

20. Hood *v.* Tyner, 3 Ind. App. 51, 28 N. E. 1033; Grubles *v.* Nye, 13 S. & M. (Miss.) 443; Moore *v.* Gaus etc. Mfg. Co., 113 Mo. 98, 20 S. W. 975; Hartford Bridge Co. *v.* Granger, 4 Conn. 142; Jenness *v.* Jones, 68 N. H. 475, 44 Atl. 607.

21. Batchelder *v.* Batchelder, 2 Allen 105; Greenfield *v.* Kennett, 69 N. H. 419, 45 Atl. 233.

Question When Left to Jury. It is held that where there is a disagreement in the evidence upon the question whether matters offered to be proved were made as an offer of or in negotiations for a compromise the question may properly be left to the jury under instruction to disregard the admissions proved if made in an effort to compromise. Webber *v.* Dumm, 71 Me. 330; Greenfield *v.* Kennett, 69 N. H. 419, 45 Atl. 233.

22. *California.* — Rose *v.* Rose, 112 Cal. 341, 44 Pac. 658.

Colorado. — Kutcher *v.* Love, 19 Colo. 542, 36 Pac. 152.

Connecticut.—Hartford Bridge Co. *v.* Granger, 4 Conn. 142.

Georgia.—Molyneaus *v.* Collier, 13 Ga. 406.

Illinois. — McKinzie *v.* Stretch, 53 Ill. App. 184.

Iowa. — Rosenberger *v.* Marsh, 108 Iowa 47, 78 N. W. 837.

Massachusetts. — Marsh *v.* Gold, 2 Pick. 284; Gerrish *v.* Sweetser, 4 Pick. 373; Durgin *v.* Somers, 117 Mass. 55.

Michigan. — Taylor *v.* Bay City St. Ry. Co., 101 Mich. 140, 59 N. W. 447.

Mississippi. — Grubbs *v.* Nye, 13 S. & M. 443; Garner *v.* Myrick, 30 Miss. 448.

Missouri. — Moore *v.* Gaus etc. Mfg. Co., 113 Mo. 98, 20 S. W. 975.

New Hampshire. — Hamblett *v.* Hamblett, 6 N. H. 333; Perkins *v.* Concord R. R., 44 N. H. 223; Rideout *v.* Newton, 17 N. H. 71; Plummer *v.* Currier, 52 N. H. 287.

New York. — Marvin *v.* Richmond, 3 Denio 58, 17 N. Y. C. L. 280; Armour *v.* Gaffey, 30 App. Div. 121, 51 N. Y. Supp. 846.

United States. — Gibbs *v.* Johnson, 3 App. Conn. Pat. 255, 10 Fed. Cas. No. 5384.

Admission of Independent Fact. In Rose *v.* Rose, 112 Cal. 341, 44 Pac. 658, a divorce case, a paper signed by the defendant, in which he offered to divide the property and described it as community property, was admitted in evidence solely for the purpose of showing that the property was, in fact, community property. The court held the ruling to have been correct, saying:

"The declaration as to the community character of the property was not essential to the purposes of the compromise, and is therefore not to be regarded as a concession made for that purpose. While, therefore, it would not be competent to admit an offer of compromise, as such, the declaration therein of facts involved in the controversy which are not mere concessions made for the purpose of such offer, but are statements of independent facts, is admissible against the party making them. The rule is thus stated by Mr. Rice: 'It is never the intention of the law to shut out the truth, but to repel any inference which may arise from a proposition made, not with a design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made be-

4. State Secrets. — Confidential matters of state cannot be disclosed by proof of admissions or declarations made by officers possessed as such of such secrets.[23]

5. Jury Secrets. — The same rule applies to matters which come before jurors in secret sessions and in the performance of their duties.[24]

6. Privileged Communications. — If an admission is made in conversation between parties occupying such a confidential relation as to render communications so made, privileged, proof of them is inadmissible.[25]

7. Parol Admissions in Pais. — A. Generally. — Parol admissions are admissible generally as we have seen. But the question not infrequently arises, as to their competency to prove certain things, for example, the contents of written instruments. These questions have been reserved for this place under receivable admissions.

B. As Evidence of Contents of Written Instruments. —The rule is general that a written instrument is the best evidence of its contents, and that parol evidence is competent only when the instrument itself cannot be produced. Therefore, such contents could not be proved by the sworn testimony of the party except as secondary evidence after laying the proper foundation. It would seem to follow necessarily, that the contents of the instrument could not be established by the parol or verbal admissions of the party except in the same way.[26]

cause it is a fact, the evidence to prove it is competent, whatever motive may have prompted the declaration. But if the party admits a particular item in an account, or any other fact, meaning to make the admission as being true, this is good evidence, although the object of the conversation was to compromise an existing controversy.'"

Amounting to Admission of Liability. — It is held in McKinzie *v.* Stretch, 53 Ill. App. 184, that an offer to compromise a disputed claim to avoid litigation is not, as a general rule, admitted in evidence, but, when such offer amounts to an admission of liability, the rule is different.

Unless Made Without Prejudice. Kutcher *v.* Love, 19 Colo. 542, 36 Pac. 152.

23. Greenl. Ev., § 250; Worthington *v.* Scribner, 109 Mass. 487, 12 Am. Rep. 736.

24. 1 Greenl. Ev., §§ 252, 252a.

25. Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303; Van Zandt *v.* Schuyler, 2 Kan. App. 118, 43 Pac. 295; 1 Greenl. Ev., §§ 86-90.

26. *England.* — Summerset *v.* Adamson, 1 Bing. 73, 8 Eng. C. L. 255.

United States. — *In re* Paine, 9 Ben. 144, 18 Fed. Cas. No. 10,673.

Alabama. — Fralick *v.* Presley, 29 Ala. 457, 64 Am. Dec. 413; Ware *v.* Roberson, 18 Ala. (N. S.) 105; Chapman *v.* Peebles, 84 Ala. 283, 4 So. 273.

California. — Poole *v.* Gerrard, 9 Cal. 593.

Connecticut. — Davis *v.* Kingsley, 13 Conn. 285.

Illinois. — Mason *v.* Park, 4 Ill. 532; Jameson *v.* Conway, 5 Gilm. 227.

Minnesota. — Horton *v.* Chadbourn, 31 Minn. 322, 17 N. W. 865.

New Jersey. — Cumberland Mut. F. Ins. Co. *v.* Giltinan, 48 N. J. Law 495, 7 Atl. 424.

New York. — Keator *v.* Dimmick, 46 Barb. 158; Welland Canal Co. *v.* Hathaway, 8 Wend. 480, 24 Am.

C. To Prove Fact of Which Instrument Is Evidence.—There is, however, an apparent exception to this rule where the written instrument "is not part of the fact to be proved, but is *merely a collateral or subsequent memorial of the fact.*"[27]

But this, it will be seen, is not proving the *contents* of the instrument, but proving the *fact* of which the instrument is itself made evidence.[28]

Dec. 51; Jenner *v.* Joliffe, 6 Johns. 9; Morris *v.* Wadsworth, 17 Wend. 103.

North Carolina. — Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154; Roberts *v.* Roberts, 82 N. C. 29.

South Carolina. — Moore *v.* Dickinson, 39 S. C. 441, 17 S. E. 998; Lands *v.* Crocker, 3 Brev. 40.

Texas. — Dooley *v.* McEwing, 8 Tex. 306.

General Statement of the Rule. In Morgan *v.* Patrick, 7 Ala. (N. S.) 185, it is said that the rule is that admissions out of court are no evidence to establish deeds, records or statutes.

Of Existence of Policy of Insurance. — The existence of a policy of insurance on property may be established by the admission of the party in his application for other insurance. New York Cent. Ins. Co. *v.* Watson, 23 Mich. 486.

For What Purpose Oral Admission Competent. — In Keator *v.* Dimmick, 46 Barb. 158, it is held, generally, that admissions of a fact are competent only when parol evidence of the fact would be competent. See also Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154.

In Fralick *v.* Presley, 29 Ala. 457, 462, the rule is thus stated: "So far as the declarations above mentioned were mere statements of the contents of the deed they were certainly inadmissible unless the proper predicate for the introduction of secondary evidence was laid. Parol admissions are competent evidence only of those facts which it is permissible to prove by parol."

To Prove Consideration. — The consideration for a writing may be proved by the admissions of a party. Edgerton *v.* Edgerton, 8 Conn. 6; Dimon *v.* Keery, 54 App. Div. 318, 66 N. Y. Supp. 817.

Statement of the Rule. — In Welland Canal Co. *v.* Hathaway, 8 Wend. 480, 11 N. Y. Com. Law 439, the rule is thus stated: "I am not aware of any principle in the law of evidence which will authorize us to substitute the declarations of a party, even as against himself, for record or written evidence, and thereby dispense with its production. Such admissions rank only with oral testimony, and are entitled to no higher consideration in deciding upon the competency of evidence. It may be laid down, I think, as an undeniable proposition, that the admissions of a party are competent evidence against himself only in cases where parol evidence would be admissible to establish the same facts, or in other words, where there is not, in the judgment of the law, higher and better evidence in existence to be produced. It would be a dangerous innovation upon the rules of evidence, to give any greater effect to confessions or admissions of a party, unless in open court, and the tendency would be to dispense with the production of the most solemn documentary testimony."

Admissions of Agent Incompetent to Prove Contents of Written Instrument. — In Moore *v.* Dickinson, 39 S. C. 441, 17 S. E. 998 it is held that evidence of the declarations of an agent as to the contents of letters received by him from his principal is not admissible against the latter, in the absence of testimony showing that the letters have been lost or destroyed.

27. 1 Greenl. Ev., §§ 86-90; Dooley *v.* McEwing, 8 Tex. 306.

28. 1 Greenl. Ev., §§ 86-90; Dooley *v.* McEwing, 8 Tex. 306.

In What Cases Admissions Inadmissible. — In Greenleaf on evidence the following are stated as cases in which admissions or other oral evi-

D. Distinction Between Admission of Law and of Fact. — A distinction is made between an admission of law and an admission of fact, or of the legal effect of the instrument, or its contents, it being held in some cases that the former is not and the latter is admissible.[29]

E. Cases Holding Such Admissions Competent. — Again there are cases holding, apparently without exception, that admissions may be received in proof of what would otherwise have to be established by a written instrument.[30]

dence is inadmissible. 1. Where the law requires the instrument to be in writing. 2. To prove any contract which the parties have put in writing. 3. Where the existence of a writing which is material either to the issue between the parties, or to the credit of witnesses and is not merely the memorandum of some other fact. 1 Greenl. Ev., §§ 86-88.

And that such admissions are competent. 1. Where the writing does not fall within either of the three classes above described. 1 Greenl. Ev., § 90. 2. Where the record or document appointed by law is not part of the fact to be proved but is merely a collateral or subsequent memorial of the fact. 1 Greenl. Ev., §§ 86, 563n.

Of Right of Way by Married Woman. — In McGregor *v.* Wait, 10 Gray 72, 69 Am. Dec. 305, it is held that the admission by her of facts tending to establish a right of way over the land of a married woman of which she and her husband were seized and possessed were incompetent because she could not have made a valid grant, and therefore could not do indirectly by her parol admission what she could not have done by a direct grant.

29. 1 Greenl. Ev., §§ 96, 563k; Roberts *v.* Roberts, 82 N. C. 29.

30. Smith *v.* Palmer, 6 Cush. 513; Hoefling *v.* Hambleton, 84 Tex. 517, 19 S. W. 689; Loomis *v.* Wadhams, 8 Gray 557. See also as bearing on the question, Jackson *v.* Leek, 12 Wend. 105, 12 N. Y. Com. L. 105.

To Prove Contents of Written Instrument. — In Smith *v.* Palmer, 6 Cush. 513, the court said: "The general principle, as to the production of written evidence as the best evidence, does not apply to the admissions of parties; as what a party admits against himself may reasonably be taken to be true. The weight and value of the statements and admissions will vary according to the circumstances and must be determined by the jury. The ruling of the judge in the court below on this point is well supported by the authorities. See the case of Slatteric *v.* Pooley, 6 M. & W. 664, where the distinction between the admissions of parties, and parol statements from other sources, as to written instruments, is fully explained and supported. The general doctrine is also found in 1 Greenl. Ev., §§ 96, 97, and cases there cited. In the present case, the principal fact was, that the defendant had not performed his contract, in regard to which there could be no doubt that his admission would be important evidence, and the execution reciting the judgment assigned by the defendant himself was produced, in connection with the admissions and statements of the defendant."

To Prove Sale of Land. — In Hoefling *v.* Hambleton, 84 Tex. 517, 19 S. W. 689, admissions of the party were allowed to show the sale of land which was conveyed by deed. In holding the evidence to have been properly admitted the court said: "It is, we think, a proper case for the application of the doctrine that the admissions of a party *of the contents of a written instrument* may be received in evidence without the production of the writing or accounting for its absence."

Rule Stated. — The rule is thus broadly stated in Loomis *v.* Wadhams, 8 Gray 557, quoted from Mr. Justice Parke in Earle *v.* Picker, 5 Car. & P. 542: "What a party says

F. As a Substitute for Written Evidence. — Doubtless a party may waive proof by the best evidence and substitute therefor his formal admission of the fact at the trial.[31]

G. Competent to Prove Existence and Execution of Instrument. — The fact that a writing exists, without going into its contents, may be proved by oral admissions.[32]

H. As Secondary Evidence. — If the loss or destruction of a written instrument or that it is out of the jurisdiction of the court, and that it cannot be produced, are shown, the admissions of a party are competent to show not only its existence, but its contents.[33]

I. To Vary Terms of Written Instrument. — Admissions cannot be used to vary the terms of a written instrument.[34]

8. Must Be Relevant and Material to the Issue. — The admission, like all other evidence, must be material to the issue.[35]

is evidence against himself as an admission whether it relates to the contents of a written paper, or anything else."

Depends Upon the Character of the Admission. — In Cumberland Mut. F. Ins. Co. *v.* Giltinan, 48 N. J. Law 495, 7 Atl. 424, 57 Am. Rep. 586, the admission sought to be proved was contained in the proof of loss required to be furnished to the company under oath, and to set forth the policies existing on the premises. The admission thus made was held to be competent, but based upon the peculiar character of the admission, the court saying: "But, while the evidence in question is not to be invalidated by force of the theory just criticised and repudiated, we still think it was competent, and had the effect to prove the existence of the policy in question. Such evidence was not constituted of an ordinary admission, but an admission of a character so formal, and, in view of the purpose for which it was designed, so accredited as to put it on a level with admissions in a court of law, and which are intended to dispense with primary testimony. It was a part of the agreement of assurance that the proof of loss required upon the happening of a fire to be furnished to the company should contain a statement of the several insurances upon the property. Such statement was required to be verified by oath; and, if it were willfully false, the claim against the company was to become void; its object being to afford to the company a safe basis for its action in dealing with the assured. We think that admissions, thus authenticated, were properly received at the trial under the circumstances then present, and that their effect was to prove the policy in question."

31. Niles *v.* Rhodes, 7 Mich. (3 Cooley) 374.

32. Poole *v.* Gerrard, 9 Cal. 593; New York Cent. Ins. Co. *v.* Watson, 23 Mich. 486.

And its execution may also be proved by the admission of the party that he signed it. Nichols *v.* Allen, 112 Mass. 23.

33. Jackson *v.* Livingston, 7 Wend. 136; Jackson *v.* Vail, 7 Wend. 125; Fralick *v.* Presley, 29 Ala. (N. S.) 105; Jackson *v.* Hoogland, 7 Wend. 125; Allred *v.* Kennedy, 74 Ala. 326.

34. Uhler *v.* Browning, 4 N. J. Law 79; Scott *v.* Dansby, 12 Ala. (N. S.) 714; Sawyer *v.* Grandy, 113 N. C. 42, 18 S. E. 79.

35. Wells *v.* Alabama G. S. R. Co., 67 Miss. 24, 6 So. 737; Gilbert *v.* Odum, 69 Tex. 670, 7 S. W. 510; Fail *v.* McArthur, 31 Cal. 26; Tuttle *v.* Cone, 108 Iowa 468, 79 N. W. 267; Wilson *v.* Sax, 21 Mont. 374, 54 Pac. 46.

Affecting One's Title to Personal Property. — Thus it is held in Tuttle *v.* Cone, 108 Iowa 468, 79 N. W. 267, that declarations made by one in disparagement of his title to per-

9. Made on Previous Trial of Same Action. — The question whether judicial admissions made at the trial of a cause may be proved at a subsequent trial has been fully considered.[36]

If made by an attorney they are usually held not to be admissible at a subsequent trial.[37]

But there are cases holding such admissions competent at the second trial of the same case if made generally and without limiting them to the purposes of the present trial.[38]

If made by the party himself or by an attorney with his authority, and made generally and not for the purpose of the trial, there is no reason why they may not be proved against him at any subsequent time the same as admissions made out of court.

VI. MODE OF MAKING AS AFFECTING ADMISSIBILITY.

1. Generally. — The mode of making the admission is not generally material upon the mere question of its admissibility, however much it may affect its weight. But the fact that the admission is made in an unusual way as, for example, through an interpreter, or through the telephone, has given rise to some interesting questions which should be noted.

2. Through an Interpreter. — A. Designated by the Party Himself. — Admissions made through an interpreter may be proved by proving what the interpreter said as being the interpretation of what was said by the party in a foreign language.[39]

B. Appointed by the Court. — A different rule prevails in case of the appointment by the court of an interpreter for a witness. There the interpreter is himself a witness and not the agent of the witness for whom he interprets, and what he says cannot be proved as admissions of the witness.[40]

3. Through the Telephone. — A. Speaking Directly. — It is competent to prove admissions made through the telephone.[41]

sonal property, made before his title thereto was acquired, were immaterial and irrelevant.

Whether Refers to Matter in Issue. — *When question for jury.* Von Reeden *v.* Evans, 52 Ill. App. 209.

36. *Ante*, p. 464.

37. *Ante*, pp. 467, 560; Nichols Shepard & Co. *v.* Jones, 32 Mo. App. 657; State *v.* Buchanan, Wright (Ohio) 233.

38. Hallez *v.* Young, 68 Me. 215, 28 Am. Rep. 40; Woodcock *v.* Calais, 68 Me. 244; Wetherill *v.* Bird, 7 Car. & P. 6, 32 Eng. C. L. 472.

39. Nadau *v.* White River Lum. Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 291; Blazinsky *v.* Perkins, 77 Wis. 9, 45 N. W. 947; Sullivan *v.* Kuydendall, 83 Ky. 483; Camerlin *v.* Palmer Co., 10 Allen 539; McCormicks *v.* Fuller, 56 Iowa 43, 8 N. W. 800; Wright *v.* Maseras, 56 Barb. 521.

Interpreter Agent of Both Parties. — Where two parties not speaking a common language agree to commune through an interpreter, such interpreter becomes the agent of each of them and what he says for each is his admission. Miller *v.* Lathrop, 50 Minn. 91, 52 N. W. 274.

40. Schearer *v.* Harber, 36 Ind. 536.

41. *Illinois.* — Miles *v.* Andrews, 153 Ill. 262, 38 N. E. 644; Oberman

B. THROUGH AN OPERATOR. — And if a conversation is had through an operator who states what is said by each to the other, he is the agent of both, and what he stated as having been said and communicated by him is admissible.[42]

VII. HOW PROVED.

1. Generally, by Any One Who Heard Them. — Admissions, whether made by the party, or by some one by whose declarations he is bound, are original evidence and not hearsay, and may be proved the same as any other fact by the party making them, or any one who heard them.[43]

And this is true where the admission was made as a part of the testimony of a witness in court.[44]

A. EXCEPTIONS. — a. *Husband or Wife, When Competent to Prove.* — If not so made as to fall within the class of confidential communications, they may be proved by the husband or wife of the party making them.[45]

b. *Persons Disqualified to Testify.* — By statutory provisions certain persons are disqualified to testify, the other party to the con-

Brewing Co. *v.* Adams, 35 Ill. App. 540.

Massachusetts. — Lord Electric Co. *v.* Morrill, 178 Mass. 304, 59 N. E. 807.

Missouri.—Wolfe *v.* Missouri Pac. Ry. Co., 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331; Globe Printing Co. *v.* Stahl, 23 Mo. App. 451.

Nebraska. — Oskamp *v.* Gadsden, 35 Neb. 7, 52 N. W. 718, 17 L. R. A. 440.

Texas. — Missouri Pac. Ry. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861; Stepp *v.* State, 31 Tex. Crim. App. 349, 20 S. W. 753.

Proof That Party Sent the Answer. — It would seem to be necessary to identify the person making the statement. Morris *v.* Stokes, 21 Ga. 552; Oberman Brewing Co. *v.* Adams, 35 Ill. App. 540. But in Globe Printing Co. *v.* Stahl, 23 Mo. App. 451, it is held that a response to an inquiry made of a person over the telephone purporting to be an answer by him may be proved without positive proof of his identity. See also Wolfe *v.* Missouri Pac. R. Co., 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331.

Proof of, by Party Hearing One Side. — A party hearing but one side of the conversation may testify to what he heard. Miles *v.* Andrews, 153 Ill. 262, 38 N. E. 644.

Identity of Person Speaking. — It is sufficient to identify the person making the admission if the witness testifies that he recognized the voice as his. Lord Electric Co. *v.* Morrill (Mass.), 59 N. E. 807.

42. Oskamp *v.* Gadsden, 35 Neb. 7, 52 N. W. 718, 17 L. R. A. 440, 37 Am. St. Rep. 428.

43. *Georgia.*—Kitchen *v.* Robbins, 29 Ga. 713.

Illinois. — Graffenreid *v.* Kundert, 31 Ill. App. 394.

Indiana. — McConnell *v.* Hannah, 96 Ind. 102.

Massachusetts. — Goodrich *v.* Wilson, 119 Mass. 429.

Michigan. — Gilman *v.* Riopelle, 18 Mich. 145.

Tennessee. — Mulholland *v.* Ellitson, 1 Cold. 307, 78 Am. Dec. 495.

Vermont. — Lyman *v.* Lull, 20 Vt. 349.

44. Graffenreid *v.* Kundert, 31 Ill. App. 394.

45. McConnell *v.* Hannah, 96 Ind. 102.

tract sued upon being dead. In such case they cannot be heard to prove admissions made by such deceased person.[46]

c. *When Admission Is Confidential.* — So if the admission is so made as to be privileged on account of the relations of the parties, it cannot be proved by the person to whom it was made.[47]

2. By Stenographer's Notes. — Where testimony has been given as a witness and taken down by a stenographer in shorthand, it may be proved by the shorthand notes, or a transcript thereof, after proof by the stenographer of their correctness.[48]

3. Particularity Required. — A. Generally. — A witness called to prove oral admissions must be able to give the language used or its substance, or the testimony should be excluded.[49]

B. Party Making Must Be Identified. — And the identity of the party making the admission must be established either by the witness testifying to the admission or by other proof.[50]

C. Substance May Be Given. — The witness need not be able to give the exact words of the admission; it is permissible to give its substance.[51]

4. Explanation by Party Making. — A. All That Was Said at the Time May Be Proved. — Evidence is competent to explain the admissions by proving the circumstances under which they were made, and all that was said at the time that would in any way qualify or explain them, and all that was said must be taken together.[52]

46. Redden *v.* Inman, 6 Ill. App. 55; Sanford *v.* Ellithorp, 95 N. Y. 48.

47. Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303; Long *v.* Lander, 10 Or. 175.

48. Macomber *v.* Bigelow, 128 Cal. 9, 58 Pac. 312.

49. Dennis *v.* Chapman, 19 Ala. 29, 54 Am. Dec. 186; Bailey *v.* Small, 17 Wend. (N. Y.) 238; Parsons *v.* Disbrow, 1 E. D. Smith (N. Y.) 547.

50. Morris *v.* Stokes, 21 Ga. 552.

51. Woods *v.* Gevecke, 28 Iowa 561; Kittridge *v.* Russell, 114 Mass. 67.

But Cannot Give Conclusions. Parsons *v.* Disbrow, 1 E. D. Smith (N. Y.) 547.

52. *United States.* — Sargent *v.* Home Benefit Ass'n, 35 Fed. 711; Nat. Bank *v.* First Nat. Bank, 61 Fed. 809; Newman *v.* Bradley, 1 Dall. 240.

Alabama. — Troy Fertilizer Co. *v.* Logan, 90 Ala. 325, 8 So. 46.

Arkansas. — Adkins *v.* Hersy, 14 Ark. 442.

California. — Thrall *v.* Smiley, 9 Cal. 529; First Nat. Bank *v.* Wolff, 79 Cal. 69, 21 Pac. 748.

Connecticut.—Benedict *v.* Nichols, 1 Root 434.

Delaware. — Lattomus *v.* Garman, 3 Del. Ch. 232.

Georgia. — Dixon *v.* Edwards, 48 Ga. 142; Doonan *v.* Mitchell, 26 Ga. 472.

Illinois.—Stone *v.* Cook, 79 Ill. 424; McIntyre *v.* Thompson, 14 Ill. App. 554; Moore *v.* Wright, 90 Ill. 470; Rollins *v.* Duffy, 18 Ill. App. 398; Chicago B. & Q. R. Co. *v.* Bartlett, 20 Ill. App. 96.

Indiana. — Miller *v.* Wild Cat G. R. Co., 52 Ind. 511; Grand Rapids & I. R. Co. *v.* Diller, 110 Ind. 223, 9 N. E. 710.

Iowa. — Hartley State Bank *v.* McCorkell, 91 Iowa 660, 60 N. W. 197; Hess *v.* Wilcox, 58 Iowa 380, 10 N. W. 847; Courtwright *v.* Deeds, 37 Iowa 503; Jones *v.* Hopkins, 32 Iowa 503.

Kansas. — Davis *v.* McCrocklin, 34 Kan. 218, 8 Pac. 196.

Maine. — Parks *v.* Mosher, 71 Me. 304; Oakland Ice Co. *v.* Maxcy, 74 Me. 294; Stover *v.* Gorven, 18 Me. 174; Barbour *v.* Martin, 62 Me. 536.

Maryland. — Bowie *v.* Stonestreet, 6 Md. 418, 61 Am. Dec. 318.

Massachusetts.—O'Brien *v.* Cheney, 5 Cush. 148; Falrey *v.* Rodocanachi, 100 Mass. 427; Field *v.* Hitchcock, 17 Pick. 182, 28 Am. Dec. 288; Knight *v.* New England M. Co., 2 Cush. 271.

Michigan.—Passmore *v.* Passmore, 50 Mich. 626, 16 N. W. 170, 45 Am. Rep. 62; Continental Life Ins. Co. *v.* Willets, 24 Mich. 268.

Minnesota. — Searles *v.* Thompson, 18 Minn. 316.

Mississippi. — McIntyre *v.* Harris, 41 Miss. 81.

Missouri. — Howard *v.* Newsom, 5 Mo. 523; Burghart *v.* Brown, 51 Mo. 600.

Nebraska. — Johnson *v.* Opfer, 58 Neb. 631, 79 N. W. 547.

Nevada. — Dalton *v.* Bowker, 8 Nev. 190.

New Hampshire. — Moore *v.* Ross, 11 N. H. 547.

New York. — Thon *v.* Rochester R. Co., 81 Hun 615, 30 N. Y. Supp. 620; Weinberg *v.* Kram, 44 N. Y. St. 126, 17 N. Y. Supp. 535; Humes *v.* Proctor, 73 Hun 265, 26 N. Y. Supp. 315; Hopkins *v.* Smith, 11 Johns. 161; Kelsey *v.* Bush, 2 Hill 440; Schwartz *v.* Wood, 67 Hun 648, 21 N. Y. Supp. 1053; Dorton *v.* Douglas, 6 Barb. 451; Bearss *v.* Copley, 10 N. Y. 93; Root *v.* Brown, 4 Hun 797.

North Carolina. — Steele *v.* Wood, 78 N. C. 365; Roberts *v.* Roberts, 85 N. C. 9; Walker *v.* Featress, 1 Dev. & B. Law 17.

Ohio. — Cullen *v.* Bimm, 37 Ohio St. 236.

Pennsylvania. — Hamsher *v.* Kline, 57 Pa. St. 397; Bank *v.* Donaldson, 6 Pa. St. 179; Stevenson *v.* Hoy, 43 Pa. St. 191.

South Carolina. — Devlin *v.* Kilcrease, 2 McMull. 425; Cox *v.* Buck, 3 Strob. 367.

South Dakota. — Wendt *v.* Chicago St. P. M. & O. R. Co., 4 S. D. 476, 57 N. W. 226.

Tennessee. — Rogers *v.* Kincannon, 3 Humph. 252.

Vermont. — Brown *v.* Munger, 16 Vt. 12; Dean *v.* Dean, 43 Vt. 337; Mattocks *v.* Lyman, 18 Vt. 98, 46 Am. Dec. 138.

Party Entitled to Prove All That Was Said. — In Adkins *v.* Hershy, 14 Ark. 442, it is said: "There is no rule of law better settled, or more consonant with justice, than the one that the party who is sought to be charged by an admission, is entitled to the benefit of all that he said by way of qualification or explanation, during the same conversation, relative to the business in hand. The admission must be taken as a whole, and if the plaintiff proves only a part, the defendant may call for the entire conversation on cross-examination. The rule is, not that the plaintiff is concluded by the entire admission, but that it is competent evidence for the defendant to go to the jury, who are the proper judges of its credibility, and may reject such portions, if any, as appear to be inconsistent, improbable or rebutted by other circumstances in evidence.

Where Admission Is Made in Foreign Language. — Where an admission is made in a foreign language, it is competent to show that the witness, testifying to the language used and translating the same, does not give the proper meaning, in English, of the words used. Thon *v.* Rochester R. Co., 81 Hun 615, 30 N. Y. Supp. 620.

Must Be Confined to Material Matters. — In Rollands *v.* Duffey, 18 Ill. App. 398, it is held that proof of the conversation must be confined to matters material to the issue and tending to explain or qualify what has been said by the other party and proved as admissions. A different rule has been declared in some cases in which it is held that everything said in the conversation, whether material to the issue or tending to explain the admission proved on the other side or not. But the better rule is that the balance of the conversation to be competent must be material and in some way affect that portion of the conversation already proved. Wilhelm *v.* Connell, 3 Grant (Pa.) 178.

B. Not What Was Said at Another Time. — But not what was said in a different conversation.[53]

To Prove Admission Was Not Made. — In Continental L. Ins. Co. *v.* Willets, 24 Mich. 268, it was held to be competent to prove what was said in the same conversation immediately after the admission was alleged to have been made if it tended to show that such admission was not made as testified to by a prior witness.

As Explaining an Act. —So, where an act has been proved as an admission the party is entitled to prove what was said at the time explaining the act or showing the intent with which it was done or the purpose of it. Goodhue *v.* Hitchcock, 8 Metc. (Mass.) 62.

53. *Alabama.* — Roberts *v.* Trawick, 22 Ala. 490.

Arkansas. — Hazen *v.* Henry, 6 Ark. 86.

Colorado. — Nutter *v.* O'Donnell, 6 Colo. 253.

Connecticut.—Stewart *v.* Sherman, 5 Conn. 244; Robinson *v.* Ferry, 11 Conn. 460.

Georgia. — Lewis *v.* Adams, 61 Ga. 559.

Illinois. — Hatch *v.* Potter, 2 Gilm. 725, 43 Am. Dec. 88.

Indiana. — Moelering *v.* Smith, 7 Ind. App. 451, 34 N. E. 675.

Maine.—Royal *v.* Chandler, 79 Me. 265, 9 Atl. 615, 1 Am. St. Rep. 305; Carter *v.* Clark, 92 Me. 225, 42 Atl. 398.

Maryland. — Kerschner *v.* Kerschner, 36 Md. 309.

Massachusetts. — Adam *v.* Eames, 107 Mass. 275; Hunt *v.* Roylance, 11 Cush. 117, 59 Am. Dec. 140; Boston & W. R. C. *v.* Dana, 1 Gray 83.

Missouri. — Gunn *v.* Todd, 21 Mo. 303, 64 Am. Dec. 231.

New Hampshire. — Judd *v.* Brentwood, 46 N. H. 430; Woods *v.* Allen, 18 N. H. 28; Barker *v.* Barker, 16 N. H. 333.

New Jersey. — Lister *v.* Lister, 35 N. J. Eq. 49.

Pennsylvania. — McPeake *v.* Hutchinson, 5 Serg. & R. 295.

South Carolina. — Davis *v.* Kirksey, 2 Rich. Law 176; Ellen *v.* Ellen, 18 S. C. 489; Edwards *v.* Ford, 2 Bailey 461.

South Dakota. — Wendt *v.* Chicago St. P. M. & O. R. Co., 4 S. D. 476, 57 N. W. 226.

Vermont. — Lyman *v.* Lull, 20 Vt. 349; Burrows *v.* Stevens, 39 Vt. 378.

Parties' Own Declarations Inadmissible. — The rule on the subject is thus stated in Hunt *v.* Roylance, 11 Cush. (Mass.) 117, 59 Am. Dec. 140: "The defendant had a right to prove any statements of his own, which made part of those offered in evidence by the plaintiffs. He could explain and contradict any conversation or declaration which had been first proved against him by the plaintiffs, because such evidence tended directly and legitimately to control the case made out against him by the plaintiffs. But beyond this he could not go. His own admissions, not offered in evidence against him, had no legal tendency to control the case proved on the other side. To show that a man denied being a member of a copartnership to A today does not prove or in any way tend to show that he did not admit that he was a member of the firm to B yesterday. It is simply an admission in his own favor, having no bearing on the admission proved against him. Nor does it make such testimony any the more competent or relevant because a party seeks to couple it with independent acts and circumstances not proved on the other side, and which of themselves, unaccompanied by the declarations of a party, would not tend to prove the matter in issue."

At Another Conversation Inadmissible. — In Adams *v.* Eames, 107 Mass. 275, a conversation took place between the parties, which was given in evidence as containing certain admissions. It appeared that at the end of that conversation, there was an understanding between the parties that they should have another interview concerning the same matter, and that such interview was had. The opposite party offered to prove

C. Or Occuring at the Time, if Not Relevant. — Or in the same conversation, but not relating to or connected with the admission proved or tending to explain, modify or otherwise affect it.[54]

D. Contained in Written Instrument, All Must Be Read. If the admission is contained in a writing, the whole instrument, or so much of it as relates to the matter embraced in the admission, must be read.[55]

what was said in this subsequent conversation, but it was held to be incompetent.

Unless Part of Res Gestae. Roberts *v.* Trawick, 22 Ala. 490.

Must Be Confined to the Same Conversation and the Same Matter. Wendt *v.* Chicago, St. P., M. & O. R. Co., 4 S. D. 476, 57 N. W. 226.

Exeeption Where Effort Is to Prove a Gift of Property by Declarations. — In Wheaton *v.* Weld, 28 Tenn. 773, it was held that where declarations of a party were proved to establish the fact of a gift of personal property by him, other declarations of his tending to show the contrary, although made at a different time, were competent, the court saying: "But in this case, the question and the only question was whether or not Frederick Christian had given the negro to his niece, Mary C. Christian, and the proof introduced by the plaintiff to establish the fact of the gift was declarations to that effect, said to have been made by him. Unquestionably, his declarations to the contrary ought to have been heard, as it is upon a proper adjustment of balance, and these declarations and counter-declarations, if they were made that the judgment of the jury, must rest in finding the fact thus submitted to them."

54. Miller *v.* Wild Cat G. R. Co., 52 Ind. 51; Clark *v.* Smith, 10 Conn. 1, 25 Am. Dec. 47; Rouse *v.* Whited, 25 Barb. (N. Y.) 279; Wilhelm *v.* Connell, 3 Grant (Pa.) 178.

55. *Ante,* pp. 423, 448.

Nebraska. — Churchill *v.* White, 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64; Bartlett *v.* Cheeshrough, 32 Neb. 339, 49 N. E. 360.

New York. — Fisher *v.* Monroe, 51 N. Y. St. 585, 21 N. Y. Supp. 995; Root *v.* Brown, 4 Hun 797.

Pennsylvania. — Kreiter *v.* Bomberger, 82 Pa. St. 59, 22 Am. Rep. 750.

Wisconsin. — Hunter *v.* Gibbs, 79 Wis. 70, 48 N. W. 257; Wisconsin Planing Mill Co. *v.* Schuda, 72 Wis. 277, 39 N. W. 558.

The Rule Stated. — In Robeson *v.* Schuylkill Nav. Co., 39 Grant (Pa.) 186, the rule is thus stated: "Nothing in the law is better settled than the rule that a party cannot pick out such portions of the paper as he thinks will suit his purpose, and then object to the remainder. If the defendants were entitled to the whole of the report because a part of it had been produced, the cross-examination was the right way and the right time to bring it out. We cannot sustain the argument of the plaintiff's counsel that the defendants were bound to open their case and call these witnesses as their own, before they could put the interrogatories objected to. You cannot have one part and suppress another part of a conversation, an admission, a deed, contract, record, a letter, or any other document, and if an attempt be made to do so, the opposing counsel may substitute a thorough search for everything necessarily connected with the evidence in chief, and proper to explain it. The truth in a garbled and mutilated form is as well calculated to mislead as positive falsehood. To make it round and full is the object of cross-examination."

Party Offering May Disprove Portion Against Him. — As the party offering the whole instrument is bound to do so in order to have the benefit of so much of it as is favorable to him, he is not estopped to disprove that portion which is un-

E. In Correspondence, Whole May Be Required. — If the admission occurs in correspondence, by letter or otherwise, the whole correspondence bearing upon or in any way relating to the admission relied upon is competent, and may be insisted upon by either party.[56]

5. By Party, Foundation for Impeachment Need Not Be Laid. Where the admission is made by a party to the suit, it is substantive and original evidence, and not necessarily for impeachment, and may be proved without laying the foundation by asking him if he made the statement.[57]

6. In Pleading, Must Be Read in Evidence. — If a pleading in another case is relied upon as an admission, it must be offered in evidence the same as any other written admission.[58] Whether it is necessary to read in evidence an admission made in a pleading in the case on trial is a disputed question.[59]

VIII. WEIGHT TO BE GIVEN TO EVIDENCE OF.

1. Generally. — The weight to be given to evidence of admissions may depend upon various matters affecting its accuracy; as, for example, the liability to mistake what has been said, resulting either from the frailty of human memory, the natural inability to detail what has been said by another precisely as it was said, and the liability to purposely distort, color or mistake what was said.[60]

favorable. Algase *v.* Horse Owners' etc. Ass'n, 77 Hun 472, 29 N. Y. Supp. 101; Cromwell *v.* Hughes, 12 Misc. 372, 33 N. Y. Supp. 643; Mott *v.* Consumers' Ice Co., 73 N. Y. 543; Patrick *v.* Hazen, 10 Vt. 183; Cleveland C. C. & St. L. R. Co. *v.* Gray, 148 Ind. 266, 46 N. E. 675.

56. *Ante*, p. 385; Murray *v.* Great Western Ins. Co., 72 Hun 282, 25 N. Y. Supp. 414.

Confined to Matters Pertinent to Admission Proved. — Edwards *v.* Osman, 84 Tex. 656, 19 S. W. 868.

Whole Need Not Be Offered in First Instance. — But the party offering evidence of the admission may offer so much of the writing or correspondence as he desires to use leaving the opposite party to offer the remaining part of it if he desires to do so. Cramer *v.* Gregg, 40 Ill. App. 442; Jones *v.* Fort, 36 Ala. 449; Hudson *v.* Howlett, 32 Ala. 478.

57. *Alabama.* — Crocker *v.* Clements, 23 Ala. 296; Callan *v.* McDaniel, 72 Ala. 96.

Connecticut. — Bristol *v.* Warner, 19 Conn. 7.

Indiana. — McNut *v.* Dare, 8 Blatchf. 35.

Missouri. — Bompart *v.* Lucas, 32 Mo. 123; Kritzer *v.* Smith, 21 Mo. 296.

New York. — Shrady *v.* Shrady, 42 App. Div. 9, 58 N. Y. Supp. 546; Garrie *v.* Schmidt, 25 Misc. 753, 55 N. Y. Supp. 703; Young *v.* Katz, 22 App. Div. 542, 48 N. Y. Supp. 187.

Pennsylvania. — Reiter *v.* Morton, 96 Pa. St. 229; Robeson *v.* Schuylkill Nav. Co., 3 Grant 186.

South Carolina. — Cohen *v.* Robert, 2 Strob. 410; Carrier *v.* Hague, 9 Rich. 454.

Texas. — Smith *v.* Chenault, 48 Tex. 455.

58. *Ante*, p. 424.

59. *Ante*, p. 422.

But the better rule seems to be that it must be read in evidence. Town of Greenville *v.* Old Dominion S. S. Co., 104 N. C. 91, 10 S. E. 147; Smith *v.* Nimocks, 94 N. C. 243.

60. *Arkansas.* — Sadler *v.* Sadler, 16 Ark. 628.

Illinois. — Ryder *v.* Emrich, 104

A. Should Be Received With Caution. — Consequently the rule is that evidence of admissions, particularly mere verbal admissions, should be received with caution.[61]

B. Strong Evidence When Satisfactorily Proved. — But it is equally well settled that admissions deliberately made and clearly

Ill. 470; Ayers *v.* Metcalf, 39 Ill. 307.

Iowa. — Bullard *v.* Bullard, 112 Iowa 423, 84 N. W. 513.

Kentucky. — Colyer *v.* Langford, 1 A. K. Marsh. 174.

Michigan. — Niles *v.* Rhodes, 7 Mich. 374.

Mississippi. — Prewett *v.* Coopwood, 30 Miss. 369; Parker *v.* McNeil, 12 Smed. & M. 355.

Missouri. — Wolfe *v.* M. Pac. R. Co., 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539.

New York. — Garrison *v.* Akin, 2 Barb. 25.

Made Without Knowledge. — Admissions made by a party without personal knowledge on his part of the truth of the fact admitted are competent against him and should be given such weight as they deserve under all the circumstances. Kitchen *v.* Robbins, 29 Ga. 713; Sparr *v.* Wellman, 11 Mo. 230.

61. *United States.* — Sunday *v.* Gordon, 1 Blatchf. & H. 569, 23 Fed. Cas. No. 13,616; Smith *v.* Burnham, 3 Sum. 435, 22 Fed. Cas. No. 13,019.

Alabama. — Alexander *v.* Hooks, 84 Ala. 605, 4 So. 417.

California. — Mattingly *v.* Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87.

Georgia. — Richmond & D. R. Co. *v.* Kerler, 88 Ga. 39, 13 S. E. 833.

Illinois. — Ray *v.* Bell, 24 Ill. 444; Chicago & N. W. R. Co. *v.* Button, 68 Ill. 409.

Iowa. — Clark *v.* Sarkin, 9 Iowa 391.

Kentucky. — Higgs *v.* Wilson, 3 Metc. 337.

Missouri. — Ringo *v.* Richardson, 53 Mo. 385.

New York. — Garrison *v.* Akin, 2 Barb. 25.

Pennsylvania. — Erie & W. Va. R. Co. *v.* Knowles, 117 Pa. St. 77, 11 Atl. 250.

Texas. — Portis *v.* Hill, 14 Tex. 69, 65 Am. Dec. 99.

Vermont. — Fenno *v.* Weston, 31 Vt. 345.

Wisconsin. — Saveland *v.* Green, 40 Wis. 431; Benedict *v.* Horner, 13 Wis. 285; Dreher *v.* Town of Fitchburg, 22 Wis. 675, 99 Am. Dec. 91; Durkee *v.* Stringham, 8 Wis. 1; Haven *v.* Cole, 67 Wis. 493, 30 N. W. 720.

Weight to Be Given to Admissions. — In Garrison *v.* Akin, 2 Barb. N. Y. 25, it is said: "There have been but few judges or elementary writers, who have not had occasion to speak of the character of this kind of evidence; such is the facility with which it may be fabricated, and such the difficulty of disproving it, if false. It is so easy, too, by the slightest mistake or failure of recollection, totally to pervert the meaning of the party and change the effect of his declarations, that all experience in the administration of justice has proved it to be the most dangerous kind of evidence, always to be received with great caution, unless sustained by corroborating circumstances. Then indeed, the character of this species of evidence is changed, and the mind receives it without suspicion."

Party Should Be Taken at His Word. — In Blackstock *v.* Long, 19 Pa. St. 340, it is said: "As a general rule it is not unfair to take a man at his word." See also Robinson *v.* Stuart, 68 Me. 61.

Not as Satisfactory as That of Witnesses Who Testify from Knowledge. — O'Riely *v.* Fitzgerald, 40 Ill. 310.

Weakest Kind of Evidence. Dreher *v.* Town of Fitchburg, 22 Wis. 675, 99 Am. Dec. 91.

May Be the Best or the Weakest. Parker *v.* McNeill, 12 Smed. & M. (Miss.) 355.

proved are very strong and satisfactory evidence against the party making them.[62]

C. Weight to Be Determined by Jury. — The weight to be given to admissions is to be determined by the jury under proper instructions by the court.[63]

IX. EFFECT OF WHEN PROVED.

1. When Conclusive. — A. Generally Not Conclusive. — The general rule is that admissions are not conclusive, but may be disproved by other evidence.[64]

62. *Alabama.*—Wittick *v.* Keiffer, 31 Ala. 199; Wilson *v.* Calvert, 8 Ala. (N. S.) 757.

Illinois. — Ray *v.* Bell, 24 Ill. 444; Mouro *v.* Platt, 62 Ill. 450; Hartley *v.* Lybarger, 3 Ill. App. 524; Chicago & N. W. R. Co. *v.* Button, 68 Ill. 409; Ayers *v.* Metcalf, 39 Ill. 307.

Kentucky. — Milton *v.* Hunter, 13 Bush 163; Colyer *v.* Langford, 1 A. K. Marsh. 174; Higgs *v.* Wilson, 3 Metc. 337.

Virginia. — Little *v.* Slemp (Va.), 27 S. E. 808.

Wisconsin. — Saveland *v.* Green, 40 Wis. 431.

When Held to Be Strong Evidence. — It is said in Ray *v.* Bell, 24 Ill. 444: "The admissions or acknowledgments of a party to a civil suit, knowing his rights, are always held as strong evidence against him, but he is, notwithstanding, at liberty to prove that such admissions were mistaken or were untrue, and he is not estopped or concluded by them unless another person has been induced by them to alter his condition—in such a case a party is estopped from disputing their truth, with respect to such person, and those claiming under him, but as to third parties, he is not bound by them."

Against Interest Entitled to Peculiar Weight. — Levy *v.* Gillis, 1 Penn. (Del.) 119, 39 Atl. 785.

63. *Arkansas.* — Shinn *v.* Tucker, 37 Ark. 580.

Illinois.—Dufield *v.* Cross, 12 Ill. 397; Ingalls *v.* Bulkley, 15 Ill. 224; Mouro *v.* Platt, 62 Ill. 450; Hartley *v.* Lybarger, 3 Ill. App. 524; Ayers *v.* Metcalf, 39 Ill. 307; Young *v.* Foute, 43 Ill. 33.

New York. — Stevens *v.* Vroman, 18 Barb. 250; Roberts *v.* Gee, 15 Barb. 449; Bearss *v.* Copely, 10 N. Y. 93.

Wisconsin. — Saveland *v.* Green, 40 Wis. 431.

64. *England.* — Skaife *v.* Jackson, 3 Barn. & C. 421, 10 Eng. C. L. 137.

Connecticut. — Beers *v.* Broome, 4 Conn. 247; Goodwin *v.* U. S. An. & L. Ins. Co., 24 Conn. 591.

Delaware. — Sharpe *v.* Swayne, 1 Penn. (Del.) 210, 40 Atl. 113.

Illinois. — Mason *v.* Park, 4 Ill. 532; Ray *v.* Bell, 24 Ill. 444; Ayers *v.* Metcalf, 39 Ill. 307; Young *v.* Foute, 43 Ill. 33.

Indiana. — Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Kansas.—Solomon R. Co. *v.* Jones, 30 Kan. 601, 2 Pac. 657.

Kentucky. — Thompson *v.* Thompson, 93 Ky. 435, 20 S. W. 373.

Michigan. — Eastman *v.* Lake Shore & M. S. R. Co., 101 Mich. 597, 60 N. W. 309.

New Hampshire. — Pendexter *v.* Carleton, 16 N. H. 482; Pearson *v.* Sabin, 10 N. H. 205.

New Jersey. — McElroy *v.* Ludlum, 32 N. J. Eq. 828.

New York. — Stephens *v.* Vroman, 18 Barb. 250; Meister *v.* Sharkey's M. W., 5 App. Div. 470, 39 N. Y. Supp. 789; Bissell *v.* Saxton, 66 N. Y. 55; Ins. Co. *v.* Telfair, 45 App. Div. 564, 61 N. Y. Supp. 322; Metropolitan L. Ins. Co. *v.* Schaeffer, 16 Misc. 625, 40 N. Y. Supp. 984; Boyd *v.* L. H. Quinn Co., 18 Misc. 169, 41 N. Y. Supp. 391.

Vermont. — Reed *v.* Newcomb, 62 Vt. 75, 19 Atl. 367.

Wisconsin. — Hurbrook *v.* Strawser, 14 Wis. 403.

a. *Made Under Oath.* — This rule is not affected by the fact that the admission was made under oath as a witness or otherwise. It may still be disproved by other evidence, including the testimony of the party making it.[65]

B. Exceptions to the Rule. — a. *Generally.* — There are exceptions to this general rule in case of judicial admissions and those which were intended to be and have been so acted upon as to give rise to the doctrine of estoppel.[66]

b. *Judicial Admissions.* — **(1.) As Substitute for Evidence.** — Such judicial admissions as are made as a substitute for evidence that might be adduced by the other side are conclusive for the purposes of the trial and proceedings on appeal.[67]

(2.) In Pleadings. — So a party is conclusively bound, for the same purposes, by an admission in his pleading.[68]

Although Made for a Fraudulent Purpose. — Pendexter *v.* Carleton, 16 N. H. 482.

Book Entries Within the Rule. And are not conclusive. Meister *v.* Sharkey's M. W., 5 App. Div. 470, 39 N. Y. Supp. 789.

By One of Several Executors not conclusive on the others. James *v.* Hackley, 16 Johns. (N. Y.) 273.

65. *Delaware.* — Sharp *v.* Swayne, 1 Penn. (Del.) 210, 40 Atl. 113.

Kansas.—Solomon R. Co. *v.* Jones, 30 Kan. 601, 2 Pac. 657.

Kentucky. — Louisville & N. R. Co. *v.* Miller, 19 Ky. Law 1665, 44 S. W. 119.

Michigan. — Pelton *v.* Schmidt, 104 Mich. 345, 62 N. W. 552.

New York. — Akers *v.* Overbeck, 18 Misc. 198, 41 N. Y. Supp. 382.

Vermont. — Whitcher *v.* Morey, 39 Vt. 459.

66. So public records kept by a principal are held to be conclusive as against the sureties on his bond. Doll *v.* People, 48 Ill. App. 418.

67. *California.* — Hearne *v.* De Young, 111 Cal. 373, 43 Pac. 1108.

Illinois. — Mason *v.* Park, 3 Scam. 532.

Indiana. — Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Kansas. — Central Branch U. P. R. Co. *v.* Shoup, 28 Kan. 394, 42 Am. Rep. 163.

Missouri. — Moling *v.* Barnard, 65 Mo. 600.

New Hampshire. — Town of Allon *v.* Town of Gilmantown, 2 N. H. 520.

Made on Former Trial cannot be retracted at the second trial of the same case. Owen *v.* Cawley, 36 N. Y. 600.

By One Not a Party to the action not conclusive. Reed *v.* Newcomb, 62 Vt. 75, 19 Atl. 367.

Conclusive Only as Between the Parties. — Murphy *v.* Hindman, 58 Kan. 184, 48 Pac. 850.

In Bill of Exceptions Not Conclusive. —In Mullin *v.* Vermont Mut. F. Ins. Co., 56 Vt. 39, it is held that a bill of exceptions containing a statement of facts admitted on the trial while conclusive on appeal is not so upon a second trial of the case in the court below.

68. *Ante,* p. 398; Goldwater *v.* Burnside, 22 Wash. 215, 60 Pac. 409; Or. R. & Nav. Co. *v.* Dacres, 1 Wash. 195, 23 Pac. 415; Cal. Elec. Works *v.* Finch, 47 Fed. 583; New Albany V. P. R. Co. *v.* Stallcup, 62 Ind. 345; Johnson *v.* Thorn, 27 Misc. 771, 57 N. Y. Supp. 762.

But Not Where Pleading Is Abandoned by Filing Amended. — Baxter *v.* N. Y. T. & M. R. Co., (Tex. Civ. App.,) 22 S. W. 1002; Miller *v.* Nicodemus, 58 Neb. 352, 78 N. W. 618; Fogg *v.* Edwards, 20 Hun 90.

In Confession and Avoidance. May be explained. Garrie *v.* Schmidt, 25 Misc. 753, 55 N. Y. Supp. 703; Young *v.* Katz, 22 App. Div. 542, 48 N. Y. Supp. 187.

(A.) But Not When Offered in Another Action. — But the rule is different if the admission is offered in another action or for another purpose. Then the admission is not conclusive but may be disproved by the party making it.[69]

(3.) Confession of Judgment. — The confession of a judgment is a conclusive admission of liability for the amount confessed.[70]

(4.) To Avoid Continuance, Effect Of. — An admission to avoid a continuance that the witness will testify to the facts alleged in the affidavit for the continuance, only admits that such testimony will be given by the witness, and is not conclusive of the fact, but may be disproved.[71]

(5.) Made by Mistake. — A party may be relieved from the conclusive effect of a judicial admission where it is shown to have been made by mistake.[72]

(6.) Procured by Fraud. — So a party may avoid the effect of an admission by a showing that it was procured by fraud.[73]

c. *When Acted Upon.* — And an admission made with intent to influence, and acted upon in good faith by another, may be held conclusive if injury would result to such party if the admission were denied or repudiated.[74]

69. McLemore *v.* Nuckolls, 37 Ala. (N. S.) 662; Parsons *v.* Copeland, 33 Me. 370, 54 Am. Dec. 628; Rich *v.* City of Minneapolis, 40 Minn. 82, 41 N. W. 455; Tabb's Curator *v.* Cabell, 17 Gratt. (Va.) 160.

70. Iglehart *v.* State, 2 Gill. & J. (Md.) 235.

Plea of Guilty in Criminal Case Not Conclusive in Civil Case. —Jones *v.* Cooper, 97 Iowa 735, 65 N. W. 1000; Young *v.* Copple, 52 Ill. App. 547; Clark *v.* Irvin, 9 Ohio 131.

Confession by Executor, Effect of. In Iglehart *v.* State, 2 Gill. & J. (Md.) 235, it is held that a confession of judgment by an executor is conclusive on him as well as to the debt confessed as to the sufficiency of assets to pay it; but as to the surety on his bond, not a party to the suit, it is only *prima facie* evidence as to either.

71. *Ante*, p. 480; Bestor *v.* Sardo, 2 Cranch C. C. 260, 3 Fed. Cas. No. 1363; Alden *v.* Carpenter, 7 Colo. 87, 1 Pac. 904; Brent *v.* Heard, 40 Miss. 370.

Does Not Admit Immaterial or Irrelevant Matter. — In State *v.* Eisenmeyer, 94 Ill. 96, it is held that the court is not bound to admit in evidence an affidavit for a continuance containing only incompetent evidence because the facts stated have been admitted to avoid a continuance.

72. 1 Greenl. Ev. § 206; Or. R. & Nav. Co. *v.* Dacres, 1 Wash. 195, 23 Pac. 415; Hawley *v.* Bennett, 5 Paige Ch. (N. Y.) 104; Knight *v.* New England W. Co., 2 Cush. (Mass.) 271; Miller *v.* Moore, 1 E. D. Smith (N. Y.) 739.

73. Reed *v.* Newcomb, 62 Vt. 75, 19 Atl. 367.

74. 1 Greenl. Ev. § 207.

California. — Hearne *v.* De Young, 111 Cal. 373, 43 Pac. 1108.

Delaware. — Sharp *v.* Swayne, 1 Penn. (Del.) 210, 40 Atl. 113.

Illinois. — Ray *v.* Bell, 24 Ill. 444.

Minnesota. — Whitacre *v.* Culver, 8 Minn. 103.

Nebraska. — Towne *v.* Sparks, 23 Neb. 142, 36 N. W. 375.

New York. — Calanan *v.* McClure, 47 Barb. 206; Joslyn *v.* Rockwell, 59 Hun 129, 13 N. Y. Supp. 311.

Admissions Acted Upon. — In Calanan *v.* McClure, 47 Barb. 206, it is held that the admissions of a party of law or of fact, which have been acted upon by another, are conclusive against the party making them, and between him and the per-

C. In Deeds. — The general rule is that admissions in deeds are, as between the parties to them and their privies, conclusive,[75] but not as affecting strangers.[76]

D. In Other Writings. — The fact that an admission is in writing does not render it conclusive. It is still open to be disproved.[77]

E. Containing Hearsay. — An admission not founded upon knowledge, but based upon information received from others, should receive but little weight.[78]

F. Parol Admissions in Pais. — Parol admissions fall within the class that may be explained or disproved unless they are within some of the exceptions above mentioned.[79]

2. Effect of For the Jury. — The effect of an admission when proved must be left to the jury and received according to its terms.[80]

son whose conduct he has influenced, and this, whether the admissions are made in the express language to the person himself, or are implied from the open and general conduct of the party.

75. 1 Greenl. Ev., § 211.

76. 1 Greenl. Ev., 16th Ed., § 211.

77. Solomon R. Co. *v.* Jones, 30 Kan. 601, 2 Pac. 657; Chicago B. & Q. R. R. Co. *v.* Bartlett, 20 Ill. App. 96; Insurance Co. *v.* Telfair, 45 App. Div. 564, 61 N. Y. Supp. 322.

78. Stevens *v.* Vroman, 18 Barb. (N. Y.) 250; Kitchen *v.* Robbins, 29 Ga. 713.

Competent But Unsatisfactory. Sparr *v.* Wellman, 11 Mo. 230.

79. Chicago B. & Q. R. R. Co. *v.* Bartlett, 20 Ill. App. 96; Sharp *v.* Swayne, 1 Penn. (Del.) 210, 40 Atl. 113.

May Believe Part or Disbelieve Part. — In Roberts *v.* Gee, 15 Barb. (N. Y.) 449, it is held that the rule as now established in reference to the oral admissions of the party to a suit, permits the court and jury to believe that part of the admission which *charges* the party who makes it, and to disbelieve that part which *discharges,* when the latter is improbable on its face or is discredited by the other testimony. See also to the same effect, Bearss *v.* Copley, 10 N. Y. 93.

80. Ripley *v.* Paige, 12 Vt. 353; Pearson *v.* Sabin, 10 N. H. 205.

ADOPTION OF CHILDREN. — See Parent and Child; Legitimacy.

ADULT.—See Age.

ADULTERATION.

By Clark Ross Mahan.

I. ELEMENTS OF THE OFFENSE.

1. The Fact of the Adulteration. — A. Certificate of Analysis by Inspector. — The statutes of England and of the various states under which the adulteration of, or the sale of adulterated food products is prohibited, very generally embrace a provision for tests or analyses of samples by inspectors, the results of which tests are recorded and preserved, to be received as evidence on prosecutions for violations of such statutes, on the question of the fact of adulteration.[1]

1. Constitutionality of Statute. A certificate of analysis of milk by an inspector appointed under a statute providing that such a certificate when sworn to shall be admissible in evidence in all prosecutions under the statute, is not inadmissible on the ground that the legislature has no power to make it evidence where it further appears that the inspector was a witness in the case and testified to all the facts set forth in the certificate. Com. *v.* Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; State *v.* Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419; Shivers *v.* Newton, 45 N. J. Law 469. See also State *v.* Groves, 15 R. I. 208, 2 Atl. 384.

Purchase of Sample Tested. — The fact that a statute requires as a requisite for using the analysis by an inspector or collector as evidence of the fact that the food analyzed was adulterated, that a portion of the sample analyzed must, if desired, be sealed and delivered to the owner or person in charge of the food, is not ground for excluding the testimony of the inspector who purchased a sample for analysis without disclosing that he is such an inspector and without giving to the person from whom it was purchased an oppor-

B. Evidence Other Than Official Analysis. — But it is held that the method thus pointed out by the statutes for procuring a sample for analysis to show the fact of adulteration is not exclusive[2] and does not operate to exclude competent evidence from any other source to show the fact of adulteration.[3] And the testimony of any

tunity to ask for a sealed sample; the requirement of the statute referred to does not apply to such a case to show that the food so purchased was in fact adulterated. Com. *v.* Coleman, 157 Mass. 460, 32 N. E. 662.

Under the English Statutes, the certificate of analysis given in evidence must show in detail the quantities of each element in the compound substance. Newby *v.* Sims, (1894) 1 Q. B. 478, 70 L. T. 105, 10 R. 596; Fortune *v.* Hanson, (1896) 1 Q. B. 202, 74 L. T. 145, 44 W. R. 431, 18 Cox C. C. 258; Bridge *v.* Howard, (1897) 1 Q. B. 80, 18 Cox C. C. 421, 75 L. T. 300. But where the certificate contains extraneous facts unconnected with the analysis, the certificate is not admissible as evidence of such facts. Reg. *v.* Smith, (1896) 1 Q. B. 596, 18 Cox C. C. 307, 74 L. T. 348.

Analysis Made After Lapse of Year Not Admissible. — Stearns *v.* Ingraham, 1 Thomp. & C. (N. Y.) 218.

2. Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40; Com. *v.* Spear, 143 Mass. 172, 9 N. E. 632.

A statute providing that in all prosecutions thereunder for adulterated milk, if the milk be shown upon analysis by the proper officer or inspector therein designated to contain an excess of fluids or not to contain sufficient solids, the milk shall be deemed for the purpose of the act to be adulterated, is not intended to operate as a rule of evidence by which the act of analysis is to be conclusive of the guilt of the defendant in selling adulterated milk, but is intended to prohibit the sale of milk under a certain standard of excellence and is a lawful exercise by the legislature of its police power. Shivers *v.* Newton, 45 N. J. Law 469. See also People *v.* Cipperly, 101 N. Y. 634, 4 N. E. 107.

In State *v.* Groves, 15 R. I. 208, 2 Atl. 384, and State *v.* Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419, the objection was that a statute providing that in prosecutions thereunder if the milk shall be shown upon analysis to contain an excess of fluids or not to contain the necessary solids, it shall be deemed for the purpose of that statute to be adulterated, was unconstitutional because it virtually confined the testimony to the analysis of the sample taken by the inspector, which samples were destroyed in the making of the analysis, so that the testimony could not be controverted; but the court ruled that the testimony although it might not always be practicable to controvert it by another analysis, could be controverted by evidence of collateral facts going to prove that the analysis was incorrect and hence that the act was not unconstitutional on the ground alleged.

3. Test by Lactometer. — On prosecution for unlawfully keeping, offering for sale and selling adulterated milk, it is proper to allow a witness, who has testified that during the course of several years he had used a lactometer in a great many instances for the purpose of testing the quality and purity of milk, to state that he had applied this lactometer to the milk sold by the defendant to the prosecuting witness, and what was indicated by the lactometer as the specific gravity thereof and what was the standard specific gravity of pure milk according to the lactometer, although there is no evidence as to the character of the instrument, the principles of its construction and operation, or its accuracy. Tests by means of instruments are used in a great variety of cases and are found to be trustworthy, and for this reason they are admissible in evidence. In each particular case the value of the test is to be estimated by the jury. Com. *v.* Nichols, 10 Allen (Mass.) 199.

Sample Delivered to Inspector by Purchaser. — Where it appears that the milk analyzed, for whose adul-

person who has sufficient skill to make an analysis, and who has analyzed some of the food product in question, is admissible.[4]

2. Identifying Product Adulterated. — In a prosecution under a statute making it an offense to sell, keep or offer to sell adulterated milk, or milk to which water or any foreign substance has been added, it is not necessary to prove that the milk sold was cow's milk.[5]

3. Mode of Adulteration. — On a prosecution for a violation of a statute against the adulteration of food products defining the various modes of adulteration prohibited, it is not necessary to show the particular manner by which the adulteration was effected.[6]

4. Knowledge and Intent. — A. Burden of Proof. — Whenever knowledge of the fact of adulteration is, by the terms of the statute made an element of the offense, it is necessary for the prosecution to show such knowledge on the part of the defendant;[7] but not

teration the defendant is being prosecuted, was not taken by the inspector under the provision of the statute but was delivered to the inspector for analysis by the purchaser of the milk, the competency of the testimony of the milk inspector as to the results of his analysis is to be determined by the common law. Com. *v.* Holt, 146 Mass. 38, 14 N. E. 930.

Where evidence has been introduced to show that a particular foreign substance had been added to milk, it is proper to permit a chemist who has tested the milk to testify what the milk was independent of the substance added. Com. *v.* Schaffner, 146 Mass. 512, 16 N. E. 280.

On a prosecution for having in his possession adulterated milk with intent unlawfully to sell the same, evidence that the wagon belonged to the defendant; that it was at a certain place at a certain time, in charge of his servant, and contained several cans of milk, from one of which the inspector took a sample without objection from the servant, is proper evidence for the jury. Com. *v.* Smith, 143 Mass. 169, 9 N. E. 631.

In Com. *v.* Rowell, 146 Mass. 128, 15 N. E. 154, the defendant was charged with having in his possession adulterated milk with intent to sell the same, and it was held that evidence that the milk was taken from a can not marked "skimmed milk," out of a wagon on which was painted a license and the name of the firm of which the defendant was a member, and on which wagon was the defendant with certain other cans of milk, from which he gave to the chemist in the employ of the milk inspector, a sample for analysis, was competent evidence for the jury upon the issue whether the defendant was in possession of the milk with intent to sell it.

4. Com. *v.* Holt, 146 Mass. 38, 14 N. E. 930.

5. "As the statute does not mention cow's milk, it must be held to include all the milk of commerce, and this objection is therefore groundless." Com. *v.* Farren, 9 Allen (Mass.) 489.

6. It is enough for the purpose of the prosecution to show that the food in question fails to meet the requirements of the statute in any one of the particulars specified. State *v.* Luther, 20 R. I. 472, 40 Atl. 9. See also to the same effect, Vandegrift *v.* Miehla, 66 N. J. Law 92, 49 Atl. 16.

7. Sanchez *v.* State, 27 Tex. App. 14, 10 S. W. 756; Carter *v.* State, 27 Tex. App. 53, 10 S. W. 757; Verona Central Cheese Co. *v.* Murtaigh, 50 N. Y. 314; People *v.* Dold, 44 N. Y. St. 822, 18 N. Y. Supp. 643; Com. *v.* Flannelly, 15 Gray (Mass.) 195; State *v.* Snyder, 44 Mo. App. 420; Dilley *v.* People, 4 Ill. App. 52.

It is not necessary to prove that the milk in question was to the knowledge of the defendant below the required standard. It is competent for the legislature to declare

where such knowledge is not an element of the offense.[8]

5. Cogency of Proof. — It is necessary that the prosecution show clearly that the provisions of the statute have been violated;[9] and it

the doing of an act shall subject the doer thereof to a penalty irrespective of his motive or knowledge, and in such case the court has no power to require proof of motive or knowledge. Vandegrift *v.* Miehla, 66 N. J. Law 92, 49 Atl. 16.

8. Reg. *v.* Woodrow, 15 M. & W. 404; Roberts *v.* Egerton, L. R. 9 Q. B. 494; Dyke *v.* Gouer (1892), 1 Q. B. 220, 17 Cox C. C. 421; State *v.* Schlenker, 112 Iowa 642, 84 N. W. 698, 51 L. R. A. 347; People *v.* Schaeffer, 41 Hun (N. Y.) 23; People *v.* Mahaney, 41 Hun (N. Y.) 26; Com. *v.* Farren, 9 Allen (Mass.) 489; Com. *v.* Nichols, 10 Allen (Mass.) 199; Com. *v.* Evans, 132 Mass. 11; State *v.* Smith, 10 R. I. 258; People *v.* Eddy, 35 N. Y. St. 146, 12 N. Y. Supp. 628; Com. *v.* Warren, 160 Mass. 533, 36 N. E. 308; Bissman *v.* State, 9 Ohio C. C. 226; Altschul *v.* State, 8 Ohio C. C. 214.

Presumption of Intent From Possession. — Under the New York statute making the doing of anything prohibited thereby, to-wit: the sale, or offer or exposure for sale, of adulterated milk, evidence of a violation thereof irrespective of the intent of the doer, the mere fact of possession does not raise a presumption of intent to sell. People *v.* Wright, 19 Misc. 135, 43 N. Y. Supp. 290.

Actual Knowledge Need Not Be Shown. or express authority to adulterate the food in any particular manner or to any particular extent. It is sufficient to prove knowledge by the defendant, that his servants and agents did sell an adulterated product or a general authority in them to do so; and this knowledge and authority may be implied by circumstances. Verona Central Cheese Co. *v.* Murtaugh, 50 N. Y. 314.

9. People *v.* Braested, 30 App. Div. 401, 51 N. Y. Supp. 824.

In People *v.* Kellina, 23 Misc. 134, 50 N. Y. Supp. 653, a prosecution under the New York statute to recover the penalty prescribed therein for selling adulterated milk, the evidence showed that adulterated milk was found by the inspectors in the defendant's milk wagon which was being driven by his employee; but there was no evidence that the driver was engaged in delivering milk to customers at the time, the evidence being merely to the effect that he had just received the milk from the shipper and was taking it to the defendant's place of business. It was held that the evidence did not justify a conviction. But in People *v.* Koch, 19 Misc. 634, 44 N. Y. Supp. 387, it was held that evidence that the defendant was delivering milk to regular customers at the time the can of adulterated milk was found in his wagon is sufficient to justify a conviction, although after its analysis he returned the milk from where he had bought it and was credited with its price.

Testimony that a salesman solicited and obtained an order for pure fruit jelly which he reduced to writing, describing the goods ordered as above specified is not sufficient to justify a conviction under the Michigan statute (Pub. Acts 1895, Act No. 193 as amended by Pub. Acts 1897; Act No. 118 and Pub. Acts 1899, Act No. 117), where no further connection with the order by the salesman is shown, although his employer sends adulterated jelly in response to his order in glasses labeled "Pure Fruit Jelly." People *v.* Skillman, (Mich.), 89 N. W. 330.

Evidence merely that milk was found in a milk wagon on the street and was intended for delivery down town does not justify a conviction for selling, offering or exposing for sale adulterated milk. People *v.* Wright, 19 Misc. 135, 43 N. Y. Supp. 290.

In Verona Central Cheese Co. *v.* Murtaugh, 50 N. Y. 314, a prosecution for selling skimmed milk, the evidence was that the defendant was at and about his farm, managing and controlling it, and that his servants prepared and delivered to the plaintiff diluted and skimmed milk. It was held that the evidence un-

has been said that the jury must be satisfied beyond a reasonable doubt before they can convict.[10] There is, however, authority to the effect that the mere fact that an action to recover a penalty prescribed by statute for adulterating, or selling adulterated food products, is instituted in the name of the people, and other sections of the statute declare such an act to be a misdemeanor, does not require that the jury be satisfied of the defendant's guilt beyond a reasonable doubt, but that a preponderance of the evidence is sufficient.[11]

II. MATTERS OF DEFENSE.

1. In General. — A person prosecuted under a statute prohibiting the adulteration of food products may, of course, resort to any evidence otherwise unobjectionable which will establish his innocence of the offense charged.[12]

rebutted by the proof that the defendant had no knowledge and was in no way accessory to the acts complained of, raised a presumption of fact that they were done with his knowledge and consent, and required the submission of that question to the jury.

10. In Com. *v.* Rowell, 146 Mass. 128, 15 N. E. 154, the court instructed the jury that if they believed beyond a reasonable doubt, that the milk was in the possession of the defendant at the time the sample was taken from him, with the intent to sell the same, he should be convicted; but the opinion of the supreme court seems not to have touched the propriety of that instruction.

In Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, a prosecution under the Indiana statute which reads, "whoever knowingly . . . has in his possession," etc., the court said: "It must be conceded that under a plea of not guilty, it was incumbent upon the state to satisfy the jury beyond a reasonable doubt that the defendant knew (that the milk was adulterated.) But it was not essential that the proof should be positive and direct. It was sufficient if the state had proven a state of facts from which knowledge might be reasonably and naturally inferred."

11. In People *v.* Briggs, 114 N. Y. 56, 20 N. E. 820, the court said: "Such an action is no less a civil action because so brought. The purpose of the action is not 'punishment' of the defendant in the sense legitimately applicable to the term, but such action is brought to recover the penalty as fixed by way of indemnity to the public for the injury suffered by reason of the violation of the statute. The effect of the recovery is merely to charge the defendant with pecuniary liability while a criminal prosecution is had for the purpose of punishment of the accused, and the consequence of conviction may be more serious to him for the reason, if for no other, that it is held an imputation affecting his moral standing in a degree depending more or less upon the nature of the crime. There is, therefore, more apparent reason for the application to criminal cases of the rule which continues the burden of proof on the prosecution throughout the trial, and requires that the evidence be such as to overcome all reasonable doubt as to the guilt to justify conviction."

12. In People *v.* Richard, 48 App. Div. 408, 63 N. Y. Supp. 165, a prosecution for selling adulterated milk, the evidence as to the milk tested showed that it had stood over night in the can, and after being stirred up, a sample was taken and put into two bottles, one of which the inspector retained, the other being delivered to the defendant. It was held that for the purpose of aiding the jury to determine whether the sample taken from the can was a fair sample of the whole can, it was proper for the defendant to show

2. Absence of Knowledge of Adulteration. — When the statute in terms makes proof of the sale of an adulterated food product presumptive evidence of guilt, evidence of absence of knowledge of the fact of adulteration on the part of the defendant is not competent to rebut such a presumption.[13] Otherwise, however, where the statute in terms makes knowledge an element of the offense charged.[14]

3. Exemption From Statute. — When the defense to an action to recover a penalty for the unlawful manufacture, possession or sale of adulterated food products is that the product in question was for some reason excepted from the operation of the statute the defend-

that by a well-known and universally accepted method of ascertaining butter fats in milk, the sample delivered to him showed a greater percentage of butter fats than that shown by the chemical tests by the state.

Explaining Result of Analysis. Thus, in an action to recover the penalty for selling adulterated milk in which the analysis of the milk sold by the defendant showed that it was not of the standard required by law, it was held that the defendant had the right to account for the condition of the milk as shown by the analysis, by evidence that the milk had not been tampered with; that it had remained in the can over night; that the cream had separated from the milk and risen to the top of the can; that it had not again become perfectly mixed with the milk, and that the sample from which the analysis was made was drawn from the lower part of the can. People *v.* Hodnett, 51 N. Y. St. 895, 22 N. Y. Supp. 809.

Physical Interference With Milk. In an action to recover the penalty for selling adulterated milk, the defendant may give evidence tending to show that there had been no physical interference with the milk after it was drawn from the animals, although the chemical analysis showed an excess of fluids and a lack of the necessary solids. People *v.* Salisbury, 2 App. Div. 39, 37 N. Y. Supp. 420.

On a prosecution for the alleged violation of an act prohibiting the adulteration and selling of adulterated milk, evidence offered by the defendant to show that his cows were properly fed, is properly excluded when not made for the purpose of discrediting the analysis put in by the state. State *v.* Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419.

The defendant may show that he sold the milk as skimmed milk out of a tank duly marked as containing skimmed milk. Com. *v.* Tobias, 141 Mass. 129, 6 N. E. 217.

13. People *v.* Mahaney, 41 Hun 26; People *v.* Worden Grocer Co., 118 Mich. 604, 77 N. W. 315; State *v.* Kelly, 54 Ohio St. 166, 43 N. E. 163. See also, People *v.* Cipperly, 101 N. Y. 634, 4 N. E. 107.

14. The law will not permit the state to construct about the defendant a circumstantial case and then deny him an opportunity to show the circumstances consistent with his innocence. And if he used the adulterant honestly believing, after making reasonable inquiry and investigation, that it contained no substance injurious to health, he may show that fact. What he did to ascertain the facts about it, who he inquired of, what was said to him by others in whom he might reasonably confide, what was explained to him in writing or printing, are all proper subjects of inquiry to lay before the jury as to his assertion that he did not at the time know the milk was adulterated. Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40.

Like other questions of fact or circumstantial evidence tending to prove a fact, knowledge on the part of the defendant prosecuted for selling adulterated milk may be rebutted by evidence that he did not, in any way, authorize it, and had no knowledge of it. Verona Central Cheese Co. *v.* Murtaugh, 50 N. Y. 314.

ant has the burden of showing that fact.[15]

15. People v. Briggs, 114 N. Y. 56, 20 N. E. 820, so holding of the defense that the product was so excepted because manufactured or in process of manufacture at the time the act was passed.

ADULTERY.

By D. Mountjoy Cloud.

CROSS-REFERENCES.

Bastardy; Bigamy;
Criminal Conversation;
Divorce;
Fornication;
Husband and Wife;
Lewdness;
Marriage.

I. PROOF OF MARRIAGE.

1. Necessity Of. — The State must establish, beyond a reasonable doubt, that at the time of the act charged, the defendant was the *lawful* consort of some person other than the one with whom the act was committed.[1]

1. *Alabama.* — Buchanan *v.* State, 55 Ala. 154; Smitherman *v.* State, 27 Ala. 23; White *v.* State, 74 Ala. 31; Owens *v.* State, 94 Ala. 97, 10 So. 669.

Georgia. — Bigby *v.* State, 44 Ga. 344.

Iowa. — State *v.* Sanders, 30 Iowa 582.

Montana. — Montana *v.* Whitcomb, 1 Mont. 359, 25 Am. Rep. 740.

Texas. — Webb *v.* State 24 Tex. App. 164, 5 S. W. 651; Clay *v.* State, 3 Tex. App. 499; Tucker *v.* State, 35 Tex. 113.

Evidence of Marriage to a Woman Under Age is insufficient to establish a legal marriage in the absence of proof that she acquiesced in such marriage upon attaining her majority, and prior to the commission of the offense charged. People *v.* Bennett, 39 Mich. 208.

Invalid Marriage. — Mary Henke married Thomas Sinnett in 1868, and about New Years, 1869, four days after the second marriage, he disappeared, and she never procured a divorce. She married defendant in 1884.

The court instructed the jury that "if the evidence shows that at the time of the marriage of the defendants, Henry and Mary, Sinnett had . . . been voluntarily absent from Mary for the space of three years, and Mary did not then, to-wit: at the time of her marriage to Henry, know that Sinnett was alive . . . then the marriage of Henry to Mary was legal." The court thus applied to this case the provisions of § 4010 of the Code, enacted in favor of a party contracting a second marriage, whose husband or wife had been continually absent for three years, and was not known to be living at the time of the second marriage. Thus by the action of the court a statute which was intended to establish innocence in a prosecution for bigamy, is made to establish guilt in a prosecution for adultery. The instruction is clearly erroneous. A presumption of the death of a party does not arise until he has been absent, without intelli-

2. Method Of. — For a complete statement of the methods of proving marriage the Article "MARRIAGE" should be consulted.

A. STRICT PROOF REQUIRED. — Stricter proof is required in prosecutions for adultery than in most other actions.[2]

Marriage may not, in such prosecutions, be established by general reputation.[3]

B. BY CERTIFICATE. — But it may be proved by production of a marriage certificate, accompanied by proof of the identity of the parties.[4]

C. BY CELEBRANT'S RECORD. — In some states it may be proved by the record of the celebrant.[5]

D. BY TESTIMONY OF WITNESSES. — It may be established by testimony of persons present at the wedding.[6]

gence concerning him, for the period of seven years. State *v.* Henke, 58 Iowa 457, 12 N. W. 477.

2. State *v.* Annice, Chip. N. (Vt.) 9; State *v.* Winkley, 14 N. H. 480.

3. *Alabama.* — Buchanan *v.* State, 55 Ala. 154.

Connecticut. — State *v.* Roswell, 6 Conn. 446.

Maine. — Wedgwood's Case, 8 Me. 75; State *v.* Hodgskins, 19 Me. 155, 36 Am. Dec. 742; Ham's Case, 11 Me. 391.

Massachusetts. — Com. *v.* Norcross, 9 Mass. 492.

Missouri. — State *v.* Coffee, 39 Mo. App. 56.

Texas. — Webb *v.* State, 24 Tex. App. 164, 5 S. W. 651.

Vermont. — State *v.* Annice, Chip. N. 9; State *v.* Rood, 12 Vt. 396.

Holding Themselves Out As Husband and Wife. — In Ham's Case, 11 Me. 391, where the accused, about twenty years prior to the alleged adultery, in renting a house, stated that his family consisted of "a wife and one child," and afterwards moved into such house with a woman whom he called "Miss Ham," with whom he lived for several years as his wife before deserting her, it was held that such evidence was not sufficient proof of marriage to sustain a conviction for adultery. *Contra.* Wood *v.* State, 62 Ga. 406; Com. *v.* Holt, 121 Mass. 61.

4. People *v.* Isham, 109 Mich. 72, 67 N. W. 819; State *v.* Isenhart, 32 Or. 170, 52 Pac. 569; People *v.* Broughton, 49 Mich. 239, 13 N. W. 621; State *v.* Schweitzer 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125; State *v.* Brecht, 41 Minn. 50, 42 N. W. 602.

Certificate of Marriage in Foreign Country. — State *v.* Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449.

Discrepancy in Certificate. — *Identity.* — In People *v.* Stokes, 71 Cal. 263, 12 Pac. 71, there was offered the record of a certain marriage certificate, which showed that Stokes was married to Rebecca G. A witness testified that at the time and place named in the certificate, he was present at the marriage of the defendant and Rachael G., performed by the minister signing the certificate. Evidence was introduced that defendant and Rachael lived together as man and wife for years. Such evidence was held admissible as tending to prove that defendant and Rachael G. were the persons named in the certificate.

Presumption of Validity. — It will be presumed that such marriage certificate was made by the proper officer, and contains all that is necessary to make it the authentic evidence of a valid marriage. State *v.* Potter, 52 Vt. 33. See State *v.* Brecht, 41 Minn. 50, 42 N. W. 602.

5. Com. *v.* Littlejohn, 15 Mass. 163; Wedgwood's Case, 8 Me. 75; State *v.* Colby, 51 Vt. 291.

Celebrant's Authority to Be Established. — State *v.* Winkley, 14 N. H. 480; State *v.* Hodgskins, 19 Me. 155, 36 Am. Dec. 742.

6. Lord *v.* State, 17 Neb. 526, 23 N. W. 507; Com. *v.* Littlejohn, 15 Mass. 163; Com. *v.* Norcross, 9 Mass.

E. By Confessions or Admissions. — It may be proved by confessions or admissions of the fact.[7]

Possibility of Untruth of Confession affects its weight but not its competency.[8]

Extrajudicial Confession. — An extrajudicial confession, by the accused, of his marriage, unconnected with the existing prosecution, would be insufficient proof thereof, to sustain conviction.[9]

F. By Marriage Contract. — Marriage may be established by proving a marriage contract without witness or celebrant, but followed by cohabitation.[10]

3. Presumption of Continuance Of. — A. Generally. — A marriage having been established, the continuance thereof is presumed.[11]

B. Overcoming Presumption. — a. *By Showing Absence.*—But this presumption is overcome by the presumption of death after one has been absent and unaccounted for for seven years.[12]

b. *By Showing Divorce.* — Or by proving a divorce by the record of such divorce.[13]

492; State *v.* Marvin, 35 N. H. 22; State *v.* Winkley, 14 N. H. 480; Mills *v.* U. S., 1 Pinn. (Wis.) 73.

Marriage in Other State or Country. — People *v.* Imes, 110 Mich. 250, 68 N. W. 157; Cayford's Case, 7 Me. 57. See also Ham's Case, 11 Me. 391.

7. *Alabama.* — Owens *v.* State, 94 Ala. 97, 10 So. 669; Cameron *v.* State, 14 Ala. 546, 48 Am. Dec. 111; Buchanan *v.* State, 55 Ala. 154.

Georgia. — Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410; Wood *v.* State, 62 Ga. 406.

Iowa. — State *v.* Sanders, 30 Iowa 582.

Maine. — Ham's Case, 11 Me. 391; Cayford's Case, 7 Me. 57; State *v.* Libby, 44 Me. 469, 69 Am. Dec. 115.

Massachusetts. — Com. *v.* Thompson, 99 Mass. 444; Com. *v.* Holt, 121 Mass. 61.

Michigan. — People *v.* Imes, 110 Mich. 250, 68 N. W. 157.

Missouri. — State *v.* McDonald, 25 Mo. 176.

North Carolina. — State *v.* Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449.

Pennsylvania. — Com. *v.* Manock, 2 Crim. L. Mag. 239.

Rhode Island. — State *v.* Medbury, 8 R. I. 543.

Texas. — Boger *v.* State, 19 Tex. App. 91.

Statements to Arresting Officer. Com. *v.* Holt, 121 Mass. 61.

Letter Written by Accused. State *v.* Horn, 43 Vt. 20.

Contra. — State *v.* Armstrong, 4 Minn. 251.

8. State *v.* Libby, 44 Me. 469, 69 Am. Dec. 115.

9. People *v.* Isham, 109 Mich. 72, 67 N. W. 819.

10. Bailey *v.* State, 36 Neb. 808, 55 N. W. 241; State *v.* Rood, 12 Vt. 396. See also State *v.* Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449.

11. **Defense Must Show Dissolution.** — State *v.* Wilson, 22 Iowa 364; People *v.* Stokes, 71 Cal. 263, 12 Pac. 71.

Burden of Proof. — Where the evidence shows that defendant's husband was alive four or five years previous to the offense charged, the burden of proving his death rests upon the defendant. Cameron *v.* State, 14 Ala. 546, 48 Am. Dec. 111.

12. People *v.* Stokes, 71 Cal. 263, 12 Pac. 71; Cameron *v.* State, 14 Ala. 546, 48 Am. Dec. 111.

13. People *v.* Broughton, 49 Mich. 339, 13 N. W. 621.

Invalid Decree of Divorce Not Admissible. — Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21.

In State *v.* Fleak, 54 Iowa 429, 6 N. W. 689, the defendant offered in evidence a decree of divorce obtained in Utah, it was held that parol evidence was admissible on behalf of

II. PROOF THAT PROSECUTION WAS INSTITUTED BY CONSORT.

It is sometimes provided that prosecutions for adultery can be instituted only on complaint of the consort of the accused. It will depend upon the wording of the statute whether or not evidence is required on this point.[14]

III. MATTERS RELATING IMMEDIATELY TO THE ACT CHARGED.

1. Time Not Material. — Evidence which establishes the fact that the alleged offense was committed on any day within the time fixed by the Statute of Limitations is sufficient..[15]

2. Identity of Particeps Criminis. — Where the indictment alleges the adultery to have been committed with a certain person, the evidence must establish the identity of that person.[16]

3. Guilty Knowledge. — The state need not adduce evidence of a guilty intent.[17]

4. Potency of Accused. — **Presumptions of Virility.** — Until the contrary appears by satisfactory evidence, it will be presumed that a mature, male, human being possesses normal powers of virility.[18]

The Burden of Proof lies upon him who denies such powers.[19]

5. Completion of Act. — It is not necessary to prove emission.[20]

the state, going to show that the tribunal granting such divorce was without jurisdiction.

14. Not Required in Minnesota. State *v.* Brecht, 41 Minn. 50, 42 N. W. 602.

In Iowa, the fact that the prosecution was so instituted must be proved. State *v.* Henke, 58 Iowa 457, 12 N. W. 477.

But the fact need not be established beyond a reasonable doubt. A preponderance of evidence is enough. State *v.* Donovan, 61 Iowa 278, 16 N. W. 130.

15. State *v.* Williams, 76 Me. 480; Com. *v.* Cobb, 14 Gray (Mass.) 57; Com. *v.* O'Connor, 107 Mass. 219.

16. Difference in Names. — Where the indictment alleged the act to have been committed with one "Lula Hunting," evidence was admitted of the confession of "Lula Huntington," but none was adduced to show them to be identical. It was held insufficient. State *v.* Mims, 39 S. C. 557, 17 S. E. 850.

In State *v.* Vittum, 9 N. H. 519, the indictment alleged that adultery was committed with one Levi Wallace, without further description. The evidence showed that there were in the same town two persons of that name, father and son, and that the latter was well known and distinguished from his father by the suffix of "junior" to his name. The accused is justified in understanding the adultery to have been committed with the father, and evidence of adultery with the son is inadmissible.

Upon an Indictment of Two for Adultery, if one is known by the name charged, the other cannot escape by introducing evidence to show that it is, nevertheless, not the true name. State *v.* Glaze, 9 Ala. 283.

17. Com. *v.* Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398; Fox *v.* State, 3 Tex. App. 329, 30 Am. Rep. 144; Collum *v.* State, 10 Tex. App. 708.

18. Gardner *v.* State, 81 Ga. 144, 7 S. E. 144.

19. Gardner *v.* State, 81 Ga. 144, 7 S. E. 144.

20. Sexual Act Incomplete. — In Com. *v.* Hussey, 157 Mass. 415, 32 N. E. 362, the joint defendants were dis-

6. Single Adulterous Act. — By statute in some of the states, where the crime consists in living together in adultery or in state of open and notorious adultery, or in an open state of adultery, evidence of a single act of adultery only, is insufficient to warrant a conviction,[21] but it tends to prove the offense and, if cohabitation is shown, raises a presumption of continuance.[22]

IV. PROVING ACT OF ADULTERY.

1. Relevancy. — A. Direct Proof Not Required. — From the nature of the crime it is usually impossible to produce direct proof of guilt, hence, direct, positive proof of sexual acts need not be furnished.[23]

B. Facts Held Relevant. — It is sufficient if the evidence establishes facts and circumstances from which guilt may be inferred, and which will satisfy a rational and just man beyond a reasonable doubt.[24]

covered by the officers in bed together, partially undressed, and in the act of sexual intercourse, but were interrupted before completion. It was held sufficient to convict.

21. Miner *v.* People, 58 Ill. 59; People *v.* Gates, 46 Cal. 52; State *v.* Coffee, 39 Mo. App. 56; Morrill *v.* State, 5 Tex. App. 447; Searls *v.* People, 13 Ill. 597.

Relation of Master and Servant. In Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465, it was held that, where the evidence simply showed that the parties had lived together under the same roof as master and servant, and there were occasional instances of illicit intercourse between them, such evidence would not be sufficient to convict of unlawful cohabitation. Citing Searls *v.* People, 13 Ill. 597; State *v.* Marvin, 12 Iowa 499; State *v.* Jolly, 3 Dev. & B. (N. C.) 110, 32 Am. Dec. 656; Wright *v.* State, 5 Blackf. (Ind.) 358, 35 Am. Dec. 126; Com. *v.* Calef, 10 Mass. 153.

22. State *v.* Coffee, 39 Mo. App. 56.

23. State *v.* Eliason, 91 N. C. 564; State *v.* Green, Kirby (Conn.) 87; State *v.* Poteet, 8 Ired. (N. C.) 23; Com. *v.* Bowers, 121 Mass. 45; Com. *v.* Gray, 129 Mass. 474, 37 Am. Rep. 378; Richardson *v.* State, 34 Tex. 142.

24. *Alabama.* — Gore *v.* State, 58 Ala. 391; State *v.* Crowley, 13 Ala. 172; Love *v.* State, 124 Ala. 82, 27 So. 217.

Connecticut. — State *v.* Schweitzer, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125.

Georgia. — Weaver *v.* State, 74 Ga. 376.

Illinois. — Crane *v.* People, 168 Ill. 395, 48 N. E. 54.

Iowa. — State *v.* Wiltsey, 103 Iowa 54, 72 N. W. 415; State *v.* Henderson, 84 Iowa 161, 50 N. W. 758.

Massachusetts. — Com. *v.* Gray, 129 Mass. 474, 37 Am. Rep. 378; Com. *v.* Clifford, 145 Mass. 97, 13 N. E. 345.

Michigan. — People *v.* Fowler, 104 Mich. 449, 62 N. W. 572; People *v.* Montague, 71 Mich. 447, 39 N. W. 585; People *v.* Girdler, 65 Mich. 68, 31 N. W. 624.

Mississippi. — Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465.

Missouri. — State *v.* Coffee, 39 Mo. App. 56; State *v.* Clawson, 30 Mo. App. 139.

Nebraska. — State *v.* Way, 5 Neb. 283.

New Hampshire. — State *v.* Winkley, 14 N. H. 480.

New Jersey. — State *v.* Snover, 64 N. J. Law 65, 44 Atl. 850.

North Carolina. — State *v.* Austin, 108 N. C. 780, 13 S. E. 219; State *v.* Poteet, 8 Ired. 23; State *v.* Stubbs, 108 N. C. 774, 13 S. E. 90; State *v.* Waller, 80 N. C. 401.

a. *Opportunity and Disposition.* — In prosecutions for adultery, all evidence is admissible which tends to show a disposition[25] or opportunity for the adulterous act.[26]

b. *Reputation of Female Particeps Criminis.* — On the trial of a man for adultery, evidence of the reputation for chastity of the *particeps criminis* is admissible, in connection with evidence of facts showing opportunity for committing the offense.[27]

c. *Other Adulterous Acts.* — **(1.) Before Indictment.** — Evidence is admissible of sexual acts, between the same parties, before the time laid down in the indictment.[28]

Pennsylvania. — Com. *v.* Bell, 166 Pa. St. 405, 31 Atl. 123.

Texas. — Swancoat *v.* State, 4 Tex. App. 105; Stewart *v.* State, (Tex.) 43 S. W. 979; Bradshaw *v.* State, (Tex.) 61 S. W. 713; Lenert *v.* State, (Tex.) 63 S. W. 563; Kahn *v.* State, (Tex.) 38 S. W. 989.

Vermont. — State *v.* Bridgman, 49 Vt. 202, 24 Am. Rep. 124; State *v.* Colby, 51 Vt. 291.

Wisconsin. — Baker *v.* U. S., 1 Pinn. 641.

25. **Disposition Shown by Letters Written** by paramour and read by accused. State *v.* Butts, 107 Iowa 653, 78 N. W. 687; Boatwright *v.* State, (Tex.) 60 S. W. 760; People *v.* Imes, 110 Mich. 250, 68 N. W. 157.

Letters Not So Read Are Not Admissible. — People *v.* Montague, 71 Mich. 447, 39 N. W. 585.

26. Gardner *v.* State, 81 Ga. 144, 7 S. E. 144; Com. *v.* Tarr, 4 Allen (86 Mass.) 315.

Occupying Same Room at Night. State *v.* Ean, 90 Iowa 534, 58 N. W. 898; Com. *v.* Bowers, 121 Mass. 45; Richardson *v.* State, 34 Tex. 142; Com. *v.* Mosier, 135 Pa. St. 221, 19 Atl. 943; Eldridge *v.* State, 97 Ga. 192, 23 S. E. 832; Starke *v.* State, 97 Ga. 193, 23 S. E. 832; State *v.* Snover, 65 N. J. Law 289, 47 Atl. 583.

27. **Reputation a Material Fact.** In Com. *v.* Gray, 129 Mass. 474, 37 Am. Rep. 378, Lord, J., said: "In this case, the precise question presented by the exception under consideration is, whether evidence of the character or reputation for chastity of the person with whom the adultery of the defendant is alleged to have been committed, is admissible. It is quite true that legally her character or reputation is not in issue. No judgment upon this indictment can affect either her or her reputation, and in no proceeding against her would a judgment upon this indictment be admissible in evidence. Still, her character or reputation may be a material fact, and so evidence upon it be competent and material."

Where an indictment was found against a married man for living in adultery with an unmarried woman, it having been duly shown that he frequently visited at night, the house in which such woman lived, and was seen lying in her bed, evidence going to prove her general reputation for want of chastity is relevant. Blackman *v.* State, 36 Ala. 295. *Contra.*—Boatwright *v.* State (Tex.), 60 S. W. 760; Guinn *v.* State, (Tex.), 65 S. W. 376.

28. *Alabama.* — Cross *v.* State, 78 Ala. 430; McLeod *v.* State, 35 Ala. 395; Alsabrooks *v.* State, 52 Ala. 24.

Florida. — Brevaldo *v.* State, 21 Fla. 789.

Illinois. — Crane *v.* People, 168 Ill. 395, 48 N. E. 54.

Indiana. — State *v.* Markins, 95 Ind. 464, 48 Am. Rep. 733.

Iowa. — State *v.* Smith, 108 Iowa 440, 79 N. W. 115; State *v.* Briggs, 68 Iowa 416, 27 N. W. 358.

Maine. — State *v.* Williams, 76 Me. 480; State *v.* Witham, 72 Me. 531.

Massachusetts. — Com. *v.* Curtis, 97 Mass. 574; Com. *v.* Dacey, 107 Mass. 206; Com. *v.* Lahey, 80 Mass. (14 Gray) 91; Com. *v.* Merriam, 14 Pick. 518, 25 Am. Dec. 420; Com. *v.* Durfee, 100 Mass. 146; Com. *v.* Pierce, 77 Mass. (11 Gray) 447; Com. *v.* Thrasher, 77 Mass. (11 Gray) 450.

This Rule Obtains without reference to the sufficiency of other evidence tending to authorize conviction,[29] and notwithstanding such evidence, may prove distinct offenses other than the one charged.[30]

The Reason of the Rule rests upon the material assistance which such evidence renders the jury in determining the truth as to the matters charged in the indictment.[31]

(2.) After Indictment. — Evidence of facts of adultery, or indecent familiarity, occurring subsequent to the time named in the indictment is admissible,[32] but the opposite view has been

Michigan. — People *v.* Davis, 52 Mich. 569, 18 N. W. 362; People *v.* Hendrickson, 53 Mich. 525, 19 N. W. 169.

Missouri. — State *v.* Coffee, 39 Mo. App. 56; State *v.* Clawson, 30 Mo. App. 139.

Nebraska. — State *v.* Way, 5 Neb. 283.

New Jersey. — State *v.* Jackson, 65 N. J. Law 62, 46 Atl. 767; Snover *v.* State (N. J.), 44 Atl. 850.

North Carolina. — State *v.* Pippin, 88 N. C. 646; State *v.* Guest, 100 N. C. 410, 6 S. E. 253; State *v.* Kemp, 87 N. C. 538.

Pennsylvania. — Com. *v.* Bell, 166 Pa. St. 405, 31 Atl. 123.

Tennessee. — Cole *v.* State, 6 Baxt. 239.

Texas. — Burnett *v.* State, 32 Tex. Cr. 86, 22 S. W. 47; Henderson *v.* State (Tex.), 45 S. W. 707.

Acts Eighteen Months Before Admissible. — State *v.* Briggs, 68 Iowa 416, 27 N. W. 358; State *v.* Smith, 108 Iowa 440, 79 N. W. 115.

Acts Against Which the Statute of Limitations Has Run. — State *v.* Potter, 52 Vt. 33; State *v.* Kemp, 87 N. C. 538; State *v.* Pippin, 88 N. C. 646; State *v.* Guest, 100 N. C. 410, 6 S. E. 253.

Intercourse With Particeps Criminis Before Her Marriage. — In State *v.* Arnold, 50 Vt. 731, there was evidence to show that the act had been committed on the day alleged in the indictment. The defendant, upon his examination in chief, being asked whether on the day alleged, or at any time thereafter, he had made improper solicitations, or had intercourse with her, replied, "I never had in my life, nor never made any improper words, nor talked with her any way." The state was then permitted to adduce evidence tending to show that he had had connection with her before her marriage. It was held that such evidence was admissible both by way of rebuttal, and also to discredit the defendant.

Upon a trial for adultery, the indictment alleging only one act of sexual intercourse, the state introduced evidence showing that defendant and the alleged paramour slept in the same bed on one occasion. It was held competent for the state to give evidence of other acts, showing an adulterous intercourse between them down to the time named in the indictment. Baker *v.* U. S., 1 Pinn. (Wis.) 641; State *v.* Witham, 72 Me. 531; People *v.* Hendrickson, 53 Mich. 525, 19 N. W. 169; State *v.* Snover, 65 N. J. Law 289, 47 Atl. 583.

29. Cross *v.* State, 78 Ala. 430.

30. State *v.* Bridgman, 49 Vt. 202, 24 Am. Rep. 124.

31. State *v.* Guest, 100 N. C. 410, 6 S. E. 253; State *v.* Potter, 52 Vt. 33.

32. *Alabama.* — Alsabrooks *v.* State, 52 Ala. 24.

Illinois. — Crane *v.* People, 168 Ill. 395, 48 N. E. 54.

Iowa. — State *v.* Briggs, 68 Iowa 416, 27 N. W. 358; State *v.* Moore (Iowa), 88 N. W. 322.

Maine. — State *v.* Williams, 76 Me. 480.

Massachusetts. — Com. *v.* Curtis, 97 Mass. 574.

Michigan. — People *v.* Hendrickson, 53 Mich. 525, 19 N. W. 169.

Nebraska. — State *v.* Way, 5 Neb. 283.

Tennessee. — Cole *v.* State, 6 Baxt. 239.

taken.[33]

(3.) In Other Jurisdictions. — For the same reason evidence of adultery, or acts of indecent familiarity, in another jurisdiction, is admissible.[34]

(4.) Instructions As to Such Evidence. — When evidence of other acts than those charged is admitted, its effect should be limited to its proper purpose by appropriate instructions and cautions to the jury.[35]

d. *Birth, Appearance and Treatment of Child.* — It seems that it is admissible to show that the *particeps criminis* if not married, or if long separated from her husband, gave birth to a child, that might have been begotten about the time of the alleged crime.[36]

It is incompetent to adduce evidence of an existing resemblance between the accused and an illegitimate child, in order to determine its paternity in a prosecution for adultery with its mother.[37]

Texas. — Funderburg *v.* State, 23 Tex. App. 392, 5 S. W. 244.

Utah. — State *v.* Snowden (Utah), 65 Pac. 479.

Vermont. — State *v.* Bridgman, 49 Vt. 202, 24 Am. Rep. 124.

33. Com. *v.* Horton, 2 Gray (Mass.) 354; Com. *v.* Pierce, 77 Mass. (11 Gray) 447; State *v.* Donovan, 61 Iowa 278, 16 N. W. 130.

Acts Eighteen Months After Indictment. — Acts occurring eighteen months after the finding of an indictment and unconnected with acts charged in the indictment, are inadmissible in evidence, though going to prove an illicit connection. State *v.* Crowley, 13 Ala. 172.

Acts Three Months Subsequent Inadmissible. — People *v.* Fowler, 104 Mich. 449, 62 N. W. 572.

The Error May Be Cured by the withdrawal of such evidence from the jury. State *v.* Donovan, 61 Iowa 278, 16 N. W. 130.

34. Crane *v.* People, 168 Ill. 395, 48 N. E. 54; State *v.* Briggs, 68 Iowa 416, 27 N. W. 358; Com. *v.* Nichols, 114 Mass. 285, 19 Am. Rep. 346; Funderburg *v.* State, 23 Tex. App. 392, 5 S. W. 244; State *v.* Guest, 100 N. C. 410, 6 S. E. 253; State *v.* Snover, 65 N. J. Law 289, 47 Atl. 583.

Adulterous Acts in Another State. Com. *v.* Curtis, 97 Mass. 574; State *v.* Moore (Iowa), 88 N. W. 322.

35. Funderburg *v.* State, 23 Tex. App. 392, 5 S. W. 244; State *v.* Witham, 72 Me. 531.

36. Com. *v.* Morrissey, 175 Mass. 264, 56 N. E. 285.

Parties Living Together Nine Months Before Birth of Child. — In Com. *v.* Curtis, 97 Mass. 574, a prosecution for adultery, it was held, that, evidence might be introduced on cross examination to show that the female *particeps criminis* had given birth to a bastard child several months after the act complained of was committed, and that she lived in the house with accused for nine months before the birth of such child; and also that at, or about the time of the alleged offense, she wished it understood that she was the wife of accused, and said that they had been married for several years.

Contra. — In Com. *v.* O'Connor, 107 Mass. 219, the court said: "The paternity of the child was not the subject of inquiry, and it is difficult to see how the fact or the date of its birth could be material to the question at issue. It had no tendency to show the defendant's guilt on the occasion referred to in the indictment, and we cannot say that the evidence of the fact may not have had some effect upon the minds of the jurors to his prejudice."

37. Resemblance to Seven Months Old Child. — Hilton *v.* State (Tex.), 53 S. W. 113; Barnes *v.* State, 37 Tex. Crim. 320, 39 S. W. 684.

See article "BASTARDY."

But the treatment of the child by the accused may be shown.[38]

C. Certain Facts Held Irrelevant. — Without attempting to classify irrelevancy, some illustrations are given in the note of facts held inadmissible, in addition to the cases cited in the foregoing section as holding contrary to the text.[39]

2. Competency. — A. Of Particeps Criminis. — One was not, at Common Law, incompetent to testify merely because he or she was the *particeps criminis* named in the indictment.[40]

The Present Rule, sustained by the decided weight of authority, sanctions the admission of a paramour's testimony, when corrobo-

38. In State *v.* Chaney, 110 N. C. 507, 14 S. E. 780, which was an indictment of a white man and negress for adultery, evidence was admitted that the latter had, since being separated from her husband, given birth to two children, of whom the male defendant was so fond that he had been observed teaching one of them to sing, and had had his photograph taken with such children.

A Letter Written by Accused to his alleged paramour, who had lived a year in his house before giving birth to a child, in which letter he threatens to take such child from her, is material evidence in a prosecution for adultery, and if sufficiently corroborated, will sustain a conviction. Powell *v.* State (Tex.), 44 S. W. 504.

39. **Contents of Letter** written by *particeps criminis* to accused, but not shown to have been read by him. People *v.* Montague, 71 Mich. 447, 39 N. W. 585.

Statements Made by Paramour in Absence of Accused. — Whicker *v.* State (Tex.), 55 S. W. 47; Com. *v.* Thompson, 99 Mass. 444; Gore *v.* State, 58 Ala. 391.

The Suspicions of a Witness. McKnight *v.* State, 6 Tex. App. 158.

Neighborhood Rumor. — Belcher *v.* State, 27 Tenn. 63; Buttram *v.* State, 4 Cold. (Tenn.) 171.

That accused is "foolishly fond" of women cannot be shown in rebuttal of his evidence of good character. Cauley *v.* State, 92 Ala. 71, 9 So. 456.

Seen Together Early in Morning. In State *v.* Waller, 80 N. C. 401, the male defendant was 23 years old and the female 50, at the time of the alleged crime. A witness testified that one morning, at 4 o'clock, he called at the house and saw the female in one bed, the other bed not being tumbled, and that the male defendant was up and dressed, but witness did not know where he had spent the night. The admission of this testimony was held error.

Occupying Separate Rooms in Same House. — Bradshaw *v.* State (Tex.), 61 S. W. 713.

Jealousy of Consort. — The suspicions or jealousy of the wife of one indicted for adultery, cannot be admitted as evidence against him. State *v.* Crowley, 13 Ala. 172.

Suspicions of Consort. — Graham *v.* State, 28 Tex. App. 9, 11 S. W. 781, 19 Am. Rep. 809, was the prosecution of a woman for adultery committed with her husband's cousin, then residing in the house during the husband's illness. Evidence was admitted to show that the husband, who died soon after, requested the witness to remain with him and administer his medicine, as he dared not trust his wife and cousin to do so. It was held that such evidence, though not objectionable as hearsay, was irrelevant, as being too uncertain: the husband's fear was not necessarily for his wife's virtue.

40. **Unconvicted Paramour Competent Witness.** — In State *v.* Crowley, 13 Ala. 172, Collier, C. J., said: "It is said to be a settled rule of evidence that a *particeps criminis*, notwithstanding the turpitude of his conduct, is not on that account an incompetent witness, so long as he remains not convicted and sentenced for an infamous crime."

rated by additional proof of his connection with the crime alleged,[41] though the contrary is maintained.[42]

B. Of Consort of Accused. — At common law and in the absence of a statute, neither husband nor wife may testify in a trial of the other for adultery.[43]

Where a statute provides that the husband or wife may testify in a criminal proceeding for a crime committed by one against the other, the authorities are in conflict.[44]

Where the paramour is on trial the authorities are in conflict as to the admissibility of testimony of the husband or wife, the weight of authority holding it incompetent.[45]

C. Confessions and Statements of Accused. — A confession, shown to have been voluntary, is admissible, or a statement or admission made by the accused.[46]

41. Merritt *v.* State, 10 Tex. App. 402; Wiley *v.* State, 33 Tex. Cr. 406, 26 S. W. 723; Morrill *v.* State, 5 Tex. App. 447; State *v.* Colby, 51 Vt. 291; State *v.* Crowley, 13 Ala. 172; People *v.* Isham, 109 Mich. 72, 67 N. W. 819; People *v.* Knapp, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438; McAlpine *v.* State, 117 Ala. 93, 23 So. 130.

42. State *v.* Rinehart, 106 N. C. 787, 11 S. E. 512; State *v.* McGuire, 50 Iowa 153; Rutter *v.* State, 4 Tex. App. 57; State *v.* Mims, 39 S. C. 557, 17 S. E. 850; State *v.* Berry, 24 Mo. App. 466; Frost *v.* Com., 9 B. Mon. (Ky.) 362.

43. Cotton *v.* State, 62 Ala. 12; Miner *v.* People, 58 Ill. 59; Com. *v.* Jailer, 1 Grant (Pa.) 218; State *v.* Gardner, 1 Root (Conn.) 485; State *v.* Jolly, 3 Dev. & B. (N. C.) 110, 32 Am. Dec. 656.

Testimony of Divorced Husband of adultery before divorce incompetent. State *v.* Jolly, 3 Dev. & B. (N. C.) 110, 32 Am. Dec. 656.

44. In State *v.* Bennett, 31 Iowa 24; Lord *v.* State, 17 Neb. 526, 23 N. W. 507, the adultery of the defendant was considered an offense by one spouse against the other, and the testimony of the consort was admitted. See also State *v.* Hazen, 39 Iowa 648; State *v.* Sloan, 55 Iowa 217, 7 N. W. 516 (bigamy).

Such Was Formerly the Rule in Texas. — Roland *v.* State, 9 Tex. App. 277, 35 Am. Rep. 743. But that case was expressly overruled in Compton *v.* State, 13 Tex. App. 271, 44 Am. Rep. 703 (approved in Thomas *v.* State, 14 Tex. App. 70), holding that the weight of authority in England and in America is against the admission of such testimony.

In Michigan, where the statute provides that "in any action or proceeding instituted by the husband or wife, in consequence of adultery, the husband and wife shall not be competent to testify," it was held that the testimony of the spouse instituting the proceeding is not admissible. People *v.* Isham, 109 Mich. 72, 67 N. W. 819; People *v.* Imes, 110 Mich. 250, 68 N. W. 157. But the testimony of the husband of a woman, jointly indicted with a married man, was competent as to his marriage, where the complaint was sworn to by the wife of the co-defendant. People *v.* Isham, *supra.*

In Pennsylvania, by Statute. Act of March 23d, 1887, upon a trial for the adultery of the husband, the wife is a competent witness to the marriage. Com. *v.* Mosier, 135 Pa. St. 221, 19 Atl. 943.

45. People *v.* Fowler, 104 Mich. 449, 62 N. W. 572; Com. *v.* Sparks, 7 Allen (Mass.) 534; State *v.* Welch, 26 Me. 30, 45 Am. Dec. 96; Cotton *v.* State, 62 Ala. 12; State *v.* Jolly, 3 Dev. & B. (N. C.) 110, 32 Am. Dec. 656.

Contra. — Morrill *v.* State, 5 Tex. App. 447; Alonzo *v.* State, 15 Tex. App. 378, 49 Am. Rep. 207; State *v.* Bridgman, 49 Vt. 202, 24 Am. Rep. 124.

46. McAlpine *v.* State, 117 Ala.

Statements made by the accused to his wife, regarding his whereabouts on the night in question, are admissible, as are the questions of the wife which led to his statement.[47]

The confession of the accused is to be accorded great weight.[48] It should be corroborated by a showing of opportunity or access, together with a probability of guilt arising from the surrounding circumstances of each particular case.[49]

3. Weight. — The credence to be given the testimony of the *particeps criminis* is a matter peculiarly for the jury.[50]

4. Sufficiency. — The testimony of one credible witness will sustain a conviction.[51]

The testimony of an eye witness is sufficient.[52] The facts and circumstances must be such as to convince, beyond a reasonable doubt, but what circumstantial evidence will suffice for that must rest very largely with the jury.[53]

Whether or not the evidence shows that there was time for the commission of the offense, is a question peculiarly for the consideration of the jury, and must be submitted to them for final decision.[54]

Where there is circumstantial evidence going to show undue intimacy, the jury will not be instructed that they must acquit, provided they do not credit a witness who testifies to having seen the adulterous act.[55]

It has been held sufficient that accused was the companion of an itinerant peddler,[56] or was found in bed with a prostitute,[57] but not

93, 23 So. 130; Com. v. Morrissey, 175 Mass. 264, 56 N. E. 285; Com. v. Tarr (4 Allen), 86 Mass. 315.

47. State v. Austin, 108 N. C. 780, 13 S. E. 219.

48. Com. v. Manock, 2 Crim. Law Mag. (Pa.) 239.

49. Com. v. Morrissey, 175 Mass. 264, 56 N. E. 285.

50. State v. Crowley, 13 Ala. 172.

51. Com. v. Cregor, 7 Gratt. (Va.) 591.

52. People v. Montague, 71 Mich. 447, 39 N. W. 585.

53. Illustration.—In Crane v. People, 168 Ill. 395, 48 N. E. 54, the defendants moved from the country to a certain town, rented and furnished a house, and, with one or two servants, lived there, the relation between them being ostensibly that of landlady and boarder. Their mode of life had all the appearances of a married couple keeping house in the usual manner. The defendants had become alienated from their families by their infatuation for each other, and prior acts having been proved, which reasonably led the jury to believe that adultery had been elsewhere committed, it was held that the above state of facts would justify conviction.

54. State v. Henderson, 84 Iowa 161, 50 N. W. 758; State v. Green, Kirby (Conn.) 87.

55. State v. Austin, 108 N. C. 780, 13 S. E. 219.

Wholly Negative Evidence. Where evidence adduced against the accused, is of a character entirely negative, and not such as to exclude a contrary inference, the jury should not be charged to consider such evidence as tending to show an adulterous intercourse. Hall v. State, 88 Ala. 236, 7 So. 340, 16 Am. St. Rep. 51.

56. Stewart v. State (Tex.), 43 S. W. 979.

57. Ellis v. State, 20 Ga. 438.

That Accused and Particeps Criminis Occupied the Same Room at Night. — State v. Ean, 90 Iowa 534, 58 N. W. 898; Com. v. Bowers, 121

the mere fact that a married man kissed his housekeeper.[58]

Mass. 45; Richardson v. State, 34 Tex. 142; Com. v. Mosier, 135 Pa. St. 221, 19 Atl. 943; Eldridge v. State, 97 Ga. 192, 23 S. E. 832; Starke v. State, 97 Ga. 193, 23 S. E. 832.

58. Kahn v. State (Tex.), 38 S. W. 989.

ADVANCEMENTS.—See Descent and Distribution.

ADVERSE POSSESSION.

By A. B. Young.

CROSS-REFERENCES.

Boundaries;
Declarations;
Possession;
Prescription;
Title.

I. POTENT EVIDENCE OF TITLE.

Possession has always been potent evidence in support of exclusive property rights of every nature and description.[1]

1. Is a Legal Conception Based on Fact. — In the absence of statutory modification of the common law rule, adverse possession is a question of law, but what constitutes adverse possession in the legal sense is a question of fact.[2]

1. Earliest Mode of Acquiring Title. — "Possession has always been a means of acquiring title to property. It was the earliest mode recognized by mankind of the *appropriation* of anything tangible by one person to his own use, to the exclusion of others, and legislators and publicists have always acknowledged its efficacy in confirming or creating title." Campbell *v.* Holt, 115 U. S. 620, 6 Sup. Ct. 260. "The elements of all title are possession, the right of possession and the right of property." Horback *v.* Miller, 4 Neb. 31; Schall *v.* Williams Valley R. Co., 35 Pa. St. 191; McNeely *v.* Langan, 22 Ohio St. 32; Keith *v.* Keith, 104 Ill. 397.

Applies to Both Real and Personal Property. — "By the long and undisturbed possession of tangible property real or personal, one may acquire a title to it, or ownership, superior in law to that of another who may be able to prove an antecedent, and at one time paramount title." Campbell *v.* Holt, 115 U. S. 620, 6 Sup. Ct. 260.

2. *United States.* — Bradstreet *v.* Huntington, 5 Pet. 402; Anderson *v.* Bock, 15 How. 323.

Alabama. — Woods *v.* Montevallo Coal & Transp. Co., 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393; Nashville etc. R. Co. *v.* Hammond, 104 Ala. 191, 15 So. 935.

California. — Franz *v.* Mendonca, 131 Cal. 205, 63 Pac. 361; Clarke *v.* Clarke, 133 Cal. 667, 66 Pac. 10; Baum *v.* Roper, 132 Cal. 42, 64 Pac. 128.

Connecticut. — St. Peters Church *v.* Beach, 26 Conn. 355.

Florida. — Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 99.

Georgia. — Flannery *v.* Hightower, 97 Ga. 592, 25 S. E. 371; Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351; Verdery *v.* Savannah F. & W. R. Co., 82 Ga. 675, 9. S. E. 1133.

Illinois. — Weber *v.* Anderson, 73 Ill. 439.

2. Practically All a Question of Evidence. — It necessarily follows that adverse possession is, practically, all a question of evidence.[3]

3. Available Independent of Any Statute. — And, adverse possession may serve as a medium for the acquisition of rights inde-

Maine. — Gardner *v.* Gooch, 48 Me. 487; Adams *v.* Clapp, 87 Me. 316, 32 Atl. 911.

Maryland.—Armstrong *v.* Risteau, 5 Md. 56, 59 Am. Dec. 115.

Massachusetts. — Rand *v.* Freeman, 1 Allen 517; Eastern Railroad *v.* Allen, 135 Mass. 13; Wheeler *v.* Land, 147 Mass. 421, 18 N. E. 212.

Michigan. — Sauers *v.* Giddings, 90 Mich. 50, 51 N. W. 265; Marquette Co. Sg. Soc., 95 Mich. 491, 55 N. W. 384.

Minnesota. — Washburn *v.* Cutter, 17 Minn. 361.

Mississippi. — Magee *v.* Magee, 37 Miss. 138; Huntington *v.* Allen, 44 Miss. 654.

Missouri. — Macklot *v.* Dubrenil, 9 Mo. 473, 43 Am. Dec. 550.

New Hampshire. — Hopkins *v.* Deering (N. H.), 52 Atl. 75.

New Jersey. — Foulke *v.* Bond, 41 N. J. Law 527; Cooper *v.* Morris, 48 N. J. Law 607, 7 Atl. 421.

New York. — Barnes *v.* Light, 116 N. Y. 34, 22 N. E. 441.

Pennsylvania. — Bennett *v.* Morrison, 120 Pa. St. 390, 14 Atl. 264, 6 Am. St. Rep. 711.

South Carolina. — Few *v.* Killer (S. C.), 41 S. E. 85.

Texas. — Gillispie *v.* Jones, 26 Tex. 343.

Vermont. — Adams *v.* Fullain, 43 Vt. 592.

Adverse Possession Defined. "Adverse possession is a legal idea, admits of a legal definition, of legal distinctions, and may be correctly laid down as a rule of law, but the fact of adverse possession, in its legal sense, is a question for the jury." Bradstreet *v.* Huntington, 5 Pet. 402.

3. *United States.* — Bradstreet *v.* Huntington, 5 Pet. 402; Ewing *v.* Burnet, 11 Pet. 41; Ricard *v.* Williams, 7 Wheat. 59; Holtzapple *v.* Phillibaum, 4 Wash. C. C. 356, 12 Fed. Cas. No. 6648.

Indiana. — Moore *v.* Hinkle, 151 Ind. 343, 50 N. E. 822.

Iowa. — Booth *v.* Small, 25 Iowa 177.

Maine. — School District *v.* Benson, 31 Me. 381, 52 Am. Dec. 618.

Missouri. — Draper *v.* Shoot, 25 Mo. 197, 69 Am. Dec. 462.

New York. — Baker *v.* Oakwood, 123 N. Y. 16, 25 N. E. 312.

Pennsylvania.—Groft *v.* Weakland, 34 Pa. St. 304.

South Carolina. — Mole *v.* Folk, 45 S. C. 265, 22 S. E. 882.

Washington. — Balch *v.* Smith, 4 Wash. 497, 30 Pac. 648.

West Virginia. — Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255.

Wisconsin. — Illinois Steel Co. *v.* Budzisz, 106 Wis. 499, 81 N. W. 1027, 80 Am. St. Rep. 54, 48 L. R. A. 30.

Foundation of Doctrine. — "What the primary owner has lost by his laches, the other party has gained by continued possession, without question of his right. This is the foundation of the doctrine of *prescription*, a doctrine which, in the English law, is mainly applied to incorporeal hereditaments, but which, in the Roman law, and the codes founded on it, is applied to property of all kinds." Campbell *v.* Holt, 115 U. S. 620, 6 Sup. Ct. 260.

Every Element Must Exist. Every element in the definition of adverse possession must exist, otherwise the possession will not confer title. Groft *v.* Weakland, 34 Pa. St. 304. "The title is created by the existence of the facts, and not by the exhibition of them in evidence." School District *v.* Benson, 31 Me. 381, 52 Am. Dec. 618.

What Are the Tests. — Whenever this defense is set up the idea of a rightful title is excluded; the fact of possession, and the *quo animo* it was commenced and continued, are the only tests. Jackson *v.* Newton, 1 Johns. (N. Y.) 355.

pendent of statutes of limitations.[4]

4. May Invoke Conclusive Presumptions. — Adverse possession will also invoke presumptions absolutely conclusive.[5]

4. *United States.* — Ricard *v.* Williams, 7 Wheat. 59; Barclay *v.* Howell, 6 Pet. 498; Pratt *v.* Vattier, 9 Pet. 405; Goodin *v.* Hobart, 2 Sun. 401, 10 Fed. Cas. No. 5609; Miller *v.* McIntyre, 6 Pet. 61; U. S. *v.* Chaves, 159 U. S. 452, 16 Sup. Ct. 62; Jackson *v.* Porter, 1 Paine 457, 13 Fed. Cas. No. 7143; Fletcher *v.* Fuller, 120 U. S. 534, 7 Sup. Ct. 667; Oaksmiths' Lessee *v.* Johnston, 92 U. S. 343; Armstrong *v.* Morrill, 14 Wall. 120.

Alabama. — McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529.

California. — Bryan *v.* Tormey (Cal.), 21 Pac. 725.

Connecticut. — Brownell *v.* Palmer, 22 Conn. 106.

North Carolina. — Bryan *v.* Spivey, 109 N. C. 57, 13 S. E. 766.

South Carolina. — Trustees *v.* Jennings, 40 S. C. 168, 18 S. E. 257, 42 Am. St. Rep. 854; Trustees *v.* McCully, 11 Rich. Law 424; Few *v.* Killer (S. C.), 41 S. E. 85.

Wisconsin. — Scheuber *v.* Held, 47 Wis. 340, 2 N. W. 779.

Thirty Years Adverse Possession.

Grant Presumed. — "It is well settled that an adverse possession of land for thirty years raises a presumption of a grant from the state, and that it is not necessary even that there should be a privity or connection among the successive tenants." Davis *v.* McArthur, 78 N. C. 357; Reed *v.* Earnhart, 10 Ired. (N. C.) 516; Wallace *v.* Maxwell, 11 Ired. (N. C.) 110, 51 Am. Dec. 380; Fitzrandolph *v.* Norman, Tayl. (N. C.) 127. "This presumption," says Smith, C. J., in the case first cited, "arises at common law, and without the aid of the act of 1791, and it is the duty of the court to instruct the jury to act upon it as a rule of the law of evidence. Simpson *v.* Hyatt, 1 Jones (N. C.) 517." Bryan *v.* Spivey, 109 N. C. 57, 13 S. E. 766.

Under Long Possession Grant From Government Presumed. Under some circumstances, grants will be presumed from the government, in support of a long continued possession, not merely from the possibility of the loss of documents by the common accidents of time, but from the general experience of men that property is not usually suffered to remain for long periods in the quiet possession of any one but the true owner, and that no other person will deliberately add to the value of the property by permanent improvements. Oaksmiths' Lessee *v.* Johnston, 92 U. S. 343.

Grant May Be Presumed From Shorter Possession Than Statutes Fix. — "If it were necessary, an unmolested possession for thirty years would authorize the presumption of a grant. Indeed, under peculiar circumstances, a grant has been presumed from a possession less than the number of years required to bar the action of ejectment by the statute of limitations." Barclay *v.* Howell, 6 Pet. 498.

Although the legislature may exclude lands from the operation of statutes of limitation enacted by it, presumption of title or grant arising from twenty years adverse possession, not rebutted by facts inconsistent with such presumption, may be invoked on behalf of a claim of adverse possession. Trustees *v.* Jennings, 40 S. C. 168, 18 S. E. 257, 42 Am. St. Rep. 854.

5. *England.* — Anges *v.* Dalton, 4 Q. B. Div. 162.

United States. — U. S. *v.* Devereaux, 90 Fed. 182; Barclay *v.* Howell, 6 Pet. 498; U. S. *v.* Chaves, 159 U. S. 452, 16 Sup. Ct. 62; Oaksmiths' Lessee *v.* Johnston, 92 U. S. 343.

Alabama. — McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529.

Connecticut. — Sherwood *v.* Barlow, 19 Conn. 471.

Georgia. — Georgia R. & Banking Co. *v.* Gardner, 113 Ga. 897, 39 S. E. 299.

Kentucky. — Howes *v.* Kirk (Ky. App.), 35 S. W. 1032; Woodson *v.* Scott, 1 Dana 470; Terrill *v.* Herron, 4 J. J. Marsh. 519; Marshall *v.* McDaniel, 12 Bush 378.

II. BURDEN OF PROOF.

1. Rests Upon Claimant.— In the absence of statutory modification of the rule, a claim of title or right by virtue of the adverse possession of property, real or personal, can only be rendered effective by affirmative evidence establishing all the constituents of such possession.[6]

Massachusetts. — Church in Brattle Square *v.* Bullard, 2 Metc. 363; Tufts *v.* Charleston, 117 Mass. 401.

New Jersey. — Spottiswoode *v.* Morris & E. R. Co., 61 N. J. Law 322, 40 Atl. 505; Lehigh Valley R. Co. *v.* McFarlan, 43 N. J. Law 605.

New York. — Jackson *v.* Diffendorf, 3 Johns. 269; Jackson *v.* Harder, 4 Johns, 202, 4 Am. Dec. 262; *In re* City of New York, 63 Hun 630, 18 N. Y. Supp. 82; Moon *v.* Green, 19 How. Pr. 69.

North Carolina. — Baker *v.* McDonald, 47 N. C. 244; Freeman *v.* Loftis, 6 Jones 524; Yount *v.* Miller, 91 N. C. 331; Graham *v.* Houston, 15 N. C. 232.

South Carolina. — McLeod *v.* Rogers, 2 Rich. Law 19; Trustees etc. *v.* McCully, 11 Rich. Law 424; Few *v.* Killer (S. C.), 41 S. E. 85.

Tennessee. — Cannon *v.* Phillips, 2 Sneed. 21.

Texas. — Herndon *v.* Vick, 89 Tex. 469, 35 S. W. 141; Paul *v.* Perez, 7 Tex. 338.

Vermont. — Sellick *v.* Starr, 5 Vt. 255; University of Vermont *v.* Reynolds, 3 Vt. 542, 23 Am. Dec. 234.

Wisconsin. — Scheuber *v.* Held, 47 Wis. 340, 2 N. W. 779.

Thirty Years Adverse Possession Good, Regardless of Disabilities. In a case where adverse possession for over thirty years was established by the proof, the court said: "This court, as evidence held the thirty years' statute to be a complete bar to actions for the recovery of real estate regardless of disabilities and we are not inclined to depart from the rule so well established." Howes *v.* Kirk (Ky. App.), 35 S. W. 1032.

Without going at length into the subject, it may safely be said that by the weight of authority as well as by the preponderance of opinion, it is the general rule of American law that a grant may be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure*, whenever, by possibility, a right may be acquired in any manner known to the law. U. S. *v.* Chaves, 159 U. S. 452, 16 Sup. Ct. 62.

Presumption Operates as Evidence of Owner's Relinquishment of Right. Presumption does not operate like the statute of limitations, and bar the right which is known to exist; or like laches, which deprives one of a right which did exist. It operates as evidence and establishes the conclusion that the right which did exist has been duly relinquished by the possessor of it. U. S. *v.* Devereaux, 90 Fed. 182.

Presumption of Prior Grant One of Fact. — And it is for the jury to determine the effect of the evidence in support of that presumption. Herndon *v.* Vick, 89 Tex. 469, 35 S. W. 141.

6. *United States.* — Shuffleton *v.* Nelson, 2 Sawy. 540, 22 Fed. Cas. No. 12,822; Braxton *v.* Rich, 47 Fed. 178.

Alabama. — Newton *v.* Louisville & N. R. Co., 110 Ala. 474, 19 So. 19; Lucy *v.* Tennessee & C. R. Co., 92 Ala. 246, 8 So. 806; Beasely *v.* Howell, 117 Ala. 490, 22 So. 989.

California. — Thompson *v.* Pioche, 44 Cal. 508; De Frieze *v.* Quint, 94 Cal. 653, 30 Pac. 1, 28 Am. St. Rep. 151; Ball *v.* Kehl, 95 Cal. 606; Tuffree *v.* Polhemus, 108 Cal. 670, 41 Pac. 806.

Colorado. — Evans *v.* Welsh (Colo.), 68 Pac. 776.

Connecticut. — Huntington *v.* Whaley, 29 Conn. 391.

Florida.—Wilkins *v.* Pensacola City Co., 36 Fla. 36, 18 So. 20.

Illinois.—Bryan *v.* East St. Louis, 12 Ill. App. 390.

2. Same Rule in Ejectment. — The same rule as to burden of proof applies in actions of ejectment whether the title be asserted by a plaintiff, or merely as a defense.[7]

Maryland. — Trustees of Sharp St. Station M. E. Church *v.* Rother, 83 Md. 289.

Michigan. — Beecher *v.* Ferris, 110 Mich. 537, 68 N. W. 269.

New York. — Bissing *v.* Smith, 85 Hun 564, 33 N. Y. Supp. 123; Howard *v.* Howard, 17 Barb. 663; Lewis *v.* N. Y. & H. R. Co., 162 N. Y. 202, 56 N. E. 540; Jackson *v.* Sharp, 9 Johns, 163, 6 Am. Dec. 267.

North Carolina.—Bryan *v.* Spivey, 109 N. C. 57, 13 S. E. 766.

Oregon. — Rowland *v.* Williams, 23 Or. 515, 32 Pac. 402.

Pennsylvania. — De Haven *v.* Landell, 31 Pa. St. 120.

Tennessee. — Fuller *v.* Jackson (Tenn. Ch. App.), 62 S. W. 274; Tubb *v.* Williams, 7 Humph. 367.

Texas. — Beall *v.* Evans, 1 Tex. Civ. App. 443, 20 S. W. 945; Smith *v.* Estill, 87 Tex. 264, 28 S. W. 801.

Virginia. — Atkinson *v.* Smith (Va. App.), 24 S. E. 901.

West Virginia. — Maxwell *v.* Cunningham, 50 W. Va. 298, 40 S. E. 499.

Wisconsin. — Kurz *v.* Miller, 89 Wis. 426, 62 N. W. 182; Fuller *v.* Worth, 91 Wis. 406, 64 N. W. 995; Ryan *v.* Schwartz, 94 Wis. 403, 69 N. W. 178.

Burden of Proof Rests Upon One Claiming by Adverse Possession. Evidence of adverse possession is always to be construed strictly, and every presumption is to be made in favor of the true owner. The burden of establishing it is upon him who asserts it, and it is not to be made out by inference or presumption, but by clear and positive proof. Kurz *v.* Miller, 89 Wis. 426, 62 N. W. 182.

Evidence Must Be Clear and Satisfactory. — It is incumbent on one who relies upon an adverse possession to extinguish the legal title, to establish the necessary facts by clear and satisfactory evidence. All presumptions are in favor of the legal holder, and the burden of overcoming them rests with him who assails the legal title. Evans *v.* Welsh (Colo.), 68 Pac. 776.

Burden of Proving the Possession Adverse. — That it was taken and held under a claim of title hostile to the title of the true owner rests upon the party asserting it. Newton *v.* Louisville & N. R. Co., 110 Ala. 474, 19 So. 19. The burden of proving all the essential elements of an adverse possession, including its hostile character, is upon the party relying upon it. De Freize *v.* Quint, 94 Cal. 653, 30 Pac. 1, 28 Am. St. Rep. 151.

7. *California.* — Sharp *v.* Daugney, 33 Cal. 505.

Colorado. — Evans *v.* Welsh (Colo.), 68 Pac. 776.

Indiana. — State Trustees *v.* Vincennes University, 5 Ind. 77.

Iowa. — Montgomery *v.* Chadwick, 7 Iowa 114.

Kentucky. — Smith *v.* Frost, 2 Dana 144.

Michigan. — Highstone *v.* Burdette, 54 Mich. 329, 20 N. W. 64.

Nebraska. — Weeping Water *v.* Reed, 21 Neb. 261, 31 N. W. 797.

Nevada. — McDonald *v.* Fox, 20 Nev. 364, 22 Pac. 234.

Pennsylvania. — Hawk *v.* Senseman, 6 Serg. & R. 21; De Haven *v.* Landell, 31 Pa. St. 120; Union Canal Co. *v.* Young, 1 Whart. 410.

West Virginia. — Maxwell *v.* Cunningham, 50 W. Va. 298, 40 S. E. 499.

Burden of Proof in Ejectment. The entry of the owner of land is only barred by an actual, continued, visible, notorious, distinct, and hostile possession for twenty-one years. It is not necessary, to entitle him to recover in ejectment, that he should prove, that he, or those under whom he claims, have been in possession within twenty-one years before bringing suit. Hawk *v.* Senseman, 6 Serg. & R. (Pa.) 21. Defendant pleading adverse possession in actions of ejectment has burden of proof on such issue. McConnell *v.* Day, 61 Ark. 464, 33 S. W. 731.

Distinction in Actions of Ejectment.—This is not to be confounded with the rule, however, that a defendant in possession of land when sued in ejectment is entitled to stand upon his possession alone until the plaintiff shows a *prima facie* title and present right of recovery.[8]

III. PROOF TO ESTABLISH ADVERSE POSSESSION.

In the absence of statutory provision to the contrary, the constituents necessary to be proved to establish adverse possession are:

1. An Actual Occupancy.[9]

2. Intention to Claim Ownership. — The intent to assert ownership must be evinced in some affirmative manner.[10]

Must Prove Every Element. — If a plaintiff in ejectment claims title by twenty-one years' adverse possession, he must prove every element necessary to constitute a title under the statute of limitations; otherwise, it is the duty of the court to instruct the jury, that there is not sufficient evidence to entitle him to recover. De Haven *v.* Landell, 31 Pa. St. 120.

Proof of Ouster of Possession. In this case both parties relied upon an ouster, and it was incumbent upon the plaintiff to prove it within the statute of limitations, and if he introduced evidence tending to prove it within that period, the burden was shifted upon the defendants to prove an actual ouster which occurred anterior to that period. Highstone *v.* Burdette, 54 Mich. 329, 20 N. W. 64.

8. Atkinson *v.* Smith (Va. App.), 24 S. E. 901.

9. *United States.*—Ward *v.* Cochran, 150 U. S. 597, 14 Sup. Ct. 230.

California. — De Freize *v.* Quint, 94 Cal. 653, 30 Pac. 1, 28 Am. St. Rep. 151.

Connecticut. — Huntington *v.* Whaley, 29 Conn. 391.

Kentucky. — Ohio & B. S. Co. *v.* Wooten (Ky.), 46 S. W. 681.

Minnesota. — Village of Glencoe *v.* Wadsworth, 48 Minn. 402, 51 N. W. 377; Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220.

Mississippi. — Davis *v.* Bouneau, 55 Miss. 671; Dixon *v.* Cook, 47 Miss. 220.

Missouri. — Draper *v.* Shoot, 25 Mo. 197, 69 Am. Dec. 422.

Nebraska. — Horbach *v.* Miller, 4 Neb. 31; Crawford *v.* Galloway, 29 Neb. 261, 45 N. W. 628.

Tennessee. — Fuller *v.* Jackson (Tenn. Ch. App.), 62 S. W. 274.

Texas. — Polk *v.* Beaumont Pasture Co. (Tex. Civ. App.), 64 S. W. 58; Wheeler *v.* Moody, 9 Tex. 372; Phillipson *v.* Flynn, 83 Tex. 580, 19 S. W. 136; De Las Fuentes *v.* McDonald, 85 Tex. 132, 20 S. W. 43.

Virginia. — Overton *v.* Davisson, 1 Gratt. 211, 42 Am. Dec. 544.

10. *United States.* — Faggost *v.* Stanberry, 2 McLean 543, 23 Fed. Cas. No. 13,724; Harvey *v.* Tyler, 2 Wall. 328; Ewing *v.* Burnet, 11 Pet. 41; Shuffleton *v.* Nelson, 2 Sawy. 540, 22 Fed. Cas. No. 12,822; Ellicott *v.* Pearl, 10 Pet. 412; Fussell *v.* Hughes, 8 Fed. 384.

California. — Millett *v.* Logamarsino (Cal.), 38 Pac. 308; Thompson *v.* Pioche, 44 Cal. 508.

Connecticut. — Huntington *v.* Whaley, 29 Conn. 391.

Georgia. — Flannery *v.* Hightower, 97 Ga. 592, 25 S. W. 371.

Illinois. — Bryan *v.* East St. Louis, 12 Ill. App. 390; Hayden *v.* McCloskey, 161 Ill. 351, 43 N. E. 1091; Scott *v.* Delaney, 87 Ill. 146.

Indiana. — Pierson *v.* Turner, 2 Ind. 123.

Iowa. — Litchfield *v.* Sewall, 97 Iowa 247, 66 N. W. 104; Jones *v.* Hockman, 12 Iowa 101; Booth *v.* Small, 25 Iowa 177.

Kentucky. — Taylor *v.* Buckman, 2 A. K. Marsh. 18, 12 Am. Dec. 354; Badley *v.* Coghill, 3 A. K. Marsh. 614; Smith *v.* Morrow, 5 Litt. 211.

3. Open and Notoriously Adverse. — And the acts of the occupant must be proved to have been of a character reasonably calculated to imply his adverse attitude towards the true owner.[11]

Louisiana. — Roe *v.* Bundy's Heirs, 45 La. Ann. 1, 12 So. 759.

Maine. — Bethum *v.* Turner, 1 Greenl. 111, 10 Am. Dec. 36.

Michigan. — Beecher *v.* Ferris, 110 Mich. 537, 68 N. W. 269; McGee *v.* McGee, 37 Mich. 138; Smeberg *v.* Cunningham, 96 Mich. 378, 56 N. W. 73, 35 Am. St. Rep. 613.

Minnesota. — Todd *v.* Weed, 84 Minn. 4, 86 N. W. 756.

Mississippi. — Davis *v.* Bouneau, 55 Miss. 671; Magee *v.* Magee, 37 Miss. 138; Ford *v.* Wilson, 35 Miss. 490, 72 Am. Dec. 137.

Missouri. — Ivy *v.* Yancy, 129 Mo. 501, 31 S. W. 937; Spencer *v.* O'Neill, 100 Mo. 49, 12 S. W. 1054; Pharis *v.* Jones, 122 Mo. 125, 26 S. W. 1032; Pitzman *v.* Boyce, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 536.

Oregon. — Swift *v.* Mulky, 14 Or. 59, 12 Pac. 76; Rowland *v.* Williams, 23 Or. 515, 32 Pac. 402.

Pennsylvania. — Long *v.* Mast, 11 Pa. St. 189.

South Carolina. — Trustees *v.* Jennings, 42 S. C. 265, 18 S. E. 275, 42 Am. St. Rep. 854.

Tennessee. — Kirkman *v.* Brown, 93 Tenn. 476, 27 S. W. 709; Bon Air Coal & Lum. Co. *v.* Parks, 94 Tenn. 263, 29 S. W. 130.

Texas. — Peterson *v.* Ward, 5 Tex. Civ. App. 208, 23 S. W. 637; Ivey *v.* Petty, 70 Tex. 178, 7 S. W. 798.

Virginia. — Atkinson *v.* Smith (Va.), 24 S. E. 901; Kincheloe *v.* Tracewells, 11 Gratt. 587; Earley *v.* Garland, 13 Gratt. 1.

Washington. — Blake *v.* Shriver (Wash.), 68 Pac. 330.

West Virginia. — Maxwell *v.* Cunningham, 50 W. Va. 298, 40 S. W. 499.

Wisconsin. — Link *v.* Doerfin, 42 Wis. 391; Ayers *v.* Riedel, 84 Wis. 276, 54 N. W. 588.

Intention to Claim Title Must Be Shown. — Inasmuch as the whole doctrine of adverse possession may be said to rest upon the presumed acquiescence of the party against whom it is held the intention to claim against the true owner must be shown. Litchfield *v.* Sewall, 97 Iowa 247, 66 N. W. 104.

Possession Unexplained, Impotent. Simple possession creates neither a legal right in the occupant, nor a bar to the assertion of the owner's title. Jones *v.* Hockman, 12 Iowa 101. The overwhelming weight of authority is that the basis of an adverse possession is a claim of title or right. Blake *v.* Shriver (Wash.), 68 Pac. 330.

The Intention to Claim Title Is a Question of Fact. — Whether the intention existed in the mind of the occupant to claim title during the time of his possession is a question of fact. Todd *v.* Weed, 84 Minn. 4, 86 N. W. 756. Intention is a guide denoting the character of the entry. Ewing *v.* Burnet, 11 Pet. 41. What constitutes an adverse possession is a question of law; but the intention of the possessor, which is always material in determining questions of adverse possession, is a fact which can be ascertained only by a jury. Magee *v.* Magee, 37 Miss. 138. Evidence which simply shows possession, but not how title was claimed, implies nothing adverse to the lawful owner. Pierson *v.* Turner, 2 Ind. 123.

Claim of Entire Title. — It must be made to *appear* that the possession was under a claim or color of title, hostile to the title of the true owner, and a claim of the entire title. Huntington *v.* Whaley, 29 Conn. 391. The affirmative acts of the party claiming rights of adverse possession, not those of the party against whom they are asserted, are material. Beecher *v.* Ferris, 110 Mich. 537, 68 N. W. 269.

11. *United States.* — Bracken *v.* Union Pac. R. Co., 75 Fed. 347; Ward *v.* Cochran, 150 U. S. 597, 14 Sup. Ct. 230; Pillow *v.* Roberts, 13 How. 472.

Alabama. — Eureka *v.* Norment, 104 Ala. 625, 16 So. 579; Doe *v.* Clayton, 81 Ala. 391, 2 So. 24; Black *v.* Tennessee Coal, Iron & R. Co.,

A. Simple Occupation No Evidence. — Simple occupancy unaccompanied by any indicia of claim of ownership avails nothing in support of a claim of adverse possession.[12]

93 Ala. 109, 9 So. 537; Murry *v.* Hoyle, 92 Ala. 559, 9 So. 368.

California. — Brumagim *v.* Bradshaw, 39 Cal. 24; Thompson *v.* Felton, 54 Cal. 547; Mauldin *v.* Cox, 67 Cal. 387, 7 Pac. 804; Alta Land & Water Co. *v.* Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217; Thompson *v.* Pioche, 44 Cal. 508; Davis *v.* Baugh, 59 Cal. 568.

Connecticut. — St. Peter's Church *v.* Beach, 26 Conn. 354; Turner *v.* Baldwin, 44 Conn. 121.

Florida. — Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 38 Am. Dec. 139.

Georgia. — Carrol *v.* Gillion, 33 Ga. 539.

Illinois. — Bryan *v.* East St. Louis, 12 Ill. App. 390.

Iowa. — Booth *v.* Small, 25 Iowa 177.

Kentucky. — Buford *v.* Cox, 5 J. J. Marsh. 582.

Louisiana. — Simon *v.* Richard, 42 La. Ann. 842, 8 So. 629.

Maryland. — Beathy *v.* Mason, 30 Md. 409.

Massachusetts. — Sparkhawk *v.* Bullard, 1 Metc. 95; Poignard *v.* Smith, 6 Pick. 172.

Michigan. — Yelverton *v.* Steele, 40 Mich. 538; Paldi *v.* Paldi, 95 Mich. 410, 54 N. W. 903; Bird *v.* Stark, 66 Mich. 654, 33 N. W. 754.

Minnesota. — Washburn *v.* Cutter, 17 Minn. 361.

Mississippi. — Magee *v.* Magee, 37 Miss. 138; Wilson *v.* Williams, 52 Miss. 487.

Missouri. — Bowman *v.* Lee, 48 Mo. 335; Crispen *v.* Hannover, 50 Mo. 536; Kansas City *v.* Scarrett (Mo.), 69 S. W. 283.

Nebraska. — Horback *v.* Miller, 4 Neb. 31; Ballard *v.* Hanson, 33 Neb. 861, 51 N. W. 295.

Oregon. — Curtis *v.* Water Co., 20 Or. 34, 23 Pac. 808.

Pennsylvania.—Hawk *v.* Senseman, 6 Serg. & R. 21.

South Carolina. — Trustees *v.* Jennings, 40 S. C. 168, 18 S. E. 257, 42 Am. St. Rep. 854.

Tennessee. — Fuller *v.* Jackson (Tenn.), 62 S. W. 274.

Texas. — Polk *v.* Beaumont Pasture Co. (Tex. Civ. App.), 64 S. W. 58; Gillispie *v.* Jones, 26 Tex. 343.

West Virginia. — Heavner *v.* Morgan, 41 W. Va. 428, 23 S. E. 874.

Wisconsin. — Link *v.* Doerfin, 42 Wis. 391.

Acts to Establish Peais Possessio. They must not only carry with them the usual *indicia* of ownership, but they must be open, notorious and unequivocal, so as to notify the public that the land is appropriated. Brumagim *v.* Bradshaw, 39 Cal. 24.

Effect of Decided Cases. — The effect of all the cases is that there must be continuous evidence upon the land of the assertion of an active domination and control by the person claiming. Fuller *v.* Jackson (Tenn.), 62 S. W. 274.

12. *United States.* — Jackson *v.* Porter, 1 Paine 457, 13 Fed. Cas. No. 7143.

Alabama. — Bernstein *v.* Hinnes, 78 Ala. 134; Doe *v.* Beck, 108 Ala. 71, 19 So. 802.

California. — Thompson *v.* Felton, 54 Cal. 547; Rix *v.* Horstman, 93 Cal. 502, 29 Pac. 120.

Connecticut. — Russell *v.* Davis, 38 Conn. 562.

Georgia. — Wade *v.* Johnson, 94 Ga. 348, 21 S. E. 569.

Indiana. — Maple *v.* Stevenson, 122 Ind. 368, 23 N. E. 854.

Iowa. — Jones *v.* Hockman, 12 Iowa 101; Clagett *v.* Conler, 16 Iowa 487; Larum *v.* Wilmer, 35 Iowa 244; McCarthy *v.* Rochel, 85 Iowa 427, 52 N. W. 361; Doolittle *v.* Bailey, 85 Iowa 398, 52 N. W. 337.

Mississippi. — Adams *v.* Grice, 30 Miss. 397; Davis *v.* Bouneau, 55 Miss. 671.

Missouri. — Pease *v.* Larson, 33 Mo. 35; Kansas City Milling Co. *v.* Riley, 133 Mo. 574, 34 S. W. 835; Bakewell *v.* McKee, 101 Mo. 337, 14 S. W. 119.

New Hampshire. — Little *v.* Downing, 37 N. H. 355.

B. Claim Without Possession No Evidence. — And, on the other hand, mere claim of title unsupported by actual occupancy is no evidence of an adverse claim.[13]

4. Without Interruption. — The possession thus characterized must appear to have been maintained continuously for the period necessary to ripen into title.[14]

New York. — Humbert *v.* Trinity Church, 24 Wend. 587; Howard *v.* Howard, 17 Barb. 663; Andrews *v.* Delhi & Stanford Tel. Co., 36 Misc. 23, 72 N. Y. Supp. 50.

Tennessee. — Story *v.* Saunders, 8 Humph. 663; Turner *v.* Turner, 34 Tenn. 27.

Virginia. — Atkinson *v.* Smith (Va.), 24 S. E. 901; Kinchelve *v.* Tracewells, 11 Gratt. 587.

Mere Possession Creates Nothing Adverse. — It is not possession alone, but that it is accompanied with the claim of the fee, that by construction of law, is deemed *prima facie* evidence of such an estate. Jackson *v.* Porter, 1 Paine 457, 13 Fed. Cas. No. 7143.

13. *Alabama.* — Lipscomb *v.* McClellan, 72 Ala. 151; Beasley *v.* Clarke, 102 Ala. 254, 14 So. 744; Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561; Bonham *v.* Loeb, 107 Ala. 604, 18 So. 300.

Arkansas. — Shark *v.* Johnson, 22 Ark. 79.

California. — San Francisco *v.* Fulde, 37 Cal. 349, 99 Am. Dec. 278; Howell *v.* Slauson, 83 Cal. 539.

Georgia. — Eagle *v.* Phoenix Mfg. Co. *v.* Bank of Brunswick, 55 Ga. 44; Walker *v.* Hughes, 90 Ga. 52, 15 S. E. 912; Anderson *v.* Dodd, 65 Ga. 402.

Illinois. — Stalford *v.* Goldsing (Ill.), 64 N. E. 395.

Iowa. — Moore *v.* Antill, 53 Iowa 612, 6 N. W. 14.

Kentucky. — Wickliff *v.* Ensor, 9 B. Mon. 253; Myers *v.* McMillan, 4 Dana 485; Strange *v.* Spaulding (Ky. App.), 29 S. W. 137.

Maine. — Thayer *v.* McLellan, 23 Me. 417; Tilton *v.* Hunter, 24 Me. 29; Welsh *v.* Wheelright (Me.), 52 Atl. 243.

Massachusetts.—Bates *v.* Norcross, 14 Pick. 224.

Michigan. — Campau *v.* Lafferty, 50 Mich. 114.

Minnesota. — Washburn *v.* Cutter, 17 Minn. 361.

Missouri. — Tayon *v.* Ladew, 33 Mo. 205; Avery *v.* Adams, 69 Mo. 603; Lynde *v.* Williams, 68 Mo. 360.

New Hampshire. — Linen *v.* Maxwell, 67 N. H. 370, 40 Atl. 184; Fowle *v.* Ayer, 8 N. H. 57; Bailey *v.* Carleton, 12 N. H. 9, 37 Am. Dec. 190.

North Carolina. — Wallace *v.* Maxwell, 11 Ired. 110, 51 Am. Dec. 380; Hamilton *v.* Icard, 114 N. C. 532, 19 S. E. 607; Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154.

Oregon. — Willamette Real Estate Co. *v.* Hindrix, 28 Or. 485, 42 Pac. 514, 32 Am. St. Rep. 800.

Pennsylvania. — Wheeler *v.* Winn, 53 Pa. St. 122, 91 Am. Dec. 186.

Tennessee. — Gass *v.* Richardson, 2 Cold. 28; Hicks *v.* Fredricks, 9 Lea. 491; Sequatchie Val. Coal & Iron Co. *v.* Coppinger, 95 Tenn. 526, 32 S. W. 465.

Texas. — Hill *v.* Harris (Tex. Civ. App.), 64 S. W. 820; Mason *v.* Stapper (Tex.), 8 S. W. 598.

Claim Unaccompanied by Possession Ineffective to Confer Right. Mere claim of title unaccompanied by adverse possession furnishes no right of action to the person against whom it is asserted, and his rights are unaffected. Campton *v.* Lafferty, 50 Mich. 114. The survey, allotment and conveyance of a tract of land and registration of the deed will furnish no evidence of a disseizin, without any open occupation. Thayer *v.* McLellan, 23 Me. 417; Tilton *v.* Hunter, 24 Me. 29.

14. *Alabama.* — Alabama State Land Co. *v.* Kyle, 99 Ala. 474, 13 So. 43; Ross *v.* Goodwin, 88 Ala. 390, 6 So. 682.

Arkansas. — Cunningham *v.* Brumback, 23 Ark. 336.

California. — Unger *v.* Mooney, 63 Cal. 586, 49 Am. Rep. 100; San

5. Exclusive of All Others. — And to the exclusion of all others.[15]

Francisco *v.* Fulde, 37 Cal. 349, 99 Am. Dec. 278.

Georgia. — Holcombe *v.* Austell, 19 Ga. 604.

Indiana. — Peck *v.* Louisville N. A. R. & C. R. Co., 101 Ind. 366; Doe *v.* Brown, 4 Ind. 143.

Iowa. — Booth *v.* Small, 25 Iowa 177.

Kentucky. — Wickliffe *v.* Ensor, 9 B. Mon. 253.

Louisiana. — Lane *v.* Cameron, 37 La. Ann. 250.

Maine. — Roberts *v.* Richards, 84 Me. 1, 24 Atl. 425; School District *v.* Benson, 31 Me. 381, 52 Am. Dec. 618.

Maryland. — Stump *v.* Henry, 6 Md. 201, 61 Am. Dec. 300.

Mississippi. —Davis *v.* Bonneau, 55 Miss. 671.

Missouri. — Harrison *v.* Cochelin, 23 Mo. 117.

New Jersey. — Cornelius *v.* Giberson, 25 N. J. Law 1.

New York. — Bliss *v.* Johnson, 94 N. Y. 235; Cleveland *v.* Crawford, 7 Hun 616.

North Carolina.—Williams *v.* Wallace, 78 N. C. 354; Ruffin *v.* Overby, 105 N. C. 78, 11 S. E. 251.

Pennsylvania. — Groft *v.* Weakland, 34 Pa. St. 304; Overfield *v.* Christie, 7 Serg. & R. 177.

Tennessee. — Fuller *v.* Jackson (Tenn.), 62 S. W. 274.

Texas. — Ivey *v.* Petty, 70 Tex. 178, 7 S. W. 798.

Virginia. — Atkinson *v.* Smith (Va.), 24 S. E. 901; Stonestreet *v.* Doyle, 75 Va. 356, 40 Am. Rep. 731.

West Virginia. — Oney *v.* Clendenin, 28 W. Va. 34.

Possession Must Be Continuous. Adverse possession is not a matter open to presumption, but its continuance for the statutory period under a claim or color of title is required to be proved. Atkinson *v.* Smith (Va.), 24 S. E. 901.

15. *United States.* — Ward *v.* Cochran, 150 U. S. 597, 14 Sup. Ct. 230; Hordpenning *v.* The Reformed etc. Church, 16 Pet. 455.

Alabama. — Bank *v.* New Orleans M. & T. R. Co., 55 Ala. 480.

California. — Spotts *v.* Hanley, 85 Cal. 155, 24 Pac. 738; Silverder *v.* Hansen, 77 Cal. 579, 20 Pac. 136.

Connecticut. — Tracy *v.* Morwick & W. R. Co., 39 Conn. 382; Huntington *v.* Whaley, 29 Conn. 391.

Georgia. — McCook *v.* Crawford, 114 Ga. 337, 40 S. E. 225.

Illinois. — Ambrose *v.* Raley, 58 Ill. 506; Shaw *v.* Schoonover, 130 Ill. 448, 22 N. E. 589.

Maryland. — Stump *v.* Henry, 6 Md. 201, 61 Am. Dec. 300.

Nevada. — McDonald *v.* Fox, 20 Nev. 364, 22 Pac. 234.

New York. — Humbert *v.* Trinity Church, 24 Wend. 587; Heller *v.* Cohen, 154 N. Y. 299, 48 N. E. 527.

North Carolina.—Gilchrist *v.* McLaughlin, 7 Ired. 310; Avent *v.* Arrington, 105 N. C. 377, 10 S. E. 991.

Pennsylvania. — Long *v.* Mast, 11 Pa. St. 189.

Texas. — Gillispie *v.* Jones, 26 Tex. 343; Richards *v.* Smith, 67 Tex. 610, 4 S. W. 571.

Vermont. — Spear *v.* Ralph, 14 Vt. 400.

West Virginia. — Ketchum *v.* Spurlock, 34 W. Va. 597, 12 S. E. 832; Core *v.* Fanpel, 24 W. Va. 238.

Wisconsin. — Illinois Steel Co. *v.* Bilot, 109 Wis. 418, 85 N. W. 402.

Right Asserted Must Have Been Exclusive. — The fact that the plaintiffs and their predecessors in title were in the undisturbed possession of the land for twenty years and upwards does not show that the possession was adverse. It does not necessarily follow therefrom that their entry was under the deed mentioned, exclusive of any other right; and this was essential to constitute an adverse holding under a written conveyance, which would devest the title of the true owner. Heller *v.* Cohen, 154 N. Y. 299, 48 N. E. 527. And such possession must be proved, and not left to mere conjecture; and it must be open, and of such a character as to clearly show that the occupant claims the land as his own, exclusively. Ambrose *v.* Raley, 58 Ill. 506.

A. Actual Occupancy. — a. *Ouster of True Owner Essential.* But, an occupancy will not be deemed adverse until such time as the evidence may show acts from which an ouster of the true owner may be assumed.[16]

b. *Ouster Is Question of Fact.* — The question of ouster of the true owner is one of fact to be established by evidence sufficient to import an actual ouster, or from which an ouster may be presumed.[17]

16. *United States.* — Bradstreet *v.* Huntington, 5 Pet. 402; Ewing *v.* Burnet, 11 Pet. 41.

Alabama. — Polly *v.* McCall, 37 Ala. 20.

Georgia. — Georgia Pac. R. Co. *v.* Strickland, 80 Ga. 776, 6 S. E. 27.

Iowa. — Robinson *v.* Lake, 14 Iowa 421.

Kentucky. — Humphrey *v.* Jones, 3 Mon. 261.

Massachusetts. — Pray *v.* Pierce, 7 Mass. 381, 5 Am. Dec. 54; Small *v.* Proctor, 15 Mass. 495.

Minnesota. — Ramsey *v.* Glenny, 45 Minn. 401, 48 N. W. 322.

Mississippi. — Huntington *v.* Allen, 44 Miss. 654.

Missouri. — Ivey *v.* Yancy, 129 Mo. 501, 31 S. W. 937.

New Hampshire. — Waldron *v.* Tuttle, 4 N. H. 371.

New York. — Smith *v.* Burtis, 6 Johns. 197.

Texas. — Galveston Land & Improvement Co. *v.* Perkins (Tex. Civ. App.), 26 S. W. 256.

Washington. — Blake *v.* Shriver (Wash.), 68 Pac. 330.

Disseizin Must Be Shown.—There must be a disseizin before another can become legally possessed of the lands, and this, of course, can only be done by some act which works a disseizin of the original owner, for the seizin cannot abide in two claimants at the same time. Blake *v.* Shriver (Wash.), 68 Pac. 330.

17. *United States.* — Elder *v.* McCloskey, 70 Fed. 529; Bradstreet *v.* Huntington, 5 Pet. 402; Ewing *v.* Burnett, 36 U. S. 41.

Alabama. — Trufant *v.* Hudson, 99 Ala. 526, 13 So. 83.

California. — Carpentier *v.* Mendenhall, 28 Cal. 484, 87 Am. Dec. 135; Winterburn *v.* Chambers, 91 Cal. 170, 27 Pac. 658.

Connecticut.—Johnson *v.* Gorham, 38 Conn. 513.

Indiana. — Manchester *v.* Doddridge, 3 Ind. 360.

Massachusetts. — Steel *v.* Johnson, 4 Allen 425; Cummings *v.* Wyman, 10 Mass. 465; Parker *v.* Locks & Canals, 3 Metc. 91, 37 Am. Dec. 121.

Michigan.—Highstone *v.* Burdette, 54 Mich. 329, 20 N. W. 64.

Mississippi. — Harmon *v.* James, 7 Smed. & M. 111.

Pennsylvania. — O'Hara *v.* Richardson, 46 Pa. St. 385; Blackmore *v.* Gregg, 2 Watts. & S. 182.

Tennessee. — East *v.* Lainer, 9 Humph. 762; Copeland *v.* Murphy, 2 Cold. 64.

Vermont. — McFarland *v.* Stone, 17 Vt. 165, 44 Am. Dec. 325; Wing *v.* Hall, 47 Vt. 182.

Virginia. — Taylor *v.* Hill, 10 Leigh. 457; Purcell *v.* Wilson, 4 Gratt. 16.

Assertion of Title Important. "The result of the cases is that assertion of title by the possessor is an important circumstance indicating adverse possession and ouster of the real owner, and the absence of such assertion may be an important circumstance, and often very important, as indicating that the possession is not adverse; yet the question of ouster is one that must depend upon all the circumstances of the case, and it is not therefore strictly true, as stated in the charge under consideration, that it is essential that the possessor should hold the land claiming it as his own, and denying the right of everybody else." Johnson *v.* Gorham, 38 Conn. 513.

Disseizin, Evidence Constituting. A daughter was put in possession of certain premises in consideration of a written release to the owner, her father, of all claim in and title to

6. Residence Unnecessary. — It is not indispensable to prove that a claimant resided upon the land, or that he held possession through a tenant.[18]

any part of his real or personal estate. The court said: "If no deed of the estate was then made to her, of which no evidence has been produced, her entry upon and exclusive occupation of it under these circumstances constituted a dissei.in of Levi Steel." Steel *v.* Johnson, 4 Allen (Mass.) 425.

Actual Ouster Unnecessary. — In order that an effectual adverse possession may be initiated it is not necessary to show an actual ouster of the true owner. Bradstreet *v.* Huntington, 5 Pet. 402.

18. *United States.* — Latta *v.* Clifford, 47 Fed. 614; Zeilin *v.* Rogers, 21 Fed. 103; Harris *v.* McGovern, 99 U. S. 161; Fletcher *v.* Fuller, 120 U. S. 534, 7 Sup. Ct. 667; Coal Co. *v.* Doran, 142 U. S. 417, 12 Sup. Ct. 239; Boyrean *v.* Campbell, 1 McAll. 119, 3 Fed. Cas. No. 1760; Ewing *v.* Burnet, 11 Pet. 41; Elliott *v.* Pearl, 1 McLean 206, 8 Fed. Cas. No. 4386.

Alabama. — Bell *v.* Denson, 56 Ala. 444.

Arkansas. — Dorr *v.* School District No. 20, 40 Ark. 237; Mooney *v.* Cooledge, 30 Ark. 640.

California. — Webber *v.* Clarke, 74 Cal. 11, 15 Pac. 431; Barstow *v.* Newman, 34 Cal. 90.

Delaware. — Bartholomew *v.* Edwards, 1 Houst. 17.

Illinois. — Scott *v.* Delany, 87 Ill. 146; Coleman *v.* Billings, 89 Ill. 183; Zirngibl *v.* Calumet & C. Canal & Dock Co., 157 Ill. 430, 42 N. E. 431; Horner *v.* Reuter, 152 Ill. 106, 38 N. E. 747.

Indiana. — Moore *v.* Hinkle, 151 Ind. 343, 50 N. E. 822; Worthley *v.* Burbanks, 146 Ind. 534, 45 N. E. 770.

Iowa. — Dice *v.* Brown, 98 Iowa 297, 67 N. W. 253; Langworthy *v.* Meyers, 4 Iowa 18.

Kansas. — Anderson *v.* Burnham, 52 Kan. 455, 34 Pac. 1056; Gilmore *v.* Norton, 10 Kan. 491.

Kentucky. — Hook *v.* Joyce, 94 Ky. App. 450, 22 S. W. 651, 21 L. R. A. 96; Singleton *v.* School District No. 34, (Ky. App.,) 10 S. W. 793.

Massachusetts. — Eastern Railroad *v.* Allen, 135 Mass. 13; Tufts *v.* Charleston, 117 Mass. 401.

Michigan. — Murry *v.* Hudson, 65 Mich. 670, 32 N. W. 889; Whittacre *v.* Erie Shooting Club, 102 Mich. 454, 60 N. W. 983.

Minnesota. — Swan *v.* Munch, 65 Minn. 500, 67 N. W. 1022, 60 Am. St. Rep. 491, 35 L. R. A. 743.

Missouri. — Turner *v.* Hall, 60 Mo. 275; Goltermore *v.* Schiermeyer, 111 Mo. 404, 19 S. W. 484.

New Jersey. — Foulke *v.* Bond, 41 N. J. Law 527.

Pennsylvania.—Susquehanna & W. V. R. & C. Co. *v.* Quick, 68 Pa. St. 189; Stephens *v.* Leach, 19 Pa. St. 262; Thompson *v.* Philadelphia & R. Coal & Iron Co., 133 Pa. St. 46, 19 Atl. 346.

Tennessee. — Fuller *v.* Jackson, (Tenn.,) 62 S. W. 274; Hornsby *v.* Davis, (Tenn.,) 36 S. W. 159; Macon *v.* Shepard, 12 Humph. 335; Copeland *v.* Murphy, 2 Cold. 64.

Texas. — Polk *v.* Beaumont Pasture Co., (Tex. Civ. App.,) 64 S. W. 58; Hodges *v.* Ross, 6 Tex. Civ. App. 437, 25 S. W. 975; Cantagrel *v.* Von Lupin, 58 Tex. 570; Kimbro *v.* Hamilton, 28 Tex. 560.

Virginia. — Lemmings *v.* White, (Va.,) 20 S. E. 831; Taylor *v.* Burnsides, 1 Gratt. 165.

Washington. — Bellingham Bay Land Co. *v.* Dibble, 4 Wash. 764, 31 Pac. 30.

West Virginia. — Oney *v.* Clendenin, 28 W. Va. 34.

Wisconsin. — Moore *v.* Chicago M. & St. P. R. Co., 78 Wis. 120, 47 N. W. 273; Batz *v.* Woerpel (Wis.,) 89 N. W. 516.

Ownership, Claim of How Evidenced. — Public acts of ownership, such as the owner would exercise over property claimed in his own right, and would not exercise over property which he did not claim will be competent evidence in support of a claim by adverse possession of property so situated as not to admit

7. Inclosure and Improvement Unnecessary. — Acts may be of such character respecting a particular tract of land as to ripen into a title by adverse possession, even though no inclosure or improvement be erected upon it by the claimant.[19]

of use or residence. Harris *v.* Mc Govern, 99 U. S. 161.

Actual Occupation Not Indispensable. — Actual occupation is not always indispensable, but its absence should be supplied by some act done on or about the land. Turner *v.* Hall, 60 Mo. 275.

Any Acts Evincive of Exclusive Claim of Ownership Sufficient. Possession may exist without actual residence on the land, and be denoted by enclosed fields, or, in fact, by any open, visible and continuous acts or evidence of claim of ownership or possession, or the exercise of dominion that will show or indicate that they were done in the character of owners, and not by occasional trespassers. Hornsby *v.* Davis, (Tenn.,) 36 S. W. 159. Actual residence unnecessary, nor is it incumbent upon adverse possessor to make oral declarations of his adverse claim. Swan *v.* Munch, 65 Minn. 500, 67 N. W. 1022, 60 Am. St. Rep. 491, 35 L. R. A. 743.

Actual Occupancy Not Indispensable. — Acts of ownership done upon the land which are of such a nature as to manifest a notorious claim of property and are continued for the period of twenty years, without interruption or interference by the true owner, may, under the circumstances and the situation of the property, be sufficient evidence of an ouster and of an adverse possession to support a claim of title by adverse possession without any residence, cultivation or enclosure. Foulke *v.* Bond, 41 N. J. Law 527.

Occupancy in Customary Manner Sufficient. — If the land is constantly used and enjoyed for the only purpose for which it is possible and profitable, it is sufficient possession to be *prima facie* evidence of title. Moore *v.* Chicago M. & St. P. R. Co., 78 Wis. 120, 47 N. W. 273. The possession of a church by its officers fills all the requirements of actual possession. Macon *v.* Shepard, 2 Humph. 335.

19. *United States.* — Zeilin *v.* Rogers, 41 Fed. 103; Ewing *v.* Burnet, 11 Pet. 41; Quindor Tp. *v.* Squier, 51 Fed. 152; Boyreau *v.* Campbell, 1 McAll. 119, 3 Fed. Cas. No. 1760.

Alabama. — Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443.

Arkansas. — Hames *v.* Harris, 50 Ark. 68, 6 S. W. 233.

California. — Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705; Kockeman *v.* Bickel, 92 Cal. 665, 28 Pac. 219; Webber *v.* Clarke, 74 Cal. 11, 15 Pac. 431; Marshall *v.* Beysser, 75 Cal. 544, 17 Pac. 644; McCreery *v.* Everding, 44 Cal. 246.

Georgia. — Flannery *v.* Hightower, 97 Ga. 592, 25 S. E. 371.

Illinois. — Brooks *v.* Bruyn, 18 Ill. 539; Kerr *v.* Hitt, 75 Ill. 51.

Iowa. — Booth *v.* Small, 25 Iowa 177; Dice *v.* Brown, 98 Iowa 297, 67 N. W. 253; Brett *v.* Farr, 66 Iowa 684, 24 N. W. 275.

Kentucky. — Webbs *v.* Hynes, 9 B. Mon. 388, 50 Am. Dec. 515.

Michigan. — Beecher *v.* Calvin, 71 Mich. 391, 39 N. W. 469; Green *v.* Anglemier, 77 Mich. 168, 43 N. W. 772; Saners *v.* Giddings, 90 Mich. 50, 51 N. W. 265; Chabert *v.* Russell, 109 Mich. 571, 67 N. W. 902.

Minnesota. — Costello *v.* Edson, 44 Minn. 135, 46 N. W. 299.

Missouri. — Merchants' Bank of St. Louis *v.* Clovin, 60 Mo. 559.

Nevada. — Eureka Mining Co. *v.* Way, 11 Nev. 171.

New Jersey. — Foulke *v.* Bond, 41 N. J. Law 527; Yard *v.* Ocean Beach Ass'n., 49 N. J. Eq. 306, 24 Atl. 729; Cooper *v.* Morris, 48 N. J. Law 607, 7 Atl. 427.

North Carolina. — Tredwell *v.* Reddick, 1 Ired. 56; Burton *v.* Carruth, 1 Dev. & B. 2.

Tennessee. — Hornsby *v.* Davis (Tenn.,) 36 S. W. 159; West *v.* Lanier, 9 Humph. 762.

Wisconsin. — Batz *v.* Woerpel,

Distinction Where Claim Is by Occupancy Alone. — But, where no claim is asserted save through occupancy, the evidence must show an exclusive possession by inclosure in order to establish title, as against one having the constructive possession.[20]

8. Character of Land Important. — The uses to which the land may be shown susceptible will be important in determining the question of actual occupancy.[21]

(Wis.,) 89 N. W. 516; Wilson *v.* Hevey, 35 Wis. 24; Moore *v.* Chicago M. & St. P. R. Co., 78 Wis. 120, 47 N. W. 273.

Boundaries May Be Partly Artificial and Partly Natural. — The boundaries may be artificial in part and natural in part if the circumstances are such as to clearly indicate that the inclosure partly artificial and partly natural marks the boundaries of the adverse occupancy. Illinois Steel Co. *v.* Bilot, 109 Wis. 418, 85 N. W. 402; Becker *v.* Von Valkenberg, 29 Barb. (N. Y.) 319; Trustees *v.* Kirk, 84 N. Y. 215; Claney *v.* Hondlettle, 39 Me. 451; Brumagim *v.* Bradshaw, 39 Cal. 24.

20. *California.* — Polack *v.* McGrath, 32 Cal. 15.

Kentucky. — Griffith *v.* Huston, 7 J. J. Marsh. 385; Caskey *v.* Lewis, 15 B. Mon. 27; Degman *v.* Elliott, (Ky.,) 8 N. W. 10.

Louisiana. — Ellis *v.* Pervost, 19 La. 250.

Maryland. — Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115.

Massachusetts. — Kennebec Purchase *v.* Springer, 4 Mass. 416, 3 Am. Dec. 227.

New Hampshire. — Hale *v.* Glidden, 10 N. H. 397.

New Jersey. — Saxton *v.* Hunt, 20 N. J. Law 487.

New York. — Jackson *v.* Schoonaker, 2 Johns. 230.

Pennsylvania. — Wheeler *v.* Winn, 53 Pa. St. 122, 91 Am. Dec. 186.

South Carolina. — Bailey *v.* Ivey, 2 Nott & McC. 343.

Tennessee. — Dyche *v.* Gass, 3 Yerg. 397.

21. *United States.* — Holtzman *v.* Douglass, 168 U. S. 278; Fletcher *v.* Fuller, 120 U. S. 534, 7 Sup. Ct. 667; Elliott *v.* Pearl, 10 Pet. 442; Ewing *v.* Burnet, 11 Pet. 41; Quindor Tp. *v.* Squier, 51 Fed. 152; Merrill *v.* Tobin, 30 Fed. 738.

Arkansas. — Brown *v.* Bocquin, 57 Ark. 97, 20 S. W. 813.

California. — Plume *v.* Seward, 4 Cal. 94.

Illinois. — Brooks *v.* Bruyn, 18 Ill. 539; Hubbard *v.* Kiddo, 87 Ill. 578.

Indiana. — Moore *v.* Hinkle, 151 Ind. 343, 50 N. E. 822.

Iowa. — Booth *v.* Small, 25 Iowa 177; Colvin *v.* McCune, 39 Iowa 502.

Kansas.—Giles *v.* Ortman, 11 Kan. 59.

Louisiana. — Chamberlain *v.* Madie, 48 La. Ann. 587, 19 So. 574.

Minnesota. — Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220; Backins *v.* Burke, 63 Minn. 272, 65 N. W. 45.

Missouri. — Benne *v.* Miller, 149 Mo. 228, 50 S. W. 824; Turner *v.* Hall, 60 Mo. 275.

Nebraska. — Twohig *v.* Leamer, 48 Neb. 247, 67 N. W. 152; Omaha & Florence L. & T. Co. *v.* Parker, 33 Neb. 775, 51 N. W. 139, 29 Am. St. Rep. 506.

New York. — East Hampton *v.* Kirk, 84 N. Y. 215, 38 Am. Dec. 505.

North Carolina. — Tredwell *v.* Reddick, 1 Ired. 56; Williams *v.* Buchanan, 1 Ired. 535, 35 Am. Dec. 760; Smith *v.* Bryan, 1 Busb. 180; Bynum *v.* Carter, 4 Ired. 310.

Tennessee. — Cowen *v.* Hatcher, (Tenn.,) 59 S. W. 689.

Wisconsin. — Moore *v.* Chicago M. & St. P. R. Co., 78 Wis. 120, 47 N. W. 273; Wilson *v.* Hevey, 35 Wis. 24.

Acts Necessary to Show Adverse Possession. — Acts of ownership displayed upon land naturally indicating a notorious claim of property in it, continued for the requisite time, with the knowledge of the adverse claimant, without interruption or adverse entry by him will be evidence of an actual ouster of a former owner, and an actual adverse possession against him, provided the jury shall think the property was not

Burial Lot. — This rule of evidence applies with peculiar force as respects adverse claims asserted to burial lots.[22]

9. Evidence of Occupation of Part. — If there be unity of character in location, acts of ownership in places upon a tract will be competent evidence of possession of the whole.[23]

Qualification of Rule. — Conveyance of the portion in actual possession of a claimant abrogates his constructive possession of the remainder, unless he takes actual possession of some part of it.[24]

10. Tenant's Possession Is That of His Landlord. — Successive holdings of a landlord and his tenant, if adverse to all others, are to be treated as evidence of a continuous possession of the landlord.[25]

susceptible of a more strict or definite possession than had been so taken and held. Ewing *v.* Burnet, 11 Pet. 41.

Character of Real Estate Controlling Factor. — The character of real estate is of controlling influence in determining what acts of ownership, use, or occupancy are adverse. Neither actual occupancy, cultivation nor residence is necessary; and occupation of a part of a tract under color of title, is constructive occupancy of the whole. Moore *v.* Hinkle, 151 Ind. 343, 50 N. E. 822.

Acts Sufficient to Evidence Adverse Possession. — Cranberry culture sufficient occupancy of marsh land fit only for such purpose. Moore *v.* Chicago, M. & St. P. R. Co., 78 Wis. 120, 47 N. W. 273. Mining land near the surface for lead yearly by lessees of the claimant during mining season. Wilson *v.* Hevey, 35 Wis. 24.

Use of Lot by Stone Cutter. Use of an uninclosed lot by a tenant in conducting his business of marble and stone cutting, although not all covered by material is evidence of adverse possession. Holtzman *v.* Douglass, 168 U. S. 278.

Use so Far as Susceptible to Exclusion of All Others Sufficient. To constitute an adverse possession it is not necessary that the evidence show actual occupancy or inclosure of the land where it was subjected to such uses as it was susceptible of to the exclusion of others. Fletcher *v.* Fuller, 120 U. S. 534, 7 Sup. Ct. 667.

22. Hook *v.* Joyce, 94 Ky. App. 450, 22 S. W. 651, 21 L. R. A. 96; Zirngibl *v.* Calumet & C. C. & D. Co., 157 Ill. 430, 42 N. E. 431.

23. Foulke *v.* Bond, 41 N. J. Law 527; Moore *v.* Hinkle, 151 Ind. 343, 50 N. E. 822; Mason *v.* Calumet Canal & Imp. Co., 150 Ind. 699, 50 N. E. 85; Holtzman *v.* Douglass, 168 U. S. 278; Worthley *v.* Burbanks, 146 Ind. 534, 45 N. E. 779; Kirkman *v.* Mays (Miss.), 12 So. 443.

Acts on Part Sufficient Where There Is Unity of Character of Location. — Acts of ownership in places upon a tract are competent evidence of possession of the whole where there is unity of character in location. "If competent evidence of possession, such acts of possession must necessarily be sufficient to maintain title by adverse possession without occupation by residence, cultivation or enclosure, provided they be continued for the full period of twenty years, with such notoriety as that the true owner may reasonably be expected to have had notice of the nature and extent of the title being acquired thereunder." Foulke *v.* Bond, 41 N. J. Law 527.

24. Sharp *v.* Shenandoah Furnace Co. (Va.), 40 S. E. 103; Trotter *v.* Cassady, 3 A. K. Marsh. (Ky.) 365, 13 Am. Dec. 103; Cunningham *v.* Robinson Lessee, 1 Swan (Tenn.) 138; Chandler *v.* Rushing, 38 Tex. 591; West *v.* McKinney, 92 Ky. 638, 18 S. W. 633.

25. *United States.* — Scaife *v.* Western N. C. Land Co., 90 Fed. 238; U. S. *v.* Sliney, 21 Fed. 894.

Alabama. — Jay *v.* Stein, 49 Ala.

11. Wild Lands. — In order to sustain a claim of title by adverse possession of wild land, a more stringent rule of evidence obtains.[26]

514; Alabama State Land Co. *v.* Keyle, 99 Ala. 474, 13 So. 43; Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443; Barrett *v.* Kelly (Ala.), 30 So. 824; Zendel *v.* Baldwin, 114 Ala. 328, 21 So. 420.

Arkansas. — Cox *v.* Dougherty, 62 Ark. 629, 36 S. W. 184.

California. — San Francisco *v.* Fulde, 37 Cal. 349, 99 Am. Dec. 278.

Illinois. — Riggs *v.* Girard, 133 Ill. 619, 24 N. E. 1031.

Kansas. — Deetjen *v.* Richter, 33 Kan. 410, 6 Pac. 595.

Kentucky. — Chiles *v.* Conley, 9 Dana 385; Lee *v.* McDaniel, 1 A. K. Marsh. 234.

Michigan. — Rayner *v.* Lee, 20 Mich. 384.

New York. — Sherman *v.* Kane, 86 N. Y. 57.

North Carolina. — Alexander *v.* Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757; Ruffin *v.* Overby, 105 N. C. 78, 11 S. E. 251.

South Carolina. — Johnson *v.* McMullan, 1 Strob. 143.

Tennessee. — Sims *v.* Eastland, 3 Head 368; Massengill *v.* Boyles, 11 Humph. 112.

Texas. — Dawson *v.* Ward, 71 Tex. 72, 9 S. W. 106; Heflin *v.* Burns, 70 Tex. 347, 8 S. W. 48; Read *v.* Allen, 63 Tex. 154; McManus *v.* Matthews (Tex. Civ. App.), 55 S. W. 589.

Washington. — McAuliff *v.* Parker, 10 Wash. 141, 38 Pac. 744.

When the evidence shows the successive holdings of a land owner and his tenant to be adverse, they are to be treated as continuous. Cox *v.* Dougherty, 62 Ark. 629, 36 S. W. 184. Actual residence, as required by an act of limitation, may be established by occupation by a tenant of the owner of the title, or by one in possession, under a contract purchase. Riggs *v.* Girard, 133 Ill. 619, 24 N. E. 1031.

26. *United States.* — Bump *v.* Butler Co., 93 Fed. 290; Winnipisisgee Paper Co. *v.* New Hampshire Co., 59 Fed. 542.

Alabama. — Burks *v.* Mitchell, 78 Ala. 61.

Arkansas. — Conway *v.* Kinsworthy, 21 Ark. 9.

Georgia. — Scott *v.* Cain, 90 Ga. 34, 15 S. E. 816.

Massachusetts. — Richmond Iron Works *v.* Wadhains, 142 Mass. 569, 9 N. E. 1; Parker *v.* Parker, 1 Allen 245.

Michigan. — McKinnon *v.* Meston, 104 Mich. 642, 62 N. W. 1014.

New Jersey. — Saxton *v.* Hunt, 20 N. J. Law 487.

New York. — People *v.* Livingston, 8 Barb. 253; Doe *v.* Thompson, 5 Cow. 371; Thompson *v.* Burhans, 79 N. Y. 93.

Tennessee. — Pullen *v.* Hopkins, 1 Lea 741.

Texas. — Boone *v.* Hulsey, 71 Tex. 176, 9 S. W. 531.

Virginia. — Harman *v.* Ratliff, 93 Va. 249, 24 S. E. 1023; Koiner *v.* Rankin, 11 Gratt. 420; Overton *v.* Davisson, 1 Gratt. 211, 42 Am. Dec. 544; Turpin *v.* Saunders, 32 Gratt. 27.

Evidence to Show Appropriation of Wild Lands. — Acts of ownership exercised over wild and unoccupied lands, to constitute adverse possession against the true owner of the legal title of record, must be of a character so open, notorious and unequivocal that the true owner cannot fail to know them. Bump *v.* Butler Co., 93 Fed. 290.

Notice of Surveys and Lines Must Be Shown. — The doctrine of title by adverse possession is fraught with danger, as applied to wild lands, and its application should be made with great caution; and it may be doubtful whether it should be applied upon constructive notice, or in any case, unless the evidence is clear and unmistakable that the owner had notice of the surveys and lines, as well as the character and extent of the claims. Winnipisisgee Paper Co. *v.* New Hampshire Land Co., 59 Fed. 542.

12. Interruption. — An interruption sufficient to defeat such claim must be shown to have arisen under such circumstances as materially to alter the relations of such claimant to the premises.[27]

27. *United States.* — Fuller *v.* Fletcher, 44 Fed. 34; Armstrong *v.* Morrill, 14 Wall. 20; Smith *v.* Trabue, 1 McLean 87, 22 Fed. Cas. No. 13,116.

Alabama. — Barron *v.* Barron, 122 Ala. 194, 25 So. 55; Beasley *v.* Howell, 117 Ala. 499, 22 So. 989.

Arkansas. — Brown *v.* Hananen, 48 Ark. 277, 3 S. W. 27.

California. — Bree *v.* Wheeler, 129 Cal. 145; Borel *v.* Rollins, 30 Cal. 408; McGrath *v.* Wallace, 85 Cal. 622, 24 Pac. 793; Spotts *v.* Hanley, 85 Cal. 155; Riverside L. & R. Irr. Co. *v.* Jenson, 108 Cal. 146, 41 Pac. 40; Lacoste *v.* Eastland, 117 Cal. 673, 49 Pac. 1046; Cox *v.* Clough, 70 Cal. 345, 11 Pac. 732; Baldwin *v.* Durfee, 116 Cal. 625, 48 Pac. 724; Breon *v.* Robrecht, 118 Cal. 469, 50 Pac. 689, 62 Am. St. Rep. 247; Hesperia Land & Water Co. *v.* Rogers, 83 Cal. 10, 23 Pac. 196, 17 Am. St. Rep. 209.

Connecticut.—Conner *v.* Sullivan, 40 Conn. 26, 16 Am. Rep. 10; Burrows *v.* Gallup, 32 Conn. 493, 87 Am. Dec. 186.

Georgia. — Byrne *v.* Lowry, 19 Ga. 27.

Illinois. — O'Flakerty *v.* Mann (Ill.), 63 N. E. 727; Peoria P. U. R. Co. *v.* Tamplin, 156 Ill. 285, 40 N. E. 960; Nickrans *v.* Wilk, 161 Ill. 76, 43 N. E. 741; Downing *v.* Mayes, 153 Ill. 330, 38 N. E. 620, 46 Am. St. Rep. 896.

Iowa. — Litchfield *v.* Sewell, 97 Iowa 247, 66 N. W. 104; Mendenhall *v.* Price, 88 Iowa 203, 55 N. W. 321; Pella *v.* Scholte, 24 Iowa 283, 95 Am. Dec. 729.

Kansas. — Ard *v.* Wilson, 60 Kan. 857, 56 Pac. 80; Corby *v.* Moran, 56 Kan. 278, 49 Pac. 82.

Kentucky.—Middlesborough Water Works Co. *v.* Neal, 20 Ky. Law 1403, 49 S. W. 428; Turner *v.* Thomas, 13 Bush. 518; Webbs *v.* Hynes, 9 B. Mon. 388, 50 Am. Dec. 515; Hord *v.* Walker, 5 Litt. 22, 15 Am. Dec. 39.

Massachusetts. — Harrison *v.* Dolan, 172 Mass. 395, 52 N. E. 513; Thacker *v.* Guardenier, 48 Mass. 484; Brickett *v.* Spofford, 14 Gray 514.

Michigan. — Shearer *v.* Middleton, 88 Mich. 621, 50 N. W. 737.

Minnesota. — Swan *v.* Munch, 65 Minn. 500, 67 N. W. 1022, 60 Am. St. Rep. 491, 35 L. R. A. 743; St. Paul M. & M. R. R. Co. *v.* Olsen (Minn.), 91 N. W. 294; Ricker *v.* Butler, 45 Minn. 545, 48 N. W. 407.

Mississippi. — Massey *v.* Rimmer, 69 Miss. 667, 13 So. 832.

Missouri. — Wilkinson *v.* St. Louis Sectional Dock. Co., 102 Mo. 130, 14 S. W. 177; Snell *v.* Harrison, 131 Mo. 495, 32 S. W. 37, 52 Am. St. Rep. 642; Pim *v.* St. Louis, 122 Mo. 654, 27 S. W. 525.

Montana. — Casey *v.* Anderson, 17 Mont. 176, 42 Pac. 761.

Nebraska. — Webb *v.* Thiele, 56 Neb. 752, 77 N. W. 56; Oldig *v.* Fisk, 53 Neb. 156, 73 N. W. 661.

New Hampshire. — Gage *v.* Gage, 30 N. H. 420.

New Jersey. — Lehigh Valley R. Co. *v.* McFarlan, 43 N. J. Law 605.

New York. — Lewis *v.* N. Y. & H. R. Co., 162 N. Y. 202, 56 N. E. 541; Simpson *v.* Downing, 23 Wend. 316; Landon *v.* Townsend, 129 N. Y. 166, 29 N. E. 71; Sherman *v.* Kane, 86 N. Y. 57.

North Carolina. — Mallett *v.* Simpson, 94 N. C. 37, 55 Am. Rep. 594.

Oregon. — Oregon Const. Co. *v.* Allen Dutch Co. (Or.), 69 Pac. 455; Barrell *v.* Title Guar. & T. Co., 27 Or. 77, 39 Pac. 992.

Pennsylvania. — Hollingshead *v.* Naurven, 48 Pa. St. 140; Sheik *v.* McElroy, 20 Pa. St. 25.

Tennessee. — Hornsby *v.* Davis (Tenn.), 36 S. W. 159; Cowan *v.* Hatcher (Tenn.), 59 S. W. 689.

Texas.—Anderson *v.* Carter (Tex. Civ. App.), 69 S. W. 78; Spofford *v.* Bennett, 55 Tex. 293; Jacks *v.* Dillon, 6 Tex. Civ. App. 192, 25 S. W. 645; Smith *v.* Garza, 15 Tex.

A. ABANDONMENT. — And, evidence of equal cogency will be required to show the abandonment of an adverse possession once initiated.[28]

150; Robinson *v.* Bazoon, 79 Tex. 524, 15 S. W. 585; Moore *v.* McCown (Tex. Civ. App.), 20 S. W. 1112; Thompson *v.* Dutton (Tex. Civ. App.), 69 S. W. 641; Kirkpatrick *v.* Tarlton (Tex. Civ. App.), 69 S. W. 179.

Vermont. — Buck *v.* Squires, 23 Vt. 498; Wing *v.* Hall, 47 Vt. 182; Webb *v.* Richardson, 42 Vt. 465; Perkins *v.* Blood, 36 Vt. 273.

West Virginia. — Swann *v.* Young, 30 W. Va. 57, 14 S. E. 426.

Wisconsin. — Warren *v.* Putnam, 63 Wis. 410, 24 N. W. 58.

Absence From State No Interruption if Possession Is Maintained by Tenants. — Evidence showing that a defendant claiming by adverse possession was absent from the state as was his grantor also, but the land was in possession of tenants during such absences, will operate as possession of such adverse claimant, so as to prevent any break in the possession. Ard *v.* Wilson, 60 Kan. 857, 56 Pac. 80, citing Corby *v.* Moran, 56 Kan. 278, 49 Pac. 82.

Vacancy During Change of Tenants Not Evidence of Relinquishment. — A mere vacancy in the occupancy of agricultural land for a reasonable time necessary to change tenants, will not necessarily interrupt a landlord's possession, in the absence of anything tending to show an intention on his part to relinquish a possession. Beasley *v.* Howell, 117 Ala. 499, 22 So. 989.

Faithless Acts of Agent Will Not Break Continuity of Possession. The continuity of a claimant's possession will not be deemed to have been interrupted by evidence that one who took possession at his request and agreed to maintain it for him afterwards yielded it to another in violation of his promise, the claimant having resumed possession directly upon learning such fact. Middlesborough Water Works Co. *v.* Neal 20 Ky. Law 1403, 49 S. W. 428.

28. *United States.* — Fletcher *v.* Fuller, 120 U. S. 534, 7 Sup. Ct. 667; Holtzapple *v.* Phillabaum, 4 Wash. C. C. 356, 12 Fed. Cas. No. 6648.

Alabama. — Perry *v.* Lawson, 112 Ala. 480, 20 So. 611.

California. — Baldwin *v.* Durfee, 116 Cal. 625, 48 Pac. 724; Roberts *v.* Unger, 30 Cal. 676.

Georgia. — King *v.* Sears, 91 Ga. 577, 18 S. E. 830.

Illinois. — Downing *v.* Mayes, 153 Ill. 330, 38 N. E. 620, 46 Am. St. Rep. 896.

Kentucky. — Middlesborough Water Works Co. *v.* Neal, 20 Ky. Law 1403, 49 S. W. 428; Smith *v.* Morrow, 5 Litt. 211; Myers *v.* McMillan, 4 Dana 485.

Maine. — Schwartz *v.* Kuhn, 10 Me. 274, 25 Am. Dec. 239; School District No. 4 in Winthrop *v.* Benson, 31 Me. 381, 52 Am. Dec. 618.

Michigan. — Rayner *v.* Lee, 20 Mich. 384; Lamoreaux *v.* Creveling, 103 Mich. 501, 61 N. W. 783.

Mississippi. — Ford *v.* Wilson, 35 Miss. 490, 72 Am. Dec. 137; Hooper *v.* Topley, 35 Miss. 506.

Missouri. — Crispen *v.* Hannavan, 50 Mo. 536; Hamilton *v.* Boggess, 63 Mo. 233; Western *v.* Flanagan, 120 Mo. 61, 25 S. W. 531; Fugate *v.* Pierce, 49 Mo. 441.

Nebraska. — Webb *v.* Thiele, 56 Neb. 752, 77 N. W. 56; Oldig *v.* Fisk, 53 Neb. 156, 73 N. W. 661.

New Hampshire. — Jones *v.* Merimack River Lumber Co., 31 N. H. 381.

New York. — Lewis *v.* N. Y. & H. R. Co., 162 N. Y. 202, 56 N. E. 541; Sherman *v.* Kane, 86 N. Y. 57; Northrop *v.* Wright, 7 Hill 476; Second Methodist Episcopal Church, 66 Hun 628, 21 N. Y. Supp. 89.

North Carolina. — Hamilton *v.* Icard, 114 N. C. 532, 19 S. E. 607.

Pennsylvania. — Susquehanna & R. R. Co. *v.* Quick, 68 Pa. St. 189; Stephens *v.* Leach, 19 Pa. St. 262; Schall *v.* Williams Val. R. Co., 35

B. Abandoned Occupancy Cannot Be Retrieved. — But, the continuity once severed by acts equivalent to an abandonment cannot be retrieved.[29]

Pa. St. 191; Byers *v.* Sheplar (Pa.), 7 Atl. 182.

Tennessee. — Fuller *v.* Jackson (Tenn.), 62 S. W. 274; Hornsby *v.* Davis (Tenn.), 36 S. W. 159.

Texas. — De La Vega *v.* Butler, 47 Tex. 529.

Vermont. — Patchin *v.* Stroud, 28 Vt. 394; Aldrich *v.* Griffith, 66 Vt. 390, 29 Atl. 376.

Absence of Statutory Requirement to Fence. — *Evidence as to Abandonment.* — Where the land in controversy is situated in territory where land owners are no longer required to keep lawful fences around their cultivated lands, the possession is not deemed abandoned when it is shown that the plaintiff used the land from year to year as is customary among farmers. Hamilton *v.* Icard, 114 N. C. 532, 19 S. E. 607.

Loose Talk Will Not Relinquish Rights. — Rights acquired by adverse possession cannot be devested by loose talk of the occupant Byers *v.* Sheplar (Pa.), 7 Atl. 182.

Evidence Not Showing Abandonment of Possession. — Evidence showing that one having entered upon land under color of title cultivated it except for one year, during which he pastured it, and kept up the farm fences, will not be treated as an abandonment of the possession. Perry *v.* Lawson, 112 Ala. 480, 20 So. 611.

Where claim of title to land by adverse possession is based upon the alleged substantial enclosure of the land by a fence for more than the statutory period, such title is not defeated by showing that the fences were down at intervals in consequence of floods. Baldwin *v.* Durfee, 116 Cal. 625, 48 Pac. 724.

Abandonment. — The possession of an ancestor will not avail if the premises are abandoned by the heir, but merely leaving them after improvements are destroyed, *animo revertendi,* is not an abandonment. Fugate *v.* Pierce, 49 Mo. 441.

Replacing of Structure No Abandonment. — The removal of one railroad structure followed immediately by the erection of another, in the same place and for the same purpose, is not evidence of abandonment of the prescriptive right to have a railroad structure in the street. Lewis *v.* N. Y. & H. R. Co., 162 N. Y. 202, 56 N. E. 540.

Purchase of Outstanding Title Does Not of Itself Break Continuity of Possession. — The purchase or attempted purchase of an outstanding title by one in adverse possession is not alone sufficient evidence to break the continuity of the possession or divest it of its adverse character. Webb *v.* Thiele, 56 Neb. 752, 77 N. W. 56.

29. *United States.* — Armstrong *v.* Morrell, 14 Wall. 120; Potts *v.* Gilbert, 3 Wash. C. C. 475.

Arkansas. — Sharp *v.* Johnson, 22 Ark. 79.

Georgia. — Thursby *v.* Myers, 57 Ga. 155; Byrne *v.* Lowry, 19 Ga. 27.

Kentucky. — Myers *v.* McMillan, 4 Dana 485.

Maine.—Hamilton *v.* Paine, 17 Me. 219; School District No. 4 in Winthrop *v.* Benson, 31 Me. 381, 52 Am. Dec. 618.

Mississippi. — Nixon *v.* Porter, 38 Miss. 401.

Missouri. — Hickman *v.* Link (Mo.), 7 S. W. 12; Menkins *v.* Blumenthal, 27 Mo. 198; Crispen *v.* Hanover, 50 Mo. 536.

New Hampshire. — Blaisdell *v.* Martin, 9 N. H. 253; Linen *v.* Maxwell, 67 N. H. 370, 40 Atl. 184.

New York. — Poor *v.* Horton, 15 Barb. 485; Jackson *v.* Harder, 4 Johns. 202, 4 Am. Dec. 262.

North Carolina. — Andrews *v.* Mulford, 1 Hayw. 320; Holdfast *v.* Shepard, 86 N. C. 251; Malloy *v.* Bruden, 86 N. C. 251.

Pennsylvania.—Susquehanna & W. V. R. Co. *v.* Quick, 68 Pa. St. 189.

Tennessee. — Free *v.* Fine (Tenn. App.), 59 S. W. 384.

13. Nature of Occupancy.—Evidence of Intention to Claim Ownership. The nature of the demonstrative acts of occupancy may be such as to show an intent to claim ownership independent of any oral statements by a claimant.[30]

Texas.—Ivey *v.* Petty, 70 Tex. 178, 7 S. W. 798; Collier *v.* Couts, 92 Tex. 234, 47 S. W. 525; Settegast *v.* O'Donnell, 16 Tex. Civ. App. 56, 41 S. W. 84.

Vermont.—Winslow *v.* Newell, 19 Vt. 164.

Virginia.—Taylor's Devisees *v.* Burnsides, 1 Gratt. 165.

West Virginia.—Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177; Parkerburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255.

Wisconsin.—Whittlesey *v.* Hoppenyan, 72 Wis. 140, 39 N. W. 355.

Effect of Abandonment.—If possession be abandoned the seizin of the true owner reverts and he may assert his right within the statutory period. Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177. When one quits possession, the siezin of the owner is restored. Hickman *v.* Link (Mo.), 7 S. W. 12.

30. *Alabama.*—Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443.

California.—Lick *v.* Diaz, 44 Cal. 479.

Georgia.—Morrison *v.* Hays, 19 Ga. 294.

Illinois.—James *v.* Indianapolis St. L. R. Co., 91 Ill. 554; Faloon *v.* Simshauser, 130 Ill. 649, 22 N. E. 835; Brooks *v.* Bruyn, 24 Ill. 373.

Indiana.—Webb *v.* Rhodes (Ind. App.), 61 N. E. 735.

Iowa.—Wilbur *v.* Cedar Rapids & M. R. Co. (Iowa), 89 N. W. 101.

Kansas.—Stockton *v.* Geissler, 43 Kan. 613, 23 Pac. 612.

Michigan.—Shearer *v.* Middleton, 88 Mich. 621, 50 N. W. 737.

Minnesota.—Dean *v.* Goddard, 55 Minn. 290, 56 N. W. 1060; Village of Glencoe *v.* Wadsworth, 48 Minn. 402, 51 N. W. 377; Butler *v.* Drake, 62 Minn. 229, 64 N. W. 559.

Mississippi.—Magee *v.* Magee, 37 Miss. 138; Davis *v.* Bounean, 55 Miss. 671.

Nebraska.—Fitzgerald *v.* Brewster, 31 Neb. 51, 47 N. W. 475.

New Jersey.—Johnston *v.* Fitz George, 50, 14 Atl. 762, 5 N. J. Law 470.

New York.—Barnes *v.* Light, 116 N. Y. 34, 22 N. E. 441; La Frambois *v.* Smith, 8 Cow. 589; Dominy *v.* Miller, 33 Barb. 386.

Oregon.—Swift *v.* Mulkey, 14 Or. 59, 12 Pac. 76.

Tennessee.—Cowen *v.* Hatcher (Tenn.), 59 S. W. 689; Hornsby *v.* Davis (Tenn.), 36 S. W. 159.

Virginia.—Brock *v.* Bear (Va.), 42 S. E. 307.

Evidence of Claim of Title. "The possession of real estate and its use and improvement by one as other persons are accustomed to use and improve their estates continued for twenty years, without recognizing title in anyone else or disclaiming it in himself, raise a presumption of entry and holding as owner, and unless rebutted by other evidence will establish the fact of claim of title." Webb *v.* Rhodes (Ind. App.), 61 N. E. 735.

Acts May Operate as Oral Declarations.—"Continuous and uninterrupted possession will not alone establish a claim of right; neither will payment of taxes; but when, with these circumstances, it also appears that the party has set out trees, erected a house and outbuildings, inclosed the premises by fence, cultivated the land, and in all respects treated it precisely as his own, a claim of right may be inferred, and treated as fully established as though shown by oral declarations of such claim." Wilbur *v.* Cedar Rapids & M. R. R. Co. (Iowa), 89 N. W. 101.

"There is no express parol evidence that the defendant claimed the title to the premises uninclosed by him, but that is to be inferred from the fact that the grant to his father was a grant in fee, and from the manner of his occupation, and the uses to which he applied the prem-

A. Oral Declarations. — The intent may also be shown by the oral declarations of the claimant made in connection with the possession.[31]

B. Evidence of Intent From Acts Must Show Continuous Hostility. — But, evidence of such intent by acts must show continuous hostility to all adverse claims.[32]

C. Secret Intent No Evidence, Except As Shown By Acts. The intent which determines the character of the possession is not the secret purpose of the occupant, except as manifested by his acts when sufficiently brought to the notice of the person to be affected.[33]

ises." Dominy *v.* Miller, 33 Barb. 386.

"The intent to claim may be inferred from the nature of the occupancy. Oral declarations are not necessary. Possessory acts, so as to constitute adverse possession, must necessarily depend upon the character of the property, its location, and the purposes for which it is ordinarily fit or adapted." Dean *v.* Goddard, 55 Minn. 290, 56 N. W. 1060.

"A claim of title may be made by acts alone quite as effectually as by the most emphatic assertions." Barnes *v.* Light, 116 N. Y. 34, 22 N. E. 441.

It is competent to show that one through whom claim is made performed work on the land during his lifetime, as tending to prove that he asserted title to it. Lick *v.* Diaz, 44 Cal. 479.

31. Patterson *v.* Reigh, 4 Pa. St. 201, 45 Am. Dec. 684; Blakely *v.* Morris, 89 Va. 717, 17 S. E. 126.

32. *United States.*—Bradstreet *v.* Huntington, 5 Pet. 402.

California. — Thompson *v.* Pioche, 44 Cal. 508; De Frieze *v.* Quint, 94 Cal. 653, 30 Pac. 1, 28 Am. St. Rep. 151.

Georgia. — Denham *v.* Holeman, 26 Ga. 182, 71 Am. Dec. 198.

Illinois. — McClellan *v.* Kellogg, 17 Ill. 498.

Mississippi. — Gordon *v.* Sizer, 39 Miss. 805.

Missouri. — Lynde *v.* Williams, 68 Mo. 360.

Nebraska. —Ballard *v.* Hansen, 33 Neb. 861, 51 N. W. 295.

Tennessee. — Hornsby *v.* Davis (Tenn.), 36 S. W. 159.

Texas. — Clark *v.* Keirby (Tex. Civ. App.), 25 S. W. 1096.

Utah. — Toltec Ranch Co. *v.* Babcock (Utah), 66 Pac. 876.

Hostility in Technical Sense Unnecessary. — "The possession, as appears from the evidence, was open, notorious, uninterrupted and peaceable, and under a claim of right. It must, therefore, necessarily be deemed to have been adverse to the holder of the legal title, and such long continued possession may be deemed to have been adverse though not in its character hostile." Toltec Ranch Co. *v.* Babcock (Utah), 66 Pac. 876.

Whilst one period of occupancy may be inadmissible as evidence of adverse possession it may be competent so far as exhibiting the character and intention of other holdings. Hornsby *v.* Davis (Tenn.), 36 S. W. 159.

"Wherever the proof is that one in possession holds for himself, to the exclusion of all others, the possession so held must be adverse to all others, whatever relation in point of interest or privity he may stand in to the others." Bradstreet *v.* Huntington, 5 Pet. 402.

33. *Alabama.* — East Tenn. V. & G. R. Co. *v.* Davis, 91 Ala. 615, 8 So. 349.

Arkansas. — Sharp *v.* Johnson, 22 Ark. 79.

California. — Gage *v.* Downey, 94 Cal. 241, 29 Pac. 635; Winterburn *v.* Chambers, 91 Cal. 170, 27 Pac. 658.

Connecticut. — French *v.* Pearce, 8 Conn. 440, 21 Am. Dec. 680.

Kentucky. — Myers *v.* McMillan, 4 Dana 485.

D. "Squatter." — This rule applies with all its force as against persons denominated "Squatters," who neither by acts on the land, nor otherwise, present any indicia of an adverse occupancy.[34]

14. Proof of Open and Adverse Use. — A. Visible Effects. Visible effects naturally implying the use of the land by some one may also afford sufficient notoriety of an occupancy adverse to the true owner.[35]

Missouri. — Comstock *v.* Eastwood, 108 Mo. 41, 18 S. W. 39.

Oregon. — Rowland *v.* Williams, 23 Or. 515, 32 Pac. 402.

Vermont. — Soule *v.* Barlow, 48 Vt. 132.

34. Blake *v.* Shriver (Wash.), 68 Pac. 330; Sackett *v.* McDonald, 8 Biss. 394, Fed. Cas. No. 12,202; Bell *v.* Fry, 5 Dana (Ky.) 341; Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255; Smeberg *v.* Cunningham, 96 Mich. 378, 56 N. W. 73, 35 Am. St. Rep. 613; Gay *v.* Mitchell, 35 Ga. 139, 89 Am. Dec. 278; *In re* City of New York, 63 Hun 630, 18 N. Y. Supp. 82.

"A strolling struggling occupancy will not constitute notice of adverse possession." Blake *v.* Shriver (Wash.), 68 Pac. 330.

35. *United States.* — Quindor Tp. *v.* Squier, 51 Fed. 152; Florida Southern R. Co. *v.* Loring, 51 Fed. 932.

Alabama. — Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443.

California. — Silvarer *v.* Hansen, 77 Cal. 579, 20 Pac. 136.

Connecticut. — St. Peter's Church *v.* Beach, 26 Conn. 354.

Illinois. — Sullivan *v.* Eddy, 154 Ill. 199, 40 N. E. 482; St. Louis A. & T. H. R. Co. *v.* Nugent, 152 Ill. 119, 39 N. E. 263.

Iowa. — Teabout *v.* Daniels, 38 Iowa 158.

Louisiana. — Michel *v.* Stream, 48 La. Ann. 341, 19 So. 215.

Maryland. — Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115.

Massachusetts. — Tufts *v.* Charleston, 117 Mass. 401.

Mississippi. — Huntington *v.* Allen, 44 Miss. 654.

Nebraska. — Omaha Florence Land & Trust Co. *v.* Hansen, 32 Neb. 449, 49 N. W. 456; Tourtelotte *v.* Pearce, 27 Neb. 57, 42 N. W. 915.

New Jersey. — Foulke *v.* Bond, 41 N. J. Law 527.

Washington. — Flint *v.* Long, 12 Wash. 342, 41 Pac. 49.

West Virginia. — Jarrett *v.* Stevens, 36 W. Va. 445, 15 N. E. 177.

Visible Evidence Imparting Notoriety of Claim. — Openness and notoriety and exclusiveness of possession are shown by such acts in respect to the land in its condition at the time as comport with ownership. Such acts as would ordinarily be performed by the true owner in appropriating the land or its avails to his own use and in preventing others from the use of it as far as reasonably practicable. Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443.

"The open and notorious use of this land as a public park, under claim of title, constituted a possession as effectual to bar the plaintiff's action as if it had been enclosed by a stone wall. The boundaries of the park were distinctly marked on the plat of the town which dedicated it to the public use as a park. The only possession of which it was susceptible was a possession consistent with its use as a park, and its open, public, and notorious use for that purpose was all the possession requisite to support the defendant's plea. The court erred in excluding the evidence offered; and for this error the judgment must be reversed, and the case remanded for a new trial." Quindor Tp. *v.* Squier, 51 Fed. 152.

What Sufficient Evidence of Adverse Use. — Adverse occupation will be evidenced by such use of the premises in question by the occupant and his privies as would indicate to a passerby, and to the owner if he went to them, that they were used and claimed by some one. Omaha Florence Land & Trust Co.

B. Otherwise, Of Land Not Susceptible of Occupancy. The rule last stated applies only in cases where the land is susceptible of being the means of such evidence.[36]

C. Reputation Incompetent. — Notoriety cannot be proved by reputation.[37]

D. Proof of Actual Knowledge Sufficient. — If it appear that the true owner has actual knowledge that an occupation is under claim adverse to himself, openness and notoriety become unimportant.[38]

15. Continuity. — A. Evidence of Permanent Occupancy. The possession must be shown to have been permanent in the practical sense.[39]

v. Hansen, 32 Neb. 449, 49 N. W. 456.

36. When Land Cannot Be Visibly Occupied. — If the evidence show an impossibility of inclosing, cultivating or otherwise employing land in any manner so notorious as may tend to attract the attention of opposing claimants, title cannot be acquired by adverse possession. McCook *v.* Crawford, 114 Ga. 337, 40 N. E. 225.

37. Notoriety of Occupation Not Proved by Reputation. — "It is notorious occupation which is one of the elements necessary to constitute a title by adverse possession. It is not proved by reputation. Notoriety of occupation is not to be inferred from notoriety of claim." Carter *v.* Clark, 92 Me. 225, 42 Atl. 398.

38. Dausch *v.* Crane, 109 Mo. 323, 19 S. W. 611; De Frieze *v.* Quint, 94 Cal. 653, 30 Pac. 1, 28 Am. St. Rep. 151.

Notoriety; Qualification of Rule. Possession taken under a parol gift is adverse in the donee against the donor, and if continued for fifteen years perfects the title of the donee as against the donor. The donor in such cases not only knows that the possession is adverse, but intends it to be, and there is no occasion for any notoriety. Clark *v.* Gilbert, 39 Conn. 94.

39. *United States.* — Zeilen *v.* Rogers, 21 Fed. 103.

California. — Hespera L. & W. Co. *v.* Rogers, 83 Cal. 10, 23 Pac. 196, 17 Am. St. Rep. 209; De Frieze *v.* Quint, 94 Cal. 653, 30 Pac. 1, 28 Am. St. Rep. 151.

Georgia. — Flannery *v.* Hightower, 97 Ga. 592, 25 S. E. 371.

Illinois. — Burns *v.* Edwards, 163 Ill. 494, 45 N. E. 113.

Indiana. — Mason *v.* Calumet Canal & Imp. Co., 150 Ind. 699, 50 N. E. 85.

Massachusetts. — Allan *v.* Holton, 37 Mass. 458.

Michigan. — Cornwell Mfg. Co. *v.* Swift, 89 Mich. 503, 50 N. W. 1001.

Minnesota. — Swan *v.* Munch, 65 Minn. 500, 67 N. W. 1022, 60 Am. St. Rep. 491, 35 L. R. A. 743.

No Unvarying Rule as to Nature of Possession. — "As to adverse possession there can be no absolutely unvarying rule with reference to every kind of real estate. The requirement as to the kind of occupancy of or dominion over land to show adverse possession in the case of a cultivated farm, a town lot or a residence in a populous city may be quite inapplicable or even impossible in the case of a piece of desert land, a mining claim, a non-navigable lake, a prairie or a forest." Mason *v.* Calumet Canal & Imp. Co., 150 Ind. 699, 50 N. E. 85.

Use Need Not Be Constant. — Occupation and use of a right of flowage or poundage in order to create a prescriptive right, need not be constant in the sense of a daily occupancy or use. It must be continuous and uninterrupted, but not necessarily constant. Cornwell Mfg. Co. *v.* Swift, 89 Mich. 503, 50 N. W. 1001.

B. Successive Possessions May Be Combined. — Distinct possessions of the same nature may be united successively in order to complete the requisite period.[40]

a. *Privity of Estate Must Be Shown.* — To effectually connect such distinct possessions it must appear that the actual relationship subsisting between such successive occupants was equivalent to a privity of estate.[41]

What Use Sufficient. — When the claimant needs the use of the easement from time to time, and so uses it, there is a sufficient continuous use to be adverse although it is not constant. Swan *v.* Munch, 65 Minn. 500, 67 N. W. 1022, 60 Am. St. Rep. 491, 35 L. R. A. 743.

"An omission to use when not needed does not disprove a continuity of use, shown by using when needed." Hespera L. & W. Co. *v.* Rogers, 83 Cal. 10, 23 Pac. 196, 17 Am. St. Rep. 209.

40. *United States.* — Walden *v.* Gratz, 14 U. S. 292, 4 L. Ed. 94; Walden *v.* Gratz, 1 Wheat, 292.

Alabama. — Smith *v.* Roberts, 62 Ala. 83.

Connecticut. — Fanning *v.* Willcox, 3 Day 258.

Illinois. — Weber *v.* Anderson, 73 Ill. 439.

Kentucky. — Shannon *v.* Kinny, 1 A. K. Marsh. 3, 10 Am. Dec. 705.

Massachusetts.—Leonard *v.* Leonard, 7 Allen 277.

Mississippi. — Benson *v.* Stewart, 30 Miss. 57; Harvey *v.* Briggs, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62.

Missouri. — Cooper *v.* Ord, 60 Mo. 420; Bakewell *v.* McKee, 101 Mo. 337, 14 S. W. 119.

North Carolina. — Alexander *v.* Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757; Miller *v.* Bumgardner, 109 N. C. 412, 13 S. E. 935.

New Jersey. — Colgan *v.* Pellens, 48 N. J. Law 27, 2 Atl. 633.

New York. — Reformed Church *v.* Schoolaraft, 65 N. Y. 134.

Oregon. — Clark *v.* Bundy, 29 Or. 190, 44 Pac. 282.

South Carolina. — McLeod *v.* Rogers, 2 Rich. Law 19; Johnson *v.* McMullan, 1 Strob. 143.

Tennessee. — Sims *v.* Eastland, 3 Head 308.

Tacking Successive Possessions. It is immaterial whether the possession be held for the entire period by one party, or by several parties in succession, provided the possession be continued and uninterrupted. Benson *v.* Stewart, 30 Miss. 57.

41. *United States.* — Christy *v.* Aloord, 58 U. S. 601; Patterson *v.* Games, 47 U. S. 550; Shuffleton *v.* Nelson, 2 Sawy. 540, 22 Fed. Cas. No. 12,822.

Alabama. — Ross *v.* Goodwin, 88 Ala. 390, 6 So. 682; Louisville & N. R. Co. *v.* Philyaw, 88 Ala. 264, 6 So. 837; Carter *v.* Chevalier, 108 Ala. 563, 19 So. 798.

California. — Allen *v.* McKay, 120 Cal. 332, 52 Pac. 828; San Francisco *v.* Fulde, 37 Cal. 349, 99 Am. Dec. 278; Pulliam *v.* Bennett, 55 Cal. 368.

Colorado. — Evans *v.* Welsh (Colo.), 68 Pac. 770.

Florida. — Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871.

Georgia. — Burch *v.* Burch, 96 Ga. 133, 22 S. E. 718; Morrison *v.* Hays, 19 Ga. 294.

Indiana. — Doe *v.* Brown, 4 Ind. 143; McEntire *v.* Brown, 28 Ind. 347.

Kentucky. — Winn *v.* Wilhite, 5 J. J. Marsh. 521; Bell *v.* Fry, 5 Dana 341.

Maine. — Cornville *v.* Hutchins, 73 Me. 227.

Maryland. — Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115.

Massachusetts. — Haynes *v.* Bordman, 119 Mass. 414; Wade *v.* Lindsey, 6 Metc. 407.

Minnesota. — Witt *v.* Railway Co., 38 Minn. 122, 35 N. W. 862; Ramsey *v.* Glenny, 45 Minn. 401, 48 N. W. 322.

Mississippi. — Huntington *v.* Allen, 44 Miss. 654.

Missouri. — Adkins *v.* Tomlinson,

b. *Privity, How Proved.* — Privity may be established by oral proof.[42]

Distinctions Respecting Actual and Constructive Possessions. — In some jurisdictions the doctrine appears to obtain, that written evidence is necessary to effect the required privity between successive occupants; except as to so much of the land as may be treated as actually occupied.[43]

121 Mo. 487, 26 S. W. 573; Crispen *v.* Hannovan, 50 Mo. 536.

Nebraska. — Carson *v.* Dundas, 39 Neb. 503, 58 N. W. 141.

New Hampshire.—Locke *v.* Whitney, 63 N. H. 597, 3 Atl. 920.

New Jersey. — Davock *v.* Nealon, 58 N. J. Law 21, 32 Atl. 675.

New York. — Simpson *v.* Downing, 23 Wend. 316.

Oregon. — Low *v.* Schaffer, 24 Or. 239, 33 Pac. 678; Rowland *v.* Williams, 23 Or. 515, 32 Pac. 402.

Pennsylvania. — Schrack *v.* Zubler, 34 Pa. St. 38.

Tennessee. — Marr *v.* Gilliam, 1 Cold. 488; Erck *v.* Church, 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641.

Texas. — Heflin *v.* Burns, 70 Tex. 347, 8 S. W. 48; Wheeler *v.* Moody, 9 Tex. 372; Chandler *v.* Rushing, 38 Tex. 591; Brownson *v.* Scanlan, 59 Tex. 222.

West Virginia. — Jarrett *v.* Stephens, 36 W. Va. 445, 15 S. E. 177.

Wisconsin. — Allis *v.* Field, 89 Wis. 327, 62 N. W. 85; Ryan *v.* Schwartz, 94 Wis. 403, 69 N. W. 178.

Privity Required. — "There must be privity of grant or descent, or some judicial or other proceedings which shall connect the possessions so that the latter shall apparently hold by the former." Crispen *v.* Hannovan, 50 Mo. 536.

42. *England.* — Cunningham *v.* Patton, 6 Burr 357; Schutz *v.* Fitzwater, 5 Burr 131; Carter *v.* Bomard, 13 Q. B. 945; Dixon *v.* Gufere, 17 Brev. 421.

United States.—Shuffleton *v.* Nelson, 2 Sawy. 540, 22 Fed. Cas. No. 12,822.

Alabama. — Dothard *v.* Denson, 72 Ala. 541.

Connecticut. — Smith *v.* Chapin, 31 Conn. 580.

Illinois. — Faloon *v.* Simshauser, 130 Ill. 649, 22 N. E. 835; Weber *v.* Anderson, 73 Ill. 439.

Kentucky. — Winn *v.* Wilhite, 5 J. J. Marsh. 521.

Minnesota. — Sherin *v.* Brackett, 36 Minn. 152, 30 N. W. 551; Vandall *v.* St. Martin, 42 Minn. 163, 44 N. W. 525.

Missouri. — Menkins *v.* Blumenthal, 27 Mo. 198; Crispen *v.* Hannovan, 50 Mo. 536; Atkins *v.* Tomlinson, 121 Mo. 487, 26 S. W. 573.

Oregon. — Vance *v.* Wood, 22 Or. 77, 29 Pac. 73; Rowland *v.* Williams, 23 Or. 515, 32 Pac. 402.

Tennessee. — Rambert *v.* Edmundson (Tenn.), 41 S. W. 935; Erck *v.* Church, 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641.

Texas. — McManus *v.* Mathews (Tex. Civ. App.), 55 S. W. 589; Johnson *v.* Simpson (Tex. Civ. App.), 54 S. W. 308.

Wisconsin. — Ryan *v.* Schwartz, 94 Wis. 417, 69 N. W. 178.

Parol Evidence Admissible to Establish Privity Between Occupants. Parol evidence is admissible to establish a privity of possession between occupants under statutes of limitation, in order to make up the requisite period from successive holdings of the several occupants. Johnson *v.* Simpson (Tex. Civ. App.), 54 S. W. 308.

A verbal agreement between the grantor and grantee that a strip within the enclosure but outside the limits of the deed should pass to the grantee established such privity of possession in respect to such strip as that the successive possessions of the grantor and grantee could be tacked together so as to make out a bar of statute. Rambert *v.* Edmundson (Tenn.), 41 S. W. 935.

43. Simpson *v.* Downing, 23

16. Transfer, How Proved. — A. By Any Agreement or Understanding Carried Into Effect. — Such successive transfers may be evidenced by any conveyance, agreement, or understanding in pursuance of which a transfer ensues.[44]

B. Possessions of Ancestor and Heir Are in Privity. — Evidence showing that an adverse possession initiated by one dying before it ripened into title was continued by his heirs or representatives, may be sufficient to establish the privity essential to connect such distinct possessions.[45]

Wend. (N. Y.) 316; Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871.

44. *United States.* — Shuffleton *v.* Nelson, 2 Sawy. 540, 22 Fed. Cas. No. 12,822.

Illinois. — Chicago & A. R. Co. *v.* Keegan, 185 Ill. 70, 56 N. E. 1088; Weber *v.* Anderson, 73 Ill. 439; Downing *v.* Mayes, 153 Ill. 330, 38 N. E. 620, 46 Am. St. Rep. 896.

Indiana. — Buchanan *v.* Whitham, 36 Ind. 257.

Kentucky. — Shannon *v.* Kinney, 1 A. K. Marsh. 3.

Maine. — Moore *v.* Moore, 21 Me. 350.

Massachusetts. — Wishart *v.* McKnight, 178 Mass. 356, 59 N. E. 1028; Chapin *v.* Freeland, 142 Mass. 383, 8 N. E. 128, 56 Am. Rep. 701.

Minnesota. — Vandall *v.* St. Martin, 42 Minn. 163, 44 N. W. 525; Ramsey *v.* Glenny, 45 Minn. 401, 48 N. W. 322.

Missouri. — Crispen *v.* Hannovan, 50 Mo. 536.

New York. — Jackson *v.* Moore, 13 Johns. 513.

Ohio. — McNeely *v.* Langan, 22 Ohio St. 32.

Oregon. — Vance *v.* Wood, 22 Or. 77, 29 Pac. 73.

Pennsylvania. — Scheltz *v.* Fitzwater, 5 Pa. St. 126.

Tennessee. — Marr *v.* Gilliam, 1 Cold. 488; Rambert *v.* Edmondson (Tenn.), 41 S. W. 935.

Texas. — McManus *v.* Mathews (Tex. Civ. App.), 55 S. W. 589.

Vermont. — Winslow *v.* Newell, 19 Vt. 164.

"But not even a writing is necessary if it appear that the holding is continuous and under the first entry, and this doctrine applies not only to actual but constructive possession under color of title. Such possession tacks to that of previous holders, if there has been a colorable transfer." Crispen *v.* Hannovan, 50 Mo. 536.

Parol Evidence Admissible to Show Transfer of Possession. "When one person succeeds to the possession of another, and it becomes necessary to connect the possession of the two to make the period required to bar the owner, the transfer of possession may be shown by parol evidence." Chicago & A. R. Co. *v.* Keegan, 185 Ill. 70, 56 N. E. 1093.

45. *Alabama.* — Jay *v.* Stein, 49 Ala. 514.

Illinois. — Horner *v.* Reuter, 152 Ill. 106, 38 N. E. 747.

Indiana. — McEntire *v.* Brown, 28 Ind. 347.

Iowa. — Hamilton *v.* Wright, 30 Iowa 480.

Kentucky. — Mills *v.* Bodley, 4 T. B. Mon. 248.

Massachusetts. — Haynes *v.* Bordman, 119 Mass. 414; Leonard *v.* Leonard, 7 Allen 277.

Minnesota. — Witt *v.* Railway Co., 38 Minn. 122, 35 N. W. 862; Sherin *v.* Brackett, 36 Minn. 152, 30 N. W. 551.

Mississippi. — Hanna *v.* Renfro, 32 Miss. 125; Magee *v.* Magee, 37 Miss. 138.

Missouri. — St. Louis *v.* Gorman, 29 Mo. 593, 77 Am. Dec. 586; Frigati *v.* Pierce, 49 Mo. 441.

North Carolina. — Trustees of the University *v.* Blount, 4 N. C. 13.

Oregon. — Rowland *v.* Williams, 23 Or. 515, 32 Pac. 402.

Tennessee. — Marr *v.* Gilliam, 1 Cold. 488.

C. Particular Description Not Always Necessary. — If land not included in a deed description, but lying contiguous to that actually described, be occupied in like manner as the other, it will pass by a deed following the original description.[46]

17. Period Need Not Be That Next Preceding. — The period requisite to confer title by adverse possession need not be that immediately preceding a given date.[47]

Vermont. — Alexander *v.* Stewart, 50 Vt. 87.

West Virginia. — Ketchum *v.* Spurlock, 34 W. Va. 597, 12 S. E. 832.

46. Rights of Successive Disseizors May Be Transferred in Pais. If the successive owners of a lot of land for a continuous period of twenty years occupy and use a strip of land adjoining, the possession of which is transferred to each successive grantee but described in none of the deeds, the right of the owner of the record title will be barred. Wishart *v.* McKnight, 178 Mass. 356, 59 N. E. 1028.

Acts Evidencing Privity of Possession. — If one holding the legal paper title to a piece of land, in enclosing it, include within the enclosure a piece of adjoining land, enters into possession of the entire enclosed tract and then transfers his legal paper title to another, who goes into possession of the entire tract, this is sufficient evidence of a transfer of possession to create a privity and tack the two possessions together to make out an adverse possession of twenty years. Davock *v.* Nealon (N. J.), 32 Atl. 675.

Rights Under Adverse Possession Transferable in Pais. — It is settled that one who has the possession of land is thereby invested with the right to that land, which in the absence of a better title will be enforced by law . . . and this possession, and the right arising out of it may be transferred *in pais* to another." Wishart *v.* McKnight, 178 Mass. 356, 59 N. E. 1028.

Possession of Land Outside of Deed Limits Cannot Be Tacked. A claimant of land by adverse possession cannot tack to the time of his possession that of a previous holder, when the land is not included in the boundaries in the deed from such holder." Vicksburg & Pac. R. Co. *v.* Le Rosen, 52 La. Ann. 192, 26 So. 854.

47. *Alabama.* — Echols *v.* Hubbard, 90 Ala. 309, 7 So. 817; Hoffman *v.* White, 90 Ala. 354, 7 So. 816.

California. — Unger *v.* Mooney, 63 Cal. 586, 49 Am. Rep. 100; Cannon *v.* Stockmon, 36 Cal. 535, 95 Am. Dec. 205; Webber *v.* Clarke, 74 Cal. 11, 15 Pac. 431.

Minnesota. — Dean *v.* Goddard, 55 Minn. 290, 56 N. W. 1060.

Mississippi. — Geohegan *v.* Marshall, 66 Miss. 676, 6 So. 502.

Missouri. — Allen *v.* Mansfield, 82 Mo. 688; Crispen *v.* Hannovan, 50 Mo. 536.

New York. — Sherman *v.* Kane, 86 N. Y. 57.

North Carolina. — Christenbury *v.* King, 85 N. C. 229.

Pennsylvania. — Union Canal Co. *v.* Young, 1 Whart. 410, 30 Am. Dec. 212.

Texas. — Branch *v.* Baker, 70 Tex. 190, 7 S. W. 808.

Need Not Be Ten Years Immediately Preceding. — "On the contrary we understand the law to be that any ten years of continuous adverse possession before suit brought will vest title in the holder as efficiently and absolutely, for all purposes as would an absolute conveyance from the holder of the fee." Echols *v.* Hubbard, 90 Ala. 309, 7 So. 817. The ten years relied on need not be those next before the action brought. Allen *v.* Mansfield, 82 Mo. 688; Unger *v.* Mooney, 63 Cal. 586, 49 Am. Rep. 100. Need not be twenty years immediately preceding the date upon which an amended act shortening the time to

IV. PRESUMPTIVE EVIDENCE.

1. Presumptions All in Favor of True Owner. — The weight of authority supports the rule that every presumption is in favor of a possession in subordination to the title of the true owner.[48]

2. Owner Seized in Fee Simple Presumed to Be Entitled to Possession. — And, that in the absence of countervailing proof, one shown to be seized in fee simple is deemed in constructive possession and rightfully entitled to the actual possession.[49]

fifteen years, went into effect. Dean *v.* Goddard, 55 Minn. 290, 56 N. W. 1060.

48. *United States.* — McClurg *v.* Ross, 5 Wheat. 116.

Colorado. — Evans *v.* Welsh (Colo.), 68 Pac. 776.

Florida. — Barrs *v.* Brace, 38 Fla. 265, 20 So. 991.

Georgia. — Gay *v.* Mitchell, 35 Ga. 139, 89 Am. Dec. 278; English *v.* Register, 7 Ga. 387.

Illinois. — Bryan *v.* East St. Louis, 12 Ill. App. 390.

Mississippi. — Davis *v.* Bouneau, 55 Miss. 671.

Missouri. — Meylar *v.* Hughes, 60 Mo. 105.

New York. — Jackson *v.* Sharp, 9 Johns. 163, 6 Am. Dec. 267; Doherty *v.* Matsell, 119 N. Y. 646, 23 N. E. 994; Heller *v.* Cohen, 154 N. Y. 299, 48 N. E. 527; Lewis *v.* N. Y. H. R. Co., 162 N. Y. 202, 56 N. E. 540.

Tennessee. — Marr *v.* Gilliam, 1 Cold. 488.

Wisconsin. — Fuller *v.* Worth, 91 Wis. 406, 64 N. W. 995.

Possession Presumed To Be Under That One of Two Instruments Which Is Subservient. — When the evidence shows an occupant to be in possession under two separate instruments; one subservient and the other hostile to the true owner, such possession, in the absence of positive notice to the contrary, will be regarded as subservient only; the law raising a presumption in favor of an honest and against a dishonest purpose. Lewis *v.* N. Y. H. R. Co., 162 N. Y. 202, 56 N. E. 540.

Presumptive Evidence. — "And this doctrine of adverse possession is to be taken strictly, and must be made out by clear and positive proof, and not by inference; every presumption being in favor of a possession in subordination to the title of the true owner." Marr *v.* Gilliam, 1 Cold. (Tenn.) 488.

"The presumption is that the possession is in subordination to the actual title." Heller *v.* Cohen, 154 N. Y. 299, 48 N. E. 527.

49. *United States.* — Brownsville *v.* Cavazos, 100 U. S. 138; Lamb *v.* Burbank, 1 Sawy. 227, 14 Fed. Cas. No. 8112; Thomas *v.* Hatch, 3 Sum. 170, 23 Fed. Cas. No. 13,899; U. S. *v.* Arredondo, 6 Pet. 691; Lanvell *v.* Stevens, 12 Fed. 559.

Arkansas. — Miller *v.* Fraley, 23 Ark. 735; Scanlan *v.* Guiling, 63 Ark. 540, 39 S. W. 713.

Massachusetts. — Kennebeck Purchase *v.* Call, 1 Mass. 483.

Minnesota. — Washburn *v.* Cutter, 17 Minn. 361.

New Jersey. — Saxton *v.* Hunt, 20 N. J. Law 487.

New York. — Howard *v.* Howard, 17 Barb. 663.

Vermont. — Holley *v.* Hawley, 39 Vt. 525, 94 Am. Dec. 350.

Washington. — Balch *v.* Smith, 4 Wash. 497, 30 Pac. 648.

Seizin Presumes Possession. Where it appears that the parties are seized in fee simple this gives them constructive possession and the right to actual possession, which will be presumed until the contrary appears. Lamb *v.* Burbank, 1 Sawy. 227, 14 Fed. Cas. No. 8112.

Where evidence shows that there has never been any possession, adverse or otherwise, the possession follows the legal title by construction Scanlan *v.* Guiling, 63 Ark. 540, 39 S. W. 713.

Ownership and Seizin Presumed to

3. Mixed Possession Governed by the Same Rule. — The principle applies also in case of a mixed possession.[50]

4. Grant From State May Be Presumed. — In support of a claim by adverse possession, a grant from the state may be presumed from facts and circumstances.[51]

Continue. — Where ownership and seizin are once shown it will be presumed to have continued until such presumption is overcome by allegation and proof of adverse possession in some one else. Balch *v.* Smith, 4 Wash. 497, 30 Pac. 648.

Legal Owner Presumed in Possession. — Every person is presumed to be in the legal seizin and possession of the land to which he has a perfect title, until ousted by an actual possession in another under a claim of right. U. S. *v.* Arredondo, 6 Pet. 691.

50. *United States.* — Lanvell *v.* Stevens, 12 Fed. 559; Brownsville *v.* Cavazos, 100 U. S. 138; National Water Works Co. *v.* Kansas City, 78 Fed. 428.

Kentucky. — McConnell *v.* Wilborn (Ky. App.), 24 S. W. 627; Pollit *v.* Bland (Ky. App.), 22 S. W. 842.

Louisiana. — Wafer *v.* Pratt, 1 Rob. 41, 36 Am. Dec. 681.

Maryland. — Cheney *v.* Ringgold, 2 Har. & J. 87.

Massachusetts. — Leach *v.* Woods, 14 Pick. 461.

Missouri. — Crispen *v.* Hannovan, 50 Mo. 536; Robert *v.* Walsh, 19 Mo. 452.

New Hampshire. — Bailey *v.* Carleton, 12 N. H. 9, 37 Am. Dec. 190.

New York. — Culver *v.* Rhodes, 87 N. Y. 348.

Pennsylvania. — Union Canal Co. *v.* Young, 1 Whart. 410, 30 Am. Dec. 212.

Tennessee. — Fancher *v.* De Montegre, 1 Head 40.

South Carolina. — Lloyd *v.* Rawl (S. C.), 41 S. E. 312.

Neither Concurrent Occupant Acquires Title Adversely. — Evidence showing several to have held contemporaneous use and occupation of property devolves the title upon the holder of the legal title. Wafer *v.* Pratt, 1 Rob. 41, 36 Am. Dec. 681.

In Mixed Possessions Legal Right Controls. — Where two persons are in mixed possession of the same land, one by title the other by wrong, the law considers the one who has the title as in possession to the extent of his right, so as to preclude the other from taking advantage of the statute of limitations. Cheney *v.* Ringgold, 2 Har. & J. (Md.) 87; Crispen *v.* Hannovan, 50 Mo. 536.

"Where actual possession is claimed by both the law presumes it to have been with him who has the right." Pollit *v.* Bland (Ky. App.), 22 S. W. 842.

Mixed Possession. — The possession follows the title, and if the owner and others are in possession, the law considers the owner to have the possession. Lanvell *v.* Stevens, 12 Fed. 559.

Where there has been a mixed possession of the parties, continued contest and litigation for a long time before suit and no actual possession by either claimant of a large portion of the property, no prescriptive rights can be claimed. Brownville *v.* Cavazos, 100 U. S. 138.

"And this rule applies as strongly in favor of the children and other members of the father's family as strangers." Fancher *v.* De Montegre, 1 Head. 40.

51. *United States.* — Jackson *v.* Porter, 1 Paine 457, 13 Fed. Cas. No. 7143; Barclay *v.* Howell, 6 Pet. 498.

Alabama. — Stodder *v.* Powell, 1 Stew. 287.

Kentucky. — Jorboe *v.* McAtee, 7 B. Mon. 279.

Maine. — Crooker *v.* Pendleton, 23 Me. 339.

Maryland. — Casey *v.* Inloes, 1 Gill. 430, 39 Am. Dec. 658.

Michigan. — State *v.* Dickinson (Mich.), 88 N. W. 621.

Missouri. — McNair *v.* Hunt, 5 Mo. 300.

This Presumption May Be Rebutted by Contrary Presumptions. — But the presumption of a grant may be rebutted by contrary presumptions.[52]

5. Peaceable Possession, Effect Of. — **Proof of Peaceable Possession Establishes Prima Facie Right.** — And, evidence merely showing one to be in peaceable possession of land establishes a *prima facie* title which will defeat an adversary who neither asserts title in himself nor shows it to be in another.[53]

When Possession Presumed to Be Adverse. — Possession accompanied by the usual acts of ownership is presumed to be adverse until shown to be subservient to the title of another.[54]

6. Unexplained Possession Shows Prima Facie Title. — And, an unexplained possession will be sufficient *prima facie* evidence of title by adverse possession.[55]

North Carolina. — Rogers *v.* Mabe, 4 Dev. 180; Reed *v.* Earnhart, 10 Ired. 516; Phipps *v.* Pierce, 94 N. C. 514; Hamilton *v.* Icard, 114 N. C. 532, 19 S. E. 607.

Tennessee. — Scales *v.* Cockrill, 3 Head 432; Hanes *v.* Peck, Mart. & Y. 228; Gilchrist *v.* McGee, 9 Yerg. 455.

Vermont. — Victory *v.* Wells, 39 Vt. 488.

Grant Presumed Against the State. A grant to land may be presumed against the state from facts and circumstances in cases where the original grant cannot be produced and no record of it can be shown. State *v.* Dickinson (Mich.), 88 N. W. 621.

"In order to raise a presumption of grant from the state it is not necessary to show a continuous and unceasing possession. A break of two or three years in the chain of possession or a failure to show a connection between successive occupants, is not a fatal defect in the proof, where in the aggregate, the actual possession has extended over the statutory period." Hamilton *v.* Icard, 114 N. C. 532, 19 S. E. 607.

52. Hurst *v.* McNeil, 1 Wash. C. C. 70, 12 Fed. Cas. No. 6936.

Presumption of Grant May Be Rebutted by Contrary Presumptions. The presumption of a grant arising from lapse of time may be rebutted by contrary presumptions, and can never arise where all the circumstances are entirely consistent with the non-existence of the grant, nor where the claim is at variance with the supposition of a grant. Randale *v.* Grove, 4 McLean 282, 20 Fed. Cas. No. 11,570.

53. Reed *v.* C. M. St. P. R. Co., 71 Wis. 399, 37 N. W. 225; Moore *v.* Chicago M. & St. P. R. Co., 78 Wis. 120, 47 N. W. 273; Record *v.* Williams, 7 Wheat. 59.

Possession Prima Facie Title. "A defendant in possession of land, when sued in ejectment, stands upon his possession, and the law requires nothing at his hands in defense until the plaintiff has made out a *prima facie* title and shown a present right under it to recover the land." Atkinson *v.* Smith (Va.), 24 S. E. 901.

54. Barnes *v.* Light, 116 N. Y. 34, 22 N. E. 441; Neel *v.* McElheny, 69 Pa. St. 300; Gillispe *v.* Jones, 26 Tex. 543; Black *v.* Tennessee Coal & Iron Railroad Co., 93 Ala. 109, 9 So. 537.

Open and Notorious Possession and Cultivation Presumed To Be Adverse. — In the absence of evidence to the contrary open and notorious possession of realty by occupancy and customary cultivation will be presumed to be adverse. Hammond *v.* Crosby, 68 Ga. 767.

Such actual possession, being an open and patent fact, furnishes evidence of its own existence, and is the equivalent of actual notice of the claim under which it is held. Murray *v.* Hoyle, 92 Ala. 599, 9 So. 368.

55. Woolman *v.* Ruehle, 104 Wis. 603, 80 N. W. 919; Bryan *v.* Spivey,

7. Presumption of Same Possession During Intermediate Period. The presumption will be admitted that during a period no evidence touches, the condition and occupancy of the property were the same as they are proved to have been at the commencement and close of the period.[56]

V. WRITTEN EVIDENCE NOT INDISPENSABLE.

1. Written Evidence Not Indispensable to Prove Title or Color of Title. — In the absence of statutory requirement to the contrary, title by adverse possession may be established independent of any written evidence tending to show either title or color of title in such claimant.[57]

109 N. C. 57, 13 S. E. 766; Heller *v.* Peters, 140 Pa. St. 648, 21 Atl. 416; Rowland *v.* Williams, 23 Or. 515, 32 Pac. 402; Keith *v.* Keith, 104 Ill. 397.

Unexplained Possession Prima Facie Title. — "The rule has been frequently asserted that unexplained occupancy, continued for twenty years, raises the presumption that such occupancy was under claim of right and adverse. . . . Such possession when estahlished, is conclusive as to the nature of the possession, unless rebutted or explained away by some satisfactory evidence." Bishop *v.* Bleyer, 105 Wis. 330, 81 N. W. 413.

Possession of land unexplained is presumed to be adverse. Alexander *v.* Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757.

Occupation for ten years unexplained will be presumed to have been made under a claim of right and adverse, and will authorize the presumption of a grant unless contradicted or explained. Swift *v.* Mulkey, 14 Or. 59, 12 Pac. 76.

56. People *v.* Trinity etc., 22 N. Y. 44; Cahill *v.* Palmer, 45 N. Y. 478; Alabama State Land Co. *v.* Keyle, 99 Ala. 474, 13 So. 43.

57. *United States.* — Probst *v.* Trustees, 129 U. S. 182; Roberts *v.* Pillow, Hempst, 624, 20 Fed. Cas. No. 11,909; Zeilin *v.* Rogers, 21 Fed. 103.

Alabama. — Murray *v.* Hoyle, 92 Ala. 559, 9 So. 368; Lee *v.* Thompson, 99 Ala. 95, 11 So. 672; Lucy *v.* Tennessee & C. R. Co., 92 Ala. 246, 8 So. 806; Smith *v.* Roberts, 62 Ala. 83; Wilson *v.* Glenn, 68 Ala. 383; Alexander *v.* Wheeler, 78 Ala. 167.

Arkansas. — Trotter *v.* Neal, 50 Ark. 340, 7 S. W. 384.

California. — Tuffree *v.* Polhemus, 108 Cal. 670, 41 Pac. 806; Cook *v.* McKinney (Cal.), 11 Pac. 799.

Georgia. — Laromore *v.* Minish, 43 Ga. 282; Pandergrast *v.* Gullatt, 10 Ga. 218.

Illinois. — Noyes *v.* Hefferman, 153 Ill. 339, 38 N. E. 571; McClellan *v.* Kellogg, 17 Ill. 498; Weber *v.* Anderson, 73 Ill. 439.

Indiana. — Wood *v.* Kuper, 150 Ind. 622, 50 N. E. 755; Moore *v.* Hinkle, 151 Ind. 343, 50 N. E. 882; Bowen *v.* Swander, 121 Ind. 164, 22 N. E. 725; Roots *v.* Beck, 109 Ind. 472, 9 N. E. 698.

Iowa. — Watters *v.* Connelly, 59 Iowa 217, 13 N. W. 82.

Kansas. — Anderson *v.* Burnham, 52 Kan. 454, 34 Pac. 1056; Wood *v.* M. K. T. R. Co., 11 Kan. 323.

Kentucky. — Spradlin *v.* Spradlin 13 Ky. Law 723, 18 S. W. 14; Thompson *v.* Thompson, 93 Ky. 435, 20 S. W. 373; Taylor *v.* Buckner, 2 A. K. Marsh. 18, 12 Am. Dec. 354; Young *v.* Cox, 12 Ky. Law 347, 14 S. W. 348.

Louisiana. — Durel *v.* Tennison, 31 La. Ann. 538.

Maine. — Jewett *v.* Hussey, 70 Me. 435; School Dist. *v.* Benson, 31 Me. 381, 52 Am. Dec. 618; Moore *v.* Moore, 61 Me. 417; Martin *v.* Maine Cent. R. Co., 83 Me. 100, 21 Atl. 740; Wiggins *v.* Mullen (Me.), 52 Atl. 791.

Massachusetts. — Sumner *v.* Stevens, 6 Metc. 337.

Michigan. — Sanscrainte *v.* Torongo,

2. Is Always of Primary Importance in Fixing Limits.—But, written evidence of title or color of title is always of primary importance as tending by construction to render the actual occupancy co-extensive with the muniment description not adversely occupied,[58] and as

87 Mich. 69, 49 N. W. 497; Shafer *v.* Hansen (Mich.), 35 L. R. A. 835.

Minnesota. — Village of Glencoe *v.* Wadsworth, 48 Minn. 402, 51 N. W. 377.

Mississippi. — Wilson *v.* Williams, 52 Miss. 487; Davis *v.* Bowman, 55 Miss. 671; Magee *v.* Magee, 37 Miss. 138.

Missouri. — Rannels *v.* Rannels, 52 Mo. 112; Minkins *v.* Blumenthal, 27 Mo. 198; Bushey *v.* Glenn, 107 Mo. 331, 17 S. W. 969; Mather *v.* Walsh, 107 Mo. 121, 17 S. W. 735.

Montana. — Minnesota & M. L. Imp. Co. *v.* Brasier, 18 Mont. 444, 45 Pac. 632.

Nebraska.—Fitzgerald *v.* Brewster, 31 Neb. 51, 47 N. W. 475; Omaha Loan & Trust Co. *v.* Barrett, 31 Neb. 803, 48 N. W. 967.

New York.—La Frombois *v.* Jackson, 8 Cow. 859; Jackson *v.* Olitz, 8 Wend. 440; Humbert *v.* Trinity Church, 24 Wend. 587.

Ohio. — McNeeley *v.* Langan, 22 Ohio St. 32.

Oregon. — Swift *v.* Mulkey, 14 Or. 59, 12 Pac. 76.

Pennsylvania. — McCall *v.* Neeley, 3 Watts 72; Prager *v.* Stoud (Pa. St.), 18 Atl. 637; Watson *v.* Gregg, 10 Watts 289, 36 Am. Dec. 176.

Tennessee. — Marr *v.* Gilliam, 1 Cold. 488.

Texas. — Shepard *v.* G. R. Co., 2 Tex. Civ. App. 535, 22 S. W. 267; Grimes *v.* Bastrap, 26 Tex. 310.

Vermont. — Jakeway *v.* Barrett, 38 Vt. 316; Swift *v.* Gage, 26 Vt. 224.

Washington.—Moore *v.* Brownfield, 7 Wash. 23, 34 Pac. 199.

West Virginia. — Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255.

Paper Evidence Unnecessary. "There is no case to be found which holds that this adverse claim of title must be found in some written instrument." Probst *v.* Trustees etc., 120 U. S. 182.

"And it follows, from this case, and the authorities cited, that to create the presumption, it is not necessary that the possession, either in its origin or its continuance, should be accompanied by deeds, or other writings; and they are only material to extend the boundary where a constructive possession is claimed beyond the actual occupation." Marr *v.* Gilliam, 1 Cold. (Tenn.) 488.

Title Equally Potent Whether With or Without Color. — "An adverse possession of land which continues unbroken for ten years, will confer a title which will sustain as well as defeat an action of ejectment and the principle applies alike where possession is held under color or claim of title and where possession was that of a mere trespasser." Lucy *v.* Tennessee & C. R. Co., 92 Ala. 246, 8 So. 806.

Oral Claim of Actual Occupant Sufficient. — Where there is an actual occupation of the premises, an oral claim is sufficient to sustain the defense of adverse possession; it is only where a constructive adverse possession is relied upon, that the claim must be founded on color of title by deed or other documental semblance of right. Humbert *v.* Trinity Church, 24 Wend. (N.Y.) 587.

58. *United States.*— Brobst *v.* Brock, 10 Wall. 519; Elliott *v.* Pearl, 1 McLean 206, 8 Fed. Cas. No. 4386; Smith *v.* Gale, 144 U. S. 509, 12 Sup. Ct. 674; Clark *v.* Courtney, 5 Pet. 318; Fussell *v.* Hughes, 8 Fed. 384; Van Gunden *v.* Va. Coal & Iron Co., 52 Fed. 838; Kingman *v.* Holthaus, 59 Fed. 305.

Alabama. — Jones *v.* Pelham, 84 Ala. 208, 4 So. 22; Armiston City Land Co. *v.* Edmondson (Ala.), 30 So. 61; Bonett *v.* Kelley (Ala.), 30 So. 824; Cogsbill *v.* Mobile & Ground Railway Co., 92 Ala. 252, 9 So. 512; Black *v.* Tennessee Coal, Iron & R. Co., 93 Ala. 109, 9 So. 537.

California. — Ayers *v.* Bensley, 32 Cal. 620; Russell *v.* Harris, 38 Cal. 426, 99 Am. Dec. 421; McKee *v.* Greene, 31 Cal. 418; Hicks *v.* Cole-

evincing the nature and character of the initial entry under which

man, 25 Cal. 122, 85 Am. Dec. 103; Donahue *v.* Gallavan, 43 Cal. 573.

Florida. — Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334.

Georgia. — Johnson *v.* Simerly, 90 Ga. 612, 16 S. E. 951; Acme Brewing Co. *v.* Central R. & Banking Co. (Ga.), 42 S. E. 8.

Illinois. — Chicago & N. W. R. Co. *v.* Galt, 133 Ill. 657, 23 N. E. 425; Coleman *v.* Billings, 89 Ill. 183; Keith *v.* Keith, 104 Ill. 397; Hinchman *v.* Whetstone, 23 Ill. 108; Dryden *v.* Newman, 116 Ill. 186, 4 N. E. 768.

Indiana. — Bell *v.* Longworth, 6 Ind. 273; State *v.* Portsmouth Savings Bank, 106 Ind. 435, 7 N. E. 379; Roots *v.* Beck, 109 Ind. 472, 9 N. E. 698.

Kentucky. — Crish *v.* Brashers, 3 Litt. 19; Harrison *v.* McDaniel, 2 Dana 348.

Maine. — Bracket *v.* Persons Unknown, 53 Me. 228.

Maryland. — Hammond *v.* Ridgely, 5 Har. & J. 245, 9 Am. Dec. 522.

Massachusetts. — Kennebec Purchase *v.* Springer, 4 Mass. 416, 3 Am. Dec. 277; Sterns *v.* Woodbury, 10 Metc. 27.

Minnesota. — Washburn *v.* Cutter, 17 Minn. 369; Miesen *v.* Canfield, 64 Minn. 513, 67 N. W. 632.

Mississippi. — Welborn *v.* Anderson, 37 Miss. 155.

Missouri. — Carter *v.* Hornbeck, 139 Mo. 238, 40 S. W. 893; Frugate *v.* Pierce, 49 Mo. 441; Johnson *v.* Prewitt, 32 Mo. 553; Lynde *v.* Williams, 68 Mo. 360; Schultz *v.* Lindill, 30 Mo. 310; Chapman *v.* Templeton, 53 Mo. 463; Harbison *v.* School District No. 1, 89 Mo. 184, 1 S. W. 30; Callahan *v.* Davis, 103 Mo. 444, 15 S. W. 433.

Nebraska. — Omaha & R. V. R. Co. *v.* Richards, 38 Neb. 847, 57 N. W. 739.

New Hampshire. — Farrar *v.* Fessenden, 39 N. H. 268; Little *v.* Downing, 37 N. H. 355.

New Jersey. — Foulke *v.* Bond, 41 N. J. Law 527.

New York. — Kent *v.* Harcourt, 33 Barb. 491; Donohue *v.* Whitney, 133 N. Y. 178, 30 N. E. 848.

North Carolina. — Barker *v.* Southern R. Co., 125 N. C. 596, 34 S. E. 701, 74 Am. St. Rep. 658; Lewis *v.* John L. Roper Lumber Co., 113 N. C. 55, 18 S. E. 52; Hough *v.* Damas, 4 Dev. & B. 328; Staton *v.* Mullis, 92 N. C. 623; Scott *v.* Elkins, 83 N. C. 424.

Ohio. — Clark *v.* Potter, 32 Ohio St. 49; Humphries *v.* Huffman, 33 Ohio St. 395.

Oregon. — Joy *v.* Stump, 14 Or. 361, 12 Pac. 929.

Pennsylvania. — Susquehanna etc. Co. *v.* Quick, 68 Pa. St. 189; Ege *v.* Medlar, 82 Pa. St. 86.

South Carolina.—Stanley *v.* Schoolbred, 25 S. C. 181; Anderson *v.* Dorby, 1 Nott. & McC. 369.

Tennessee. — Winters *v.* Hainer (Tenn.), 64 S. W. 44; Rutherford *v.* Franklin, 1 Swan 321; Hebard *v.* Scott, 95 Tenn. 467, 32 S. W. 390; Bonair Coal, Land & Lumber Co. *v.* Parks, 94 Tenn. 263, 29 S. W. 130; Cooper *v.* Great Falls Cotton Mills Co., 94 Tenn. 588, 30 S. W. 353; Hornsby *v.* Davis (Tenn.), 36 S. W. 159.

Texas. — Coleman *v.* Flory (Tex. Civ. App.), 61 S. W. 412; Allen *v.* Boggess, 94 Tex. 83, 58 S. W. 833; Hodges *v.* Ross, 6 Tex. Civ. App. 437, 25 S. W. 975; Cantagrel *v.* Von Lupin, 58 Tex. 570; Porter *v.* Miller, 84 Tex. 204, 19 S. W. 467; Meyer *v.* Kirlicks (Tex. Civ. App.), 25 S. W. 652; Taliaferro *v.* Butler, 77 Tex. 578, 14 S. W. 191.

Vermont. — Fullam *v.* Foster, 68 Vt. 590, 35 Atl. 484; Aldrich *v.* Griffith, 66 Vt. 390, 29 Atl. 376.

Virginia. — Andrews *v.* Roseland Iron & Coal Co., 89 Va. 393, 16 S. E. 252.

Washington. — Upper *v.* Lowell, 7 Wash. 460, 35 Pac. 363.

West Virginia. — Maxwell *v.* Cunningham, 50 W. Va. 298, 40 S. E. 499; Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177; Heavener *v.* Morgan, 41 W. Va. 428, 23 S. E. 874; Oney *v.* Clendenin, 28 W. Va. 34.

Wisconsin. — Pepper *v.* O'Dowd, 39 Wis. 538.

Written Color of Title, Extent of

a claim is asserted in virtue of an alleged adverse possession;[59] but, in the absence of any such written evidence, no permanent rights can be acquired beyond the limits which the actual occupancy in a given case may tend to impress with the requisites of an adverse possession.[60]

Possession Under. — Possession under color of title evidenced by writing is deemed to embrace all land within the description not in the adverse occupancy of another. Brobst *v.* Brock, 10 Wall. 519.

And, this effect may be accorded although the land is unfenced and actual residence on part only. Elliott *v.* Pearl, 1 McLean 206, 8 Fed. Cas. No. 4386.

Actual Possession Under Deed of Part Extends to All. — When possession of land in controversy considered alone is insufficient to support an adverse claim, the actual possession of adjoining lands under a deed covering the whole will render such possession coextensive with the limits of the deed and create title by adverse possession. Winters *v.* Hainer (Tenn.), 64 S. W. 44.

59. Foulke *v.* Bond, 41 N. J. Law 527; Nelson *v.* Davidson, 160 Ill. 254, 43 N. E. 361; Martin *v.* Skipwith, 50 Ark. 141, 6 S. W. 514; Alabama State Land Co. *v.* Kyle, 99 Ala. 474, 13 So. 43; Wilson *v.* Atkinson, 77 Cal. 485, 20 Pac. 66, 11 Am. St. Rep. 299.

Color of Title Evidences Claim Adverse to World. — "Hence, color of title even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and, of course adversely to all the world." Pillow *v.* Roberts, 13 How. 477.

"And any instrument, however defective or ineffectual to convey title in fact, and even if void on its face, will be sufficient to bring a case within this rule if by sufficient description it purports to convey title. Whether valid or void on its face, it characterizes the entry of the occupant by showing the nature and extent of his claim." Miesen *v.* Canfield, 64 Minn. 513, 67 N. W. 632.

Void Deed, Claim Under Characterizes Possession. — It was very properly conceded, on the argument of this cause, by counsel for the appellants, that a claim of title, even under a paper altogether void and inoperative as a deed, will yet characterize a possession as adverse within the statute of limitations. Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 587.

A grant imperfect by omission to describe the lands, otherwise regular, is admissible on behalf of a municipal corporation as explanatory of the character in which it has held possession of the land for a period necessary to give title by adverse possession. Grimes *v.* Bastrop, 26 Tex. 310.

Effect of Void Deed. — Color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims adversely to all the world, and mere notice of a better title in some other person will not prevent the operation of an adverse possession under such color of title. McIntyre *v.* Thompson, 10 Fed. 531.

"It follows from what has been said that there was no error in admitting the tax deed in evidence although it was void on its face. It was admissible for the purpose of showing the nature and extent of the claim of the occupant who entered under it." Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220.

60. *United States.* — Jackson *v.* Porter, 1 Paine 457, 13 Fed. Cas. No. 7143; Barr *v.* Grotz, 17 U. S. 213.

Alabama. — Jones *v.* Pelham, 84 Ala. 208, 4 So. 22; Ryan *v.* Kilpatrick, 66 Ala. 332; Hawkins *v.* Hudson, 45 Ala. 482.

Arkansas. — Mooney *v.* Cooledge, 30 Ark. 640.

California. — United Land Ass'n *v.* Pacific Imp. Co. (Cal.), 69 Pac. 1064; Kile *v.* Tubbs, 23 Cal. 431.

Georgia. — Tripp *v.* Fausett, 94 Ga. 330, 21 S. E. 572.

A. Qualification of Rule. — The doctrine that written color of title operates constructively is subject to the important qualification that an implied possession of different tracts of land will be carried no further than the evidence may show them to be actually contiguous, or in apparent actual use in connection with that which is actually occupied.[61]

B. Mere Trespasser Acquires Nothing Outside His Actual

Illinois. — Chicago & N. W. R. Co. *v.* Galt, 133 Ill. 657, 23 N. E. 425; James *v.* Ind. & St. Louis R. Co., 91 Ill. 554; Turney *v.* Chamberlain, 15 Ill. 271.

Indiana. — Prather *v.* Western Union Tel. Co., 89 Ind. 501.

Maine. — Richardson *v.* Watts, 94 Me. 476, 48 Atl. 180.

Massachusetts. — Kennebec Purchase *v.* Springer, 4 Mass. 415.

Minnesota. — Coleman *v.* Northern Pac. R. Co., 36 Minn. 525, 32 N. W. 859.

Missouri. — Hamilton *v.* Boggess, 63 Mo. 233; Wilson *v.* Purl, 148 Mo. 449, 51 S. W. 90; Hargis *v.* Kansas City C. & S. R. Co., 100 Mo. 210, 13 S. W. 680; Allen *v.* Mansfield, 108 Mo. 343, 18 S. W. 901.

Nebraska. — Omaha & R. V. R. Co. *v.* Rickards, 38 Neb. 847, 57 N. W. 739.

New Jersey. — Roll *v.* Rea, 50 N. J. Law 264, 12 Atl. 905; Hodges *v.* Amerman, 40 N. J. Eq. 99, 2 Atl. 257; Saxton *v.* Hunt, 20 N. J. Law 487.

North Carolina. — Harris *v.* Maxwell, 4 Dev. & B. 241.

Ohio. — Humphries *v.* Huffman, 33 Ohio St. 395.

Oregon. — Swift *v.* Mulkey, 14 Or. 64, 12 Pac. 76.

Pennsylvania. — Ege *v.* Medlar, 82 Pa. St. 86; Criswell *v.* Altemus, 7 Watts 566; Miller *v.* Shaw, 7 Serg. & R. 129.

Tennessee. — Marr *v.* Gilliam, 1 Cold. 488; Pettyjohn *v.* Akers, 6 Yerg. 448.

Texas. — Whitehead *v.* Foley, 28 Tex. 268.

Vermont. — Hatch *v.* Vermont Cent. R. Co., 28 Vt. 142.

West Virginia. — Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177.

Wisconsin. — Illinois Steel Co. *v.* Budzisz, 106 Wis. 499, 81 N. W. 1027, 80 Am. St. Rep. 54, 48 L. R. A. 831.

Mere Occupancy Fixes Its Own Limit. — In absence of color of title claim is limited to actual possession which must be marked by a fence or clearing or cultivation or something else visible, actual, and notorious so as to be tantamount thereto. Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177.

While actual occupancy of a part of a tract of land, into the possession of which a party has entered under claim and color of title, draws constructive possession of the entire tract described in the conveyance, if the color of title is inoperative as a conveyance, by reason of uncertainty in the description of the lands, the possession is limited to the part actually occupied. James *v.* Pelham, 84 Ala. 208, 4 So. 22.

In the absence of any evidence of paper title in an occupant, his title, if any, is confined to the extent of his actual possession. Chicago & N. W. R. Co. *v.* Galt, 133 Ill. 657, 23 N. E. 425.

61. *Alabama.* — Kerret *v.* Nicholas, 88 Ala. 346, 6 So. 698.

Arkansas. — Brown *v.* Bocquin, 57 Ark. 97, 20 S. W. 813.

Kentucky. — West *v.* McKinney, 92 Ky. 638, 18 S. W. 633.

Maine. — Adams *v.* Clapp, 87 Me. 316, 32 Atl. 911.

Missouri. — Ware *v.* Johnson, 55 Mo. 500.

North Carolina. — Lenoir *v.* South, 10 Ired. 237.

Oregon. — Willamette Real Estate Co. *v.* Hendrix, 28 Or. 485, 42 Pac. 514, 52 Am. St. Rep. 800.

Pennsylvania. — Hole *v.* Rittenhouse, 25 Pa. St. 491.

Texas. — Galveston Land & Imp. Co. *v.* Perkins (Tex. Civ. App.), 26 S. W. 256.

Occupancy. — And a mere trespasser, asserting no claim of right, will acquire no title beyond the limits which the evidence may show an actual occupancy of.[62]

VI. COLOR OF TITLE.

1. Is the Mere Semblance of Title. — Anything in writing connected with the title to land which serves to define the limits of the claim is color of title.[63]

2. Void Instruments, Evidence Of. — And the great weight of authority sustains the rule, that, in the absence of statute to the contrary, an instrument absolutely inoperative as a medium for the transmission of title to land, may confer color of title upon a claimant acting in good faith.[64]

62. *United States.* — Potts *v.* Gilbert, 30 Wash. C. C. 475, 19 Fed. Cas. No. 11,347.

Alabama. — Burks *v.* Mitchell, 78 Ala. 61.

Arkansas. — Ferguson *v.* Paden, 33 Ark. 150.

Georgia. — Hall *v.* Gay, 68 Ga. 442.

Illinois. — Foster *v.* Letz, 86 Ill. 412; Bristol *v.* Carroll Co., 95 Ill. 84.

Massachusetts. — Paignord *v.* Smith, 8 Pick. 272.

Mississippi. — Welborn *v.* Anderson, 37 Miss. 155.

Missouri. — Rannels *v.* Rannels, 52 Mo. 112; St. Louis *v.* Gorman, 29 Mo. 593, 77 Am. Dec. 586.

New Jersey. — Saxton *v.* Hunt, 20 N. J. Law 487.

Pennsylvania. — Hall *v.* Powell, 4 Serg. & R. 456, 8 Am. Dec. 722; Bishop *v.* Lee, 3 Pa. St. 214.

Texas. — Bracken *v.* Jones, 63 Tex. 184; Whitehead *v.* Foley, 28 Tex. 268.

Vermont. — Langdon *v.* Templeton, 66 Vt. 173, 28 Atl. 866.

63. *United States.* — Hall *v.* Law, 102 U. S. 461; Fields *v.* Columbet, 4 Sawy. 523, 9 Fed. Cas. No. 4764; Wright *v.* Mattison, 18 How. 56.

Georgia. — Connell *v.* Culpepper, 111 Ga. 805, 35 S. W. 667; Burdell *v.* Blain, 66 Ga. 169; Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351.

Illinois. — Rawson *v.* Fox, 65 Ill. 200.

Maine. — Bracket *v.* Persons Unknown, 53 Me. 228.

Missouri. — St. Louis *v.* Gorman, 29 Mo. 593, 77 Am. Dec. 586.

Oregon. — Swift *v.* Mulkey, 17 Or. 532, 21 Pac. 871.

South Dakota. — Wood *v.* Conrad, 2 S. D. 334, 50 N. W. 95.

Virginia. — Sharp *v.* Shenandoah Furnace Co. (Va.), 40 S. E. 103.

West Virginia. — Robinson *v.* Lowe, 50 W. Va. 75, 40 S. E. 454.

Color of Title Defined. — "Color of title for the purpose of adverse possession under the statute of limitations as to land is that which has the semblance or appearance of title, legal or equitable which, in fact, is no title." Sharp *v.* Shenandoah Furnace Co. (Va.), 40 S. E. 103.

Color of Title. — Is anything in writing connected with the title to land which serves to define the limits of the claim asserted. Connell *v.* Culpepper, 111 Ga. 805, 35 S. W. 667.

"Mere color of title is valuable only so far as it indicates the extent of the claim under it." Robinson *v.* Lowe, 50 W. Va. 75, 40 S. E. 454.

"The courts have concurred, it is believed, without exception, in defining color of title to be that which in appearance is title, but which in reality is no title." Wright *v.* Mattison, 18 How. 56.

"A color of title is anything in writing which serves to define the extent and character of the claim to the land, with parties from whom it may come, and to whom it may be made." Burdell *v.* Blain, 66 Ga. 169.

64. *United States.* — Hall *v.* Law,

3. Under Void Tax Deed for Government Land. — The fact that

120 U. S. 466; Wright *v.* Mattison, 18 How. 50; Ellicott *v.* Pearl, 10 Pet. 412, Fed. Cas. No. 4386; Bartlett *v.* Ambrose, 78 Fed. 839; McIntyre *v.* Thompson, 10 Fed. 531; Roberts *v.* Pillow, Hempst. 623 20 Fed. Cas. No. 11,909; Latta *v.* Clifford, 47 Fed. 614; Pillow *v.* Roberts, 13 How. 472.

Alabama. — Torrey *v.* Forbes, 94 Ala. 135, 10 So. 320; Perry *v.* Lawson, 112 Ala. 480, 20 So. 611.

Arkansas. — Logan *v.* Jelks, 34 Ark. 547.

California. — Tryon *v.* Huntoon, 67 Cal. 325, 7 Pac. 741.

Connecticut. — Taylor *v.* Danbury Public Hall Co., 35 Conn. 430.

Georgia. — Acme Brewing Co. *v.* Central R. & Banking Co. (Ga.), 42 S. E. 8; Conyers *v.* Kennan, 4 Ga. 308, 78 Am. Dec. 226; Ingram *v.* Little, 14 Ga. 173, 58 Am. Dec. 549.

Illinois. — Nelson *v.* Davidson, 160 Ill. 254, 43 N. E. 361, 52 Am. St. Rep. 338; 31 L. R. A. 325; Brooks *v.* Bruyn, 35 Ill. 392.

Indiana. — Van Cleave *v.* Milliken, 13 Ind. 105; Irey *v.* Markey, 132 Ind. 546, 32 N. E. 309.

Iowa. — Tremaine *v.* Weatherby, 58 Iowa 615, 12 N. W. 609; Sater *v.* Meadows, 68 Iowa 507, 27 N. W. 481.

Kansas. — Goodman *v.* Nichols, 44 Kan. 22, 23 Pac. 957.

Kentucky. — Logan *v.* Bull, 78 Ky. 607; Smith *v.* Frost, 2 Dana 144.

Maine. — Robinson *v.* Sweet, 3 Greenl. 316.

Maryland. — Erdman *v.* Corse, 87 Md. 506, 40 Atl. 107; Gump *v.* Sibley, 79 Md. 165, 28 Atl. 977; Trustees of Zion Church *v.* Hilkin, 84 Md. 170, 35 Atl. 9; Kopp *v.* Herman, 82 Md. 339, 33 Atl. 646.

Minnesota. — Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220.

Mississippi. — Hanna *v.* Renfro, 32 Miss. 125; Nash *v.* Fletcher, 44 Miss. 609.

Missouri. — Wilson *v.* Purl, 148 Mo. 449, 34 S. W. 884; Hickman *v.* Link (Mo.), 7 S. W. 12; Hamilton *v.* Boggess, 63 Mo. 233; Sutton *v.* Caseleggi, 77 Mo. 397.

Nebraska. — Twohig *v.* Leamer, 48 Neb. 247, 67 N. W. 152.

New Hampshire. — Farrar *v.* Fessenden, 39 N. H. 268; Gage *v.* Gage, 30 N. H. 420.

New Jersey. — Foulke *v.* Bond, 41 N. J. Law 527.

New York. — Jackson *v.* Newton, 18 Johns. 355.

North Carolina. — Avent *v.* Arrington, 105 N. C. 377, 10 S. E. 991.

North Dakota. — Powen *v.* Kitching, 10 N. D. 254, 86 N. W. 737.

Ohio. — Humphries *v.* Huffman, 33 Ohio St. 395.

South Carolina. — Lyles *v.* Kirkpatrick, 9 Rich. 265.

Tennessee. — Hunter *v.* O'Neal, 4 Baxter 494.

Texas. — Williams *v.* Bradley (Tex. Civ. App.), 67 S. W. 170.

Vermont. — Chandler *v.* Spear, 22 Vt. 388; Aldrich *v.* Griffith, 66 Vt. 390, 29 Atl. 376.

Virginia. — Stull *v.* Rich. Patch Iron Co., 92 Va. 253, 23 S. E. 293.

Washington. — Ward *v.* Huggins, 7 Wash. 617, 32 Pac. 740; Flint *v.* Long, 12 Wash. 342, 41 Pac. 49.

West Virginia.—Robinson *v.* Lowe, 50 W. Va. 75, 40 S. E. 454; Swann *v.* Thayer, 36 W. Va. 46, 14 S. E. 423.

Wisconsin. — Egerton *v.* Bird, 6 Wis. 527, 70 Am. Dec. 473; Zweitusch *v.* Watkins, 61 Wis. 615, 21 N. W. 821.

Void Deed Color of Title. — "Immaterial whether the title be valid or not, provided the entry and claim be *bona fide* under that title." Erdman *v.* Corse, 87 Md. 506, 40 Atl. 107.

An entry under a deed, void on its face, which describes an unfenced tract by metes and bounds will impart constructive possession to all land not actually occupied adversely. Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220.

"Hence, color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and of course adversely to all

the title was in the government when possession was taken under a void tax deed cannot be used against a claimant holding adversely for the statutory period after the title passed from the government.[65]

4. Color of Title May Aid Prior Ineffectual Entry. — A claimant by acquiring color of title after an ineffective entry may transform it into one of adverse character from that time.[66]

5. Different Kinds of Written Evidence. — Written evidence tending to establish color of title may flow from a multiplicity of sources.[67]

the world." Pillow *v.* Roberts, 13 How. 472.

Void Instrument Will Give Color of Title. — Any writing purporting to convey the title to land by appropriate words of transfer, and describing the land, is color of title, though the writing is invalid, actually void and conveys nothing. Hickman *v.* Link (Mo.), 7 S. W. 12.

However inadequate to carry the true title and however incompetent may have been the power of the grantor to pass a title, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title. Wright *v.* Mattison, 18 How. (U. S.) 50.

65. Chicago, Rock Island & Pacific R. Co. *v.* Allfree, 64 Iowa 500.

One will gain title by adverse possession during the statutory period of limitation, although unable to show a title from the government to himself. Sanitary District *v.* Allen, 178 Ill. 330, 53 N. E. 109.

66. Jackson *v.* Thomas, 16 Johns. (N. Y.) 292; Bank of Kentucky *v.* McWilliams, 2 J. J. Marsh. (Ky.) 256.

Obtaining Color of Title After Entry Renders Holding Adverse. One acquiring color of title after entry thereafter holds an adverse possession which may mature into a title. Hawkins *v.* Richmond Cedar Works, 122 N. C. 87, 30 S. E. 13.

"An entry without color of title or claim of right may become adverse by subsequently acquiring color of title or claim of right, and holding under it; but the possession is only adverse from the time of acquiring such title or claim of right." Wickam *v.* Henthorn (Iowa), 59 N. W. 276.

67. *United States.*—Texas Pacific R. Co. *v.* Smith, 159 U. S. 66.

California. — Brind *v.* Gregory, 120 Cal. 640, 53 Pac. 25.

Georgia. — Wade *v.* Garrett, 109 Ga. 270, 34 S. E. 572; Tumlin *v.* Perry, 108 Ga. 520, 34 S. E. 171.

Illinois. — Wright *v.* Stice, 173 Ill. 571, 51 N. E. 71; Sexson *v.* Barker, 172 Ill. 361, 50 N. E. 109.

Oregon. — Clark *v.* Bundy, 29 Or. 190, 44 Pac. 282.

New Jersey. — Den Watson *v.* Kelty, 16 N. J. Law 517.

West Virginia.—Hitchcock *v.* Morrison (W. Va.), 34 S. E. 993.

Need Not Be Recorded Instrument. Aldrich *v.* Griffith, 66 Vt. 390, 29 Atl. 376; Lewis *v.* Roper Lum. Co., 109 N. C. 19, 13 S. E. 701.

Master's Deed Under Invalid Decree in Equity. — Mullins' Adm'r *v.* Carper, 37 W. Va. 215, 16 S. E. 527.

Instrument of Ambiguous Character. — Westmorland *v.* Westmorland, 92 Ga. 233, 17 S. E. 1033.

Will, If it Describes the Real Estate. — Blakey *v.* Morris, 89 Va. 717, 17 S. E. 126.

Irregular Decree of Distribution. Brind *v.* Gregory, 122 Cal. 480, 55 Pac. 250.

Partition Judgment Confers Color of Title. — The judgment of a proper court making partition purporting on its face to convey title, will constitute good color of title in favor of one claiming by adverse possession, even though a part of the tenants in common were not made parties to the suit in which such judgment or decree was rendered. Wright *v.* Stice, 173 Ill. 571, 51 N. E. 71.

Possession for Twenty Years Under Colorable Partition Effective. Although a parol partition might not be originally good under the statute

6. Written Evidence Not Indispensable. — Unless rendered so by statute, written evidence is not indispensable to establish color of title.[68]

7. Facts Showing Nature of Entry May Operate As Color of Title. And, facts showing the character and extent of the entry and claim may perform the office of color of title.[69]

VII. ADMISSIBILITY OF PARTICULAR CLASSES OF WRITTEN EVIDENCE.

1. Judgment Roll in Former Action. — The judgment roll in a

of frauds, yet lands holden in severalty peaceably, for twenty years under the colorable partition will amount to evidence of title under the statute of limitation. Den Watson *v.* Kelty, 16 N. J. Law 517.

Deed Under Void Decree Confers Color of Title. — Although a deed under a void decree may be inadmissible for any other purpose, it is competent to show color of title, in the absence of any showing of fraud conducing to such decree. Sexson *v.* Barker, 172 Ill. 361, 50 N. E. 109.

There is no force in the objection that a decree of distribution, under which one claims to hold adverse possession, is erroneous. Brind *v.* Gregory, 120 Cal. 640, 53 Pac. 25.

Master's Deed, Though Irregular, Confers Color of Title. — A deed made by a special commissioner in a chancery cause, under a decree confirming the sale, purporting to convey the real estate described in the deed, gives color of title in the grantee, notwithstanding irregularities in the proceedings in such cause and sale. Hitchcock *v.* Morrison (W. Va.), 34 S. E. 993.

Sheriff's Deed, Though Invalid, Confers Color of Title. — As against one supplying no evidence of title except naked possession for less than twenty years, a sheriff's deed, pursuant to a sale under a justices' court execution, accompanied by possession, is good color of title upon which to base title by prescription, whether such sale was valid or not, no bad faith appearing. Wade *v.* Garrett, 109 Ga. 270, 34 S. E. 572.

Receiver's Receipt Good Color of Title. — A receiver's pre-emption entry receipt which embraces nothing tending to show that the land is not subject to such entry, nor the time when entry may have been made upon the land is "just title" within the terms of the Louisiana statutes to begin title by prescription. Texas Pac. R. Co. *v.* Smith, 159 U. S. 66.

68. *Illinois.* — McClellan *v.* Kellogg, 17 Ill. 498.

Iowa. — Hamilton *v.* Wright, 30 Iowa 480.

Kentucky. — Gregory *v.* Nesbit, 5 Dana 419; Houchin *v.* Houchin, 14 Ky. Law 453, 20 S. W. 506.

Michigan. — Miller *v.* Davis, 106 Mich. 300, 64 N. W. 338; Hyne *v.* Osborn, 62 Mich. 235, 28 N. W. 821.

Mississippi. — Greene *v.* Mizelle, 54 Miss 220.

Missouri. — Cooper *v.* Ord, 60 Mo. 420; Hamilton *v.* Boggess, 63 Mo. 233; Rannels *v.* Rannels, 52 Mo. 111.

New York. — Kent *v.* Harcourt, 33 Barb. 491.

Tennessee. — Dyche *v.* Gass, 3 Yerg. 397.

Texas. — Shepard *v.* Galveston R. Co. (Tex. Civ. App.), 22 S. W. 267.

Virginia. — Kincheloe *v.* Tracewells, 11 Gratt. 587.

Heir of Patentee Has Color of Title. — One who enters upon land as an heir of the patentee, from whom no conveyance is shown, has color of title although the patent was not in his possession. Miller *v.* Davis, 106 Mich. 300, 64 N. W. 338.

69. Rannels *v.* Rannels, 50 Mo. 111; Miller *v.* Davis, 106 Mich. 300, 64 N. W. 338; Dyche *v.* Gass, 3 Yerg. (Tenn.) 397.

Color of Title by Possession Under Parol Agreement. — Color of title may be made through conveyances

forcible entry case involving the disputed premises, is admissible on behalf of the one in whose favor judgment was rendered, as tending to show that such party had maintained an adverse possession for the statutory period.[70]

2. All Writings Tending to Show Nature of Claim Asserted. — Any writing tending to show the nature of the claim asserted to the land will be admissible whether recorded or not.[71]

or bonds and contracts, or bare possession under parol agreements. Edgerton *v.* Bird, 6 Wis. 527, 70 Am. Dec. 473.

70. *United States.* — Sharon *v.* Tucker, 144 U. S. 533.

Alabama. — Bishop *v.* Truett, 85 Ala. 376, 5 So. 154; Barron *v.* Barron, 122 Ala. 194, 25 So. 55.

California. — Unger *v.* Roper, 53 Cal. 39; Fredricks *v.* Judah, 73 Cal. 604, 15 Pac. 305; Spotts *v.* Hanley, 85 Cal. 155, 24 Pac. 738; Dillon *v.* Center, 68 Cal. 561, 10 Pac. 176.

Missouri. — Hickman *v.* Link (Mo.), 7 S. W. 12.

North Carolina. — Faulcon *v.* Johnston, 102 N. C. 264, 9 S. E. 394.

Texas. — Rodriguez *v.* Lee, 26 Tex. 32; Thouvernin *v.* Rodriguez, 24 Tex. 468.

Vermont. — Hollister *v.* Young, 42 Vt. 403.

"Though in an action of unlawful detainer the title to the land cannot be inquired into, a judgment in such action is an adjudication that the defendant therein did not have and hold adverse possession at the time the action was instituted, that his possessory interest, whatever may be its character and extent, had terminated, and that the plaintiff therein is lawfully entitled to possession." Bishop *v.* Truett, 85 Ala. 376, 5 So. 154.

In an action in which there was evidence tending to show that the adverse possession of the land by one of the claimant's grantors had been interrupted and broken by the entry of another person, it was competent in a rebuttal of this to introduce the record in an unlawful detainer suit brought by the claimant against such intruders which had been prosecuted successfully. Barron *v.* Barron, 122 Ala. 194, 25 So. 55.

Equitable Action to Confirm Title by Adverse Possession. — "The title by adverse possession, of course, rests on the recollection of witnesses; and by a judicial determination of its validity against any claim under the former owners, record evidence will be substituted in its place." Sharon *v.* Tucker, 144 U. S. 533.

71. *Alabama.* — Mobile & M. R. Co. *v.* Gilmer, 85 Ala. 422, 5 So. 138.

California. — Dougherty *v.* Miles, 97 Cal. 568; Fredricks *v.* Judah, 73 Cal. 604, 15 Pac. 305; Baldwin *v.* Temple, 101 Cal. 396, 35 Pac. 1008.

Connecticut. — St. Peter's Church *v.* Beach, 26 Conn. 354.

Georgia. — Carstarphen *v.* Holt, 96 Ga. 703, 23 S. E. 904.

Louisiana. — Winston *v.* Prevost, 6 La. Ann. 164.

Pennsylvania. — Collins *v.* Lynch, 167 Pa. St. 635, 31 Atl. 921.

Tennessee. — Bleidorn *v.* Pilot Mt. Coal & Mining Co., 89 Tenn. 204, 15 S. W. 737; Meriwether *v.* Vaulx, 5 Sneed 300; Jones *v.* Perry, 10 Yerg. 59, 30 Am. Dec. 430.

Texas. — Kimbro *v.* Hamilton, 28 Tex. 560; Ortiz *v.* De Benavides, 61 Tex. 60.

Vermont. — Spaulding *v.* Warren, 25 Vt. 316.

Virginia. — Atkinson *v.* Smith (Va.), 24 S. E. 901; Sulphur Mines Co. *v.* Thompson's Heirs, 93 Va. 293, 25 S. E. 232.

Former Leases Admissible to Explain Nature of Second Entry. "The leases were properly admitted in evidence. They were admissible to show the character of plaintiff's possession—whether for himself, or as tenant of Ferguson. The plaintiff testified that he took possession in 1867, 'to take care of the tract under the same old agreement.' The leases contained this provision: 'And to pay the rent as above stated

3. Deed Muniments of Adverse Claimants. — Deeds not offered by one claimant may be introduced by his adversary as tending to show the time and extent of the claim of the earlier occupant.[72]

Deeds Showing Incipient Title. — Deeds are admissible which tend to show the character of the occupancy upon which the claim of title is predicated.[73]

VIII. EVIDENCE OF PARTICULAR ACTS.

1. All Acts of an Occupant Tending to Show Claim of Ownership Admissible. — All acts on the part of an occupant tending to show a claim of ownership of the premises are admissible in support of a title by adverse possession.[74]

during the term; also the rent as above stated for such further term as the lessee may hold the same.' It was for the jury to determine whether plaintiff re-entered upon the premises under the terms of the lease, or under the parol agreement testified to by plaintiff." Fredricks *v.* Judah, 73 Cal. 604, 15 Pac. 305.

Acceptance of Lease Evidence of Admission Against Interest. — "It is quite true that, where the owner of land accepts a lease from another, it does not destroy his title to the land. Where, however, the lessee is in possession without title, it is a pregnant admission of the fact, and may be used as evidence tending to show that he did not claim to hold the land adversely to the party from whom he accepted the lease." Baldwin *v.* Temple, 106 Cal. 396, 35 Pac. 1008.

Unregistered Will Probated in Another State. — Neither an occupant nor a good faith purchaser under him will stand unaffected by an unregistered foreign will under which the statute does not run against an estate in remainder in such land. Bleidorn *v.* Pilot Mt. Coal & Mining Co., 89 Tenn. 204, 15 S. W. 737.

Unrecorded Private Survey. — A private survey and map never recorded and not referred to in, nor made a part of the deed under which a party claims, cannot be considered color of title, though admissible to show the character of his claim of right. Sulphur Mines Co. *v.* Thompson's Heirs, 93 Va. 293, 25 S. E. 232.

72. Shepard *v.* Hayes, 16 Vt. 486.

73. Elder *v.* McClosky, 70 Fed. 529; Dangerfield *v.* Paschal, 11 Tex. 579; Emmanuel *v.* Gates, 53 Fed. 772.

Deeds Showing Incipient Title. "It is suggested that the fact that these deeds from Morgan were made, and possession begun under them, before the claimant's right of entry accrued, should prevent their having any effect to oust the latter. The contention is without merit. The question is whether the possession of the defendants was adverse after the life tenant died. There was no change in the claim or character of the possession after the life estate terminated. It continued as before, and we can only know its nature by reference to the circumstances under which it began and was continued. Thus, the warranty deeds from Morgan prior to the falling in of the life estate are of first importance in showing whether the possession taken by virtue of them was intended to be, and was in fact, adverse, when continued after the time at which claimants' right of entry accrued." Elder *v.* McCloskey, 70 Fed. 529. See also Dangerfield *v.* Paschal, 11 Tex. 579,

74. *Alabama.* — Barron *v.* Barron, 122 Ala. 194, 25 So. 55; Stiff *v.* Cobb, 126 Ala. 381, 28 So. 402; Abbett *v.* Page, 92 Ala. 571, 9 So. 332.

California. — Frick *v.* Sinon, 75 Cal. 439, 17 Pac. 439; Sill *v.* Reese, 47 Cal. 294.

Kentucky. — Hillman *v.* White, (Ky. App.), 44 S. W. 111.

Maine. — Carter *v.* Clark, 92 Me. 225, 42 Atl. 398.

Maryland. — Jacob Tome Inst. *v.* Crothers, 87 Md. 569, 40 Atl. 261.

2. Payment of Taxes Admissible. — Independent of statutes bearing directly upon the question, payment of taxes by an occupant claiming adversely is always competent evidence in support of such claim.[75]

IX. DECLARATIONS OF AN OCCUPANT.

1. Admissible to Explain Character and Extent of Claim. — The acts and declarations of a person, while in the occupation of a tract

New Hampshire. — Fellows *v.* Fellows, 37 N. H. 75.

North Carolina. — Bryan *v.* Spivey, 109 N. C. 57, 13 S. E. 766; McLean *v.* Smith, 114 N. C. 356, 19 S. E. 279.

Pennsylvania. — Sailor *v.* Hertzogg, 10 Pa. St. 296.

South Carolina. — Metz *v.* Metz, 48 S. C. 472, 26 S. E. 787.

Texas. — Bradshaw *v.* Mayfield, 18 Tex. 21; Paxton *v.* Meyer, 67 Tex. 96, 2 S. W. 817.

Sale of Part of Land by Occupant. On an issue as to the adverse possession of land, it is competent to show that the claimant in possession sold a portion of the land in controversy as tending to show the nature and character of the claim asserted by such occupant. Barron *v.* Barron, 122 Ala. 194, 25 So. 55.

Sale of Part and Mortgaging Balance. — Sale of part and mortgage of whole premises in possession of claimant, are acts of ownership proper to consider in determining character of claim. Stiff *v.* Cobb, 126 Ala. 381, 28 So. 402.

Collecting Rent, Consenting to Erection of Buildings. — In support of a claim of an adverse possession, it is competent for such claimant to show that persons in the occupancy of such premises have paid rent to him as tenants and erected buildings on the premises by his consent. Jacob Tome Inst., etc. *v.* Crothers, 87 Md. 596, 40 Atl. 261.

Receipt of Rents. — On the issue of adverse possession, it is competent to prove by a witness that he knew that an occupant received rents of the land and had possession of it and paid the taxes, as tending to show the character in which such occupant held the land in question. Metz *v.* Metz, 48 S. C. 472, 26 S. E. 787.

75. *United States.* — Fletcher *v.* Fuller, 120 U. S. 534, 7 Sup. Ct. 667; Holtzman *v.* Douglass, 168 U. S. 278; Ewing *v.* Burnet, 11 Pet. 54.

Alabama. — Green *v.* Jordan, 83 Ala. 220, 3 So. 513, 3 Am. St. Rep. 711.

Illinois. — Davis *v.* Easley, 13 Ill. 192.

Maine. — Carter *v.* Clark, 92 Me. 225, 42 Atl. 398.

Minnesota. — Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220; Dean *v.* Goddard, 55 Minn. 290, 5 N. W. 1060; Wheeler *v.* Gorman, 80 Minn. 462, 83 N. W. 442.

Missouri. — St. Louis Public Schools *v.* Risley, 40 Mo. 356; Draper *v.* Shoot, 25 Mo. 197, 69 Am. Dec. 482.

New York. — Miller *v.* Long Island R. Co., 71 N. Y. 380.

North Carolina. — Pasley *v.* Richardson, 119 N. C. 449, 26 S. E. 32.

Pennsylvania. — Sailor *v.* Hertzogg, 10 Pa. St. 296.

Vermont. — Paine *v.* Hutchins, 49 Vt. 314.

Payment of Taxes, Effect as Evidence. — Whilst payment of taxes is not evidence of an ouster of the true owner, the question of adverse possession depends on so many circumstances that such fact is to be weighed by the jury in considering it. "It would be an argument against one claiming to hold land that he should for twenty years fail to pay the annual assessments upon it." Draper *v.* Shoot, 25 Mo. 197, 69 Am. Dec. 422.

Payment of taxes on one entire tract, though not constituting possession, shows claim of title and is material and competent evidence for that purpose. Murphy *v.* Doyle, 37 Minn. 113, 33 N. W. 220.

of land, may be given in evidence to explain the character and extent of his claim and possession.[76] *See* "ADMISSIONS" and "DECLARATIONS."

76. *United States.* — Ricard *v.* Williams, 7 Wheat. 59; Jackson *v.* Porter, 1 Paine 457, 13 Fed. Cas. No. 7143; Ward *v.* Cochran, 71 Fed. 127; Dodge *v.* Trust Co., 93 U. S. 379.

Alabama. — Nashville C. & St. Co. *v.* Hammond, 104 Ala. 191, 15 So. 935; Beasley *v.* Howell, 117 Ala. 499, 22 So. 989; Jones *v.* Williams, 108 Ala. 282, 19 So. 317; Kirkland *v.* Trott, 66 Ala. 417.

California. — Cannon *v.* Stockman, 36 Cal. 535; Clarke *v.* Clarke, 133 Cal. 667; Dillon *v.* Center, 68 Cal. 561, 10 Pac. 176; Baldwin *v.* Temple, 101 Cal. 396, 35 Pac. 1008; Von Glahn *v.* Brennan, 81 Cal. 261; McCracken *v.* San Francisco, 16 Cal. 591; Stockton Savings Bank *v.* Staples, 98 Cal. 189, 32 Pac. 96.

Connecticut. — Turner *v.* Baldwin, 44 Conn. 121; St. Peter's Church *v.* Beach, 26 Conn. 354; Williams *v.* Ensign, 4 Conn. 456; Comins *v.* Comins, 21 Conn. 413; Saugatuck Congl. Soc. *v.* East Saugatuck School District, 53 Conn. 478, 2 Atl. 751.

Florida. — Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805.

Georgia. — Clements *v.* Wheeler, 62 Ga. 53; Walker *v.* Hughes, 90 Ga. 52, 15 S. E. 912; Wade *v.* Johnson, 94 Ga. 348, 21 S. E. 569; Wood *v.* McGuire, 17 Ga. 303.

Illinois. — Davis *v.* Easley, 13 Ill. 192; Brooks *v.* Bruyn, 24 Ill. 373; Horner *v.* Reuter, 152 Ill. 106, 38 N. E. 747.

Iowa. — Davidson *v.* Thomas, (Iowa,) 86 N. W. 291.

Kentucky. — Crutchlow *v.* Beatty, 15 Ky. Law 464, 23 S. W. 960; Haffendorfer *v.* Gault, 84 Ky. 124; Smith *v.* Morrow, 7 T. B. Mon. 234.

Louisiana. — Davidson *v.* Matthews, 3 La. Ann. 316.

Maine. — Moore *v.* Moore, 21 Me. 350; Lamb *v.* Foss, 21 Me. 240; School Dist. *v.* Benson, 31 Me. 381, 52 Am. Dec. 618.

Maryland. — Keener *v.* Kaufman, 16 Md. 296.

Massachusetts. — Shumway *v.* Holbrook, 1 Pick. 114, 11 Am. Dec. 153; Church *v.* Burghardt, 8 Pick. 327; Hale *v.* Silloway, 1 Allen 21; Proprietors *v.* Bullord, 2 Metc. 363.

Michigan. — Bower *v.* Earl, 18 Mich. 367; Youngs *v.* Cunningham, 57 Mich. 153, 23 N. W. 626.

Missouri. — Mier *v.* Mier, 105 Mo. 17, 16 S. W. 223; Tomlinson *v.* Lynch, 32 Mo. 160; Crawford *v.* Ahrens, 103 Mo. 88, 15 S. W. 341.

Nebraska. — Webb *v.* Thiele, 56 Neb. 752, 77 N. W. 56; Roggencamp *v.* Converse, 15 Neb. 105, 17 N. W. 361.

New York. — Tindale *v.* Powell, 88 Hun 193, 34 N. Y. Supp. 659; Jackson *v.* McCall, 10 Johns. 377, 6 Am. Dec. 343; Donahue *v.* Case, 61 N. Y. 631; Jackson *v.* Miller, 6 Wend. 228, 21 Am. Dec. 316.

North Carolina. — Kirby *v.* Masten, 70 N. C. 540; Marsh *v.* Hampton, 5 Jones 382; Cansler *v.* Fete, 5 Jones 424; Guy *v.* Hall, 3 Murph. 150; Nelson *v.* Whitfield, 82 N. C. 46.

Pennsylvania. — Handley *v.* Barrett, 176 Pa. St. 246, 35 Atl. 133; Susquehanna & R. Co. *v.* Quick, 68 Pa. St. 189; Sailor *v.* Hertzogg, 10 Pa. St. 296; Calhoun *v.* Cook, 9 Pa. St. 226; Kennedy *v.* Wible, (Pa.), 11 Atl. 98.

South Carolina. — Metz *v.* Metz, 48 S. C. 472, 26 S. E. 787; Leger *v.* Doyle, 11 Rich. Law 109, 70 Am. Dec. 240; Bell *v.* Talbird, 1 Rich. Eq. 361; Markley *v.* Amos, 2 Bailey 603, 42 Am. Rep. 854.

Tennessee. — Carnahan *v.* Wood, 32 Tenn. 500.

Texas. — Williams *v.* Rand, 9 Tex. Civ. App. 631, 30 S. W. 509; Bruce *v.* Washington, 80 Tex. 368, 15 S. W. 1104; Mooring *v.* McBride, 62 Tex. 309; Hurley *v.* Lockett, 72 Tex. 262, 12 S. W. 212; Lochausen *v.* Laughter, 4 Tex. Civ. App. 291, 23 S. W. 513; Satterwhite *v.* Rosser, 61 Tex. 166.

Vermont. — Soule *v.* Borlow, 48 Vt. 132; Wing *v.* Hall, 47 Vt. 182; Day *v.* Wilder, 47 Vt. 584; Coffrin

A. Conduct and Admissions After Statutory Period Ensues. Where the evidence on the subject of adverse possession is inconclusive, the acts and conduct of a claimant subsequent to the completion of the statutory period tending to characterize such prior possession are admissible against him.[77]

B. Admissions Not Prejudicial After Title Acquired. — But after a claimant has held adversely for a period sufficient to vest title, his admission thereafter that the title is in another will not operate to divest him of title.[78]

v. Cole, 67 Vt. 226, 31 Atl. 313; Brown *v.* Edson, 22 Vt. 357.

Virginia. — Blakey *v.* Morris, 89 Va. 717, 17 S. E. 126; Erskine, *v.* North, 14 Gratt. 60.

Wisconsin. — Roebke *v.* Andrews, 26 Wis. 311; Lamoreaux *v.* Huntley, 68 Wis. 34, 31 N. W. 331; Bartlett *v.* Secor, 56 Wis. 520, 14 N. W. 714.

Declarations of Claimant Admissible Whether in Derogation of His Title or Otherwise. — Declarations made by a claimant while in possession tending to show in what character he was then occupying the property, held competent, the court saying: "The testimony was relevant and competent for the purpose of showing that Flannagan claimed to be the owner of the property in fee simple; that such claim was made openly to all inquirers, and that it was not kept secret. The better view is that such declarations, when made in good faith by persons who are at the time in possession of land or tenements, are verbal acts, which may be admitted for the purpose of showing the character of the possession, whether they are in disparagement of the declarant's title or otherwise." Ward *v.* Cochran, 71 Fed. 127. *Citing* Patterson *v.* Reigh, 4 Pa. St. 201, 45 Am. Dec. 684; Blakey *v.* Morris, 89 Va. 717, 17 S. E. 126.

Declarations Indicating Non-Claim Inconclusive. — On an issue of adverse possession, where the proof tends to show a continuous exclusive possession for the statutory period by acts indicating dominion over the land, the fact that there was proof of declarations of the occupant indicating that he did not at first claim ownership does not conclusively rebut the inference of a claim of right derivable from his acts. The issue is for the jury. Webb *v.* Thiele, 50 Neb. 752, 77 N. W. 56.

Taking a deed for land which is part of a larger tract belonging to the vendor, will not prevent the grantee from acquiring by adverse possession a title to land lying outside of his deed, but forming a part of the tract from which his purchase was made. Handley *v.* Barrett, 176 Pa. St. 240, 35 Atl. 133.

Declarations Showing Verbal Exchange of Land. — Declarations by one before formally conveying land that he had verbally agreed to exchange a part of it to an adjoining owner are admissible in support of the latter's claim of title to it by adverse possession. Davidson *v.* Thomas, (Iowa), 86 N. W. 291.

77. Sage *v.* Rednick, 69 Minn. 362, 69 N. W. 1096; Todd *v.* Weed, 84 Minn. 4, 86 N. W. 756; Mier *v.* Mier, 105 Mo. 411, 16 S. W. 223; Neel *v.* McElhenny, 69 Pa. St. 300; Williams *v.* Rand, 9 Tex. Civ. App. 631, 30 S. W. 509.

Declarations After Statutory Period Ends. — "But the very question was, as to the nature and character of that antecedent possession; and the acts and declarations of the parties owning the estates, made after thirty years, which had a tendency to show their motives and views during the thirty years, were proper to show the nature of the occupancy and rebut the inference which would otherwise follow from the fact of possession." Church *v.* Burkhardt, 8 Pick. (Mass.) 327.

78. Jones *v.* Williams, 108 Ala. 282, 19 So. 317.

Recognizing Superior Title After Adverse Title Gained, Harmless. Evidence tending to show that one

2. Declarations As to Source of Title Incompetent. — The exception to the general rule admitting declarations of one in possession explanatory of it, as constituting part of the *res gestae*, does not authorize the reception of evidence touching the source of title not explanatory of the possession.[79]

3. Although the Declarant Be Not Living. — Declarations or admissions made by a party when in possession of real estate, and afterwards deceased, are admissible as competent evidence to show the character of his possession, but not for the purpose of building up or destroying the record title.[80]

X. REPUTATION.

1. Proof of Particular Landmarks. — It is competent for a claimant to prove that particular landmarks, such as trees, streams, or lines, constituted according to the general report, parts of his boundary.[81]

A. Occupant May Show He Was Reputed Owner of Land in Question. — And, that he was commonly reputed to own the land in the community where it is situated, in cases where there is nothing tending to show that the owner of the legal title had actual knowledge that the land was being held against him under claim of right.[82]

whose alleged adverse possession of unimproved land arose upon a parol gift from the owner has since recognized the title of the latter, will not impair such right by adverse possession unless transpiring within the statutory period. Lee *v.* Thompson, 99 Ala. 95, 11 So. 672.

79. Jones *v.* Pelham, 84 Ala. 208, 4 So. 22; Swerdferger *v.* Hopkins, 67 Vt. 136, 31 Atl. 153; Kimbal *v.* Ladd, 42 Vt. 747; Mooring *v.* McBride, 62 Tex. 306; Gilbert *v.* Odum, 69 Tex. 670, 7 S. W. 510.

80. Decker *v.* Decker, (Neb.), 89 N. W. 795; Sutton *v.* Casselleggi, 5 Mo. App. 11; Osgood *v.* Coats, 1 Allen (Mass.) 77; Gilbert *v.* Odum, 69 Tex. 670, 7 S. W. 510; Morrill *v.* Titcomb, 8 Allen (Mass.) 100; Masterson *v.* Jordan, (Tex. Civ. App.) 24 S. W. 549.

81. Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154.

General Notoriety of Fact Once Established May Be Shown. Whilst the existence of the fact cannot be proved by reputation or notoriety, it is competent after a fact has been shown to exist to show the general notoriety of it in the neighborhood, in order to charge the resident of the vicinity with notice of it. Tennessee Coal Iron R. Co. *v.* Linn, 123 Ala. 112, 26 So. 245.

Reputed Boundaries. — "The first town plat was filed sixty years ago. The streets have been recognized as public highways ever since, and certainly evidence of general repute as to the location of the boundaries of these streets is admissible." Klinker *v.* Schmidt, (Iowa), 87 N. W. 661.

82. McAuliff *v.* Parker, 10 Wash. 141, 38 Pac. 744.

Generally Reputed To Be Owner. It is competent to prove that it was generally understood in the neighborhood not only that one pastured his cattle on lands, but that he did so under claim of ownership, and that his claim and the character of his possession were such that he was generally reputed the owner, as having an important bearing upon the notoriety of his possession. Maxwell Land-Grant Co. *v.* Dawson, 151 U. S. 586, 14 Sup. Ct. 458.

Reputation of Claim of Ownership. "Defendant having shown his pos-

B. Rule Not Uniform. — This rule is not of uniform recognition.[83]

XI. WHERE ADVERSE CLAIM IS MADE BY PUBLIC.

Evidence Must Show Definite Use. — Where adverse claim is made by the public, the evidence must be such as to fix the character and extent of the use with practical certainty.[84]

XII. AS BETWEEN LANDLORD AND TENANT.

By Tenant Against Landlord. — Evidence of Disclaimer Known to Landlord Initiates Adverse Occupancy. — A tenant may initiate an adverse occupancy against his landlord by the denial of all subserviency to him brought distinctly to his knowledge.[85]

session for the requisite length of time, under tax titles which are now conceded to be invalid, was suffered to prove that the land was generally understood to be and called his, in the neighborhood. Exception was taken to this evidence, but we think it was competent. It tended to establish the notoriety of defendant's possession, and claim of title, which were important facts in his defense." Sparrow *v.* Hovey, 44 Mich. 63.

In an action of ejectment it was held competent for the defendant to show that during a given period, it was generally understood and known in the vicinity of the lands in dispute that they were claimed by a company as its own. Woods *v.* Montevallo Coal & Transp. Co., 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393.

83. Atwood *v.* Canrike, 86 Mich. 99, 48 N. W. 950; Walker *v.* Hughes, 90 Ga. 52, 15 S. E. 912; Casey *v.* Inloes, 1 Gill (Md.) 430, 39 Am. Dec. 658; Beecher *v.* Galvin, 71 Mich. 391, 39 N. W. 469.

Ownership Cannot Be Proved by Reputation. — It is not competent to show by reputation and general understanding in the neighborhood that the plaintiffs in this class of actions owned or had title to the land; and it is error to permit a witness to testify that "the land was generally known and considered as belonging to the plaintiff;" that, "it was understood and known in the community as plaintiff's land." Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443.

Testimony that the claimant was generally understood to be the owner of the land in controversy is inadmissible in support of claim of title by adverse possession. Preston *v.* Hilburn, (Tex. Civ. App.), 44 S. W. 698.

84. Wyman *v.* State, 13 Wis. 663; Stephens *v.* Murry, 132 Mo. 468, 34 S. W. 56.

Evidence Must Establish the Use With Practical Certainty. — "Where the public have acquired the right to a public highway by user, they are not limited in width to the actual beaten path. The right carries with it such width as is reasonably necessary for the public easement of travel, and the width must be determined from the facts and circumstances peculiar to each case. The highway having been permanently fenced the usual width of highways in the locality, and the width recognized by the owner of the fee and the public, when there has been such recognition, are permanent facts from which, in connection with other evidence, width may be inferred." Whitesides *v.* Green, 13 Utah 341, 44 Pac. 1032.

Change of Roadway, When Will Not Impair Right. — "The track by reason of washing or other causes, by consent of the traveling public who use it changes a few feet sometimes to one side of the 33 feet and sometimes to the other, but the road remains substantially the same. Such a change in a roadbed acquired by prescription would not destroy the right." Kurtz *v.* Hoke, 172 Pa. St. 165, 33 Atl. 549.

85. *Alabama.* — De Jarnette *v.* McDaniel, 93 Ala. 215, 9 So. 570.

XIII. AS BETWEEN CO-OWNERS — PRESUMPTIONS.

Presumption That Possession of One Is for Benefit of All. — The possession of the whole by one co-owner will be presumed to be for the benefit of all, agreeably to their several rights, until notice of a different intent on his part is imparted to them.[86]

1. This Is Simply a Rule of Evidence. — The presumption of amicable relations between tenants in common is merely a rule of evidence, liable to be overcome by the circumstances of any particular case involving the question whether in fact the possession was adverse, and is not a rule of law denying the application of the

California. — Thompson *v.* Pioche, 44 Cal. 508; Abbey Homestead Ass'n *v.* Willard, 48 Cal. 614.

Florida. — Wilkins *v.* Pensacola City Co., 36 Fla. 36, 18 So. 20; Winn *v.* Strickland, 34 Fla. 610, 16 So. 606.

Illinois. — Lowe *v.* Emerson, 48 Ill. 160.

Michigan. — Ryerson *v.* Eldred, 18 Mich. 12.

Mississippi.—Jones *v.* Madison Co., 72 Miss. 777, 18 So. 87; Greenwood *v.* Moore (Miss.), 30 So. 609.

Missouri. — Cook *v.* Farrah, 105 Mo. 492, 16 S. W. 692; Pharis *v.* Jones, 122 Mo. 125, 26 S. W. 1032; Hamilton *v.* Boggess, 63 Mo. 233.

Nebraska. — Shields *v.* Harbach, 49 Neb. 262, 68 N. W. 524.

New Jersey. — Horner *v.* Leeds, 25 N. J. Law 106.

New York. — Bedlow *v.* New York Floating Dry Dock Co., 112 N. Y 263, 19 N. E. 800, 2 L. R. A. 629.

Oregon. — Nessley *v.* Ladd, 29 Or. 354, 45 Pac. 904.

South Carolina. — Trustees *v.* Jennings, 40 S. C. 168, 18 S. E. 257, 42 Am. St. Rep. 854.

Vermont. — Sherman *v.* Transp. Co., 31 Vt. 162.

West Virginia. — Swann *v.* Young, 36 W. Va. 57, 14 S. E. 426; Swan *v.* Thayer, 36 W. Va. 46, 14 S. E. 423; Voss *v.* King, 33 W. Va. 236, 10 S. E. 402.

Evidence of Repudiation of Tenancy. — "The law is well settled that a tenant, after the expiration of his lease, may disavow and disclaim his title and the title of his landlord, and drive the landlord to his action for the recovery of the possession within the period of the statute of limitations, but before any foundation can be claimed for the operation of the statute in such a case, a clear, positive and continued disclaimer and disavowal of the landlord's title, and assertion of an adverse right must be brought home to the landlord by clear, positive and distinct notice." Wilkins *v.* Pensacola City Co., 36 Fla. 36, 18 So. 20.

86. *United States.* — Elder *v.* McClaskey, 70 Fed. 529; Zellers Lessee *v.* Eckert, 4 How. 289.

California. — Brown *v.* McKay, 125 Cal. 291, 57 Pac. 1001; Reed *v.* Smith, 125 Cal. 491, 58 Pac. 139; Scadden Flat G. M. Co. *v.* Scadden, 121 Cal. 33, 53 Pac. 440.

Missouri. — Stevens *v.* Martin (Mo.), 68 S. W. 347.

Pennsylvania. — Watson *v.* Gregg, 10 Watts 289, 36 Am. Dec. 176.

Tennessee. — Woodruff *v.* Roysden, 105 Tenn. 491, 58 S. W. 1066, 80 Am. St. Rep. 905.

Vermont. — Holley *v.* Hawley, 39 Vt. 525, 94 Am. Dec. 350; Roberts *v.* Morgan, 30 Vt. 319; Leach *v.* Beattie, 33 Vt. 195.

One Tenant in Common Holds for Benefit of All. — "Under authority above cited" (Mo. cases) "where a tenant in common takes possession of a tract of land, in which he has an undivided interest, unless he manifests a contrary intention he is presumed to hold possession as well for his co-tenants as for himself." Stevens *v.* Martin (Mo.), 68 S. W. 347.

statute of limitations to persons sustaining the relations of tenants in common.[87]

2. Evidence Must Show Distinct Acts of Adverse Claim to Oust Co-Owner. — And, in order to avoid such fiduciary relation and establish one inimical to the rights of his co-tenants the evidence must show distinct acts of repudiation and assertion of an adverse claim brought home to his co-tenants.[88]

3. Entry and Claim Under Deed of Whole by One Co-Owner May

87. *United States.* — Zellers *v.* Eckert, 4 How. 289; Clymers' Lessee *v.* Dawkins, 3 How. 674.

California. — Trenouth *v.* Gilbert, 86 Cal. 584, 25 Pac. 126; Unger *v.* Mooney, 63 Cal. 586, 49 Am. Rep. 100; Packard *v.* Moss, 68 Cal. 123, 8 Pac. 818.

Connecticut. — Newell *v.* Woodruff, 30 Conn. 492.

Massachusetts.—Cummings *v.* Wyman, 10 Mass. 465; Leonard *v.* Leonard, 7 Allen 277.

New Jersey. — Foulke *v.* Bond, 41 N. J. Law 527.

New York. — Baker *v.* Oakwood, 123 N. Y. 16, 25 N. E. 312; Zaph *v.* Carter, 70 App. Div. 395, 75 N. Y.

Texas. — Beall *v.* Evans, 1 Tex. Civ. App. 443, 20 S. W. 945; Puckett *v.* McDaniel, 8 Tex. Civ. App. 630, 28 S. W. 360.

Distinction Between Strangers and Tenants in Common. — "In the acquisition of title by adverse possession the distinction between strangers and tenants in common relates to the character of the evidence necessary to prove that the possession was adverse." Foulke *v.* Bond, 41 N. J. Law 527.

Evidence to Show Adverse Possession of Tenant in Common. — "The only distinction in this class of cases and those in which no privity between the parties existed when the possession commenced is in the degree of proof required to establish the adverse character of the possession. The statute, therefore, does not begin to operate until the possession, before consistent with the title of the true owner, becomes tortious and wrongful by disloyal acts of the tenant, which must be open, notorious, so as to preclude all doubt as to the character of the holding or want of knowledge on the part of the owner." Zellers *v.* Eckert, 4 How. 289. "It is true that the entry and possession of one tenant, in common of and into land held in common is ordinarily deemed the entry and possession of all the tenants, and this presumption will prevail in favor of all until some notorious act of ouster or adverse possession by the party so entering into possession is brought home to the knowledge or notice of the others." Clymers' Lessee *v.* Dawkins, 3 How. Pr. (N. Y.) 674.

88. *England.* — Doe *v.* Taylor, 5 Barn. & A. 575.

United States.—Prescott *v.* Nevers, 4 Mason 330, 19 Fed. Cas. No. 11,390; Zellers *v.* Eckert, 4 How. 289.

Arkansas. — McNeely *v.* Terry, 61 Ark. 527, 33 S. W. 953.

California. — Brown *v.* McKay, 125 Cal. 29, 57 Pac. 1001; Packard *v.* Johnson, 57 Cal. 180; Gage *v.* Downey, 94 Cal. 241, 29 Pac. 635; Seaton *v.* Son, 32 Cal. 481; Gregory *v.* Gregory, 102 Cal. 50, 36 Pac. 364.

Connecticut.—Newell *v.* Woodruff, 30 Conn. 492; White *v.* Beckwith, 62 Conn. 79, 25 Atl. 400.

Delaware. — Mulbourn *v.* David, 7 Houst. 209, 30 Atl. 971.

Florida. — Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391.

Illinois. — Ball *v.* Palmer, 81 Ill. 370; Nickrans *v.* Wilk, 161 Ill. 76, 43 N. E. 741.

Indiana. — Price *v.* Hall, 140 Ind. 314, 39 N. E. 941.

Kentucky. — Ward *v.* Ward, 15 Ky Law 706, 25 S. W. 112.

Maine. — Mansfield *v.* McGinniss, 86 Me. 118, 29 Atl. 956.

Michigan. — Pierson *v.* Conley, 95 Mich. 619, 55 N. W. 387.

Evidence Ouster of Others. — And, an entry and claim of ownership under a deed from one co-tenant purporting to convey the entire estate in fee may evidence an adverse possession amounting to a disseizin of the other co-tenants.[89]

Mississippi. — Bentley *v.* Callaghan (Miss.), 30 So. 709; Alsobrook *v.* Eggleston, 69 Miss. 833, 13 So. 850.

New Jersey. — Foulke *v.* Bond, 41 N. J. Law 527.

New York. — Culver *v.* Rhodes, 87 N. Y. 348.

Ohio. — Youngs *v.* Heffner, 36 Ohio St. 232.

Pennsylvania. — Forward *v.* Deetz, 32 Pa. St. 69; Hawk *v.* Senseman, 6 Serg. & R. 21.

Texas. — Teal *v.* Terrell, 58 Tex. 257; Baily *v.* Trammel, 27 Tex. 317; Beall *v.* Evans, 1 Tex. Civ. App. 443, 20 S. W. 945.

Virginia.—Pillow *v.* Southwest Va. Imp. Co., 92 Va. 144, 23 S. E. 32.

Wisconsin. — Syder *v.* Palmer, 29 Wis. 226.

Ouster of One Tenant in Common by Another. — In order that possession by one tenant in common shall operate as an ouster of his co-tenants the evidence must be such as to justify them in bringing ejectment against him. Bentley *v.* Callaghan (Miss.), 30 So. 709.

"As between tenants in common, adverse possession begins with an actual ouster. Nothing short of an actual ouster will sever the unity of possession." Seaton *v.* Son, 32 Cal. 481.

Tenancy in Common. — Repudiation of co-tenancy must always appear clear, for acts and declarations of the party in possession are construed much more strongly against him than when there is no privity of title. Teal *v.* Terrell, 58 Tex. 257. A higher degree of proof is required to show an ouster of one tenant in common by another than in cases where this relation does not subsist. Newell *v.* Woodruff, 32 Conn. 492.

89. *Arkansas.* — Brown *v.* Bocquin, 57 Ark. 97, 20 S. W. 813.

California. — Packard *v.* Moss, 68 Cal. 123, 8 Pac. 818.

Connecticut. — Clark *v.* Vaughn, 3 Conn. 191.

Mississippi. — Harvey *v.* Briggs, 68 Miss. 60, 8 So. 275, 10 L. R. A. 62.

New Hampshire. — New Market Mfg. Co. *v.* Pendergast, 24 N. H. 54.

New Jersey. — Foulke *v.* Bond, 41 N. J. Law 527.

New York. — Jackson *v.* Smith, 13 Johns. 406; Bogardus *v.* Trinity Church, 4 Paige 178; Clapp *v.* Bromaghan, 9 Cow. 530; Sweetland *v.* Buell, 69 N. Y. St. 733, 35 N. Y. Supp. 346.

North Carolina. — Ross *v.* Durham, 20 N. C. 54.

Pennsylvania. — Longwell *v.* Bentley, 23 Pa. St. 99; Culler *v.* Motzer, 13 Serg. & R. 356.

Tennessee. — Marr *v.* Gilliam, 1 Cold. 488; Weisinger *v.* Murphy, 39 Tenn. 674.

West Virginia. — Bennett *v.* Pierce, 50 W. Va. 604, 40 S. E. 395.

Grantee of One Tenant in Common of Whole Estate May Oust Other Tenants. — "But when one tenant in common assumes to sell and convey the entire estate in the premises, and apparently does so by warranty deed, and his grantee takes it as such, and goes into possession, claiming title to the whole, the possession thus taken by the grantee and held by him may be treated as an ouster of the co-tenants, and constitutes an adverse possession, and by its continuance for the requisite time will ripen into a title as against them. Clapp *v.* Bromagham, 9 Cow. 530; Bogardus *v.* Trinity Church, 4 Paige 178; Town *v.* Needham, 3 Paige 545; Florence *v.* Hopkins, 46 N. Y. 186; Baker *v.* Oakwood, 123 N. Y. 16, 25 N. E. 312." Sweetland *v.* Buell, 69 N. Y. St. 733, 35 N. Y. Supp. 346.

Presumption that the entry of one co-tenant is for the benefit of all does not apply where the grantor's conveyance is of the whole estate by one of the co-tenants, such an entry being a disseizin of the other co-tenants. Foulke *v.* Bond, 41 N. J. Law 527.

4. Conveyance of Whole by One Co-Tenant Not Notice of Exclusive Claim. — The conveyance by one joint tenant, or tenant in common, of all his interest in real estate, though the land is described in such manner as to pass the whole under the deed, if the grantor had owned the whole is not notice of itself to the other joint owner of any such exclusive claim to the land as will oust him of his legal seizin in the land.[90]

5. But Such Deed When Recorded May Have That Effect. — But if duly recorded, such deed may operate to such effect.[91]

6. Sole Possession Not Evidence of Ouster in Itself. — Sole possession will not operate as evidence of an ouster unless supported by claim of exclusive right.[92]

7. Acts May Operate As Positive Notice. — But the acts of an occupant may create such notorious evidence of his adverse claim

Claiming Under Deed of One Tenant in Common Adverse to Others. Sale or conveyance of the entire estate by one tenant in common to a stranger who enters into possession under a deed claiming title to the entirety, and openly exercises acts of exclusive ownership works a disseizin, and makes the possession of such purchaser adverse to his vendor's co-tenants. Bennett *v.* Pierce, 50 W. Va. 604, 40 S. E. 395.

90. Roberts *v.* Morgan, 30 Vt. 320; Hardee *v.* Weathington (N. C.), 40 S. E. 855.

91. Deed of Whole by One Tenant in Common. — *Policy of Recording Acts.* — The policy of recording acts substitutes the constructive notice arising from the publicity of record in the place of notoriety of investiture by livery of seizin at common law. Fonlke *v.* Bond, 41 N. J. Law 527.

Possession Under Deed of All from One Tenant in Common Is Adverse. "It does not appear that Tyler had notice or knowledge of the defect in his title. But whether he had such knowledge or not, it is very clear that he was in possession, claiming the entire title; and this undoubtedly was an adverse possession, which, being open and notorious, amounts to a disseizin. To constitute a disseizin, it is not necessary, at the present day, to prove the forcible expulsion of the owner; nor is it necessary for a tenant in common to prove an actual ouster of the co-tenant. If he enters, claiming the whole estate, the entry is adverse to the other tenants. The intention so to hold the estate must be manifest, as it is in the present case; and the open and notorious possession of Tyler was constructive notice of a claim adverse to those heirs of Moore who had not conveyed their title. If they had notice by the deeds to Hale, and by him to Tyler (which were duly recorded), they must have known that the latter never entered as tenant in common, but that he entered as purchaser of the entire estate." Parker *v.* Proprietors, 3 Metc. (Mass.) 91.

92. Parker *v.* Locks & Canals, 3 Metc. (Mass.) 91; Bentley *v.* Callaghan (Miss.), 30 So. 709.

Mere Occupancy of One Tenant in Common Not Evidence of Adverse Claim. — "But the sole silent occupation by one, of the entire property, claiming the whole and taking the whole profits, with no account to, or claim by the others, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, cannot be construed into an adverse possession." Marr *v.* Gilliam, 1 Cold. (Tenn.) 488.

Ouster of One Tenant in Common. "An ouster or disseizin is not to be presumed from the mere fact of sole possession; but it may be proved by such possession, accompanied by a notorious claim of exclusive right." Bradstreet *v.* Huntington, 5 Pet. 402.

as to render it unnecessary to show either positive notice to a co-tenant, or facts showing a probable actual knowledge on his part.[93]

8. Conclusive Presumptions. — And, from such acts conclusive presumptions may arise in favor of an occupant, as against all adverse claimants.[94]

93. *United States.*—Elder *v.* McClaskey, 74 Fed. 581.

California. — Packard *v.* Johnson, 57 Cal. 180; Unger *v.* Mooney, 63 Cal. 586, 49 Am. Rep. 100.

Illinois. — Dugan *v.* Follett, 100 Ill. 581.

Massachusetts. — Sullivan *v.* Holmes, 8 Cush. (Mass.) 252.

Missouri. — Warfield *v.* Lindell, 30 Mo. 272; Lapeyre *v.* Paul, 47 Mo. 586.

New York. — Culver *v.* Rhodes, 87 N. Y. 348.

Tennessee.—Marr *v.* Gilliam, 1 Cold. 488.

Actual Ouster of Tenant in Common Not Indispensable. — "While mere possession alone, except possibly in very extreme cases, will not be sufficient of itself to establish an adverse holding by one tenant in common against another, yet in such case other circumstances, short of an ouster, may be sufficient for that purpose." Dugan *v.* Follett, 100 Ill. 581.

Notice of Ouster of Co-Tenant May Be From Acts. — "It is not necessary that he should give actual notice of his ouster or disseizin of his co-tenant to him. He must, in the language of the authorities, bring it home to his co-tenant. But he may do this by conduct, the implication of which cannot escape the notice of the world, or of any one, though not a resident of the neighborhood, who has an interest in the property, and exercises that degree of attention in respect to what is his that the law presumes in every owner." Elder *v.* McClaskey, 74 Fed. 529.

One Tenant in Common Acquires Title by Adverse Possession. — "It appears, then, that by consent of the other heirs, Mr. and Mrs. Richard Sullivan entered on the estate as owners, claiming, whether by valid title or not is immaterial, but in fact claiming to hold the whole estate in severalty. This was done with full notice to John L. Sullivan, and therefore as against him, amounted to a constructive disseizin. After such entry by Richard Sullivan, his exclusive, adverse and uninterrupted possession, as stated in the facts, and the entire acquiescence of John L. Sullivan, under circumstances of embarrassment and insolvency, without claim, are sufficient proof both of a non-appearing grant, and also of an ouster, continued until all right of entry was barred, before the levy of the tenant's execution." Sullivan *v.* Holmes, 8 Cush. (Mass.) 252.

94. Van Dyke *v.* Van Buren, 1 Caines (N. Y.) 464; Cummings *v.* Wyman, 10 Mass. 465.

Conclusive Presumptions. — "It is, however, well settled that the exclusive and uninterrupted possession by one tenant in common, of land for a great number of years—say for twenty or more—claiming the same as his own, without any account with his co-tenants, or claim on their part—they being under no disability to assert their rights—becomes evidence of a title to such sole possession; and the jury are authorized to presume a release, an ouster, or other thing necessary to protect the possessor; and the action of ejectment by his co-tenants, in such case, is barred. The presumption is an inference of fact to be drawn by the jury, to whom the evidence is to be submitted. 4 Dev. 223-290; Cowper 217; 6 Cowen 632; 1 Sneed 279. It is made without any reference to our statute of limitations, and in no analogy to it." Marr *v.* Gilliam, 1 Cold. (Tenn.) 488.

Evidence From Possession and Acts. — Where one of several heirs had taken exclusive possession of land to which all were entitled as tenants in common, and had im-

9. Evidence of Parol Partition. — The exclusive possession in severalty by co-parceners of the various parts of the common land acquiesced in for a great number of years will authorize an inference of parol partition, unless other circumstances rebut such presumption.[95]

10. Exclusive Possession Under Invalid Partition Proceedings. Exclusive possession of one tenant in common under partition proceedings invalid against his co-tenant may ripen into title of the entire estate.[96]

XIV. FRAUDULENT ENTRY.

1. Occupant Gains No Rights by Fraudulent Entry. — A possession taken and held in such manner as to evince a fraudulent purpose of concealing the existing conditions of the premises from the true owner, will not ripen into title by adverse possession.[97]

proved it without interference from the others, though they lived in the immediate neighborhood, and no possessory action was brought by them, or by their heirs or representatives for more than twenty-five years after their death, it was held that no possession could probably be found that was not adverse and exclusive within the statutory period of limitation, and that there could be no recovery in the right of the excluded owners. Campan *v.* Dubois, 39 Mich. 274.

When Parol Demise of One Co-Grantee Will Be Presumed.—One of three joint grantees paying no part of the purchase money, nor claiming any possession or title under the deed during a period of more than forty years, during which exclusive possession of the real estate has been with his co-grantees, will be considered as having made a parol demise of all his interests in the property to such co-grantees, and they will be deemed to hold a valid title to the property as against any claim that he might afterwards assert. Webster *v.* Holland, 58 Me. 168.

95. Berry *v.* Seawell, 65 Fed. 742.

Evidence of Parol Partition. "We think that, in the absence of evidence to the contrary, the fact that co-tenants of a tract of land have occupied the several portions in severalty for more than fifty years, with the knowledge and consent of each other, and have exercised exclusive ownership and control over the respective shares, without objection or claim on the part of the other co-tenants, raises a strong presumption of fact that there was a mutual division by agreement, express or tacit, of the land, between the co-tenants according to the lines of exclusive occupancy." Allen *v.* Seawell, 70 Fed. 561.

Evidence of an Executed Parol Partition. — "Under this agreement Polhemus selected a section which he gave to his daughter, the plaintiff herein. She entered into the possession thereof, claiming the same; has had the exclusive possession for more than fifteen years; has cultivated the same and has made improvement thereon to the value of seven thousand dollars; and said cultivation and making of improvements were known to Robinson and all the co-tenants. This is a strong showing and clearly indicates an example of an executed parol partition." Tuffree *v.* Polhemus, 108 Cal. 670, 41 Pac. 806.

96. Elder *v.* McClaskey, 70 Fed. 529; Clymess' Lessee *v.* Dawkins, 3 How. Pr. (N. Y.) 674.

97. *California.* — Thompson *v.* Pioche, 44 Cal. 508; Reay *v.* Butler, 95 Cal. 206, 30 Pac. 208; Walsh *v.* Hill, 38 Cal. 481.

Georgia. — Parker *v.* Salmons, 101 Ga. 160, 28 S. E. 681.

Indiana. — Pennington *v.* Flock, 93 Ind. 378.

2. Fraudulent Purpose Must Appear From Acts. — But, there must be evidence of acts tending to show such fraudulent purpose, other than constructively.[98]

3. Evidence of Later Acts May Render Fraudulent Entry Unimportant. — And, possession, although accomplished by a trick may be so maintained as to give notice of an adverse claim.[99]

4. Knowledge That Claimant's Title Is Bad Immaterial. — Nor

Iowa. — Litchfield *v.* Sewell, 97 Iowa 247, 66 N. W. 104.

Kentucky. — Buford *v.* Cox, 5 J. J. Marsh. 582.

New Jersey. — Foulke *v.* Bond, 41 N. J. Law 527.

Texas. — Texas Land Co. *v.* Williams, 51 Tex. 51.

Possession by One Fraudulently Withholding Knowledge of True Owners. — The grandfather of an infant three years old conveyed a tract of land to her, in consideration of love and affection, by a deed which he placed in the custody of her father, who took possession of the land, occupying it until long after she became twenty-one years old, and assuming ownership, rented a portion of the land to her, keeping her in ignorance of such deed. It was held that such possession was not of the character to ripen into title by adverse possession. Parker *v.* Salmons, 101 Ga. 160, 28 S. E. 681.

Actual Knowledge of Invalidity of Claim Destroys It. — "Now, while it is true that a void deed, or one given without right or title by the grantor, or even a tax deed void on its face, may be sufficient to give color of title, yet, such a rule has no application to one who actually knows that he has no claim, or title, or right to a title." Litchfield *v.* Sewell, 97 Iowa 247, 66 N. W. 104.

"Adverse possession, to avoid a deed by the true owner, must be *bona fide* under a claim of title and belief by the tenant that the land is his." Pennington *v.* Flock, 93 Ind. 378.

The extent of the constructive possession acquired under color of title, whether by the owner in person or by his tenants, depends upon whether it is *bona fide*, and under such color of right, that others can understand its character and extent. Texas Land Co. *v.* Williams, 51 Tex. 51.

98. *California.* — Wilson *v.* Atkinson, 77 Cal. 485, 20 Pac. 66.

Georgia. — Parker *v.* Salmons, 101 Ga. 160, 28 S. E. 681; Hall *v.* Gay, 68 Ga. 442; Brady *v.* Walters, 55 Ga. 25.

Illinois. — Dickenson *v.* Breeden, 30 Ill. 279; Hodgen *v.* Henrichsen, 85 Ill. 259.

New Jersey. — Foulke *v.* Bond, 41 N. J. Law 527; Saxton *v.* Hunt, 20 N. J. Law 487; Cornelius *v.* Giberson, 25 N. J. Law 1.

Fraud. — In order that a grantor shall be deprived of the legal advantages attending an entry under color of title upon the ground of bad faith, the evidence must clearly show his knowledge of the invalidity of the title and an intent to defraud the real owner. Foulke *v.* Bond, 41 N. J. Law 527.

Fraud Must Be Brought Home to Occupant. — "Adverse possession is one of intention, and it turns upon the good faith of the person setting it up. The facts must be such as to affect his conscience and they must be brought home to him." Parker *v.* Salmons, 101 Ga. 160, 28 S. E. 681.

99. San Francisco *v.* Fulde, 37 Cal. 349, 99 Am. Dec. 278; Strange *v.* Durham, 1 Brev. (S. C.) 83.

Possession, Although Obtained by Trick, Is Notice of Adverse Claim. "One may enter clandestinely or by a trick; but when he is once in, and continues there, claiming to hold the land as his own, the possession, it would seem, cannot, in its nature, be secret, but is necessarily visible. There can be no question of the object of the defendant in taking possession, nor of its character throughout—that it was adverse." Lenoir *v.* Smith, 32 N. C. 237.

will knowledge that his title is invalid prevent an occupant from acquiring a good one by adverse possession.[1]

5. Need Not Show Claimant's Absolute Good Faith. — The rule fixed by the weight of authority is, that it is not necessary to establish a title by adverse possession that the evidence show entire good faith upon the part of such occupant.[2]

1. *United States.* — Gaines *v.* Agnelly, 1 Woods 238, 9 Fed. Cas. No. 5173; Alexander *v.* Pendleton, 8 Cranch 462.

Alabama. — Alexander *v.* Wheeler, 69 Ala. 332; Baucum *v.* George, 65 Ala. 259; Manly *v.* Turnipseed, 37 Ala. 522.

Georgia. — Wood *v.* McGuire, 17 Ga. 303; Lee *v.* Ogden, 83 Ga. 325, 10 S. E. 349.

Illinois. — Russell *v.* Mandell, 73 Ill. 136; Burgett *v.* Taliaferro, 118 Ill. 503, 9 N. E. 334.

Massachusetts. — Warren *v.* Bowdran, 156 Mass. 280, 31 N. E. 300.

New Jersey. — Cornelius *v.* Giberson, 25 N. J. Law 1.

New York. — Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633.

North Carolina. — Den *v.* Leggat, 7 N. C. 539; Whitfield *v.* Hill, 58 N. C. 316.

Pennsylvania. — Brown *v.* McKinney, 9 Watts 565, 36 Am. Dec. 139.

Tennessee. — Love *v.* Love, 10 Tenn. 288.

West Virginia. — Jones *v.* Lemon, 26 W. Va. 629; Swann *v.* Young, 36 W. Va. 57, 14 S. E. 426.

Knowledge of Bad Title Not Inimical to Right by Adverse Holding. Knowledge that a man's title is bad will not prevent his getting a good one in twenty years. Warren *v.* Bowdran, 156 Mass. 280, 31 N. E. 300.

2. *United States.* — Oliver *v.* Pulman, 24 Fed. 127.

Alabama. — Smith *v.* Roberts, 62 Ala. 83; Murray *v.* Hoyle, 97 Ala. 588, 11 So. 797.

California. — San Francisco *v.* Fulde, 37 Cal. 349, 99 Am. Dec. 278.

Illinois.—Hardin *v.* Gouveneur, 69 Ill. 140.

Indiana. — Moore *v.* Hinkle, 151 Ind. 343, 50 N. E. 822.

Kansas. — Anderson *v.* Burnham, 52 Kan. 454, 34 Pac. 1051.

Massachusetts. — Warren *v.* Bowdran, 156 Mass. 280, 31 N. E. 300.

Missouri. — Wilkerson *v.* Eilers, 114 Mo. 245, 21 S. W. 514.

Nebraska. — Lantry *v.* Wolff, 49 Neb. 374, 68 N. W. 494; Fitzgerald *v.* Brewster, 31 Neb. 51, 47 N. W. 475.

New York. — Humbert *v.* Trinity Church, 24 Wend. 587; Sands *v.* Hughes, 53 N. Y. 287.

Oregon. — Morrison *v.* Holladay, 27 Or. 175, 39 Pac. 1100.

South Carolina. — Strange *v.* Durham, 1 Brev. 83.

Tennessee. — Love's Lessee *v.* Shields, 3 Yerg. 405; York *v.* Bright, 23 Tenn. 312.

Wisconsin. — McCann *v.* Welch, 100 Wis. 142, 81 N. W. 996; Lampman *v.* Van Alstyne, 94 Wis. 417, 69 N. W. 171.

Fraud of Occupant No Excuse for Laches of Owner. — Neither fraud in obtaining nor continuing the possession, nor knowledge on the part of a claimant that his claim is unfounded, wrongful and fraudulent will excuse the negligence of the owner in not bringing his action within the prescribed period; nor will his ignorance of the injury, until the statute has attached, excuse him, though such injury was fraudulently concealed by the contrivance of the wrongdoer. Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 587.

Fraudulent Deed, Grantee May Lawfully Hold Under. — "Even a fraudulent deed may be color of title and become a good title if the fraudulent grantee holds actual adverse possession for seven years against the owner, who has a right of entry and a right of action to recover possession, and is under no disability mentioned in the statutes." Oliver *v.* Pullum, 24 Fed. 127. "The

Contrary Doctrine. — In some jurisdictions the distinction is maintained that whilst void instruments may confer color of title, if the evidence show that an occupant knows his paper title is void, it will avail him nothing.[3]

XV. CONFLICTING POSSESSIONS.

1. Older Possession Succeeds. — If neither claimant has the true title, the older possession will succeed.[4]

2. Evidence to Supplant Must Be Same As to Create. — And, the rights acquired will not be destroyed by a subsequent entry and

fact that defendant procured a deed by fraud if it were so, and fraudulently obtained possession, would make no difference. The statute makes no exception for fraud, and will run in favor of a possession obtained by fraud." York *v.* Bright, 23 Tenn. 312; McCann *v.* Welch, 106 Wis. 142, 81 N. W. 996.

3. Litchfield *v.* Sewell, 97 Iowa 274, 66 N. W. 104; Kopp *v.* Kerman, 82 Md. 339, 33 Atl. 646; Saxton *v.* Hunt, 20 N. J. Law 487.

Knowledge Must Be Actual. — But it is held that the knowledge must be actual and not such as would arise from the legal construction of the instrument. Wilson *v.* Atkinson, 77 Cal. 485, 20 Pac. 66.

4. *United States.*—Green *v.* Liter, 8 Cranch 229; Hunt *v.* Wickliffe, 2 Pet. 201.

Alabama. — Reddick *v.* Long, 124 Ala. 260, 27 So. 402; Payne *v.* Crawford (Ala.), 30 So. 824.

Georgia. — Flannery *v.* Hightower, 97 Ga. 592, 25 S. E. 371; King *v.* Sears, 91 Ga. 577, 18 S. E. 830.

Illinois. — Brooks *v.* Bruyn, 18 Ill. 539; Riverside Co. *v.* Townsend, 120 Ill. 9, 9 N. E. 65; Bowman *v.* Wettig, 39 Ill. 416; Herbert *v.* Herbert, 1 Ill. 354, 12 Am. Dec. 192.

Louisiana. — Michel *v.* Stream, 48 La. 340, 19 So. 215.

Massachusetts. — Pettigill *v.* Boynton (Mass.), 29 N. E. 655; Institution of Savings *v.* Burnham, 128 Mass. 458; Perry *v.* Weeks, 137 Mass. 584; Thoreau *v.* Pallies, 1 Allen 425.

Mississippi. — Kerr *v.* Farish, 52 Miss. 101.

Missouri. — Mather *v.* Walsh, 107 Mo. 121, 17 So. 755; Fugate *v.* Pierce, 49 Mo. 441; Farrar *v.* Heinrich, 86 Mo. 521.

Nebraska. — Ballard *v.* Hansen, 33 Neb. 861, 51 N. W. 295.

New York. — Smith *v.* Burtis, 6 Johns. 197; Smith *v.* Lorillard, 10 Johns. 338; Jackson *v.* Harder, 4 Johns. 202, 4 Am. Dec. 262; Thompson *v.* Burhans, 79 N. Y. 93.

North Carolina.—Graham *v.* Houston, 15 N. C. 232.

Pennsylvania. — Green *v.* Killum, 23 Pa. St. 254.

Vermont. — Wing *v.* Hall, 47 Vt. 182; Hughes *v.* Graves, 39 Vt. 359, 94 Am. Dec. 331.

Prior Possession Short of Twenty Years Defeats an Intruder Who Has Held Less Than Twenty Years. Evidence showing a prior possession short of twenty years under claim of right will defeat a subsequent possession of less than twenty years when no other evidence of title is adduced on either side. Smith *v.* Lorillard, 10 Johns. (N. Y.) 338.

"The proof here adduced was *prima facie* evidence, both of title and of right of possession, and was sufficient to put the defendant on his defense. It was not necessary that the plaintiff should have shown a possession of twenty years, or a paper title. Upon this state of the case, the mere naked possession of the defendant could not prevail against it." Herbert *v.* Herbert, 1 Ill. 354, 12 Am. Dec. 192.

Evidence insufficient to establish a title by adverse possession against a true owner may be valid as against a mere intruder having no pretense of title. Pettigill *v.* Boynton, (Mass.), 29 N. E. 655.

occupation by the opposing claimant until it has ripened into a title by adverse possession.[5]

XVI. CLAIMS UNDER CONFLICTING TITLES.

Overlapping Grants. — Where there is an interlock between two tracts of land claimed under different titles, the fact of actual possession under such respective titles will practically determine the rights of adverse claimants to the disputed territory.[6]

5. *Alabama.* — Reddick *v.* Long, 124 Ala. 260, 27 So. 402; Mills *v.* Clayton, 73 Ala. 359; Strange *v.* King, 84 Ala. 212, 4 So. 600; Anderson *v.* Melear, 56 Ala. 621; Murray *v.* Hoyle, 92 Ala. 559, 9 So. 368.

California. — Longford *v.* Poppe, 56 Cal. 73.

Mississippi. — Harper *v.* Tapley, 35 Miss. 506.

New Jersey. — Spottiswoode *v.* Morris & E. R. Co., 61 N. J. Law 322, 40 Atl. 505.

New York. — Sherman *v.* Kane, 86 N. Y. 57.

Pennsylvania. —Schall *v.* Williams Valley R. Co., 35 Pa. St. 191.

Texas. — Spofford *v.* Bennett, 55 Tex. 293.

Actual possession of a part of a tract under patent from the state in 1862, was held sufficient to extend constructive possession over a disputed tract, as against one claiming under a patent from the United States who had not taken actual possession of such disputed strip until in the year 1874. Longford *v.* Poppi, 56 Cal. 73.

6. *United States.* — Hunnicutt *v.* Peyton, 102 U. S. 333.

California. — Davis *v.* Perley, 30 Cal. 630; Kimball *v.* Stormer, 65 Cal. 116, 3 Pac. 408; Labory *v.* Los Angeles Orphans' Asylum, 97 Cal. 270, 32 Pac. 231.

Kentucky. — Swafford *v.* Herd, (Ky.), 65 S. W. 803; Kruth *v.* Kahn, (Ky.), 65 S. W. 18; McDowell *v.* Kenny, 3 J. J. Marsh, 516; Flynn *v.* Sparks, 10 Ky. Law 960, 11 S. W. 206.

Maryland. — Hammond *v.* Warfield, 2 Har. & J. 151.

Missouri. — Schultz *v.* Lindell, 30 Mo. 310; Crispen *v.* Hannavan, 50 Mo. 536; Ozark & Plateau Land Co. *v.* Hay, 105 Mo. 143, 16 S. W. 957.

North Carolina. — Green *v.* Harmon, 15 N. C. 158; McLean *v.* Smith, 106 N. C. 172, 11 S. E. 184; Boomer *v.* Gibbs, 114 N. C. 76, 19 S. E. 226; Ashury *v.* Fair, 111 N. C. 251, 16 S. E. 467.

Pennsylvania. — Arden *v.* Grove, 18 Pa. St. 377; Beaupland *v.* McKeen, 28 Pa. St. 124, 70 Am. Dec. 115.

Tennessee. — Mitchell *v.* Churchman, 4 Humph. 218; Berry *v.* Walden, 4 Hayw. 175; Creech *v.* Jones, 37 Tenn. 631; White *v.* Lavender, 37 Tenn. 648; Peck *v.* Houston, 5 Lea 227; Coal Creek Mining Co. *v.* Heck, 15 Lea 497.

Texas. — Parker *v.* Baines, 65 Tex. 605; Evitts *v.* Roth, 61 Tex. 81; Cook *v.* Lister, 15 Tex. Civ. App. 31, 38 S. W. 380; Roach *v.* Fletcher, 11 Tex. Civ. App. 225, 32 S. W. 585; Porter *v.* Miller, (Tex.), 13 S. W. 555.

Vermont. — Ralph *v.* Bayley, 11 Vt. 521.

Virginia. — Shanks *v.* Lancaster, 5 Gratt. 110, 50 Am. Dec. 108; Cline *v.* Catron, 22 Gratt. 378; Harman *v.* Ratliff, 93 Va. 249, 24 S. E. 1023; Fry *v.* Stowers, 98 Va. 417, 36 S. E. 232; Sulphur Mines Co. *v.* Thompson's Heirs, 93 Va. 293, 25 S. E. 232; Stull *v.* Rich Patch Iron Co., 92 Va. 253, 23 S. E. 293.

West Virginia. — Congrove *v.* Burdett, 28 W. Va. 220; White *v.* Ward, 35 W. Va. 418, 14 S. E. 22; Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367; Ilsley *v.* Wilson, 42 W. Va. 757, 26 S. E. 551.

Wisconsin. — Wilson *v.* Henry, 40 Wis. 594.

XVII. POSSESSION MAINTAINED BY MISTAKE.

Mistaken Boundaries. — Possession Restricted to True Line, When. Possession maintained, however long, to a given extent under the mistaken belief that it corresponds with the true boundary line, beyond which it was not intended to assert any claim, will not be competent evidence in support of a claim of title by adverse possession to anything not actually embraced by the true boundary.[7]

XVIII. ADVERSE POSSESSION AND ACQUIESCENCE DISTINGUISHED.

This doctrine, however, is to be distinguished from that appar-

7. *Alabama.* — Humes *v.* Bernstein, 72 Ala. 546; Brown *v.* Cockerell, 33 Ala. 38; Alexander *v.* Wheeler, 69 Ala. 332; Davis *v.* Caldwell, 107 Ala. 526, 18 So. 103.

California. — Quinn *v.* Windmiller, 67 Cal. 461, 8 Pac. 14; Gordon *v.* Booker, 97 Cal. 586, 32 Pac. 593; Woodward *v.* Farris, 109 Cal. 12, 41 Pac. 781; Smith *v.* Roberts (Cal.), 9 Pac. 104; Powers *v.* Bank of Oroville, 136 Cal. 486, 69 Pac. 151.

Connecticut. — Huntington *v.* Whaley, 29 Conn. 391.

Florida. — Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 99.

Georgia. — Howard *v.* Reedy, 29 Ga. 152, 74 Am. Dec. 58.

Indiana. — Silver Creek Cement Corp. *v.* Union Lime & Cement Co., 138 Ind. 297, 35 N. E. 125.

Iowa. — Miller *v.* Mills Co., 111 Iowa 654, 82 N. W. 1038; Palmer *v.* Osborn (Iowa), 87 N. W. 712; Goldsborough *v.* Pidduck, 87 Iowa 599, 54 N. W. 431.

Kansas. — Winn *v.* Abeles, 35 Kan. 85, 10 Pac. 443.

Kentucky. — Smith *v.* Morrow, 7 J. J. Marsh. 442.

Maine. — Worchester *v.* Lord, 56 Me. 265, 96 Am. Dec. 456; Preble *v.* Maine Cent. R. Co., 85 Me. 260, 27 Atl. 149.

Maryland. — Davis *v.* Furlow, 27 Md. 536.

Missouri. — Crawford *v.* Ahrens, 103 Mo. 88, 15 S. W. 341; Finch *v.* Ullman, 105 Mo. 255, 16 S. W. 863; McWilliams *v.* Samuel, 123 Mo. 659, 27 S. W. 550; Handlan *v.* McManus, 100 Mo. 124, 13 S. W. 207; Adkins *v.* Tomlinson, 121 Mo. 487, 26 S. W. 573.

New Hampshire. — Smith *v.* Hosmer, 7 N. H. 436, 28 Am. Dec. 354.

Oregon.—King *v.* Brigham, 23 Or. 262, 31 Pac. 601.

Wisconsin. — Fuller *v.* Worth, 91 Wis. 406, 64 N. W. 995.

Possession Under Mistake as to True Line Not Admissible. — The possession of two co-terminous proprietors under mistake or ignorance of the true line dividing their premises, and without intending to claim beyond the true line, when discovered, will not work a disseizin in favor of either. Crawford *v.* Ahrens, 103 Mo. 88, 15 S. W. 341. "But neither they nor their grantors have ever claimed land between the true boundary as we have found it, and this ridge, save as a part of said lots. It is the case of a mistake in the boundaries, and the doctrine of Grube *v.* Wells, 34 Iowa 148, and the long line of cases following it, must be applied." Palmer *v.* Osborne (Iowa), 87 N. W. 712. One making no claim of ownership to land beyond description of his deed is not holding adversely. Ross *v.* Gould, 5 Me. 204. If one place his enclosure not claiming that his fences are upon the true line, but expecting to move them to the true line when it should be determined, he is not claiming adversely. Woodward *v.* Farris, 109 Cal. 12, 41 Pac. 781.

Party Wall. — Mere belief of an adjoining occupant and owner that he owns to the center of a divisional wall wholly on the adjoining land

ently recognized by the current of authority respecting the location of permanent boundary lines by long acquiescence of the co-terminous land owners, which it is not deemed practical to consider distinctively in connection with adverse possession.[8]

1. Claiming Ownership to Mistaken Lines. — Although mere occupancy by one co-terminous owner coincident with what is erroneously believed to be the true boundary line is not presumed to be adverse, it will be impressed with that character by evidence that a claimant asserting it to be the true line, held the premises up to it claiming them as his own.[9]

without anything evincing it affirmatively will not constitute adverse possession. Huntington *v.* Whaley, 29 Conn. 391.

8. *See* article "BOUNDARIES."

California.—Quinn *v.* Windmiller, 67 Cal. 461, 8 Pac. 14; Irvine *v.* Adler, 44 Cal. 559.

Florida. — Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 99.

Illinois. — Kerr *v.* Hitt, 75 Ill. 51.

Iowa. — Klinker *v.* Schmidt (Iowa), 87 N. W. 661; Palmer *v.* Osborne (Iowa), 87 N. W. 712; Miller *v.* Mills Co., 111 Iowa 654, 82 N. W. 1038.

Kansas. — Zimmerman *v.* Gunther (Kan. App.), 63 Pac. 657.

Michigan. — Carpenter *v.* Monks, 81 Mich. 103, 45 N. W. 477.

New York. — Sherman *v.* Kane, 86 N. Y. 57.

Pennsylvania. — Reiter *v.* McJunkin, 173 Pa. St. 82, 33 Atl. 1012.

Wisconsin. — Illinois Steel Co. *v.* Budzisz, 106 Wis. 499, 82 N. W. 534.

Adverse Possession, and Acquiescence Distinguished. — "We apprehend the distinction between the doctrine of the cases which deny efficacy to an occupancy founded on mistake and those which recognize occupancy to a line established by acquiescence, to be this: that in the one case the assertion of title is presumed to be limited to the premises covered by the grant under which the possession is claimed, while in the other case there is a wholly independent basis for the assertion of title, to wit: acquiescence of the adjoining owner." Klinkner *v.* Schmidt (Iowa), 87 N. W. 661.

Acquiescence Not Presumed. "This acquiescence is not to be presumed from the mere fact of notorious possession by the adverse claimant to a line which himself established. It must be shown by proof of an express agreement or of facts from which an agreement may be implied." Klinkner *v.* Schmidt (Iowa), 87 N. W. 661. This doctrine is substantially one of practical location by acquiescence. Sherman *v.* Kane, 86 N. Y. 57.

Fence Concedes Title by Adverse Possession After Twenty-one Years. "The maintenance of a line fence between owners of adjoining lands by their acts, up to which each claims and occupies, is a concession by each of the open, adverse possession by the other of that which is on his side of such division fence, which, after twenty-one years, will give title, though subsequent surveys may show that the fence was not exactly upon the surveyed line." Reiter *v.* McJunkin, 173 Pa. St. 82, 33 Atl. 1012.

"Where owners of adjacent lands have a resurvey of their dividing line made, readjust their fences, cultivation, and occupancy of their respective premises to the line just established, and they and their grantees acquiesce in the correctness of the lines as established by such survey for more than fifteen years, such occupancy is sufficient to start and uphold the statute of limitations to the lands thus occupied." Zimmerman *v.* Gunther (Kan. App.), 63 Pac. 657.

9. *United States.* — Brown *v.* Lette, 2 Fed. 440; Harvy *v.* Tyler, 2 Wall. 349; Probst *v.* Trustees, 129 U. S. 191, 9 Sup. Ct. 263.

2. Claim of Ownership Beyond His True Line. — And, the same doctrine obtains where a land owner, by mistake, incloses and holds beyond his true boundaries, claiming the premises as his own.[10]

Alabama.—Barrett *v.* Kelly (Ala.), 30 So. 824.

California. — Woodward *v.* Farris, 109 Cal. 12, 41 Pac. 781; Lucas *v.* Provinces, 130 Cal. 270, 62 Pac. 509; Powers *v.* Bank Oroville, 136 Cal. 486, 69 Pac. 151.

Connecticut. — French *v.* Pearce, 8 Conn. 440, 21 Am. Dec. 680.

Florida. — Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 99.

Illinois. — McNamara *v.* Seaton, 82 Ill. 498.

Indiana. — Dyer *v.* Eldridge, 136 Ind. 654, 36 N. E. 522.

Iowa. — Miller *v.* Mills Co., 111 Iowa 654, 82 N. W. 1038.

Kansas. — Conrad *v.* Sockett, 8 Kan. App. 635, 56 Pac. 507.

Kentucky. — Louisville & N. R. Co. *v.* Quinn, 94 Ky. 310, 22 S. W. 221.

Maine. — Abbott *v.* Abbott, 51 Me. 575; Hitchings *v.* Morrison, 72 Me. 331; Preble *v.* Maine Cent. R. Co., 85 Me. 260, 27 Atl. 149.

Michigan. — Bunce *v.* Bidwell, 43 Mich. 542, 5 N. W. 1023; Van Der Groef *v.* Jones, 108 Mich. 65, 65 N. W. 602.

Minnesota. — Ramsey *v.* Glenny, 45 Minn. 401, 48 N. W. 322, 22 Am. St. Rep. 736.

Missouri. — Battner *v.* Baker, 108 Mo. 311, 18 S. W. 911; McWilliams *v.* Samuel, 123 Mo. 659, 27 S. W. 550; Brummel *v.* Harris, 148 Mo. 430, 50 S. W. 93; Mather *v.* Walsh, 107 Mo. 121, 17 S. W. 755.

Nebraska. — Obernalte *v.* Edgar, 28 Neb. 70, 44 N. W. 82; Levy *v.* Yerga, 25 Neb. 764, 41 N. W. 773.

Ohio. — Yetzer *v.* Thoman, 17 Ohio St. 130, 91 Am. Dec. 122.

Texas. — Blisso *v.* Casper, 14 Tex. Civ. App. 19, 36 S. W. 345.

Wisconsin. — Ayers *v.* Reidel, 84 Wis. 276, 54 N. W. 588.

Claiming by Mistake Effectual. "It is the fact that possession is held, and that title is claimed, which make it adverse possession, or claim, or both, though they may have resulted from a mistake; but it is their existence and not their cause that the law considers, and existing, they constitute adverse possession." Metcalfe *v.* McCutchen, 60 Miss. 145.

Claiming to an Erroneous Division Line May Ripen Into Title. Possession by a co-terminous owner up to a line erroneously believed to be the true line is not presumably adverse, but may be rendered so if the claimant claims it as the true line and holds the property up to it, claiming it as his own. Barrett *v.* Kelly (Ala.), 30 So. 824.

Doctrine of Intent When Claiming to Erroneous Line. — "No question is raised as to the extent, duration or continuity of the defendant's occupation. If it was not accompanied by a claim of title, but was merely inadvertence or mistake as to the extent of his land, without intention to claim title to the extent of his occupation, but only to the bounds described in his deed, then the verdict is against law. Lincoln *v.* Edgecomb, 31 Maine 354; Abbott *v.* Abbott, 51 Maine 584; Worchester *v.* Lord, *supra*, and the earlier cases therein cited; Dow *v.* McKenny, 64 Maine 138; but if, on the contrary, he did claim title clear to the fence which was not on the true line as described in the deed, although he by mistake supposed it was, the verdict is not against law. Abbott *v.* Abbott, *supra*. If, however, the evidence is not sufficient to warrant the jury in finding such claim to title, then the verdict is against evidence, and should be set aside for that cause; otherwise there should be judgment on the verdict." Hutchings *v.* Morrison, 72 Me. 331.

"If, however, such possession, though taken by mistake, is with the intention to claim title to the division line, and thus, if necessary, acquire title by prescription, it may ripen into title." Miller *v.* Mills Co., 111 Iowa 654, 82 N. W. 1038.

10. *United States.* — Brown *v.* Lette, 2 Fed. 440.

Alabama. — Hoffman *v.* White, 90

3. Grantee Must Show Intent. — But, in such conflict between a boundary adhered to and the line fixed by the deed of an occupant, the evidence to sustain his claim to the disputed strip must be of a character to overcome the presumption that his entry and pos-

Ala. 354, 7 So. 816; Taylor *v.* Fomby, 116 Ala. 621, 22 So. 910.

California. — Grimm *v.* Curley, 43 Cal. 250; Woodward *v.* Farris, 109 Cal. 12, 41 Pac. 781; Silvarer *v.* Hansen, 77 Cal. 579, 20 Pac. 136.

Connecticut. — French *v.* Pearce, 8 Conn. 440, 21 Am. Dec. 680.

Illinois. — McNamara *v.* Seaton, 82 Ill. 498.

Indiana. — Riggs *v.* Riley, 113 Ind. 208, 15 N. E. 253.

Iowa. — Meyer *v.* Weigman, 45 Iowa 579; Crapo *v.* Cameron, 61 Iowa 447, 16 N. W. 523.

Kansas. — Moore *v.* Wiley, 44 Kan. 736, 25 Pac. 200.

Kentucky. — Summers *v.* Green, 4 J. J. Marsh. 137.

Maine. — Hitchings *v.* Morrison, 72 Me. 331.

Massachusetts. — Harrison *v.* Dolan, 172 Mass. 395, 52 N. E. 513; Beckman *v.* Davidson, 162 Mass. 347, 39 N. E. 38; Thacker *v.* Guardenier, 48 Mass. 484.

Michigan. — Bunce *v.* Bidwell, 43 Mich. 542, 5 N. W. 1023.

Minnesota. — Seymour *v.* Carli, 31 Minn. 81, 16 N. W. 495; Vandell *v.* St. Martin, 42 Minn. 163, 44 N. W. 525; Brown *v.* Morgan, 44 Minn. 432, 46 N. W. 913.

Mississippi. — Metcalf *v.* McCutchen, 60 Miss. 145.

Missouri. — Cole *v.* Parker, 70 Mo. 372; Mather *v.* Walsh, 107 Mo. 121, 17 S. W. 755; Hamilton *v.* West, 63 Mo. 93; Keen *v.* Schnedler, 15 Mo. App. 590; Battner *v.* Baker, 108 Mo. 311, 18 S. W. 911.

Nebraska. — Levy *v.* Yerga, 25 Neb. 764, 41 N. W. 773; Obernalte *v.* Edgar, 28 Neb. 70, 44 N. W. 82.

New Hampshire. — Wendell *v.* Moulton, 26 N. H. 41.

Tennessee. — Erck *v.* Church, 87 Tenn. 575, 11 S. W. 794.

Texas. — Bisso *v.* Casper, 14 Tex. Civ. App. 19, 36 S. W. 345; Daughtrey *v.* New York & T. Land Co. (Tex. Civ. App.), 61 S. W. 947.

It is clear that appellant believed, when he erected his fence along La Parita creek, and still believes, that the land in controversy was and is a portion of the Segura grant, and he claimed and held it for over ten years as a part of that grant. The fact that it was not a part of that grant would not affect his adverse holdings, because he placed his fence along La Parita creek with the intention of claiming and holding all within his inclosure as his own. Daughtrey *v.* New York & T. Land Co. (Tex. Civ. App.), 61 S. W. 947.

If one, by mistake, inclose the land of another, and claim it as his own to certain fixed monuments or boundaries, his actual and uninterrupted possession as owner for the statutory period will work a disseizin and his title will be perfect. Levy *v.* Yerga, 25 Neb. 764, 41 N. W. 773.

If, by a mistake in a deed, a portion of the premises intended to be included be omitted, and the grantor occupies the portion so omitted, uninterruptedly and under claim of right for the statutory period, he will acquire a prescriptive title. Vandell *v.* St. Martin, 42 Minn. 163, 44 N. W. 525.

Claiming All Within Fence Gives Title. — One purchasing land enclosed by a fence, who claims title to all within such enclosure, holds adverse possession as to the entire tract, although he may believe he is only claiming to the extent of the boundaries of his deed, which do not as a matter of fact embrace all the land so fenced. Bisso *v.* Casper, 14 Tex. Civ. App. 19, 36 S. W. 345; citing Hand *v.* Swann, 1 Tex. Civ. App. 240, 21 S. W. 282.

Where one through mistake takes possession under a deed of more land than it conveys, he may, notwithstanding, begin later an adverse occupancy of the excess. Mather *v.* Walsh, 107 Mo. 121, 17 S. W. 755.

session extended no farther than his deed limits, and show that his attitude during the entire statutory period was of such nature as to render his possession adverse to the true owner.[11]

4. Mistaken Belief That Land Is Public, Abortive. — No period of occupancy under the erroneous belief that the land belongs to the state will furnish any evidence in support of a claim of title by adverse possession against the true owner.[12]

Contrary Doctrine. — This rule is not recognized in some jurisdictions.[13]

XIX. TITLE ACQUIRED BY ADVERSE POSSESSION.

1. Is Evidence Under All Circumstances. — Adverse possession ripened into title operates as plenary proof in favor of such claimant affirmatively and defensively.[14]

11. Anderson *v.* Jackson, 69 Tex. 346, 6 S. W. 575; Haskins *v.* Cox, 2 B. Mon. (Ky.) 306.

Burden on Claimant to Show Adverse Claim Beyond His Deed Boundaries. — One in possession of land under a deed who occupies coextensive with the line of a fence which incloses land not covered by such deed, is presumed to have entered pursuant to his deed, and the burden of showing the contrary rests upon him. Fuller *v.* Worth, 91 Wis. 406, 64 N. W. 995.

Disclaimer, When Inconclusive. Where a purchaser goes into possession under a deed which does not describe the lands as they are fenced, after holding the lands thus fenced exclusively for over forty years, claiming them as his own, he will be held to have acquired a title, notwithstanding he may have disclaimed ownership of all land not described by his deed. Bishop *v.* Bleyer, 105 Wis. 330, 81 N. W. 413.

12. Leon & H. Plum Land Co. *v.* Rogers, 11 Tex. Civ. App. 184, 32 S. W. 713.

Occupant's Mistaken Belief As to State Ownership Concludes His Claim. — Evidence showing the occupancy of land under the belief that it belonged to the state, will not sustain the claim of title by adverse possession as against the true owner of the land. Schleicher *v.* Gatlin, 85 Tex. 270, 20 S. W. 120.

Evidence showing that one entered into possession of land of the state under the mistaken claim that it was vacant public land of the United States, intending to obtain title from the government, will not sustain a claim of title by adverse possession. Beale *v.* Hite, 35 Or. 176, 57 Pac. 322.

13. Clemens *v.* Runckel, 34 Mo. 41, 84 Am. Dec. 69; McManus *v.* O'Sullivan, 48 Cal. 7; Miller *v.* State, 38 Ala. 606; Clark *v.* Gilbert, 39 Conn. 94.

14. *United States.* — Hacket *v.* Marmet Co., 52 Fed. 268.

Alabama. — Wilson *v.* Glenn, 68 Ala. 383; Murray *v.* Hoyle, 92 Ala. 559, 9 So. 368; Burks *v.* Mitchell, 78 Ala. 61.

Arkansas. — Jacks *v.* Chaffin, 34 Ark. 534.

Illinois. — Sanitary District *v.* Allen, 178 Ill. 330, 53 N. E. 109; McDuffee *v.* Sinnott, 119 Ill. 449, 10 N. E. 385.

Indiana. — Roots *v.* Beck, 109 Ind. 472, 9 N. E. 698.

Iowa. — Cramer *v.* Clow, 81 Iowa 255, 47 N. W. 59.

Kentucky. — Sutton *v.* Pollard, 96 Ky. 640, 29 S. W. 637.

Maine. — Magoon *v.* Davis, 84 Me. 178, 24 Atl. 809.

Missouri. — Lynde *v.* Williams, 69 Mo. 360; Swenson *v.* Lexington, 69 Mo. 157.

Nebraska. — Lantry *v.* Wolf, 49 Neb. 374, 68 N. W. 494.

New York. — Cahill *v.* Palmer, 45 N. Y. 478; Barnes *v.* Light, 116 N. Y.

2. Survives Default in Ejectment. — One having title by adverse possession, but dispossessed pursuant to a default in an action of ejectment, may afterwards recover the premises from such adverse claimant.[15]

3. Evidence of May Be Perpetuated by Decree in Equity. — A title arising from adverse possession may be made evidence of record by a bill in equity.[16]

34, 22 N. E. 441; Paige *v.* Waring, 103 N. Y. 636, 8 N. E. 476.

North Carolina. — Avant *v.* Arrington, 105 N. C. 377, 10 S. E. 991.

Pennsylvania. — Mead *v.* Leffingwell, 83 Pa. St. 187.

South Carolina. — Busby *v.* Florida Cent. & P. R. Co., 45 S. C. 312, 23 S. E. 50.

Vermont. — Hughes *v.* Graves, 39 Vt. 359, 94 Am. Dec. 331.

Virginia. — Middleton *v.* Johns, 4 Gratt. 129.

West Virginia. — Parkerbury Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255.

"The counsel for the appellant insists that an adverse possession, although for the length of time required by statute to bar the true owner, is available only as defense to a suit brought by such owner for the recovery of the land. In this the counsel is in error. When the possession is actual, exclusive, open and notorious, under a claim of title adverse to any and all other for the time prescribed by statute, such possession establishes a title. To uphold it, a grant from the true owner to such party may be presumed." Cahill *v.* Palmer, 45 N. Y. 478.

Title Available for all Purposes. One having acquired title by adverse possession may interpose it in defense of an action brought against himself and may maintain an action upon it in his own behalf against one entering after the statutory period had run. Sanitary District *v.* Allen, 178 Ill. 330, 53 N. E. 109.

"An action of ejectment, founded only on adverse possession, can be maintained even against the true owner." Lantry *v.* Wolf, 49 Neb. 374, 68 N. W. 494; Barnes *v.* Light, 116 N. Y. 34, 22 N. E. 441.

15. Jackson *v.* Oltz, 8 Wend. (N. Y.) 40.

16. *United States.* — Sharon *v.* Tucker, 144 U. S. 553; Alexander *v.* Pendelton, 8 Cranch 462; Four Hundred and Twenty Mining Claim *v.* Bullion Mining Co., 3 Sawy. 634, 9 Fed. Cas. No. 4989.

Alabama. — Lucy *v.* Tenn. & Coosa R. Co., 92 Ala. 246, 8 So. 806; Torrent Fire Engine Co. No. 5 *v.* City of Mobile, 101 Ala. 559, 14 So. 557.

Arizona. — Pacheco *v.* Wilson (Ariz.), 18 Pac. 597.

California. — Arrington *v.* Liscom, 34 Cal. 365.

Illinois. — Walker *v.* Converse, 148 Ill. 622, 36 N. E. 202.

Iowa. — Quinn *v.* Quinn, 76 Iowa 565, 41 N. W. 316; Independent Dist. of Oakdale *v.* Fagen, 94 Iowa 676, 63 N. W. 456; Cramer *v.* Claw, 81 Iowa 255, 47 N. W. 59.

Kentucky. — Vallandingham *v.* Taylor (Ky.), 64 S. W. 725.

Nebraska. — Ballou *v.* Sherwood, 32 Neb. 666, 49 N. W. 790; Tourtelotte *v.* Pearce, 27 Neb. 57, 42 N. W. 915.

New Jersey. — Yard *v.* Ocean Beach Ass'n, 49 N. J. Eq. 306, 24 Atl. 729.

Oregon. — Parker *v.* Metzger, 12 Or. 407, 7 Pac. 518.

And by an Ordinary Action to Quiet Title. — Arrington *v.* Liscom, 34 Cal. 386; Fredericks *v.* Judah, 73 Cal. 605, 15 Pac. 305; Alexander *v.* Pendleton, 8 Cranch 462; Powers *v.* Bank of Oroville, 136 Cal. 301, 69 Pac. 151.

Recollection of Witnesses May Be Established by Decree. — "The same principle which leads a court of equity, upon proper proof, to establish by its decree the existence of a lost deed, and thus make it matter of record, must justify it, upon like proof, in declaring by its decree the validity of a title resting in the recollection of witnesses, and

4. Evidence of Verbal Surrender Inoperative. — Evidence showing a verbal surrender of possession adversely maintained for the period necessary to invest an occupant with a superior title will not preclude him from thereafter asserting it.[17]

thus make the evidence of the title a matter of record." Sharon *v.* Tucker, 144 U. S. 533.

17. *Alabama.* — Lee *v.* Thompson, 99 Ala. 95, 11 So. 672.

Arkansas. — Parham *v.* Dedman, 66 Ark. 26, 48 S. W. 673.

Maine. — School District *v.* Benson, 31 Me. 384, 52 Am. Dec. 618.

North Carolina. — Avent *v.* Arrington, 105 N. C. 377, 10 S. E. 991.

Vermont. — Austin *v.* Bailey, 37 Vt. 219; Tracey *v.* Atherton, 36 Vt. 503; Hodges *v.* Eddy, 41 Vt. 485.

An oral promise by one after he has acquired title to land by adverse possession to the former owners that if they will let his tenant occupy the same for a certain time, he will surrender possession to them and pay rent, will not devest him of title. Such promise, being without consideration and not evidenced by writing, is within the statute of frauds. Parham *v.* Dedman, 66 Ark. 26, 48 S. W. 673.

Title Cannot Pass by Verbal Surrender. — "If Gamsby and the Heatons had acquired title by fifteen years of adverse possession, such title thereby became perfect, and was as good as a paper title by the record from the original proprietors. It was no longer a mere possessory right. It had ripened into a legal estate in fee in the land. This being so, it is quite obvious that such an estate, such a title, cannot pass by mere verbal surrender." Austin *v.* Bailey, 37 Vt. 219.

ADVICE OF COUNSEL.—See Attorney and Client.

AFFIDAVITS.

By Frank S. Adams.

SCOPE OF THE ARTICLE.

This article is intended to cover the competency and sufficiency of affidavits when offered as *evidence* to establish some fact in controversy. Therefore, questions as to the use of affidavits as the foundation for provisional remedies, such as attachments, are omitted. So questions of practice merely relating to the use and sufficiency of affidavits are avoided as not within the scope of this work.

I. DEFINITION.

An affidavit is a written declaration under oath, sworn to by the person making the declaration, before some person authorized to administer oaths;[1] and is distinguished from a deposition in that it is made without notice.[2]

II. THE DECLARATION.

1. In General. — To render an affidavit competent as evidence, the probative facts alleged therein should be stated in such manner and with such exactness as to have the direct and positive sanction

1. *Alabama.* — Watts *v.* Womack, 44 Ala. 605.
Illinois. — Harris *v.* Lester, 80 Ill. 307; Hays *v.* Loomis, 84 Ill. 18.
Kentucky. — Bishop *v.* McQuerry, 13 Bush 417.
Michigan. — Knapp *v.* Duclo, 1 Mich. N. P. 189.
Missouri. — Barhydt *v.* Alexander, 59 Mo. App. 188.
Nebraska. — Bautley *v.* Finney, 43 Neb. 794, 62 N. W. 213.
New Jersey. — Hetsman *v.* Garrard, 16 N. J. Law 124.
South Carolina. — State *v.* Sullivan, 39 S. C. 400, 17 S. E. 865.
Tennessee. — Grove *v.* Campbell, 9 Yerg. 7.
Texas. — Shelton *v.* Berry, 19 Tex. 154, 15 Am. Dec. 326.
Virginia. — Hawkins *v.* Gibson, 1 Leigh 476.
2. Stimpson *v.* Brooks, 23 Fed. Cas. No. 13,454; City of Atchison *v.*

of the party's oath to its truth so as to bind his conscience and subject him to the penalties of the law in case the statement is untrue.[3]

2. Language of Statute. — An affidavit need not follow the language of the statute authorizing it; words of equivalent import suffice.[4] Indeed, an affidavit following the statute *verbatim* may be

Bartholow, 4 Kan. 124; Bishop *v.* McQuerry, 76 Ky. (13 Bush) 417.

3. *England.* — Watson *v.* Walker, 1 Moore & S. 437.

United States. — Blake Crusher Co. *v.* Ward, 3 Fed. Cas. No. 1505.

Kentucky. — Peers *v.* Carter, 4 Litt. 268.

New York. — Van Wyck *v.* Reid, 10 How. Pr. 366; People *v.* Becker, 20 N. Y. 354; People *v.* Sutherland, 81 N. Y. 1.

Texas. — Mays *v.* Lewis, 4 Tex. 38.

Wisconsin. — Quarles *v.* Robinson, 1 Chand. 29, 32 note, 2 Pinn. 97; Miller *v.* Munson, 34 Wis. 579, 17 Am. Rep. 461.

In Redemption Proceedings. "The affidavit on which the right of the original purchaser was sought to be acquired, was, in my opinion, defective in the manner of stating the amount due upon the mortgage. It says: 'That there is actually due or to become due on said mortgage, at this, the time of claiming a right to purchase or redeem thereon, over and above all payments, the sum of $6433, as claimed by this deponent.'

"The statute requires an affidavit, stating the true sum due, or to become due, over and above all payments. The sum thus stated is the amount which any other person seeking, in pursuance of the statute, to subsequently acquire the same right, must pay. There is, therefore, good reason for saying that the statement shall be made in such manner as to have the direct and positive sanction of the party's oath to its truth; and that, not only so as to bind his conscience by the solemnity of an oath, but also to subject him to the penalties of the law in case the statement is untrue." People *v.* Becker, 20 N. Y. 354.

4. *Alabama.* — Graham *v.* Ruff, 8 Ala. 171; Ware *v.* Todd, 1 Ala. 199; Free *v.* Hukill, 44 Ala. 197; Hafley *v.* Patterson, 47 Ala. 271.

Arkansas. — Mandel *v.* Peet, 18 Ark. 236.

Georgia. — Chambers *v.* Sloan, 19 Ga. 184; Kennon *v.* Evans, 36 Ga. 89.

Indiana. — Story *v.* Story, 32 Ind. 137.

Iowa. — Wiltse *v.* Stearns, 13 Iowa 282.

Louisiana. — Parmele *v.* Johnston, 15 La. Ann. 429; Sawyer *v.* Arnold, 1 La. Ann. 315.

Maryland. — Stanhope *v.* Dodge, 52 Md. 483.

Michigan. — Cross *v.* McMaken, 17 Mich. 511, 97 Am. Dec. 203; Mathews *v.* Densmore, 43 Mich. 461, 5 N. W. 669.

Mississippi. — Wallis *v.* Wallace, 6 How. 254; Lee *v.* Peters, 1 Smed. & M. 503; Dandridge *v.* Stevens, 12 Smed. & M. 723; Commercial Bank *v.* Ullman, 10 Smed. & M. 411.

Missouri. — Curtis *v.* Settle, 7 Mo. 452.

New York. — Schwartz *v.* Allen, 7 N. Y. Supp. 5; Van Kirk *v.* Wilds, 11 Barb. 520.

Wisconsin. — Oliver *v.* Town, 28 Wis. 328; Russell *v.* Ralph, 53 Wis. 328, 10 N. W. 518.

In Affidavit of Claim Against Estate. — Where a claim filed against an estate contained a statement of debits and credits and closed with the statement "Amount due $741.50" and the affidavit verifying the account was as follows: "I, Harriet H. Story, of Underhill, in the County of Chittenden, and State of Vermont, of lawful age, on oath depose and say that the within is a correct account of the number of weeks that I worked for my stepfather, in his family, which was done at his special request, since I arrived at the age of 18 years, *giving correct statement of the debit and credit,*

insufficient.[5]

3. Immaterial Words Omitted. — The omission of words, not material to the sense, will not vitiate an affidavit, if, by those remaining, the sense and scope of the law are fulfilled.[6]

4. Clerical or Grammatical Errors. — Where the meaning clearly appears an affidavit is not vitiated by mere clerical or grammatical errors.[7]

according to the best of my knowledge and belief." Held, that the words italicized in the affidavit, taken in connection with the fact that the claim showed the "amount due," was a substantial compliance with the statute requiring the claimant to attach to the claim an affidavit, "*to the effect* that the same is justly due and wholly unpaid," and that it was not necessary to follow the words of the statute; the affidavit being *to the effect* that the claim was justly due and wholly unpaid was sufficient. Story *v.* Story, 32 Ind. 137.

5. Miller *v.* Munson, 34 Wis. 579, 17 Am. Rep. 461; Klenk *v.* Schwalm, 19 Wis. 124; Goodyear Rubber Co. *v.* Knapp, 61 Wis. 103, 20 N. W. 651; Spring *v.* Robinson, 2 Pinn. (Wis.) 97.

In Affidavit for Attachment. Where the statute authorized an attachment upon affidavit that defendant has assigned, disposed of, or concealed, or is about to assign, dispose of or conceal *any* of his property with intent to defraud his creditors, and the affidavit was in the precise language of the statute the court said: "This is sometimes sufficient, but not so in all cases. We must look for some other test by which to determine its sufficiency. The proceeding by attachment is very summary and violent. The purpose of the law which requires that a certain affidavit be made before the writ can issue, is to protect the alleged debtor from so severe a process, unless the creditor or some person in his behalf, under the responsibilities of an oath, shall assert the existence of certain facts which the law adjudges good grounds for issuing the writ. This requirement of the law would afford the debtor no protection whatever, unless the affiant is liable to be punished criminally if he willfully swears falsely in such affidavit. Hence, although the affidavit be in the very words of the statute, it is not sufficient, unless perjury could be assigned upon it." The affidavit was held insufficient as the words "*any of his property*" following the language of the statute rendered the affidavit meaningless. Miller *v.* Munson, 34 Wis. 579, 17 Am. Rep. 461.

6. **Omission of Immaterial Words.** Jean *v.* Spurrier, 35 Md. 110.

Where the word "the" was omitted in the statement, he says that "statements in the foregoing petition are true," the court held that it was manifest that it was a mere omission of the draughtsman, and that being the case, it was substantially sufficient. Clark *v.* Miller, 88 Ky. 108, 10 S. W. 277.

The omission of the words, "In some manner" from an affidavit for attachment under a statute requiring an affidavit to state that the defendant "is in some manner about to dispose of his property with intent to defraud his creditors," was held not to vitiate the attachment. Drake *v.* Hager, 10 Iowa 556.

Where in alleging the defendant's indebtedness, the word "is" was omitted before the word "indebted," it was held that without that word the language plainly alleged indebtedness. Buchanan *v.* Sterling, 63 Ga. 227.

But where the grounds upon which an attachment is sought are to be written in a blank space in the printed form, and the space is not filled in, so that by the omission of the words the grounds are not alleged, the omission is fatal to the affidavit. Black *v.* Scanlon, 48 Ga. 12.

7. Bromley *v.* Foster, 1 Chit. 562, 18 Eng. C. L. 307, note.

5. Should State Facts, Not Conclusions. — As it is the office of an affidavit to present to the court the evidence from which it may draw its conclusions, the facts upon which such conclusions are to be drawn must be stated. An affidavit containing only opinions and conclusions of affiant is insufficient and cannot be considered.[8]

Where the Affidavit for Publication of citation stated that the residence of the defendant was "known to affiant" (instead of unknown,) "and that in consequence personal service cannot be had on him," the mistake was held immaterial. Pierpont *v.* Pierpont, 19 Tex. 227.

On Appeal by several executors from the decision of the probate court, allowing a claim against the estate of their testator, one of them filed an affidavit, stating that "affiant is aggrieved" instead of "affiants are aggrieved." *Held* to be a clerical misprision, and that the affidavit was substantially good. Ross *v.* Davis, 13 Ark. 293.

Chattel Mortgage. — Where it was contended that a chattel mortgage was void because the affidavit to the mortgage stated that the instrument "was" made in good faith instead of "is" made in good faith, the court held that there was no merit in the contention. Vincent *v.* Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396.

Attachment. — A clerical error in stating, as the ground for attachment, that defendant "his" disposed of his property with intent to defraud creditors, is no ground for quashing the attachment, when the context clearly shows that "has" was intended. Corrigan *v.* Nichols, 6 Tex. Civ. App. 26, 24 S. W. 952.

8. Dreyfus *v.* Otis, 54 How. Pr. (N. Y.) 405; Morris *v.* Talcott, 96 N. Y. 100; Hecht *v.* Levy, 20 Hun (N. Y.) 54; Baker *v.* Akerman, 77 Ga. 89; Hinman *v.* Wilson, 2 How. Pr. (N. Y.) 27; Markey *v.* Diamond, 46 N. Y. St. 283, 19 N. Y. Supp. 181; Brown *v.* Keogh, 39 N. Y. St. 225, 14 N. Y. Supp. 915; Cattaraugus Cutlery Co. *v.* Case, 30 N. Y. St. 961, 9 N. Y. Supp. 862; Mechanics' Bank *v.* Loucheim, 52 Hun 396, 8 N. Y. Supp. 520; Westervelt *v.* Agrumaria Sicula Societa, etc., 58 Hun 147, 11 N. Y. Supp. 340; Hodgman *v.* Barker, 60 Hun 156, 14 N. Y. Supp. 574; Perkins *v.* Gibbs, 1 Baxt. (Tenn.) 171; Delaplain *v.* Armstrong, 21 W. Va. 211.

Facts Must Be Stated. — Where a complaint and affidavit upon which an order of arrest was granted set forth that the defendant represented to plaintiff that said "Maria N. Winne was solvent and in good credit, and worth the sum of one hundred thousand dollars over all her debts and liabilities," and that she owned real estate in the City of New York, free and unincumbered, worth over fifty thousand dollars; . . . that said representations as to the solvency of Maria N. Winne were false and fraudulent and untrue, and were made with the preconceived design and intent of defrauding this plaintiff, and as a matter of fact, said Winne was insolvent, and was a woman without means, and deponent has since ascertained from persons who know said Maria N. Winne that she was residing at 226 First street, Albany, on the top floor of a tenement, at a rental of $9 per month, and that she had been supported in part, for past years, by the Ladies' Aid Society of St. Paul's Church, in the City of Albany." *Held,* that the affidavit was insufficient; that affiant should have stated when, and how, and from whom, and what were the facts upon which he predicated his conclusions that said Winne was insolvent, etc. To authorize an order of arrest, facts and not conclusions must be stated. Iron Co. *v.* Baudman, 2 Wkly. Dig. 591; Dreyfus *v.* Otis, 54 How. Pr. 405. If the conclusions of the affidavit are to be drawn from communications, whether written or verbal, the communications must be set forth in order, that the court may see that the deductions of affiant are well founded. Any other rule would make the affiant the sole judge as to whether the evidence which he had

III. THE OATH.

1. Necessity Of. — An affidavit is not admissible as such for any purpose unless it appears that the party making the declaration did so under the sanctity of a legal oath.[9]

2. How Administered. — The oath necessary to the declaration may be administered according to the religious belief of the affiant, and no particular ceremony is required to make a legal oath; it being sufficient that both the affiant and the officer understand that the declaration is in fact sworn to by the party making it.[10]

in his possession was sufficient to entitle him to the relief sought. In the case at bar, affiant swore to nothing but conclusions. Such allegations may be good in a complaint, but are entirely useless in an affidavit whose office is to place before the court the evidence from which it may draw its conclusions. Markey *v.* Diamond, 46 N. Y. St. 283, 19 N. Y. Supp. 181.

Office of the Affidavit. — "The office of an affidavit is to set forth the evidence from which the court may draw conclusions of fact, differing in this respect, radically, from a complaint, which should only set forth conclusions of fact, and not the evidence of the correctness of these conclusions." Mechanics' Bank *v.* Loucheim, 55 Hun 396, 8 N. Y. Supp. 520.

Affidavit for Injunction. — A mere statement of a conclusion in an affidavit is not sufficient to make it appear that plaintiff will be unduly prejudiced if an injunction is not issued without notice, but the facts from which such conclusion is to be drawn should be stated. Brough *v.* Schanzenbach, 59 Ill. App. 407.

9. *Illinois.*—Kehoe *v.* Rounds, 69 Ill. 351; McDermaid *v.* Russell, 41 Ill. 489.

Indiana. — Cantwell *v.* State, 27 Ind. 505.

Mississippi. — Carlisle *v.* Gunn, 68 Miss. 243, 8 So. 743.

New York. — People *v.* Sutherland, 81 N. Y. 1; Ladow *v.* Groom, 1 Demo 429; Thompson *v.* Fuller, 28 N. Y. St. 4, 8 N. Y. Supp. 62.

South Carolina. — Doty *v.* Boyd, 46 S. C. 39, 24 S. E. 59.

Texas. — Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80.

West Virginia. — Hudkins *v.* Haskins, 22 W. Va. 645; Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977.

Oath of Assessor. — Where the oath of the County Assessor to the assessment roll was signed by him, but it did not appear that the oath was actually taken, the court held the assessment void. Merriam *v.* Coffee, 16 Neb. 450, 20 N. W. 389.

Where the affidavit for publication of a summons did not appear to have been sworn to before any officer, it was held to be no affidavit, and gave no authority to the court to enter an order of publication. McDermaid *v.* Russell, 41 Ill. 489.

Certificate Insufficient. — A mere recital of the facts averred by the affiant in the form of a certificate of the officer which does not state that the facts stated were sworn to is not an affidavit. Hudkins *v.* Haskins, 22 W. Va. 645.

Cannot Be Sworn to by Separate Affidavit. — An affidavit in which the affiant swears that the facts stated in another paper, to which he refused to be sworn, are true, will not give that paper validity as an affidavit. Thompson *v.* Fuller, 28 N. Y. St. 4, 8 N. Y. Supp. 62.

10. Newman *v.* Newman, 7 N. J. Eq. 26; Matthews *v.* Reid, 94 Ga. 461, 19 S. E. 247; Dunlap *v.* Clay, 65 Miss. 454, 4 So. 118.

Oath Believed to Be Taken by Affiant Only. — A justice of the peace prepared the affidavit, writ and bond, and handing them to affiant asked him "if it was all right," and the party replied that it was. The affidavit was not signed by the affiant, nor was the jurat signed by the jus-

3. How Shown. — A. By Jurat. — The certificate or jurat of the officer by whom the affidavit was taken containing a statement that the affiant was sworn is *prima facie* evidence that the affiant made the declaration under oath.[11]

Necessity of Showing by Jurat. — The jurat has been held to be essential, and proof *aliunde* of the administration of the oath inadmissible;[12] but the weight of authority is to the contrary.[13]

tice. The affiant testified that he considered that what has been detailed was swearing to the affidavit. The magistrate testified that he was positive that no oath was administered, and no attempt to make an oath was made. *Held*, that the instrument was no affidavit. Carlisle *v.* Gunn, 68 Miss. 243, 8 So. 743.

To the Same Effect, see Matthews *v.* Reid, 94 Ga. 461, 19 S. E. 247, where an attorney laid a paper on the desk of the clerk of the superior court, at the same time remarking to the clerk, "Here is an affidavit. I want to swear to it. I have already signed it. The facts stated in it are true," and there was no evidence that the clerk heard what was said, and the paper was not certified by the clerk till long afterwards, it was held that the affidavit was not duly made.

Holding Up the Hand. — It is not necessary that one should "hold up his hand and swear" to make his act an oath to the truth of the matters set out for grounds of attachment, where the affiant and the officers both understand that what is done is all that is necessary to complete the oath. Dunlap *v.* Clay, 65 Miss. 454, 4 So. 118.

11. Hitsman *v.* Garrard, 16 N. J. Law 124; Crosier *v.* Cornell Steamboat Co., 27 Hun (N. Y.) 215.

Office of Jurat. — The jurat or certificate is no part of the oath or affidavit, but is simply evidence that the oath was made or the affidavit was sworn to. It is like the acknowledgment of a deed, which is no part of the deed itself, but authorizes the deed to be recorded and read in evidence without proving the signatures to the deed. And so here the jurat or certificate attached to an affidavit, if the officer making such jurat or certificate had authority to administer oaths, enables such affidavit to be read in evidence as the oath of the party, whom the officer certifies made such oath. Bantley *v.* Finney, 43 Neb. 794, 62 N. W. 213.

12. Metcalf *v.* Prescott, 10 Mont. 283, 25 Pac. 1037; Gordon *v.* State, 29 Tex. App. 410, 16 S. W. 337; Casner's Adm'r. *v.* Smith, 36 W. Va. 788, 15 S. E. 977; Blake Crusher Co. *v.* Ward, 3 Fed. Cas. No. 1505.

13. *Alabama.* — McCartney *v.* The Branch Bank, 3 Ala. 709.

Arkansas. — Fortenheim *v.* Claflin, 47 Ark. 49, 14 S. W. 462.

Georgia. — Smith *v.* Walker, 93 Ga. 252, 18 S. E. 830; Veal *v.* Perkerson, 47 Ga. 92; Matthews *v.* Reid, 94 Ga. 461, 19 S. E. 247.

Illinois. — Kruse *v.* Wilson, 79 Ill. 233.

Indiana. — Williams *v.* Stevenson, 103 Ind. 243, 2 N. E. 728.

Iowa. — Stout *v.* Folger, 34 Iowa 71, 11 Am. Rep. 138; Cook *v.* Jenkins, 30 Iowa 452.

Nebraska. — Bantley *v.* Finney, 43 Neb. 794, 62 N. W. 213.

New Jersey. — Hitsman *v.* Garrard, 16 N. J. Law 124.

New York. — Ladow *v.* Groom, 1 Denio 429.

Pennsylvania. — Borough of Pottsville *v.* Curry, 32 Pa. St. 443.

Washington. — Tacoma Grocery Co. *v.* Draham, 8 Wash. 263, 36 Pac. 31, 40 Am. St. Rep. 907.

Absence of Jurat; Parol Evidence. Where the affidavit was in the usual form of an affidavit against a nonresident debtor, and was unexceptionable in all its statements, but the jurat was not signed by the officer taking it, and the writ of attachment issued the same day recited the fact that the affiant named in the affidavit complained on oath to the clerk issuing the writ, and the affiant testified that he signed the affidavit, and swore to it at the time in

B. No Particular Words Necessary to Show. —No particular wording is necessary to show that the declaration was sworn to. It is a valid affidavit if it can be reasonably inferred from the language used that the oath was duly administered by the officer before whom the affidavit purports to have been taken.[14]

the clerk's office, before the deputy clerk, it was held that the affidavit was sufficient and could not be assailed in a collateral proceeding. Kruse *v.* Wilson, 79 Ill. 233.

Amendment. — Where no jurat was attached to an affidavit as to the posting of notices, it was held that parol evidence was admissible to prove that such affidavit was in fact sworn to at the proper time before the clerk, and that the affidavit might be amended to conform to such evidence by attaching the proper jurat. That the jurat of the officer is not the affidavit nor any part of it, but is simply evidence of the fact that the affidavit was properly sworn to by the affiant. Williams *v.* Stevenson, 103 Ind. 243, 2 N. E. 728.

Omission of Jurat no Ground for Plea in Abatement. — In Hyde *v.* Adams, 80 Ala. 111, it was held that if an affidavit for an attachment is in fact made before the officer who issues the writ, it is not necessary that it shall be signed or certified by him; and a plea in abatement "because it was not signed by the clerk" presents an immaterial issue.

Court May Order Jurat Affixed. Where an affidavit contained no jurat it was held in Williams *v.* Stevenson, 103 Ind. 243, 2 N. E. 728, that it is proper for the court to hear evidence upon the question whether the affidavit was sworn to, and if the fact is thus established, to order the officer to affix his jurat to the affidavit.

Affiant May Give Evidence. Where an objection was made at the trial that the affidavit in question was void for the reason that the jurat of the officer was not signed by him, the affiant was sworn and testified that he signed the affidavit and swore to it at the time in the clerk's office before the deputy clerk. Kruse *v.* Wilson, 79 Ill. 233.

By Other Facts and Circumstances. Where the jurat was not signed by the officer, but the affidavit was filed in the clerk's office and a writ of attachment issued which recited that the plaintiff had complained on oath to the clerk, it was held that the facts and circumstances justified the presumption that the affidavit had been sworn to, and that the clerk could not be presumed to have made a false statement in the writ, or that he would have issued the writ without the oath. Kruse *v.* Wilson, 79 Ill. 233.

By the Record. — In Borough of Pottsville *v.* Curry, 32 Pa. St. 443, where the jurat to the affidavit was not signed by the officer, but the record on appeal recited that an affidavit had been "filed with the award," the court said: "The attestation is convenient. It affords evidence that the oath was taken, but it is not the only possible evidence. When, therefore, the paper filed, being in form an affidavit, was found without attestation, it was competent for the appellant to show by other evidence that the oath was made. This was shown by the record, as we have seen, at least sufficiently to warrant an allowance to the prothonotary to attest by his signature, *nunc pro tunc* the administration of the oath."

14. Barhydt *v.* Alexander, 59 Mo. App. 188; Sargent *v.* Townsend, 2 Disney (Ohio) 472; Kleber *v.* Block, 17 Ind. 294.

Form of Jurat. — Where the petition, signed by the appellant, had appended to it the following words, "Sworn to before me this 3rd day of April, 1860. H. C. Wibble, Cl'k," it was held sufficient. Allen *v.* Gillum, 16 Ind. 234.

To an affidavit made before a justice of the peace, the justice appended his jurat in this form: "Subscribed and sworn to," giving the date, and officially signing his name. The jurat was held sufficient. Hosea *v.* State, 47 Ind. 180.

In Trice *v.* Jones, 52 Miss. 138, the court say: "An inspection of the

4. Where Affidavit Is Used As Foundation of Proceedings. — It has been held that the failure of the officer to state in his certificate that the oath was administered or the affidavit sworn to, will not render the affidavit invalid or vitiate proceedings in which the affidavit is an essential prerequisite.[15]

5. Where Administered. — A. In General. — As the jurisdiction of the officer competent under the law to administer the oath is generally confined to certain territorial limits, it must be administered at some place within the limits of his jurisdiction, and where it appears from the affidavit itself that it was taken outside of his jurisdiction it is a nullity, and can not be read.[16]

B. Necessity of Showing. — In some jurisdictions it is insisted that an affidavit is a nullity unless the venue or place where the affidavit was sworn to is mentioned in the affidavit.[17]

affidavit made by Trice for his appeal, shows nothing unusual in it except that instead of the stereotyped formula, 'sworn to and subscribed before me,' the justice certified the making of the affidavit by these words, viz., 'Given under my hand and seal,' etc. To sustain such an objection would justly bring judicial proceedings into contempt, and we cannot suppose that it was on this ground that the motion to dismiss the appeal was sustained. The affidavit conforms to the statute, and we fail to discover why it was held insufficient, and, if insufficient, why it was not permitted to be amended." See also Clement *v.* Bullens, 159 Mass. 193, 34 N. E. 173, wherein it was held that the words, "then personally appeared," meant personally appeared before the signer.

15. Hyde *v.* Adams, 80 Ala. 111; McCartney *v.* Branch Bank, 3 Ala. 709.

16. Byrd *v.* Cochran, 39 Neb. 109, 58 N. W. 127.

17. *Missouri.* — Barhydt *v.* Alexander, 59 Mo. App. 188.

Nebraska. — Blair *v.* West Point Mfg. Co., 7 Neb. 146.

New York. — Brooks *v.* Hunt, 3 Caines 128; Cook *v.* Staats, 18 Barb. 407; Vincent *v.* People, 5 Park. Crim. 88; Saril *v.* Payne, 24 N. Y. St. 486, 4 N. Y. Supp. 897; Thompson *v.* Burhans, 61 N. Y. 52; Thurman *v.* Cameron, 24 Wend. 87; Lane *v.* Morse, 6 How. Pr. 394.

Utah. — Smith *v.* Richardson, 1 Utah 194.

Wisconsin. — Burns *v.* Doyle, 28 Wis. 460.

Where it appeared that the county was stated in the affidavit, but the letters "ss." (scilicet) omitted, it was held that the affidavit was sufficient. Mercantile Co. *v.* Glenn, 6 Utah 139, 21 Pac. 500.

Venue Should Appear on Face of Affidavit. — An affidavit verifying the plaintiff's complaint purported to have been made before a commissioner of deeds. There was no venue to the affidavit, and nothing upon its face to show where it was taken, nor of what place or county the commissioner was appointed. *Held*, that the venue is an essential part of every affidavit, and is *prima facie* evidence of the place where it was taken. An affidavit should show upon its face that it was made before some officer competent to take affidavits, and within some place where he was authorized by law to administer an oath. For aught that appears, the affidavit was made in Canada, or in some other State, where the oath administered was extrajudicial and void. No presumption arises that an affidavit has been made at any particular place within the state; nor, indeed, that it was made within the limits of the state, where no place is mentioned. The affidavit did not, therefore, contain enough to show that the plaintiff, in verifying his complaint, had been legally sworn. Lane *v.* Morse, 6 How. Pr. (N. Y.) 394. See also State *v.* Green, 15 N. J. Law 88, wherein it is held that an

C. How Shown. — It is the usual practice to set forth in the form of a caption to the affidavit the place where it was taken; but this is not material as it is sufficient if the venue appears anywhere on the face of the instrument.[18]

D. Presumption As to Jurisdiction. — It has been held in most jurisdictions that if an affidavit appears to have been taken before an officer authorized to administer oaths, the omission of the venue will not invalidate it. It will be presumed to have been made within his jurisdiction,[19] provided the contrary does not appear.[20]

E. Venue, Matter in Pais. — But the venue stated in an affidavit is by no means conclusive evidence that the oath was taken at the place mentioned.[21]

affidavit when offered to be read in evidence, must appear on the face of it to be, what an affidavit ought to be, to entitle it to be read. It must appear to have been taken before the proper officer, and in compliance with all legal requirements. The court cannot stop to inquire into the competency of the officer or the place where it was taken.

18. Venue Stated in Caption Sufficient. — Where the caption of the affidavit was "State of Illinois, Carroll County," and it was contended that there was no evidence tending to prove the oath was administered in the county of Carroll, it was held that in all affidavits and other papers requiring a venue, it is for the very purpose of indicating the place where the act was done. Finding such a venue in the caption of the affidavit, the proof, until overcome by other evidence, was ample of the fact that the oath was administered in Carroll county. Van Dusen *v.* People, 78 Ill. 645.

19. *Canada.* — McLean *v.* Cummings, Tayl. 184.

United States. — Ormsby *v.* Ottman, 85 Fed. 492, 29 C. C. A. 295.

California. — Reavis *v.* Cowell, 56 Cal. 588.

Illinois. — Stone *v.* Williamson, 17 Ill. App. 175.

Iowa. — Stoddard *v.* Sloan, 65 Iowa 680, 22 N. W. 924; Stone *v.* Miller, 60 Iowa 243, 14 N. W. 781; Snell *v.* Eckerson, 8 Iowa 284.

Kansas. — Baker *v.* Agriculture Land Co., 62 Kan. 79, 61 Pac. 412.

Minnesota. — Young *v.* Young, 18 Minn. 90.

Nebraska. — Merriam *v.* Coffee, 16 Neb. 450, 20 N. W. 389; Miller *v.* Hurford, 13 Neb. 13, 12 N. W. 832; Crowell *v.* Johnson, 2 Neb. 146.

Oregon. — Dennison *v.* Story, 1 Or. 272.

South Dakota. — State *v.* Henning, 3 S. D. 492, 54 N. W. 536.

Where Notary is State Officer. A notary public being a state officer under the laws of Michigan, and his official acts not being limited to the county in which he resides, it is held that a logger's lien is not invalid because the affidavit of claim does not show the county where the oath was administered. Sullivan *v.* Hall, 86 Mich. 7, 48 N. W. 646, 13 L. R. A. 556. See also Perkins *v.* Collins, 3 N. J. Eq. 482, and State *v.* Henning, 3 S. D. 492, 54 N. W. 536.

20. Parker *v.* Baker, 8 Paige Ch. (N. Y.) 428; Mosher *v.* Stowell, 9 Abb. N. C. (N. Y.) 456; Crosier *v.* Cornell Steamboat Co., 27 Hun (N. Y.) 215.

21. Smith *v.* Richardson, 1 Utah 194; Barhydt *v.* Alexander, 59 Mo. App. 188; Cook *v.* Staats, 18 Barb. (N. Y.) 407; Van Dusen *v.* People, 78 Ill. 645; Lane *v.* Morse, 6 How. Pr. (N. Y.) 394; Babcock *v.* Kuntzsch, 85 Hun 33, 32 N. Y. Supp. 587.

Venue as Matter in Pais. — It is no doubt very proper for officers, especially, if they have only limited territorial jurisdiction, to certify in affidavits taken before them, the place or county; first that it may appear on the face of the document, that it was taken within his jurisdiction; and secondly, that perjury may be

F. May Be Established by Parol. — Where the omission of the venue is not regarded as a fatal defect, the place where the oath was administered may be established by parol.[22]

G. Variance Between Venue and Jurat. — Where the formal venue of an affidavit is laid in one county, but it appears from the jurat to have been sworn to before an officer in another county, it is presumed that the officer taking the affidavit administered the oath within the limits of his jurisdiction.[23] But there are cases contrary to this doctrine.[24]

properly assigned, should it become necessary. But the place where an affidavit was actually made is a matter *in pais*. If the officer certifies it to have been made in A, it may be shown to have been actually sworn to in B. Otherwise perjury might be committed with impunity, if the officer by design or accident, inserted a wrong place. Peltier *v.* Banking Co., 14 N. J. Law 257. See also Van Dusen *v.* People, 78 Ill. 645.

22. Mosher *v.* Heydrick, 45 Barb. (N. Y.) 549; Miller *v.* Hurford, 13 Neb. 13, 12 N. W. 832; Babcock *v.* Kuntzsch, 85 Hun 33, 32 N. Y. Supp. 587; Reedy Elevator *v.* American Grocery Co., 48 N. Y. Supp. 619; People *v.* Stowell, 9 Abb. N. C. (N. Y.) 456; People *v.* Cady, 105 N. Y. 299, 308, 11 N. E. 810.

Waiver of Venue, Parol Evidence. In People *v.* County Canvassers, 20 N. Y. Supp. 329, where an affidavit for an order to show cause was questioned on appeal for the reason that it contained no venue, the court said: "An affidavit must show upon its face that it was taken within the jurisdiction of the officer before whom it was verified and, if taken in any other part of the county of Poughkeepsie, the affidavits would have been nullities. Had the objection been taken upon the return of the order to show cause, the proceedings should have been dismissed, but the objection was not raised, and the respondent answered to the merits; evidence being taken. I think this waived the irregularity. The only present effect of this defect, if not cured, would be that such affidavits could not be considered in disposing of the questions of fact involved in the application. But it has been proved that the affidavits were taken within the jurisdiction of the commissioner and the irregularity is cured."

Amendment After Proof. — In Babcock *v.* Kuntzsch, 85 Hun 33, 32 N. Y. Supp. 587, the court say: "The weight of authority in this state seems to be to the effect that the venue of an affidavit is *prima facie* evidence of the place where it was sworn to, and in the absence of a venue or statement in the jurat as to where it was taken, it would contain no evidence that it was sworn to within the jurisdiction of the officer administering the oath, and, without evidence, that it was taken by a proper officer within his jurisdiction, would be regarded as a nullity, unless the presumption would be that it was taken within his jurisdiction. But the omission does not invalidate the oath, or render the affidavit a nullity, when it is shown, as in this case, that it was duly administered by a proper officer within his jurisdiction, and the omission of the venue may be supplied by amendment." Citing, Smith *v.* Collier, 3 N. Y. St. 172; People *v.* Stowell, 9 Abb. N. C. (N. Y.) 456; People *v.* Cady, 105 N. Y. 299, 308, 11 N. E. 810; Saril *v.* Payne, 24 N. Y. St. 486, 4 N. Y. Supp. 897; People *v.* County Canvassers, 20 N. Y. Supp. 329.

23. Goodnow *v.* Litchfield, 67 Iowa 691, 25 N. W. 882; Goodnow *v.* Oakley, 68 Iowa 25, 25 N. W. 912.

24. Variance Fatal. — Where the venue in the affidavit stated it to be "Albany Co. ss," and the affidavit was sworn to before "Abram B. Ollin, Recorder of the city of Troy" (Rensselaer County,) it was held that the affidavit could not be read on motion, as the officer had no jurisdiction to take it. Davis *v.*

II. Appearance of Affiant Before Officer. — It has been held in some cases that the appearance of the affiant before the officer taking the affidavit must be shown by the certificate or jurat of the officer;[25] but the omission of words in the jurat showing such appearance is not generally held to be fatal to the affidavit,[26] especially where the appearance is sufficiently shown in the body of the affidavit.[27]

IV. AUTHORITY OF OFFICER.

1. Officer Must Have Authority. — In order that an affidavit may be admissible for any purpose, it is essential that it be sworn to before an officer authorized by law to take it,[28] and where it appears upon the face of the affidavit that it was not taken before such an officer it cannot be received.[29]

Rich, 2 How. Pr. (N. Y.) 86; Cook *v.* Staats, 18 Barb. (N. Y.) 407; Sandland *v.* Adams, 2 How. Pr. (N. Y.) 127; Snyder *v.* Olmsted, 2 How. Pr. (N. Y.) 181.

25. Affidavits Before Commissioner. — In Reg. *v.* Bloxam, 6 Ad. & E. (N. S.) 528, it is held that the jurat to an affidavit to obtain a *certiorari*, sworn to before a commissioner, should contain the words "before me."

Before Judges of Courts of Record. In Empey *v.* King, 13 M. & W. 518, it is said that the jurat to an affidavit taken before a judge of a court of record need not contain the words "Before me."

In Iowa, under § 2913 of the revision of 1860, it was held that it was necessary for the officer to certify that the affidavit was sworn to before him, and that an affidavit to which was attached a jurat in the following words: "subscribed in my presence and sworn to by Freedom Way, this 3rd day of December, A. D. 1862, at my office in Toledo, Tama County, Iowa," was insufficient. Way *v.* Lamb, 15 Iowa 79.

26. Clement *v.* Bullens, 159 Mass. 193, 34 N. E. 173.

Omission of Stereotyped Formula. In Trice *v.* Jones, 52 Miss. 138, it is said that the use of the words, "Given under my hand and seal," etc. instead of the usual stereotyped formula: "Subscribed and sworn to before me," is sufficient.

27. Showing in Body of Affidavit. Where the complaint shows in the body thereof that it has been taken before the proper justice, it is not necessary that the words "before me" should be contained in the jurat. Cross *v.* People, 10 Mich. 24.

See also In the Matter of Edwin P. Teachout, 15 Mich. 346, wherein it was held that where an affidavit was used before the officer who administered the oath, the omission in the jurat of the words, "Before me" does not vitiate it.

28. *United States.* — Haight *v.* Morris Aqueduct, 4 Wash. C. C. 601, 11 Fed. Cas. No. 5902.

Arkansas. — Edmondson *v.* Carnall, 17 Ark. 284.

Michigan. — Greenvault *v.* Farmers and Mechanics' Bank, 2 Doug. 498.

New York. — Stanton *v.* Ellis, 16 Barb. 319; Berrien *v.* Westervelt, 12 Wend. 194.

Tennessee. — Baker *v.* Grigsby, 7 Heisk. 627.

29. *United States.* — Atkinson *v.* Glenn, 4 Cranch C. C. 134, 2 Fed. Cas. No. 610.

Arkansas. — Hammond *v.* Freeman, 9 Ark. 62.

Colorado. — Anderson *v.* Sloan, 1 Colo. 33; Martin *v.* Skehan, 2 Colo. 614; Frybarger *v.* McMillen, 15 Colo. 349, 25 Pac. 713.

Kansas. — Schoen *v.* Sunderland, 39 Kan. 758, 18 Pac. 913; Warner *v.* Warner, 11 Kan. 121; Tootle *v.* Smith, 34 Kan. 27, 7 Pac. 577.

Nebraska. — Collins *v.* Stewart, 16 Neb. 52, 20 N. W. 11; Horkey *v.*

2. Necessity of Showing. — It is necessary to the validity of an affidavit that it contain somewhere on its face a statement of the official character of the officer before whom it was taken.[30]

3. How Shown. — A. By Jurat or Certificate of Officer. The authority of the officer taking an affidavit, may, and usually does, appear by his official designation affixed to the signature subscribed to the jurat.[31]

B. Anywhere on Face of Instrument. — But if it appears anywhere on the face of the paper that the person before whom it was sworn was an officer authorized to take affidavits, it is sufficient.[32]

C. By Extrinsic Evidence. — But in the absence of any showing of the officer's authority on the face of the affidavit itself, it is held permissible to establish the fact of his authority by parol;[33]

Kendall, 53 Neb. 522, 73 N. W. 953, 68 Am. St. Rep. 623.

New Jersey. — Den *v.* Geiger, 9 N. J. Law 225; Pullen *v.* Pullen, 17 Atl. 310.

New York. — Taylor *v.* Hatch, 12 Johns. 340; Bliss *v.* Molter, 58 How. Pr. 112; Davis *v.* Rich, 2 How. Pr. 86.

30. Hart *v.* Grigsby, 14 Bush (Ky.) 542; Blanchard *v.* Bennett, 1 Or. 329; Edmondson *v.* Carnall, 17 Ark. 284; Knight *v.* Elliott, 22 Minn. 551.

Officer's Authority Should Appear on Face. — "An affidavit when offered to be read in evidence, must appear on the face of it to be what an affidavit ought to be, to entitle it to be read. It must appear to have been before the proper officer, and in compliance with all legal requirements. The court cannot stop to inquire into the competency of the officer or the place where it was taken. State *v.* Green, 15 N. J. Law 88.

31. Bandy *v.* Chicago etc. R. Co., 33 Minn. 380, 23 N. W. 547.

32. Bandy *v.* Chicago etc. R. Co., 33 Minn. 380, 23 N. W. 547.

May Appear in Body of the Affidavit. — When a certificate of acknowledgment of a deed or certificate of a notary, clerk or other officer states in its body the official character of the officer certifying, it is unnecessary and utterly useless to again certify it by full designation or significant letters following the signature. Hefferman *v.* Harvey, 41 W. Va. 766, 24 S. E. 592.

33. By Parol. — English *v.* Wall, 12 Rob. (La.) 132; Maples *v.* Hicks, Brightly (Pa.) 56; Hunter *v.* Le Conte, 6 Cow. (N. Y.) 728; People *v.* Rensselaer, 6 Wend. (N. Y.) 543; McKinney *v.* Wilson, 133 Mass. 131; Jackman *v.* City of Gloucester, 143 Mass. 380, 9 N. E. 740.

Prima Facie Evidence of Authority. — Where a statute required an affidavit to be made before a "Justice of the Peace or other magistrate in said city and county, authorized to administer oaths," etc., and it did not appear by the affidavit that the officer before whom it was taken was a magistrate authorized to administer oaths, nor was the fact proved or offered to be proved or disproved in the court below, the court said: "It is fairly inferable that the fact of his being a justice was conceded, but it was contended that his official character should appear affirmatively. We think that the fact of Mr. Abell's taking an affidavit, and of the clerk's receiving and filing it, were *prima facie* sufficient; and threw on the other side the burden of proving the want of authority." Hunter *v.* Le Conte, 6 Cow. (N. Y.) 728. See also McKinney *v.* Wilson, 133 Mass. 131, wherein it was held that the burden of proving that the officer was not legally empowered to take depositions was on the party objecting.

Omission Does Not Render Void. Where a justice of the peace omitted to add to his signature to the jurat the title of his office, the court

or it may be presumed from evidence afforded by other papers in the cause.[34]

D. Judicial Notice of Official Character. — It is held in some jurisdictions that courts should take judicial notice of the

said: "We think that this omission did not render the filing of the statement void, and that the fact that the person by whom the oath was administered was authorized to administer it may be proved by evidence. There is nothing in the statute that in terms requires any certificate of the oath, although the statute construed with reference to well known usages undoubtedly implies that the statement shall have a jurat attached. Affidavits lawfully taken by a person authorized to take them are not to be treated as unsworn statements because the magistrate has not added to the certificate signed by him the name of his office. Courts permit the certificate to be amended, or, without an amendment, admit evidence of the authority of the person by whom they are taken, if they do not take judicial notice of it. In this case, if the statement appeared on its face to have been sworn to, we think that it could be filed; and if, in fact, it was sworn to before a person authorized to administer an oath, we think that there was a compliance with the statute." Jackman *v.* City of Gloucester, 143 Mass. 380, 9 N. E. 740.

34. By Other Papers in the Cause. Where the jurat to an affidavit for a writ of attachment showed that the affidavit was sworn to before "Henry L. Webb," and the writ of attachment was tested and signed by "Henry L. Webb, clerk of the Alexander Circuit Court," it was held that the court would presume that the affidavit was sworn to before the clerk. Singleton *v.* Wofford, 3 Scam. (Ill.) 576. To the same effect see Ede *v.* Johnson, 15 Cal. 53.

By Affidavit. — People *v.* Rensselaer, 6 Wend. (N. Y.) 543.

Reference in Writ of Attachment. In Bank *v.* Gettinger, 4 W. Va. 305, where the jurat was not signed by the officer, but the writ of attachment based on the affidavit recited the fact of its having been made, it was held that the accidental omission of the clerk to sign it at the time could not vitiate when the fact was made to appear.

Valid Unless it Appears that it Was Not Taken by Proper Officer. Where an affidavit offered in evidence was objected to upon the ground that it did not appear to be properly verified, no evidence that the notary public before whom it was taken and subscribed was a notary, or was authorized by the laws of his state to administer an oath to the affiant, and render the affidavit evidence in the case, and it did not appear he was in fact a notary except by his signature and seal, nor when, where, for what term, or by what authority he was appointed, for what purpose, nor that the act was in the scope of his duties. *Held*, that it did not appear that it was not made before a notary public in the state, and that there was no error in overruling the objections to its admissibility in evidence. Richardson *v.* Comer, 112 Ga. 103, 37 S. E. 116.

Affidavit of Bona Fides to Chattel Mortgage. — The affidavit of *bona fides* in a chattel mortgage purported to be sworn before "T. B. F." without any addition. The affidavit of execution was sworn before the same officer, his name being followed by the words: "A Commissioner in B. R." *Held*, no objection to the affidavit of *bona fides*. Hamilton *v.* Harrison, 46 Q. B. 127.

By Seal. — In Iowa it is held that an affidavit is not proved to have been made unless the jurat is authenticated by both seal and signature. Tunis *v.* Withrow, 10 Iowa 305, 77 Am. Dec. 117. See also Chase *v.* Street, 10 Iowa 593; Stephens *v.* Williams, 46 Iowa 540; Stone *v.* Miller, 60 Iowa 243, 14 N. W. 781; Gage *v.* D. & P. R. R., 11 Iowa 310, 77 Am. Dec. 145; Goodnow *v.* Litchfield, 67 Iowa 691, 25 N. W. 882.

signatures of their officers,[35] and of the official character of officers empowered to administer oaths within their jurisdictions.[36]

E. Foreign Affidavits. — The authentication of the official character of the officer taking an affidavit in a foreign state must conform to the requirements of the statutes of the state where it is intended to be used.[37]

V. THE AFFIANT.

1. Identification of Affiant. — A. In General. — An affidavit, in

35. *See* "Judicial Notice."

Brooster *v.* State, 15 Ind. 190; Mountjoy *v.* State, 78 Ind. 172; Hipes *v.* State, 73 Ind. 39; Allen *v.* Gillum, 16 Ind. 234; Simon *v.* Stetter, 25 Kan. 155.

Presumption on Appeal. — Courts take judicial knowledge of the signatures of their officers, and where the signature affixed to the jurat in the affidavit on which the information is based, was: "Rufus P. Wells, C. P. C. C.," the supreme court will presume that the court in which such information was filed knew such signature to be that of its clerk. Buell *v.* State, 72 Ind. 523.

36. **In Illinois** it is held that the signature of the officer taking the affidavit need not be followed by a description of his authority where the affidavit is taken in the county in which it is used, as the court takes judicial notice of the official character of officers authorized to administer oaths in the county in which the court has jurisdiction; but where the affidavit is taken in some other county or state, the authority of the officer must be shown. Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73; Thompson *v.* Haskell, 21 Ill. 215, 74 Am. Dec. 98; Stout *v.* Slattery, 12 Ill. 162; Rowley *v.* Berrian, 12 Ill. 198; Shattuck *v.* People, 5 Ill. 477. To the same effect see Ede *v.* Johnson, 15 Cal. 53.

37. *Georgia.* — Behn *v.* Young, 21 Ga. 207; Charles *v.* Foster, 56 Ga. 612.

Illinois. — Trever *v.* Colgate, 181 Ill. 129, 54 N. E. 909; Smith *v.* Lyons, 80 Ill. 600.

New Jersey. — Whitehead *v.* Hamilton Rubber Co., 53 N. J. Eq. 454, 32 Atl. 377; Magowan *v.* Baird, 53 N. J. Eq. 656, 33 Atl. 1054.

New York. — Cream City Furniture Co. *v.* Squier, 51 N. Y. St. 118, 21 N. Y. Supp. 972; Phelps *v.* Phelps, 6 Civ. Proc. 117, 32 Hun 642.

North Carolina. — Miazza *v.* Calloway, 74 N. C. 31.

West Virginia. — Bohn *v.* Zeigler, 44 W. Va. 402, 29 S. E. 983.

In New York, where by § 844 of the Code of Civil Procedure it is provided that an affidavit taken in another state may be used here, provided it was taken before an officer authorized by the laws of the state to take and certify the acknowledgment and proof of deeds to be recorded in the state, it is held that an affidavit can not be received in evidence which contains a certificate that the notary public was authorized to administer oaths, but fails to state that he was authorized to take acknowledgments of deeds. Stanton *v.* U. S. Pipe Line Co., 90 Hun 35, 35 N. Y. Supp. 629.

In New Jersey, a statute respecting oaths, which directs that "any oath required to be taken. . . . when taken out of this state, may be taken before any notary public of the state . . . in which the same shall be taken . . . and a recital that he is such notary or officer in the jurat or certificate of such oath, affirmation or affidavit, and his official designation annexed to his signature and attested under his official seal shall be sufficient proof that the person before whom the same is taken is such notary or officer," is held not to make the recital of official character in the jurat or certificate essential to the validity of the affidavit, or prohibit other proof, or deny to the ordinary jurat and certificate its *prima facie* effect. Magowan *v.* Baird, 53 N. J. Eq. 656, 33 Atl. 1054.

order to be a valid instrument of evidence, should have that in or about it which identifies the party making it, and which furnishes proof of his having uttered the matter of it under oath.[38]

B. By Signature. — **Where Written.** — The omission of the name of the affiant from the jurat will not make the affidavit invalid provided the name and signature appear in the body of the instrument.[39]

Place of Signature. — While it is proper and usual to place the signature of the deponent before the officer's certificate or jurat, the

38. Affiant Must Be Identified. Where an affidavit, indorsed on the appeal bond, commenced as follows: "J. Gaddis and Pierson, the appellants named in the within bond, being duly sworn, upon oath, say" etc., and there was nothing further in the affidavit showing which of the parties actually made and signed the affidavit, the affidavit being signed, "J. Gaddis and Pierson," the court said: "If but one of the appellants made the affidavit, it ought to appear which of them it was, so that perjury, if it has intervened, though none is apprehended in this case, might be assigned on the affidavit. We do not decide that it was necessary to the validity of the affidavit, that it should be signed by the person making it; but this is signed in the partnership name, and as the partnership could not make an affidavit, the whole matter is rendered ambiguous and uncertain. The mandamus is therefore refused." Gaddis *v.* Durashy, 13 N. J. Law 324.

Affidavit Sufficient if Witness is Identified. — In People *v.* Sutherland, 81 N. Y. 1, a well considered case, the court say: "What more is there to legal evidence, in any case where it is taken, relied on and acted upon by courts, than that it is rendered in such form and under such sanctions as that the witness takes on responsibilities and incurs liability to the criminal law if he utters willful falsehood? An affidavit is instead of the presence of the person who makes it, and of his testimony given orally. If the written paper has that in or about it which identifies him as the witness as well as does his presence, and which furnishes proof of his having uttered the matter of it under oath, as well as does his kissing the book and speaking in the witness-box, it is formally as sufficient for evidence as his oral testimony to the same matter."

39. Omission of Name From Jurat. — Where affiant's name was mentioned in the body and was also subscribed to the affidavit, but was not contained in the jurat, the court said: "The proof of service is said to be deficient in that the jurat does not contain the name of the affiant; but the jurat shows that what was written for an affidavit was subscribed and sworn to by one, although the name is not given. They purport, however, to have been subscribed by Frank Pierce, and no one else. If Frank Pierce's name had been written by some one without authority, the words written for an affidavit could not, in any proper sense, be said to be subscribed. We think, then it is expressly shown that they were subscribed by Frank Pierce, and the fair inference is that they were sworn to by the same person. In the absence of a statute expressly requiring the jurat to contain the name of the affiant, we think that we must hold the jurat in question sufficient." Kirby *v.* Gates, 71 Iowa 100, 32 N. W. 191.

To the same effect see Stoddard *v.* Sloan, 65 Iowa 680, 22 N. W. 924.

In Taylor *v.* State, 48 Ala. 180, the following jurat was held sufficient where the paper was signed by 27 persons:

"State of Alabama, Mobile County. } I do hereby certify that the persons whose names are signed above were duly sworn to it before me, Hiram Carver, Notary Public in and for Mobile County, this 26th day of March, 1872. Hiram Carver, N. P. and ex-officio J. P., M. C."

affidavit will not be rendered invalid by placing the signature below the certificate or jurat.[40]

C. By Jurat. — In the absence of a rule of court or statute requiring it, affiant's signature is not necessary to the validity of an affidavit, provided the jurat sufficiently identifies the affiant.[41]

2. When Must State Capacity of Affiant. — Where an affidavit is required to be made by a certain person, acting in a certain capacity, both name and capacity must be stated, and the capacity of affiant must be declared in the body of the affidavit.[42]

40. Place of Signature. — Launius *v.* Cole, 51 Mo. 147; Kohn *v.* Washer, 69 Tex. 67, 6 S. W. 551, 5 Am. St. Rep. 28.

In Affidavit or Certificate to Answer. — When the authentication of the answer is in the form of an affidavit, the name of the deponent must be subscribed on the affidavit; when in the form of a certificate for the officer who administered the oath, the name of the deponent should be subscribed to the answer. Pincers *v.* Robertson, 24 N. J. Eq. 348.

41. *Alabama.* — Watts *v.* Womack, 44 Ala. 605.

California. — Ede *v.* Johnson, 15 Cal. 53.

Indiana. — Turpin *v.* Eagle Creek etc. Road Co., 48 Ind. 45.

Iowa. — Bates *v.* Robinson, 8 Iowa 318.

Michigan. — Bloomingdale *v.* Chittenden, 75 Mich. 305, 42 N. W. 836.

Minnesota. — Norton *v.* Hauge, 47 Minn. 405, 50 N. W. 368.

Mississippi. — Redus *v.* Wofford, 12 Miss. 579; Brooks *v.* Snead, 50 Miss. 416.

New Jersey.—Hitsman *v.* Garrard, 16 N. J. Law 124.

New York. — Haff *v.* Spicer, 3 Caines 190; Jackson *v.* Virgil, 3 Johns. 540; Millius *v.* Shafer, 3 Denio 60.

North Carolina. — Alford *v.* McCormac, 90 N. C. 151.

South Carolina. — Armstrong *v.* Austin, 45 S. C. 69, 22 S. E. 763, 29 L. R. A. 772; Fuller *v.* Missroon, 35 S. C. 314, 14 S. E. 714.

Texas. — Alford *v.* Cochrane, 7 Tex. 485; Crist *v.* Parks, 19 Tex. 234.

Contra. — Crenshaw *v.* Taylor, 70 Iowa 386, 30 N. W. 647; Lynn *v.* Morse, 76 Iowa 665, 39 N. W. 203; Hargadine *v.* Van Horn, 72 Mo. 370.

Neither Signature Nor Jurat. Where the affidavit to the notice of location of a mineral claim, required by the statute, is not signed by the locators and there is no jurat showing it to have been subscribed and verified, the affidavit and notice are insufficient and no evidence of location. Metcalf *v.* Prescott, 10 Mont. 283, 25 Pac. 1037.

42. People *v.* Sutherland, 81 N. Y. 1; Whipple *v.* Hill, 36 Neb. 720, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L. R. A. 313.

Affidavit of Publication by Printer, Foreman, or Principal Clerk. Where an affidavit of publication of summons commenced in this way: "H. B. principal clerk, etc., being duly sworn, deposes" it was held insufficient to give the court jurisdiction of the person of defendant, the court saying: "The fact that an order of publication has been complied with, is to be proved by 'the affidavit of the printer, or his foreman, or principal clerk.' . . . that the affiant is one of the three, is itself a substantive fact, and must be proved as such before the court in which the action is pending can proceed to render judgment against the parties to whom notice is intended to be given. In the affidavit now in question, the affiant swears to nothing except to the matters set forth after the word 'deposes.' He names himself as principal clerk, but he does not swear that that was his position in fact. . . . The result is, that as the record in Steinbach *v.* Leese is made up, judgment was rendered against Jones without any proof that the order of publica-

3. Name May Be Omitted From the Body. — The omission of the name of the affiant from the body of the affidavit does not make the same invalid or inadmissible, provided it is signed by the party making the declaration.[43] But it has been held that when an affidavit to be effectual must be made by one having a certain character or personal capacity wherein he acted or is to act in doing the matters averred therein, the paper ought to state that the deponent has that character or capacity, and this statement should be sworn to.[44]

4. Agents and Attorneys. — It is now generally held that an attorney may make an affidavit for his client where the facts are within his knowledge;[45] and an agent may make the affidavit for his principal under like circumstances.[46] But this relationship must

tion had been complied with." Steinbach *v.* Leese, 27 Cal. 295.

In Supplementary Proceedings. An affidavit in supplementary proceedings is insufficient, where it fails to show that it is made by the judgment creditor or his attorney, or some one authorized to make it in his behalf. Brown *v.* Walker, 28 N. Y. St. 36, 8 N. Y. Supp. 59.

By Officer or Agent of Corporation. Where a statute required an affidavit to be made by the "president, secretary, general superintendent, managing agent of the corporation, or some managing agent thereof within the county;" it was held that an affidavit beginning "John Corning of the Central Pacific Railroad Company, being duly sworn, says," etc., and containing no further description of the affiant's authority, or agency, or connection with said railroad company, was insufficient in that it did not show that the party making the affidavit was one of the persons made competent to make the affidavit under the statute. State *v.* Washoe County, 5 Nev. 317.

43. People *v.* Sutherland, 81 N. Y. 1; Cunningham *v.* Doyle, 5 Misc. 219, 25 N. Y. Supp. 476.

Variance Between Signature and Name in Body. — Where the affidavit for the publication of the order for the appearance of defendants was signed by Charles H. Lee, but it began by the recital that "Fred B. Lee, of said county being duly sworn," etc. it was held that the recital of the name of Fred B. Lee in the beginning of the affidavit was apparently a clerical error, and to be overlooked as such, and that the affidavit was in legal effect the same that it would have been if in the body of it there had been no recital of any name as that of an affiant. Torrans *v.* Hicks, 32 Mich. 307.

44. *Ex parte* Bank of Monroe, 7 Hill (N.Y.) 177; *Ex parte* Shumway, 4 Denio (N. Y.) 258; Cunningham *v.* Goelet, 4 Denio (N. Y.) 71; Cunningham *v.* Doyle, 5 Misc. 219, 25 N. Y. Supp. 476; People *v.* Sutherland, 81 N. Y. 1; Steinbach *v.* Leese, 27 Cal. 295; Payne *v.* Young, 8 N. Y. 158.

45. *United States.* — The Harriet, 11 Fed. Cas. No. 6096.

California. — Byrne *v.* Alas, 68 Cal. 479, 9 Pac. 850; Will *v.* Lytle Creek Water Co., 100 Cal. 344, 34 Pac. 830.

Indiana.—Abbott *v.* Leigler, 9 Ind. 511.

Louisiana. — Hardie *v.* Colvin, 43 La. Ann. 851, 9 So. 745; Fulton *v.* Brown, 10 La. Ann. 350; Dwight *v.* Weir, 6 La. Ann. 706; Williams *v.* Brashear, 16 La. 77.

New York. — Tim *v.* Smith, 93 N. Y. 87; Pittsburg Bank *v.* Murphy, 64 Hun 632, 18 N. Y. Supp. 575.

Texas. — McAlpin *v.* Finch, 18 Tex. 831; Doll *v.* Muldine, 84 Tex. 315, 19 S. W. 394.

46. Murray *v.* Cone, 8 Port. (Ala.) 252; Wetherwax *v.* Paine, 2 Mich. 555; McAlpin *v.* Finch, 18 Tex. 831; Nicholls *v.* Lawrence, 30 Mich. 395; Allen *v.* Champlin, 32 La. Ann. 511; Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068; School Directors *v.* Hentz, 57 Ill. App. 648;

exist at the time the affidavit is made.[47] It has also been held that such affidavits are receivable only when circumstances exist which would excuse the party himself from making it, such as sickness or absence from the county;[48] in which case such disability should be alleged.[49]

5. Presumption of Authority to Make. — Where an affidavit is made on behalf of a party by his attorney or agent, a recital of such relationship is usually held sufficient,[50] it being presumed in such case that the affidavit is made on behalf of the principal.[51]

Stringer *v.* Dean, 61 Mich. 196, 27 N. W. 886.

47. Relation of Attorney or Agent Must Exist. — A statute providing that an affidavit may be made by the attorney or agent of the party when the party is absent from the county is confined to cases where the relation of attorney and client or agent and principal exists at the time the affidavit is made and a subsequent ratification by the party of an unauthorized affidavit is not sufficient. Johnson *v.* Johnson, 31 Fed. 700.

48. People *v.* Spalding, 2 Paige (N. Y.) 326; Cross *v.* Nat. F. Ins. Co., 53 Hun 632, 6 N. Y. Supp. 84; Johnson *v.* Johnson, 31 Fed. 700.

49. People *v.* Spalding, 2 Paige (N. Y.) 326; Talbert *v.* Storum, 66 Hun 635, 21 N. Y. Supp. 719; Van Ingen *v.* Herold, 64 Hun 637, 19 N. Y. Supp. 456.

Reason for the Rule. — "It has never been held that no one but the defendant can make the affidavit of defense. Cases may arise where it would be physically impossible for the defendant to make such an affidavit. Under such and similar circumstances we have no doubt that an affidavit of defense may be made on behalf of defendant by an attorney at law or other person duly authorized, but the reason why it is not made by the defendant should be set forth in the affidavit. The court can then judge of the sufficiency of such reason. It would never do to allow a stranger to the record to intermeddle in this manner. The correct rule would seem to be that, when a defendant puts in a stranger's affidavit, it must show upon its face sufficient reason why it was not made by the defendant himself; that a real disability existed, which prevented him from making it, and the circumstances giving rise to the disability." Griel *v.* Buckius, 114 Pa. St. 187, 6 Atl. 153.

50. *Alabama.* — Murray *v.* Cone, 8 Port. 250.

Arkansas. — Mandel *v.* Peet, 18 Ark. 236.

Massachusetts. — Wright *v.* Coles, 52 Mass. (11 Metc.) 293.

Michigan. — Nicholls *v.* Lawrence, 30 Mich. 395; Forbes Lithograph Mfg. Co. *v.* Winter, 107 Mich. 116, 64 N. W. 1053; Stringer *v.* Dean, 61 Mich. 196, 27 N. W. 886; Wetherwax *v.* Paine, 2 Mich. 555.

Minnesota. — Smith *v.* Victorin, 54 Minn. 338, 56 N. W. 47.

Missouri. — White Sewing Machine Co. *v.* Betting, 53 Mo. App. 260; Ring *v.* Chas. Vogel & Glass Co., 46 Mo. App. 374; Remington Sewing Machine Co. *v.* Cushen, 8 Mo. App. 528.

Texas. — Evans *v.* Lawson, 64 Tex. 199.

51. Stringer *v.* Dean, 61 Mich. 196, 27 N. W. 886; Nicholls *v.* Lawrence, 30 Mich. 395; Wright *v.* Coles, 52 Mass. (11 Metc.) 293; Smith *v.* Victorin, 54 Minn. 338, 56 N. W. 47.

Affidavit Presumed to Be Made on Behalf of Plaintiff. — Where an affidavit for attachment was objected to upon the ground that it contained no allegation that it was made on behalf of plaintiff the court said: "It is a matter of formal consequence whether the affidavit does or does not show whether the person who made it, made it for the plaintiffs. Whether it is or is not so stated, it will be so intended, for it is not presumed that one in no wise interested in the suit would make such

6. Where Statute Designates Affiant. — The particular person competent to make a certain affidavit such as is required in proof of service of summons,[52] change of venue,[53] and the like,[54] is sometimes pointed out by statute, and in such cases the affidavit of a person other than the one designated as competent can not be received as evidence in proof of the facts required by the statute.

VI. IDENTIFICATION OF CAUSE.

1. Cause or Proceeding Must Be Identified. — It is held in some jurisdictions that an affidavit made to be used in a pending cause

an affidavit without it was done by him as the agent of the party in interest, or done for him, for accommodation." Mandel *v.* Peet, 18 Ark. 236.

But see Wiley *v.* Aultman, 53 Wis. 560, 11 N. W. 32, wherein it is held that an affidavit for an attachment is insufficient which fails to allege the relationship of affiant to plaintiff and that it is made on behalf of the plaintiff.

See also Miller *v.* Chicago etc. Ry. Co., 58 Wis. 310, 17 N. W. 130, to the same effect.

52. Publication of Summons. In Steinbach *v.* Leese, 27 Cal. 295, it was held that under the statute providing that proof of the publication of a summons may be made by the affidavit of the "printer, foreman or principal clerk" an affidavit beginning, "H. W. F. Hoffman, principal clerk in the office of the California Chronicle, a daily newspaper published in said city and county, being duly sworn, deposes and says" etc., is insufficient to give the court jurisdiction. That the affiant is one of the three persons pointed out by the statute as competent to make the affidavit is itself a substantive fact and must be proved as such. That affiant swears to nothing except to the matters set forth after the word deposes, and that the affidavit not appearing to have been made by one of the persons pointed out by the statute was not sufficient.

Affidavit for Order of Publication of Summons. — Under Code of Colorado 1887 § 41 requiring an affidavit for the publication of a summons to be made by a party to the action it was held that such statutes must be strictly construed and that such affidavit made by the attorney of the party could not be received. Davis *v.* John Mouat Lumber Co., 2 Colo. App. 381, 31 Pac. 187.

53. In Western Bank *v.* Tallman, 15 Wis. 92, it is held that an application under § 8, ch. 123, R. S. 1858, for a change of venue in a civil action on account of the prejudice of the judge before whom the action is pending, must be verified by the oath or affirmation of a "party" to the action, and cannot be verified by his attorney even in the absence of the agents or officers qualified to make an affidavit for the corporation under the general provisions of law.

But see Shattuck *v.* Myers, 13 Ind. 46, 74 Am. Dec. 236, wherein it is held that while it should be the usual practice to require the affidavit for a change of venue to be made by the party himself, the affidavits of others might be received in the exercise of a sound legal discretion.

54. Suits and Affidavits in Forma Pauperis. — Hadden *v.* Larned, 83 Ga. 636, 10 S. E. 278; Railroad Co. *v.* Tyson, 48 Ga. 351; Elder *v.* Whitehead, 25 Ga. 262; Lester *v.* Haynes, 80 Ga. 120, 5 S. E. 250.

In Redemption Proceedings. Upon an application by an assignee of a junior judgment to redeem land sold under execution under a statute requiring the affidavit of assignment to be made by the assignee or some witness to the assignment, it was held that an affidavit made by another person describing himself as the agent of the assignee was insufficient. *Ex parte* Aldrich, 1 Denio (N. Y.) 662.

must be identified by containing the title of the cause in which it is intended to be used or it cannot be received.[55]

2. Where Cause Clearly Appears. — The want of the formality of a title is of no consequence, provided the affidavit has been otherwise fully identified as having been made to be used in that cause.[56]

55. *United States.* — Goldstein *v.* Whelan, 62 Fed. 124.

Illinois. — Watson *v.* Reisig, 24 Ill. 281, 76 Am. Dec. 746.

Michigan. — Whipple *v.* Williams, 1 Mich. 115.

Mississippi. — Saunders *v.* Erwin, 2 How. 732.

New York. — Higham *v.* Hayes, 2 How. Pr. 27; Burgess *v.* Stitt, 12 How. Pr. 401; Irroy *v.* Nathan, 4 E. D. Smith 68.

West Virginia. — Vinson *v.* Norfolk, 37 W. Va. 598, 16 S. E. 802.

Effect of Omitting Title. — In Buerck *v.* Imhaeuser, 4 Fed. Cas. No. 2107a, it was held that an affidavit not entitled in the cause was merely an extrajudicial oath, and not admissible in evidence.

Where Title Must Appear. Every affidavit must bear upon its face, either at the commencement of it or in its body the title of the suit in which it is taken and the proceedings to which it is intended to apply. Saunders *v.* Erwin, 3 Miss. (2 How.) 732.

On Motion for Injunction. — In Goldstein *v.* Whelan, 62 Fed. 124, it is held that affidavits not entitled in the cause cannot be considered in opposition to a motion for an injunction.

56. Dunham *v.* Rappleyea, 16 N. J. Law 75; Hays *v.* Loomis, 84 Ill. 18; Harris *v.* Lester, 80 Ill. 307; Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288; Kearney *v.* Andrews, 5 Wis. 23; Yard *v.* Bodine, 18 N. J. Law 490; King *v.* Harrington, 14 Mich. 532.

Where Affidavits Are Forwarded to Counsel. — In Shook *v.* Rankin, 21 Fed. Cas. No. 12,804, where affidavits to support an application for a writ of injunction were without title, but were forwarded to counsel in the case, the court say: "It affirmatively appears, I think, that these affidavits were made for the purpose of being used in this case; and conceding that they did not at the time contain the proper title of the cause, still they were made and forwarded to counsel, who may be presumed to be authorized by the parties to give the proper character to them by stating the name of the cause in which they were to be used. It seems to me that it would be adopting a very rigid rule, and one hardly in accordance with the liberal practice of the present day, to declare that the affidavits should be rejected because at the time when the affidavits were made and signed by the parties, the name of the cause was not stated, provided they knew that they were to be used in the cause, although they did not know the technical description of the title to the same."

Identity on its Face. — Where an affidavit shows on its face that it is intended to be used in the suit it is not necessary that it should be entitled. Dunham *v.* Rappleyea, 16 N. J. Law 75.

But see Saunders *v.* Erwin, 2 How. (Miss.) 732, wherein it was held that every affidavit must bear upon its face, either at the commencement of it or in its body, the title of the suit in which it is taken and of the proceedings to which it is intended to apply.

In Kearney *v.* Andrews, 5 Wis. 23, it was held that it is not necessary that an affidavit for appeal from a judgment of a justice of the peace should be entitled of the cause and court. If it substantially conform to the statute, and properly describe the parties to the suit, it is good by relation to the other papers which are properly entitled, and is sufficient.

In Case of Appeal, if the justice certifies on his docket that an affidavit has been filed with him, sends up his transcript and appeal bond, and affidavit made by the appellant, before him or any other justice,

So where the affidavit contains a reference to or is attached to other papers in the cause which are properly identified;[57] or where it follows or is indorsed upon other papers correctly identified in the cause,[58] even where it is wrongly entitled.[59]

3. Identified With Wrong Cause. — But a wrongly entitled affidavit which has the effect of identifying the affidavit with a cause other than the one in which it is intended to be used, cannot be read.[60]

stating in substance, what the statute requires, it is sufficient evidence to the court that the affidavit, thus sent up, was made in that cause; and it is not necessary that the affidavit should be entitled in the cause, or even show upon its face who are the appellees, or the style of the action; unless it appears by its caption or on the face of it, to have been made in a different cause, or is otherwise shown to have been so made, it ought to be received and acted on. Yard *v.* Bodine, 18 N. J. Law 490.

Affidavit of Due Examination of Witness. — In McLeod *v.* Torrance, 3 Q. B. 146, it is held that the affidavit of the due examination of witnesses by a commissioner need not be entitled in the cause.

57. *Arkansas.* — Powers *v.* Swigart, 8 Ark. 363.

California. — Watt *v.* Bradley, 95 Cal. 415, 30 Pac. 557.

Illinois. — Harris *v.* Lester, 80 Ill. 307; Hays *v.* Loomis, 84 Ill. 18.

Iowa. — Levy *v.* Wilson, 43 Iowa 605.

Michigan. — King *v.* Harrington, 14 Mich. 532.

New York. — Anonymous, 4 Hill 597; *ex parte* Metzler, 5 Cow. 287.

Wisconsin. — Kearney *v.* Andrews, 5 Wis. 23.

Affidavit Attached to Writ. —"The formal requisites of an affidavit are the title, venue, signature, jurat and authentication. This affidavit contains all the formal parts, except the title, or entitling in the cause. The general rule is that the affidavit must be entitled in the suit in which it is to be used. If there be no suit pending at the time, of course, the affidavit must not be entitled. If a suit be pending, and the affidavit is entitled in a suit not pending, the affidavit is a nullity." Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288.

Where Affidavit of Publication Refers to the Order. — Where the affidavit of the publication of an order to appear was not entitled in the suit, but the order referred to in the affidavit was properly entitled, it was held that the affidavit referring to a paper properly entitled, to which it is appended, must be assumed to have adopted the title by the reference, the object of entitling affidavits being to connect them with a suit so that perjury will lie upon them. King *v.* Harrington, 14 Mich. 532.

58. Where it Follows or is Indorsed on Other Papers. — Where the affidavit immediately follows the papers for the motion, or where it is indorsed upon them, they being properly entitled, it is sufficient though not itself entitled. Anonymous, 4 Hill (N. Y.) 597.

59. Wrongly Entitled Affidavit. Where the affidavit and notice of motion were entitled in the wrong court but they intelligibly referred to the action and proceedings in reference to which the affidavit is made and the notice given, it was held that the objection that the affidavit and notice of motion were wrongly entitled, could not be maintained. Blake *v.* Locy, 6 How. Pr. (N. Y.) 108.

60. Dickenson *v.* Gilliland, 1 Cow. (N. Y.) 481; Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288; Whipple *v.* Williams, 1 Mich. 115; Humphrey *v.* Cande, 2 Cow. (N. Y.) 509; Hawley *v.* Donnelly, 8 Paige (N. Y.) 415.

Cause of Action Misstated. — Where in an action of trespass on the case, an affidavit on appeal was entitled

4. When No Cause Is Pending. — Affidavits entitled as in a cause pending when no such suit was in existence at the time, are not entitled to be read or used for any purpose whatever.[61]

5. Rule Not Universal. — But there are cases to the contrary.[62]

in an action of debt, it was held that the affidavit was fatally defective. Dunham *v.* Rappleyea, 16 N. J. Law 75.

Where Parties Allowed to Sever. Where it appeared that a writ of error was sued out in the names of W and R, but on motion W was allowed to sever in the prosecution of the suit, affidavits subsequently drawn up and entitled in the name of W and R were held to be erroneously entitled. Whipple *v.* Williams, 1 Mich. 115.

Wrong Christian Name. — An affidavit entitled "Charles Reissig *v.* Alanson Watson, *et al.*," cannot be considered where the proper title of the cause is "Charles Reissig *v.* Alonzo Watson, *et al.*" Watson *v.* Reissig, 24 Ill. 281, 76 Am. Dec. 746.

Wrong Title Cannot Be Rejected as Surplusage. — Where the affidavit was wrongly entitled and it was contended in support of the affidavit that the title might be rejected as surplusage the court said: "The objection is fatal. There is no such cause in existence as the one mentioned in the title and such an affidavit is never received. The party cannot be convicted of perjury, though he swears falsely. We refuse to hear motions for writs of *mandamus* upon affidavits which are entitled, and the same rule prevails in the K. B. as to affidavits to hold to bail." Humphrey *v.* Cande, 2 Cow. (N. Y.) 509.

61. *England.* — Rex *v.* Harrison, 6 T. R. 60; Green *v.* Redshaw, 1 B. & P. 227; Reg. *v.* Jones, 1 Str. 704; King *v.* Cole, 6 T. R. 640; Rex. *v.* Pierson, Andrews 313.

United States. — Baldwin *v.* Bernard, 9 Blatchf. 509, 2 Fed. Cas. No. 797; Blake Crusher Co. *v.* Ward, 3 Fed. Cas. No. 1505; Sterrick *v.* Pugsley, 1 Flip. 350, 22 Fed. Cas. No. 13,379.

Florida. — West *v.* Walfolk, 21 Fla. 189.

Indiana. — Hawkins *v.* State, 136 Ind. 630, 36 N. E. 419.

Michigan. — Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288.

New York. — Whitney *v.* Warner, 2 Cow. 499; Haight *v.* Turner, 2 Johns. 371; Nichols *v.* Cowles, 3 Cow. 345; Milliken *v.* Selye, 3 Denio 54; People *v.* Tioga Com. Pl., 1 Wend. 291; People *v.* Dikeman, 7 How. Pr. 124; Stacy *v.* Farnham, 2 How. Pr. 26; *in re* Bronson, 12 Johns. 460; Hawley *v.* Donnelly, 8 Paige 415.

Wisconsin. — Quarles *v.* Robinson, 2 Pinn. 97, note.

Title Cannot Be Rejected as Surplusage. — *In re* Bronson, two of the judges thought the entitling might be rejected as surplusage but the majority of the court decided otherwise, and the affidavits were rejected. *In re* Bronson, 12 Johns. (N. Y.) 460.

See also Blake Crusher Co. *v.* Ward, 3 Fed. Cas. No. 1505.

62. Effect of Statute in New York. — "The only remaining point urged by defendant's counsel in support of his motion, which it is necessary to notice, is, that the affidavit is entitled in a cause which as yet had no existence. Under the former practice, this objection might have been fatal to the proceedings. It seems to have been settled by authority, though I have never been able to perceive the soundness of the reason upon which the rule was founded, that affidavits to hold to bail must not be entitled. The only reason that has ever been assigned for the rule is, that as the affidavit purports to be made in a suit when in fact no suit is pending, an indictment for perjury could not be sustained, if the affidavit should prove to be false. I can see no difficulty, however, in sustaining an indictment, containing proper allegations in such a case. But whatever should have been the rule under

6. Waiver of Irregularity. — But it has been held that the objection to an affidavit upon the ground that it is entitled in a cause not yet commenced, must be made in the first instance, and is waived by the opposite party's predicating a motion upon it.[63]

7. When Used As Foundation for Writs. — There are instances, however, where false swearing will be perjury, although no suit was pending at the time. It is so wherever the oath was lawful; and the oath is lawful whenever it is a preparatory step in legal proceedings. Affidavits made to be thus used need not necessarily be entitled;[64] and if made before the cause in which they are intended to be used is actually commenced, may be vitiated if entitled in the cause.[65]

the former practice, it is enough to say now, that the error or defect, if it be one, 'does not affect the substantial rights of the adverse party,' and I am, therefore, required by the 176th section of the Code, to disregard it." Pindar *v.* Black, 4 How. Pr. (N. Y.) 95; City Bank *v.* Lumley, 28 How. Pr. (N. Y.) 397.

Rule in Minnesota. — "Another objection to the affidavit is that it was void because entitled in a cause not yet commenced. There are undoubtedly decisions which go to this length, but they are, in our judgment, devoid of reason, and based upon a frivolous technicality. We do not suppose that there was ever an affidavit made in this state for a replevin, garnishment, attachment, or publication of a summons that was not thus entitled, although, strictly speaking, the action was not yet commenced when the affidavit was sworn to. Even at common law it was, at most, a mere irregularity which, in the language of the court in Clarke *v.* Cawthorne, 7 Term R. 321, 'does not interfere with the justice of the case.' A prosecution for perjury based upon such an affidavit would lie." Crombie *v.* Little, 47 Minn. 581, 50 N. W. 823.

63. City Bank *v.* Lumley, 28 How. Pr. 397.

64. Kinney *v.* Heald, 17 Ark. 397; *in re* Bronson, 12 Johns. (N. Y.) 460.

For Mandamus. — "An affidavit for *mandamus* may be treated as a complaint, and still, to all intents and purposes, have the effect of such an affidavit. The fact that such affidavit lacks the title of the action or proceeding in which it was used will not invalidate it as such. McCrary *v.* Beaudry, 67 Cal. 120, 7 Pac. 264.

But see Milliken *v.* Selye, 3 Denio 54, wherein it was held that where an affidavit required to be delivered to the sheriff with a writ of replevin was entitled in the cause before any cause was pending it was void. That the affidavit should not have been entitled, because when it was made there was no suit pending in court. As the affidavit purported to be made in a suit when there was none, the party could not be convicted of perjury for false swearing. As there was no suit pending the affidavit as thus entitled was not a lawful but an extrajudicial oath, and a nullity.

65. People *v.* Tioga Com. Pl., 1 Wend. (N. Y.) 291; Haight *v.* Turner, 2 Johns. (N. Y.) 371.

Affidavit for Injunction. — In Baldwin *v.* Bernard, 2 Fed. Cas. No. 797, the court said: "It is undoubtedly irregular to swear a person in a suit before the bill has been filed. The irregularity consists in having the affidavit sworn to under the title of a suit, in which no suit has been filed. If the title had been omitted there would have been no irregularity. This is continually done in applications for *habeas corpus* and *mandamus*, and to swear falsely in such affidavits is indictable as perjury. The suit is commenced when the suit is filed. Eicke's affidavit

VII. AS AN INSTRUMENT OF EVIDENCE.

The principal service of an affidavit as evidence, is to bring to the knowledge of the court facts not appearing by the record when such facts are necessary to be shown as a basis for some preliminary or interlocutory action,[66] or in proof of matters which are auxiliary to the trial of the cause.[67]

should not have been entitled in the suit. On this ground the affidavit of Eicke should be excluded."

For Certiorari. — In Whitney *v.* Warner, 2 Cow. (N. Y.) 499, it is held that an affidavit for a writ of *certiorari* to a justice's court might be entitled in the court below but not in the court to which the application was made.

In People *v.* Tioga Com. Pl., 1 Wend. (N. Y.) 291, the court say: "It is the settled practice of this court that on a motion for a *mandamus* the affidavit must not be entitled. The reason is that at the time of the making of the affidavit there is no cause pending in this court, and an indictment for perjury in making such an affidavit must fail, as it could not be shown that such a cause existed in the court in which the affidavit was made."

66. Cooper *v.* Galbraith, 24 N. J. Law 219; Harwood *v.* Smethurst, 30 N. J. Law 230; Faulkner *v.* Chandler, 11 Ala. 725; Coffin *v.* Abbott, 7 Mass. 252; Tennant *v.* Divine, 24 W. Va. 387.

Rule to Show Cause. — In Baldwin *v.* Flagg, 43 N. J. Law 495, it is held that *ex parte* affidavits may be used for the purpose of obtaining a rule to show cause, but are not competent to prove the facts necessary to support a motion not of course, or to read on the hearing of a rule to show cause depending on facts extrinsic the record; such facts can only be brought before the court by depositions taken on notice. *See* "ATTACHMENT," "REPLEVIN."

67. In Matters Auxiliary to Cause. — In Schloss *v.* His Creditors, 31 Cal. 201, it is said: "Application for a continuance on the ground of a party's inability to procure the attendance of a witness, or to obtain some necessary evidence, or to establish the loss of a written instrument, and the like, are in practice generally founded upon affidavits, and the service of notices and subpoenas and matters of the kind are usually proved by affidavit."

AFFILIATION.—See Bastardy.

AFFINITY.—See Relationship.

AFFIRMATION.—See Oath.

AFFRAY.

CROSS-REFERENCES.

Assault and Battery;
Breach of Peace;
Duelling;
Prize Fighting;
Riot;
Unlawful Assembly.

I. DEFINITION.

An affray is in general a breach of the peace in a public place to the terror of the people.[1] It may consist either in the fighting of two or more persons,[2] with or without mutual consent,[3] or in simply

1. 1 Hawk. P. C., ch. 63, § 1.

2. 1 Hawk. P. C., ch. 63, § 1; 4 Blk. Com. 145; 1 Russ. Crimes, p. 406; 1 Bish. Crim. L., § 535; Black's Law Dict. *sub verbo*; McClellan *v.* State, 53 Ala. 640; Childs *v.* State, 15 Ark. 204; Supreme Council etc. *v.* Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; Com. *v.* Simmons, 29 Ky. 614; Duncan *v.* Com., 36 Ky. 295; State *v.* Perry, 5 Jones Law (N. C.) 9, 69 Am. Dec. 768; State *v.* Woody, 47 N. C. 335; State *v.* Davis, 65 N. C. 298; Simpson *v.* State, 5 Yerg. (Tenn.) 356; State *v.* Priddy, 4 Humph. (Tenn.) 429; Pollock *v.* State, 32 Tex. Crim. App. 29, 22 S. W. 19.

3. **At Common Law** consent was immaterial, but some statutes have made it otherwise. See Fritz *v.* State, 40 Ind. 18; Klum *v.* State, 1 Blackf. (Ind.) 377; Supreme Council etc. *v.* Garrigus, 104 Ind. 103, 3

going about armed.[4]

II. PROOF NECESSARY TO CONVICTION.

1. Fighting of Two or More. — All the elements of the offense must be proved;[5] fighting, public place, terror of the people, and in some cases consent or agreement.

A. Proof of Fighting. — Fighting must be proved,[6] though not necessarily that defendants fought each other.[7] One blow is sufficient to constitute a fight, when it renders the other party unable to return it.[8] Proof of a mere friendly scuffle is insufficient.[9]

a. *Words.* — Authorities are in direct conflict as to whether proof of mere words alone will sustain a conviction for affray. In North Carolina it is held that they will;[10] in Alabama and Georgia that they will not.[11] In any case, of course, they may be introduced as part of the *res gestae*.[12]

B. Proof of Public Place. — The state must show that the fighting was in a public place.[13] What is a public place is a matter of evidence,[14] to be determined by the jury under proper instructions by the court.[15]

N. E. 818, 54 Am. Rep. 298; State *v.* Herrell, 107 N. C. 944, 12 S. E. 139; Champer *v.* State, 14 Ohio St. 437.

4. 1 Hawk. P. C., ch. 63, § 4; Knight's Case, 3 Mod. 117; 1 Russ. Crimes, p. 407; State *v.* Huntly, 25 N. C. 418, 40 Am. Dec. 416; State *v.* Lanier, 71 N. C. 288; State *v.* Davis, 65 N. C. 298; State *v.* Griffin, 125 N. C. 692, 34 S. E. 513; State *v.* Washington, 19 Tex. 128, 70 Am. Dec. 323; Simpson *v.* State, 5 Yerg. (Tenn.) 356, abrogates the common law rule, as infringing a right guaranteed by the state constitution.

5. State *v.* Brewer, 33 Ark. 176. *Examples.* — See State *v.* Glenn, 119 N. C. 804, 25 S. E. 789; Piper *v.* State (Tex. App.), 51 S. W. 1118.

6. State *v.* Brewer, 33 Ark. 170.

7. Thompson *v.* State, 70 Ala. 26.

8. State *v.* Gladden, 73 N. C. 150.

9. State *v.* Freeman, 127 N. C. 544, 37 S. E. 206.

10. State *v.* Perry, 5 Jones Law (N. C.) 9, 69 Am. Dec. 768; State *v.* Robbins, 78 N. C. 431; State *v.* Fanning, 94 N. C. 940, 55 Am. Rep. 653.

11. O'Neill *v.* State, 16 Ala. 65; Hawkins *v.* State, 13 Ga. 322, 58 Am. Dec. 517.

12. Hawkins *v.* State, 13 Ga. 322, 58 Am. Dec. 517.

13. State *v.* Brewer, 33 Ark. 170; Shelton *v.* State, 30 Tex. 431.

In State *v.* Billings, 72 Mo. 662, it was held that evidence that fight began in a private house was admissible, if it continued into the street.

14. Shelton *v.* State, 30 Tex. 431.

15. Thus, in Carwile *v.* State, 35 Ala. 392, where the jury found that the fight occurred in a private lot ninety feet from the road, but within sight of persons passing thereon, the court held it to be a public place as required. Gamble *v.* State, 113 Ga. 701, 39 S. E. 301, held that evidence that fight occurred in a private house "near" a public road is not sufficient proof of its publicity; neither is the fact that at the time the house was being used for a dance; though under some circumstances the unusual assemblage of people in a private place may make it public. Taylor *v.* State, 22 Ala. 15, held, that the casual presence of three persons in a forty-acre tract one mile from a highway and enclosed by a woodland, does not make such tract a public place.

Highway Not Necessarily a Public Place. — State *v.* Weekly, 20 Ind. 206.

"Public Highway" is a Public Place. — State *v.* Warren, 57 Mo. App. 502.

C. Proof of Terror. — Where the fight is public, terror will be conclusively presumed.[16]

D. Proof of Consent. — Consent, when material,[17] may be shown by the acts and declarations of the parties.[18] Such acts and declarations must be part of the immediate transaction.[19] The mere fact of fighting will not raise a presumption that it was by agreement.[20]

2. Going About Armed.[21]— Whether a public offense of this kind is an affray or not, is a question for the jury.[22] In this class of cases, "terror" will not be presumed but must be shown.[23]

III. JUSTIFICATION BY DEFENDANT.

1. Burden to Show. — When the fact of fighting in a public place, to the terror of the people, has been proved or admitted, the burden of proof shifts to the accused to show a justification therefor.[24]

2. Self-Defense As. — Evidence that he fought in self-defense is admissible.[25]

3. Other Facts. — No authority can be found for allowing any proof in justification other than that of self-defense.[26]

16. State v. Sumner, 5 Strob. (S. C.) 53.

17. *Held* material. State v. Weathers, 98 N. C. 685, 4 S. E. 512.

By statute. Fritz v. State, 40 Ind. 18; Supreme Council etc. v. Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298.

Held immaterial. Cash v. State, 2 Over. (Tenn.) 198.

18. State v. Herrell, 107 N. C. 944, 12 S. E. 439. Evidence that after fight was ended, defendants shouted out to retreating opponents to "stop and shoot it out like men" held admissible to prove consent.

19. Skains v. State, 21 Ala. 218; State v. Goff, 117 N. C. 755, 23 S. E. 355.

20. Klum v. State, 1 Blackf. (Ind.) 377.

21. See note 4, *ante*.

22. State v. Lanier 71 N. C. 288.

23. State v. Huntly, 25 N. C. 418, 40 Am. Dec. 416. Declarations of defendant that he intended to kill Ratcliff held admissible to prove evil purpose, and consequent terror of the people. Cited in State v. Norton, 82 N. C. 628; Sate v. Lanier, 71 N. C. 288.

24. State v. Weathers, 98 N. C. 685, 4 S. E. 512.

State v. Barringer, 114 N. C. 840, 19 S. E. 275. *Held*, that where defendant admits fighting with a deadly weapon, the burden is on him to prove facts justifying his conduct, not merely by preponderance of evidence, but to the satisfaction of the jury.

But, in State v. Freeman, 127 N. C. 544, 37 S. E. 206, admission by defendants that they were engaged in a friendly scuffle is held not sufficient to cast upon them the burden of proving justification.

25. Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517; State v. Barringer, 114 N. C. 840 19 S. E. 275; State v. Downing, 74 N. C. 184.

Contra. — State v. Herrell, 107 N. C. 944, 12 S. E. 439, held that evidence that parties came up to the accused brandishing weapons and uttering threats was inadmissible to prove that they acted in self defense.

26. Thus, it is inadmissible to prove that defendant did not expect his abusive language to be taken up and resented. State v. King, 86 N. C. 603.

State v. Weathers, 98 N. C. 685, 4 S. E. 512, held that evidence that one of the defendants, whose sister was the wife of the other defendant,

IV. WITNESSES.

Co-defendants, testifying each in his own behalf, stand in relation to each other as prosecuting witnesses, and are subject to thorough cross-examination and impeachment by both sides.[27]

tried to persuade her to leave him, was inadmissible in defense.

27. State v. Goff, 117 N. C. 755, 23 S. E. 355.

AGE.

CROSS-REFERENCES.

Ancient Documents;
Birth; Books as Evidence;
Handwriting; Hearsay;
Pedigree.

I. JUDICIAL NOTICE.

Judicial notice will be taken by the courts that an attorney at law, as an officer of the court, is at least twenty-one years of age.[1]

II. PRESUMPTIONS.

In the absence of anything appearing to the contrary, it will be presumed that a person who has entered into an agreement is of competent age to contract.[2]

It will be presumed that declarations made by an applicant for insurance, as to his age, on which a policy has been issued and premiums paid for a long time, are correct, until the contrary is made to appear.[3]

III. DOCUMENTARY EVIDENCE.

1. What Documents Admissible. — A. In General. — The fact of age has been proved by private records kept by a third person.[4] It may be proved by evidence of the figures on a birthday cake.[5]

B. Inscription on Tombstone. — Evidence of an inscription on a tombstone has been held admissible on the question of age.[6]

C. Charge in Attending Physician's Accounts. — Where the attending physician can not remember the date of the birth of a person, a charge made by him in his accounts, or any other original contemporaneous memorandum of the fact, may be received for the

1. Booth *v.* Kingsland Ave. B. Ass'n, 18 App. Div. 407, 46 N. Y. Supp. 457.

2. Rogers *v.* De Bardelaben Coal & I. Co., 97 Ala. 154, 12 So. 81; Foltz *v.* Wert, 103 Ind. 404, 2 N. E. 950; Rowe *v.* Arnold, 39 Ind. 24. See also Garber *v.* State, 94 Ind. 219; Palmer *v.* Wright, 58 Ind. 489.

3. Supreme Council, C. S. F. *v.* Conklin, 60 N. J. Law 505, 38 Atl. 659, 41 L. R. A. 440. See also McCarthy *v.* Catholic Knights & L. of A., 102 Tenn. 345, 52 S. W. 142, wherein it is held that, as forfeiture of the rights of membership in a mutual benefit association sought on the ground that the applicant had misrepresented his age in his application is not favored by the law, the fact upon which it is sought must be proved by the most satisfactory evidence; citing Bates *v.* Detroit Mut. Ass'n, 51 Mich. 587, 17 N. W. 67; Jackson *v.* N. W. Mut. Relief Ass'n, 78 Wis. 463, 47 N. W. 733; So. Life Ins. Co. *v.* Booker, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344; Mobile Life Ins. Co. *v.* Morris, 3 Lea (Tenn.) 101, 31 Am. Rep. 631. And *see* the title "Forfeiture."

4. Coan *v.* Enell, 2 Cranch C. C. 208, 5 Fed. Cas. No. 2790; Falls *v.* Gamble, 66 N. C. 455; Fletcher *v.* Cavalier, 4 La. 267.

5. Thus, in Parkhurst *v.* Krellinger, 69 Vt. 375, 38 Atl. 67, evidence that the person whose age was in question had had a birthday party, on which occasion she had a birthday cake with figures thereon indicating her age, was held admissible. "The party was before the controversy arose," said the court, "and at a time when the defendant could have no motive in representing the age of his daughter to be different form what it was in fact; and we think the evidence must be regarded as in the nature of an act of the defendant that rendered his claim more probable, and was admissible."

6. Smith *v.* Patterson, 95 Mo. 525, 8 S. W. 567.

Compare Gehr *v.* Fisher, 143 Pa. St. 311, 22 Atl. 850.

purpose of proving the age of the person in question, if the entry is supported by his testimony that it was correctly made.[7]

D. Hymn Book. — Entries in a hymn book, made by a parent *ante litem motam*, are admissible on the question of age, where the father and mother and near relatives are dead or beyond the seas.[8]

E. Public Records. — Again, public records have been received as proper evidence to prove the fact of age.[9]

2. What Documents Not Admissible. — A. Marriage Certificate. — A recital of the age of the parties in a marriage certificate is not evidence of that fact.[10]

B. Baptismal Certificate. — It has been held that the age of a person can not be shown by a baptismal certificate stating the date of his birth.[11]

7. Higham *v.* Ridgeway, 10 East 109; Blackburn *v.* Crawfords, 3 Wall. 275; Arms *v.* Middleton, 23 Barb. (N. Y.) 571; Heath *v.* West, 26 N. H. 191; *In re* Paige, 62 Barb. (N. Y.) 476.

8. Collins *v.* Grantham, 12 Ind. 440.

9. Markowitz *v.* Dry Dock, E. B. & B. R. Co., 12 Misc. 412, 33 N. Y. Supp. 702.

Census Book. — In Battles *v.* Tallman, 96 Ala. 403, 11 So. 247, it was held that entries in a census book made by a census enumerator of a mother's statement as to her daughter's age were not admissible unless the enumerator cannot, after examining it, testify to a present recollection of the fact therein noted.

10. That a Person Was of Full Age at a Certain Time can not be proved by evidence that at that time he was assessed and taxed for property. See Clark *v.* Trinity Church, 5 Watts & S. (Pa.) 206; Passmore's Appeal, 60 Mich. 463, 27 N. W. 601.

11. Berry *v.* Hall, 6 N. M. 643, 30 Pac. 936; State *v.* Snover, 63 N. J. Law 382, 43 Atl. 1059; Herman *v.* Mason, 37 Wis. 273.

A Church Register of Baptisms, even when kept under circumstances which render it admissible as evidence, is proof only of the fact of baptism, and not of the age of the person, unless the age is at the same time duly recorded in the register. Supreme Assembly, R. S. of G. F. *v.* McDonald, 59 N. J. Law 248, 35 Atl. 1061. See also McQuirk *v.* Mut. B. Life Co., 48 N. Y. St. Rep. 799, 20 N. Y. Supp. 908.

Certificates of Baptism and Marriage, which merely purport to show that certain entries were in a register of baptisms, but are not copies of the entries themselves, are not competent to show the age of one of the parties concerned. Tessman *v.* Supreme Commandery U. F., 103 Mich. 185, 61 N. W. 261.

A certificate of baptism is not admissible to prove the age of the person stated to have been baptized under a statute (Wis. Rev. Stat. § 4172) which makes official certificates of marriages, births or deaths, issued in foreign countries in which such marriage, birth or death has occurred, purporting to be founded on books of record, when authenticated as therein prescribed, presumptive evidence of the facts stated. Lavin *v.* Mut. Aid Soc., 74 Wis. 340, 43 N. W. 143.

Extract From Parish Record. — In Hunt *v.* Order of Chosen Friends, 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855, it was held that a sworn and examined extract from the parish record of a Catholic church, showing the baptism of the party, reciting the names of his parents and their description, and stating the age of the person baptized, supported by evidence of the priest that such a record was required by the rules of the church, which record was thirty years of age, was admissible as evidence of age.

Compare Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521.

IV. HEARSAY EVIDENCE.

1. Age As a Fact of Pedigree. — A. General Rule. — It is a general rule that when age is a fact of pedigree to be established, hearsay evidence may be received in proof thereof.[12]

B. Family Bible or Record. — It has been held that a family Bible containing a record of the family births is admissible to prove the age of one whose name is entered therein, without proof of the handwriting or authorship of the entries.[13] But where both of the parents are present in court, the family record is not competent to prove the age of one of their children.[14]

12. Monkton *v.* Attorney General, 2 Russ. & M. 147; Watson *v.* Brewster, 1 Pa. St. 381.

13. Jones *v.* Jones, 45 Md. 144; People *v.* Ratz, 115 Cal. 132, 46 Pac. 913; Carskadden *v.* Poorman, 10 Watts (Pa.) 82, 36 Am. Dec. 145. See also Weaver *v.* Leiman, 52 Mo. 708; People *v.* Slater, 119 Cal. 620, 51 Pac. 957; People *v.* Mayne, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256.

Compare Wiseman *v.* Cornish, 8 Jones Law (N. C.) 218.

Supreme Council, G. S. F. *v.* Conklin, 60 N. J. Law 565, 38 Atl. 659, 41 L. R. A. 449, wherein it was held that an entry in a Bible of the date of the birth of a person, without proof of when and by whom entered, or that the persons whose names are entered had ever acknowledged it to be an authentic family record, and the entries are not shown to have been contemporaneous with the facts recorded, is not competent evidence to prove the age of the person whose name is recorded therein. Turner *v.* King, 98 Ky. 253, 32 S. W. 941.

To Require Evidence of the Handwriting or Authorship of the entries is to mistake the distinctive character of the evidence, for it derives its weight, not from the fact that the entries are made by any particular person, but that, being in that place, they are to be taken as assented to by those in whose custody the book has been. Hubbard *v.* Lees, L. R. I. Ex. Cas. 255.

Statement of Rule. — In Campbell *v.* Wilson, 23 Tex. 252, 76 Am. Dec. 67, wherein it was held that the exclusion of entries in a family Bible offered to prove the age of the person concerning whom the entry was made, upon the ground that there was better evidence accessible, was not error, the court said: "It has been considered that these entries stand on the ground of family acknowledgments, and that they are admissible on account of their publicity, without proof that the entries were made by a member of the family. 1 Phill. Ev. 231, 216, note 2; Monkton *v.* Attorney General, 2 Russ. & M. 147. But when better evidence is shown to be accessible, they are excluded by the rule that excludes the secondary when primary evidence can be obtained. When admitted, it is in general, as the declaration of the persons by whom they are made. But they cannot be received, where the father, mother, or other declarant is present in court, or within the reach of process. Taylor *v.* Hawkins, 1 McCord 165."

In Woodard *v.* Spiller, 1 Dana (Ky.) 180, 25 Am. Dec. 139, it was held that the court properly permitted to be given in evidence, to prove the age of the plaintiff, a register of the births of his father's children, made out in the handwriting of the father, who had been dead thirty years.

14. Smith *v.* Geer, 10 Tex. Civ. App. 252, 30 S. W. 1108. See also Leggett *v.* Boyd, 3 Wend. (N. Y.) 376; Taylor *v.* Hawkins, 1 McCord (S. C.) 165; People *v.* Mayne, 118 Cal. 516, 50 Pac. 516, 62 Am. St. Rep. 256.

Kobbe *v.* Price, 14 Hun (N. Y.) 55, so holding of a family record shown to be in the father's handwriting, who was living abroad at the time, containing the births of his

C. Testimony of the Person Himself. — Age may be proved by the testimony of the person whose age is in question;[15] and the fact that his knowledge is derived from statements of his parents, or from family reputation, does not render his testimony inadmissible.[16]

2. Age As a Fact, Not of Pedigree. — But when the fact of age is not one of pedigree to be established, but it is necessary to be established for other purposes, hearsay evidence can not be received in proof thereof.[17]

children, upon the ground that it was not a public record and the father's testimony could have been procured.

15. *California.* — Morrill *v.* Morgan, 65 Cal. 575, 4 Pac. 580.

Georgia. — Cent. R. Co. *v.* Coggin, 73 Ga. 689.

Kansas. — State *v.* McClain, 49 Kan. 730, 31 Pac. 790.

Massachusetts. — Com. *v.* Stevenson, 142 Mass. 466, 8 N. E. 341; Com. *v.* Hollis, 170 Mass. 433, 49 N. E. 632; Com. *v.* Phillips, 162 Mass. 504, 39 N. E. 109.

Michigan. — Cheever *v.* Congdon, 34 Mich. 296; Morrison *v.* Emsley, 53 Mich. 564, 19 N. W. 187.

Minnesota. — Houlton *v.* Manteuffel, 51 Minn. 185, 53 N. W. 541.

Montana. — State *v.* Bowser, 21 Mont. 133, 53 Pac. 179.

New York. — DeWitt *v.* Barly, 17 N. Y. 340; Stevenson *v.* Kaiser, 59 N. Y. St. Rep. 515, 29 N. Y. Supp. 1122.

Texas. — Reed *v.* State (Tex. Crim. App.), 29 S. W. 1074.

Wisconsin. — Dodge *v.* State, 100 Wis. 294, 75 N. W. 954.

Contra. — Doe *v.* Ford, 3 U. C. Q. B. (Can.) 353.

"It Would Shock the Common Sense of the Community to Hold Otherwise," said the court in Pearce *v.* Kyzer, 16 Lea (Tenn.) 521, 57 Am. Rep. 240, "and there is no reason why it should be held otherwise after he has been rendered competent by statute to testify on his own behalf, and when his knowledge is obtained in precisely the same way as the public obtains it so as to constitute general repute. His testimony is not hearsay in the legal sense, but the original evidence. And no part of his evidence should have been excluded upon the ground that better evidence might be produced."

In Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17, a prosecution for assault with intent to murder, the prosecutor was permitted to state that he was about eighteen years of age at the time of the assault, in order to show the relative condition of the parties.

16. People *v.* Ratz, 115 Cal. 132, 46 Pac. 915; Bain *v.* State, 61 Ala. 75; State *v.* Best, 108 N. C. 747, 12 S. E. 907; Hill *v.* Eldridge, 126 Mass. 75. See also Cheney *v.* Ward, 68 Ala. 29, so holding although the witness testified that his reason for his knowledge of his age was "that his mother told him so, and that it was written down in a book which his father had in his pocket, in the court house."

17. Peterson *v.* State, 83 Md. 194, 34 Atl. 934.

Family Reputation. — Thus, testimony of the brother and brother-in-law of a person suing for personal injuries, that each knows the family reputation as to his age, and that he was under twenty-one at the time of an alleged settlement with the defendant, is inadmissible as hearsay. Rogers *v.* De Bardelaben Coal & I. Co., 97 Ala. 154, 12 So. 81.

Statement by Mother of Party. A witness cannot testify that he heard the mother of a grantor in a deed say that he was an infant at the time of its execution, unless it is first affirmatively shown that the declaration was made *ante litem motam*, and that the declarant is dead. Hodges *v.* Hodges, 106 N. C. 374, 11 S. E. 364.

Compare David *v.* Settig, 1 Mart. (La.) 147, 14 Am. Dec. 179, holding

Infancy As a Defense.—Thus, hearsay evidence can not be received in proof of age, where the purpose of the evidence is to establish infancy as a defense.[18]

V. INSPECTION BY JURY.

It is competent for the jury to consider the appearance of the person whose age is in question, in determining his age.[19]

declarations of a parent concerning the age of his child, made before the controversy arose, are competent. See also State *v.* Marshall, 137 Mo. 463, 39 S. W. 63.

Information From Sister Living at Time of Trial.—A witness cannot testify to the age of another, on information from the latter's sister, where it does not appear that the sister is dead. State *v.* Parker, 106 N. C. 711, 11 S. E. 517.

Age as an Element of Crime. In People *v.* Sheppard, 44 Hun (N. Y.) 565, it was held that age could not be established by hearsay, where the purpose of the evidence was to prove infancy as an element of the crime of abduction. *Compare* Laws 1888, p. 201, ch. 145, amending Pen. Code, § 19. People *v.* Mayne, 118 Cal. 516, 50 Pac., 516, 62 Am. St. Rep. 256, holding entry in Bible not admissible to prove age of prosecutrix in case of rape; the entry had been made by one present at the trial

Age as Element of Damages.—In Greenleaf *v.* Dubuque & S. C. R. Co., 30 Iowa 301, an action to recover damages for negligence in causing the death of a person, the plaintiff, for the purpose of establishing the age of the decedent as an element in determining the amount of damages, was allowed to show the date of his birth from an entry in the family Bible. This was held to be error on the ground that it was not shown that the person who made the entry was dead.

Age as Fact Sustaining Plea of Statute of Limitations.—In Robinson *v.* Blakely, 4 Rich, L. (S. C.) 586, 55 Am. Dec. 703, the family register of births and deaths was held inadmissible to show the age of the plaintiff for the purpose of determining whether the action was barred by the statute of limitations, upon the ground that the father, who made the entry, was still alive.

18. Haines *v.* Guthrie, L. R. 13 Q. B. Div. 818; Plant *v.* Taylor, 7 H. & N. 227; Connecticut Mut. L. Ins. Co. *v.* Schwenck, 94 U. S. 593. See also Leggett *v.* Boyd, 3 Wend. (N. Y.) 376; Campbell *v.* Wilson, 23 Tex. 252, 76 Am. Dec. 67.

Passport as Hearsay.—In Kobbe *v.* Price, 14 Hun (N. Y.) 55, it was held that a passport alleged to have been given when the defendant left Germany, and containing a statement of his age at that time, and offered by him to prove his infancy, was properly excluded as mere hearsay. "Although an official document," said the court, "it was made up from the statements of the defendant himself, or some person in his behalf, and is not by any statute made evidence of the correctness of its contents."

19. Com. *v.* Hollis, 170 Mass. 433, 49 N. E. 632; Herman *v.* State, 73 Wis. 248, 41 N. W. 171, 9 Am. St. Rep. 89; People *ex rel* Zeigler *v.* Special Session Court Justices, 10 Hun (N. Y.) 224. See also State *v.* Arnold, 13 Ired. Law (N. C.) 184, and Com. *v.* Emmons, 98 Mass. 6, so holding, wherein the court said that "there are cases where such an inspection would be satisfactory evidence of the fact."

Compare Bird *v.* Stone, 104 Ind. 384, 3 N. E. 827, holding otherwise on the authority of Ihinger *v.* State, 53 Ind. 251; the court stating, however, that if the question could have been properly considered as an open one in that state, some of the members of the court would have been inclined to hold as stated in the text.

VI. COMPETENCY OF WITNESSES.

1. Witness Having Knowledge. — Again, age may be proved by the testimony of any person having proper sources of knowledge of the fact.[20]

2. The Attending Physician. — The attending physician is a competent witness to testify to the fact and date of birth, for the purpose of proving the age of a person.[21]

3. Witness Testifying From Appearance of a Person. — An ordinary witness, having fully testified to the appearance of a person, may give his opinion as to the age of that person.[22] But it is not

20. Testimony of the Person's Mother is competent under this rule. Herman *v.* State, 73 Wis. 248, 41 N. W. 171, 9 Am. St. Rep. 789. See also Smith *v.* Geer, 10 Tex. Civ. App. 252, 30 S. W. 1108; State *v.* Woods, 49 Kan. 237, 30 Pac. 520; so holding of the testimony of the person's parents.

A Witness Who Has Known a Person for Over Twenty Years may testify to the age of such person, to the best of his knowledge. Winter *v.* State, 123 Ala. 1, 26 So. 949.

In Hogen *v.* Mut. Aid & A. Ass'n, 75 Hun 271, 26 N. Y. Supp. 1081, a witness was allowed to state the age of his brother who was a few years younger, because he remembered him from infancy, knew his own age, and had grown up with the brother, although, independently of the statement of his father and general talk in the family, he was unable to recollect the circumstances of his birth or the year.

21. Edington *v.* Mut. L. Ins. Co., 67 N. Y. 185; Blackburn *v.* Crawfords, 3 Wall. 192; Guy *v.* Mead, 22 N. Y. 462.

22. *Alabama.* — Weed *v.* State, 55 Ala. 13; Mayshall *v.* State, 49 Ala. 21.

Connecticut. — Morse *v.* State, 6 Conn. 9.

Indiana. — Benson *v.* McFadden, 50 Ind. 431.

Iowa. — State *v.* Bernstein, 99 Iowa 6, 68 N. W. 442.

Kansas. — State *v.* Grubb, 55 Kan. 678, 41 Pac. 951 (citing numerous authorities).

Massachusetts. — Com. *v.* O'Brien, 134 Mass. 198.

Missouri. — State *v.* Douglass, 48 Mo. App. 39.

South Carolina. — Robinson *v.* Blakeley, 4 Rich. Law 586, 55 Am. Dec. 703.

Texas. — Jones *v.* State, 32 Tex. Crim. App. 108, 22 S. W. 149.

Contra. — Valley Life Ins. Ass'n *v.* Terwalt, 79 Va. 421.

Effect of Testimony of Parent. The fact that the parents of the person whose age is in question have testified thereto does not preclude others from giving their opinion as to her age. State *v.* Grugg, 55 Kan. 678, 41 Pac. 951.

Physician Acquainted with Physical Appearance. — In Bice *v.* State, 37 Tex. Crim. App. 38, 38 S. W. 803, it was held that a physician might testify that he was well acquainted with the prosecutrix on a prosecution for rape of a girl under fifteen years of age, at or about the time of the alleged outrage; that he knew her physical appearance with reference to her size and development, and that judging therefrom he would say she was seventeen or eighteen years old.

Comparison with Child of Known Age. — A witness may testify that from the appearance of his brother's wife's child, whose age he knew to be four or five months, and the appearance of the child in question, he knew the latter to be four or five months old. Bice *v.* State, 37 Tex. Crim. App. 38, 38 S. W. 803.

Impression Produced by Appearance. — A witness may testify to the effect produced on his own mind by the physical appearance of the person whose age is in question. Garner *v.* State, 28 Tex. App. 561, 13 S. W.

error to exclude such testimony where the person whose age is in question is present in court.[23]

4. Experts and Non-Experts. — It has been held that a non-expert witness is not competent to give his opinion as to the age of another.[24] It is sometimes expressly provided by statute, however, that an expert, who has examined the person, may give his opinion as to the age of that person, based on such examination.[25]

5. Testing Capacity of Witness. — For the purpose of testing the capacity of a witness who has stated his opinion as to the age of another, he may, on cross-examination, be requested to give his opinion as to the age of a bystander, and the bystander may then be called to testify to his age.[26]

VII. QUESTIONS OF FACT.

When the age of an insured as stated in his application is controverted, and the evidence in relation thereto is conflicting, the question is one of fact for the jury to determine.[27]

VIII. AGE OF HORSE.

The age of a horse may be established by an impression or cast of the mouth of the horse, proved by the person who took the impression.[28]

1064. But not as to how others were impressed by such appearance. Koblenschleg *v.* State, 23 Tex. App. 264, 4 S. W. 888.

23. State *v.* Robinson, 32 Or. 43, 48 Pac. 357.

24. Martin *v.* State, 90 Ala. 702, 8 So. 858.

25. Thus in New York. See Pen. Code, § 19.

26. Louisville, N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

27. Corbett *v.* Metropolitan L. Ins. Co., 38 App. Div. 623, 55 N. Y. Supp. 775.

28. Earl *v.* Lener, 40 Hun (N. Y.) 9. Such an impression in plaster, wax or other suitable substance, may be classed as a species of evidence with diagrams, drawings and photographs.

AGENCY.—See Principal and Agent.

AGGRAVATED ASSAULT.—See Assault and Battery.

AGGRAVATION.—See Damages.

AGNOSTIC.—See Atheist.

AGREED CASE.—See Admissions.

AGREEMENT.—See Contracts.

AIDERS AND ABETTORS.—See Accessories.

ALCOHOLIC LIQUORS.—See Intoxicating Liquors.

ALIBI.

By A. B. Young.

I. DEFINITION.

The word "alibi" signifies elsewhere, and one on trial is said to set up an alibi when he asserts that at the time when such offense was committed he was "elsewhere" than at the place where it was committed.[1]

II. NATURE OF THE DEFENSE.

1. May Be Shown in Rebuttal. — In rebuttal of the testimony tending to show defendant's presence at the time and place material to the accusation (excluding those cases where he is charged as an absent principal or accessory) he may show that he was then at some other place.[2]

2. Not an Affirmative Defense. — The rule sustained by the weight of authority is, in effect, that alibi is not an independent, affirmative defense.[3]

1. Bouvier's Law Dict.; Anderson's Dict. of Law.

2. Payton *v.* State, 54 Neb. 188, 74 N. W. 597; State *v.* Taylor, 118 Mo. 153, 24 S. W. 449.

Rebuttal by the State. — One accused of burglary testified that on the night the crime was committed, he was at another city. On cross-examination he stated that he saw a procession there, without being able to describe it very fully. It was held competent for the state to show, in rebuttal, the extent of the procession, as these witnesses saw it, as bearing more or less upon the question of the truth of the statement of the accused that he was there and saw it. People *v.* Gibson, 58 Mich. 368, 25 N. W. 316; State *v.* Lewis, 69 Mo. 92.

3. *California.* — People *v.* Roberts, 122 Cal. 377, 55 Pac. 137, 138; People *v.* Winters, 125 Cal. 325, 57 Pac. 1067.

Colorado. — McNamara *v.* People, 24 Colo. 61, 48 Pac. 541.

Montana. — State *v.* McClellan, 23 Mont. 532, 59 Pac. 924, 75 Am. St. Rep. 558.

New Jersey. — Sherlock *v.* State, 60 N. J. Law 31, 37 Atl. 435.

Ohio. — Toler *v.* State, 16 Ohio St. 583.

Oregon. — State *v.* Chee Gong, 16 Or. 534, 19 Pac. 607.

Texas. — Ayres *v.* State, 21 Tex. App. 399, 17 S. W. 253.

Not an Independent Affirmative Defense. — Alibi is not an affirmative and independent defense with the burden of proof resting upon the accused to establish, but is in the nature of a traverse of a fact that it is incumbent on the prosecution to establish, namely, the presence of the accused at the time and place of the crime. McNamara *v.* People, 24 Colo. 61, 48 Pac. 541.

Not a Plea. — It is by no means true in law, that the defense of alibi admits the body of the crime or offense charged. It is an admission of nothing that is charged in the indictment and denied by the plea of not guilty. By this defense the prisoner does not allege that he was elsewhere when the crime was committed, but that he was elsewhere when it is charged to have been committed. Foler *v.* State, 16 Ohio St. 583.

Not an Independent Exculpatory Fact. — Ayres *v.* State, 21 Tex. App. 399, 17 S. W. 253.

Not a Defense in the Legal Sense. "We find many courts and law writers referring to an alibi as matter of defense, and also stating that it must be proved by defendant. We doubt the strict legal propriety of using either one of these expressions in those jurisdictions where it is held that an alibi is sufficiently established when a reasonable doubt is raised in the minds of the jurors as to the presence of the defendant at the scene of the crime. Yet these terms are used and held unobjectionable in all those instructions where the jury are clearly and fully

But merely a species of evidence tending to rebut the case made by the state.[4]

told that a reasonable doubt in their minds as to the presence of the defendant at the scene of the homicide entitles him to an acquittal. In all those cases the word 'proved' is held to mean the production of sufficient evidence to raise a reasonable doubt." People *v.* Winters, 125 Cal. 325, 57 Pac. 1067.

Evidence of, Not a Defense. "It is, as said by Mr. Bishop, mere ordinary evidence in rebuttal; and any charge to the jury that it is not—as, that the law looks with disfavor upon it, or that it should be tested differently from other evidence—is erroneous. Section 1062, 1 Bish. Crim. Pr. (3d Ed.)" State *v.* Chee Gong, 16 Or. 534, 19 Pac. 607.

Not a Special Defense. — "There is no *prima facie* case without showing the presence of the defendant; therefore defendant may rebut the evidence of the fact of his presence by evidence of the fact that he was not present. Alibi is not a special defense changing the presumption of innocence, or relieving the state of its burden of proving the guilt of the defendant beyond a reasonable doubt." Schultz *v.* Territory (Ariz.), 52 Pac. 352; State *v.* McClellan, 23 Mont. 532, 59 Pac. 924, 75 Am. St. Rep. 558. Citing State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026.

4. *England.* — Foster's Crown Law, 368.

Alabama. — Ratliff *v.* State, 122 Ala. 104, 26 So. 123.

Iowa. — State *v.* Reed, 62 Iowa 40, 17 N. W. 150.

Mississippi. — Pollard *v.* State, 53 Miss. 410, 24 Am. Rep. 703.

Missouri. — State *v.* Taylor, 118 Mo. 153, 24 S. W. 449.

Montana. — State *v.* McClellan, 23 Mont. 532, 59 Pac. 924, 75 Am. St. Rep. 558.

North Carolina. — State *v.* Freeman, 100 N. C. 429, 5 S. E. 921.

Texas. — Walker *v.* State, 42 Tex. 360; Johnson *v.* State, 21 Tex. App. 368, 17 S. W. 252; Padron *v.* State (Tex. Crim. App.), 55 S. W. 827.

West Virginia. — State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561.

Is Testimony Against Testimony. "The defense known as an alibi is operative as disproving the charge, and impairing, if not destroying, the credit of the witnesses who testify to the identity of the party accused—an essential element of the case." State *v.* Freeman, 100 N. C. 429, 5 S. E. 921.

Evidence in Rebuttal. — "The somewhat confused question of how the defense of an alibi relates to the whole case in criminal law simplifies itself when we discard the illogical doctrine that it is an affirmative defense, to be proved by the defendant, and substitute therefore the doctrine, which easily flows from the premises already stated, that it is but one of the many defenses offered in rebuttal of the state's evidence, carrying with it to the defendant no burden of proof other than the obligation to introduce evidence sufficient to raise a reasonable doubt. This he may do by evidence sufficient to raise a reasonable doubt of his presence at the place where the act was done, and this doubt may arise without its springing from an affirmatively proved fact that he was somewhere else at the time, and could not have committed it." State *v.* McClellan, 23 Mont. 532, 59 Pac. 924, 75 Am. St. Rep. 558.

Direct Evidence Not Necessary to Raise Issue. — "Appellant requested the court to charge on alibi. The judge, in approving the bill presenting the matter, insists that the issue of alibi is not raised by the evidence. Appellant testified to a state of facts showing clearly, if true, that he was not at the place where the homicide is alleged to have been committed. This being the case, we think the issue of alibi is raised. We held in Wilson *v.* State, 51 S. W. 916, that the charge on alibi should be given where defendant swears that he was at another place at the time of the alleged crime. We do not understand it is necessary for the defendant, or any witness testifying for appellant, to swear in so many words that he was at another and different

3. Is Not a Plea. — Alibi is not a plea in the legal sense, but a defense under the plea of not guilty.[5]

4. No Pleading Necessary. — And no formal affirmative pleading is necessary to render it available.[6]

5. Is a Traverse. — Or as quite often defined it is a traverse of the crime charged.[7]

6. Not an Extrinsic Defense. — And is not an extrinsic defense.[8]

7. Nothing Admitted by Defendant. — There is no dissent from the doctrine that the accused admits nothing whatsoever by undertaking to establish an alibi.[9]

III. BURDEN OF PROOF.

1. General Rule Applies to Alibi. — The rule that in criminal

place than that of the homicide, in order to raise the issue of alibi. But, if the evidence shows that he was at another or different place from the scene of the homicide, then the issue of alibi is raised, regardless of how this statement is made. It is the province of the jury to pass upon the sufficiency and truthfulness of the defenses urged by appellant. It is the province of the court to charge, under the statute, all the law applicable to the facts. We do not think this was done in this instance. Smith *v.* State (Tex. Cr. App.), 49 S. W. 583; Smith *v.* State (Tex. Cr. App.), 50 S. W. 362." Padron *v.* State (Tex. Crim. App.), 55 S. W. 827.

5. Toler *v.* State, 16 Ohio St. 583; State *v.* Ardoin, 49 La. Ann. 1145, 22 So. 620, 62 Am. St. Rep. 678.

Traverse of Crime Charged. Proof of an alibi is, therefore as much a traverse of the crime charged as any other defense. People *v.* Fong Ah Sing, 64 Cal. 253, 28 Pac. 253.

6. State *v.* Ward, 61 Vt. 153, 17 Atl. 483; Westbrook *v.* State, 91 Ga. 11, 16 S. E. 100; State *v.* McClellan, 23 Mont. 532, 59 Pac. 924, 75 Am. St. Rep. 558; 1 Archibalds' Crim. Pro. p. 400.

Evidence Competent Under Plea of Not Guilty. — "Evidence of an alibi is competent under the defendant's plea of not guilty. No special averment need be made to warrant the introduction of testimony in support of it." State *v.* McClellan, 23 Mont. 532, 59 Pac. 924, 75 Am. St. Rep. 558.

7. Albritton *v.* State, 94 Ala. 76, 10 So. 426; People *v.* Fong Ah Sing, 64 Cal. 253, 28 Pac. 253; McNamara *v.* People, 24 Colo. 61, 48 Pac. 541; Watson *v.* Com., 95 Pa. St. 418.

Traverses Charge. — "An alibi is not, in the strict and accurate sense, a special defense, but a traverse of the material averment in the indictment that the defendant did, or participated in, the particular act charged, and is comprehended in the general plea, 'Not guilty.'" Albritton *v.* State, 94 Ala. 76, 10 So. 426.

8. Not an Extrinsic Defense. "Alibi is not an extrinsic defense. It is a traverse of the material averments of the indictment that the defendant did then and there the particular act charged." 1 Bishop Crim. Pro. (2 ed.) 1062; Whart. Crim. Ev. 333; State *v.* Taylor, 118 Mo. 153, 24 S. W. 449.

9. State *v.* Collins, 20 Iowa 85; Toler *v.* State, 16 Ohio St. 583; Briceland *v.* Com., 74 Pa. St. 463.

Not Confession and Avoidance. "An alibi is not a defense of confession and avoidance, but if established merely negatives the guilt of the defendant." Albritton *v.* State, 94 Ala. 76, 10 So. 426.

Admits Nothing. — "It is by no means true in law, that the defense of alibi admits the body of the crime or offense charged." Toler *v.* State, 16 Ohio St. 583.

cases the burden never shifts from the state is applicable to the proof of alibi.[10]

2. Alibi Relieves State of Nothing. — And the assertion of an alibi in no wise changes the presumptions of innocence, or relieves the state of its burden of proving the guilt of the defendant beyond a reasonable doubt.[11]

10. *Arizona.* — Schultz *v.* Territory (Ariz.), 52 Pac. 352.
California.—People *v.* Roberts, 122 Cal. 377, 55 Pac. 137.
Colorado. — McNamara *v.* People, 24 Colo. 61, 48 Pac. 541.
Idaho. — State *v.* Webb (Idaho), 55 Pac. 892.
Illinois. — Hopps *v.* People, 31 Ill. 385, 83 Am. Dec. 231.
Indiana.—Parker *v.* State, 136 Ind. 284, 35 N. E. 1105.
Kansas.—State *v.* Conway, 56 Kan. 682, 44 Pac. 627.
Montana. — State *v.* McClellan, 23 Mont. 532, 59 Pac. 924, 75 Am. St. Rep. 558.
Nebraska. — Gravely *v.* State, 38 Neb. 871, 57 N. W. 751.
North Carolina. — State *v.* Freeman, 100 N. C. 429, 5 S. E. 921.
Oregon. — State *v.* Chee Gong, 16 Or. 534, 19 Pac. 607.
Pennsylvania. — Turner *v.* Com., 86 Pa. St. 54, 27 Am. Rep. 683; Watson *v.* Com., 95 Pa. St. 418; Briceland *v.* Com., 74 Pa. St. 463; Rudy *v.* Com., 128 Pa. St. 500, 18 Atl. 344.
Texas. — Walker *v.* State, 42 Tex. 360.

11. Burden Not on Defendant. An instruction placing the burden of proof on the defendant to establish the fact to the satisfaction of the jury that he was at some other place when the crime was committed was held to imply that in such cases the burden was shifted; a doctrine to which the court declined assent. State *v.* Freeman, 100 N. C. 429, 5 S. E. 921.

Evidence Raising Reasonable Doubt. — "If the evidence is sufficient to raise a reasonable doubt in the minds of the jury as to whether he was or was not present at the commission of the crime he is entitled to an acquittal." McNamara *v.* People, 24 Colo. 61, 48 Pac. 541.

Pennsylvania. — "Where the commonwealth rests upon positive and undoubted proof of the prisoner's guilt, it should not be overcome by less than full, clear and satisfactory evidence of the alleged alibi. But the evidence tending to establish an alibi, though not of itself sufficient to work an acquittal, shall not be excluded from the case, for the burden of proof never shifts, but rests upon the commonwealth throughout, upon all the evidence given in the cause taken together, to convince the jury, beyond a reasonable doubt, of the prisoner's guilt. Turner *v.* Com., 5 Norris 54." Watson *v.* Com., 95 Pa. St. 418, 422.

"The burden of proving it was clearly on the prisoner. If he failed to do so to the satisfaction of the jury, the alleged alibi, as a substantive defense, was valueless; but that did not deprive him of the benefit of his evidence on that subject, so far as it, in connection with other testimony in the case, may have had a tendency to create a reasonable doubt as to his guilt." Rudy *v.* Com., 128 Pa. St. 500, 18 Atl. 344, 346.

Arizona. — Schultz *v.* Territory (Ariz.), 52 Pac. 352.
Colorado. — McNamara *v.* State, 24 Colo. 61, 48 Pac. 541.
Kansas. — State *v.* Child, 40 Kan. 482, 20 Pac. 275.
Mississippi. — Pollard *v.* State, 53 Miss. 410, 24 Am. Rep. 703.
Missouri. — State *v.* Hale (Mo.), 56 S. W. 881.
Montana. — State *v.* McClellan, 23 Mont. 532, 59 Pac. 924, 75 Am. St. Rep. 558.
South Carolina. — State *v.* Jackson, 36 S. C. 487, 15 S. E. 559, 31 Am. St. Rep. 890.
Texas. — Gallaher *v.* State, 28 Tex. App. 247, 12 S. W. 1087.
Virginia. — Thompson *v.* Com., 88 Va. 45, 13 S. E. 304.

The later authorities hold it to be an essential averment of the indictment that the accused was present

3. What Burden on Defendant. — Yet there are cases holding the burden to be on the defendant to establish the alibi.[12]

4. Qualified Burden. — But, where this is held, it is usually

and committed or participated in the commission of the offense. Hence this averment must be established by the prosecution beyond a reasonable doubt. McNamara *v.* State, 24 Colo. 61, 48 Pac. 541.

"For the defendant to say he was not there is not an affirmative proposition; it is a denial of the existence of a material fact in the case. He meets the evidence of the prosecution by denying it. If a consideration of all the evidence in the case leaves a reasonable doubt of his presence, he must be acquitted." Schultz *v.* Territory (Ariz.), 52 Pac. 352.

Burden on State. — The defense of alibi is peculiar in that the state is bound to prove in making its case, that the defendant was present at the commission of the crime, and this material fact it must prove beyond any reasonable doubt. State *v.* Child, 40 Kan. 482, 20 Pac. 275.

12. State *v.* Thornton, 10 S. D. 349, 73 N. W. 196, 41 L. R. A. 530; Thompson *v.* Com., 88 Va. 45, 13 S. E. 304; Towns *v.* State 111 Ala. 1, 20 So. 528; Holley *v.* State, 105 Ala. 100, 17 So. 102; Miles *v.* State, 93 Ga. 117, 19 S. E. 805, 44 Am. St. Rep. 140; Carlton *v.* People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346.

Burden on Accused. — The burden of making out the defense of alibi was upon the accused. In order to maintain it he was bound to establish in its support such facts and circumstances as were sufficient when considered in connection with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against him. Carlton *v.* People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346.

The court holding it error to instruct that, the burden was on the defendant to satisfy the jury beyond a reasonable doubt that the alibi was true, said: "To make an alibi available as a defense, it must be proved of course; but if the proof offered for this purpose is sufficient to satisfy the jury with reasonable certainty that the accused was not present when the crime was committed, no more should be required." Miles *v.* State, 93 Ga. 117, 19 S. E. 805, 44 Am. St. Rep. 346.

The doctrine seems fixed in Alabama, that an alibi (as a substantive defense) must be established to the reasonable satisfaction of the jury Holley *v.* State, 105 Ala. 100, 17 So. 102.

All the authorities agree upon the proposition, that proof of the facts and circumstances tending to establish the alibi must be made by the defendant. "If this be so, is it not a mere distinction without a difference to contend that a court may say that the proof of such a defense must come from the defendant, but that it would be error for the court to say the burden of proving these facts is upon the defendant?" State *v.* Thornton, 10 S. D. 349, 73 N. W. 196, 41 L. R. A. 530. In the same case it is said: "It is manifest that the term 'burden of proof' as used in these decisions, by the text writers, and in the instructions of the court in the case at bar, does not imply that the defendant must prove his defense by a preponderance of the evidence, or by such evidence as will satisfy the jury that his defense is true, but only that after the state has made out its case, it devolves on the accused to introduce evidence, if he has any, to prove his alibi, if he relies upon such a defense."

The following instruction was held proper:

"The burden rests upon the commonwealth to make out its case against the accused to the exclusion of a reasonable doubt, but, where the accused relies upon or attempts to prove an alibi in his defense, the burden of proving the alibi rests upon him; but upon other questions in the case the burden still rests upon the commonwealth." Thompson *v.* Com., 88 Va. 45, 13 S. E. 304.

declared to be a qualified burden. That is to say, it is only necessary to make such proof as will raise a reasonable doubt of guilt.[13]

Thus, in Iowa the rule would now seem to be, that whilst the jury cannot acquit on the defense of alibi unless it be supported by a preponderance of the evidence, if the evidence upon that defense considered alone, or in connection with all the other evidence leaves a reasonable doubt in the minds of the jury as to the guilt of the defendant, they cannot convict.[14]

In Illinois the rule has been supposed to require that proof in support of an alibi must preponderate in order to yield practical

13. *Alabama.* — Towns *v.* State, 111 Ala. 1, 20 So. 528; Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28; Pate *v.* State, 94 Ala. 14, 10 So. 665.

Arizona. — Schultz *v.* Territory (Ariz.), 52 Pac. 352.

California. — People *v.* Winters, 125 Cal. 325, 57 Pac. 1067; People *v.* O'Niel, 59 Cal. 259.

Florida. — Adams *v.* State, 28 Fla. 511, 10 So. 106.

Georgia. — Miles *v.* State, 93 Ga. 117, 19 S. E. 805, 44 Am. St. Rep. 140.

Idaho. — State *v.* Webb (Idaho), 55 Pac. 892.

Illinois. — Ackerson *v.* People, 124 Ill. 563, 16 N. E. 847.

Kansas. — State *v.* Child, 40 Kan. 482, 20 Pac. 275; State *v.* Conway, 56 Kan. 682, 44 Pac. 627.

Michigan. — People *v.* Pichette, 111 Mich. 461, 69 N. W. 739; People *v.* Resh, 107 Mich. 251, 65 N. W. 99.

Mississippi. — Dawson *v.* State, 62 Miss. 241; Pollard *v.* State, 53 Miss. 410.

Missouri. — State *v.* Miller (Mo.), 56 S. W. 907; State *v.* Hale (Mo.), 56 S. W. 881.

Montana. — State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026.

Nevada. — State *v.* Waterman, 1 Nev. 543.

New Jersey. — Sherlock *v.* State, 60 N. J. Law 31, 37 Atl. 435.

Pennsylvania. — Myers *v.* Com., 83 Pa. St. 144.

South Carolina. — State *v.* Jackson, 36 S. C. 487, 15 S. E. 559, 31 Am. St. Rep. 890.

Texas. — Gallaher *v.* State, 28 Tex. App. 247, 12 S. W. 1087.

West Virginia. — State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561.

Wisconsin. — Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

"The burden of making good the defense of alibi is upon the accused, and to make it availing he must establish such facts and circumstances, clearly sustaining that defense, as will be sufficient, when considered in connection with the other evidence in the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against him." Ackerson *v.* People, 124 Ill. 563, 16 N. E. 847.

Whenever the evidence introduced supports the defense of alibi, and its effect is to create a reasonable doubt in the minds of the jury as to the defendant's guilt, he is as much entitled to an acquittal as if the reasonable doubt had arisen upon any other legitimate evidence. Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28.

"While it is true that, in order to convict the defendants, it devolved upon the state to prove their presence at the time and place of the commission of the offense, in order to overcome the case made out by the state against them they assumed the burden of showing such a state of facts as would raise in the minds of the jury a reasonable doubt as to their presence at the time and place of the commission of the offense, and to this extent an alibi was a defense." State *v.* Hale (Mo.), 56 S. W. 881, 883.

14. State *v.* Maher, 74 Iowa 77, 37 N. W. 2; State *v.* McGarry (Iowa), 83 N. W. 718.

benefit, but in a comparatively recent case that doctrine, if it ever obtained, was materially modified.[15]

IV. EVIDENCE ADMISSIBLE.

1. On Behalf of the Accused. — A. Presumptions. — The legal presumption of the innocence of the accused is in no wise affected by the introduction of evidence in support of an alibi.[16]

B. Facts and Circumstances. — The accused may, in support of an alibi, invoke all facts and circumstances tending in anywise to show his absence from the time and place of the *corpus delicti*.[17]

15. Hoge *v.* People, 117 Ill. 44, 6 N. E. 796; Hoops *v.* People, 31 Ill. 392; Ackerson *v.* People, 124 Ill. 563, 16 N. E. 847.

State v. Jennings, 81 Mo. 185, Overruled. — "In the Howell case, 100 Mo. 628, 14 S. W. 4, the Jennings case was overruled in terms, and we think correctly. The rule in Jennings' case requires a defendant to prove his innocence and cannot be sustained on principle." State *v.* Taylor, 118 Mo. 153, 24 S. W. 449. In this case it was further said: "Indeed we have found but two states and one territory committed to the doctrine that an alibi must be established by the defendant by a preponderance of the evidence, and they are Iowa, Illinois and New Mexico."

16. *California.* — People *v.* Fong Ah Sing, 64 Cal. 253, 28 Pac. 253.

Kansas. — State *v.* Child, 40 Kan. 482, 20 Pac. 275; State *v.* Conway, 56 Kan. 682, 44 Pac. 627.

Mississippi. — Cunningham *v.* State, 56 Miss. 269, 31 Am. Rep. 360.

Missouri. — State *v.* Taylor, 118 Mo. 153, 24 S. W. 449.

Nevada. — State *v.* Waterman, 1 Nev. 543.

New York. — People *v.* Videto, 1 Parker Crim. 603.

Pennsylvania. — Turner *v.* Com., 86 Pa. St. 54.

Wisconsin. — Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

17. *Alabama.* — Ratliff *v.* State, 122 Ala. 104, 26 So. 123.

Arkansas. — Kinnemer *v.* State, 66 Ark. 206, 49 S. W. 815.

California. — People *v.* Kalkman, 72 Cal. 212, 13 Pac. 500; People *v.* Mitchell, 94 Cal. 550, 29 Pac. 1106.

Illinois. — Otmer *v.* People, 76 Ill. 149.

Maine. — State *v.* Fenlason, 78 Me. 495, 7 Atl. 385.

Texas. — Blake *v.* State, 38 Tex. Crim. App. 377, 43 S. W. 107.

Where it is shown that deceased was assassinated at about 11 o'clock at night, evidence that the accused was at his own house, seven miles away, late that night, is admissible on the question of alibi. Kinnemer *v.* State, 66 Ark. 206, 49 S. W. 815.

The defendant in a criminal prosecution for the purpose of proving an alibi may testify as to various acts which he claims to have done at and about the time of the alleged offense, but cannot give the particulars of conversation had between himself and others. People *v.* Kalkman, 72 Cal. 212, 13 Pac. 500.

There being nothing positive, but only facts and circumstances tending to prove guilt, and an apparently reliable witness having testified that the accused was at her house, 600 or 700 yards from the scene of the crime, at the time of its commission, and had been there for some time before—this testimony, it was held, was such as to raise a reasonable doubt of defendant's guilt. Otmer *v.* People, 76 Ill. 149.

Testimony of witnesses to prove an alibi that they saw defendant on the Friday before he was arrested cannot be excluded because they cannot fix the date, when the date of the arrest is fixed by other competent testimony. Blake *v.* State, 38 Tex. Crim. App. 377, 43 S. W. 107.

V. WEIGHT AND SUFFICIENCY.

1. Not Covering Exact Time. — And the evidence of his absence is competent and material, although it may not cover the exact time or the whole time of the alleged commission of the crime.[18]

2. Insufficient to Establish, How Considered. — But if the evidence adduced in support of an alibi be insufficient to establish it as an independent defense, such evidence is not to be excluded from the case, but should be considered with the other evidence.[19]

18. Waters *v.* People, 172 Ill. 367, 50 N. E. 148; Parker *v.* State, 136 Ind. 284, 35 N. E. 1105; Peyton *v.* State, 54 Neb. 188, 74 N. W. 597; State *v.* Ardoin, 49 La. Ann. 1145, 22 So. 620, 62 Am. St. Rep. 678; Thompson *v.* State, (Tex. Crim. App.,) 57 S. W. 805.

A charge that the jury would be warranted in paying no attention to alibi evidence unless it covered the whole time necessary, was held error, for, if such evidence was sufficient to create a reasonable doubt of guilt, it should have been considered. Kaufman *v.* State, 49 Ind. 248.

Failure to Account for Whole Time. — It was declared error to have told the jury that defendants' failure to account for their whereabouts during the entire time involved was to be considered by the jury along with the other evidence tending to show guilt. Parker *v.* State, 136 Ind. 284, 35 N. E. 1105.

Impossibility. — Proof of alibi not required to show that the place defendant alleged himself to have been was so far from place of crime as to preclude the possibility of his guilt. Peyton *v.* State, 54 Neb. 188, 74 N. W. 597.

Need Not Cover Place of Taking and Recapture. — *Held,* error to have charged the jury that it was necessary to show the absence of the accused from the place of the theft of property as well as from the possession of it en route, and at the place of recapture. The alibi did not depend upon concurrence of the facts of absence from both places. Thompson *v.* State, (Tex. Crim. App.,) 57 S. W. 805.

The court gave the following instruction: "The defendant having introduced evidence for the purpose of establishing an alibi, or in other words, to show that he was not guilty, for the reason that he was at a different place, if he failed to cover the whole time necessary when the crime may have been committed, then you would be warranted in paying no attention to such testimony."

And the appellate court said: "As a rule of law, this instruction is erroneous. An alibi is a legitimate defense, and if the evidence touching it was sufficient to raise a reasonable doubt of the appellant's guilt in the minds of the jury, it should have been considered, although the alibi did not cover the whole time during which the crime was committed. The case of French *v.* The State, 12 Ind. 670, is in point. The same principle is supported in the cases of Adams *v.* The State, 42 Ind. 373, and Binns *v.* The State, 46 Ind. 311." Kaufman *v.* State, 49 Ind. 248, 251.

"The instruction that proof of an alibi 'must cover the time that the offense is shown to have been committed, *so as to preclude the possibility of the prisoner's presence at the place of the burglary.*' . . . and that 'the value of the defense consists in his showing that he was absent from the place where the deed was done, and *at the very time* that the evidence of the People tends to fix its commission upon him. If, however, *it be possible that he could have been at both places, the proof of alibi is valueless,*' was casting a burden upon the accused much heavier than the law would justify or than it required. No such strict proof is required, and to so hold would render the defense, no matter how honestly made, in most cases valueless." Stuart *v.* People, 42 Mich. 255, 260, 3 N. W. 863.

19. Chappel *v.* State, 7 Cold. (Tenn.) 92; Dawson *v.* State, 62

3. Sufficiency for the Jury. — Whether it is sufficient to raise a reasonable doubt is for the jury to determine from all the evidence.[20]

Miss. 241; People *v.* Resh, 107 Mich. 251, 65 N. W. 99.

But if the evidence offered in support of an alibi be insufficient to establish it as a distinct issue, nevertheless such evidence is for the consideration of the jury; and if upon the whole case, including that pertaining to the alibi, they have a reasonable doubt of defendant's guilt, he should be acquitted. State *v.* McGarry (Iowa), 83 N. W. 718.

Any evidence whatever of alibi is to be considered in the general case with the rest of the testimony, and, if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be given in favor of innocence. Harrison *v.* State, 83 Ga. 129, 9 S. E. 542.

Proof insufficient to show impossibility of presence of accused may generate a reasonable doubt of such presence. Wisdom *v.* People, 11 Colo. 170, 17 Pac. 519.

Reasonable Doubt. — The accused is entitled to the benefit of any reasonable doubt that the jury might have of his guilt, arising from the proof touching alibi in connection with the other proof in the cause. Chappel *v.* State, 7 Cold. (Tenn.) 92.

The jury should consider all the evidence bearing upon alibi, and if in view of the evidence, the jury had any reasonable doubt as to whether the defendant was at some other place at the time the crime was committed, they should give him the benefit of any doubt and find him not guilty. People *v.* Resh, 107 Mich. 251, 65 N. W. 99.

"The defendant is not required, in any phase, of any criminal case, to prove his defense to the *satisfaction of the jury*, but it is sufficiently established if, upon consideration of the whole evidence, there is a reasonable doubt of his guilt. Pollard *v.* The State, 53 Miss. 410; Cunningham *v.* The State, 56 Miss. 269; Hawthorne *v.* The State, 58 Miss. 778; Smith *v.* The State, *Ib.* 867; Ingram *v.* The State, *ante*, 142." Dawson *v.* State, 62 Miss. 241, 244.

20. *Alabama.* — Albritton *v.* State, 94 Ala. 76, 10 So. 426; Pate *v.* State, 94 Ala. 14, 10 So. 665.

Colorado. — Wisdom *v.* People, 11 Colo. 170, 17 Pac. 519.

Mississippi. — Pollard *v.* State, 53 Miss. 410, 24 Am. Rep. 703.

Nebraska. — Henry *v.* State, 51 Neb. 149, 70 N. W. 924, 66 Am. St. Rep. 450; Nightingale *v.* State, (Neb.,) 87 N. W. 158.

Nevada. — State *v.* Waterman, 1 Nev. 543.

Oklahoma. — Wright *v.* Territory, 5 Okla. 78, 47 Pac. 1069; Shoemaker *v.* Territory, 4 Okla. 118, 43 Pac. 1059.

Tennessee. — Ford *v.* State, 101 Tenn. 454, 47 S. W. 703.

Reasonable Doubt. — Proof insufficient to show impossibility of the defendant's presence at the commission of the offense might still create a doubt in the minds of the jury as to such presence, and therefore engender a reasonable doubt as to guilt, of the benefit of which the defendant should not be deprived. Wisdom *v.* People, 11 Colo. 170, 17 Pac. 519.

Though alibi evidence do not cover entire time nor show impossibility of defendant's guilt, it is sufficient if it reasonably satisfies the jury or in connection with other evidence generates a reasonable doubt of guilt. Albritton *v.* State, 94 Ala. 70, 10 So. 426.

When Defendant Entitled to an Acquittal. — It is only necessary that the defendant show from facts or circumstances to the reasonable satisfaction of the jury, that he was elsewhere than at the place of the crime when it was committed. Pate *v.* State, 94 Ala. 14, 10 So. 665.

No Presumption that Prisoner Was Not at Some Other Place. "There is no presumption as to the locality of the party indicted unless you can say that the legal presumption of the prisoner's innocence involves the presumption that he was not at the place where the offense was committed. Certainly, there is no presumption that he was not at some other place." State *v.* Waterman, 1 Nev. 543.

4. Whole Evidence Must Be Considered. — And if upon the whole evidence including that in relation to alibi, there be in the minds of the jury, a reasonable doubt of the guilt of the accused, he should be acquitted.[21]

Whole Time Not Essential. — "It follows logically if not necessarily, from the decisions of this court, that the proof of an alibi is not required to cover the entire period within which the offense might possibly have been committed, but that the accused is entitled to an acquittal whenever the evidence is sufficient to create in the minds of the jurors a reasonable doubt of his presence at the commission of the offense with which he stands charged." Henry *v.* State, 51 Neb. 149, 70 N. W. 924, 66 Am. St. Rep. 450; Nightingale *v.* State, (Neb.,) 87 N. W. 158.

Proof need not exclude the absolute possibility of presence at the time and place of the offense to be of some value. It can be admitted and considered for what it is worth, if it renders it very improbable that defendant could have been present. Ford *v.* State, 101 Tenn. 454, 47 S. W. 703.

21. *Alabama.* — Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28; Pate *v.* State, 94 Ala. 14, 10 So. 665; Towns *v.* State, 111 Ala. 1, 20 So. 528; Albritton *v.* State, 94 Ala. 76, 10 So. 426.

Arkansas. — Blankenship *v.* State, 55 Ark. 244, 18 S. W. 51; Ware *v.* State, 59 Ark. 379, 27 S. W. 485.

California. — People *v.* Fong Ah Sing, 64 Cal. 253, 28 Pac. 253.

Illinois. — Ackerson *v.* People, 124 Ill. 563, 16 N. E. 847; Carlton *v.* People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346; Hoge *v.* People, 117 Ill. 35, 6 N. E. 796; Miller *v.* People, 39 Ill. 457; Mullins *v.* People, 110 Ill. 42.

Indiana. — Fleming *v.* State, 136 Ind. 149, 36 N. E. 151; French *v.* State, 12 Ind. 670, 74 Am. Dec. 229; Line *v.* State, 51 Ind. 172.

Iowa. — State *v.* Maher, 74 Iowa 77, 37 N. W. 2.

Louisiana. — State *v.* Ardoin, 49 La. Ann. 1145, 22 So. 620, 62 Am. St. Rep. 678.

Michigan. — People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162; People *v.* Pearsell, 50 Mich. 233, 15 N. W. 98.

Mississippi. — Pollard *v.* State, 53 Miss. 410, 24 Am. Rep. 703.

Montana. — State *v.* McClellan, 23 Mont. 532, 59 Pac. 924, 75 Am. St. Rep. 558.

Nebraska. — Nightingale *v.* State, (Neb.,) 87 N. W. 158; Henry *v.* State, 51 Neb. 149, 70 N. W. 924, 66 Am. St. Rep. 450.

Nevada. — State *v.* Waterman, 1 Nev. 543.

New Mexico. — Willburn *v.* Territory, (N. M.,) 62 Pac. 968.

New York. — People *v.* Stone, 117 N. Y. 480, 23 N. E. 13.

South Carolina. — State *v.* Jackson, 36 S. C. 487, 15 S. E. 559, 31 Am. St. Rep. 890.

South Dakota. — State *v.* Thornton, 10 S. D. 349, 73 N. W. 196, 41 L. R. A. 530.

Vermont. — State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

West Virginia. — State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561.

Wisconsin. — Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

"An alibi was alleged, and the jury were told that the evidence to prove it must outweigh the evidence to show the respondent at the place of the crime, and, if so established, they should acquit him. After this instruction, it was the duty of the court to go further, and to tell the jury that, if the alibi was not so established, evidence of it was not to be excluded from the case, but that it should be considered with the other evidence, and if upon the whole, including that in relation to the alibi, there was a reasonable doubt of the respondent's guilt, he was entitled to an acquittal." State *v.* Ward, 61 Vt. 153, 17 Atl. 483, 490.

When the people have made a *prima facie* case, the burden is on defendant to prove an alibi, not beyond a reasonable doubt, nor by a preponderance of the evidence, but

VI. EVIDENCE IN REBUTTAL BY STATE.

1. State May Rebut Evidence of Alibi. — The state may introduce evidence in rebuttal of that offered by the defendant in support of an alibi.[22]

2. State May Rebut by Proving Another Crime. — Even to the extent of proving the commission of another and different crime.[23]

by such evidence and to such degree of certainty as will, when the whole evidence is considered, create and leave in the minds of the jury a reasonable doubt of his guilt. Hoge *v.* People, 117 Ill. 44, 6 N. E. 796; Hopps *v.* People, 31 Ill. 392; Ackerson *v.* People, 124 Ill. 563, 16 N. E. 847.

"After the state has made out its case, it devolves upon the accused to introduce evidence, if he has any, to prove his alibi, if he relies upon such a defense. In that sense the burden is upon the accused, and, in order to maintain it, he is bound to establish in its support such facts and circumstances as are sufficient, when considered in connection with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of his guilt." State *v.* Thornton, 10 S. D. 349, 73 N. W. 196, 41 L. R. A. 530.

22. "The defense in its attempt to make out the alibi introduced testimony tending to show that the defendant at a given time was many miles from the place of the murder, and that by the public road he could not have had time to reach this point, and have been present at the killing. In order to prove that he could not have reached there by any other more direct routes than the public road, one of his witnesses had testified that the country was covered with wire fences. It was competent to show in rebuttal of this statement that the accused was in possession of a wire-cutter, by which the jury could deduce that it was possible for him to travel across the country by cutting the fences. Of course the weight to be attached to the proof was a matter for the jury, but it was clearly rebuttal testimony, and its admissibility as such is covered by the ruling in Moore *v.* United States, 150 U. S. (37: 998.)" Goldsby *v.* United States, 160 U. S. 70, 74, 16 Sup. Ct. 216.

"It is plain that the state may in rebuttal support the proof before given of defendant's presence at the time and place of the crime, and contradict testimony tending to prove an alibi." State *v.* Maher, 74 Iowa 77, 37 N. W. 2.

"Under the rule adopted by this court, the burden was upon defendant to establish the alibi, and the state had the right to rebut any showing the defendant made as to his whereabouts at or near the time the crime was committed." State *v.* Watson, 102 Iowa 651, 72 N. W. 283.

An offense was committed on the night of September 15th. The accused offered evidence of an alibi. The court, touching the right of the state to rebut such proof, said: "If the defendants had contented themselves with a simple denial that they were at Olivet, or in that vicinity, on the evening of the 15th of September, the state would clearly not have been entitled to examine witnesses in rebuttal of their statement who had not been examined before the grand jury, or of whose introduction the notice prescribed by § 4421 of the Code had not been given, for the testimony of such witnesses would have tended to prove a fact which had a tendency to support the indictment." It was held further, that the testimony was admissible, not in support of the indictment, but to contradict defendant's statements. State *v.* Rivers, 68 Iowa 611, 27 N. W. 781.

23. **Rebutting Alibi by Proving Another Offense.** — On a charge of highway robbery, the prosecution was allowed to rebut an alibi, by proving that shortly before the attack and near the same spot, the prisoner had robbed another person. R. *v.* Briggs, 2 M. & Rob. 199.

VII. ALIBI A LEGITIMATE DEFENSE.

1. Attempt to Prove Does Not Justify Suspicion of Guilt. — The attempt to prove an alibi furnishes no cause for suspicion of guilt.[24]

24. State *v.* Collins, 20 Iowa 85; State *v.* Josey, 64 N. C. 56; Turner *v.* Com., 86 Pa. St. 54, 27 Am. Rep. 683; Ford *v.* State, 101 Tenn. 454, 47 S. W. 703; Adams *v.* State, 28 Fla. 511, 10 So. 106; Line *v.* State, 51 Ind. 172.

"An unsuccessful attempt to establish an alibi is always a circumstance of great weight against a prisoner," etc. (Quoted from Wills on Circumstantial Evidence); but, say the court, "this is stated as a fact which we all know to be true, and not as a rule of law to be charged by the court." State *v.* Josey, 64 N. C. 56.

Attempt to Prove an Alibi Not Evidence of Guilt. — "Failing to prove an alibi should have no greater weight to convince a jury of the guilt of the prisoner attempting it than the failure to prove any other important item of defense. A prisoner is entitled to rely on the facts in his favor he may suppose he is able to prove, and if he is so unfortunate as to fail in his proof, it should not, generally speaking, operate to his prejudice." Miller *v.* People, 39 Ill. 457.

In a comparatively early Iowa case, the court, speaking through Dillon, J., said: "The instruction under consideration was founded upon a passage in Wills (Cir. Ev., 83 quoted without comment, Burrill, *Id.*, 519.) where he observes that 'an unsuccessful attempt to establish an alibi is always a circumstance of great weight against a prisoner, because the resort to that kind of evidence implies an admission of the truth and relevancy of the facts alleged, and the correctness of the inference drawn from them, if they remain uncontradicted.'

"If this is the law in any case, it must be limited to cases where the alibi has been forged or concerted, and is resorted to fraudulently. In such cases, if exposed, it would be, as above observed, a damaging circumstance to the defendant. But the *reason* given by Mr. Wills is improper to be stated to the jury, especially in a case like the one before us, where there was no certain evidence connecting the accused with the commission of the crime. We think it wrong to state to the jury that the effect of a failure to establish an alibi is to admit that the facts deposed to by the State's witnesses are *true* as well as *relevant*. Whether *true* or not is for the jury to determine upon other considerations, and not upon any such supposed admission. State *v.* Collins, 20 Iowa 85.

"The court instructed the jury that if the defendant proved an alibi, it constituted a perfect defense, but if not proved, and they did not think it had been proved, the attempt to manufacture evidence was a circumstance which always bore against the person making it; that no innocent person is driven to manufacture evidence. *Held,* (reversing the court below,) that this instruction is manifestly wrong, inasmuch as the jury are told that the defendant having undertaken to defend himself on the ground of alibi, must produce evidence sufficient to work his acquittal, or if not his failure is evidence of guilt. *Held, further,* that were the defendant detected in an attempt to corrupt witnesses or to manufacture evidence, it would certainly weigh heavily against him, but his mere failure to prove a given part of his defense is no evidence of such attempt and ought not to have been submitted as such to the jury." Turner *v.* Com., 86 Pa. St. 54, 27 Am. Rep. 683.

When an accused unsuccessfully attempts to establish an alibi, it is only a circumstance against him, when it appears to have been made in bad faith, and "a perfectly innocent man might make such an attempt in good faith, and fail for lack of evidence to establish it. It could only be a circumstance against him if it appeared to have been made in bad faith, manufactured, fabri-

A. Court May Not Give Disparaging Instructions. — And the court cannot properly disparage the defense in its instructions to the jury.[25]

cated or false." Ford *v.* State, 101 Tenn. 454, 47 S. W. 703.

25. *California.* — People *v.* Levine, 85 Cal. 39, 22 Pac. 969; People *v.* Malaspina, 57 Cal. 628; People *v.* Lattimore, 86 Cal. 403, 24 Pac. 1091.

Georgia. — Miles *v.* State, 93 Ga. 117, 19 S. E. 805, 44 Am. St. Rep. 140; Kimbrough *v.* State, 101 Ga. 583, 29 S. E. 39.

Mississippi. — Nelms *v.* State, 58 Miss. 362; Dawson *v.* State, 62 Miss. 241.

Missouri. — State *v.* Crowell, 149 Mo. 391, 50 S. W. 893, 73 Am. St. Rep. 402.

Nebraska. — Casey *v.* State, 49 Neb. 403, 68 N. W. 643.

Pennsylvania. — Com. *v.* Orr, 138 Pa. St. 276, 20 Atl. 866.

Tennessee. — Chappel *v.* State, 7 Cold. (Tenn.) 92.

"We again repeat that the defense of alibi is 'not one requiring that the evidence given in support of it should be scrutinized otherwise or differently from that given in support of any other issue in the cause;' and we may add that if the trial courts will cease to give this particular form of instruction, the ends of justice will be equally as well subserved, and the administration of the laws less embarrassed." People *v.* Lattimore, 86 Cal. 403, 24 Pac. 1091.

The court below had instructed the jury, substantially, that alibi testimony should be weighed with great caution because it is a defense easily fabricated and often attempted by contrivance or perjury: the court held such instruction wrong, and for the error in giving it reversed the case; reviewing earlier cases supposed to conflict with such ruling. Dawson *v.* State, 62 Miss. 241.

The trial court in the introductory sentence of the instruction in question said to the jury: "The evidence produced to establish an alibi should be cautiously received, though when proved it is as strong as any other defense." This, it was held, was error, as discrediting a legitimate defense. Casey *v.* State, 49 Neb. 403, 68 N. W. 643.

"The court ought not to have said that the accused had attempted to set up an alibi. The use of the word 'attempted,' at least had a tendency to convey to the minds of the jury an intimation that the effort of the accused to prove an alibi amounted to nothing more than an attempt." Miles *v.* State, 93 Ga. 117, 19 S. E. 805, 44 Am. St. Rep. 140.

Condemning an instruction using the word "attempted," the court held, that the language in question necessarily discredited the defense; and that such error was not remedied by another instruction, that if the jury believed the "plea of alibi" they were not authorized to convict. Kimbrough *v.* State, 101 Ga. 583, 29 S. E. 39.

Court Not to Disparage. — "The defense was an alibi. An alibi is a proper and legal defense. That it is a defense is proof of its propriety and legality. If it is a defense at all, it is a good defense, and the law can attach no odium to it. It is an error to say that any good legal defense is odious and suspicious; *a fortiori*, to say that by the use of a legal defense a suspicion is cast upon the truth of the defense. The defense of an alibi is as good a defense, when proven, as any other defense, and no court has the right to tell the jury that it is 'often fabricated by perjury.' . . .

"The true rule is stated in Williams *v.* The State, 49 Ala. 664: 'An alibi is a fact, and its existence is established just as any other fact may be; and the testimony to support it needs the same weight of evidence —no more, no less.'" Nelms *v.* State, 58 Miss. 362, 364.

Concerning an instruction complained of, the court said: "That instruction reads: 'The court instructs the jury that, though an alibi may be a well-worn defense, yet it is a legal one, to the benefit of which the defendant is entitled,' etc. There was error in giving this instruction,

2. Omissions on Part of Defendant. — A. Failure to Make Defense at Preliminary Examination, Effect Of. — Omission to introduce alibi evidence at the preliminary examination before the magistrate does not operate to the prejudice of the accused.[26]

But the omission on the part of the accused to produce evidence may be a matter for the jury to consider in connection with the whole case.[27]

3. False Testimony in Support of Alibi. — A. False Alibi, Effect Of. — False alibi testimony does not operate to strengthen the proofs adduced by the state.[28]

as the court is not permitted to disparage the defense of an alibi, or to refer to it in a slighting manner. Evidence in regard to an alibi is to be tested and treated just like evidence offered in support of any other defense: insanity, self-defense, etc. 1 Bish. Cr. Proc. § 1062; Sater *v.* State, 56 Ind. 378; Walker *v.* State, 37 Tex. 366; Albin *v.* State, 63 Ind. 598; State *v.* Chee Gong, 16 Or. 534, 19 Pac. 607; 11 Enc. Pl. & Prac. 360 *et seq.* and cases cited." State *v.* Crowell, 149 Mo. 391, 50 S. W. 893, 73 Am. St. Rep. 402.

26. Omission to Produce Evidence. — "It is easy to see that there may have been good reasons why the defendant, however innocent, should, as matter of prudence, have neglected to go into the evidence of the alibi before the magistrate." Sullivan *v.* People, 31 Mich. 1.

27. Omission to Produce Evidence. — On the trial of an indictment for murder, the defendant requested the judge to instruct the jury that he was not bound to show by evidence where he was from six o'clock in the afternoon of the alleged day of the murder, to two o'clock the next morning, and that the jury should draw no inference from any failure so to do. The judge declined to give this instruction, but ruled that the question was entirely for the jury; that if a prisoner was shown to be in any connection with the transaction which seemed to them to put into his possession facts which, if innocent, he would use, which he could use without going upon the stand himself, the withholding of those means to explain the circumstances might be considered by the jury, in connection with the other testimony, in determining how far he was responsible for the occurrence. *Held*, that the defendant had no ground of exception. Com. *v.* Costley, 118 Mass. 1.

"It is easy to imagine a case where it would be impossible for a prisoner upon his trial to show his whereabouts on a given day, and a case also where he is guiltless of the crime charged, and where prudence and safety in regard to other transactions might induce silence and suppression of the evidence of his presence or absence, as the case might be. But the rule which treats the omission to produce such evidence as strongly corroborative, as strongly suspicious and inferential only, is reasonable as well as humane, and a safer and surer guide to a just result." Gordon *v.* People, 33 N. Y. 501.

28. False Alibi Testimony. — The court charged the jury substantially, that, if alibi proof, which if true would work a refutation of the charges against defendant, should actually prove false, the legal presumption was that the evidence of the state upon which conviction was urged, whether weak or strong, was true.

Touching this instruction and alluding to the testimony of the state, the court said: "It does not follow that, because the defense has offered to sustain itself by falsehood, the prosecution has not. While the law presumes every man to speak truth, yet if that presumption be removed, it does not deprive the party of showing from itself or otherwise, that the proof of his adversary is insufficient or untrue. The jury may look to the attempt and failure to prove an

4. How Truth of Defense Tested. — A. The Evidence of the State Not to Be Used As a Standard. — The evidence of the state is not to be used as a standard by which to test the truth of that given on the subject of alibi by the defense.[29]

alibi as a fact against the defendant, weak or strong, as justified by the surroundings, but not as rejecting a legal presumption of the truth of other proof against him." Sawyers *v.* State, 15 Lea (Tenn.) 694, 696.

29. Evidence of State Not a Standard by which to test the truth of that given on subject of alibi by defense. People *v.* Pearsell, 50 Mich. 233, 15 N. W. 98.

All facts in evidence constituting part of the *res gestae*, including the defense of alibi, are to be considered by the jury without discrimination as to rules of evidence. McNamara *v.* People, 24 Colo. 61, 48 Pac. 541.

ALIENS.—See Citizens and Aliens.

ALIENATING AFFECTIONS.

CROSS-REFERENCES.

Criminal Conversation;
Damages;
Husband and Wife.

I. PROOF OF MARRIAGE.

In an action for alienating the affections direct proof of a formal marriage is not necessary, the general rule being that evidence of cohabitation, reputation, and acknowledgment by the parties, a holding themselves out to the world as husband and wife is a sufficient proof of the fact of marriage,[1] and the admission of the defendant that the plaintiff and his alleged wife were married is sufficient.[2]

II. PROOF OF ALIENATION.

1. Fact of Alienation.—A. Presumption of Affection.—Plain-

1. Abbot's Trial Ev. 681; Perry *v.* Lovejoy, 49 Mich. 529, 14 N. W. 485; Scherpf *v.* Szodeczky, 1 Abb. Pr. (N. Y.) 366. See also Mead *v.* Randall, 111 Mich. 268, 69 N. W. 506.

2. Perry *v.* Lovejoy, 49 Mich. 529, 14 N. W. 485.

tiff need not prove that he had affection for his wife, the law presumes that, and it is for the defendant to prove the contrary if he questions the fact.[3]

B. Evidence of Relations Between Husband and Wife.—It is relevant to inquire into the terms on which the husband and wife lived together before the appearance of the defendant, and evidence of what they have said or written to or of each other is admissible for the purpose of showing their mental demeanor and conduct, and whether they were living on good or bad terms.[4]

Showing Preliminary to Introducing Declarations. — It is, however, always required that proof should be given that the declarations or letters of the wife (when the husband is plaintiff) purporting to express her feelings, were made or written prior to the existence of any facts calculated to excite suspicion of misconduct on her part, and that there be no grounds to suspect collusion.[5]

3. Lewis *v.* Hoffman, 54 App. Div. 620, 66 N. Y. Supp. 428; Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341.

Affection Presumed. — "The law presumes that a husband who lives with and cohabits with his wife, she bearing children, the issue of such cohabitation, has an affection for her, and this presumption continues until it is overthrown by a fair preponderance of the testimony to the contrary." Beach *v.* Brown, 20 Wash. 266, 55 Pac. 46, 43 L. R. A. 114, 72 Am. St. Rep. 98.

4. *United States.*—Ash *v.* Prunier, 105 Fed. 722.

Alabama. — Long *v.* Booe, 106 Ala. 570, 17 So. 716.

Iowa. — Puth *v.* Zimbleman, 99 Iowa 641, 68 N. W. 895.

Massachusetts. — Palmer *v.* Crook, 7 Gray 418.

Michigan. — Edgell *v.* Francis, 66 Mich. 303, 33 N. W. 501.

Ohio.—Preston *v.* Bowers, 13 Ohio St. 1; Holtz *v.* Dick, 42 Ohio St. 23, 51 Am. Rep. 791.

Vermont. — Fratini *v.* Caslini, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843; Rudd *v.* Rounds, 64 Vt. 432, 25 Atl. 438.

Wisconsin. — Horner *v.* Yance, 93 Wis. 352, 67 N. W. 720.

In Williams *v.* Williams, 20 Colo. 51, 37 Pac. 614, plaintiff and her husband were secretly married in New York, and their marriage was not known to the defendant for one year thereafter. The defendant was much displeased with her son's marriage, and immediately sought to bring about their separation. Plaintiff was of good moral character, she and her husband living happily together until the appearance of the defendant. In conversation with her husband just prior to his leaving her, he said, "Well, Kate, you know Ma has got all the money and will not give it to me until we are separated, but don't you worry, and keep quiet, and when I get it back from her I will come and live with you again." *Held,* it was proper therefore, that the husband's declarations concerning such conduct on his mother's part, and having reference to his separation, or contemplated separation from his wife, should be submitted to the jury for the purpose of enabling them, in connection with other evidence, to determine the cause or motive which prompted his separation from his wife. See Baker *v.* Baker, 16 Abb. N. C. 293; Buchanan *v.* Foster, 23 App. Div. 542, 48 N. Y. Supp. 732.

5. Plaintiff's wife wrote to her parents in August, 1879, prior to leaving her husband the following June, that he was unkind to her, and to such a degree that she had become sick of her home. *Held,* that defendant could introduce this letter as a part of the *res gestae,* for the purpose of showing the state of the wife's mind and affection towards plaintiff, and also for the further purpose of showing that her leaving him was due to his illegal behavior.

Caution in Admitting Declarations.—The declarations of the wife, imputing to the husband cruel treatment of her and showing want of conjugal affection are to be received under the closest scrutiny, and are in no case to be admitted unless it affirmatively appears that they were made before the wife was the subject of intrigue with, or under the influence of the paramour, in whose favor they are sought to be introduced.[6]

Declarations Part of Res Gestae.—But the declarations of the wife made immediately before, and at the time she left her husband, of his ill-treatment, are competent evidence for the defendant.[7]

Declarations Favorable to Plaintiff.—And it is held that the plaintiff also has the right to give in evidence the declarations of his wife made recently, prior to the seduction, in order to show the state of her feelings toward him at the time.[8]

Letters Showing Husband's Affection Admissible.—Letters written by the husband to the wife during coverture are admissible for the purpose of showing the affection of the husband towards the wife.[9]

Perry *v.* Lovejoy, 49 Mich. 529; White *v.* Ross, 47 Mich. 172, 10 N. W. 188, distinguished.

6. Gilchrist *v.* Bale, 8 Watts (Pa.) 355; Dickerman *v.* Graves, 6 Cush. (Mass.) 308, 53 Am. Dec. 41; Higham *v.* Vanosdol, 101 Ind. 160; Palmer *v.* Crook, 7 Gray (Mass.) 418; Fratini *v.* Caslini, 60 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843. But see Huot *v.* Wise, 27 Minn. 68, 6 N. W. 425.

7. In Gilchrist *v.* Bale, 8 Watts (Pa.) 355, defendant offered to prove that she went to her physician, and complained that her husband treated her badly, and showed marks on her arms, which she said she had received from his beating her, and asked him what she should do; that he advised her to go to her father and leave her husband. The court said: "The evidence was very pertinent; for if Mrs. Bale left her husband in consequence of ill treatment, it was an answer to the plaintiff's action. The material part of the testimony was the advice of the witness that she should leave her husband. The residue of the offer explains the reasons which induced him to give this advice, and were evidence in explanation. The witness saw the marks on her arm, and was informed by her, at the time, that they arose from the ill treatment of her husband. If I am correct, the latter part of the offer was unconnected with information derived from Mrs. Bale, and in that view was undoubtedly evidence, as it tended to show the motives which governed the wife in leaving the protection of her husband." Cattison *v.* Cattison, 22 Pa. St. 275; Palmer *v.* Crook, 7 Gray (Mass.) 418; Glass *v.* Bennett (5 Pickle), 89 Tenn. 478; Rudd *v.* Rounds, 64 Vt. 432, 25 Atl. 438. But see Kidder *v.* Lovell, 14 Pa. St. 214.

8. 1 Greenl. § 102; Preston *v.* Bowers, 13 Ohio 1; Palmer *v.* Crook, 7 Gray (Mass.) 418.

9. Beach *v.* Brown, 20 Wash. 266, 55 Pac. 46, 43 L. R. A. 114, 72 Am. St. Rep. 98; Holtz *v.* Dick, 42 Ohio St. 23, 51 Am. Rep. 791.

Letters Showing Wife's Affection. In March, 1880, plaintiff went to look up a location for his family, leaving his wife and children in the house they had been occupying on defendant's farm. While in Kansas he received letters from his wife, two of which were produced on the trial, one of which indicated affection for him, whilst the other did not, which caused him to return at once. He then lived with his wife for about one week, when, without his knowledge or consent, she left his home and went to her father's. The letter indicating the wife's affection was properly admitted as showing the wife's affection at the time, and immediately after his departure.

But the letters of one consort to the other, showing the state of his or her affections toward the other are inadmissible in a suit against the parents, until it is first shown that there was misconduct on the part of the parents.[10]

Husband's Statement When Wife Plaintiff, Inadmissible. — Except as hereinbefore stated, the declarations of the husband, made in the absence of the defendant, as to the cause of his abandoning or putting away his wife, are not admissible,[11] nor the declarations of the wife in an action for enticing away the wife.[12]

C. Partial Alienation.—If plaintiff shows even a partial alienation of the wife's affections, the defendant is liable. Nor is he required to show that at the time in question his wife had affection for him and defendant completely alienated it from him.[13]

D. Abandonment of Home.—It is not necessary to prove debauchery, or that the wife was enticed away from the home of the

Perry *v.* Lovejoy, 49 Mich. 529, 14 N. W. 485.

In Rubenstein *v.* Rubenstein, App. Div., 69 N. Y. Supp. 1067, a letter written to plaintiff by her husband two years after commencement of the action is not admissible to show existence of affectionate relations between them.

10. White *v.* Ross, 47 Mich. 172, 10 N. W. 188; Edgell *v.* Francis, 66 Mich. 303, 33 N. W. 501. But see Perry *v.* Lovejoy, 49 Mich. 529, 14 N. W. 485.

Where the letters written by the wife and her statements are introduced in evidence on behalf of plaintiff, as showing the state of her mind and affection towards her husband, it is error not to allow the wife to testify for defendants (her parents) if the version of the wife would have been in their favor. McKenzie *v.* Lautenschalanger, 113 Mich. 171, 71 N. W. 489.

11. Winsmore *v.* Greenbank, Wiles 577; Westlake *v.* Westlake, 34 Ohio St. 621, 32 Am. Rep. 397. But see Williams *v.* Williams, 20 Colo. 51, 37 Pac. 614; Baker *v.* Baker, 16 Abb. N. C. (N. Y.) 293; Buchanan *v.* Foster, 23 App. Div. 542, 48 N. Y. Supp. 732.

12. Higham *v.* Vanosdol, 101 Ind 160.

The wife will not be permitted to give conversations had with her husband as to opposition of his parents to their marriage. Huling *v.* Huling, 32 Ill. App. 519.

Confessions of the wife in the absence of the paramour are not admissible against him. Sanborn *v.* Gale, 162 Mass. 412, 38 N. E. 710, 26 L. R. A. 864. But see Underwood *v.* Linton, 44 Ind. 72; Lewis *v.* Hoffman, 54 App. Div. 620, 66 N. Y. Supp. 428.

In Edgell *v.* Francis, 66 Mich. 303, 33 N. W. 501, the husband sued his father-in-law for taking his wife and child, and persuading her to remain at his home and away from plaintiff. The statements of the wife were introduced as to why she stayed with her parents and her feelings and wishes, also to having warned plaintiff to stay away from defendants. The court said: "This is undoubtedly hearsay, but it is claimed to be one of the exceptions to the rule of exclusion relating to what are usually called *res gestae* or accompanying acts and circumstances which cannot be well understood without such testimony."

The evidence being regarded as explanatory of her residence with her parents was the only means, except calling her as a witness, of ascertaining these facts, and was properly admitted.

13. Fratini *v.* Caslini, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843; Dallas *v.* Sellers, 17 Ind. 479, 79 Am. Dec. 489; Nichols *v.* Nichols, 147 Mo. 387, 48 S. W. 947. See *Ex parte* Warfield, 40 Tex. Crim. App. 413, 50 S. W. 933, 76 Am. St. Rep. 727.

husband in order to recover for alienating her affections.[14]

E. Adultery. — It is not necessary to prove adultery between the wife of plaintiff and defendant to sustain the action.[15]

2. Defendant's Agency in Alienating. — To maintain the action plaintiff must show a wrongful and willful attempt on the part of defendant to alienate the affections of the consort, and to deprive plaintiff of the consort's society, that such attempt was successful, and that plaintiff was not a consenting party.[16]

To entitle the plaintiff to recover, in an action for alienating the affections, it is necessary to prove that the defendant maliciously caused the husband or wife to leave the other.[17]

Wrongful Act of Defendant. — There must be a direct interference on defendant's part, a wrongful act or acts shown, whereby it is made to appear that defendant has wrongfully alienated the affections of the consort, and this must be shown by a preponderance of the evidence.[18]

14. Hermance *v.* James, 47 Barb. 120; Hoard *v.* Peck, 56 Barb. 202; Adams *v.* Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266; Van Olinda *v.* Hall, 68 N. Y. St. 711, 34 N. Y. Supp. 777.

In Foot *v.* Card, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829, it is held the fact that the man and wife continued to live together will not defeat the wife's action against another woman for alienating the affections of her husband.

The alienation of the wife's affections for which the law gives redress may be accomplished notwithstanding her continued residence under her husband's roof. Reinhart *v.* Bills, 82 Mo. 534, 52 Am. Rep. 385.

15. Adams *v.* Main, 3 Ind. App. 232, 29 N. E. 792; Higham *v.* Vanosdol, 101 Ind. 160.

16. Van Olinda *v.* Hall, 68 N. Y. St. 711, 34 N. Y. Supp. 777; Reading *v.* Gazzam, 200 Pa. St. 70, 49 Atl. 889; Ash *v.* Prunier, 105 Fed. 722; Warner *v.* Miller, 17 Abb. N. C. (N. Y.) 221; Churchill *v.* Lewis, 17 Abb. N. C. (N. Y.) 226; Whitman *v.* Egbert, 27 App. Div. 374, 50 N. Y. Supp. 3; Childs *v.* Muckler, 105 Iowa 279, 75 N. W. 100.

17. Westlake *v.* Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Waldron *v.* Waldron, 45 Fed. 315; Buchanan *v.* Foster, 23 App. Div. 542, 48 N. Y. Supp. 732.

It must appear that the defendant has acted from improper motives. Schuneman *v.* Palmer, 4 Barb. (N. Y.) 225.

As Showing Motive. — Tucker *v.* Tucker, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623.

18. "The defendant should not be held to answer in damages because the plaintiff's husband left her, although without good cause, and afterwards fell in love with, and finally married defendant. If the husband alienated his own affections from his wife, or if alienated by the plaintiff's own conduct, or both, without the interference of defendant, or if they were alienated by any other cause known or unknown, over which defendant had no control or exercised no intentional direction or influence, then the plaintiff howsoever unfortunate or wronged, cannot recover damages from the defendant." Waldron *v.* Waldron, 45 Fed. 315.

Statements Made in Absence of Plaintiff; When Admissible. — In Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341, defendants proposed to prove that they offered their son, plaintiff's husband, eighty acres of land, a team, farming implements, and one year's supplies, if he would go there and live with her. This evidence was refused on the ground that it called for self-serving declarations, made at a time when plaintiff was not present. *Held*, this was error. The fact that the statements were not made in the presence of plaintiff was wholly immaterial, for

Defendant's Conduct Controlling Cause.—It is not necessary for the plaintiff to prove the defendant's conduct was the sole cause of his wife's leaving him: it is sufficient to show that defendant's conduct was the controlling cause without which she would not have left him.[19]

Financial Standing of Defendants.—Evidence may be introduced as to financial standing of the parents, to show the weight and probable effect of the property inducements held out by them to their child to abandon either husband or wife.[20]

Declarations of Co-Conspirator.—If the plaintiff has established the fact that a conspiracy has been entered into by two or more parties to entice away his wife, the declarations of one of the conspirators would become evidence against the other defendants, *provided those declarations were made in furtherance of the common design*, tending to effectuate the object of the conspiracy, and so becoming, not mere words, but verbal acts.[21]

III. PROOF OF DEFENDANT'S MOTIVE.

1. Evil Motive Must Exist.—If the husband's conduct has been such as to justify the wife in leaving him, he cannot maintain an action against one who assists her, or receives or harbors her,

they were not offered as bearing upon her knowledge of defendant's treatment of his son. "It was substantive testimony of verbal acts, tending to show that defendant was trying to induce his son to live with plaintiff, and that the son's refusal to do so, was not brought about by his conduct."

19. Prettyman *v.* Williamson, 1 Penn. (Del.) 224, 39 Atl. 731; Rice *v.* Rice, 104 Mich. 371, 62 N. W. 833; Waldron *v.* Waldron, 45 Fed. 315.

In Bathke *v.* Krassin, 78 Minn. 272, 80 N. W. 950, there was no evidence that either defendants ever advised their sister to leave her husband, the plaintiff. One of defendants, in the presence of his sister, disparaged, criticized and belittled the husband, his house, his farm, his work and his financial condition.

Three days after the marriage the wife wrote plaintiff, reproaching him because he had not prepared a better house for her, threatening to leave him. *Held*, that while the conduct of defendants may have been one of the inducing causes of the wife's separation, it was a fair inference that the wife was disappointed in the financial condition of her husband, and that this was one of the causes, if not *the cause*, of her leaving him, and the award of damages, when compared with the evidence, was so excessive as to justify the conclusion that the verdict was the result of passion or prejudice.

20. Price *v.* Price, 91 Iowa 693, 60 N. W. 202, 51 Am. St. Rep. 360, 29 L. R. A. 150; Nichols *v.* Nichols, 147 Mo. 387, 48 S. W. 947; Johnston *v.* Allen, 100 N. C. 131, 5 S. E. 666.

In Knapp *v.* Wing, 72 Vt. 334, 47 Atl. 1075, it was held not error to admit evidence tending to show that defendant attempted to use the influence of her property to alienate the husband from the wife, and in that connection to show the amount of property defendant possessed.

Contra.—But see Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341, which holds that it is improper to admit evidence as to the wealth, rank, social position or condition of defendants, and Derham *v.* Derham, 123 Mich. 451, 83 N. W. 1005.

21. Preston *v.* Bowers, 13 Ohio St. 1; Beeler *v.* Webb, 113 Ill. 436. But see Buchanan *v.* Foster, 23 App. Div. 542, 48 N. Y. Supp. 732.

provided it be shown that his assistance is rendered from motives of humanity, and not from an evil motive or purpose, or in bad faith towards the husband.[22]

A Question for the Jury.—The material point of inquiry is the *intent* with which the defendant has acted. It is therefore a question for the jury to determine whether the defendant has acted from improper motives.[23]

2. Presumption From Fact of Alienation.—If defendant did intend to induce a separation he has a right to show that his advice was given honestly, with a view to the welfare of both parties.[24]

The burden is upon the defendant to give some proper and reasonable explanation for his conduct in inducing the plaintiff's wife to leave him.[25]

Wife's Statements No Excuse.—And the mere statement of the wife that she was abused by her husband, without any proof of such abuse, in fact, will not justify the defendant in advising her to leave her husband.[26]

22. 1 Bish. Mar. & Div., § 1362; Prettyman *v.* Williamson, 1 Penn. (Del.) 224, 39 Atl. 731; Van Olinda *v.* Hall, 68 N. Y. St. 611, 34 N. Y. Supp. 777.

23. *Colorado.*—Williams *v.* Williams, 20 Colo. 51, 37 Pac. 614.

Indiana.—Higham *v.* Vanosdol, 101 Ind. 160.

Missouri.—Modisett *v.* McPike, 74 Mo. 636; Hartpence *v.* Rogers, 143 Mo. 623, 43 S. W. 650.

New York.—Wilson *v.* Coulter, 29 App. Div. 85, 51 N. Y. Supp. 804; Warner *v.* Miller, 17 Abb. N. C. 221; Smith *v.* Lyke, 13 Hun 204; Schuneman *v.* Palmer, 4 Barb. 225; Barnes *v.* Allen, 1 Keyes 390.

North Carolina.—Brown *v.* Brown, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574.

Ohio.—Westlake *v.* Westlake, 34 Ohio St. 621, 32 Am. Rep. 397.

Malice Implied From Conduct. In the case of Westlake *v.* Westlake, 24 Ohio St. 621, 32 Am. Rep. 397, it was said: "The term malice, as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind, not sufficiently cautious before it occasions an injury to another. If the conduct of the defendant was unjustifiable and actually caused the injury complained of by the plaintiff, which was a question for the jury, malice in law would be implied from such conduct, and the court should have so charged."

24. Tasker *v.* Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468.

25. Higham *v.* Vanosdol, 101 Ind. 160; Johnston *v.* Allen, 100 N. C. 131, 5 S. E. 666.

"That a state of circumstances might exist where a stranger would be justified in carrying a wife beyond the reach of her husband with her consent, and without his, can not be denied; but such an adventure on the part of a stranger is always attended with the peril of his being able to show to the satisfaction of a court that the safety of the wife, apparently, at least, demanded his intervention, and that what he did was meant in good faith for her protection." Higham *v.* Vanosdol, 101 Ind. 160.

26. Barnes *v.* Allen, 30 Barb. 663.

In Rudd *v.* Rounds, 64 Vt. 432, 25 Atl. 438, it appeared that plaintiff's wife left her home and went to a neighbor's, where the defendant was boarding; that she then bore marks of violence about her face and arms. The defendant offered to show that on that day she expressed fears of bodily injury from her husband, and declined to follow defendant's advice to return to her husband and live with him, such statements were admissible.

3. In Actions Against Parents.—In actions against the parents of either husband or wife, much stronger evidence of malicious and improper motives must be shown than where the action is against a stranger. Bad or unworthy motives cannot be presumed.[27]

Parent's Motive Important. — In every suit of this character the question always must be, from what motive did the parent act? Was it malicious, or was it inspired by a proper parental regard for the welfare and happiness of the child?[28]

27. *Arkansas.* — Burnett *v.* Burkhead, 21 Ark. 77, 76 Am. Dec. 358.

Indiana. — Reed *v.* Reed, 6 Ind. App. 317, 33 N. E. 638.

Massachusetts. — Tasker *v.* Tasker, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468.

Michigan. — White *v.* Ross, 47 Mich. 172, 10 N. W. 188.

Mississippi. — Tucker *v.* Tucker, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623.

New York. — Hutcheson *v.* Peck, 5 Johns. 196; Bennett *v.* Smith, 21 Barb. 439; Smith *v.* Lyke, 13 Hun 204, 20 N. Y. Supp. 204.

Ohio. — Friend *v.* Thompson, Wright 636.

Tennessee. — Payne *v.* Williams, 4 Baxt. 583.

The Conduct of the Parent Must Be Proved To Be Malicious. Brown *v.* Brown, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574.

28. *Illinois.* — Huling *v.* Huling, 32 Ill. App. 519.

Kansas.—Eagon *v.* Eagon, 60 Kan. 697, 57 Pac. 942.

Maine. — Oakman *v.* Belden, 94 Me. 280, 47 Atl. 553, 80 Am. St. Rep. 396.

Massachusetts. — Tasker *v.* Tasker, 153 Mass. 148, 10 L. R. A. 468.

Michigan. — Rice *v.* Rice, 104 Mich. 371, 62 N. W. 833; White *v.* Ross, 47 Mich. 172, 10 N. W. 188.

Mississippi. — Tucker *v.* Tucker, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623.

Missouri. — Modisett *v.* McPike, 74 Mo. 636.

North Carolina.—Brown *v.* Brown, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574.

Pennsylvania. — Gernerd *v.* Gernerd, 185 Pa. St. 233, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. Rep. 646.

Washington. — Beach *v.* Brown, 20 Wash. 266, 55 Pac. 46, 43 L. R. A. 114.

Quo Animo Important Consideration. — When a father or mother is charged with the alienation of the husband's or wife's affections, the *quo animo* is an important consideration. The right of the parents to advise their children must be carefully protected as well as the rights of husband or wife. Rice *v.* Rice, 104 Mich. 371, 62 N. W. 833.

Plaintiff and her husband were married in May, 1892, and went to live at the home of his parents, and continued to so reside until March, 1893; during this time plaintiff and defendants had frequent quarrels, which finally resulted in defendants' compelling plaintiff to leave their house. Defendants at that time made no attempt to keep their son, plaintiff's husband, from living with her. It was shown by the testimony of one witness that after plaintiff had gone to reside with her parents, Mrs. Young, one of defendants, requested the witness to use her influence to prevent plaintiff's husband from again living with her, giving as a reason that if he did so his father would disinherit him, but witness never mentioned the matter to the husband. *Held*, that plaintiff had failed to show that her husband's refusal to live with her was due to improper influence exercised over him by his parents. Young *v.* Young, 8 Wash. 81, 35 Pac. 592.

In Rice *v.* Rice, 104 Mich. 371, 62 N. W. 833, where the husband had made up his mind to leave his wife if she rejoined the Catholic church, and finding that she had done so commenced to move the furniture out of the house. Upon his wife's return from church he then informed her, in the presence of his father, the defendant, that as she had gone back to the church he would no longer live with her.

It appeared that defendant did not

IV. DAMAGES.

1. Loss of Consortium. — The gist of the matter is the loss of the comfort and society of the consort, and it is not necessary to prove any pecuniary loss.[29]

It is not necessary to show actual loss of support caused by alienation of the spouse's affections; it is sufficient to show the injured feelings, mortification and mental anguish caused by such alienation.[30]

Proof of Social Position Admissible.—It is competent for either party to show plaintiff's occupation, and perhaps the social position of

advise plaintiff's husband to leave her until after she had gone back to her church. *Held*, defendant was not liable; that it was not shown that plaintiff's husband left her because defendant alienated his affections; that he had a right to object to his son's marrying a Catholic; that he had a right to advise his son that it would be unwise for him to live with her if she again joined the church, and any advise given after the separation would not render him liable.

Gernerd *v.* Gernerd, 185 Pa. 233, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. Rep. 646.

The case of Brown *v.* Brown, 124 N. C. 19, 32 S. E. 320, was a suit against the father of plaintiff's husband. The court said: "Before a parent can be held liable in damages for advising his married child to abandon his wife or her husband, the conduct of the parent should be alleged and proved to be malicious; that the willful advice and action of the parent in such a case may not be necessarily malicious, for the parent may be determined and persistent and obstinate in his purpose to cause the separation, and yet be entirely free from malice—in fact, have in view the highest good of his child. Our opinion, however, is that the malice necessary to be alleged and proved is not alone such malice as must proceed from a malignant and revengeful disposition, but that it would be sufficient to prove, to the satisfaction of the jury, that the parent's action was taken without proper investigation of the facts, or where the advice was given from recklessness or dishonesty of purpose; the law presuming malice from such conduct in actions of this nature."

29. *Delaware.*—Prettyman *v.* Williamson, 1 Penn. 224, 39 Atl. 731.

Illinois. — Betser *v.* Betser, 186 Ill. 537, 58 N. E. 249, 78 Am. St. Rep. 303.

Indiana. — Adams *v.* Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266.

Michigan. — Perry *v.* Lovejoy, 49 Mich. 529, 14 N. W. 485.

Minnesota. — Lockwood *v.* Lockwood, 67 Minn. 476, 70 N. W. 784.

Missouri. — Reinhart *v.* Bills, 82 Mo. 534, 52 Am. Rep. 385.

New York. — Bennett *v.* Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; Van Olinda *v.* Hall, 68 N. Y. St. 711, 34 N. Y. Supp. 777; Bennett *v.* Smith, 21 Barb. 439; Barnes *v.* Allen, 1 Keyes 390; Hermance *v.* James, 47 Barb. 120; Hutcheson *v.* Peck, 5 Johns. 207; Schuneman *v.* Palmer, 4 Barb. 227.

Pennsylvania. — Reading *v.* Gazzam, 200 Pa. St. 70, 49 Atl. 889.

Vermont. — Fratini *v.* Caslini, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843.

Loss of the Consortium. — In Prettyman *v.* Williamson, 1 Penn. (Del.) 224, 39 Atl. 731, it was said: "The action is based mainly on what is termed 'loss of the *consortium*,' that is, the loss of the conjugal society, affection and assistance of the wife, and it is not necessary to the maintenance of the action that there should be any pecuniary loss whatever."

30. Rice *v.* Rice, 91 Iowa 693, 62 N. W. 833, 51 Am. St. Rep. 360; Bowersox *v.* Bowersox, 115 Mich. 24, 72 N. W. 986.

herself and husband, as bearing upon the value of the husband's *consortium*.[31]

Evidence of the Reputed Wealth of defendant in actions of this nature is inadmissible.[32]

Letters Written by Plaintiff's Wife to him prior to an alleged alienation of her affections, are admissible in evidence on the question of damages alleged to have been sustained by plaintiff.[33]

2. Mitigation of Damages.—In mitigation of damages evidence may be introduced which shows that prior to the wife's relation with defendant the relations between her and her husband were unhappy, or that they were wanting in affection for each other, or that he was cruel or unkind in his treatment of her, or any misconduct on his part tending to show their unhappy relations or lack of affection.[34]

31. Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341.

32. Derham *v.* Derham, 123 Mich. 451, 83 N. W. 1005; Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341.

Contra.—Nichols *v.* Nichols, 147 Mo. 387, 48 S. W. 947.

As Bearing on the Question of Damages, statement of the wife that she married her husband because she supposed he had more money than he did have, and that she was ashamed of him, are admissible. Derham *v.* Derham, 123 Mich. 451, 83 N. W. 1005.

33. Horner *v.* Yance, 93 Wis. 352, 67 N. W. 720.

In Derham *v.* Derham, 123 Mich. 451, 83 N. W. 1005, an action by a divorced wife against her father-in-law, she was permitted to testify concerning contents of a lost letter written by her husband to her during the marriage relations. *Held* error. This was a communication to the wife by the husband, and it was not competent for her to state it without his consent.

The case of McKenzie *v.* Lautenschlager, 113 Mich. 171, 71 N. W. 489, distinguished. In this case the letters were written to a friend.

34. Churchill *v.* Lewis, 17 Abb. N. C. (N. Y.) 226; Schorn *v.* Berry, 63 Hun 110, 17 N. Y. Supp. 572; Peek *v.* Traylor (Ky.), 34 S. W. 705. Prettyman *v.* Williamson, 1 Penn. (Del.) 224, 39 Atl. 731.

In Van Vacter *v.* McKillip, 7 Blackf. (Ind.) 578, it was said: "There are many facts and circumstances which defendant, in actions of this kind, may show in mitigation of damages; but we have met with no case in which it has been decided that a bad temper, or the occasional collisions that may take place between husband and wife, in consequence of the bad temper of one or both of them, affords the slightest extenuation to the guilt of the seducer."

Voluntary Abandonment. — In Bassett *v.* Bassett, 20 Ill. App. 543, defendant offered to prove that at the time plaintiff and her husband (his son) were married he was in such a state of intoxication as not to know what he was about; that his son had never kept company with plaintiff, nor paid her any such attention as indicated any love for her, and that immediately after the marriage, when he came to realize his position, he voluntarily abandoned the plaintiff, and was in no wise affected by any advice of his father, the defendant. *Held,* this evidence was admissible, and should have been considered in mitigation of damages.

In Hadley *v.* Heywood, 121 Mass. 236, it was said, any unhappy relations existing between the plaintiff and his wife may affect the question of damages, and were properly submitted to the jury, but they are in no sense a justification or paliation of the defendant's conduct. They are not allowed to affect the damages because the acts of the defendant are less reprehensible, but because the condition of the husband is such that the injury which such acts occasion is less than otherwise it might have been.

In Mitigation of Damages. — In Wolf *v.* Frank, 92 Md. 138, 48 Atl.

Unhappy Relations of Husband and Wife.—If the husband and his wife lived unhappily before the improper advances of the defendant, circumstances which show that he possessed no comforts of a domestic character are proper to be given in evidence in mitigation of damages.[35]

Records in a Divorce Proceeding.—The complaint and evidence in a divorce, previously obtained by one of the parties, are not admissible in an action for alienating the affections.[36]

But it has been held that the fact of a divorce having been obtained during the pendency of the action may be considered in mitigation of damages.[37]

3. Exemplary Damages.—If it be shown that the defendant willfully and maliciously induced the husband or wife to abandon the other, the plaintiff may recover exemplary damages.[38]

132, 52 L. R. A. 102, the defendant offered to prove that plaintiff had had improper relations with one Keiffer, and that about two months thereafter the husband of plaintiff left her. While it was not shown that this was the cause of his leaving, it was proper evidence to be considered by the jury in mitigation of damages.

In Ash *v.* Prunier, 105 Fed. 722, plaintiff was permitted to introduce evidence showing manifestations of remorse by her husband in some of their interviews, after the intimacy between him and defendant had begun, and also of great grief on part of plaintiff. *Held*, competent to show mental suffering of plaintiff caused by the misconduct of defendant, an element of damages properly considered in such actions.

35. Bennett *v.* Smith, 21 Barb. (N. Y.) 439; Smith *v.* Masten, 15 Wend. (N. Y.) 270; Coleman *v.* White, 43 Ind. 429; Prettyman *v.* Williamson, 1 Penn. (Del.) 224, 39 Atl. 731; Peek *v.* Traylor (Ky.), 34 S. W. 705.

Where the plaintiff had reason to know of the improper conduct of his wife and did suspect it, but did not take any means to prevent it, this was a circumstance properly considered by the jury in their assessment of damages. And where the plaintiff was in the habit of having improper relations with other women "his sense of moral propriety and regard for chastity, could not be much offended by the loss of virtue in his wife, the guilt of the defendant is not, therefore, diminished, but the plaintiff has sustained less damage." Smith *v.* Masten, 15 Wend. 270; Wolf *v.* Frank, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102.

Profane and Indecent Language of the Wife.—Where the plaintiff is shown to have used profane and indecent language in the presence of her husband, although not to him, and taught her little boy to use vulgar language, held, such evidence was properly admitted as tending to show the state of domestic happiness in which they had previously lived, and that it may have had considerable to do in alienating her husband's affections. Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341.

36. Waldron *v.* Waldron, 45 Fed. 315; Crose *v.* Rutledge, 81 Ill. 266; Mead *v.* Randall, 111 Mich. 268, 69 N. W. 506.

37. Prettyman *v.* Williamson, 1 Penn. (Del.) 224, 39 Atl. 731; Derham *v.* Derham, 123 Mich. 457, 83 N. W. 1005; Mead *v.* Randall, 111 Mich. 268, 69 N. W. 506.

38. Lindblom *v.* Sonstelie; 10 N. D. 140, 86 N. W. 357; Prettyman *v.* Williamson, 1 Penn. (Del.) 224, 39 Atl. 731; Williams *v.* Williams, 20 Colo. 51, 37 Pac. 614; Waldron *v.* Waldron, 45 Fed. 315; Warner *v.* Miller, 17 Abb. N. C. (N. Y.) 221.

ALIENATION.—See Deeds.

ALIMONY.—See Divorce; Husband and Wife.

ALLEGIANCE.—See Citizens and Aliens.

ALLOWANCE.—See Descent and Distribution.

ALLUVION.—See Boundaries.

ALMANAC.

By Lewis R. Works.

I. DEFINITION.

An almanac is defined to be "a book or table containing a calendar of days, weeks and months, to which astronomical data and various statistics are often added, such as the times of the rising and setting of the sun and moon, changes of the moon, etc.[1]

II. USE ON TRIAL.

1. Courts Take Judicial Notice Of. — Courts take judicial notice of the almanac,[2] or, as it has been put, the almanac is a part of the law of the land.[3]

2. Is Not Evidence. — Hence, a publication containing the almanac need not, and properly speaking, should not, be offered or received in evidence.[4]

1. Webster's Dic.

2. *Alabama.* — Sprowl *v.* Lawrence, 33 Ala. 674; Allman *v.* Owen, 31 Ala. 167.

California. — People *v.* Chee Kee, 61 Cal. 404; People *v.* Mayes, 113 Cal. 618, 45 Pac. 860.

Connecticut. — State *v.* Morris, 47 Conn. 179.

Iowa. — McIntosh *v.* Lee, 57 Iowa 356, 10 N. W. 895.

Maine. — First Nat. Bank *v.* Kingsley, 84 Me. 111, 24 Atl. 794.

Maryland. — Kilgour *v.* Miles, 6 Gill. & J. 268; Sasscer *v.* Farmers' Bank, 4 Md. 409, 56 Am. Dec. 755; Philadelphia, W. & B. R. Co. *v.* Lehman, 56 Md. 209, 40 Am. Rep. 415.

New York. — Case *v.* Perew, 46 Hun 57; Lendle *v.* Robinson, 53 App. Div. 140, 65 N. Y. Supp. 894.

Pennsylvania. — Wilson *v.* Van Leer, 127 Pa. St. 371, 17 Atl. 1097, 14 Am. St. Rep. 854.

"The court must take judicial notice not only of the law-merchant, which is a part of the common law, but also of the almanac, from which it appears that the 15th day of December, 1872, fell on Sunday." Reed *v.* Wilson, 41 N. J. Law 29.

3. Finney *v.* Callendar, 8 Minn. 41.

4. People *v.* Chee Kee, 61 Cal. 404; Lendle *v.* Robinson, 53 App. Div. 140, 65 N. Y. Supp. 894.

No Occasion for Offering Almanac. "The court erred in refusing to permit the counsel for defendant below to refer to the almanac to show, in support of his argument against the testimony of Margaret Manahan, that a certain date in 1865 fell upon Sunday. . . . All of the authorities agree that this is one of the matters that do not require to be proved, but are taken judicial notice of without evidence. As all the authorities agree that no proof is necessary it follows that it is not required to be put in evidence at all. The almanac in such cases is used, like the statutes, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury. State *v.* Morris, 47 Conn. 179." Wilson *v.* Van Leer, 127 Pa. St. 371, 17 Atl. 1097, 14 Am. St. Rep. 854.

In the case of Louisville & N. R. Co. *v.* Brinckerhoff, 119 Ala. 606, 24 So. 892, the statement of facts shows that: "Upon the plaintiff offering an almanac in evidence, showing when the sun set on the day of the night the stock was killed, the defendant objected to the introduction of the almanac in evidence, upon the ground that it was irrelevant, incompetent and immaterial. The court overruled this objection, and the defendant duly excepted."

In its opinion the court said: "The court had common knowledge of the time the sun set on the day under inquiry, and so did the jury. There was no occasion, therefore, to introduce an almanac to show the hour."

Admission Not Error. — But it has been held that the admission of such a publication is not error.[5]

Sometimes Held to Be Competent. — And the almanac has been even declared to be competent evidence to prove the time of the rising and phase of the moon and the like.[6]

3. Is an Aid to the Memory of the Court. — A. If Admitted in Evidence. — It has been held that an almanac is received merely to refresh the memory of the court and jury as to a fact already known, and not as evidence.[7]

B. When Not Offered Court May Refer To. — The court may refer to a published almanac not offered in evidence for information as to the time of the rising or setting of the sun, and the like, and while the publication is not itself evidence, the information or knowledge derived from it is.[8]

5. State *v.* Morris, 47 Conn. 179; People *v.* Chee Kee, 61 Cal. 404.

As an Aid to the Memory of the Court. — "Another exception was taken to the introduction of an almanac for the purpose of showing the time of sunset on the day of the accident. An almanac from an unofficial source, and not properly verified, is not, strictly speaking, competent evidence; but receiving it as an aid to the memory of the court and jury is not reversible error. It was entirely proper for the court, without evidence, to take judicial notice of the time of sunset on the day of the accident, and, for the purpose of refreshing the mind of the court, there was no legal objection to consulting an almanac." Lendle *v.* Robinson, 53 App. Div. 140, 65 N. Y. Supp. 894.

6. Munshower *v.* State, 55 Md. 11, 39 Am. Rep. 414.

Competent Evidence. — "It was clearly competent to prove the time of the rising and phase of the moon on the night in question by the introduction of an almanac. Munshower *v.* State, 55 Md. 11; State *v.* Morris, 47 Conn. 179; Sisson *v.* Railroad Co., 14 Mich. 497." Mobile & B. R. Co. *v.* Ladd, 92 Ala. 287, 9 So. 169.

7. Lendle *v.* Robinson, 53 App. Div. 140, 65 N. Y. Supp. 894; Case *v.* Perew, 46 Hun 57.

To Refresh Memory. — "For the purpose of showing that it was in the night season, the state was permitted to introduce in evidence, against the objection of the defense, a copy of Beckwith's Almanac for 1879, in which the hour of sunset for that day is placed at four o'clock and forty-one minutes. There is no error in this.

"The time of the rising or setting of the sun on any given day belongs to a class of facts, like the succession of the seasons, changes of the moon, days of the month and week, etc., of which courts will take judicial notice. The almanac in such cases is used, like the statute, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury." State *v.* Morris, 47 Conn. 179.

8. Lendle *v.* Robinson, 53 App. Div. 140, 65 N. Y. Supp. 894.

Court May Consult. — "The fact, for the proof of which the almanac is offered, was one of those facts of which a court may take judicial notice; formal proof of it was therefore unnecessary. It would have been sufficient to have called it to the knowledge of the judge at the trial; and if his memory was at fault, or his information not sufficiently full and precise to induce him to act upon it, he had the right to resort to an almanac, or any other book of reference for the purpose of satisfying himself about it (Sub. 8, § 1875, C. C. P.); and such knowledge would have been evidence." People *v.* Chee Kee, 61 Cal. 404.

ALTERATION OF INSTRUMENTS.

By Clark Ross Mahan.

CROSS-REFERENCES.

Best and Secondary Evidence; Bills and Notes;
Consent;
Documentary Evidence;
Expert Testimony;
Handwriting;
Opinions and Conclusions;
Ratification;
Spoliation.

I. THE FACT OF THE ALTERATION.

1. Burden of Proof. — A. General Rule. — The general rule is that where the objection is that an instrument in writing offered in evidence has been altered in a material part since its execution and without authority, which the party offering the instrument denies, and the alteration is not apparent on the face of the instrument, the burden of proof to establish the fact of the alteration is upon the party raising that objection.[1]

Under a Special Plea of Non Est Factum, alleging that the note in

1. *United States.* — U. S. *v.* Linn, 1 How. 104; Stirsen *v.* Baker, 150 U. S. 312.

Alabama. — Montgomery *v.* Crosthwait, 90 Ala. 553, 8 So. 498, 12 L. R. A. 140.

Florida. — Harris *v.* Bank of Jacksonville, 22 Fla. 501, 1 So. 140.

Illinois. — Lowman *v.* Auberg, 72 Ill. 619.

Indiana. — Johns *v.* Harrison, 20 Ind. 317; Maikel *v.* State Sav. Inst., 36 Ind. 355; Ins. Co. of North America *v.* Brim, 111 Ind. 281, 12 N. E. 315.

Iowa. — Potter *v.* Kennelly, 81 Iowa 96, 46 N. W. 856; Odell *v.* Gallup, 62 Iowa 253, 17 N. W. 502; Shroeder *v.* Webster, 88 Iowa 627, 55 N. W. 569; Farmer's Loan and T. Co. *v.* Olson, 92 Iowa 770, 61 N. W. 199; Van Horn *v.* Bell, 11 Iowa 465, 79 Am. Dec. 506.

Kansas. — J. I. Case Threshing Mach. Co. *v.* Peterson, 51 Kan. 213, 33 Pac. 470.

Kentucky. — Thacker *v.* Booth, 9 Ky. Law 745, 6 S. W. 460.

Maryland. — Wickes *v.* Caulk, 5 Har. & J. 36.

Mississippi. — Moye *v.* Herndon, 30 Miss. 110.

Nebraska. — McClintock *v.* State Bank, 52 Neb. 130, 71 N. W. 978.

New York. — Conable *v.* Keeney, 61 Hun 624, 16 N. Y. Supp. 719.

Tennessee. — Smith *v.* Parker (Tenn.), 49 S. W. 285.

Texas. — Heath *v.* State, 14 Tex. App. 213; Wells *v.* Moore, 15 Tex. App. 521.

Wisconsin. — Gordon *v.* Robertson, 48 Wis. 493, 4 N. W. 579.

Statement of the Rule. — "The law imposes upon the party who claims under the instrument the burden of explaining the alteration. This is the rule, undoubtedly, where the alteration appears on the face of the instrument, as an erasure, interlineation, and the like. In such case, the party having the possession of the instrument and claiming under it, ought to be called upon to explain it. It is presumed to have been done while in his possession. But, where no such *prima facie* evidence exists, there can be no good reason why this should devolve upon a party, simply because he claims under the instrument. The plea avers the alteration, and the defendant, therefore, holds the affirmative; and the general rule is, that he who holds the affirmative must prove it." U. S. *v.* Linn, 1 How. (U. S.) 104.

Proof That a Portion of the Document Has Been Torn Off is not enough of itself to establish the fact of an alteration. Hall *v.* Forqueran, 2 Litt. (Ky.) 329.

Burden on Plaintiff. — In Farmer's L. & T. Co. *v.* Siefke, 144 N. Y. 354, 39 N. E. 358, wherein the complaint alleged that the note sued on was executed under seal, which the defendant answered by general denial, it was held that the plaintiff had the burden of proving that the note had not been altered after delivery by the addition of the seal.

Memorandum of Character of Transaction. — The presumption is that a memorandum on a bank check showing the character of the transaction evidenced by the check was inserted before the delivery of the check, in the absence of any evidence to the contrary. *In re* Barnes' Est., 92 Iowa 379, 60 N. W. 659.

suit was altered after its execution and delivery, the burden of proof is upon the defendant to establish the fact of the alteration.[2]

2. Parol Evidence. — A. General Rule. — The rule excluding parol evidence offered to explain or vary that which is in writing does not apply to evidence to prove a fraudulent or unauthorized alteration of a written instrument, and hence such evidence may always be resorted to to impeach the validity of the instrument on the ground of such an alteration.[3] So also parol evidence is competent to show that the instrument had been executed in blank, and that the blanks had been filled contrary to directions.[4]

2. Douglass *v.* Brandon, 6 Baxt. (Tenn.) 58.

The Plaintiff Under Such a Plea Has Nothing to Do but Read the Note, and the special matter in avoidance must be proved by the defendant. Bumpass *v.* Timms, 3 Sneed (Tenn.) 459.

3. *Alabama.* — Montgomery *v.* Crosthwait, 90 Ala. 553, 8 So. 498, 12 L. R. A. 140.

Illinois. — Johnson *v.* Pollock, 58 Ill. 181; Schwarz *v.* Herrenkind, 26 Ill. 208.

Iowa. — Coit *v.* Churchill, 61 Iowa 296, 16 N. W. 147.

Louisiana. — Perry *v.* Burton, 31 La. Ann. 262.

Maine. — Goodwin *v.* Norton, 92 Me. 532, 43 Atl. 111; Buck *v.* Appleton, 14 Me. 284.

Mississippi. — Everman *v.* Robb, 52 Miss. 653, 24 Am. Rep. 682.

Missouri. — Sweet *v.* Maupin, 65 Mo. 65.

Nebraska. — Courcamp *v.* Weber, 39 Neb. 533, 58 N. W. 187.

Oregon. — Wren *v.* Fargo, 2 Or. 19.

Latitude of Evidence. — In Winters *v.* Mowrer, 163 Pa. St. 239, 29 Atl. 916, it was held that upon an issue of fraudulent alteration of a writing the door is thrown open to evidence bearing in any way on the nature of the transaction.

Testimony of a Grantor, Present and Consenting to the Alteration, is admissible to show the fact of alteration. It does not tend to vary, contradict or avoid the deed which he made. It tends rather to show exactly what that deed was. Nor do his statements come within the rule excluding declarations. Goodwin *v.* Norton, 92 Me. 532, 43 Atl. 111.

In Jourden *v.* Boyce, 33 Mich. 302, it was held that evidence that the only note of the kind defendant ever signed was payable in two years, while the note sued upon and produced in court was payable in four months, was evidence, fairly tending, if believed, to prove an alteration of the identical instrument originally signed; and that the defendant had a right to have the case submitted to the jury on this theory.

Conversations. — In an action upon a bond, against which the defendants defend on the ground of the insertion without their knowledge or consent after its execution of a place of payment, it is not competent to permit one of the defendants, after testifying to the alteration, for the purpose of showing how this fact was impressed on his memory, to testify to conversations between himself and his co-defendants, in the absence of the plaintiffs and after the execution of the bond. Dickson *v.* Bamberger, 107 Ala. 293, 18 So. 290.

4. Richards *v.* Day, 137 N. Y. 183, 33 N. E. 146, 33 Am. St. Rep. 703, 23 L. R. A. 601.

Testimony of Printer Who Printed Blank. — Where the maker of a note in an action thereon against him claims that the note was altered after he had signed it, some of the alterations claimed to have been made being printed words standing in the note as produced, the testimony of the printer in whose office the blank was printed, that it was originally printed as it then appeared, is competent. Hunter *v.* Parsons, 22 Mich. 96.

B. Surrounding Circumstances. — On an issue as to whether an instrument has been altered, it is competent to put in evidence the circumstances surrounding the execution of the writing.[5]

Increase of Liability. — The fact that the obligor's liability would be increased by the alteration is relevant as tending to show that he would less readily have consented to the change alleged by him as constituting the alteration.[6]

3. Other Instruments and Memoranda. — A. Other Alterations. On an issue as to whether or not a writing has been altered since its execution, evidence that other writings executed at the same time have been altered is inadmissible.[7] But where there are strong circumstances to support the inference that an instrument has been fraudulently altered, evidence that other papers drawn and signed by the same parties, and a part of the series to which the one in

Evidence of Representations Made by the Maker of a Note to the Sureties as to the time of payment, which was left blank when indorsed, and filled in by the payee, is inadmissible for the sureties, where such representations had not been brought to the knowledge of the payee. Johns *v.* Harrison, 20 Ind. 317.

5. Pearson *v.* Hardin, 95 Mich. 360, 54 N. W. 504.

Financial Condition of Maker of Note. — The rule admitting evidence of surrounding circumstances does not permit the reception of evidence that one maker of a promissory note was in embarrassed circumstances when the note was made, in a suit against the other makers, for the purpose of showing that the note was altered by him so as to increase its amount before negotiating it. Agawam Bank *v.* Sears, 4 Gray (Mass.) 95. The court said: "It was wholly irrelevant to the question of the time of making the alteration of the note, and furnished no proper aid in deciding that question. The embarrassed circumstances of a debtor furnish no presumption that he would make a fraudulent alteration of a note in his hands. To admit such evidence would do great injustice to the honest, but unfortunate debtor. The rule of admitting evidence of surrounding circumstances, to which the counsel of the defendants refers is not, in our opinion, comprehensive enough to include the fact that the principal was embarrassed with debts, as a circumstance having any proper bearing upon the issue tried between these two parties."

6. Matlock *v.* Wheeler, 29 Or. 64, 43 Pac. 867.

7. *England.* — Thompson *v.* Moseley, 5 Car. & P. 501, 24 Eng. C. L. 676.

Alabama. — Winter *v.* Pool, 100 Ala. 503, 14 So. 411.

District of Columbia. — Cotharin *v.* Davis, 2 Mackey 230.

Michigan. — Pearson *v.* Hardin, 95 Mich. 360, 54 N. W. 504.

Missouri. — Paramore *v.* Lindsey, 63 Mo. 63.

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

The Written Contract for the Purchase of the Goods for Which the Notes in Suit Were Given, signed by the parties, and containing the terms of the sale, is competent as tending to prove that the notes were given in conformity to the terms of the sale. Stein *v.* Brunswick-Balke-Collender Co., 69 Miss. 277, 13 So. 731.

Refusal to Produce Copy. — In Curry *v.* May, 4 Harr. (Del.) 173, the court refused to nonsuit a party for an unexplained alteration of the instrument declared on, though the alteration was material and was in the plaintiff's handwriting, and the instrument in his custody, because it appeared the defendant had a counterpart which he refused to produce.

question belongs, had been altered, may be given in evidence.[8]

Paper Referring to Instrument. — On an issue as to whether an instrument has been altered, another paper referring to the instrument in question in its present condition is admissible.[9]

B. Facsimiles, Copies, Etc. — But alterations in a writing may be shown by a duly certified facsimile or exemplification thereof, when the party has not the power to produce, nor to compel the production of, the original.[10] So also, it is proper for a copy of the paper, as it was proved by the defendant to have been originally, to go to the jury to determine whether the original has been altered or not.[11]

4. Competency of Witnesses. — A. In General. — The fact of an alteration may be proved either by the subscribing witness, or by any other person who can testify that he saw the alteration made.[12]

B. Transactions With Deceased Persons. — The statute prohibiting testimony in regard to personal transactions or communications with deceased persons has been held to extend to the testimony of one of the parties to the fact of an alteration of a written instrument the other party to which is dead.[13]

8. Rankin *v.* Blacknell, 2 Johns. Cas. (N. Y.) 198. See also Haynes *v.* Christian, 30 Mo. App. 198.

9. Carlisle *v.* People's Bank, 122 Ala. 446, 26 So. 115.

10. Ansley *v.* Peterson, 30 Wis. 653.

11. Conner *v.* Fleshman, 4 W. Va. 693. See also Young *v.* Cohen, 42 S. C. 328, 20 S. E. 62.

12. Penny *v.* Corwithe, 18 Johns. (N. Y.) 499. And see Com. *v.* McGurty, 145 Mass. 257, 14 N. E. 98.

Arbitrators Are Competent Witnesses to testify that the submission under which they acted has been altered since the award. Abel *v.* Fitch, 20 Conn. 90.

Declarations. — The affidavit of the party producing the paper will not be received to prove that an alteration was made through error or mistake; it must be established by legal evidence, and not by the declaration of the party seeking to recover. Slocomb *v.* Watkins, 1 Rob. (La.) 214.

The Indorser of a Note, after being released from liability thereon as such indorser, is a competent witness to prove that the note has been altered since his indorsement. Buck *v.* Appleton, 14 Me. 284. This case also held that the objection that a party to a negotiable instrument cannot be admitted as a witness to prove it void, extends only to proof that it was void when originally made and not to proof of an alteration.

13. Cole *v.* Marsh, 92 Iowa 379, 60 N. W. 659; Harris *v.* Bank of Jacksonville, 22 Fla. 501, 1 So. 140; Mitchell *v.* Woodward, 2 Marv. (Del.) 311, 43 Atl. 165; Benton Co. Sav. Bank *v.* Strand, 106 Iowa 606, 76 N. W. 1001; Pyle *v.* Onstatt, 92 Ill. 209. And see Gist *v.* Gans, 30 Ark. 285; Foster *v.* Collner, 107 Pa. St. 305.

Interest of Witness. — The rule forbidding testimony as to transactions with a deceased person is not to be held inapplicable in respect of the fact of an alteration because the testimony does not in any way affect the witness' liability. Williams *v.* Barrett, 52 Iowa 637, 3 N. W. 690. The court said: "John T. Clark was a party to the action, and for that reason was disqualified as a witness to testify to personal transactions between himself and the deceased. We think the fact that the other defendants were not necessarily jointly liable with him, and that separate actions might have been maintained against the defendants, makes no difference. There was but one party on trial, and the witness, being a

5. Opinion Evidence. — An expert witness duly qualified as such,[14] may be asked whether or not a written instrument has in fact been altered;[15] but not it seems when the alterations are apparent on the face of the paper.[16] So, an expert may be asked whether an alteration was in his opinion made before or after the body of the instrument was written;[17] whether interlineations and the like are the same handwriting as the remainder of the paper;[18] whether the whole of the paper was written with the same ink, and the like.[19]

6. Inspection by Jury. — It is proper for the jury, in determining the question of an alteration, to inspect the instrument.[20] But not

proper party defendant therein, was by the very terms of the statute incompetent to testify to the facts under consideration."

Date of Instrument. — It has been held that the rule forbidding testimony of transactions with deceased persons does not forbid the examination of the makers of a note, as to the true date of the note, which appears to have been changed. Barlow *v.* Buckingham, 68 Iowa 169, 26 N. W. 58, 58 Am. Rep. 218, wherein the court said: "It is as to facts and circumstances of the transaction between them and the deceased that they are forbidden by the provision to testify. The date on which it occurred is a matter quite distinct from them and we think it is not included in the prohibition."

Surrounding Circumstances. — It has been held, however, that, as to a note which the defendants allege has been altered since execution, one of them, as a witness for the defense, might properly be asked when and with what intent he signed the note; whether he struck out the words in the printed form which appear to have been struck out, and other questions which do not call for any transaction or communication by the defendants with the deceased payee personally. Page *v.* Danaher, 43 Wis. 221.

14. Qualification of Expert Witness. — A county treasurer, who has also been a banker, and a banker of several years' experience, are qualified to testify as experts as to whether two capital letters claimed to have been the initials of the payee of a note have been changed. Hendrix *v.* Gillett, 6 Colo. App. 127, 39 Pac. 896.

15. *Colorado.*—Hendrix *v.* Gillett, 6 Colo. App. 127, 39 Pac. 896.

Indiana. — Nelson *v.* Johnson, 18 Ind. 329.

Michigan. — Vinton *v.* Peck, 14 Mich. 287.

Mississippi. — Moye *v.* Herndon, 30 Miss. 110.

New York. — Nat. State Bank *v.* Rising, 4 Hun 793; Hadcocke *v.* O'Rourke, 6 N. Y. Supp. 543.

Compare Swan *v.* O'Fallon, 7 Mo. 231.

16. Stillwell *v.* Patton, 108 Mo. 352, 18 S. W. 1075; Johnson *v.* Van Name, 51 Hun 644, 4 N. Y. Supp. 523; Yates *v.* Waugh, 1 Jones Law (N. C.) 483.

17. Dubois *v.* Baker, 30 N. Y. 355; Sackett *v.* Spencer, 29 Barb. (N. Y.) 180; Cheney *v.* Dunlap, 20 Neb. 265, 29 N. W. 925, 57 Am. Rep. 828, 5 L. R. A. 465; Phoenix Fire Ins. Co. *v.* Philip, 13 Wend. (N. Y.) 81; Hayden Mill Co. *v.* Lewis (Ariz.), 32 Pac. 263; Quinsigamond Bank *v.* Hobbs, 11 Gray (Mass.) 250.

Opinion Founded on Appearance of Instrument. — The opinion of an expert witness that certain words were interpolated in a written agreement after the signature, if founded upon the situation and crowded appearance of the words, is inadmissible. Jewett *v.* Draper, 6 Allen (Mass.) 434.

18. Graham *v.* Spang (Pa. St.), 16 Atl. 91; Hawkins *v.* Grimes, 13 B. Mon. (Ky.) 257.

19. Glover *v.* Gentry, 104 Ala. 222, 16 So. 38; Nat. State Bank *v.* Rising, 4 Hun (N. Y.) 793.

20. Hill *v.* Barnes, 11 N. H. 395; Gooch *v.* Bryant, 13 Me. 386; Smith *v.* U. S., 2 Wall. (U. S.) 219.

when the fact of the alteration in the instrument in suit is not raised by the pleadings.[21]

7. Variance. — When the party producing the instrument has set up the paper as alleged, and the other party has not put the same in issue, the paper as altered is admissible, and evidence of the alteration is not.[22]

But otherwise, where the plaintiff has set out the instrument as altered, without averring the alteration, and the defendant denies the execution of the instrument as set up, and alleges the alteration.[23]

But under a verified denial of the execution of the instrument sued on, the defendant may give evidence of the alteration since the execution of the instrument.[24]

8. Cogency of Proof. — The fact of an alteration may be established by a mere preponderance of the evidence.[25] It is not enough, however, that the evidence may raise a suspicion.[26] There are cases, however, in which the courts have said that the evidence must be "quite convincing,"[27] "very clear and forcible,"[28] "satisfactory," and the like.[29]

9. Conversion of Altered Instrument. — Mitigation of Damages. In a suit for the conversion of a promissory note, the defendant may show, in reduction of damages, that the note had been altered by the payee after its execution, in a material part, and without the consent, authority or ratification of the maker.[30]

21. Shelton *v.* Reynolds, 111 N. C. 525, 16 S. E. 272.

22. Sundberg *v.* Whittesey, 3 Sandf. Ch. (N. Y.) 320.

In Hollis *v.* Vandergrift, 5 Houst. (Del.) 521, however, wherein the plaintiff filed with his declaration a duly certified copy of the note sued on, and the defendant did not file an affidavit at the time of pleading denying his signature to the original note of which it purports to be a sworn, correct and literal copy, it was held that the defendant was not thereby precluded from proving that the note had been altered since its execution and without his knowledge or consent.

23. Howlett *v.* Bell, 52 Minn. 257, 53 N. W. 1154.

24. Coburn *v.* Webb, 56 Ind. 96, 26 Am. Rep. 15; Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469.

25. Dodge *v.* Haskell, 69 Me. 429; McClintock *v.* State Bank, 52 Neb. 130, 71 N. W. 978; Farmer's L. & T. Co. *v.* Olson, 92 Iowa 770, 61 N. W. 199.

No Greater Quantum of Evidence Is Required to establish the fact of a fraudulent alteration than any other fraudulent act. Coit *v.* Churchill, 61 Iowa 296, 16 N. W. 147.

Proof Beyond a Reasonable Doubt is not necessary. Lewis *v.* Garretson, 56 Iowa 178, 9 N. W. 214; Glover *v.* Gentry, 104 Ala. 222, 16 So. 38.

26. Oakey *v.* Hennen, 18 La. 435.

27. Rosenbug *v.* Jett, 72 Fed. 90.

28. Sweet *v.* Naupin, 65 Mo. 65. See also North River Meadow Co. *v.* Christ Church, 22 N. J. Law 424, 53 Am. Dec. 258.

29. Duggar *v.* Dempsey, 13 Wash. 396, 43 Pac. 357. See also Boston Block Co. *v.* Buffington, 39 Minn. 385, 40 N. W. 361.

30. Booth *v.* Powers, 56 N. Y. 22. *Compare* Flint *v.* Craig, 59 Barb. (N. Y.) 319, a similar action, where the note had been held by the defendant as collateral security, which he refused to return to the plaintiff after the payment of the partial indebtedness, in which it was held that the defendant could not show either as a

II. EXPLANATION OF ALTERATIONS.

1. Admissibility of the Instrument. — Formerly it was the rule that if an instrument was altered in a material part, the court declared it to be void, and hence it was not receivable in evidence for any purpose, even though the alteration was capable of explanation.[31] But under the present practice the fact of such an alteration does not justify the court in excluding the instrument when offered in evidence,[32] the question of the alteration and the time when it was made being for the jury to determine from the instrument in connection with the explanatory evidence adduced by the parties.[33]

Objection Available Only to Non-Consenting Parties. — The objection that an instrument has been altered in a material respect is available only to parties not consenting thereto.[34]

2. Immaterial Alterations Need Not Be Explained. — It is a general rule that immaterial alterations in a paper offered in evidence, although apparent on its face, need not be explained before receiving the paper in evidence.[35]

party to the action or to mitigate damages that there had been made a material alteration in the note after its execution; the whole matter on the subject of the alteration of the note is as between the parties to such an action wholly irrelevant and immaterial for any purpose.

31. See Babb *v.* Clemson, 10 Serg. & R. (Pa.) 419, 13 Am. Dec. 684; Soaps *v.* Eichberg, 42 Ill. App. 375, for statements of the former rules in this respect.

32. Comstock *v.* Smith, 26 Mich. 306; Hunt *v.* Gray, 35 N. J. Law 227, 10 Am. Rep. 232; Pringle *v.* Chambers, 1 Abb. Pr. (N. Y.) 58; Ravisies *v.* Alston, 5 Ala. 297; Mitchell *v.* Woodward, 2 Marv. (Del.) 311, 43 Atl. 165, holding that the fact of alteration of the note sued on is matter for defense, and not ground for objection to the note as evidence.

As to whether or not such an instrument may be excluded upon failure of the party producing it to adduce the requisite explanatory evidence see *infra* II, 7-A.

33. *See infra*, this title III, "QUESTIONS OF LAW AND FACT."

34. Hochmark *v.* Richler, 16 Colo. 263, 26 Pac. 818. See also Andrews *v.* Burdick, 62 Iowa 714, 16 N. W. 275; Flint *v.* Craig, 59 Barb. (N. Y.) 319.

An Erasure of the Names of the Guarantors of a Note, when the note is in the guarantor's hands, cannot be objected to by a prior or subsequent indorsee. Logue *v.* Smith, Wright (Ohio) 10.

Objection by Stranger. — In Ravisies *v.* Alston, 5 Ala. 297, it was held that as the parties to the instrument made no objection to it, but admitted its validity, certainly a third person could not object to the admission of the instrument on the ground of an alteration, unless the alteration was evidence of fraud between the parties to the injury of creditors.

Erasure by Consent. — Where the holder of a negotiable instrument, under an arrangement with the principal debtor and one of the sureties, allows the signature of the surety to be erased by the principal debtor, the latter cannot be allowed to set up the erasure in discharge of himself. People *v.* Call, 1 Den. (N. Y.) 120.

35. Lee *v.* Newland, 164 Pa. St. 360, 30 Atl. 258; Zimmerman *v.* Camp, 155 Pa. St. 152, 25 Atl. 1086; Virginia & T. Coal & I. Co. *v.* Fields, 94 Va. 102, 26 S. E. 426.

3. Material Alterations. — A. In General. — The discussion in this article of the question of the materiality of an alteration such as will necessitate the party producing the instrument to give evidence explaining the appearance of the instrument, and accordingly involve of necessity the competency of the evidence offered by him for that purpose, has been restricted to alterations which because of their materiality so affect the instrument as that nothing can be proved by it, at least, in the absence of the requisite explanatory evidence. And no attempt has been made to discuss such questions as alterations by strangers; or with due and proper authority, or the effect of the alteration on the original obligation, and other like questions which do not go to the materiality of the alteration.

B. Operation of the Alteration As Constituting Materiality. — a. *General Rule.* — The general rule deduced from all the authorities is to the effect that in order to constitute a material alteration, such as will require explanation upon the part of the party producing the instrument as evidence in his behalf, the alteration must be one which in some manner changes the legal effect or identity of the instrument in respect of some right, duty or obligation of some of the parties thereto,[36] otherwise the alteration will

Where the Execution and Delivery of a Deed Have Been Proved by Other Evidence, the deed is not inadmissible because of an alteration in the acknowledgment. Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 65.

In Missouri it is held to be a firmly established rule that any alteration of a written instrument after delivery, however immaterial in its nature, or however innocently made, must be shown to have been made with the consent of all the parties. Morrison *v.* Garth, 78 Mo. 434; First Nat. Bank *v.* Fricke, 75 Mo. 178, 42 Am. Dec. 397. *Compare* Capital Bank *v.* Armstrong, 62 Mo. 59.

36. *England.* — Doedem Lewis *v.* Bingham, 4 Barn. & A. 672, 6 Eng. C. L. 648.

Canada. — Swaisland *v.* Davidson, 3 Ont. 320.

United States. — Crawford *v.* Dexter, 5 Sawy, 201, 6 Fed. Cas. No. 3368, quoting with approval from Smith *v.* U. S., 2 Wall. (U. S.) 219; Mersman *v.* Werges, 112 U. S. 139.

Alabama. — White S. M. Co. *v.* Saxton, 121 Ala. 399, 25 So. 784; Ala. State Land Co. *v.* Thompson, 104 Ala. 570, 16 So. 440, 53 Am. St. Rep. 80, and cases cited.

Arkansas. — Inglish *v.* Breneman, 5 Ark. 377, 41 Am. Dec. 96; Little Rock Trust Co. *v.* Martin, 57 Ark. 277, 21 S. W. 468.

California. — Humphreys *v.* Crane, 5 Cal. 173; Pelton *v.* San Jacinto Lumb. Co., 113 Cal. 21, 45 Pac. 12.

Colorado. — King *v.* Rea, 13 Colo. 69, 21 Pac. 1084.

Connecticut. — Nichols *v.* Johnson, 10 Conn. 192; Mahaiwe Bank *v.* Douglass, 31 Conn. 170; Murray *v.* Klinzing, 64 Conn. 78, 29 Atl. 244.

Delaware. — Warder B. & G. Co. *v.* Stewart, 2 Maw. 275, 36 Atl. 88.

Georgia. — Low *v.* Argrove, 30 Ga. 129.

Idaho. — Mulkey *v.* Long (Idaho), 47 Pac. 949.

Illinois. — Ryan *v.* First Nat. Bank, 148 Ill. 349, 35 N. E. 1120; Magers *v.* Dunlap, 39 Ill. App. 618; McKibben *v.* Newell, 41 Ill. 461; Houghton *v.* Francis, 29 Ill. 244.

Indiana. — Bowser *v.* Rendell, 31 Ind. 128; Shuck *v.* State, 136 Ind. 63, 35 N. E. 993; Harris *v.* State, 54 Ind. 2. Citing Cochran *v.* Nebeker, 48 Ind. 459; State *v.* Berg, 50 Ind. 496.

Indian Territory.—Taylor *v.* Acom, 1 Ind. Ter. 436, 45 S. W. 130.

Iowa. — Starr *v.* Blatner, 76 Iowa 356, 41 N. W. 41.

be regarded as immaterial.[37]

Kansas. — Davis *v.* Eppler, 38 Kan. 629, 16 Pac. 793.

Kentucky. — Philips *v.* Breck, 79 Ky. 465; Phoenix Ins. Co. *v.* McKernan, 100 Ky. 97, 37 S. W. 490.

Maine. — Jewett *v.* Hodgdon, 3 Me. 103; Lee *v.* Starbird, 55 Me. 491.

Maryland. — Owen *v.* Hall, 70 Md. 97, 16 Atl. 376.

Massachusetts. — Rhoades *v.* Castner, 12 Allen 130; Osgood *v.* Stevenson, 143 Mass. 399, 9 N. E. 825.

Michigan. — Prudden *v.* Nester, 103 Mich. 540, 61 N. W. 777; Aldrich *v.* Smith, 37 Mich. 468, 26 Am. Rep. 536.

Minnesota. — Herrick *v.* Baldwin, 17 Minn. 209, 10 Am. Rep. 161.

Mississippi. — Bridges *v.* Winters, 42 Miss. 135, 2 Am. Rep. 598; Henderson *v.* Wilson, 6 How. 65.

Missouri. — Capital Bank *v.* Armstrong, 62 Mo. 59.

Nebraska. — Erickson *v.* First Nat. Bank, 44 Neb. 622, 62 N. W. 1078, 48 Am. St. Rep. 753, 28 L. R. A. 577; Hurlbut *v.* Hall, 39 Neb. 889, 58 N. W. 538.

New Hampshire. — Cole *v.* Hills, 44 N. H. 227; Humphreys *v.* Guillow, 13 N. H. 385, 38 Am. Dec. 499; Morrill *v.* Otis, 12 N. H. 466.

New York. — Martin *v.* Tradesmen's Ins. Co., 101 N. Y. 498, 5 N. E. 338; Flint *v.* Craig, 59 Barb. 319; Ludekins *v.* Pscherhofer, 5 N. Y. St. 241, 28 N. Y. Supp. 230; Casoni *v.* Jerome, 58 N. Y. 315; Booth *v.* Powers, 56 N. Y. 22.

North Carolina. — Cheek *v.* Nall, 112 N. C. 370, 17 S. E. 80.

North Dakota. — First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473.

Ohio. — Davis *v.* Bauer, 41 Ohio St. 257; Newman *v.* King, 54 Ohio St. 273, 43 N. E. 683, 56 Am. St. Rep. 705, 35 L. R. A. 471.

Oklahoma. — Richardson *v.* Fellner, 9 Okla. 513, 60 Pac. 270.

Pennsylvania. — Robertson *v.* Hay, 91 Pa. St. 242; McIntyre *v.* Velte, 153 Pa. St. 350, 25 Atl. 739; Gettysburg Nat. Bank *v.* Chisholm, 169 Pa. St. 564, 32 Atl. 730, 47 Am. St. Rep. 929.

Rhode Island. — Keene *v.* Weeks, 19 R. I. 309, 33 Atl. 446.

South Carolina. — Heath *v.* Blake, 28 S. C. 406, 5 S. E. 842; Burton *v.* Pressly, Cheves Eq. 1.

Tennessee.—McDaniel *v.* Whitsett, 96 Tenn. 10, 33 S. W. 567.

Texas. — Marrow *v.* Richardson (Tex.), 6 S. W. 763; Heath *v.* State, 14 Tex. App. 213; Butler *v.* State, 51 Tex. Crim. App. 63, 19 S. W. 676; Wegner *v.* State, 28 Tex. App. 419, 13 S. W. 608; Park *v.* Glover, 23 Tex. 469.

Utah. — American Pub. Co. *v.* Fisher, 10 Utah 147, 37 Pac. 259.

Virginia. — Dobyns *v.* Raivley, 76 Va. 537.

West Virginia. — Yeager *v.* Musgrave, 28 W. Va. 90; Moreland *v.* Nat. Bank, 5 W. Va. 74, 13 Am. Rep. 636.

Wisconsin. — Krouskop *v.* Shontz, 51 Wis. 204, 81 N. W. 241; Matteson *v.* Ellsworth, 33 Wis. 488, 14 Am. Rep. 766.

Wyoming.—McLaughlin *v.* Venine, 2 Wyo. 1.

Altering Return Term of Court of Bail Bond. — Any alteration of an instrument which causes it to speak a language different in legal effect from that which it originally spoke is a material alteration. Under this rule the alteration of a bail bond as to the term of court before which the principal is bailed to appear, if made without the consent of the sureties, is a material alteration, as to such non-consenting sureties. Heath *v.* State, 14 Tex. App. 213.

37. *Alabama.* — Winter *v.* Pool, 100 Ala. 503, 14 So. 411.

Illinois. —Ryan *v.* First Nat. Bank, 148 Ill. 349, 35 N. E. 1120.

Indiana. — Cochran *v.* Nebeker, 48 Ind. 459.

Iowa. — Horton *v.* Horton, 71 Iowa 448, 32 N. W. 452.

Louisiana. — Martin *v.* McMasters, 14 La. 420.

Maine. — Cushing *v.* Field, 70 Me. 50, 35 Am. Rep. 293.

Massachusetts. — Brown *v.* Pinkham, 18 Pick. 172.

Michigan. — White S. M. Co. *v.* Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313.

Minnesota. — Herrick *v.* Baldwin, 17 Minn. 209, 10 Am. Rep. 161.

b. *Basis of Doctrine.* — Two rules are usually assigned as the basis for the doctrine just stated: First, that the identity of the contract is destroyed by the alteration; and second, that no man shall be permitted on grounds of public policy to take the chance of committing a fraud without running any risk of loss by the event when it is detected.[38]

c. *Test of Materiality.* — (1.) **In General.** — It is immaterial how the alteration is effected, whether by erasure, interlineation or otherwise. The question is: has the integrity or identity of the paper been changed in respect of some right, duty or obligation of the party to be affected by the alteration, whether of detriment or benefit.[39]

Mississippi. — Bridges *v.* Winters, 42 Miss. 135, 2 Am. Rep. 598.

Nebraska. — Fisherdick *v.* Hutton, 44 Neb. 122, 62 N. W. 488.

New York. — Casoni *v.* Jerome, 58 N. Y. 315.

Ohio. — Huntington *v.* Finch, 3 Ohio St. 445.

Pennsylvania. — Express Pub. Co. *v.* Aldine Press Co., 126 Pa. St. 347, 17 Atl. 608.

Texas. — Churchill *v.* Bielstein, 9 Tex. Civ. App. 445, 29 S. W. 302; Tutt *v.* Thornton, 57 Tex. 35.

Wisconsin. — Krouskop *v.* Shontz, 51 Wis. 204, 8 N. W. 241.

Erasing Unperformed Condition. A credit on a note indorsed pursuant to the agreement with the maker, conditional upon his performing certain acts, may be erased by the holder where the maker fails to perform the condition upon which the credit was indorsed. Chamberlain *v.* White, 79 Ill. 549.

Description of Property Attached. An interlineation in a delivery bond giving a description of the attached property, made in good faith by the officer to whom the bond is presented for acceptance, at the request of the principal in the bond, is not a material alteration. Rowley *v.* Jewett, 56 Iowa 492, 9 N. W. 353.

38. *Massachusetts.* — Lee *v.* Butler, 167 Mass. 426, 46 N. W. 52, 57 Am. St. Rep. 466; Cambridge Sav. Bank *v.* Hyde, 131 Mass. 77, 41 Am. Rep. 193.

Minnesota. — Theopold *v.* Deike, 76 Minn. 121, 78 N. W. 977.

New Jersey. — Hunt *v.* Gray, 35 N. J. Law 227, 10 Am. Rep. 232.

Ohio. — Huntington *v.* Finch, 3 Ohio St. 445.

Pennsylvania. — Gettysburg Nat. Bank *v.* Chisolm, 169 Pa. St. 564, 32 Atl. 730, 47 Am. St. Rep. 929, quoting with approval from Hartley *v.* Corboy, 150 Pa. St. 23, 24 Atl. 295.

Tennessee. — McDaniel *v.* Whitsett, 96 Tenn. 10, 33 S. W. 567.

Virginia. — Newell *v.* Mayberry, 3 Leigh 250, 23 Am. Dec. 261, and cases cited; Dobyns *v.* Rawley, 76 Va. 537.

See also cases cited and particularly applied in the succeeding sections.

39. *Alabama.* — White S. M. Co. *v.* Saxon, 121 Ala. 399, 25 So. 784; Lesser *v.* Scholze, 93 Ala. 338, 9 So. 273.

Indiana. — Johnston *v.* May, 76 Ind. 293.

Iowa. — Dickeman *v.* Miner, 43 Iowa 508.

Kansas. — McCormick Harv. Mach. Co. *v.* Lauber, 7 Kan. App. 730, 52 Pac. 577.

Kentucky. — Phoenix Ins. Co. *v.* McKernan, 100 Ky. 97, 37 S. W. 490.

Missouri. — Moore *v.* Hutchinson, 69 Mo. 429.

New York. — McCaughey *v.* Smith, 27 N. Y. 39.

And see cases cited and applied to particular kinds of alterations in the succeeding sections.

The Test is whether the alteration has made the writing a new writing; and not whether the new writing is more or less beneficial to some of the parties. Chism *v.* Toomer, 27 Ark. 108.

(2.) Effect on Liability of Maker or Obligor. — Within the rule previously stated, it is held that any alteration is material which operates to change the legal liability of the maker or obligor, or which may work to his prejudice; and it is immaterial whether that change is the enlargement or reduction of his liability.[40]

(3.) The Time of the Alteration. — An alteration of a writing, although apparent on its face, is immaterial if it was made before execution of the writing, which includes its delivery, and hence does not affect its character or value as an instrument of evidence.[41]

d. *Intent.*— Again it has been held not to be material whether or not the alteration was made with fraudulent intent,[42] or innocently

40. *England.* — Gardner *v.* Walsh, 5 El. & B. 83, 85 Eng. C. L. 83.

United States. — Miller *v.* Stewart, 9 Wheat. 680; Mersman *v.* Werges, 112 U. S. 139.

Alabama. — Green *v.* Sneed, 101 Ala. 205, 13 So. 277, 46 Am. St. Rep. 119; Glover *v.* Robbins, 49 Ala. 219, 20 Am. Rep. 272.

Arkansas. — Fordyce *v.* Kosminski, 49 Ark. 40, 3 S. W. 892, 4 Am. St. Rep. 18; Little Rock Trust Co. *v.* Martin, 57 Ark. 277, 21 S. W. 468; Chism *v.* Toomer, 27 Ark. 108.

Colorado.—Hoopes *v.* Collingwood, 10 Colo. 107, 13 Pac. 909, 10 Am. St. Rep. 565.

Connecticut. — Aetna Nat. Bank *v.* Winchester, 43 Conn. 391.

Georgia. — Gwin *v.* Anderson, 91 Ga. 827, 18 S. E. 43.

Illinois. —Rudesill *v.* Jefferson Co., 85 Ill. 446; Yost *v.* Minneapolis Harv. Wks., 41 Ill. App. 556.

Indiana. — Wier Plow Co. *v.* Walinsley, 110 Ind. 242, 11 N. E. 232.

Kentucky. — Locknane *v.* Emerson, 11 Bush. 69.

Michigan. — Osburne *v.* Van Houten, 45 Mich. 444, 8 N. W. 77.

Minnesota. — Renville Co. *v.* Gray, 61 Minn. 242, 63 N. W. 635; White *v.* John, 24 Minn. 387.

Nebraska. — State Sav. Bank *v.* Shaffer, 9 Neb. 1, 1 N. W. 980, 31 Am. Rep. 394.

New Hampshire. — Goodman *v.* Eastman, 4 N. H. 455.

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

Ohio. — Jones *v.* Bangs, 40 Ohio St. 139, 48 Am. Rep. 664.

Virginia. — Dobyns *v.* Rawley, 76 Va. 537.

And see cases cited and applied in notes to succeeding sections.

A Reduction of the Penalty Named in the Bond of a Sheriff made by the proper authorities, but after the execution by the sheriff and a portion of the sureties, and without their knowledge or consent, is a material alteration. People *v.* Brown, 2 Dougl. (Mich.) 9.

41. Hall *v.* Weaver, 34 Fed. 104, quoting with approval from 1 Whart. Ev., § 625, to the effect that "the period after which alterations, not mutual, are false is that of the final delivery of the document." To similar effect see Hills *v.* Barnes, 11 N. H. 395; Chapman *v.* Sargent, 6 Colo. App. 438, 40 Pac. 849; Williams *v.* Starr, 5 Wis. 534; Hilton *v.* Houghton, 35 Me. 143; Thorpe *v.* Keeler, 18 N. J. Law 252. *Compare* Briton *v.* Dierker, 46 Mo. 591, 2 Am. Rep. 553.

42. Vogle *v.* Ripper, 34 Ill. 100, 85 Am. Dec. 298; Owen *v.* Hall, 70 Md. 97, 16 Atl. 376; Phoenix Ins. Co. *v.* McKerran, 100 Ky. 97, 37 S. W. 490; Richardson *v.* Fellner, 9 Okla. 513, 60 Pac. 270; Craighead *v.* McLoney, 99 Pa. St. 211.

An Immaterial Alteration Is Not Made Material Simply by the Intent, if the intent to give a different effect to the instrument was not and could not be effectuated by the act done. Robinson *v.* Phoenix Ins. Co., 25 Iowa 430; Fuller *v.* Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600. *Compare* McDaniel *v.* Whitsell, 96 Tenn. 10, 33 S. W. 567.

or in the belief that it could lawfully be made without the consent of the other party to the instrument.[43]

C. Subject Matter of the Alteration. — a. *In General.* — The alteration, in order to be material, must be in a material part of the instrument.[44]

b. *Inserting Matter Which Law Would Supply.* — An alteration is regarded as immaterial which only expresses what the law implies.[45]

43. Hartley *v.* Corboy, 150 Pa. St. 23, 24 Atl. 295. See also Gettysburg Nat. Bank *v.* Chisolm, 169 Pa. St. 564, 32 Atl. 730, 47 Am. St. Rep. 929; Moore *v.* Hutchinson, 69 Mo. 429. *Compare* First Nat. Bank *v.* Wolff, 79 Cal. 69, 21 Pac. 551.

44. *United States.* — Crawford *v.* Dexter, 5 Sawy. 201, 16 Fed. Cas. No. 3368.

Illinois. — Bryan *v.* Dyer, 28 Ill. 188.

Kentucky. — Lisle *v.* Rogers, 18 B. Mon. 528; Woolfolk *v.* Bank of America, 10 Bush. 504.

Michigan. — White S. M. Co. *v.* Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313.

Nebraska. — State Sav. Bank *v.* Shaffer, 9 Neb. 1, 1 N. W. 980, 31 Am. Rep. 394, citing Brown *v.* Straw, 6 Neb. 536, 29 Am. Rep. 369.

New York.—People, *ex rel.* Newel, *v.* Muzzy, 1 Denio 239.

Texas. — Morris *v.* Cude, 57 Tex. 337; Gregg *v.* State, 18 Tex. App. 295.

And see cases cited in succeeding sections.

When a Contract Is Evidenced by Several Writings, all of which are material to show the actual agreement between the parties, the fraudulent alteration of any of them by one of the parties is a material alteration of the contract. Myer *v.* Hinneke, 55 N. Y. 412.

Adding a Date to an Indorsement of a Payment upon the back of a promissory note is not an alteration of the note. Howe *v.* Thompson, 11 Me. 152. "The indorsement," said the court, "on the back of the note forms no part of the original instrument, and the addition of the date to this indorsement can have no effect upon the legal validity of that instrument. It is no alteration of it, and can neither destroy its efficacy or give it force."

Credits Wrongfully Indorsed Upon a Promissory Note by the maker may properly be obliterated by the holder thereof. Burtch *v.* Dent, 13 Ind. 542.

The Writing of a Guaranty on the Back of a Note by the Payee Thereof at the time of the transfer by him to the present holder, is not an alteration of the original contract of the makers; it is the collateral undertaking of the payee, which in no way affects the liability of the original parties. Hutches *v.* Case Thresh. Mach. Co. (Tex. Civ. App.), 35 S. W. 60.

Cutting Margin of Paper. — In Goodfellow *v.* Inslee, 12 N. J. Eq. 355, it was objected that the obligee mutilated the bond, cutting off a part of the margin, and mutilating the receipts upon it. The answer was held to be that the instrument itself was not mutilated. "The mere cutting the margin of the paper upon which a bond is printed or written," said the court, "is not a mutilation of the instrument itself. It is no part of the bond, as a legal instrument, where the paper has been mutilated for the purpose of destroying a receipt or other indorsement upon the paper; the strongest presumptions may be raised against his touching the instrument mutilated or destroyed, but it is no mutilation or alteration of the bond itself."

45. *England.* — Waugh *v.* Phillips, 5 Taunt. 707, 15 Rev. Rep. 624.

Alabama. — Anderson *v.* Bellenger, 87 Ala. 334, 6 So. 82, 4 L. R. A. 68, 13 Am. St. Rep. 46.

Illinois. — Swigart *v.* Weare, 37 Ill. App. 258.

Indiana. — State *v.* Berg, 50 Ind. 496.

c. *Orthography, Phraseology, Etc.* — **(1.) Generally.** — Nor is a mere change in the phraseology of the language, a material alteration, where the sense or legal effect of the instrument is not affected.[46]

(2.) Conforming Writing to Intention of Parties. — An alteration which not only does not change the meaning and construction of the writings, but does in fact conform the language of the writing to the clear and obvious intention of the parties,[47] or which only conforms the writing to the facts, and goes but to the identity of its subject matter, is not material.[48]

d. *Retracing Pencil Writing in Ink.* — Where a note is written in pencil, to go over it and retrace the writing in ink is not a material alteration, although done without the consent of the maker by a party claiming under it.[49]

e. *Memoranda.* — **(1.) General Rule.** — Any alteration of a memorandum placed upon a written instrument, or annexed thereto, is not material where such memorandum is no part of the writing, or in no way effects a change therein.[50] But where the memoran-

Iowa. — James *v.* Delbey, 107 Iowa 463, 78 N. W. 51.

Massachusetts. — Hunt *v.* Adams, 6 Mass. 519.

Mississippi. — Bridges *v.* Winters, 42 Miss. 135, 2 Am. Rep. 598.

Missouri. — West Bldg. & Loan Ass'n *v.* Fitzmaurice, 7 Mo. App. 283.

New Hampshire. — Burnham *v.* Ayer, 35 N. H. 351.

New York. — Kinney *v.* Schmitt, 12 Hun 521.

Tennessee. — Blair *v.* State Bank, 11 Humph. 84.

Washington. — Kleeb *v.* Bard, 12 Wash. 140, 40 Pac. 733.

The Addition to a Bond for a Deed, of a Clause Granting Immediate Possession to the obligee, without the knowledge or consent of the obligor, is a material alteration. It is not a case of inserting what the law would supply. Kelly *v.* Tumble, 74 Ill. 428.

46. State *v.* Riebe, 27 Minn. 315, 7 N. W. 262; Cushing *v.* Field, 70 Me. 50, 35 Am. Rep. 293.

Interlining the Word "Before" Over the Word "By," in a clause fixing the time within which a specified privilege may be exercised, is not a material alteration. Express Pub. Co. *v.* Aldine Press, 126 Pa. St. 347, 17 Atl. 608.

47. U. S. *v.* Hatch, 1 Paine 336, 26 Fed. Cas. No. 15,325.

Erasing Signatures Placed in the Wrong Place and re-signing in the proper place, is not a material alteration of the instrument. Fournier *v.* Cyr, 64 Me. 32; Ryan *v.* First Nat. Bank, 148 Ill. 349, 35 N. E. 1120. See also Fisher *v.* King, 153 Pa. St. 3, 25 Atl. 1029. *Compare* Morrison *v.* Garth, 78 Mo. 434, under the Missouri rule, that an unauthorized alteration, however immaterial, vitiates the writing.

48. Domestic Sewing Mach. Co. *v.* Barry, 2 Misc. 264, 21 N. Y. Supp. 970.

49. Reed *v.* Roark, 14 Tex. 329. See also Donnell Mfg. Co. *v.* Jones, 49 Ill. App. 327.

Retracing Blotted Writing. — In Dunn *v.* Clement, 7 Jones L. (N. C.) 58, where the obligee in a bond attempted to retrace part of the obligor's name, which had been blotted with ink and obscured, and in doing so mispelled it, but not so as to alter the sound, no fraud being imputable to the act, it was held that the alteration was not material.

50. *Alabama.* — Manning *v.* Maroney, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67; Maness *v.* Henry, 96 Ala. 454, 11 So. 410.

Louisiana. — Nugent *v.* Delhomme, 2 Mart. O. S. 308.

Maine. — Cushing *v.* Field, 70 Me. 50, 35 Am. Rep. 293.

dum constitutes part of the instrument, an alteration thereof is governed by the same rules as obtains in the case of an alteration of the body of the instrument, except in those cases where the memorandum has been made in such manner as to permit of its being altered, and still leave the body of the instrument unaffected,[51] and whether the memorandum qualifying the effect of the instrument is underwritten or indorsed, is immaterial, so long as it is in fact a part of the original contract.[52] A memorandum under a negotiable

Missouri. — American Nat. Bank *v.* Bangs, 42 Mo. 450, 97 Am. Dec. 349.

Nebraska. — Palmer *v.* Largent, 5 Neb. 223, 25 Am. Rep. 479.

North Carolina.—Hubbard *v.* Williamson, 5 Ired. 397.

Texas. — First Nat. Bank *v.* Pritchard, 2 Will. Tex. Civ. Cas. Ct. App. § 130; Marrow *v.* Richardson (Tex.), 6 S. W. 763.

A Memorandum of a Partial Payment indorsed by the holder on a promissory note, is no part of the note or written evidence of the contract of the parties; and hence its erasure by the holder, although fraudulently made, is not an alteration of the note. Theopold *v.* Deike, 76 Minn. 121, 78 N. W. 977.

In Foote *v.* Bragg, 5 Blackf. (Ind.) 363, the payee of a note indorsed over his signature the words "Pay the bearer," and delivered it to the present holder. It was held that the holder might erase the words "Pay the bearer" and insert in their place over the payee's signature a formal assignment of himself.

Erasing Unauthorized Indorsement Made by Agent. — Erasing an indorsement put on a note pursuant to a contract between the maker and an unauthorized agent of the payee is not an alteration of the note. Waldrof *v.* Simpson, 15 App. Div. 297, 44 N. Y. Supp. 921.

51. *England.* — Fitch *v.* Jones, 5 Ellis & B. 238, 85 Eng. C. L. 238.

Canada. — Campbell *v.* McKennon, 18 U. C. Q. B. 612; Swaisland *v.* Davidson, 3 Ont. 320.

Illinois. — Benjamin *v.* McConnel, 9 Ill. 536, 46 Am. Dec. 474.

Indiana. — Cochran *v.* Nebeker, 48 Ind. 459.

Iowa. — Scofield *v.* Ford, 56 Iowa 370, 9 N. W. 309; State *v.* Stratton, 27 Iowa 420, 1 Am. Rep. 282.

Kentucky. — Warren *v.* Faut, 79 Ky. 1.

Maine. — Johnson *v.* Heagan, 23 Me. 329.

Massachusetts.—Wheelock *v.* Freeman, 13 Pick. 165, 23 Am. Dec. 674.

Michigan. — Wait *v.* Pomeroy, 20 Mich. 425, 4 Am. Rep. 395.

Mississippi. — Bay *v.* Schrader, 50 Miss. 326.

Missouri. — Law *v.* Crawford, 67 Mo. App. 150.

Nebraska. — Davis *v.* Henry, 13 Neb. 497, 14 N. W. 523.

New Hampshire. — Gerrish *v.* Glines, 56 N. H. 9.

New Jersey. — Price *v.* Tallman, 1 N. J. Law 447.

New York. — Benedict *v.* Cowden, 49 N. Y. 396, 10 Am. Rep. 382.

Tennessee. — Stephens *v.* Davis, 85 Tenn. 271, 2 S. W. 382.

Texas. — Meade *v.* Sandidge, 9 Tex. Civ. App. 360, 30 S. W. 245.

Test of Materiality. — In Bay *v.* Schrader, 50 Miss. 326, it was held that words written on the back of a note are no part of the body thereof, *prima facie*, but are presumed to have been put there after the note was completed. The court said that the test of the materiality of such memoranda or indorsement on the back of the instrument is the time and the extent and purpose of it. If made before or at the time of the execution of the instrument it may be parcel of it and may control the obligation in some important particular. But being disconnected from the body of the instrument through which the maker's name is signed it forms no potent part of it until shown to have been on it when executed.

52. Swaisland *v.* Davidson, 3 Ont.

instrument and qualifying it is to be taken as a part of the contract, and the fraudulent removal of such a memorandum is a material alteration.[53]

(2.) Collateral to Writing. — If a memorandum, however, is collateral to and independent of the instrument, it does not become part of it, and placing it upon the same paper as the instrument itself is not a material alteration of the instrument.[54]

Memorandum Indicating Verbal Understanding. — A memorandum showing clearly that it was designed by the holder of the instrument as a mere memorandum for his own guidance, very probably having reference to some verbal understanding between himself and the maker, will not be deemed material.[55]

(3.) Marginal Figures. — The marginal figures in the corner of a note are no part of the note, and an unauthorized change in them is not a material alteration.[56]

(4.) Figures Indicating Series. — The figures in the margin of the instrument denoting the number in a particular series, to which the instrument belongs, are no part of the contract, and their alteration is immaterial.[57]

320, citing Warrington *v.* Early, 2 Ellis & B. 763; Hartley *v.* Wilkinson, 4 M. & S. 25; Campbell *v.* McKennon, 18 U. C. Q. B. 612.

53. Orton *v.* Largent, 5 Neb. 223. *Compare* Zimmerman *v.* Rote, 75 Pa. St. 188.

54. *Alabama.* — Maness *v.* Henry, 96 Ala. 454, 11 So. 410.

Arkansas. — Mente *v.* Townsend, 68 Ark. 391, 59 S. W. 41.

Indiana. — Current *v.* Fulton, 10 Ind. App. 617, 38 N. E. 419.

Maine. — Littlefield *v.* Combs, 71 Me. 110.

Massachusetts. — Cambridge Sav. Bank *v.* Hyde, 131 Mass. 77, 41 Am. Rep. 193.

Minnesota. — White *v.* Johns, 24 Minn. 387.

Nebraska. — Oliver *v.* Hawley, 5 Neb. 439.

New Hampshire. — Morrill *v.* Otis, 12 N. H. 466.

In Payne *v.* Long, 121 Ala. 385, 25 So. 780, the alteration alleged was that before the note was delivered, the defendant entered thereon a memorandum: "Subject to a settlement between us;" that after said note was delivered, plaintiff, without the knowledge or consent of the defendant, detached the memorandum. The court said that the memorandum plainly enough indicated that there was something unsettled between the parties not included in the note, and which may be brought forward on its settlement, and such words constituted a material part of the note.

55. Carr *v.* Welch, 46 Ill. 88.

56. Smith *v.* Smith, 1 R. I. 398, 53 Am. Dec. 652; Johnston Harvester Co. *v.* McLean, 57 Wis. 258, 15 N. W. 117; Woolfolk *v.* Bank of America, 10 Bush 504; Schryver *v.* Hawks, 22 Ohio St. 308; Yost *v.* Watertown Steam Engine Co. (Tex. Civ. App.), 24 S. W. 657; Chase *v.* Washington M. Ins. Co., 12 Barb. 595; Kinard *v.* Glenn, 29 S. C. 590, 8 S. E. 203.

Words Added Upon the Margin of an Obligation, and above the signatures of the obligors, by an arrangement between the obligee and principal obligor, after the delivery of the writing, are to be deemed a part of the obligation. Warren *v.* Fant, 79 Ky. 1.

57. *England.* — Suffell *v.* Bank of Eng., 51 L. J. Q. B. 401, 9 Q. B. D. 555 (reversing 7 Q. B. Div. 270).

United States. — Wylie *v.* Mo. Pac. R. Co., 41 Fed. 623.

Alabama. — State *ex rel.* Plock *v.* Cobb, 64 Ala. 127.

f. *Matters Pertaining to the Execution of the Writing.*— **(1.) Place of Execution.** — Adding the name of a place to the signature of the maker of a note, so as to make the note negotiable according to the laws of that place, is a material alteration.[58] So also is changing the name of the place where the instrument purports to have been executed.[59]

(2.) Date. — (A.) In General. — The alteration of the date of a negotiable instrument, without the consent of the maker or surety, is a material alteration; and it makes no difference whether the effect of the alteration is to accelerate or extend the time of payment.[60] An impossible date raises a presumption of *ante* or *post*

Massachusetts. — Com. *v.* Emigrant Industrial Sav. Bank, 98 Mass. 12.

New Jersey. — Elizabeth *v.* Force, 29 N. J. Eq. 587 (reversing 28 N. J. Eq. 587).

New York. — Birdsall *v.* Russell, 29 N. Y. 220 (*dictum*).

Tennessee. — Bank of Tennessee *v.* Funding Board, 16 Lea 46, 57 A. S. R. 211.

58. Commercial & Farmers Bank *v.* Patterson, 2 Cr. C. C. 346, 6 Fed. Cas. No. 3056.

Memorandum Indicating Object of Instrument. — In Bachellor *v.* Priest, 12 Pick. 39, it was held that a memorandum written on a bill of exchange under the signature of the drawer indicating it had been left with the indorser was in no sense an alteration of the original. "It was a memorandum of a collateral agreement between the maker and indorser which did no more affect the liability of the parties to the note than it would have done had it been made on a separate cover."

Memorandum Indicating Beneficiary of Insurance Policy.—A memorandum written in lead pencil on the face of an insurance policy amounting to no more than a suggestion of the wishes of the insured as to the persons for whose benefit the insurance is taken, is not an alteration. Chase *v.* Washington M. Ins. Co., 12 Barb. 595.

Memorandum of Insertions Before Signatures. — A note or memorandum preceding the signatures of the makers of a bond and stating that certain words have been inserted in a bond before signatures affixed is not a part of the bond proper. White *v.* Johns, 24 Minn. 387.

59. Mahaiwe Bank *v.* Douglass, 31 Conn. 170; McQueen *v.* McIntyre, 30 U. C. C. P. (Can.) 426.

60. *England.*—Outhwaite *v.* Lemtley, 4 Camp. 176, 16 Rev. Rep. 771; Master *v.* Miller, 4 T. R. 320; Vance *v.* Lowther, L. R. 1 Exchange Div. 176, 13 M. & W. 778, 34 L. T. N. S. 286.

Canada. — Gladstone *v.* Dew, 9 U. C. C. P. 439; Meredith *v.* Culver, 5 U. C. Q. B. 218.

United States. — Wood *v.* Steele, 6 Wall. 80. *Contra.*—Union Bank *v.* Cook, 2 Cr. C. C. 218, 24 Fed. Cas. No. 14,349.

Alabama. — Lesser *v.* Scholze, 93 Ala. 338, 9 So. 273.

Arkansas. — Lemay *v.* Williams, 32 Ark. 166.

California. — Galland *v.* Jackson, 27 Cal. 79.

Delaware. — Warren *v.* Layton, 3 Harr. 404.

Georgia. — Armstrong *v.* Penn, 105 Ga. 229, 31 S. E. 158; Wheat *v.* Arnold, 36 Ga. 479.

Illinois. — Wyman *v.* Yoemans, 84 Ill. 403.

Indiana. — Hamilton *v.* Wood, 70 Ind. 306.

Kansas. — Fraker *v.* Cullum, 21 Kan. 402; McCormick Harv. Mach. Co. *v.* Lauber, 7 Kan. App. 730, 52 Pac. 577.

Kentucky. — Bank of Com. *v.* McChord, 4 Dana 191, 29 Am. Dec. 398; Letcher *v.* Bates, 6 J. J. Marsh. 524, 22 Am. Dec. 92; Lisle *v.* Rogers, 18 B. Mon. 528.

dating; but not of alteration.[61]

(B.) Date of Payment Fixed. — When the date of the payment of the obligation evidenced by the paper is fixed and is not dependent upon the date of the paper, changing the date of the paper has been held to be immaterial.[62]

(C.) Changing Date to Date Intended. — But the date of an instrument may be changed so as to make it correspond with the intention of the parties.[63]

Maine. — Hervey *v.* Hervey, 15 Me. 357.

Maryland. — Mitchell *v.* Ringgold, 3 Har. & J. 159, 5 Am. Dec. 433.

Missouri. — Britton *v.* Dierker, 46 Mo. 591, 2 Am. Rep. 553; Aubuchon *v.* McNight, 1 Mo. 312, 13 Am. Dec. 502.

Montana. — McMillan *v.* Hefferlin, 18 Mont. 385, 45 Pac. 548.

Nebraska. — State Sav. Bank *v.* Shaffer, 9 Neb. 1, citing Brown *v.* Straw, 6 Neb. 536, 31 Am. Rep. 394.

New Hampshire. — Bowers *v.* Jewell, 2 N. H. 543.

New Jersey. — Wright *v.* Wright, 7 N. J. Law 175, 22 Am. Dec. 483.

New Mexico. — Ruby *v.* Talbot, 5 N. Mex. 251, 21 Pac. 72, 3 L. R. A. 724.

New York. — Rogers *v.* Vosburgh, 87 N. Y. 228; Crawford *v.* Westside Bank, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152.

Pennsylvania. — Kennedy *v.* Lancaster Bank, 18 Pa. St. 347; Heffner *v.* Wenrich, 32 Pa. St. 423; Stephens *v.* Graham, 7 Serg. & R. 505, 10 Am. Dec. 485; Hocker *v.* Jamison, 2 W. & S. 438; Miller *v.* Gilleland, 19 Pa. St. 119; Getty *v.* Shearer, 20 Pa. St. 12.

Tennessee. — Taylor *v.* Taylor, 12 Lea 714.

Wisconsin. — Lowe *v.* Merrill, 1 Prim. 340.

The Date of an Assignment or Indorsement of a Note is not an essential part of it; and an alteration thereof is not material. Griffith *v.* Cox, 1 Overt. (Tenn.) 210.

Transposing Words Indicating Date. — Erasing the figures indicating the day of the month, after the month, and writing them before, is not a material alteration. Reed *v.* Kemp, 16 Ill. 445.

61. Davis *v.* Loftin, 6 Tex. 489.

62. Prather *v.* Zulauf, 38 Ind. 155.

63. Ryan *v.* First Nat. Bank, 148 Ill. 349, 35 N. E. 1120. See also Ames *v.* Colburn, 11 Gray (Mass.) 390, 71 Am. Dec. 723; Dyker *v.* Fraz, 7 Bush (Ky.) 273, 3 Am. Rep. 314; Hervey *v.* Hervey, 15 Me. 357; Merchant's Bank *v.* Stirling, 13 Nova Scotia, 439, where the court say that a "mistake or omission stands upon a different footing, and a bill may be altered to correct a mistake and in furtherance of the original intentions of the parties;" *citing* Downes *v.* Richardson, 5 B. & Ald. 674.

Consent of All Parties Necessary. But the holder of a bill has no right to make an alteration in it to correct a mistake in the date, unless to make the instrument conform to what *all the parties to it* agreed or intended it should have been. Hervey *v.* Hervey, 15 Me. 357.

Effect of Statute of Limitations. In Horner *v.* Wallis, 11 Mass. 309, the payee of a note, procured one, not present at its execution, to attest it as a witness, and the court held it to be a material alteration. The opinion of the court seems to have been materially influenced by a statute of limitations of Massachusetts, making a difference between attested and unattested notes. Yet the same court, in Smith *v.* Dunham, 8 Pick. 249, where the payee procured one present at the execution of the note, afterwards, and without the knowledge of the maker to attest it, but without any fraudulent intent, held the alteration to be immaterial.

And in Ford *v.* Ford, 17 Pick. 418, the note was signed, and was attested by a single witness, which gave it the character of a witnessed

(3.) Attestation. — The attestation of a note by one who was not present and did not see the maker sign, has been held to be a material alteration;[64] but it has been held not to be a material alteration for an attesting witness who saw the paper executed to afterwards sign, although without the knowledge or consent of the sureties,[65] at least if he does so, or the procurement of his doing so, is without wrongful or improper intent.[66]

(4.) Seals. — Putting a seal upon an instrument after its execution, without the knowledge or consent of the maker or obligor, is a material alteration.[67] So also is tearing or cutting off the

note. The addition of the attestation of another witness in the absence of the maker furnished to the plaintiff additional evidence, but it was held not to be a material alteration of the note, because it made no alteration in its character.

64. Montgomery R. Co. *v.* Hurst, 9 Ala. 513; White T. M. Co. *v.* Saxon, 121 Ala. 39, 25 So. 784; Eddy *v.* Bond, 19 Me. 461; Foust *v.* Remio, 8 Pa. St. 378; Henning *v.* Werkheiser, 8 Pa. St. 578. *Compare* Talbot *v.* Hodson, 7 Taunt. 251, 2 Eng. C. L. 248; Fuller *v.* Green, 64 Wis. 159, 24 N. W. 907; State *v.* Gherkin, 7 Ired. (N. C.) 206.

Alteration Before Delivery. When a person executes a bond as surety, and leaves it with his principal for delivery to the obligee, and before doing so the principal procures a third person to attest the sureties' signature, who is not authorized to do so, such alteration is not an alteration of the bond, that impairs or affects its value as an instrument of evidence in the hands of the obligee, because it was made before delivery. Hall *v.* Weaver, 34 Fed. 104.

Signer Acknowledging Signature. In Blackwell *v.* Lane, 4 Dev. & B. L. (N. C.) 113, 32 Am. Dec. 675, the attesting witness, after the signature by the maker, asked the latter if he acknowledged the signature to be his, which he did; and it was held that such an alteration did not affect the paper.

Attestation at Instance of Obligor. The addition of a subscribing witness to a bond after its execution, made at the instance of one of the obligors, and whether the other obligor was present or not did not distinctly appear, but not made at the request of the obligors or with their knowledge, is not a material alteration. Fritz *v.* Commissioner of Montgomery Co., 17 Pa. St. 130.

Attestation Prima Facie Evidence of Fraudulent Intent. — In Adams *v.* Frye, 3 Met. 103, it was held that the procurement of such an attestation would be *prima facie* evidence of fraudulent intent; but that it might be rebutted by proof. To the same effect, see Willard *v.* Clarke, 7 Met. 435.

Striking Out Attestation. — In Church *v.* Fowle, 142 Mass. 12, 6 N. E. 764, it is held that such an attestation is a material alteration, but that it does not make the note void, and that the alteration, being unauthorized and no part of the contract as understood or intended by either party, may be stricken out.

65. Govenor *v.* Tagow, 43 Ill. 134.

66. Milberry *v.* Stover, 75 Me. 69.

67. *England.* — Davidson *v.* Cooper, 11 M. & W. 781; affirmed 13 M. & W. 353.

United States. — U. S. *v.* Linn, 1 How. 104.

Delaware. — State *v.* Smith, 9 Houst. 143.

Maryland. — Morrison *v.* Welty, 18 Md. 169.

Massachusetts. — Warring *v.* Williams, 8 Pick. 326.

Michigan. — Rauson *v.* Davidson, 49 Mich. 607.

Missouri. — Fred Heim Brew. Co. *v.* Hazen, 55 Mo. App. 277.

New York. — Farmers' Loan & T. Co. *v.* Sufke, 144 N. Y. 354, 39 N. E. 358.

seal.[68]

g. Matters in Respect of Nature and Terms of Instrument.

(1.) In General. — Any alteration which in some manner changes some material terms or conditions as expressed in the instrument, is a material alteration.[69]

Ohio. — Fullerton *v.* Sturges, 4 Ohio St. 530.

Pennsylvania. — Bierg *v.* Haines, 5 Whart. 563.

South Carolina. — Vaughan *v.* Fowler, 14 S. C. 355.

Texas. — Muckelroy *v.* Bethany, 23 Tex. 163.

Vermont. — Barnett *v.* Abbott, 53 Vt. 120.

68. *England.* — Mathewson *v.* Lydiate, 5 Coke 44.

North Carolina. — Evans *v.* Williamson, 79 N. C. 86.

Pennsylvania. — Rittenhouse *v.* Levening, 6 Watts. & S. 190.

South Carolina. — Porter *v.* Doley, 2 Rich. Eq. 49.

Tennessee. — Organ *v.* Allison, 9 Baxt. 459.

Vermont. — Dewey *v.* Bradberg, 1 Tyler 186.

West Virginia. — Piercy *v.* Piercy, 5 W. Va. 199.

Compare Keen *v.* Monroe, 75 Va. 424.

Several Obligation. — In Collins *v.* Presser, 1 Barn. & C. 682, 8 Eng. C. L. 183, debt on a bond, whereby Sir N. C. G. S. W., and J. W. acknowledged themselves held and bound to the plaintiffs in "£1000 each for which they bound themselves, and each of them for himself for the whole and entire sum of £1000 each," subject to a condition that G. B. M. should render a true account of all moneys received by him as treasurer for the county of Middlesex. *Held*, that this was a several bond only, and that the removal, by the obligees, of the seal of one obligor, did not constitute a material alteration.

69. *England.* — Powell *v.* Divett, 15 East 29; Mollett *v.* Wackenbarth, 5 M. G. & S. 181, 57 Eng. C. L. 181.

Alabama. — Payne *v.* Long, 121 Ala. 385, 25 So. 780.

Illinois. — Kelly *v.* Trumble, 74 Ill. 428.

Indiana. — Wier Plow Co. *v.* Walmsley, 110 Ind. 242, 11 N. E. 232.

Massachusetts. — Osgood *v.* Stevenson, 143 Mass. 399, 9 N. E. 825.

Michigan. — Osborne *v.* Van Houton, 45 Mich. 444, 8 N. W. 77.

Minnesota. — Flanigan *v.* Phelps, 42 Minn. 186, 43 N. W. 1113.

Pennsylvania. — Bengevin *v.* Bishop, 91 Pa. St. 336; McIntyre *v.* Velte, 153 Pa. St. 350, 25 Atl. 739.

Tennessee. — McDaniel *v.* Whitsett, 96 Tenn. 10, 33 S. W. 567.

Utah. — American Pub. Co. *v.* Fisher, 10 Utah 147, 37 Pac. 259.

Wisconsin. — Schwalm *v.* McIntyre, 17 Wis. 232.

Striking Out the Words "the Collection of" in the Phrase "I Guarantee the Collection of the Within Note," is a material alteration; the result of such act is to make the guarantee an absolute one. Newlan *v.* Harrington, 24 Ill. 206.

Striking Out the Clause "I Do Not, However, Guarantee Its payment" in an Assignment of a Debt, is not a material alteration where there is not in the assignment itself any guaranty of the payment of the debt. Prudden *v.* Nestor, 103 Mich. 540, 61 N. W. 777.

The Addition by the Payee of a Promissory Note of the Words "Without Defalcation or Setoff," without the knowledge or consent of the maker, is a material alteration of the note. Davis *v.* Carlisle, 6 Ala. 707.

Writing a Waiver of Exemptions over the name of the indorser of a note, is a material alteration, as against the indorser. Jordon *v.* Long, 109 Ala. 414, 19 So. 843.

Waiver of Benefit of Statute. The alteration of a mortgage by adding a clause waiving the benefit of a specific statute which, in fact, had been repealed prior to the execution of the mortgage, and hence had no validity whereby the mort-

Attorneys' Fees. — An alteration of a note by the holder, after its execution, without the knowledge or consent of the maker, whereby the provision for attorneys' fees in case suit is brought on the note is made an absolute agreement by striking out the clause as to suit being brought, is material.[70]

Compliance With Condition. — An indorsement on a note after its delivery, by the maker thereof, but without the consent of a surety, the payment of which is conditioned on the performance by the payee of a written agreement of even date therewith, that the payee has complied with the condition, is not a material alteration.[71]

(2.) Waiver of Demand and Notice. — It is a material alteration of a note to change the liability of an indorsee from a conditional to an absolute engagement.[72]

(3.) Negotiability. — An alteration of a written instrument, whereby the instrument is changed from a non-negotiable to a nego-

gage could be affected, is an immaterial alteration, which, in no manner, prejudices the mortgagor. Robertson *v.* Hay, 91 Pa. St. 242.

Clause Charging Married Woman's Estate. — In Taddiken *v.* Cantrell, 69 N. Y. 597, it was held that where a married woman executes a promissory note in the ordinary form, and perfect in its terms, the fact, that in order to make it binding upon her, the addition of other terms not suggested by the paper itself is required, i. e., an expression of an intent to charge her separate estate, does not justify the payee in making such an addition after delivery of the note, and without her knowledge and consent; and if so made it is a material alteration. Reeves *v.* Pierson, 23 Hun 185.

But since the enactment of laws N. Y. 1884, c. 381, making the separate estate of a married woman liable for her contracts, and providing that in no case shall a charge on her separate estate be necessary, it is not a material alteration to write above a married woman's indorsement on a note that she charged her estate with its payment. Clapp *v.* Collins, (City Court of N. Y.), 7 N. Y. Supp. 98, wherein the court said: "At the time Taddiken *v.* Cantrell, 69 N. Y. 597, was decided, the alteration charged would have been regarded as immaterial. It did not enlarge the indorser's liability, nor change her relation to the paper. It proved nothing against her that the very nature of the obligation did not imply without the addition. It was surplusage; nothing more."

70. Tate *v.* Fletcher, 77 Ind. 102.

71. Jackson *v.* Bowles, 64 Iowa 428, 20 N. W. 746. "We are of opinion," said the court, "that the district court correctly held that the indorsement in question did not have the effect to in any manner change the terms or conditions of the note. The note, by its terms, became due on the performance of a specified agreement by the payee. The indorsement does not undertake to change the condition, or to release the payee from its performance. It is simply a written admission that they have performed it. The fact that it is indorsed on the paper on which the note is written is not material, for it is apparent from its terms that there was no intention to change any condition of the note, and it has no different effect from what it would have had if it had been embodied in a letter or other writing signed by Bowles. It is simply *prima facie* evidence that the condition precedent to the maturing of the note has happened."

72. As by writing over the signature of the indorsee a waiver of demand and notice. Buck *v.* Appleton, 14 Me. 284; Andrews *v.* Simms, 33 Ark. 771; Davis *v.* Eppler, 38 Kan. 629, 16 Pac. 793.

tiable instrument is a material alteration.[73] And inserting the words "or order" after the name of the payee, without the knowledge or consent of the maker, is a material alteration.[74] So also is an alteration of a note payable to order, whereby it is made payable to bearer.[75] And it has been held that inserting the words "or bearer" after the name of the payee, after the execution and delivery of the instrument, is a material alteration.[76]

h. *Matters in Respect of the Parties.* — **(1.) Alterations Affecting the Number of Parties.** — (A.) In General. — An alteration of an executed written instrument subsequent to its execution, and done without authority, the effect of which is to change the number of the

73. *Canada.* — Campbell *v.* McKinnon, 18 U. C. Q. B. 612; Swaisland *v.* Davidson, 3 Ont. 320.

Delaware. — Hollis *v.* Vandergrift, 5 Houst. 521.

Indiana. — Cochran *v.* Nebeker, 48 Ind. 459.

Iowa. — State *v.* Shatton, 27 Iowa 420.

Missouri. — Mechanics' Bank *v.* Valley Pack. Co., 70 Mo. 643; affirming 4 Mo. App. 200.

Nebraska. — Walton Plow Co. *v.* Campbell, 35 Neb. 173, 52 N. W. 883.

New York. — Bruce *v.* Westcott, 3 Barb. 374.

New Hampshire. — Gerrish *v.* Glines, 56 N. H. 9.

North Dakota. — First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473.

West Virginia. — Morehead *v.* Parkersburg Nat. Bank, 5 W. Va. 74, 13 Am. Rep. 636.

So also is an alteration which changes paper not commercial to commercial paper. Toomen *v.* Rutland, 57 Ala. 379; Muter *v.* Pool, 100 Ala. 503, 14 So. 411; Gillespie *v.* Kelly, 41 Ind. 158; McCoy *v.* Lockwood, 71 Ind. 319. And see *infra* this title, "Matters in Respect of the Performance; the Place;" III-3-C-k.

74. Taylor *v.* Moore (Tex.), 20 S. W. 53; Bruce *v.* Westcott, 3 Barb. 374; Johnson *v.* Bank U. S., 41 Ky. (2 B. Mon.) 310; Pepoon *v.* Stagg, 1 Nott & McC. 103; McDaniel *v.* Whitsell (Tenn.), 33 S. W. 567; Hollis *v.* Vandergrift, 5 Houst. 521; Haines *v.* Dennett, 11 N. H. 180.

75. Booth *v.* Powers, 56 N. Y. 22; Needles *v.* Shaffer, 60 Iowa 65, 14 N. W. 129; Union Nat. Bank *v.* Roberts, 45 Wis. 373; Belknap *v.* Nat. Bank of N. A., 100 Mass. 276; Sheenan *v.* Rollberg, 11 Cal. 38; McDaniel *v.* Whitesell, 96 Tenn. 10, 33 S. W. 567. See also *re* Commercial Bank, 10 Manitoba 171, so holding of such an alteration of a bank check.

Compare Flint *v.* Craig, 59 Barb. 319, where the note, payable "to the order of" a certain person was, after delivery, and without the knowledge or consent of the makers, altered by erasing the words "to the order of" and inserting the words "or bearer," which the court held not to be a material alteration.

76. Crosswell *v.* Labree, 81 Me. 44, 16 Atl. 331; Simmons *v.* Atkinson & Lampton Co., 69 Miss. 862, 23 L. R. A. 599; Walton Plow Co. *v.* Campbell, 35 Neb. 173, 16 L. R. A. 468; McConley *v.* Gonlon, 64 Ga. 221. *Compare* Weaver *v.* Bromley, 65 Mich. 212, 31 N. W. 839; McLaughlin *v.* Vennie, 2 Wyo. 1.

Instrument Not Negotiable in First Instance. — The alteration by interpolating the words "or bearer" in an instrument in form of a promissory note, but made expressly subject to the conditions of a mortgage not payable absolutely, but only on certain contingencies, in no way invalidates or changes the legal effect of the instrument; such an instrument is not negotiable, and the use of the words in question would not make it so. Goodenow *v.* Curtis, 33 Mich. 505.

parties to the writing, is usually regarded as material.[77]

(B.) Adding New Parties. — **Additional Maker or Obligor.** — Thus an alteration which consists of the addition of a new person as a principal maker or obligor, rendering all of the promisors apparently jointly and equally liable, not only to the holder, but also as between themselves, and so far tending to lessen the ultimate liability of the original maker, or makers, has been held to be a material alteration as to such previous non-consenting signers.[78] But it has

77. Donkle *v.* Milem, 88 Wis. 33, 59 N. W. 586.

Substitution of Arbitrators. — It is a material alteration of an arbitration agreement when the effect of the alteration is to permit the substitution of arbitrators for those who fail to attend. Mackay *v.* Dodge, 5 Ala. 388.

Several Deed of Husband. — Where a mortgage on a homestead was executed and delivered as a complete instrument by the husband alone, with the understanding that his wife was not to join in the execution thereof, but her signature and acknowledgment were afterward fraudulently obtained by the mortgagee, who thereupon altered the mortgage and acknowledgment so as to make it appear a mortgage by them jointly, thus giving it the force of a lien upon the homestead, as well as upon other lands covered by the mortgage, it was held that the alteration was material. Cutler *v.* Rose, 35 Iowa 456.

Release of Wife's Dower. — In Kendall *v.* Kendall 12 Allen 92, it was held that the fraudulent addition by the grantee of the mortgage of the name of the grantor's wife releasing her dower and homestead, was not a material alteration.

Attaching Duplicate Stock Subscriptions. — In Davis *v.* Campbell, 93 Iowa 524, 61 N. W. 1053, it appeared that after the defendant had signed the instrument sued on, which was a subscription to a fund raised for the purpose of erecting a creamery, the names of the signers of a duplicate subscription had been detached from the duplicate and attached to the instrument sued on; and it was held, that this was not an alteration of the contract sued on, inasmuch as it, in no way, changed its language or meaning.

78. *England.* — Gardner *v.* Walsh, 5 Ellis & B. 83, 85 Eng. C. L. 83.

Canada. — Carrigue *v.* Beaty, 24 Ont. App. 302.

United States.—Bingham *v.* Reddy, 5 Ben. 266, 3 Fed. Cas. No. 1414.

Alabama. — Brown *v.* Johnson (Ala.), 28 So. 579.

Colorado. — Hochmark *v.* Richler, 16 Colo. 263, 26 Pac. 818.

Illinois. — Soaps *v.* Eichberg, 42 Ill. App. 375.

Indiana. — Bowers *v.* Biggs, 20 Ind. 139; Henry *v.* Coats, 17 Ind. 161; Harper *v.* State, *ex rel.* Knox Co., 7 Blackf. 61.

Iowa. — Browning *v.* Gosnell, 91 Iowa 448, 59 N. W. 340; Sullivan *v.* Rudesill, 63 Iowa 158, 18 N. W. 856, citing Hamilton *v.* Hooper, 46 Iowa 515; Dikeman *v.* Miller, 43 Iowa 508; Hall *v.* McHenry, 19 Iowa 521.

Kentucky. — Pulliam *v.* Withers, 8 Dana 98; Bank of Limestone *v.* Penick, 5 T. B. Mon. 32; Singleton *v.* McQuerey, 85 Ky. 41, 2 S. W. 652; Shipp *v.* Suggett, 9 B. Mon. 5.

Missouri. — Lunt *v.* Silver, 5 Mo. App. 186.

New York. — McVean *v.* Scott, 46 Barb. 379.

Ohio. — Wallace *v.* Jewell, 21 Ohio St. 163.

Texas. — Ford *v.* First Nat. Bank (Tex. Civ. App.), 34 S. W. 684; Harper *v.* Stroud, 41 Tex. 367.

The Reason For This Rule is said to be because it changes the number of parties and their relative rights; it changes the rate of contribution, and it changes the character and description of the instrument. Ford *v.* First Nat. Bank (Tex. Civ. App.), 34 S. W. 684.

been held otherwise of the addition of another person as maker to a several note.[79]

Sureties. — It has been held that the signing of an instrument by one as surety, after its execution by the original maker, without his knowledge and consent, is not a material alteration as to such non-consenting maker,[80] although there are cases to the contrary.[82] But it has been held that the signing by one as additional surety, after the execution of the original instrument, and without the knowledge or consent of previous sureties, is a material alteration as to the previous signing sureties;[83] although the apparent weight of authority is otherwise.[84]

Slight Evidence of Assent. — Two persons having given a note, in the body of which they were named as promisors, the addition afterward of a third signature, with a corresponding change in the body, without the consent of the original signers, was held to vitiate the note as to them. But where without any change in the form of the note, an additional promisor signed it, a jury may find it to be still the act and deed of the first signer, upon very slight evidence of even a subsequent assent on his part, and the verdict will be sustained. Pulliam *v.* Withers, 8 Dana (Ky.) 98.

The Signature of the Wife of the Principal Maker of a note after its execution and without the knowledge or consent of the surety, is not a material alteration of the note. Williams *v.* Jensen, 75 Mo. 681. "Such a signature," said the court, "imposed upon her no legal liability whatever, being in contemplation of law a nullity, and the responsibility of the parties to the note was in no way increased or diminished or otherwise changed by the addition of her name thereto."

79. Brownell *v.* Winnie, 29 N. Y. 400.

80. *United States.* — Mersman *v.* Werges, 112 U. S. 139.

Alabama. — Montgomery R. Co. *v.* Hurst, 9 Ala. 513.

Illinois. — Ives *v.* McHard, 2 Ill. App. 176.

Massachusetts. — Stone *v.* White, 8 Gray (Mass.) 589.

Michigan. — Miller *v.* Finley, 26 Mich. 249, 12 A. R. 306; Union Banking Co. *v.* Martin, 113 Mich. 521, 71 N. W. 807; Gano *v.* Heath, 36 Mich. 441.

Nebraska. — Barnes *v.* Van Keuren, 31 Neb. 165, 47 N. W. 848; Royse *v.* State Nat. Bank, 50 Neb. 16, 69 N. W. 301.

New York.—McCaughey *v.* Smith, 27 N. Y. 39.

Application of Rule. — The signing by a third party as surety of a note payable on demand some months after its execution by the original promisor and delivered to the payee and for a new consideration, is a new and independent contract not requiring the consent of the original promisor, and it does not constitute an alteration of the contract of the original parties. Stone *v.* White, 8 Gray 589. The court said: "It did not in any way change or affect their rights. It was a new and independent contract, made on a sufficient consideration with a third party, to which their assent was unnecessary. The validity of such contracts have been often recognized in this commonwealth. Tenney *v.* Prince, 4 Pick. 385; Bryany *v.* Eastman, 7 Cush. 111. See also Catton *v.* Simpson, 8 Ad. & El. 136, and 3 Nev. & P. 248; Hughes *v.* Littlefield, 18 Me. 400; Powers *v.* Nash, 37 Me. 322."

82. Wersman *v.* Werges, 112 U. S. 139; Berryman *v.* Manker, 56 Iowa 150, 9 N. W. 103; Houck *v.* Graham, 106 Ind. 195, 6 N. E. 594, 55 L. R. A. 727; Sullivan *v.* Rudersill, 63 Iowa 158, 18 N. W. 856.

83. Taylor *v.* Johnson, 17 Ga. 521.

84. Sullivan *v.* Rudisell, 63 Iowa 158, 18 N. W. 856; Bowser *v.* Rendell, 31 Ind. 128; Palmer *v.* Poor,

(C.) Striking Out Parties. — Again striking out, by erasure or otherwise, the name of one or more of several obligors to a written instrument, without the knowledge or consent of the remaining obligors, is a material alteration as to such non-consenting obligors.[85]

121 Ind. 135, 22 N. E. 984; Houck *v.* Graham, 106 Ind. 195, 6 N. E. 594. See also Anderson *v.* Bellinger, 87 Ala. 334, 4 L. R. A. 680, 6 So. 82, 13 Am. St. Rep. 46.

85. *England* — Nicholson *v.* Revell, 4 Advl. & E. 675, 31 Eng. C. L. 300.

United States. — Smith *v.* U. S., 2 Wall.; Martin *v.* Thomas, 24 How. 315; Mersman *v.* Werges, 112 U. S. 139.

Arkansas. — State *v.* Churchill, 48 Ark. 426, 3 S. W. 352.

Delaware. — Herdman *v.* Bratten, 2 Harr. 396.

Illinois. — Gillett *v.* Sweat, 6 Ill. 475.

Indiana. — State *ex rel.* Griswold *v.* Blair, 32 Ind. 313; State *v.* Polke, 7 Blackf. 27.

Iowa. — McCramer *v.* Thompson, 21 Iowa 244; State *v.* Craig, 58 Iowa 238, 12 N. W. 301.

Missouri. — Briggs *v.* Glenn, 7 Mo. 572; State *v.* Findley, 101 Mo. 217, 14 S. W. 185.

Pennsylvania. — Barrington *v.* Bank of Washington, 14 Serg. & R. 405.

Texas. — Davis *v.* State, 5 Tex. App. 48 (citing numerous authorities); Collins *v.* State, 16 Tex. App. 274.

Vermont. — Dewey *v.* Bradbury, 1 Tyler 186.

Virginia. — Blanton *v.* Com., 91 Va. 1, 20 S. E. 884.

Washington. — King Co. *v.* Ferry, 5 Wash. 536, 19 L. R. A. 500, 34 Am. St. Rep. 886.

The Reason is that such an alteration materially changes the contract of the remaining obligors, because it increases the amount which each of them may be held to contribute. Martin *v.* Thomas, 24 How. 315; Smith *v.* U. S., 2 Wall. 219.

The Deliberate Cancellation by the Holder of an Indorsement on a Note, discharges the liability of such indorser to the holder, and so operating, it will also discharge from liability to the holder, the subsequent indorser. Curry *v.* The Bank of Mobile, 8 Port. (Ala.) 360.

Erasure of Indorsement by Indorser After Payment. — When one who indorses a note before its delivery, but who is not a party thereto on the face of the note, subsequently pays it and sues the maker, the erasure of his indorsement by a pen mark drawn through his signature is not a material alteration as between the parties to the suit. Tutt *v.* Thornton, 57 Tex. 35.

Payee Erasing Signature as Surety and Indorsing. — In Lunch *v.* Hicks, 80 Ga. 200, 4 S. E. 255, the payee of the notes in suit, having at first signed them as security, and having failed in his attempt to negotiate them, erased his indorsement, and indorsed them to the plaintiff. It was held that this did not constitute a material alteration.

In Blewett *v.* Bash, 22 Wash. 536, 61 Pac. 770, a suit to foreclose a mortgage which the plaintiff had paid off, as guarantor, it was held that the plaintiff was not released from his obligation as guarantor, by the fact that the name of one of the joint obligors was erased, because such an erasure is not material unless done without their consent or acquiescence.

The Erasure of the Name of One of the Original Subscribers to the Capital Stock of a Corporation, before the articles were filed, does not alter the subscription paper, in an action by the corporation against the remaining subscribers, where it is fairly inferrible from all the circumstances that such erasure was made with the knowledge of the defendants and of the corporation and at the request of the person whose name was erased and without any fraudulent intent. Rensselaer & Washington Plank Road Co. *v.* Wetzell, 21 Barb. 56.

Erasing a Forged Signature before the delivery of the instrument to the obligee, who knew nothing of such forged signature or of its subsequent erasure, is not a material alteration.[86]

(D.) Inserting Name of Signer in Body of Instrument. — It is not a material alteration of a written instrument for the holder thereof to insert the name of the signer or maker in the body of the instrument, although after delivery and without his knowledge or consent.[87]

(2.) Alterations Affecting the Personality of Parties. — (A.) In General. Again, any alteration of a written instrument, without the knowledge or consent of all the parties thereto, which operates to change the personality of one or more of the parties, is a material alteration as to the non-consenting parties.[88]

Erasure of Signature to Several Obligation.—In Whittlesley *v.* Frantz, 74 N. Y. 456, an action on a subscription contract to the capital stock of a corporation, the subscription paper, when offered in evidence, showed the cancellation of one of the subscribers, a memorandum appearing opposite his name, "by agreement," dated a date subsequent to the time of the defendant's subscription; there being no explanation of the cancellation outside the paper itself. The court held the alteration to be immaterial.

86. York Co. M. F. Ins. Co. *v.* Brooks, 51 Me. 506.

87. Reed *v.* Kemp, 16 Ill. 445; State *ex rel.* McCarthy *v.* Pepper, 31 Ind. 76; Fouriner *v.* Cyr, 64 Me. 32; Smith *v.* Crooker, 5 Mass. 538.

88. *Canada.* — Henderson *v.* Vermilyea, 27 U. C. Q. B. 544.

United States. — Steele *v.* Spencer, 1 Pet. 552.

Alabama. — Montgomery *v.* Crossthwait, 90 Ala. 553, 8 So. 498, 12 L. R. A. 140; Hollis *v.* Harris, 96 Ala. 288, 11 So. 377.

Illinois. — Vincent *v.* People, 25 Ill. 412.

Indiana. — State *ex rel.* La Porte Co. *v.* Van Pelt, 1 Ind. 304.

Maine. — Sheridon *v.* Carpenter, 61 Me. 83; Goodwin *v.* Norton, 92 Me. 532, 43 Atl. 111; Chadwick *v.* Eastman, 53 Me. 12.

Massachusetts.—Wilde *v.* Armsby, 6 Cush. 314.

Michigan. — Aldrich *v.* Smith, 37 Mich. 468, 26 Am. Rep. 536.

Missouri. — First Nat. Bank *v.* Fricke, 75 Mo. 178, 42 Am. Dec. 397; Haskell *v.* Champion, 30 Mo. 136; State *v.* McGonigle, 101 Mo. 353, 13 S. W. 758, 8 L. R. A. 735, 20 Am. St. Rep. 609.

New Jersey. — York *v.* Janes, 43 N. J. Law 332.

Oregon. — Simpkins *v.* Windsor, 21 Or. 382, 28 Pac. 72.

Pennsylvania. — Smith *v.* Weld, 2 Pa. St. 54.

Washington. — Fairhaven *v.* Cowgill, 8 Wash. 686, 36 Pac. 1093, 32 Pac. 538, 19 L. R. A. 500, 34 Am. St. Rep. 880; King County *v.* Ferry, 5 Wash. 538, wherein the rule was recognized, but held not to be applicable because the erasure was not of the signature of the surety, but his name on the body of the bond was erased and another substituted, the bond being regular on its face and the obligee having no notice of the change.

A Bail Bond is materially altered by the erasure of the name of one of the sureties and substitution of another in his stead, without the knowledge and consent of the other sureties. Kiser *v.* State, 13 Tex. App. 201.

Words Deseriptive of Person. In Hayes *v.* Mathews, 63 Ind. 412, 30 Am. Rep. 226, the note in suit read "We promise to pay," but was signed with the individual names of the makers, followed, however, with the words "trustees" etc. of the defendant's church; and it was held that the erasure of the words "trustees" etc. was an immaterial alteration, inasmuch as the note purported to be the individual note of

(B.) Substituting Payee, Obligee, Etc. — Any alteration in a written instrument, by erasure and substitution, or otherwise, the effect of which is to change the payee or obligee therein, after its delivery, by the party interested in the instrument, is a material alteration.[89]

the makers, the additional words constituting merely a description of their persons without in any way affecting the legal character of the note itself. See also Hayes v. Brupaker, 65 Ind. 27; Burlingame v. Brewster, 79 Ill. 515, 22 Am. Rep. 177.

Individual Signature Changed to Signature as Agent. — A change in the form of the execution of a deed, whereby the signature of the grantor instead of being in his individual capacity, becomes the signature of a third person under and by virtue of the power of attorney to him is a material alteration; and if made by the grantee or by some third person with his consent or by or with the consent of one claiming title under him, and without the prior or subsequent knowledge and consent of the grantor, constitutes a material alteration of the deed in so far as concerns any action on its covenants by a party to the alteration. North v. Henneberry, 44 Wis. 306.

The Middle Initial of a Man's Name is generally regarded as immaterial; and its erasure is not of itself sufficient to cast suspicion upon the instrument; especially if the genuineness of the instrument in other respects is fully established. Banks v. Lee, 73 Ga. 25.

89. *United States.* — Sneed v. Sabinal M. & M. Co., 73 Fed. 925, affirming 71 Fed. 493, 18 C. C. A. 213.

Iowa. — Bell v. Mahin, 69 Iowa 408, 29 N. W. 331.

Kansas. — Horn v. Newton City Bank, 32 Kan. 518, 6 Pac. 1022, citing Bank v. Hall, 1 Halst. (N. J.) 215; Draper v. Wood, 112 Mass. 315, 17 Am. Rep. 92.

Maine. — Dolbier v. Norton, 17 Me. 307.

Massachusetts. — Stoddard v. Penniman, 108 Mass. 360, 11 Am. Rep. 363.

Missouri. — German Bank v. Dunn, 62 Mo. 79; Robinson v. Berryman, 22 Mo. App. 509.

Nebraska. — Erickson v. First Nat. Bank, 44 Neb. 622, 62 N. W. 1078, 28 L. R. A. 577, 48 Am. St. Rep. 753, citing Patch v. Washburn, 16 Gray 82.

Ohio. — Davis v. Bauer, 41 Ohio St. 257.

Vermont. — Broughton v. Fuller, 9 Vt. 373.

Application of Doctrine. — In German Bank v. Dunn, 62 Mo. 79, after a note was completed, in the absence and without the authority or knowledge of the maker, the name of the payee was by the holder erased, and his own name substituted. It appeared that the note was in fact made for the holder's benefit, and there was no evidence that the erasure was made with any sinister or fraudulent motive. It was urged that the alteration was not a material one, as it did not thwart the intention of the maker; but the court, in accord with its previous decisions, enforced the rigid doctrine that fraud should be prevented even in its incipient stages, by putting an absolute interdict on all unauthorized tamperings, thereby placing the holders of paper under the strong bonds of pecuniary self interest to keep it entirely intact.

Inserting Proper Obligee in Bond. In Turner v. Billagram, 2 Cal. 520, the bond in question was made payable to the acting sheriff instead of the party who was to be protected by its execution; this was the result of mistake alone, and when discovered the name of the officer was erased and that of the proper obligee inserted. It was held that this did not affect the bond. See also Hale v. Russ, 1 Me. 334.

In Elliott v. Blair, 47 Ill. 342, a holder of a note in suit added to the name of the payee the words "& Company;" and it was held that this alteration was immaterial.

In Granite R. Co. v. Bacon, 15

Adding the Word "Cashier" after the name of the payee of an executed note, with the consent of the maker, but not of the surety, is a material alteration.[90]

Erasing the Name of a Special Indorsee of a promissory note and substituting the name of another, without the knowledge or consent of the indorsee, is a material alteration as against the latter.[91]

(C.) Correction of Name. — But an alteration is not material where it is in fact but a mere correction in the name of one of the parties.[92]

(D.) Description of Person. — Nor is an alteration material where the change consists of the addition of a mere description of the person.[93]

Pick. 239, by the note in suit the defendant promised to pay to the plaintiff the amount sued for. The note was indorsed by a third person and delivered to the plaintiff's treasurer, who, without the knowledge or consent of defendant, interlined above the plaintiff's name, the name of the indorser, but did not erase the name of the plaintiff, as payee. It was held that the most that could be inferred was that it was a proposal to insert the name of another payee never acceded to, and therefore, did not constitute an alteration; as mere senseless words written on an instrument complete in itself do not affect the terms, the effect, or the identity of the contract, and so are immaterial.

90. Hodge *v.* Farmers Bank, 7 Ind. App. 94, 34 N. E. 132.

91. Grimes *v.* Piersol, 25 Ind. 246, affirmed 30 Ind. 129.

92. State *v.* Dean, 40 Mo. 464; Davis *v.* Rankin Bldg. & Mfg. Co. *v.* Dix, 64 Fed. 406; Latshaw *v.* Hiltebeil, 2 Penny. (Pa.) 257; Pardee *v.* Findley, 31 Ill. 174, 83 Am. Dec. 219; Outtoun *v.* Dulin, 72 Md. 536, 20 Atl. 134; First Nat. Bank *v.* Wolff, 79 Cal. 69, 21 Pac. 551.

Alteration Correctly Describing Payee. — An alteration in the name of the payee of a note, the only effect of which is to correctly describe the party to whom the promise was in fact understandingly made, is not material. Derby *v.* Thrall, 44 Vt. 413, 8 Am. Rep. 389.

Scratching Out the Dot Over the Letter "I" in the name of the grantee in a patent is not sufficient to exclude the patent as evidence, where it does not appear that the change is material or that it was made after the patentee came into possession of the patent. Morgan *v.* Curtenius, 4 McLean 366, 17 Fed. Cas. No. 9799.

Adding Christian Names. — In Blair *v.* Bank of Tenn., 11 Humphreys 84, the bill in suit was drawn by two persons as co-partners, who were not, in fact, such, and the alteration consisted of the individual signatures of the drawers under the joint name made after acceptance; and it was held, that this did not constitute a material alteration of the bill. It was, in effect, said the court, "but adding the christian names of the drawers, whose surnames had been affixed to the bill, before acceptance, and were so affixed by the mutual assent of the drawers. The omission of the christian names of the drawers, was one which the law supplied, and which did not affect their liability to the acceptor or other parties."

Where the Surname of the Payee Was Interlined subsequently to the delivery of a promissory note, but it was proved that the note was originally given to the payee whose name was inserted, it was held that the alteration was not material. Mouchet *v.* Cason & Hill, 1 Brev. (S. C.) 307.

93. Casto *v.* Evinger, 17 Ind. App. 298, 46 N. E. 648.

The Addition of the Word "Junior" to a Man's Name is adopted as a convenient term of designation, but is not a part of the

(3.) Alterations Affecting the Relations of Parties. — Again, any alteration, the effect of which is to change the relations of the parties, is material;[94] as for example, when a person who has signed as surety, becomes a principal maker in consequence of the alteration;[95] or when a guarantor becomes a surety.[96]

i. *Matters in Respect of the Consideration.* — It has been held that any alteration of a written instrument, the effect of which is to change the consideration as therein recited, is material.[97] So also,

name; and hence will not constitute a material alteration. Coit *v.* Starkweather, 8 Conn. 289. *Contra.* — Broughton *v.* Fuller, 9 Vt. 373, wherein it is held that this is a material alteration.

Description of Person. — In Sharpe *v.* Bellis, 61 Pa. St. 69, 100 Am. Dec. 618, it appeared that the note in suit had been drawn in blank and indorsed by the defendant as president, he refusing to indorse individually. The note was afterwards filled up with the defendant's name as payee, and the "pres't" erased. It was then handed to the plaintiff, who had no knowledge of the erasure, but did know of the defendant's connection with the company, for whose debt the note was given, and was received by the plaintiff. The court said: "There can be no difference in principle between simply adding the word 'agent' when no principal is disclosed, and the word 'pres't' when no corporation or company is disclosed. On this note so indorsed, without extrinsic proof of knowledge on part of the plaintiffs, this indorsement, we think, would have imported a legal, personal obligation, and in this aspect the erasure of the affix would be an immaterial alteration. If, however, the plaintiffs did know the official relation of the defendant to the company, the erasure was material. It changed the nature of the defendant's obligation from an official representative act to a personal undertaking. It was then not admissible in evidence, provided that fact sufficiently appeared before its offer."

94. Changing Relation of Parties. — The holder of a note with a blank indorsement by the payee has no legal right to change the obligation of the indorsee by writing a contract of guaranty over the name of the payee, "without the knowledge or consent of the payee." Belden *v.* Hann, 61 Iowa 42, 15 N. W. 591; Needhams *v.* Page, 3 B. Mon. (Ky.) 465.

95. Laub *v.* Paine, 46 Iowa 550.

In Humphreys *v.* Crane, 5 Cal. 173, a memorandum had been made upon a note in suit to the effect that certain parties who had signed it were sureties. This memorandum the holder tore off. It was held that the alteration was not material. The court said: "The defendants were liable to the plaintiff, whether they signed as principals or sureties, and it is well settled that an alteration which does not vary the meaning, the nature or the subject matter of a contract, is immaterial."

96. Robinson *v.* Reed, 46 Iowa 219.

97. *England.* — Knill *v.* Williams, 10 East 431.

Alabama. — Carlisle *v.* People's Bank, 122 Ala. 446, 26 So. 115.

Illinois. — Benjamin *v.* McConnel, 9 Ill. 536, 46 Am. Dec. 474.

Kansas. — Johnson *v.* Moore, 33 Kan. 90, 5 Pac. 406.

Minnesota. — Russell *v.* Reed, 36 Minn. 376, 31 N. W. 452.

A Change in the Recited Consideration of a Mortgage is immaterial when no change whatsoever is made in the description of the debt to be secured therein. Cheek *v.* Nall, 112 N. C. 370, 17 S. E. 80.

In Magers *v.* Dunlap, 39 Ill. App. 618, the note offered in evidence contained the clause "for labor," which the evidence showed had been added after the execution of the note. The evidence also showed that the real consideration of the note was the professional services of the

it is a material alteration of an instrument to insert a recital of a consideration where the instrument as executed recited no consideration.[98] But not so of an alteration in the account of a mere recital in a deed or contract of a consideration, whose sole purpose is to show that there was a valuable consideration paid or to be paid;[99] nor where the alteration makes the instrument express the real consideration paid.[1]

j. *Matters in Respect of the Promise.* — **(1.) In General.** — Any alteration, whereby the promise is caused to read differently from the promise as expressed, is material.[2]

(2.) Description of Property. — Any alteration in a writing transferring property, whereby the description of the property transferred is so changed as to in fact cause the writing to transfer property other than as originally expressed, is material,[3] except where the

plaintiff as a physician. It was held that no right of the defendant was or could be affected by the words inserted, and hence the alteration was immaterial.

Additional Words to Explain Consideration. — In Gardiner *v.* Harback, 21 Ill. 129, the alteration consisted of the addition of the words "$10 dollars and fifty interest," following the clause "value received." The court in holding this to be an immaterial alteration said: "Had they been inserted before the note was signed and made a part of it, we are not able to perceive that they would have added any further liability than what the language already used had imposed. Occupying the position they did, at the conclusion of the note, they would rather seem to explain the preceding language used, than to import a new obligation."

98. Low *v.* Argrove, 30 Ga. 129.

99. Reed *v.* Kemp, 16 Ill. 445.

Consideration Immaterial. — An interlineation in an instrument reciting a consideration therefor, which is subsequently striken out, will be regarded as immaterial, where it in fact makes no difference upon what consideration the instrument was made. Westmorland *v.* Westmorland, 91 Ga. 233, 17 S. E. 1033.

1. Murray *v.* Klinzing, 64 Conn. 78, 29 Atl. 244, wherein the alteration consisted of inserting in the blank of the clause "for the consideration of ———— dollars," the amount.

Filling Blanks. — In Vose *v.* Dolan, 108 Mass. 155, 11 Am. Rep. 331, the plaintiff, in consideration of ———— dollars, sold to the defendant, certain property, the quantity being unknown. Subsequent to the writing the parties agreed that the quantity should be ascertained by a third person and the blanks filled up, which was done. It was held that this was an immaterial alteration, in no way changing the terms of the writing or enlarging the defendant's liability under it.

2. Thus, in American Pub. Co. *v.* Fisher, 10 Utah 147, 37 Pac. 259, the plaintiff signed a written offer to manufacture goods for the defendant, and the defendant signed his name below that of the plaintiff. Subsequently the plaintiff interlined above the defendant's signature the words, "all terms and conditions included in above approved, read and agreed." It was held that the alteration was material.

Inserting After the Word Merchantable the Word "Young," in the clause "merchantable neat stock," is a material alteration. Martindale *v.* Follett, 1 N. H. 95.

Adding Other Property. — It is a material alteration for a vendee in a bill of sale to add other property to be transferred thereunder, after its execution and without the knowledge or consent of the vendor. Babb *v.* Clemson, 10 Serg. & R. (Pa.) 419, 13 Am. Dec. 684.

3. Pereau *v.* Frederick, 17 Neb.

sole purpose of the alteration is to cure an imperfect description;[4] to more particularly describe the location of the premises;[5] or to particularize a more general description.[6]

(3.) The Amount. — Any unauthorized change by one of the parties to a writing of the amount intended to be evidenced by the writing whereby it becomes nominally a promise to pay either a greater or less sum than that originally expressed is a material alteration.[7]

117, 22 N. W. 235; Montag *v.* Linn, 23 Ill. 551.

It is a material alteration of a promissory note which recites on its face that it is given for the purchase price of the buildings on lot 1, to erase the word "on" and insert the word "and" so as to make the note read that it is given for the purchase price of the buildings and lot 1. Richardson *v.* Fellner, 9 Okla. 513, 60 Pac. 270.

Adding Quantity. — In Shelton *v.* Deering, 10 B. Mon. 405, the deed was originally drawn and acknowledged, describing the land conveyed by metes and bounds, without naming any quantity; but before it was acknowledged by the husband, he inserted the words, "containing by a survey two hundred acres" as part of the description, and also in the covenant of warrantry which purported to be joined the words "and that the same shall contain two hundred acres." It was held that the alteration was immaterial, inasmuch as it did not change the legal effect of the deed in respect to the wife.

Description Sufficient to Include Additional Property. — An interlineation in the description of land conveyed by the deed in question, indicating a purpose to include other property in the property transferred, is immaterial, where the description of the land is sufficient of itself to include such other property. Brown *v.* Pinkham, 18 Pick. 172.

Adding the Words, "More or Less" to the Quantity of Land contracted to be conveyed, by the seller after the execution of the contract by the purchaser without his knowledge or consent, is a material alteration of the contract of purchase. Sherwood *v.* Merritt, 83 Wis. 233, 53 N. W. 512.

4. Sharpe *v.* Orme, 61 Ala. 263; Hatch *v.* Hatch, 9 Mass. 307, 6 Am. Dec. 67.

Filling Blanks. — In Vose *v.* Dolan, 108 Mass. 155, 11 Am. Rep. 331, the quantity of goods sold and intended to be transferred by the writing in question was left blank, and subsequent to the execution of the writing, the parties agreed that a third person should ascertain and fill in the blank, which was done; and it was held that this did not constitute a material alteration. See also State *v.* Dean, 40 Mo. 464; Rowley *v.* Jewett, 56 Iowa 492, 9 N. W. 335.

5. Location of Premises. — In Gordon *v.* Sizer, 39 Miss. 805, the court said: "The omission of the interlined words would only render the description of the premises in that part of the deed obscure and uncertain, and the use of the same words in the subsequent part would show what was intended, and render the former description certain and clear. In either of these views the objection was properly overruled."

6. Particularizing General Description. — In Churchill *v.* Beilstein, 9 Tex. Civ. App. 445, 29 S. W. 392, the contract in question provided for the erection of a dwelling for the defendants "on their lot on" (a designated street); and it was held that the insertion after the execution and acknowledgment of the contract of the description of the lot, by lot and block, was held not to be material.

7. *England.* — Gardner *v.* Walsh, 5 Ellis & B. 83, 85 Eng. C. L. 83.

Alabama. — Green *v.* Sneed, 101 Ala. 205, 13 So. 277, 46 Am. St. Rep. 119.

Attorneys' Fees. — The unauthorized insertion of a clause in an instrument whereby the makers or obligors are rendered liable for attorneys' fees, for which there was no liability under the instrument as first executed, is a material alteration.[8]

(4.) The Interest. — (A.) CHANGE OF RATE. — Any alteration of a written instrument, after its execution and without authority, the effect of which is to change the rate of interest to be paid, either

Arkansas. — Chism *v.* Toomer, 27 Ark. 108.

California. — People *v.* Kneeland, 31 Cal. 288.

Connecticut. — Aetna Nat. Bank *v.* Winchester, 43 Conn. 391.

Delaware. — Bank of Newark *v.* Crawford, 2 Houst. 282.

Georgia. — Winkles *v.* Guenther, 98 Ga. 472, 25 S. E. 527; Wheat *v.* Arnold, 36 Ga. 479.

Idaho. — Mulkey *v.* Long (Idaho), 47 Pac. 949.

Illinois. — Sans *v.* People, 8 Ill. 327; Merritt *v.* Boyder, 191 Ill. 136, 60 N. E. 907.

Indiana. — Collier *v.* Wangh, 64 Ind. 456; Hout *v.* Oeler, 80 Ind. 83.

Iowa. — Knoxville Nat. Bank *v.* Clark, 51 Iowa 264, 1 N. W. 491, 33 Am. Rep. 129; Maguire *v.* Eichmeier, 109 Iowa 301, 80 N. W. 395.

Kentucky. — Woolfolk *v.* Bank of America, 10 Bush 504-513.

Maine. — Dover *v.* Robinson, 64 Me. 183; Hewins *v.* Cargill, 67 Me. 554.

Maryland. — Burrows *v.* Klunk, 70 Md. 451, 3 L. R. A. 576, 17 Atl. 378, 14 A. S. R. 371.

Missouri. — State *ex rel.* Jackson Co. *v.* Chick, 146 Mo. 645, 48 S. W. 829.

Massachusetts. — Wade *v.* Withington, 1 Allen 561; Greenfield Sav. Bank *v.* Stowell, 123 Mass. 196, 25 Am. Rep. 67; Doane *v.* Eldridge, 16 Gray 254; Cape Ann Nat. Bank *v.* Burns, 129 Mass. 596.

Nebraska. — State Sav. Bank *v.* Shaffer, 9 Neb. 1, 1 N. W. 980, 31 Am. Rep. 394; Goodwin *v.* Plugge, 47 Neb. 284, 66 N. W. 407.

New Hampshire. — Goodman *v.* Eastman, 4 N. H. 455.

Minnesota. — Renville Co. *v.* Gray, 61 Minn. 242, 63 N. W. 635.

New Mexico. — Ruby *v.* Talbot, 5 N. Mex. 251, 21 Pac. 72, 3 L. R. A. 724.

New York. — Flannagan *v.* Nat. Union Bank (City Court of N. Y.), 2 N. Y. Supp. 488.

North Carolina. — Cheek *v.* Nall, 112 N. C. 370, 18 S. E. 80.

Ohio. — Portage Co. Branch Bank *v.* Lane, 8 Ohio St. 405.

Pennsylvania. — Worrall *v.* Gheen, 39 Pa. St. 388.

South Carolina. — Mills *v.* Starr, 2 Bailey 359.

South Dakota. — Searles *v.* Seipp, 6 S. D. 472, 61 N. W. 804.

Virginia. — Batchelder *v.* White, 80 Va. 103.

Wisconsin. — Matteson *v.* Ellsworth, 33 Wis. 488, 14 Am. Rep. 766.

For the Rule as to Marginal Figures indicating the amount, see *supra* II-3-C-e-(3).

8. Monroe *v.* Paddock, 75 Ind. 422; Coles *v.* Yorks, 28 Minn. 464; First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473.

Penalty Fixed by Bond. — In White Sewing Mach. Co. *v.* Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313, it was held that the clause, "together with 10 per cent. attorney's fees," interlined in a penal bond after its execution was immaterial. "The damages," said the court, "including the interest, where it is proper to allow it to be assessed under the conditions, cannot exceed the penalty; and, if they equal the penalty, they can only draw interest from the date of the judgment. The promise to pay 10 per cent. and attorney's fees is no part of the penalty of the bond, and by no possibility can it affect the judgment to be rendered upon the bond, nor the amount of damages to be assessed."

Alteration Increasing Amount. So also is an alteration whereby the liability for attorney's fees is increased in amount. Burwell *v.* Orr, 84 Ill. 465.

by way of increasing it,[9] or decreasing it, is material.[10] Otherwise, however, when the alteration consists of a memorandum of a new contract, independent of the promise.[11]

(B.) Adding Interest Clause to Non-Interest Bearing Instrument. Again, an alteration, making the debt interest-bearing, whereas it was, when the writing was executed, non-interest bearing, is material.[12] But not where the instrument would in any event bear the

9. *England.* — Warrington *v.* Early, 2 Ellis & B. 763, 75 Eng. C. L. 763.

Delaware. — Warren *v.* Layton, 3 Harr. 404.

Illinois. — Vogle *v.* Ripper, 34 Ill. 100, 85 Am. Dec. 298.

Indiana. — Bowman *v.* Mitchell, 79 Ind. 84; Sharks *v.* Albert, 47 Ind. 461; Schuewind *v.* Hackett, 54 Ind. 248.

Maine. — Lee *v.* Starbird, 55 Me. 491.

New Mexico. — Ruby *v.* Talbot, 5 N. Mex. 251, 21 Pac. 72, 3 L. R. A. 724.

New York. — Weyerhauser *v.* Dun, 100 N. Y. 150, 2 N. E. 274.

Ohio. — Harsh *v.* Klepper, 28 Ohio St. 200.

South Carolina. — Heath *v.* Blake, 28 S. C. 406, 5 S. E. 842; Sanders *v.* Bagwell, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743.

Virginia. — Dobyns *v.* Rawley, 76 Va. 537.

In Burkholder *v.* Lapp Executor, 31 Pa. St. 322, an alteration of the rate of interest from 4 1-2 to 4 3-4 per cent., after the bond was overdue, was held to be immaterial.

10. *Connecticut.* — Little *v.* Fowler, 1 Root 94.

Indiana. — Post *v.* Losey, 111 Ind. 74, 12 N. E. 121.

Minnesota.—Filmore Co. *v.* Greenleaf, 80 Minn. 242, 83 N. W. 157.

Missouri. — Whitneer *v.* Frye, 10 Mo. 348.

Nebraska. — Courcamp *v.* Weber, 39 Neb. 533, 58 N. W. 187.

Rhode Island. — Keene *v.* Weeks, 19 R. I. 309, 33 Atl. 446.

Striking Out the Rate of Interest was held to be a material alteration, in Moore *v.* Hutchinson, 69 Mo. 429.

11. Littlefield *v.* Combs, 71 Me. 110; Tremper *v.* Hemphill, 8 Leigh 623, 31 Am. Dec. 673; Carr *v.* Welch, 46 Ill. 88; Huff *v.* Cole, 45 Ind. 300; Bucklen *v.* Huff, 53 Ind. 474.

12. *Canada.* — Halcrow *v.* Kelly, 28 U. C. C. P. 551.

Alabama. — Glover *v.* Robbins, 49 Ala. 219, 20 Am. Rep. 272; Brown *v.* Jones, 3 Port. 420; Lamar *v.* Brown, 56 Ala. 157.

Arkansas. — Little Rock Trust Co. *v.* Martin, 57 Ark. 277, 21 S. W. 468.

Colorado. — Hooper *v.* Collingwood, 10 Colo. 107, 13 Pac. 909, 10 Am. St. Rep. 565.

Delaware. — Warpole *v.* Ellison, 4 Houst. 322.

District of Columbia. — Lewis *v.* Shepard, 5 Mackey, 46.

Georgia. — Gwin *v.* Anderson, 91 Ga. 827, 18 S. E. 43.

Indiana. — Brooks *v.* Allen, 62 Ind. 401; Kountz *v.* Hart, 17 Ind. 329; Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 460.

Iowa. — Smith *v.* Eats, 81 Iowa 235, 46 N. W. 1110, 25 Am. St. Rep. 486; Shepard *v.* Whetstone, 51 Iowa 457, 1 N. W. 753, 33 Am. Rep. 143; Woodworth *v.* Anderson, 63 Iowa 503, 19 N. W. 296.

Kentucky. — Lockname *v.* Emmerson, 11 Bush 69.

Maine. — Waterman *v.* Vose, 43 Me. 504; Lee *v.* Starbird, 55 Me. 491.

Maryland. — Owen *v.* Hall, 70 Md. 97, 16 Atl. 376.

Massachusetts. — Fay *v.* Smith, 1 Allen 477; Draper *v.* Wood, 112 Mass. 315, 17 Am. Rep. 92.

Michigan. — Bradley *v.* Mann, 37 Mich. 1; Holmes *v.* Trumper, 22 Mich. 427, 7 Am. Rep. 661.

Missouri. — Ivory *v.* Michael, 33 Mo. 398; Lubbering *v.* Kohlbrecher, 22 Mo. 596; Capital Bank *v.* Armstrong, 62 Mo. 59; Washington Sav.

rate of interest inserted.[13]

(C.) Time When Interest Begins. — Any unauthorized alteration, the effect of which is to change the time from which the debt is to draw interest, is material.[14]

(D.) Time of Payment of Interest. — Any alteration is material where the effect is to convert the instrument from one bearing ordinary, simple interest, into one bearing interest payable annually,[15] or semi-annually,[16] or quarter-annually.[17]

(5.) Character of Promise. — Joint or Several. — An alteration in a promise which as written, is joint or several, whereby it becomes a joint promise alone, is a material alteration.[18] Otherwise, how-

Bank *v.* Ecky, 5 Mo. 272; Presbury *v.* Michael, 33 Mo. 542.

Nebraska. — Davis *v.* Henry, 13 Neb. 497, 14 N. W. 523; Hurlbut *v.* Hall, 39 Neb. 889, 58 N. W. 538.

New York. — Schwarz *v.* Oppold, 74 N. Y. 307; McGrath *v.* Clark, 56 N. Y. 34, 15 Am. Rep. 372.

North Carolina. — Long *v.* Mason, 84 N. C. 15.

Ohio. — Jones *v.* Bangs, 40 Ohio St. 139, 48 Am. Rep. 664, citing numerous authorities; Thompson *v.* Massie, 41 Ohio St. 307.

Pennsylvania. — Fulmer *v.* Seitz, 68 Pa. St. 237, 8 Am. Rep. 172; Gettysburg Nat. Bank *v.* Chisholm, 169 Pa. St. 564, 32 Atl. 730, 47 Am. St. Rep. 929; Craighead *v.* McLoney, 99 Pa. St. 211.

South Carolina. — Plyler *v.* Elliott, 19 S. C. 257.

Tennessee. — McVey *v.* Ely, 5 Lea 438.

Wisconsin. — Kilkelly *v.* Martin, 34 Wis. 525.

13. James *v.* Dalbey, 107 Iowa 463, 78 N. W. 51.

14. *Arkansas.*—Little Rock Trust Co. *v.* Martin, 57 Ark. 277, 21 S. W. 468.

Illinois. — Benedict *v.* Miner, 58 Ill. 19; Black *v.* Bowman, 15 Ill. App. 166.

Indiana. — Dietz *v.* Harder, 72 Ind. 208; Franklin L. Ins. Co. *v.* Courtney, 60 Ind. 134; Coburn *v.* Webb, 56 Ind. 96, 26 Am. Rep. 15.

Kansas. — Sherley *v.* Sampson, 5 Kan. App. 465, 46 Pac. 994.

Michigan. — Nelson *v.* Dutton, 51 Mich. 416, 16 N. W. 791.

Nebraska. — Courcamp *v.* Weber, 39 Neb. 533, 58 N. W. 187.

Wisconsin. — Page *v.* Danaher, 43 Wis. 221.

15. Marsh *v.* Griffin, 42 Iowa 493; Kennedy *v.* Moore, 17 S. C. 464; Gordon *v.* Robinson, 48 Wis. 493, 4 N. W. 579.

In Patterson *v.* McNerley, 16 Ohio St. 348, the court said: "There is no doubt that the interlining of the word 'paid,' before the word 'annually,' was a material alteration of the note. The effect of the alteration was to add to the existing terms of the writing a further stipulation that the interest accruing upon the principal sum named in the note should be *paid annually*; and as a consequence, if the interest should not be promptly paid as it fell due, then the interest so in arrear should bear interest."

Compare Leonard *v.* Phillips, 39 Mich. 182, 33 Am. Rep. 370, wherein the court, in holding such an alteration immaterial said: "The proper construction to be given the note as thus changed is as though it had been made to read ten per cent. per annum, and when so constructed the alteration added nothing to the extent of the maker's liability nor did it change their liability in any way."

16. Dewey *v.* Reed, 40 Barb. 16; Fulmer *v.* Seitz, 68 Pa. St. 237, 8 Am. Rep. 172; Boalt *v.* Brown, 13 Ohio 364; Blakey *v.* Johnson, 13 Bush (Ky.) 197; Neff *v.* Homer, 63 Pa. St. 327.

17. Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196.

18. Ecbert *v.* Louis, 84 Ind. 99; Humphreys *v.* Guillow, 13 N. H. 385.

ever, of an alteration which changes a joint promise into a joint and several promise.[19]

(6.) Payment of Exchange. — Adding a clause to a note providing for the payment by the maker of the rate of exchange is a material alteration.[20]

k. *Matters in Respect of the Performance.* — **(1.) The Time.** Any unauthorized alteration by a party to the writing whereby the time of the act to be performed is accelerated or extended,[21] such as payment of the debt evidenced by the writing, is material.[22] So

38 Am. Dec. 499. *Contra.* — Eddy *v.* Bond, 19 Me. 461.

Changing Several Indorsement to Joint Indorsement. — In Morrison *v.* Smith, 13 Mo. 234, 53 Am. Dec. 145, it was held that the holder of note severally indorsed in blank by two or more persons, has no right to fill up one indorsement over the signatures, so as to make the assignment to him the joint act of all those whose names are thus written upon it.

19. Miller *v.* Reed, 27 Pa. St. 244, 67 Am. Rep. 459; Kline *v.* Raymond, 70 Mo. 271; Laudaner *v.* Sioux Falls Imp. Co., 10 S. D. 205, 72 N. W. 407.

In Warring *v.* Williams, 8 Pick. 322, 79 Am. Dec. 752, where an agreement signed by three persons, was afterward altered by the consent of two of them, by adding seals to the names of the signers, and interlining the words "jointly and severally," and was afterward delivered by those two, it was held that the alteration was not material.

20. Merrick *v.* Bowry, 4 Ohio St. 60. See also Hirschfield *v.* Smith, L. R. 1 C. P. 353.

Expense of Transmitting Money to Place of Payment. — In Bullock *v.* Taylor, 39 Mich. 137, 33 Am. Rep. 356, it was held that a provision in a note for the payment of current exchange or express charges is nugatory and does not add to or vary the sureties' liability, since the promisor must be liable for the expense of transmitting the money to the place where the note is payable.

21. U. S. Glass Co. *v.* West Virginia Flint Bottle Co., 81 Fed. 993.

22. *England.* — Paton *v.* Winter, 1 Taunt. 420.

Canada. — Westloh *v.* Brown, 43 U. C. Q. B. 402.

Alabama. — Lesser *v.* Scholze, 93 Ala. 338, 9 So. 273.

Indiana. — Stayner *v.* Joyce, 82 Ind. 35; Bell *v.* State Bank, 7 Blackf. 456.

Iowa. — Eckert *v.* Pickel, 59 Iowa 545, 13 N. W. 708.

Kentucky. — Lisle *v.* Rogers, 18 B. Mon. 528.

Maine. — Hervey *v.* Hervey, 15 Me. 357.

Massachusetts.—Wheelock *v.* Freeman, 13 Pick. 165, 23 Am. Dec. 674; Davis *v.* Jenney, 1 Mete. 221.

Minnesota. — Flanigan *v.* Phelps, 42 Minn. 186, 43 N. W. 1113.

Mississippi. — Henderson *v.* Wilson, 6 How. 65.

Missouri. — King *v.* Hunt, 13 Mo. 97.

New York. — Waring *v.* Smyth, 2 Barb. Ch. 119, 47 Am. Dec. 299.

Pennsylvania.—Hartley *v.* Corboy, 150 Pa. St. 23, 24 Atl. 295.

Tennessee. — Crockett *v.* Thomasson, 5 Sneed 342.

Power of Attorney to Confess Judgment. — In Hodge *v.* Gilman, 20 Ill. 437, it was held that interlining the words "before or" between the words "time" and "after," in the clause, "at any time after the said note becomes due," in the power of attorney to confess judgment, was a material alteration.

Inserting the Word "Months" in the clause "twenty-four after date" in a note is not a material alteration of the note. Conner *v.* Routh, 7 How. (Miss.) 176, 40 Am. Dec. 59.

For cases as to changing the time of the payment by a change in the date of the instrument, see *supra* this title, "MATTERS IN RESPECT OF THE

also is an alteration which deprives the obligor of his right to days of grace.[23]

(2.) The Place. — Again, it is a material alteration of a note, payable generally, to insert a place of payment;[24] or to change the place of payment.[25]

EXECUTION OF THE INSTRUMENT; DATE: II-3-C-f-(2).

23. Steinan *v.* Moody, 100 Ga. 136, 28 S. E. 30. *Contra.* — Tranten *v.* Hibbard (Ky.,) 33 S. W. 169, holding otherwise because the note was non-negotiable.

24. *England.* — Calvert *v.* Baker, 4 M. & W. 417, 2 Jur. 1020.

Alabama. — Toomer *v.* Rutland, 57 Ala. 379, 29 Am. Rep. 722; Winter *v.* Pool, 100 Ala. 503, 14 So. 411.

California. — Pelton *v.* San Jacinto Lumb. Co., 113 Cal. 21, 45 Pac. 551.

Delaware. — Sudler *v.* Collins, 2 Houst. 538.

Georgia. — Gwin *v.* Anderson, 91 Ga. 827, 18 S. E. 43.

Illinois. — Pahlman *v.* Taylor, 75 Ill. 629.

Indiana. — Ballard *v.* Franklin L. Ins. Co., 81 Ind. 239; McCoy *v.* Lockwood, 71 Ind. 319.

Iowa. — Adair *v.* England, 58 Iowa 314, 12 N. W. 277; Black *v.* DeCamp, 75 Iowa 105, 39 N. W. 215; Knoxville Nat. Bank *v.* Clark, 51 Iowa 264, 1 N. W. 491, 33 Am. Rep. 129.

Kentucky. — Whitesides *v.* Bank of Kentucky, 10 Bush 501, 19 Am. Rep. 74.

Mississippi. — Oakey *v.* Wilcox, 3 How. 3310.

Nebraska. — Townsend *v.* Star Wagon Co., 10 Neb. 615, 35 Am. Rep. 493, 7 N. W. 274.

New York. — Woodworth *v.* Bank of America, 19 Johns, 391, 10 Am. Dec. 403; Nazro *v.* Fuller, 24 Wend. 374.

Ohio. — Sturges *v.* Williams, 9 Ohio St. 443.

Pennsylvania. — Hill *v.* Cooley, 46 Pa. St. 259; Southwark Bank *v.* Gross, 35 Pa. St. 80.

West Virginia.—Moreland *v.* Nat. Bank, 5 W. Va. 74, 13 Am. Rep. 636.

Place of Delivery. — In Brady *v.* Berwind-White Coal M. Co., 94 Fed. 28, wherein a contract for the purchase and sale of coal, provided generally for the payment thereof at so much per ton, it was held that the subsequent interlineation of the phrase "f.o.b. cars at mine" was material.

Inserting the Word "At" Before the Bank Named as the place of payment is not a material alteration. Simmins *v.* Atkinson, 69 Miss. 862, 12 So. 263, 23 L. R. A. 599.

Acceptance Naming Place of Payment. — In Niagara District Bank *v.* Fairman Mfg. Co., 31 Barb. (N. Y.) 403, it was held to be a material alteration of a bill of exchange for the drawee, in his acceptance thereof, to designate as a place of payment, a place other than his place of residence. See also Walker *v.* Bank of New York, 13 Barb. (N. Y.) 636; Troy City Bank *v.* Laman, 19 N. Y. 477. But it is not a material alteration of such a bill for the drawee to designate as the place of payment some particular place in the same city. Myers *v.* Standart, 11 Ohio St. 29.

25. Charlton *v.* Reed, 61 Iowa 166, 16 N. W. 64, 47 Am. Rep. 808; Bank of Ohio Valley *v.* Lockwood, 13 W. Va. 392; Adair *v.* England, 58 Iowa 314, 12 N. W. 277.

Memorandum Naming Place of Payment. — A memorandum at the foot of a note designating a particular place at which it is payable does not constitute part of the contract. Williams *v.* Waring, 10 Barn. & C. 2, 21 Eng. C. L. 11; American Nat. Bank *v.* Bangs, 42 Mo. 450, 97 Am. Dec. 349.

Noting the Residences of the Drawers and Indorsers of a Bill of Exchange, after their names, does not affect the identity of the bill, as to any of the parties to it. It is in the nature of a memorandum for the notary, that he may know how to address notice to the protest. It does not vary the tenor of the bill, nor add to the responsibility of the

Erasing Place of Payment. — The alteration of a note after its delivery to the payee, by the erasure of the place at which it was made payable, is material.[26]

(3.) The Manner. — An unauthorized alteration, the effect of which is to authorize payment in a manner different from that expressed in the instrument as executed, is material.[27] So also is an alteration which changes a note payable generally into one payable in gold coin,[28] or into one payable in specie.[29]

4. Burden of Proof and Presumptions. — A. Rule As to Non-Apparent Alterations. — As has been previously shown, the burden of proof to establish the fact of an alteration where the same does not appear on the face of the instrument, lies with him who asserts that fact.[30] But when the facts of the alteration, and that it was made subsequent to the execution of the instrument, are admitted[31] or have been established, the presumption arises that the alteration is unauthorized and was made by the party producing the instrument, or by one under whom he claims, and it devolves upon him to overcome such presumption by showing that the alteration was not unauthorized, or has been ratified, or that, without his knowledge, it was made by a stranger.[32]

indorsers. Struthers *v.* Kendall, 41 Pa. St. 214, 80 Am. Dec. 610.

26. White *v.* Hass, 32 Ala. 430, 70 Am. Dec. 548. *Compare* Major *v.* Hanson, 2 Biss. 195, Fed. Cas. 8982. "The rights of the defendant," said the court, "are thereby enlarged, and in no respect limited, and he cannot complain unless he can in some manner connect the plaintiff with the alteration, or can show that he tendered the money at the place stated and has been damnified."

27. As where a writing calling for payment in "drafts to the order of" the promisee is changed so as to be payable "in current funds." Augle *v.* Northwestern Nat. L. Ins. Co., 92 U. S. 330.

28. Wills *v.* Wilson, 3 Or. 308; Hanson *v.* Crawley, 41 Ga. 303.

Such an Alteration Destroys the Identity and Legal Effect of the Instrument, and it is no longer the agreement the makers promised to perform, and cannot legally be used in evidence against them. Bogarth *v.* Breedlove, 30 Tex. 561.

So also an alteration changing a note payable in gold or its equivalent into one payable generally is material. Church *v.* Howard, 17 Hun 5.

Law Requiring Debt Payable in Gold. — But, in Bridges *v.* Winters, 42 Miss. 135, 2 Am. Rep. 598, it was held that where the makers of a note could not discharge their indebtedness in any other currency than gold, their legal liability is not changed by inserting the words "in gold;" that such an alteration only expresses what the law implies, and hence is immaterial.

29. Darwin *v.* Rippey, 63 N. C. 318.

30. See *supra*, this title, I-1-A.

31. Howell *v.* Cloman, 112 N. C. 77, 23 S. E. 95; Havens *v.* Osborn, 36 N. J. Eq. 426.

Admitting Alteration and Suing on Original Debt. — Where the holder of a note which he has altered in a material respect to his own advantage, sues on the original debt, admitting the alteration, but denying any fraudulent intent, and averring that it was made without his knowledge and consent, the burden rests upon him to show that there was no fraudulent intent when the alteration was made. Warder B. & G. Co. *v.* Willgard, 46 Minn. 531, 49 N. W. 300, 24 Am. St. Rep. 250.

32. *United States.* — Sneed *v.* Saberial M. & Mill. Co., 73 Fed. 925, 20 C. C. A. 230.

Presumption of Consent. — An alteration of a note, not apparent on inspection, and made before anyone as holder or payee had any legal

Alabama. — Whitsett *v.* Womack, 8 Ala. 466; Davis *v.* Carlisle, 6 Ala. 707; Winter *v.* Pool, 100 Ala. 503, 14 So. 411; White *v.* Hass, 32 Ala. 430, 70 Am. Dec. 548; Glover *v.* Gentry, 104 Ala. 222, 16 So. 38.

Illinois. — Hodge *v.* Gilman, 20 Ill. 437.

Indiana. — Bowman *v.* Mitchell, 79 Ind. 84; Emerson *v.* Opp, 9 Ind. App. 581, 34 N. E. 840; Cochran *v.* Nebeker, 48 Ind. 459; Green *v.* Beckner, 3 Ind. App. 39, 29 N. E. 172.

Iowa. — Robinson *v.* Reed, 46 Iowa 219; Shroeder *v.* Webster, 88 Iowa 627, 55 N. W. 569.

Kentucky. — Elbert *v.* McCleland, 8 Bush 577.

Massachusetts. — Draper *v.* Wood, 112 Mass. 315, 17 Am. Rep. 92.

Michigan. — Eherenwood *v.* Webber, 100 Mich. 314, 58 N. W. 665; Willett *v.* Shepard, 34 Mich. 106.

Missouri. — Capital Bank *v.* Armstrong, 62 Mo. 59.

New York. — Gleason *v.* Hamilton, 138 N. Y. 353, 34 N. E. 283, 21 L. R. A. 210.

North Carolina. — Martin *v.* Buffaloe, 121 N. C. 24, 27 S. E. 995.

Pennsylvania.—Hartley *v.* Corboy, 150 Pa. St. 23, 24 Atl. 295.

Wisconsin. — North *v.* Henneberry, 44 Wis. 306.

Burden of Proving Authority. In an action against an officer for serving a writ of replevin against plaintiff without taking a replevin bond, where it is proved that the bond returned with the writ was originally made to a different obligee and was altered by the officer and made payable to the plaintiff, it is not incumbent on the plaintiff to prove that the defendant had not authority to make the alteration, but the burden is on the defendant to show that he had authority. Dolbier *v.* Norton, 17 Me. 307.

Burden of Proving Consent. In Baxter *v.* Camp, 23 Conn. 245, 41 Atl. 803, the instrument sued on when produced showed on its face either that the signature had been crossed out or that it had been written over a line of crosses such as are commonly used for canceling writing, or that it had been re-written or re-traced over a previous signature which had been first erased. Which of these was true would be disclosed only by extrinsic evidence. The defendant testified that he had crossed out his signature immediately after making it and long before it came into the plaintiff's hands. Thereupon, the trial court ruled that, as he had admitted making the crosses, he had the burden of proving that he made them with the consent of his wife, to whom he had executed writing for the benefit of the plaintiff. But upon appealing, the court said: "There was no sufficient ground for any presumption, either of law or fact, which could throw upon the defendant the burden to which he was thus subjected. The plaintiff's case rested on a document, the defendant's signature to which had plainly been the subject of erasure, alteration or cancellation. He was bound to prove that the defendant's signature was still upon it, or else that it was upon it when delivered to Mrs. Camp, and had not since been canceled with her consent. The document did not, alone, establish either fact. Proof that the defendant canceled his signature raised no presumption that it was canceled without his wife's consent. Fraud is never presumed; and still less, crime. The question presented for decision as to whether the alterations were authorized or unauthorized, was simply beclouded by an appeal to the rules respecting burden of proof as applicable to presumptions arising in the course of a trial. It was to be decided in view of all the circumstances before the court, and guided by no other rule as to the *onus probandi* than that which requires a plaintiff, where the defense is a denial, to prove his case."

Burden of Disproving Fraud. In Bery *v.* Mariette, P. & C. Ry. Co., 26 Ohio St. 673, an action upon

claim upon it, and while it was in the hands of one of the promisors, must be presumed to have been made by their consent.[33]

B. Rule As to Apparent Alterations. — a. *Statement As to Rules.* — Whether, on the production of a written instrument, which appears to have been altered in a material respect, it is incumbent on the party offering it in evidence to first give evidence to explain the appearance of the writing, is a much vexed question, and the books are full of diverse decisions. The courts generally state the rules four different ways.[34] But this conflict has been characterized as being more apparent than real.[35]

b. *Presumption of Alteration Before Delivery.* — Accordingly one line of cases holds that an apparent alteration is presumed, in the absence of any explanation, to have been made simultaneously with or before the delivery of the instrument, and hence no explanation is required in the first instance;[36] or, as it is sometimes expressed,

a subscription to corporate stock, which after its execution had been materially altered without the knowledge or consent of the maker, wherein the execution of the contract, as set out, was denied, it was held the plaintiff could not recover the amount due on the original subscription, without showing that the alteration was not fraudulently made by it.

33. Eddy *v.* Bond, 19 Me. 461.

34. For cases discussing at great length this conflict, see Neil *v.* Case, 25 Kan. 355; Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196.

35. Cox *v.* Palmer, 3 Fed. 16.

36. *United States.* — Little *v.* Herndon, 10 Wall. 26, 19 L. Ed. 878, 119 U. S. 156.

Alabama. — Ward *v.* Cheney, 117 Ala. 238, 22 So. 996.

Florida. — Orlando *v.* Gooding, 34 Fla. 244, 15 So. 770; Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871 (citing Stewart *v.* Preston, 1 Fla. 1.) *Compare* Harris *v.* Bank of Jacksonville, 22 Fla. 501, 1 So. 140, to the effect that the party producing and claiming under the paper is bound to explain every apparent and material alteration. If it appears to have been altered, he must explain this appearance. If there is apparent upon its face any mark of or ground for suspicion, he must remove the suspicion. But if, on the other hand, however material in fact the alteration of the bill may be, there is upon its face no evidence or mark raising a suspicion thereof, the holder is not called upon to make an explanation on the mere production of the bill, or to introduce any testimony until the alteration has been shown by sufficient evidence outside of the paper.

Georgia. — Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258; Westmorland *v.* Westmorland, 9 Ga. 233, 17 S. E. 1033; Thrasher *v.* Anderson, 45 Ga. 538. *Compare* Wheat *v.* Arnold, 36 Ga. 479, wherein it was held that if the instrument, when offered, appears to have been altered, it is incumbent on the party producing it to explain such alteration.

Maryland. — Wickes *v.* Caulk, 5 Har. & J. 36.

Michigan. — Brand *v.* Johnrowe, 60 Mich. 210, 26 N. W. 883; Monroe *v.* Eastman, 31 Mich. 283; Sirrine *v.* Briggs, 31 Mich. 443. *Compare* Willett *v.* Shepard, 34 Mich. 106; Comstock *v.* Smith, 26 Mich. 306.

Minnesota. — Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196.

Missouri. — McCormik *v.* Fitzmorris, 39 Mo. 24; Stillwell *v.* Patton, 108 Mo. 352, 18 S. W. 1075; Burnett *v.* McCluey, 78 Mo. 676; Paramore *v.* Lindsey, 63 Mo. 63.

Nebraska. — Dorsey *v.* Conrad, 49 Neb. 443, 68 N. W. 645 (overruling Johnson *v.* First Nat. Bank, 28 Neb. 792, 45 N. W. 161; Courcamp *v.*

the proof or admission of the signature of the maker is *prima facie* evidence that the instrument written over it is his act, and this will

Weber, 39 Neb. 533, 58 N. W. 187; and following Bank *v.* Morrison, 17 Neb. 341, 22 N. W. 782, 52 Am. Rep. 417; Goodwin *v.* Plugge, 47 Neb. 284, 66 N. W. 407.)

New Jersey. — North River Meadow Co. *v.* Christ Church, 22 N. J. Law 424, 53 Am. Dec. 258; Cumberland Bank *v.* Hall, 6 N. J. Law, 1 Halst. 215; Hunt *v.* Gray, 35 N. J. Law 227, 10 Am. Rep. 232; Den *v.* Farlee, 21 N. J. Law 279. And see Hoey *v.* Jarman, 39 N. J. Law 523, to the effect that a party offering an instrument showing an alteration on its face need not under ordinary circumstances explain the alteration by evidence *aliunde*. Putnam *v.* Clark, 33 N. J. Eq. 338.

North Carolina. — Norfleet *v.* Edwards, 7 Jones L. 455; Pullen *v.* Shaw, 3 Dev. 238.

North Dakota. — Cass Co. *v.* Am. Exch. State Bank, 9 N. D. 263, 83 N. W. 121; First Nat. Bank *v.* Laughlin, 4 N. D. 391, 61 N. W. 473.

Ohio. — Franklin *v.* Baker, 48 Ohio St. 296, 27 N. E. 550, 29 Am. St. Rep. 547; (distinguishing Huntington *v.* Finch, 3 Ohio St. 445, as not being in point, for the reason that there the only question was as to the materiality of the change that had been made in the note — the erasure of the name of the surety. The facts were not in dispute. The court simply held that the erasure of the name of the surety, at his request and with the permission of the payee, did not affect the rights of the principal, and so did not amount to such an alteration as would invalidate the note. The observations of the court, it was said, might, conformably to a view taken by many courts at that day, indicate an opinion that the burden of explaining what are termed alterations of a suspicious character is on the plaintiff. But, it was said, no such question was before the court, and its remarks should be confined to the case it had under consideration.)

In Vermont it is held that an alteration of a written instrument, if nothing appear to the contrary, should be presumed to have been made at the time of its execution. But, generally the whole inquiry, whether there has been an alteration, and, if so, whether in fraud of the defending party or otherwise, to be determined by the instrument itself, or from that and other evidence in the case, is for the jury. The court, upon the usual proof of the execution of the instrument, should admit it in evidence, without reference to the character of any alterations upon it, leaving all testimony in relation to such alteration to be given to the jury, and passed upon by them, under proper instructions from the court upon any given state of facts. Beaman *v.* Russell, 20 Vt. 205, 49 Am. Dec. 775.

Erasing Names of Attesting Witnesses. — In Wickes *v.* Caulk, 5 Har. & J. (Md.) 36, it was held that attesting witnesses are not necessary to a deed, and where their names have been erased, it is incumbent on the party seeking to avoid the deed to prove that the erasure was made after its execution and delivery.

Erasing Credit on Note. — Where a credit has been indorsed on a bond, or note, and is afterwards erased, it devolves upon the obligee or payee to account for the erasure. The indorsement, if made with the consent of the obligee or payee, amounts to an admission of payment, and if not made with his consent, it devolves upon him to prove that fact. McElroy *v.* Caldwell, 7 Mo. 231.

Erasing Indorsement on Note. In an action upon a note, it is not necessary for the plaintiff to explain an erased indorsement found upon the note. The defendant must prove the indorsement to have been made so as to transfer the right to the note, to use it as a defense. Finney *v.* Turner, 10 Mo. 208.

Erasure of Obligor's Signature. In Blewett *v.* Bash, 22 Wash. 536, 61 Pac. 770, while recognizing the rule stated in the text, the court held

stand as binding proof unless the maker can rebut it by evidence that the alteration was made after delivery; and that the question when, by whom, and with what intent, the alteration was made, should be submitted to the jury as questions of fact upon all the evidence, both intrinsic and extrinsic.[37]

c. *No Presumption Either Way.* — Another line of cases is to the effect that an alteration apparent on the face of the instrument raises no presumption either for or against the instrument, but leaves the question as to the time when it was done, or by whom, to be ultimately determined by the jury upon proofs to be adduced by him who offers the instrument in evidence, and who has the burden of proving that the instrument declared on and put in evidence is substantially the instrument made by the opposite party.[38]

that it could not apply in the case of the erasure of a signature of an obligor, since such erasure could only have been made after execution of the writing.

Interlineations in a Deed in the Handwriting of the Officer Who Attested it Officially, will be presumed to have been made at or before the execution of the deed. Bedgood *v.* McLain, 89 Ga. 793, 15 S. E. 670.

37. Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 106. See also Davis *v.* Jenny, 1 Mete. (Mass.) 221. The court upon the usual proof of the execution of the instrument should admit it in evidence without reference to the character of any alterations upon it, about which the court will presume nothing, leaving the whole question to be passed on by the jury. Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258.

38. Shroeder *v.* Webster, 88 Iowa 627, 55 N. W. 569; Magee *v.* Allison, 94 Iowa 527, 63 N. W. 322; Niel *v.* Case, 25 Kan. 355; State *v.* Roberts, 37 Kan. 437, 15 Pac. 593.

Statement of the Rule. — Apparent alterations are often made before delivery, and sometimes alterations are made after, with or without authority. Hence, the mere fact of alteration furnishes no evidence as to when it was made, or whether made by authority or not. If, from the fact of alteration, it may not be presumed that it was made after delivery, and without authority, then surely the burden of so proving is upon him who alleges it. Hagan *v.* Merchants & Bankers' Ins. Co., 81 Iowa 321, 46 N. W. 1114, 25 Am. St. Rep. 493.

In Massachusetts, the rule is stated thus: "The further instruction that, in the absence of all proof to the contrary, the presumption of law was that the interlineations and alterations were made prior to or contemporaneously with the execution of the mortgage, was wrong. There is no such legal presumption. If it were so, the party setting up the instrument might always introduce the instrument as a genuine one, and it would stand as such if no evidence was introduced by the other party to show that it was in fact altered after the execution. Now the burden is on the party offering the instrument, to prove the genuineness of the instrument, and that the alterations apparent on the same were honestly and properly made. To what extent he shall be required to introduce evidence will depend upon the peculiar circumstances of each case. The alterations may be of such a character that he may safely rely upon the paper itself, and the subject matter, as authorizing the inference that the alteration was made before the execution, or he may introduce some very slight evidence to account for the apparent interlineations. But there is no presumption of law, either that the alterations and interlineations apparent on the face of a deed were made prior to the execution of the instrument, or that they were made subsequently. That question is to be settled by the

d. *Presumption of Alteration After Delivery.* — (1.) **General Rule.** A third line of authorities holds that such an alteration raises a presumption against the writing, and hence in order to render the instrument admissible, imposes upon the party producing the instrument the burden to explain the alteration by proper evidence.[39]

jury, upon all the evidence in the case offered by the parties, and the surrounding circumstances, including, of course, the character of the alterations and the appearance of the instrument alleged to have been altered." Ely *v.* Ely, 6 Gray 439. And see Wilde *v.* Armsby, 6 Cush. 314; Simpson *v.* Davis, 119 Mass. 269, 20 Am. Rep. 324; Belfast Nat. Bank *v.* Harriman, 68 Me. 522.

39. *United States.* — Smith *v.* United States, 2 Wall. 219; Abbe *v.* Rood, 6 McLean 106, Fed. Cas. No. 6.

Arkansas. — Chism *v.* Toomer, 27 Ark. 108. *Compare* Gist *v.* Gans, 30 Ark. 285, holding that an apparent alteration creates no legal presumption that it was fraudulently altered, and under the issue of *non est factum* the question is to be determined from the appearance of the paper in connection with the evidence adduced.

California. — An express statute requires an explanation of an apparent alteration by the party producing the paper. Corcorn *v.* Doll, 32 Cal. 82; Miller *v.* Luo, 80 Cal. 257, 22 Pac. 195; Roberts *v.* Unger, 30 Cal. 676.

Idaho. — Mulkey *v.* Long (Idaho,) 47 Pac. 949. *Compare* Dengel *v.* Levy, 1 Idaho 742.

Illinois. — Gillett *v.* Sweat, 6 Ill. 475; Catlin Coal Co. *v.* Lloyd, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216; Sisson *v.* Pearson, 44 Ill. App. 81; Walters *v.* Short, 10 Ill. 252; McAllister *v.* Avery, 17 Ill. App. 568; Hodge *v.* Gilman, 20 Ill. 437; Pyle *v.* Oustatt, 92 Ill. 209. *Compare* Miliken *v.* Marlin, 67 Ill. 13; Dehoney *v.* Soucie, 17 Ill. App. 234.

Kentucky. — Elbert *v.* McClelland, 8 Bush 577.

Louisiana. — Pipes *v.* Hardesty, 9 La. Ann. 152, 61 Am. Dec. 202; McMicken *v.* Beauchamp, 2 La. 290; Union Bank *v.* Brewer, 2 La. Ann. 835 (to the effect that an alteration in a note will be presumed fraudulent.) See also Martin *v.* Creditors, 14 La. Ann. 393.

Maine. — Dodge *v.* Haskell, 69 Me. 429; Croswell *v.* Labree, 81 Me. 44, 16 Atl. 331, 10 Am. St. Rep. 238; Johnson *v.* Heagan, 23 Me. 329. *Compare* Boothby *v.* Stanley, 34 Me. 515, Gooch *v.* Bryant, 13 Me. 386.

Mississippi. — Croft *v.* White, 36 Miss. 455; Ellison *v.* Mobile & O. R. Co., 36 Miss. 572; Everman *v.* Robb, 52 Miss. 653, 24 Am. Rep. 682.

New Hampshire. — Dow *v.* Jewell, 18 N. H. 340, 45 Am. Dec. 371; Humphreys *v.* Guillow, 13 N. H. 385, 38 Am. Dec. 499; Cole *v.* Hills, 44 N. H. 227.

New York. — Jackson *v.* Osburn, 2 Wend. 555, 20 Am. Dec. 649; Gowdey *v.* Robbins, 3 App. Div. 353, 38 N. Y. Supp. 280; Herrick *v.* Malin, 22 Wend. 388; Solon *v.* Williamsburg Sav. Bank, 114 N. Y. 122, 21 N. E. 168; Nat. Ulster Co. Bank *v.* Madden, 114 N. Y. 280, 21 N. E. 408, 11 Am. St. Rep. 633; Ridgeley *v.* Johnson, 11 Barb. 527; Acker *v.* Ledyard, 8 Barb. 514; Chappell *v.* Spencer, 23 Barb. 584.

Oregon. — In Oregon a statute requires a party offering an altered instrument to explain the alteration; and failure to comply with the statute is ground for rejecting the offered instrument. Simpkins *v.* Windsor, 21 Or. 382, 28 Pac. 72; First Nat. Bank *v.* Mark, 35 Or. 122, 57 Pac. 326. But this statute is not applicable when it is shown that the alteration was not made after the execution of the paper. Neckum *v.* Gaston, 28 Or. 322, 42 Pac. 130.

South Carolina. — Vaughan *v.* Fowler, 14 S. C. 355, 37 Am. Rep. 731; Burton *v.* Pressly, 1 Chev. Eq. 1; Kennedy *v.* Moore, 17 S. C. 464. *Compare* Wicker *v.* Pope, 12 Rich. Law 387, 75 Am. Dec. 732, to the effect that whether an alteration was made before or after an instrument was executed, is generally a question

Alteration Noted. — Where an apparent alteration is noted at the foot of the paper, the party producing it has not the burden to explain the alteration.[40]

Altered Instrument to Corroborate Oral Testimony. — And a deed is admissible without evidence to explain an apparent alteration, when it is offered merely to corroborate the testimony of the party producing it, as to the occurrence of a transaction forming the principal issue.[41]

Action to Cancel Altered Instrument. — While the burden is with a party seeking to enforce a contract to relieve it from the effect of any material alteration made in it after its inception, that rule is not necessarily applicable to a defendant in an action brought to have a security held by him canceled upon that ground, when it appears that such defendant is in no sense chargeable with *mala fides* in that respect.[42]

(2.) Alteration to Conform Paper With Itself. — But where the alteration consists of an interlineation of matter embraced in another portion of the paper, so that the paper as a whole reads connectedly, without reference to the fact of the interlineation, the presumption should be indulged that the alteration was made either before the execution of the paper or afterwards by consent of the parties.[43]

(3.) Correction of Error. — So it has been held that an alteration, whose sole purpose was to correct an error, will be presumed to have been made before delivery of the instrument.[44]

of fact for the jury to decide, and the party offering the instrument is not bound to offer evidence to show when the alteration was made, but may rely upon appearances on the face of the instrument itself to explain it.

Texas. — Jacobey *v.* Brigman, (Tex.,) 7 S. W. 366; Dewees *v.* Bluntzer, 70 Tex. 406, 7 S. W. 820; Heath *v.* State, 14 Tex. App. 213; Park *v.* Glover, 23 Tex. 469.

Virginia. — Hodsett *v.* Pace, 82 Va. 873, 6 S. E. 217; Slater *v.* Moore, 86 Va. 26, 9 S. E. 419 (citing Priest *v.* Whitacre, 78 Va. 151; Elgin *v.* Hall, 82 Va. 680; Angle *v.* Ins. Co., 92 U. S. 330; Batchelder *v.* White, 80 Va. 103.)

Wisconsin. — North *v.* Hennberry, 44 Wis. 306. And see Schwalm *v.* McIntyre, 17 Wis. 232.

Seal Cut Off. — When a sealed note was found amongst the papers of the payee after his death, with the seal carefully cut off, leaving a mere filament by which it was allowed to remain attached to show what had been the character of the instrument, it was held that the destruction of the seal was to be attributed to the payee. Porter *v.* Doby, 2 Rich. Eq. (S. C.) 49.

Annexed Paper Detached. — In McCullough *v.* Wall, 4 Rich. Law (S. C.) 68, 53 Am. Dec. 715, a deed referred to a plat annexed, but when produced the plat (admitted to be the same to which the deed referred) was separate from it, although it was manifest that it had been altered by wafers, and it was held that no further explanation of the mutilation was necessary.

40. Howell *v.* Hanrick, 88 Tex. 383, 29 S. W. 762.

41. Hay *v.* Douglas, 32 N. Y. Super. Ct. (12 Sweeny) 49.

42. Solon *v.* Williamsburg Sav. Bank, 114 N. Y. 122, 21 N. E. 168.

43. Gordon *v.* Sizer, 39 Miss. 805.

44. Correction of Error. — In Houston *v.* Jordan, 82 Tex. 352, 18 S. W. 702, an error in the description of property transferred by husband and wife was pointed out to the

(4.) Alteration Must Be Apparent. — In order to raise the presumption that the paper has been altered and put the holder to proof explaining it, it is necessary that it plainly appear from the face of the paper that it has been altered. It is not sufficient that it is probable that an alteration has been made, but it must be manifest to the inspection of the jury that it has been made.[45]

(5.) Official Documents. — The rule which excludes papers, on account of an unexplained alteration, applies to papers in possession of the party to be injured or benefited thereby, but not to official documents not in the custody or under the control of the party.[46]

e. *Burden of Proof As Dependent on Suspicious Character of Alterations.* — **(1.) Rule Stated.** — But irrespective of the conflict of authorities shown by the preceding sections, it is held that in case the alteration is of a suspicious character, or bears the ear marks of fraud, the burden is then upon the party producing the writing to explain the alteration by proper evidence.[47] And where the

husband after the execution of the deed, but before its acknowledgment, which was corrected by some one prior to the delivery of the deed by the husband. It was held that, in the absence of evidence to the contrary, the correction would be presumed to have been made before acknowledgment by the wife and before delivery.

45. Ellison *v.* Mobile & O. R. Co., 36 Miss. 572.

46. Devoy *v.* New York, 36 Barb. 264, 22 How. Pr. 226. See also Miller *v.* Alexander, 13 Tex. 497, 65 Am. Dec. 73, where the court said: "Every alteration on the face of an instrument which evidences the agreement renders it suspicious; and this suspicion the party claiming under, is ordinarily held bound to remove. 1 Greenl. Ev., §§ 564, 568. It was probably upon this principle that the evidence in this case was excluded; not adverting to the distinction between the alteration of a private instrument by one of the parties to it and the alteration by a sheriff or other officer of his entries made to evidence his official acts, which it is every day's practice to admit, by way of amendment of his returns, and which cast no suspicion upon the fairness and truthfulness of the returns themselves." *Compare* Dolbier *v.* Norton, 17 Me. 307.

47. *United States.* — Smith *v.* United States, 2 Wall. 219; Cox *v.* Palmer, 1 McCrary 431, 3 Fed. Cas. No. 16.

Alabama. — Glover *v.* Gentry, 104 Ala. 222, 16 So. 38; Ward *v.* Cheney, 117 Ala. 238, 22 So. 996; Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13; Barclift *v.* Treece, 77 Ala. 528; Hill *v.* Nelins, 86 Ala. 442, 5 So. 796.

Arkansas. — Gist *v.* Dans, 30 Ark. 285.

California. — Sedgwick *v.* Sedgwick, 56 Cal. 213.

Delaware. — Welch *v.* Coulborn, 3 Houst. 647. See also Hollis *v.* Vandergrift, 5 Houst. 521. *Compare* Warren *v.* Layton, 3 Harr. 404.

District of Columbia. — Pengh *v.* Mitchell, 3 App. D. C. 321.

Florida. — Orlando *v.* Gooding, 34 Fla. 244, 15 So. 770; Kendrick *v.* Lathan, 25 Fla. 819, 6 So. 871.

Georgia. — Gwin *v.* Anderson, 91 Ga. 827, 18 S. E. 43.

Illinois. — Catlin Coal Co. *v.* Lloyd, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216.

Indiana. — Ins. Co. of N. A. *v.* Brim, 111 Ind. 281, 12 N. E. 315; Stoner *v.* Ellis, 6 Ind. 152.

Iowa. — Harlan *v.* Berry, 4 Greene 212.

Kansas. — J. I. Case Thresh. Mach. Co. *v.* Peterson, 51 Kan. 713, 33 Pac. 470; Neil *v.* Case, 25 Kan. 355.

Maine. — Croswell *v.* Labree, 81 Me. 44, 16 Atl. 331, 10 Am. St. Rep. 238.

paper has been received conditionally upon promise of counsel to give the proper explanatory evidence, and this is not given, the court should, if the suspicion be so clear as not to leave any question for the jury, strike out the paper.[48]

Massachusetts.—Wilde *v.* Armsby, 6 Cush. 314.

Michigan.—Sirrine *v.* Briggs, 31 Mich. 443; Munroe *v.* Eastman, 31 Mich. 283; Brand *v.* Johnrowe, 60 Mich. 210, 26 N. W. 883; Wilson *v.* Hotchkiss, 81 Mich. 172, 45 N. W. 838.

Minnesota.—See Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, where the rule is recognized but is criticised.

Missouri.—McCormick *v.* Fitzmorris, 39 Mo. 24; Mathews *v.* Coalter, 9 Mo. 705; Paramore *v.* Lindsey, 63 Mo. 63; Stillwell *v.* Patton, 108 Mo. 352, 18 S. W. 1075.

New York.—Jackson *v.* Osborn, 2 Wend. 555, 20 Am. Dec. 649; Pringle *v.* Chambers, 1 Abb. Pr. 58; Smith *v.* McGowan, 3 Barb. 404; O'Donnell *v.* Harmon, 3 Daly 424.

Ohio.—Huntington *v.* Finch, 3 Ohio St. 445.

South Carolina.—Wicker *v.* Pope, 12 Rich. Law 387, 75 Am. Dec. 732.

South Dakota.—Cosgrove *v.* Fanebust, 10 S. D. 213, 72 N. W. 469.

Tennessee.—Farnsworth *v.* Sharp, 4 Sneed. 55.

Texas.—Collins *v.* Ball, 82 Tex. 259, 17 S. W. 614, 27 Am. St. Rep. 877; Rodriguez *v.* Haynes, 76 Tex. 225, 13 S. W. 296; Davis *v.* State, 5 Tex. App. 48; Kiser *v.* State, 13 Tex. App. 201; Collins *v.* State, 16 Tex. App. 274.

Vermont.—Beaman *v.* Russel, 20 Vt. 205, 49 Am. Dec. 775.

West Virginia.—Conner *v.* Fleshman, 4 W. Va. 693.

Wisconsin.—Page *v.* Danaher, 43 Wis. 221; Maldaver *v.* Smith, 102 Wis. 30, 78 N. W. 140.

Statement of the Rule.—If the interlineation is in itself suspicious, as, if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink, in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. Cox *v.* Palmer, 3 Fed. 16.

In Pennsylvania, the rule is stated thus: "When a contest occurs, and the instrument is offered in evidence, the question at once arises whether the alteration is beneficial to the party offering it; if it be, we do not presume a forgery, but we hold the party offering it in evidence and seeking advantage from it, bound to explain the alteration to the satisfaction of the jury. If the interlineation or erasure has been noted in the attestation clause as having been made before signature, this is sufficient; or if the similarity of ink and hand-writing, or the conduct of the parties, or other facts proved, shall persuade a jury that it was so made, the instrument is relieved from suspicion, and the party offering it is entitled to the benefits of it. So long as any ground of suspicion is apparent on the face of the instrument, the law presumes nothing, but leaves the question as to the time when it was done, to be ultimately found by the jury upon proofs to be adduced by him who offers it in evidence." Jordan *v.* Stewart, 23 Pa. St. 244, (citing Stahl *v.* Berger, 10 Serg. & R. 170, 13 Am. Dec. 666; Babb *v.* Clemson, *Ibid.* 424; Barrington *v.* Bank of Washington, 14 Serg. & R. 405; Heffelfinger *v.* Shutz, 16 Serg. & R. 46; Hudson *v.* Reel, 5 Barr 279.) See also Robinson *v.* Myers, 67 Pa. St. 9; Nibbitt *v.* Turner, 155 Pa. St. 429, 26 Atl. 750; McHale *v.* McDonnell, 175 Pa. St. 632, 34 Atl. 966.

48. Sweitzer *v.* Allen Bkg. Co., 76 Mo. App. 1.

And if the Writing Be Essential to the Cause of Action, the court may direct a non-suit or verdict. Tillou *v.* Clinton & E. Ins. Co., 7 Barb. 564.

(2.) Suspicious Alterations Defined. — It is impossible to state a general rule which will show just what character of an alteration will be required in order that it may be termed suspicious within the meaning of the rule just stated. Instances, however, are cited in the note.[49]

49. Hill *v.* Nelius, 86 Ala. 442, 5 So. 796; Hodsett *v.* Pace, 82 Va. 873, 6 S. E. 217; Wilson *v.* Hotchkiss, 81 Mich. 172, 45 N. W. 838.

Erasures and Interlineations in a Material Part of the Deed, of which no notice is taken at the time of the execution. Smith *v.* McGowan, 3 Barb. 404.

Difference in Ink and Handwriting. — The insertion in a note of an increased rate of interest, in an ink different from the body of the note and not written in the manner usually to be expected, is such an alteration as creates a sufficient ground of doubt to require the party using it to explain the alteration. Sheldon *v.* Hawes, 15 Mich. 519. See also Paramore *v.* Lindsey, 63 Mo. 63.

But in Smith *v.* McGowan, 3 Barb. 404, the court said: "There is no principle of the common law which requires a deed to be written throughout with the *same colored ink*. The fact that ink of different colors is used may or may not afford evidence of a fraudulent alteration of an instrument. It may often be an important item of evidence on that question. And it may be consistent with the utmost honesty. There is nothing in the fact, considered in itself, which will require the court to exclude the instrument for that reason, as matter of law. It may be a proper consideration for the jury, in connection with other facts, on the question of a fraudulent alteration; but the question was not put to the court in that way."

Blemishes in Negotiable Paper. Negotiable paper is always presumed, in the absence of evidence, to have been issued clear of all blemishes, erasures and alterations, whether of the date or body of the instrument; and the burden of showing that it was defective, when issued, is upon the holder, even though the alteration be beneficial to the maker. Heffner *v.* Wenrich, 32 Pa. St. 423. To similar effect see Simpson *v.* Stackhouse, 9 Pa. St. 186, 49 Am. Dec. 554; Paine *v.* Edsell, 19 Pa. St. 178; Robinson *v.* Myers, 67 Pa. St. 9; Hill *v.* Cooley, 46 Pa. St. 259; Appeal of Hess, 134 Pa. St. 31, 19 Atl. 434, 19 Am. St. Rep. 669 (holding that the holder of an altered instrument has the burden of proof, even though both drawee and payee be dead;) Clark *v.* Eckstein, 22 Pa. St. 507, 62 Am. Dec. 381; Hood's Appeal, (Pa. St.,) 7 Atl. 137. But the fact that the words "ten per cent." in a note are written in an ink different from the body of the note and from the signature of the maker, there being no interlineation resorted to to insert the words, they being in their natural order and position, as if written when the remainder of the note was written or inserted in a space left to receive them, does not cast upon the note such suspicion that the payee suing upon it must, before offering it in evidence, show that the words were made by authority of the maker, or before the execution of the note. Jones *v.* Ireland, 4 Iowa 63, 68. See also, Ault *v.* Fleming, 7 Iowa 143. And see Wilson *v.* Harris, 35 Iowa 507, wherein it was held that the fact that a portion of an indorsement signed by the defendant, is written in different ink and handwriting from the balance, does not afford such *prima facie* evidence of a fraudulent alteration as to require the plaintiffs to explain the same.

Interlineations in Same Ink as Body of Paper. — In Vickery *v.* Benson, 26 Ga. 582, it was held that the presumption should be indulged that interlineations in the same ink and handwriting as the body of the certificate to the copy of a deed were rightfully made. See also Zimmerman *v.* Camp, 155 Pa. St. 152, 25 Atl. 1086.

Interlineations Completing Imperfect Description. — Interlineations are not of themselves of a character to excite suspicion when they are mere completions of imperfect descriptions of parcels of the lands conveyed, and of the aggregate number of acres, the deed importing a sale by description or metes and bounds, and not by the quantity.[50]

f. *Distinction Between Deeds and Other Instruments.* — Some of the courts in holding that in the case of deeds the presumption is that the alteration was made before the execution of the deed,[51] seek to make a distinction between deeds and other instruments;[52] but others disregard any such distinction, merely applying the rule adopted by that particular jurisdiction without regard to the nature of the instrument or other writing.[53]

5. Order of Proof. — Where it is incumbent upon the party producing an instrument showing a material alteration on its face, to explain the alteration, whether the explanatory evidence or the writing shall be first introduced in evidence, is within the discretion of the court; he may receive the writing subject to explanation or on condition that counsel will give the explanation.[54]

50. Sharpe *v.* Orme, 61 Ala. 263, wherein the court said: "These interlineations, merely curing an imperfect description of the particular parcels of the lands, accord with all the purposes and objects of the conveyance, and it is but a fair presumption that their omission in the original writing of the deed was merely inadvertent. The inadvertence was corrected, so soon as it was discovered, it is also fair to presume. The legal presumption under the circumstances, is, that they were made before the acknowledgment of execution, and the burden of repelling the presumption rested on the party asserting the contrary."

51. *United States.*—Little *v.* Herndon, 10 Wall. 26, 19 L. Ed. 878.

Alabama. — White *v.* Hass, 32 Ala. 430, 70 Am. Dec. 548.

Florida. — Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871.

Georgia. — Bedgood *v.* McLain, 89 Ga. 793, 15 S. E. 670; Collins *v.* Borning, 96 Ga. 360, 23 S. E. 401.

Michigan. — Munroe *v.* Eastman, 31 Mich. 283.

Mississippi. — Ellison *v.* Mobile & O. R. Co., 36 Miss. 572, where the rule is discussed but not applied.

Missouri. — Holton *v.* Kemp, 81 Mo. 661; McCormick *v.* Fitzmorris, 39 Mo. 24; Paramore *v.* Lindsey, 63 Mo. 63; Stillwell *v.* Patton, 108 Mo. 352, 18 S. W. 1075.

Nebraska. — Dorsey *v.* Conrad, 49 Neb. 443, 68 N. W. 645.

Texas. — Rodriguez *v.* Haynes, 76 Tex. 225, 13 S. W. 296.

Contra. — Ely *v.* Ely, 6 Gray (Mass.) 439.

52. Nagles Estate, 134 Pa. St. 31, 19 Atl. 434, 19 Am. St. Rep. 669; Simpkin *v.* Stackhouse, 9 Pa. St. 186, 49 Am. Dec. 554.

53. Wood *v.* Steele, 6 Wall. 80; Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196 (citing numerous authorities); Franklin *v.* Baker, 48 Ohio St. 296, 27 N. E. 550, 29 Am. St. Rep. 547; Neil *v.* Case, 25 Kan. 355.

54. Smith *v.* McGowan, 3 Barb. 404; Smith *v.* U. S., 2 Wall. 219; Nickum *v.* Gaston, 28 Or. 322, 42 Pac. 130; Stayner *v.* Joyce, 82 Ind. 35, 22 N. E. 89.

Evidence After Argument to Jury. In Kiser *v.* State, 13 Tex. App. 201, it was held error to permit a party producing an instrument showing a suspicious alteration to make proof explaining the alteration after the argument to the jury had been completed. The court said: "It is within the discretion of the court to admit testimony at any time before the argument of the case has been

6. Parol Evidence. — A. In General. — It is a general rule that parol evidence is admissible to prove the time when, the person by whom, and the circumstances under which an alteration was made,[55] or to explain the purpose of the alteration.[56]

Immaterial Alteration. — So also, oral testimony of the subject matter referred to in a deed may be admitted for the purpose of showing that an unnoted erasure is immaterial.[57]

B. Alteration by Stranger. — Again, when it is incumbent on a party offering an altered instrument to explain the alteration, he may resort to parol evidence showing that the alteration was made by a stranger without his knowledge.[58]

concluded, but we know of no rule of law which confers such discretion where the argument has been concluded, and we think it would be imprudent to sanction such a practice."

55. *Alabama.*—Connally *v.* Spragins, 66 Ala. 258.

Georgia. — Bowe *v.* Dotterer, 80 Ga. 50, 4 S. E. 253.

Indiana. — Schneider *v.* Rapp, 33 Ind. 270.

Massachusetts. — Heywood *v.* Perrin, 10 Pick. 228, 20 Am. Dec. 518; Smith *v.* Jagoe, 122 Mass. 538, 52 N. E. 1088.

Oregon. — Wren *v.* Fargo, 2 Or. 19.

Pennsylvania. — Winters *v.* Monroe, 163 Pa. St. 239, 29 Atl. 916.

South Carolina. — Monchet *v.* Cason & Hill, 1 Brev. 307.

Wisconsin. — Lowe *v.* Merrill, 1 Pinn. 340.

The party having the burden of accounting for alteration may satisfy that burden as well by proof from circumstances as by calling witnesses. Burton *v.* Pressly, 1 Chev. Eq. (S. C.) 1.

56. Johnson *v.* Wabash M. & V. P. R. Co., 16 Ind. 389; Johnson *v.* Pollock, 58 Ill. 181; Jenkinson *v.* Monroe, 61 Mich. 454, 28 N. W. 663.

Alteration to Express Agreement. Parol evidence is admissible to show that the alteration in the date of the paper was merely an attempt to so change the writing as to make it express the agreement which was originally entered into between the parties. Barlow *v.* Buckingham, 68 Iowa 169, 26 N. W. 58, 58 Am. Rep. 218.

Testimony of the Officer Who Gave a Tax Receipt on which figures have been erased is admissible to show that such figures referred to a special tax and were erased by him because the tax had not been paid. Stringham *v.* Oshkosh, 22 Wis. 326.

Accidental Erasure. — In an action on a bank check, it is competent for the plaintiff to prove that a line drawn through a portion of the amount of the check was not intended as an erasure, but that it was either upon the check when it was drawn and was not discovered, or that it was subsequently placed there by accident—especially when the figures in the margin tend to show the same fact. Henrietta Nat. Bank *v.* State Nat. Bank, 80 Tex. 648, 16 S. W. 321, 26 Am. St. Rep. 773.

57. Hanrick *v.* Patrick, 119 U. S. 156.

58. *Alabama.* — Hill *v.* Nelius, 86 Ala. 442, 5 So. 796; Winter *v.* Pool, 100 Ala. 503, 14 So. 411.

Arkansas. — Andrews *v.* Calloway, 50 Ark. 358, 7 S. W. 449.

Florida. — Orlando *v.* Gooding, 34 Fla. 244, 15 So. 770.

Idaho. — Mulkey *v.* Long (Idaho), 47 Pac. 949.

Illinois. — Condict *v.* Fowler, 106 Ill. 105.

Indiana. — Green *v.* Beckner, 3 Ind. App. 39, 29 N. E. 172.

Kentucky. — Lee *v.* Alexander, 9 B. Mon. 25, 48 Am. Dec. 412.

Massachusetts. — Drum *v.* Drum, 133 Mass. 566; Nickerson *v.* Swett, 135 Mass. 514.

Michigan. — White S. M. Co. *v.* Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313.

C. Consent of Maker or Obligor. — So, also, he may by parol, show that the alteration was in fact made with the knowledge and consent of the maker or obligor.[59]

Alterations to Correct Errors. — So, also, the alteration may be

Mississippi. — Croft *v.* White, 36 Miss. 455.

New Jersey. — Hunt *v.* Gray, 35 N. J. Law 227, 10 Am. Rep. 232.

New York.—Nat. Ulster Co. Bank *v.* Madden, 114 N. Y. 280, 21 N. E. 408, 11 Am. St. Rep. 633; Martin *v.* Tradesmen's Ins. Co., 101 N. Y. 498, 5 N. E. 338.

Ohio. — Thompson *v.* Massie, 41 Ohio St. 307.

Oregon. — Whitlock *v.* Mausick, 10 Or. 166.

Tennessee. — Boyd *v.* McConnel, 10 Humph. 68.

Texas. — Tutt *v.* Thornton, 57 Tex. 35.

Wisconsin. — Union Nat. Bank *v.* Roberts, 45 Wis. 373.

59. *United States.* — Speake *v.* U. S. 9 Cr. 28, 3 L. Ed. 645; Mundy *v.* Stevens, 61 Fed. 77.

Alabama. — Ravisies *v.* Alston, 5 Ala. 297; White *v.* Hass, 32 Ala. 430, 70 Am. Dec. 548.

Illinois. — McNail *v.* Welch, 125 Ill. 623, 18 N. E. 737.

Indiana. — Richmond Mfg. Co. *v.* Davis, 7 Blackf. 412.

Iowa. — Browning *v.* Gosnell, 91 Iowa 448, 59 N. W. 340.

Massachusetts. — Boston *v.* Benson, 12 Cush. 61.

Missouri. — Evans *v.* Foreman, 60 Mo. 449.

Nebraska. — Holland *v.* Griffith, 13 Neb. 472, 14 N. W. 387.

North Carolina. — Campbell *v.* McAustin, 2 Hawks. 33, 11 Am. Dec. 738; Howell *v.* Cloman, 117 N. C. 77, 23 S. E. 95.

Pennsylvania.—Miller *v.* Gilleland, 19 Pa. St. 119; Smith *v.* Weld, 2 Pa. St. 54; Stahl *v.* Berger, 10 Serg. & R. 170, 13 Am. Dec. 666; Myers *v.* Nell, 84 Pa. St. 369.

South Dakota. — Wyckoff *v.* Johnson, 2 S. D. 91, 48 N. W. 837.

Texas. — Taylor *v.* Moore (Tex.), 20 S. W. 53.

In Krause *v.* Meyer, 32 Iowa 566, the court permitted evidence to go to the jury, against defendant's objection, of a conversation had between one of the plaintiffs and their agent, in which plaintiffs were informed that defendant had authorized the alteration. Defendant's counsel insisted that the court erred in overruling the objection to the evidence. The court said: "We are of a different opinion. It was competent to show the good faith and innocence of plaintiffs, that they acted upon information of the assent of defendant to the change in the note, which they directed. This information was brought them through a proper channel, and the fact that they did receive it was certainly proper to be given in evidence. And that is all that the evidence amounts to. Proof of the conversation was a direct, accurate and proper way to show that plaintiffs did receive such information as well as the manner in which they received it, which was also proper to be shown."

In King *v.* Bush, 36 Ill. 142, it was held that evidence showing that the note in suit as it appeared at the time of trial had been presented to the maker and admitted by him to be correct, was sufficient to show that the alteration was made previous to its execution, or if afterwards that it was with his consent.

Proceedings in a Partition Suit nearly two years after the grantor had full knowledge of the alteration in the deed, wherein it appeared that he testified that the grantee in such deed owned the interest which such deed purports to convey, are pertinent evidence to show his assent to such alteration as lawfully made. North *v.* Henneberry, 44 Wis. 306.

In Horton *v.* Horton, 71 Iowa 448, 32 N. W. 452, it was held that an indorsement of the place of payment of a note, made by the payee after the maker's death, was immaterial, inasmuch as the payee was administratrix of the maker's estate.

shown to have been made in good faith to correct an error, under circumstances showing the implied authority from the other party to make the correction.[60]

Other Similar Transactions. — It is not competent, however, in order to show that a party to a note in suit, has authorized the insertion of a clause, to show that he was a party to other notes containing similar clauses.[61]

D. Ratification of Unauthorized Alteration. — So, also, he may show that although made without such knowledge and consent, the maker or obligor subsequently ratified the alteration.[62]

7. Sufficiency of Attempted Explanation. — A. In General. — If the evidence given to explain the alteration is of such cogency that the paper as explained would sustain a verdict in favor of the party producing it, the court should let the paper go to the jury with such explanatory evidence.[63]

60. Lee *v.* Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466. See also Martin *v.* Tradesmen's Ins. Co., 101 N. Y. 498, 5 N. E. 338.

61. Iron Mountain Bank *v.* Murdock & Armstrong, 62 Mo. 70.

62. *England.*—Tarleton *v.* Shingler, 7 M. G. & S. 812, 62 Eng. C. L. 812.

Illinois. — King *v.* Bush, 36 Ill. 142; Goodspeed *v.* Cutler, 75 Ill. 534.

Massochusetts. — Prouty *v.* Wilson, 123 Mass. 297.

Michigan. — Stewart *v.* First Nat. Bank, 40 Mich. 348; Jenkinson *v.* Monroe etc. Co., 61 Mich. 454, 28 N. W. 663.

Minnesota. — Jauney, Sample & Co. *v.* Gochruiger, 52 Minn. 428, 54 N. W. 481.

Missouri. — Workman *v.* Campbell, 57 Mo. 53.

New Hampshire. — Humphreys *v.* Guillow, 13 N. H. 385, 38 Am. Dec. 499.

Pennsylvania. — Wilson *v.* Jamieson, 7 Pa. St. 126.

South Carolina. — Jacobs *v.* Galbreath, 45 S. C. 46, 22 S. E. 757.

Tennessee. — Ratcliff *v.* Planter's Bank, 2 Sneed. 425.

Offer to Pay Debt. — It is competent to show that the obligors of a writing, with knowledge of the alteration, offered to make payment thereon (Browning *v.* Gosnell, 91 Iowa 448, 59 N. W. 340); and asked for time in which to pay the balance. Dickson *v.* Bamberger, 107 Ala. 293, 18 So. 290.

Readiness to Ratify Alteration. According to Booth *v.* Powers, 56 N. Y. 22, an action for the conversion of a promissory note, in which the defendant set up an unauthorized alteration by the payee after the execution and delivery of the note, it seems that plaintiff may rebut the defendant's evidence of alteration, by showing a readiness on the part of the maker of the note to ratify same and to admit the note to be a valid obligation.

When the Plaintiff Has Denied That the Instrument Was Altered. he cannot be allowed to give evidence to show subsequent ratification of the alteration. Capital Bank *v.* Armstrong, 62 Mo. 59.

63. *United States.* — Rosenbug *v.* Jett, 72 Fed. 90.

Alabama. — Ward *v.* Cheney, 117 Ala. 238, 22 So. 996.

Illinois. — Catlin Coal Co. *v.* Lloyd, 180 Ill. 398, 54 N. E. 214. 72 Am. St. Rep. 216.

Michigan. — Pearson *v.* Hardin, 95 Mich. 360, 54 N. W. 504.

Nebraska. — Holland *v.* Griffith, 13 Neb. 472, 14 N. W. 387.

Pennsylvania. — Winters *v.* Mowrer, 163 Pa. St. 239, 29 Atl. 916; Miller *v.* Stack, 148 Pa. St. 164, 23 Atl. 1058.

Time Book Kept by Different Persons. — A time book is properly admitted in evidence over the objection that it was kept by different persons, and that it showed on its face that it had been altered with fraudulent

B. Cogency of Proof. — The evidence should be clear and satisfactory that it was done under such circumstances as will rebut all motive of any fraudulent intention.[64]

III. QUESTIONS OF LAW AND FACT.

1. Materiality of Alteration. — The question whether or not an alteration in a written instrument is a material one should not be submitted to the jury, but it is a question of law for the court to determine.[65]

2. The Fact of the Alteration. — But the question whether there has in fact been an alteration is one for the jury to determine from the instrument, in connection with the explanatory evidence adduced by the parties.[66]

intent, where, although there is ground for claiming from its appearance that there had been some additions to the original entries, its condition and the method pursued in making the entries are fully explained by some of the parties who made them. The jury is competent to consider it and the explanations given, and to determine its value. Gutherless *v.* Ripley, 98 Iowa 290, 67 N. W. 109.

A Statute Requiring Explanation of an Apparent Alteration is Complied With when the party presenting the instrument in evidence has shown that there has been no alteration therein since it came to his hands. Mulkey *v.* Long (Idaho), 47 Pac. 949; Sedgwick *v.* Sedgwick, 56 Cal. 213.

64. Wheat *v.* Arnold, 36 Ga. 479. See also Pew *v.* Laughlin, 3 Fed. 39, wherein the court said: "One who seeks to avoid the language in which such an instrument is drawn, as by proving the assent of parties to a change, or otherwise, must be held to full and satisfactory proof of the fact."

65. *United States.* — Steele *v.* Spencer, 1 Pet. (U. S.) 352, 7 L. Ed. 259; Wood *v.* Steele, 6 Wall. 80, 18 L. Ed. 725.

Alabama. — Payne *v.* Long, 121 Ala. 385, 25 So. 780.

Arkansas. — Overton *v.* Matthews, 35 Ark. 146, 37 Am. Rep. 9.

Georgia. — Pritchard *v.* Smith, 77 Ga. 463; Winkles *v.* Guenther, 98 Ga. 472, 25 S. E. 527. *Compare* Reinhart *v.* Miller, 22 Ga. 402, 68 Am. Dec. 506.

Illinois. — Donnel Mfg. Co. *v.* Jones, 49 Ill. App. 327; Milliken *v.* Marlin, 67 Ill. 13.

Indiana. — Cochran *v.* Nebeker, 48 Ind. 459.

Iowa. — Benton Co. Sav. Bank *v.* Strand, 106 Iowa 606, 76 N. W. 1001.

Maine. — Belfast Nat. Bank *v.* Harriman, 68 Me. 522.

Mississippi. — Hill *v.* Calvin, 4 How. (Miss.) 231.

Missouri. — Holton *v.* Kemp, 81 Mo. 661.

Nebraska. — Fisherdick *v.* Hutton, 44 Neb. 122, 62 N. W. 488.

Oklahoma. — Richardson *v.* Fillner, 9 Okla. 513, 60 Pac. 270.

Pennsylvania.—Stephen *v.* Graham, 7 Serg. & R. 505, 10 Am. Dec. 485.

South Carolina. — Kinard *v.* Glenn, 29 S. C. 590, 8 S. E. 203. And see Jacobs *v.* Gilreath, 45 S. C. 46, 22 S. E. 757, where this principle was affirmed but the charge held not to be open to the objection of submitting the question of the materiality of the alteration to the jury.

Texas.—Randall *v.* Smith, 2 Posey Unrep. Cas. 397.

Virginia. — Keen *v.* Monroe, 75 Va. 424.

66. *United States.* — Steele *v.* Spencer, 1 Pet. 352.

Colorado. — Huston *v.* Plato, 3 Colo. 402.

Georgia. — Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258.

Illinois. — Miliken *v.* Martin, 67 Ill. 13.

But it is error to submit the question to the jury for their determination from a mere inspection of the paper itself.[67] And where the alteration, if any, is material it is error to submit the fact of the alteration to the jury.[68]

3. Time of the Alteration. — So, also, it is for the jury to determine the time when an alteration was made, where the alteration is apparent on the face of the paper.[69]

Indiana. — Stoner *v.* Ellis, 6 Ind. 152.

Iowa. — Horten *v.* Horten, 71 Iowa 448, 32 N. W. 452.

Maine. — Belfast Nat. Bank *v.* Harriman, 68 Me. 522.

Michigan. — Comstock *v.* Smith, 26 Mich. 306.

Missouri. — Holton *v.* Kemp, 81 Mo. 661; Paramore *v.* Lindsey, 63 Mo. 63.

Nebraska. — Stough *v.* Ogden, 49 Neb. 291, 68 N. W. 516.

New Hampshire. — Cole *v.* Hills, 44 N. H. 227.

New Jersey. — Richman *v.* Richman, 10 N. J. Law 114; Hunt *v.* Gray, 35 N. J. Law 227, 10 Am. Rep. 232.

Oklahoma. — Richardson *v.* Fellner, 9 Okla. 513, 60 Pac. 270.

Pennsylvania. — Stahl *v.* Berger, 10 Serg. & R. 170, 13 Am. Dec. 666.

Vermont. — Beaman *v.* Russell, 20 Vt. 205, 49 Am. Dec. 775.

West Virginia. — Conner *v.* Fleshman, 4 W. Va. 693.

Wisconsin. — North *v.* Henneberry, 44 Wis. 306.

67. Horton *v.* Horton, 71 Iowa 448, 32 N. W. 452.

68. Palmer *v.* Largent, 5 Neb. 223, 25 Am. Rep. 479.

69. *Alabama.* — Ward *v.* Cheney, 117 Ala. 238, 22 So. 996.

Colorado. — Huston *v.* Plato, 3 Colo. 402; Schmidt *v.* Stecker, 3 Colo. 273.

Connecticut.—Bailey *v.* Taylor 11 Conn. 531, 29 Am. Dec. 321.

Georgia. — Planters & Merchants' Bank *v.* Erwin, 31 Ga. 371; Reinhart *v.* Miller, 22 Ga. 402, 68 Am. Dec. 506.

Illinois. — Dehoney *v.* Soucie, 17 Ill. App. 234; Milliken *v.* Marlin, 67 Ill. 13.

Kansas. — Neil *v.* Case, 25 Kan. 355, 37 Am. Rep. 259.

Louisiana. — Pipes *v.* Hardesty, 9 La. Ann. 152, 61 Am. Dec. 202.

Maine. — Crabtree *v.* Clark, 20 Me. 337.

Massachusetts. — Norwood *v.* Fairservice, Quincy 189; Newman *v.* Wallace, 121 Mass. 323.

Michigan. — Wilson *v.* Hotchkiss, 81 Mich. 172, 45 N. W. 838.

Minnesota. — Wilson *v.* Hayes, 40 Minn. 531, 4 L. R. A. 196, 42 N. W. 467.

Mississippi. — Commercial & R. Bank *v.* Hum, 7 How. 414; Wilson *v.* Henderson, 9 Smed. & M. 375, 48 Am. Dec. 716.

Missouri. — Beach *v.* Heck, 54 Mo. App. 599; Paramore *v.* Lindsey, 63 Mo. 63.

Nebraska. — Bank of Cass County *v.* Morrison, 17 Neb. 341, 22 N. W. 782, 52 Am. Rep. 417; Lamb *v.* Briggs 22 Neb. 138, 34 N. W. 217; Goodin *v.* Plugge, 47 Neb. 284, 66 N. W. 407.

New Hompshire. — Cole *v.* Hills, 44 N. H. 227; Hill *v.* Barnes, 11 N. H. 395.

New Jersey. — Cumberland Bank *v.* Hall, 1 Halst. 215 (6 N. J. L.); Hunt *v.* Gray, 35 N. J. L. 227, 10 Am. Dec. 232.

New York. — Pease *v.* Barnett, 27 Hun 378; Acker *v.* Ledyard, 8 Barb. 514; Pringle *v.* Chambers, 1 Abb. Pr. 58; Tuthill *v.* Hussey, 7 N. Y. Supp. 547, 27 N. Y. St. 362.

Pennsylvania. — Heffelfinger *v.* Shutz, 16 Serg. & R. 46; Heffner *v.* Wenrich, 32 Pa. St. 423; Martin *v.* Kline, 157 Pa. St. 473, 27 Atl. 753.

South Carolina. — Commissioners of Pore *v.* Hauion, 1 Nott & McC. 554; Wicker *v.* Pope, 12 Rich. L. 387, 75 Am. Dec. 732.

Texas. — Rodriguez *v.* Haynes, 76 Tex. 225, 13 S. W. 296.

Virginia. — Ramsey *v.* McCue, 21 Gratt. 349.

4. Person Making the Alteration. — Again, it is for the jury to determine who made the alteration.[70]

5. Intent. — It is also a question for the jury to determine with what intent an alteration was made.[71]

6. Consent. — So, also, whether or not the alteration was made with the knowledge and consent of the other party to the instrument is one for the jury.[72]

7. Ratification. — And whether or not an unauthorized alteration has been ratified by the party affected thereby, is also a question for the jury.[73]

70. *Alabama.* — Ward *v.* Cheney, 117 Ala. 238, 22 So. 996.
Illinois. — Milliken *v.* Marlin, 66 Ill. 13.
Minnesota. — Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196.
New York. — Artisans' Bank *v.* Backus, 31 How. Pr. 242.
Pennsylvania. — Martin *v.* Kline, 157 Pa. St. 473, 27 Atl. 753.
Texas. — Rodriguez *v.* Haynes, 76 Tex. 225, 13 S. W. 296.
Virginia. — Ramsey *v.* McCue, 21 Gratt. 349.

71. *Alabama.* — Ward *v.* Cheney, 117 Ala. 238, 22 So. 996.
Colorado. — Huston *v.* Plato, 3 Colo. 402.
Georgia. — Pritchard *v.* Smith, 77 Ga. 463; Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258.
Maine. — Belfast Nat. Bank *v.* Harriman, 68 Me. 522.
Minnesota. — Wilson *v.* Hayes, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196.
Missouri. — McCormick *v.* Fitzmorris, 39 Mo. 24.
New Hampshire. — Cole *v.* Hills, 44 N. H. 227.
New York. — Kelly *v.* Indemnity Fire Ins. Co., 38 N. Y. 322.
Pennsylvania. — Hudson *v.* Reel, 5 Pa. St. 279.
Texas. — Rodriguez *v.* Haynes, 76 Tex. 225, 13 S. W. 296.
Virginia. — Ramsey *v.* McCue, 21 Gratt. 349.

72. *Connecticut.* — Bailey *v.* Taylor, 11 Conn. 531, 29 Am. Dec. 321.
Indiana. — Cochran *v.* Nebeker, 48 Ind. 459.
Iowa. — Williams *v.* Barrett, 52 Iowa 637, 3 N. W. 690.
Maine. — Belfast Nat. Bank *v.* Harriman, 68 Me. 522.
Mississippi. — Wilson *v.* Henderson, 9 Smed. & M. 375, 48 Am. Dec. 716.
Missouri. — McElroy *v.* Caldwell, 7 Mo. 231.
South Carolina. — Jacobs *v.* Gilreath, 45 S. C. 46, 22 S. E. 757.
Virginia. — Keen *v.* Monroe, 75 Va. 424.
Wisconsin. — North *v.* Henneberry, 44 Wis. 306.

73. Lammers *v.* White S. M. Co., 23 Mo. App. 471. *Compare* Dickson *v.* Bamberger, 107 Ala. 293, 18 So. 290, wherein the court holds that it is for the court alone to pass upon the legal sufficiency of the facts to constitute ratification.

AMBIGUITY.

By Clark Ross Mahan.

I. UNAMBIGUOUS WRITING.

Where a writing is entirely free from any ambiguity whatsoever, extrinsic evidence is not admissible to aid or explain any of its terms.[1]

No Matter How Difficult it Is to Interpret an Instrument, if the court does finally interpret it, there is no ambiguity about it which will warrant the introduction of parol testimony.[2]

1. *United States.* — Holmes *v.* Montauk Steamboat Co., 93 Fed. 731; Kemble *v.* Lull, 3 McLean 272, 14 Fed. Cas. No. 7683.
Connecticut. — Adams *v.* Turner (Conn.), 46 Atl. 247.
Georgia. — Harrison *v.* Tate, 100 Ga. 383, 28 S. E. 227.
Kansas. — Cross *v.* Thompson, 50 Kan. 627, 32 Pac. 357.
Kentucky. — Franklin F. Ins. Co. *v.* Hellerick, 20 Ky. Law 1703, 49 S. W. 1066.
Maryland. — Neal *v.* Hopkins, 87 Md. 19, 39 Atl. 322.
Massachusetts. — Revere *v.* Leonard, 1 Mass. 91; Stowell *v.* Buswell, 135 Mass. 340.
Michigan. — Brown *v.* Schiappacasse, 115 Mich. 47, 72 N. W. 1096.
Missouri. — Schickle *v.* Chouteau H. & V. Iron Co., 84 Mo. 161.
Nebraska. — Drexel *v.* Murphy, 59 Neb. 210, 80 N. W. 813.
New York. — De Remer *v.* Brown (N. Y.), 59 N. E. 129.
North Carolina. — Chard *v.* Warren, 122 N. C. 75, 29 S. E. 373.
Texas. — Jones *v.* Hanna (Tex. Civ. App.), 60 S. W. 279.
Vermont. — Herrick *v.* Noble, 27 Vt. 1.
West Virginia. — Camden *v.* McCoy, 48 W. Va. 377, 37 S. E. 637.
Wisconsin. — Hooker *v.* Hyde, 61 Wis. 204, 21 N. W. 52.

Illustrations. — An insurance policy excepted some "oil in the tanks." It was attempted to be proved the tanks referred to were those insured in a separate policy; but the court held that as the meaning of the words was clear and unambiguous, such parol testimony must be excluded. Weisenberger *v.* Harmony Ins. Co., 56 Pa. St. 442. Where a lease purported to be made for a "term of six months, from the 6th day of December, 1881, which term shall end on the 6th day of May, 1882," the court held that there was no ambiguity which would warrant the admission of parol testimony, but a mere inaccuracy in stating the termination of the lease, which must yield to the term granted under it. Nindle *v.* State Bank, 13 Neb. 245.

2. San Diego Flume Co. *v.* Chase (Cal.), 32 Pac. 245.
"**The Language May Be Inaccurate,** but if the court can determine the meaning of this inaccurate language, without any other guide than a knowledge of the simple facts upon which, from the nature of language in general, its meaning depends, the language, although inaccurate, cannot be ambiguous." Riggs *v.* Myers, 20 Mo. 239.

II. PATENT AMBIGUITY.

1. General Rule Stated. — The rule in respect of the admissibility of extrinsic evidence to explain an ambiguity apparent on the face of an instrument of writing is generally stated as excluding such evidence,[3] unless it is otherwise expressly provided by statute;[4]

3. Statement of Rule. — "The general rule seems to be, that for an apparent ambiguity, or uncertainty upon the face of the instrument, no proof can be admitted, if it be perfectly consistent in itself; but if there is difficulty in applying its terms to the subject-matter, with reference to which those terms or stipulations were made, then parol evidence is admitted. The reason of the rule is perfectly clear; the object of the law is to carry into effect the intention of the parties, as expressed through the medium of language, which they have, more or less, solemnly and deliberately committed to writing. Now, let it be supposed that this apparent ambiguity, inherent in the words themselves, is perfectly inconsistent and unintelligible, and is, moreover, incapable of being explained and made intelligible by any one of the rules of interpretation known to the law, the effect of admitting vague and uncertain testimony of the *intention* of the parties, would be to substitute a contract, or create terms or stipulations, in reference to the subject-matter of the instrument, entirely independent of the particular expressions which the party or parties thought fit to use. Suppose, again, that the words are intelligible, but capable, upon their face, of two constructions, and parol testimony is admitted to settle which meaning shall be taken, is it not clear that it is the testimony admitted which produces the effect, and not the language of the instrument? There is one instance where such testimony is admitted, sometimes mentioned as an exception, but which, in fact, is not. Where expressions or technical terms are used in the instrument, unintelligible to the common reader, yet susceptible of a definite interpretation by experts, then explanation is admitted for the purpose of effectuating the intention of the party through the medium of his own language. Atty.-Gen. *v.* Clapham, 31 E. L. & E. R. 164; 1 Greenl. Ev., 298-99; 2 Stark. Ev., 756." Brauns *v.* Stearns, 1 Or. 368.

"**If Such a Defect Can Be Supplied by Parol Proof,**" said the court in Dingman *v.* Kelly, 7 Ind. 717, "the statute of frauds is of no avail. The proof would more than alter or vary the terms of a deed; it would make one, which, independent of such proof, could have no operation whatever."

4. In Georgia, the code expressly provides that parol evidence is admissible to explain a patent ambiguity. Hill *v.* Felton, 47 Ga. 455, 15 Am. Rep. 643; Bell *v.* Boyd, 53 Ga. 643; Barrett *v.* Powell, 63 Ga. 552; Ferrell *v.* Hurst, 68 Ga. 132; Burgé *v.* Hamilton, 72 Ga. 568; Jennings *v.* Athens Bank, 74 Ga. 782; Turner *v.* Berry, 74 Ga. 481; Savannah R. Co. *v.* Collins, 77 Ga. 376; Mohr *v.* Dillon, 80 Ga. 572, 5 S. E. 770; Johnston *v.* Patterson, 86 Ga. 725, 13 S. E. 17; American Ex. Bank *v.* Ga. Con. Co., 87 Ga. 651, 13 S. E. 505; Atlanta *v.* Schmeltzer, 83 Ga. 609, 10 S. E. 543; Brown *v.* Doane, 86 Ga. 32, 12 S. E. 179, 11 L. R. A. 381; Wheelwright *v.* Aiken, 92 Ga. 394, 17 S. E. 610; Shore *v.* Miller (Ga.), 4 S. E. 561; Neal *v.* Reams, 88 Ga. 298, 14 S. E. 617; Cent. R. Co. *v.* Ga. Exchange, 91 Ga. 389, 17 S. E. 904; Penn Tobacco *v.* Lehman, 109 Ga. 428, 34 S. E. 679; Follendore *v.* Follendore (Ga.), 35 S. E. 676; Trumlin *v.* Perry (Ga.), 34 S. E. 171.

By the Georgia code, "where the rules of construction, as understood before the passage of the code, failed to enlighten the court as to the meaning of the instrument," parol evidence was admissible, "whether the ambiguity was patent or latent." Hill *v.* Felton, 47 Ga. 455, 15 Am. Rep. 643.

and the rule as thus stated is applied to all classes of instruments in which it is sought to explain by parol such an ambiguity, without regard to their character, whether under seal or not, whether voluntary or growing out of proceedings *in invitum*, or whether within the statute of frauds or not, and the like.[5]

5. *England.* — Hollier *v.* Eyre, 9 Cl. & F. 1; Cheyneys *v.* Case, 5 Coke 68; Saunderson *v.* Piper, 5 Bing. (N. C.) 415, 35 Eng. C. L. 162; Smith *v.* Oeffnyes, 15 M. & W. 561.

Canada. — Clark *v.* Bonnycastle, 3 U. C. Q. B. (O. S.) 528.

United States. — Kemiel *v.* Wilson, 4 Wash. C. C. 308, 2 Fed. Cas. No. 7685.

Alabama. — Dane *v.* Glennon, 72 Ala. 160; Ravisies *v.* Stoddart, 32 Ala. 599.

Arkansas. — Fuller *v.* Fellows, 30 Ark. 657; Tatum *v.* Croom, 60 Ark. 487, 30 S. W. 885.

California. — Mesick *v.* Sunderland, 6 Cal. 297; Brandon *v.* Leddy, 67 Cal. 43, 7 Pac. 33; *In re* Young's Estate, 123 Cal. 337, 55 Pac. 1011.

Illinois. — Griffith *v.* Furry, 30 Ill. 251, 83 Am. Dec. 186; Panton *v.* Tefft, 22 Ill. 367; Hamilton *v.* Harvey, 121 Ill. 469, 13 N. E. 210, 2 Am. St. Rep. 118.

Indiana. — Grimes *v.* Harmon, 35 Ind. 198, 9 Am. Rep. 690.

Louisiana. — Mithoff *v.* Byrne, 20 La. Ann. 363.

Maryland. — Clark *v.* Lancaster, 36 Md. 196, 11 Am. Rep. 486; Castelman *v.* Duval, 89 Md. 657, 43 Atl. 821; Newcomer *v.* Kline, 11 Gill & J. 457, 37 Am. Dec. 74.

Massachusetts. — Stoner *v.* Freeman, 6 Mass. 435.

Minnesota. — McNair *v.* Toler, 5 Minn. 435.

Mississippi. — Silden *v.* Coffee, 55 Miss. 41.

Missouri. — Campbell *v.* Johnson, 44 Mo. 247; Carter *v.* Holman, 60 Mo. 498.

New Hampshire. — Brown *v.* Brown, 43 N. H. 17.

New Jersey. — Carr *v.* Passaic Land, Imp. & Bldg. Co., 22 N. J. Eq. 85.

North Carolina. — Holman *v.* Whitacre, 119 N. C. 113, 25 S. E. 793.

Oregon. — Noyes *v.* Stauff, 5 Or. 455.

Pennsylvania. — Wright *v.* Weakley, 2 Watts 89.

Tennessee. — Barnes *v.* Sellars, 2 Sneed 33.

Wisconsin. — Cole *v.* Clark, 3 Pinn. 303.

Omitting Dollar Mark at Top of Column. — The omission in an assessment roll at the head of a column intended for valuation of the property assessed, of anything to indicate what the figures in the column were intended to represent, is an incurable patent ambiguity not explainable by extrinsic evidence. People *v.* San Francisco Sav. Union, 31 Cal. 132. *Compare* San Luis Obispo Co. *v.* White, 91 Cal. 432, 24 Pac. 864.

Chattel Mortgagor Not Named As Owner. — In Kelly *v.* Reid, 57 Miss. 89, a mortgage of a certain number of animals did not designate the mortgagor as their owner, nor locate them other than in a certain county and state, and evidence was excluded to show that the mortgagor owned the animals and no others. *Compare* Spivey *v.* Grant, 96 N. C. 214, 2 S. E. 45, disapproving this ruling. See also Barker *v.* Wheelip, 5 Humph. (Tenn.) 329, 42 Am. Dec. 432.

Failure to Specify Securities Intended. — A memorandum of contract for the sale of real estate provided for the delivery of the deed upon receipt of the cash payments, and "the securities for the deferred payments," without specifying the kind or character of the securities. *Held*, that the contract was bad for uncertainty as to its terms in this particular. George *v.* Conhaim, 38 Minn. 338, 37 N. W. 791.

A Description of Property, as situate, lying and being in the city of Sacramento and State of California, and "consisting of two thousand two hundred town lots, be the same more or less, said lots being

2. Inquiry Into Surrounding Circumstances. — A. General Rule. — The rule as just stated, however, has been characterized as being too broadly stated, for the reason, it is said, that frequently in respect of the particular case before the court, the rule, however broadly stated, was correct in its application,[6] because the ambiguity in question was so radical in its nature as to be beyond the reach of explanation by any extraneous evidence;[7] that it is not true that every ambiguity appearing upon the face of an instrument of writing, if that alone be looked to, can not be explained by extraneous evidence,[8] but that it is a generally recognized rule that

bounded according to the original plat or plan of said city." is an illustration of a patent ambiguity which cannot be cured by parol evidence. Mesick *v.* Sunderland, 6 Cal. 297.

The Deed of a Tax Collector who sells *in invitum*, by virtue of power conferred by law, must in itself be sufficient to convey the thing sold. The deed cannot be reformed so as to help out a defective description. There is no "*aggregatio mentium*" which the instrument has mistaken. Bowers *v.* Andrews, 52 Miss. 596.

Failure of Will to Describe Property To Be Sold. — A testator requested his executors "to sell and dispose of the following-described land" but left out the description. *Held*, that evidence that he owned a parcel of land not specifically disposed of was not admissible for the purpose of supplying the missing description. Crooks *v.* Whitford, 11 Mich. 159.

Antecedent and Relative. — In Lord Cheney's Case, 5 Coke 68a, the Lord Warden of the Cinque Ports devised to his son in tail, remainder to C in tail male, on condition "that he, or they, or any of them, shall not alien;" and evidence was held inadmissible to show that the testator meant the conditioning clause to include his son, and not C only.

6. Schlottman *v.* Hoffman, 73 Miss. 188, 18 So. 893, 55 Am. St. Rep. 527; Ladnier *v.* Ladnier, 75 Miss. 777, 25 So. 430.

7. *Mississippi.*—Holmes *v.* Evans, 48 Miss. 247, 12 Am. Rep. 372.

Missouri. — Donnell Newspaper Co. *v.* Jung, 81 Mo. App. 577.

New York. — United Press *v.* New York Press Co., 164 N. Y. 406, 58 N. E. 527; Burnett *v.* Wright, 44 N. Y. St. 14, 17 N. Y. Supp. 309.

Texas. — Curdy *v.* Stafford (Tex. Civ. App.), 27 S. W. 823; McKinzie *v.* Stafford, 8 Tex. Civ. App. 121, 27 S. W. 790; Pfeiffer *v.* Lindsay, 66 Tex. 123, 1 S. W. 264.

Vermont. — Pingry *v.* Watkins, 17 Vt. 379.

Wisconsin. — Campbell *v.* Packard, 61 Wis. 88, 20 N. W. 672; *In re* Willey's Estate (Wis.), 80 N. W. 102.

An Inherently Insufficient Description in a Sale on Execution, cannot be helped out by evidence of facts tending to show what property the officer probably intended to sell. Herrick *v.* Morrill, 37 Minn. 250, 33 N. W. 849.

8. Schlottman *v.* Hoffman, 73 Miss. 188, 18 So. 893.

Lord Bacon's Definition Criticized As Too General. — In Peacher *v.* Strauss, 47 Miss. 353, the court said: "According to Lord Bacon, the learned author of these rules, patent ambiguities are 'never holpen by averment;' but Kent says, that rule is too general; vol. 2, p. 747; and is not of universal application. Broom's Max. 472; 21 Wend. 651; 23 *ib.* 71; 1 Mason 11; 1 Tex. 377; 3 Binn. 587; 4 *ib.* 482; 3 Stark. Ev. 1021. And subsequent authorities have left few cases subject to its operation, mainly those so uncertain as to be incapable of execution or enforcement. 2 Pars. on Cont. 557, note e. Indeed, these rules of Lord Bacon are less regarded of late than they were formerly. *Ib.* and cases. A simpler rule, perhaps, in most cases, is this, that evidence may explain but cannot contradict written language. *Ib.* 563."

"**The Current of the Decisions**

the court may hear evidence of the facts and circumstances surrounding the making of the instrument, its subject matter, and all proper collateral facts;[9] but that if the written language used is,

Evidently Is, if not to disregard altogether Lord Bacon's rule as to patent ambiguities, to enlarge the exceptions to it as far as that can be done without violating the rule that parol evidence is not to reform or engraft a new contract on the old, but only to explain the intentions of the parties." Roberts *v.* Short, 1 Tex. 373.

In Ely *v.* Adams, 19 Johns. (N. Y.) 313, Spencer, Ch. Justice, says: "Where a question arises on the general intention of the parties, concerning which, the instrument is not decisive, proof of independent facts, collateral to the instrument, may be properly admitted; and accordingly in that case, evidence was received, of a conversation between the parties, at the time of making the writing, and of other collateral and extraneous facts, in order to show, what kind, or degree of 'indulgence' (that being a word of equivocal import) was intended by the parties. And see Peak's Ev. 116; Phil. Ev. 343, 344; The King *v.* The Inhabitants, etc., 8 T. R. 379; Doe *v.* Burt, 1 T. R. 701; Cole *v.* Wendall, 8 Johns. R. 116; The Mechanics' Bank *v.* The Bank of Columbia, 5 Wheat. 326; and The Union Bank *v.* Hyde, 6 Wheat. 572, all of which, seem to show, that the admissibility of parol evidence is not restricted to cases in which the uncertainty is strictly and exclusively such as is properly termed, *ambiguitas latens.*" See also Bell Admrs. *v.* Martin, 18 N. J. Law 167.

Three Rules Deducible From Authorities. — "From the authorities we have been able to examine three rules which may be taken to be correct: First. Where the instrument itself seems to be clear and certain on its face, and the ambiguity arises from some extrinsic or collateral matter, the ambiguity may be helped by parol evidence. Second. Where the ambiguity consists in the use of equivocal words designating the person or subject-matter, parol evidence of collateral or extrinsic matters may be introduced for the purpose of aiding the court in arriving at the meaning of the language used. Third. Where the ambiguity is such that a perusal of the instrument shows plainly that something more must be added before the reader can determine what of several things is meant, the rule is inflexible that parol evidence cannot be admitted to supply the deficiency. About this last named class of cases there cannot, under the authorities, be any question. They belong to the *ambiguitas patens* of Lord Bacon." Palmer *v.* Albee, 50 Iowa 429. See also Holmes *v.* Simon, 71 Miss. 245, 15 So. 70.

The Distinction Between Patent and Latent Ambiguities is now regarded as intended to enable the court to distinguish between cases curable and those of incurable uncertainty; to carry the aid of evidence as far as it can go, without making for the parties what they did not make for themselves. Brannan *v.* Mesick, 10 Cal. 95.

"When the person or thing is designated on the face of the instrument by terms imperfectly understood and equivocal, admitting either of *no meaning* at all by themselves, or of a variety of different meanings, referring tacitly or expressly for the ascertainment and completion of the meaning to extrinsic circumstances, it has never been considered an objection to the evidence of those circumstances, that the ambiguity was *patent*, manifested on the face of the instrument." Plumer M. R. in Colpoys *v.* Colpoys, Jacobs 451. In a covenant to "permit the use of water from my dam," notwithstanding the uncertainty as to which dam was meant, was patent upon the instrument, parol evidence was held admissible to clear up the uncertainty. Fish *v.* Hubbard's Adm'rs, 21 Wend. (N. Y.) 651.

9. *England.* — Charter *v.* Charter, L. R. 7 H. L. 364.

Canada. — Harris *v.* Moore, 10 Ont. App. 10.

United States. — West *v.* Smith, 101 U. S. 263; Drovers' Nat. Bank

when viewed by the court in the light of such surrounding facts and circumstances, still ambiguous and incapable of interpretation, it is then a case of a hopeless, incurable ambiguity.[10]

v. Albany Co. Bank, 44 Fed. 183; Standard S. M. Co. *v.* Leslie, 78 Fed. 325.

Alabama. — McGhee *v.* Alexander, 104 Ala. 116, 16 So. 148.

Arkansas. — Merrill *v.* Sypert, 65 Ark. 51, 44 S. W. 462.

California. — Baker *v.* Clark, 128 Cal. 181; Lassing *v.* James, 107 Cal. 348; Piper *v.* True, 36 Cal. 606.

Connecticut. — *In re* Curtis Castle Arbitration, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200.

Florida. — Solary *v.* Webster, 35 Fla. 363, 17 So. 646.

Illinois. — Barrett *v.* Stow, 15 Ill. 423; Chambers *v.* Prewitt, 71 Ill. App. 119, *affirmed* 50 N. E. 145.

Indiana. — Martindale *v.* Parsons, 98 Ind. 174.

Iowa. — Rush *v.* Carpenter, 54 Iowa 132, 6 N. W. 172; McClelland *v.* James, 33 Iowa 571; Palmer *v.* Albee, 50 Iowa 429.

Kansas. — Citizen's Bank *v.* Brigham (Kan.), 60 Pac. 754.

Kentucky. — Henry *v.* Henry, 81 Ky. 342.

Louisiana. — Lee *v.* Carter, 52 La. Ann. 1453, 27 So. 739.

Maine. — Nichols *v.* Frothingham, 45 Me. 220, 71 Am. Dec. 539.

Maryland. — Haile *v.* Pierce, 32 Md. 327, 3 Am. Rep. 139.

Massachusetts. — Adams *v.* Morgan, 150 Mass. 248, 22 N. E. 708; Sargent *v.* Adams, 3 Gray 72, 68 Am. Dec. 718.

Mississippi. — Schlottman *v.* Hoffman, 73 Miss. 188, 18 So. 893; Heirn *v.* McCoughan, 32 Miss. 17, 66 Am. Dec. 588.

Missouri. — Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198.

New York. — Thomas *v.* Scott, 127 N. Y. 133, 27 N. E. 961; Garvin Mach. Co. *v.* Hammond Tpyewriter Co., 42 N. Y. Supp. 564; French *v.* Carhart, 1 N. Y. 96; Hunneman *v.* Rosenback, 39 N. Y. 98; Agawam Bank *v.* Strever, 18 N. Y. 502; Petrie *v.* Hamilton College, 158 N. Y. 458, 53 N. E. 216.

Ohio. — Worman *v.* Teagarden, 2 Ohio St. 380.

Pennsylvania. — Berridge *v.* Glassey, 112 Pa. St. 442, 3 Atl. 583, 56 Am. Rep. 332.

Rhode Island. — Kinney *v.* Flynn, 2 R. I. 319.

South Carolina. — Craig *v.* Pervis, 14 Rich. Eq. 150.

South Dakota. — Blodd *v.* Fargo & S. Elev. Co., 1 S. D. 71, 45 N. W. 200.

Tennessee. — Nashville L. Ins. Co. *v.* Mathews, 8 Lea 499.

Texas. — Watrous *v.* McKie, 54 Tex. 65; Gardner *v.* Watson, 76 Tex. 25, 13 S. W. 39.

Vermont. — Lowry *v.* Adams, 8 Vt. 157; Kinney *v.* Hooker, 65 Vt. 333, 26 Atl. 690, 36 Am. St. Rep. 864.

Virginia. — Richardson *v.* Planters Bank, 94 Va. 130, 26 S. E. 413.

West Virginia. — Camden *v.* McCoy, 48 W. Va. 377, 37 S. E. 637.

Wisconsin. — Lyman *v.* Babcock, 40 Wis. 503; Bancroft *v.* Grover, 23 Wis. 463, 99 Am. Dec. 195.

Wyoming. — Frank *v.* Hicks, 4 Wyo. 502, 35 Pac. 1025.

Acts As Part of the Res Gestae. In Kingsford *v.* Hood, 105 Mass. 495, on the trial of a writ of entry, it was shown that demandant's father paid the consideration for and received a deed of the premises while his son (of the same name) was a year old, and that the father became insane two years afterwards. Demandant claimed to be the grantee, and that his father took the conveyance as a provision for him. It was held admissible to show further that the father mortgaged the premises, and that the same were sold under foreclosure, on the ground that any acts or declarations of his which formed part of and gave character to his occupation were competent evidence as part of the *res gestae;* but declarations of the grantor to the scrivener to the effect that it was to be a deed to the infant son were excluded. See also Simpson *v.* Dix, 131 Mass. 179.

10. Language Viewed in Light of Circumstances. — When the language is of such a character as to show that the parties had a fixed and

Purpose of the Inquiry. — Extraneous circumstances are not resorted to for the purpose of controlling the writing and engrafting a new one on such proof, but for the purpose only of explaining and understanding truly the meaning of the parties who had used such words of doubtful signification.[11]

A Statute Forbidding the Reception of Evidence to Vary a Writing does not operate to exclude evidence of the circumstances under which a written instrument was made, or to which it relates.[12]

B. Illustrations of Rule Applied to Particular Instruments. — a. *Contracts Generally.* — In respect to the explanation of the terms employed in contracts generally, the rule admitting the surrounding circumstances is invoked.[13] So also, such evidence is

definite meaning which they intended to express, and used language adequate to convey that idea to persons possessed of all the facts which they had in view at the time they used the language, it then becomes the duty of the court to learn those facts, if need be, by parol proof, and thus as far as possible by occupying the place of the parties employing the expressions, ascertain the sense in which they were intended to be used. But if the language itself shows that the parties using it had no fixed and definite idea, which they intended to convey, then bringing the language in contact with no state of extraneous facts could enable the words themselves to convey a clear and definite idea, because, after all, it must be the language used in view of the circumstances, that conveys the meaning of the parties." Doyle *v.* Teas, 4 Scam. (Ill.) 202.

11. Roberts *v.* Short, 1 Tex. 373. And see cases cited in the preceding notes of this section.

The Principal Upon Which Evidence of Surrounding Circumstances Is Admissible in the exposition of written contracts is that the court may be placed, as near as possible, in the situation of the parties whose language is to be interpreted. But such evidence is not admissible to prove an unexpressed intention of the parties, or their prior negotiations, which must be deemed to be merged in the written instrument. Its use is limited simply to develop and throw light upon the real meaning of that which is written, in case of ambiguity arising from the face of the instrument. King *v.* Merriman, 38 Minn. 47, 35 N. W. 570.

Intent of Parties the End Desired. If an instrument of writing is obscure, the ascertainment of the intent of the parties to it should be the end sought, and, if that end can be accomplished by evidence *aliunde,* it should be admitted. Cox *v.* Rust (Tex. Civ. App.), 29 S. W. 807.

Where the alleged acceptance of an order is ambiguous on its face, and can be explained so as to ascertain the true intention of the parties by parol testimony, it is properly admissible for that purpose. Gallagher *v.* Black, 2 Me. 99.

12. Bogk *v.* Gassert, 149 U. S. 17, 13 Sup. Ct. 738, 37 L. ed. 631.

13. *England.* — Bruff *v.* Conybeare, 13 J. Scott (N. S.) 263, 106 Eng. C. L. 261; Osborn *v.* Wise, 32 Eng. C. L. 859.

United States. — Clay *v.* Field, 138 U. S. 464, 11 Sup. Ct. 419; American Trust Co. *v.* Takashadi, 111 Fed. 125.

Alabama. — Whatley *v.* Rees (Ala.), 29 So. 606.

Colorado. — McPhee *v.* Young, 13 Colo. 80, 21 Pac. 1014.

Connecticut. — Construction Information Co. *v.* Cass (Conn.), 50 Atl. 563.

Idaho. — Burke Land & L. S. Co. *v.* Wells, Fargo & Co. (Idaho), 60 Pac. 87.

Illinois. — Irwin *v.* Powell (Ill.), 58 N. E. 941.

Indiana. — Thomas *v.* Traxel (Ind.), 59 N. E. 483.

Iowa. — Kelly *v.* Fejervary, 111 Iowa 693, 83 N. W. 791; Clement *v.*

admissible to apply the instrument to its subject matter,[14] and to identify the parties thereto.[15]

b. *Contracts of Guaranty.* — Again, guaranties, like other contracts, must be construed so as to give effect to the intention of the parties, and if this be doubtful, because of an ambiguity therein, resort may be had to evidence of the situation and surroundings of the parties in order to solve the difficulty.[16]

Drybread, 108 Iowa 701, 78 N. W. 235.

Kansas.—Coates *v.* Sulau, 46 Kan. 341, 26 Pac. 720; Simpson *v.* Kimberlin, 12 Kan. 579.

Kentucky. — Crane *v.* Williamson (Ky.), 63 S. W. 610.

Maryland. — Morrison *v.* Baechtold, 93 Md. 319, 48 Atl. 926.

Massachusetts. — Alvord *v.* Cook, 174 Mass. 120, 54 N. E. 499.

Michigan. — Preston Nat. Bank *v.* Emerson (Mich.), 60 N. W. 981.

Minnesota. — Bell *v.* Mendenhall, 78 Minn. 57, 80 N. W. 843.

Missouri. — Nordyke & M. Co. *v.* Kehlor, 155 Mo. 643, 56 S. W. 287, 78 Am. St. Rep. 600.

Nebraska. — State *v.* Cass Co., 60 Neb. 566, 83 N. W. 733.

New Hampshire. — Grant *v.* Lathrop, 23 N. H. 67.

New York. — Cole *v.* Wendel, 8 Johns. 116; Manchester Paper Co. *v.* Moore, 104 N. Y. 680, 10 N. E. 861.

North Carolina. — Richards *v.* Schlegelmich, 65 N. C. 150.

Ohio. — Mosier *v.* Parry, 60 Ohio St. 388, 54 N. E. 364.

Pennsylvania. — Schwab *v.* Ginkinger, 181 Pa. St. 8, 37 Atl. 125.

Tennessee. — Turner *v.* Jackson (Tenn.), 63 S. W. 511.

Texas. — Eikel *v.* Randolph (Tex.), 25 S. W. 62.

Utah. — Brown *v.* Markland, 16 Utah 360, 52 Pac. 597, 67 Am. St. Rep. 629.

Vermont. — Young *v.* Young, 59 Vt. 342, 10 Atl. 528.

Washington. — Pennsylvania Mtge. Inv. Co. *v.* Simms, 16 Wash. 243, 47 Pac. 441.

West Virginia. — Scraggs *v.* Hill, 37 W. Va. 706, 17 S. E. 185.

Wisconsin. — Boden *v.* Maher, 105 Wis. 539, 81 N. W. 661.

Wyoming. — North Platte Co. *v.* Price, 4 Wyo. 293, 33 Pac. 664.

14. *Idaho.* — Kelly *v.* Leachman (Idaho), 33 Pac. 44, 34 Pac. 813.

Iowa. — Meader *v.* Allen (Iowa), 81 N. W. 799.

Kansas. — Bell *v.* Rankin, 1 Kan. App. 209, 40 Pac. 1094.

Maine. — Gillerson *v.* Small, 45 Me. 17.

Maryland. — Warfield *v.* Booth, 33 Md. 63.

Massachusetts. — Sweet *v.* Shumway, 102 Mass. 365, 3 Am. Rep. 471.

Michigan. — Norris *v.* Showerman, 2 Doug. 16.

Mississippi. — Shackelford *v.* Hooker, 54 Miss. 716.

New Jersey. — Sandford *v.* Newark & H. R. Co., 37 N. J. Law 1.

Pennsylvania. — Foster *v.* McGraw, 64 Pa. St. 464.

Vermont. — New England Works *v.* Bailey, 69 Vt. 257, 37 Atl. 1043.

West Virginia. — Caperton *v.* Caperton, 36 W. Va. 479, 15 S. E. 257.

Wisconsin. — Andrews *v.* Robertson, 111 Wis. 334, 87 N. W. 190.

In Applying a Lease to the Land Described as located on designated streets, it is competent to show where, at the time of the execution of the lease, the streets were, and what building there was on the corner of those streets recently erected by the lessor. Durr *v.* Chase, 161 Mass. 40, 36 N. E. 741.

15. Warfield *v.* Curd, 5 Dana (Ky.) 318; Shackelford *v.* Hooker, 54 Miss. 716.

16. Hamill *v.* Woods (Iowa), 62 N. W. 735; Hotchkiss *v.* Barnes, 34 Conn. 27, 91 Am. Dec. 713; Gardner *v.* Watson, 76 Tex. 25, 13 S. W. 39; White's Bank *v.* Myles, 73 N. Y. 335, 29 Am. Rep. 157; Michigan State Bank *v.* Peck, 28 Vt. 200; Waldheim *v.* Miller, 97 Wis. 300, 72 N. W. 869; Wills *v.* Ross, 77 Ind. 1, 40 Am. Rep. 279.

Result of the Circumstances. But even if the broadest view be

c. *Contracts of Conveyance and Sale.* — Ambiguous terms in a contract for the conveyance of real property may be sufficient under the statute of frauds when construed according to the evidence permissible under the rule allowing extrinsic evidence of the surrounding facts and circumstances to aid or explain such terms.[17] And so also may be the terms of a contract of sale or assignment.[18]

adopted in respect of the admissibility of evidence of the circumstances surrounding the parties, or contemplated by them when a contract is entered into, a witness cannot state what in his opinion was the result of the circumstances or that in his opinion, they limited or changed the language of the written contract. Swain *v.* Granger's Union, 69 Cal. 186, 10 Pac. 404.

17. *England.* — Oliver *v.* Hunting, L. R. 44 Ch. Div. 204.

Alabama. — O'Neal *v.* Seixas, 85 Ala. 80, 4 So. 745.

California. — Preble *v.* Abrahams, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301.

Georgia. — Towner *v.* Thompson, 82 Ga. 740, 9 S. E. 672.

Iowa. — Brown *v.* Ward (Iowa), 81 N. W. 247.

Maryland. — Stockham *v.* Stockham, 32 Md. 196.

Massachusetts. — Atwood *v.* Cobb, 16 Pick. 227, 26 Am. Dec. 657; Hurley *v.* Brown, 98 Mass. 545, 96 Am. Dec. 671.

Minnesota. — Ham *v.* Johnson, 51 Minn. 105, 52 N. W. 1080.

Nebraska. — Ballon *v.* Sherwood, 32 Neb. 666, 49 N. W. 790.

New York. — Waring *v.* Ayres, 40 N. Y. 357.

Oregon. — Richards *v.* Snider, 11 Or. 197, 3 Pac. 177.

Pennsylvania. — Stamets *v.* Denistón, 193 Pa. St. 548, 44 Atl. 575.

Texas. — Ragsdale *v.* Mays, 65 Tex. 255.

Washington. — Langert *v.* Ross, 1 Wash. 250, 24 Pac. 443.

Contracts Within Statute of Frauds. — In Dorris *v.* King (Tenn.), 54 S. W. 683, it was held that evidence of the surrounding facts and circumstances was admissible for the purpose of making more definite the land referred to in a contract for the sale and delivery of all timber of a certain kind on the settler's "lands," not within the statute of frauds. The court said, however, that "The rule would be different where the contract, under the statute of frauds, is required to be in writing, or, at any rate, would have less extensive application, as in such cases the terms of the contract must be found entire in the contract itself as to stipulations and subject-matter." See also the case of Hamner *v.* Sharp, 11 Heisk. (Tenn.) 704; Hyde *v.* Darden, 3 Heisk. (Tenn.) 515; Mumford *v.* Railroad Co., 2 Lea (Tenn.) 398, 31 Am. Rep. 616.

18. *England.* — McDonald *v.* Longbottom, 102 Eng. C. L. 977.

United States. — Case Mfg. Co. *v.* Soxman, 138 U. S. 431, 11 Sup. Ct. 360; Nash *v.* Towne, 5 Wall. 689.

Indiana. — Cross *v.* Pearson, 17 Ind. 612.

Iowa. — Pratt *v.* Prouty, 104 Iowa 419, 73 N. W. 1035, 65 Am. St. Rep. 472.

Louisiana. — Campbell *v.* Short, 35 La. Ann. 447.

Massachusetts. — New England Dressed M. & W. Co. *v.* Standard W. Co., 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516.

Mississippi. — Tufts *v.* Greenewald, 66 Miss. 360, 6 So. 156.

Missouri. — Edwards *v.* Smith, 63 Mo. 119.

New York. — Emmett *v.* Penoyer, 151 N. Y. 564, 45 N. E. 1041.

Ohio. — Dayton *v.* Hoaglund, 39 Ohio St. 671.

Vermont. — Hart *v.* Hammett, 18 Vt. 127.

Wisconsin. — Brittingham & H. Lumb. Co. *v.* Manson, 108 Wis. 221, 84 N. W. 183.

In an action on a contract to sell plaintiffs all the cattle, of whatsoever age, on defendant's ranches, except a certain number of steers, the contract being silent as to the class or ages of the steers reserved, where defendants refuse to deliver certain cattle, parol evidence is ad-

d. *Conveyances.* — Again, deeds are to be interpreted according to their subject matter, and such construction given to them as will carry out the intention of the parties, when it is legally possible to do so consistently with the language of the instrument. If the language of the instrument is vague and general, parol evidence is admissible of any extrinsic circumstances tending to show definitely what things were intended by the parties; not that such evidence enlarges or diminishes the estate granted or premises conveyed, but it identifies the subject matter on which the deed operates.[19] And

missible to show that the steers reserved were sold to a third person, were of a certain age, not of the age of those which defendants refuse to deliver, and that the parties understood this when contracting. Buford *v.* Lonergan, 6 Utah 301, 22 Pac. 164.

19. *United States.* — Le Franc *v.* Richmond, 5 Sawy. 601, 15 Fed. Cas. No. 8209; Cavazos *v.* Trevino, 6 Wall. 773.

Arkansas. — Walker *v.* David (Ark.), 60 S. W. 418.

California. — Baker *v.* Clark, 128 Cal. 181, 60 Pac. 677.

Colorado. — Gelwicks *v.* Todd, 24 Colo. 494, 52 Pac. 788.

Connecticut. — Post Hill Co. *v.* Brandegee (Conn.), 50 Atl. 874.

Georgia. — Mayor etc. *v.* Brown, 99 Ga. 766, 26 S. E. 763 (under the Georgia code).

Louisiana. — Watson *v.* Barber (La.), 29 So. 949.

Maine. — Cilley *v.* Childs, 73 Me. 130.

Maryland. — Fryer *v.* Patrick, 42 Md. 51.

Massachusetts. — Waterman *v.* Johnson, 13 Pick. 261.

Michigan. — Powers *v.* Hibbard, 114 Mich. 533, 72 N. W. 339.

Minnesota. — Ripon College *v.* Brow, 66 Minn. 179, 68 N. W. 837.

Missouri. — Preswell *v.* Headley, 141 Mo. 187, 43 S. W. 378.

New Hampshire. — Bartlett *v.* La Roachelle, 68 N. H. 211, 44 Atl. 302.

New York. — Emmett *v.* Penoyer, 151 N. Y. 567, 45 N. E. 1041.

Oregon. — Hicklin *v.* McClear, 18 Or. 126, 22 Pac. 1057.

Pennsylvania. — Palmer *v.* Farrell, 129 Pa. St. 162, 18 Atl. 761, 15 Am. St. Rep. 708.

Texas. — Clark *v.* Regan (Tex. Civ. App.), 45 S. W. 169; McHugh *v.* Gallagher, 1 Tex. Civ. App. 196, 20 S. W. 1115; Curdy *v.* Stafford, 88 Tex. 120, 30 S. W. 551.

Vermont. — Kinney *v.* Hooker, 65 Vt. 333, 26 Atl. 690, 36 Am. St. Rep. 864.

Virginia. — French *v.* Williams, 82 Va. 462, 4 S. E. 591.

Washington. — Sengfelder *v.* Hill, 21 Wash. 371, 58 Pac. 250.

West Virginia. — Hansford *v.* Chesapeake Coal Co., 22 W. Va. 70.

Wisconsin. — Sydnor *v.* Palmer, 29 Wis. 226; Murray Hill etc. Co. *v.* Milwaukee etc. Co., 110 Wis. 555, 86 N. W. 199.

Wyoming. — Frank *v.* Hicks, 4 Wyo. 502, 35 Pac. 1025.

In Chambers *v.* Ringstaff, 69 Ala. 140, a description of lands in a mortgage, void on its face for ambiguity, was allowed to be aided by oral evidence showing that the grantor owned and resided on certain lands in Alabama, which were known and described by the same numbers as those employed in the mortgage. The ambiguity arose from the fact that the description employed in the instrument was, on the face of it, equally applicable to many tracts of land located in various government surveys. The conclusion was reached upon the principle that parol evidence was admissible to show the surrounding or attendant circumstances under which the contract was made, and to identify the subject-matter to which the parties referred.

Line Pointed Out by Grantor. Evidence that the grantor in such deed, at the time the plaintiff purchased of the grantee therein, pointed out the line, was properly admitted, since they were statements made upon the land by the owner of the

this is also the rule applied in the case of an ambiguous description of the parties.[20]

e. *Wills.* — An ambiguous description in the terms of a bequest or devise is often explained under this rule, by resorting to the facts and circumstances surrounding the testator and his situation in reference to the subject matter, whether in respect of the thing devised or bequeathed,[21] or in identification of the devisee or

land adjoining, in derogation of his own title to extend over the line pointed out. Purkiss *v.* Benson, 6 Mich. 538.

On an Issue As to the Location of a Boundary Line, described as running from a designated point on a stated line to "the shop of" a person named, it is proper to show that, at the time of the making of the instrument so describing the boundary, there was a platform extending along one side of the shop, built at the same time, resting on the same foundation, and used in connection with it, a corner of which was the boundary intended. Dunham *v.* Gannett, 124 Mass. 151.

Agreement Upon Boundary Line. Where, in a conveyance of land, a description is given which is ambiguous or variable, it is competent to show that the parties, at the time of the conveyance, agreed upon a certain line as the boundary intended. Horner *v.* Stillwell, 35 N. J. Law 307.

20. Fletcher *v.* Mansur, 5 Ind. 269; Langlois *v.* Crawford, 59 Mo. 456; Heath *v.* Hewitt, 127 N. Y. 166, 27 N. E. 959, 24 Am. St. Rep. 438, 13 L. R. A. 46; Holmes *v.* Moon, 7 Heisk. (Tenn.) 506; Leach *v.* Dodson, 64 Tex. 185.

21. *England.* — *In re* Cheadle, L. R. 2 Ch. 620.

Georgia. — White *v.* Holland, 92 Ga. 216, 18 S. E. 17, 44 Am. St. Rep. 87.

Indiana. — Groves *v.* Culph, 132 Ind. 186, 31 N. E. 569.

Iowa. — Chambers *v.* Watson, 60 Iowa 339, 14 N. W. 336.

Kentucky. — Henry *v.* Henry, 81 Ky. 342.

Maryland. — Frick *v.* Frick, 82 Md. 218, 33 Atl. 462; Willett *v.* Carroll, 13 Md. 459.

Massachusetts. — Denfield *v.* Petitioner, 156 Mass. 265, 30 N. E. 1018.

Michigan. — Waldron *v.* Waldron, 45 Mich. 350, 7 N. W. 894.

Mississippi. — Schlottman *v.* Hoffman, 73 Miss. 188, 18 So. 893, 55 Am. St. Rep. 527.

Missouri. — Briant *v.* Garrison, 150 Mo. 655, 52 S. W. 361.

New Jersey. — Evans *v.* Griscom, 42 N. J. Law 579, 36 Am. Rep. 542.

New York. — Lawton *v.* Corlies, 127 N. Y. 100, 27 N. E. 847.

Ohio. — Black *v.* Hill, 32 Ohio St. 313.

Pennsylvania. — *In re* Gaston's Estate, 188 Pa. St. 374, 41 Atl. 529, 68 Am. St. Rep. 874.

Vermont. — Townsend *v.* Downer, 23 Vt. 225.

Condition of Testator's Property, Family, Etc. — While no construction can be indulged, which is in conflict with the intention of the testator, as expressed in his will, yet when the will has been written by an illiterate person, without any punctuation marks whatever, and its language is at all doubtful, evidence as to the condition of the testator's property, family, etc., is admissible in construing its terms. Donohue *v.* Donohue, 54 Kan. 136, 37 Pac. 998.

Construing Words of Indefinite Signification. — Where words of indefinite signification are used, such as *my farm and plantation*, and there is nothing on the face of the instrument to qualify them or limit and apply them to a particular subject-matter, evidence of extrinsic circumstances, matters of fact, as distinguished from mere declarations of intention, is admissible for the purpose of ascertaining in what sense such definite language was used. The office of such testimony is that of interpretation—to find out the true sense of the written words as the parties used them. When such evidence is received and the facts are either admitted or found by the jury, the intention of the parties is to be

legatee.[22]

C. Nature and Extent of Inquiry. — a. *Previous Negotiations.* — So, if the previous negotiations make it manifest in what sense the parties understood and used the ambiguous terms in the writing, they may be resorted to, and indeed, they furnish the best definition to be applied in ascertaining the intention of the parties.[23] Thus, the subject matter of the writing may be identified by proof of what was before the parties by sample or otherwise, at the time of the negotiations.[24]

determined by a construction by the court from the language of the entire instrument after the sense of such general words has been ascertained by the extrinsic truth. Griscom *v.* Evens, 40 N. J. Law 402, 29 Am. Rep. 251.

Acts of the Testator After the Execution of the Will may be shown. Succession of Ehrenberg, 21 La. Ann. 280, 99 Am. Dec. 729.

22. *England.* — *In re* Taylor, L. R. 34 Ch. Div. 155.

California. — *In re* Langdon's Estate (Cal.), 62 Pac. 73.

Illinois. — Hawhe *v.* Chicago & W.I.R. Co., 165 Ill. 501, 46 N.E. 240.

Massachusetts. — Tucker *v.* Seaman's Aid Soc., 7 Metc. 188; Hinkley *v.* Thatcher, 139 Mass. 477, 1 N. E. 840, 52 Am. Rep. 719.

Ohio. — Worman *v.* Teagarden, 2 Ohio St. 380.

Pennsylvania. — *In re* Gaston's Estate, 188 Pa. St. 374, 41 Atl. 529, 68 Am. St. Rep. 874.

Virginia. — Maund *v.* McPhail, 10 Leigh 199.

To Enable the Court to Strike Out What Is False in the Designation of the Legatee, and so carry out the intent of the testator, parol testimony has been introduced to show the number, the degree, and the kinsbip of the testator's relations, as well as how he regarded them and talked about them. Atterbury *v.* Strafford, 58 N. J. Eq. 186, 44 Atl. 160: citing Lord Camoys *v.* Blundell, 1 H. L. Cas. 778; Thomas *v.* Thomas, 6 T. R. 671; Vernor *v.* Henry, 3 Watts. (Pa.) 393; Smith *v.* Smith, 1 Edw. Ch. (N. Y.) 189; *affirmed* in 4 Paige 272.

23. Stoops *v.* Smith, 100 Mass. 63, 92 Am. Dec. 76; Keller *v.* Webb, 125 Mass. 88, 28 Am. Rep. 214; Quarry Co. *v.* Clements, 38 Ohio St. 587, 43 Am. Rep. 442.

The Terms of the Negotiation Itself, and Statements Therein made, may be resorted to for this purpose. Foster *v.* Woods, 16 Mass. 116; Sargent *v.* Adams, 3 Gray (Mass.) 72, 63 Am. Dec. 718; Mumford *v.* Gething, 7 Com. B. N. S. 305; Chadwick *v.* Burnley, 12 Week. Rep. 1077.

Articles of Agreement in Pursuance of Which a Deed Was Executed may be admitted in evidence, to show the intent of the parties, where there is an ambiguity in the deed as to the quantity of land conveyed thereby, arising from a conflict between the calls and the courses and distances. Koch *v.* Dunkel, 90 Pa. St. 264. See also New Jersey Zinc Co. *v.* Boston Franklinite Co., 15 N. J. Law 418, so holding of such a writing, in order to arrive at the true construction of the word "premises," as used in the deed.

24. Swett *v.* Shumway, 102 Mass. 365, 3 Am. Rep. 471; Bradford *v.* Manly, 13 Mass. 139, 7 Am. Dec. 122; Hogins *v.* Plympton, 11 Pick. (Mass.) 97; Clark *v.* Hougton, 12 Gray (Mass.) 38; Haven *v.* Brown, 7 Me. 421, 22 Am. Dec. 208.

Representations at Time of Negotiations. — In Stoops *v.* Smith, 100 Mass. 63, 92 Am. Dec. 76, an action on a contract to pay for "inserting the business card in 200 copies of his (plaintiff's) advertising chart to be paid when the chart is published," it was held competent for the defendant to introduce evidence of representations by the plaintiff at the time of the contract as to the material of which the charts were to be made and as to the mode in which he was to publish it.

b. *Declarations of Parties.* — **(1.) Generally.** — Within the rule admitting evidence of surrounding facts and circumstances to aid or explain an ambiguity, it has been held proper to receive evidence of declarations of the parties tending to show what they understood the ambiguous term or expression to mean,[25] although there are cases holding to the contrary.[26]

(2.) Parties to Conveyances. — And the rule allowing evidence of oral declarations of the parties to a contract to aid or explain an ambiguity therein, has been applied to evidence of declarations of the parties to a conveyance.[27]

25. *Connecticut.* — *In re* Curtis Castle Arbitration, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200.

Indiana. — Motsinger *v.* State, 123 Ind. 498, 24 N. E. 342.

Kansas. — Coates *v.* Sulau, 46 Kan. 341, 26 Pac. 720.

Maine. — Gallagher *v.* Black, 2 Me. 99.

Michigan. — Jenkinson *v.* Monroe, 61 Mich. 454, 28 N. W. 663.

Minnesota. — Auttman etc. *v.* Clifford, 55 Minn. 159, 56 N. W. 593, 43 Am. St. Rep. 478; Stoops *v.* Smith, 100 Mass. 63, 92 Am. Dec. 76.

Massachusetts. — MacDonald *v.* Dana, 154 Mass. 152, 27 N. E. 993.

Missouri. — Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198.

New Jersey. — Sandford *v.* Newark H. R. Co., 37 N. J. Law 1.

New York. — Greenwood *v.* Marvin, 111 N. Y. 423, 19 N. E. 228; Manchester Paper Co. *v.* Moore, 104 N. Y. 680, 10 N. E. 861; La Chicotte *v.* Richmond R. & El. Co., 15 App. Div. 380, 44 N. Y. Supp. 75; Hart *v.* Thompson, 10 App. Div. 183, 41 N. Y. Supp. 909.

North Carolina. — Steadman *v.* Taylor, 77 N. C. 134.

Pennsylvania. — Selden *v.* Williams, 9 Watts. 9, 42 Am. Dec. 312.

Texas. — Lemp *v.* Armengol, 86 Tex. 690, 26 S. W. 941.

Utah. — Bartels *v.* Brain, 13 Utah 162, 44 Pac. 715.

Vermont. — Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253; Hubbard *v.* Moore, 67 Vt. 532, 32 Atl. 465.

Washington. — Adamant Co. *v.* Bank, 5 Wash. 232, 31 Pac. 634.

Wisconsin. — Ganson *v.* Madigan, 15 Wis. 158, 82 Am. Dec. 652; Beason *v.* Kurz, 66 Wis. 448, 29 N. W. 230.

Written Declaration. — In Passmore *v.* Eldridge, 12 Serg. & R. (Pa.) 198, in a suit by assignees of a debtor to determine if hides were included in an assignment by him to preferred creditors, the description of the property being obscure, a written paper, addressed by the assignor to the auctioneer who sold the hides under the assignment, declaring the property in their hands included in the assignment, was held properly in evidence as amounting to a declaration identifying the property.

Conversations After Execution of Contract. — In Sabin *v.* Kendrick, 58 App. Div. 108, 68 N. Y. Supp. 546, it was held that the admission of evidence of conversation after the execution of a contract of employment as salesman presented no error, because it tended to clear up an ambiguity relating to the provision as to the maximum expenses to be incurred in making sales.

26. Kretschmer *v.* Hard, 18 Colo. 223, 32 Pac. 418; McClelland *v.* James, 33 Iowa 571; Tuttle *v.* Burgett, 53 Ohio St. 498, 42 N. E. 427, 53 Am. St. Rep. 649, 30 L. R. A. 214; Scraggs *v.* Hill, 37 W. Va. 706, 17 S. E. 185; Caperton *v.* Caperton, 36 W. Va. 479, 15 S. W. 257; Connolly *v.* Provincial Ins. Co., 2 Q. L. R. 6.

27. Ellis *v.* Burden, 1 Ala. 458, as explained in Meyer *v.* Mitchell, 75 Ala. 475; Emery *v.* Webster, 42 Me. 204, 66 Am. Dec. 274; Robinson *v.* Douthit, 64 Tex. 101.

Declarations of Auctioneer. — In Wright *v.* De Klynne, 1 Pet. C. C. 199, 30 Fed. Cas. No. 18,076, a sheriff conveyed a plantation described as "Meridth's Farm," and it was held that the declarations of the sheriff at the time of the sale

c. *Practical Construction.* — (1.) **In General.** — Again, under the rule allowing evidence of the surrounding circumstances to aid or explain an ambiguity, it is proper to show the practical construction put upon the writing by the parties by their acts under it.[28]

were admissible to show that certain flats and islands were not included in the description.

Parol Evidence of the Declarations of the Grantor is admissible to prove the identity of a lot referred to in a deed by him, conveying certain "lots in the town of H. marked on the recorded plan of the same town;" notice having been given to one of his executors, a defendant in the suit, and he having sworn that he never saw any such recorded plan, and the records of the proper county having been diligently searched, without finding any recorded plan. Patton *v.* Goldsborough, 9 Serg. & R. (Pa.) 47.

28. *United States.* — District of Columbia *v.* Gallaher, 124 U. S. 505, 9 Sup. Ct. 585; Union Bank *v.* Hyde, 6 Wheat. 572; Steinbach *v.* Stewart, 11 Wall. 566; Knox Co. *v.* Bank, 147 U. S. 91, 13 Sup. Ct. 267; Cavazos *v.* Trevino, 6 Wall. 773.

Alabama. — Boykin *v.* Bank of Mobile, 72 Ala. 262, 47 Am. Rep. 408.

Arkansas. — Walker *v.* David, (Ark.), 60 S. W. 418; Robbins *v.* Kimball, 55 Ark. 414, 18 S. W. 457, 20 Am. St. Rep. 45.

California. — Hill *v.* McKay, 94 Cal. 5, 29 Pac. 406.

Colorado. — McPhee *v.* Young, 13 Colo. 80, 21 Pac. 1014.

Connecticut. — Bray *v.* Loomer, 61 Conn. 456, 23 Atl. 831; Wooster *v.* Butler, 19 Conn. 308 (citing numerous authorities.)

Illinois. — Church *v.* Brose, 104 Ill. 206; Thomas *v.* Wiggers, 41 Ill. 470.

Indiana. — Cravens *v.* Eagle Co., 120 Ind. 6, 21 N. E. 981, 16 Am. St. Rep. 298.

Iowa. — Pratt *v.* Prouty, 104 Iowa 419, 73 N. W. 1035, 65 Am. St. Rep. 472; Cobb *v.* McElroy, 79 Iowa 603, 44 N. W. 824.

Kansas. — Cosper *v.* Nesbit, 45 Kan. 457, 25 Pac. 866, 26 Am. St. Rep. 107.

Maine. — Emery *v.* Webster, 42 Me. 204, 66 Am. Dec. 274.

Massachusetts. — Winchester *v.* Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424; Crafts *v.* Hibbard, 4 Metc. 438; Frost *v.* Spaulding, 19 Pick. 445, 31 Am. Dec. 150; Clark *v.* Munyan, 22 Pick. 410, 33 Am. Dec. 752.

Michigan. — Jenkinson *v.* Monroe, 61 Mich. 454, 28 N. W. 663.

Minnesota. — Engel *v.* Scott & H. Lum. Co., 60 Minn. 39, 61 N. W. 825.

Mississippi. — Ramsey *v.* Brown, 77 Miss. 124, 25 So. 151, 78 Am. St. Rep. 519.

Missouri. — Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198.

Nebraska. — Latenser *v.* Misner, 56 Neb. 340, 76 N. W. 897; Hale *v.* Sheehan, 52 Neb. 184, 71 N. W. 1019.

New Hampshire. — French *v.* Hayes, 43 N. H. 30, 80 Am. Dec. 127.

New York. — Sattler *v.* Hallock, 160 N. Y. 291, 54 N. E. 667, 73 Am. St. Rep. 686, 46 L. R. A. 679; French *v.* Carhart, 1 N. Y. 96.

North Carolina. — Goff *v.* Pope, 83 N. C. 123.

Ohio. — Mosier *v.* Parry, 60 Ohio St. 388, 54 N. E. 364; Butler *v.* Moses, 43 Ohio St. 166, 1 N. E. 316.

Pennsylvania. — Banhart *v.* Riddle, 29 Pa. St. 92.

Rhode Island. — Phetteplace *v.* British Ins. Co., (R. I.), 49 Atl. 33.

Tennessee. — Powell *v.* Construction Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925.

Texas. — Heidenheimer *v.* Cleveland, (Tex.), 17 S. W. 524; Pope *v.* Riggs, (Tex. Civ. App.), 43 S. W. 306.

Utah. — Brown *v.* Markland, 16 Utah 360, 52 Pac. 597, 67 Am. St. Rep. 629.

Vermont. — Barker *v.* Troy R. Co., 27 Vt. 766.

Virginia. — Mut. Assn. *v.* Taylor, 99 Va. 208, 37 S. E. 854.

Wisconsin. — Wussow *v.* Hase, 108 Wis. 382, 84 N. W. 433; Nilson *v.* Morse, 52 Wis. 240, 9 N. W. 1.

Wyoming. — Frank *v.* Hicks, 4 Wyo. 502, 35 Pac. 1025.

"**Reasonable Time.**" — In Goddard *v.* Crefield Mills, 75 Fed. 818, a con-

So also, it is proper to show the practical construction which the parties have put upon previous similar writings in the same terms.[29]

(2.) Under Conveyances. — So, also, the rule admitting evidence of the practical construction given by the parties to a writing, extends to evidence of such acts in order to resolve the ambiguous terms of a conveyance.[30] But it is error to admit such evidence where there is no such ambiguity as would render extrinsic evidence admissible.[31]

d. *Meaning in Trade or Art.* — It may be shown by parol that a word or term used in a writing has acquired a peculiar or technical

tract to manufacture and sell cotton goods contained a clause stipulating for its performance within a reasonable time, and evidence of the acts of the parties showing what period of time they contemplated as being reasonable, was held admissible.

Legislative Intent. — In Cambridge *v.* Lexington, 17 Pick. (Mass.) 222, under a statute canceling the obligation of one of three municipalities to maintain a bridge, the usage of the other two towns thereafter was shown as contemporaneous construction of the legislative intent that they should share the expense between them.

29. Gray *v.* Gannon, 4 Hun (N. Y.) 57.

30. *England.* — Smith *v.* Earl of Jersey 2 Brod. & Bing. 472, 6 Eng. C. L. 235; Weld *v.* Hornby, 7 East 195, 8 Rev. Rep. 608.

United States. — Cavazos *v.* Trevino, 6 Wall. 773.

Alabama. — Wharton *v.* Hannon, 101 Ala. 554, 14 So. 630.

Arkansas. — Walker *v.* David, (Ark.), 60 S. W. 418.

Colorado. — Kretschmer *v.* Hard, 18 Colo. 223, 32 Pac. 418.

Connecticut. —Robbins *v.* Wolcott, 28 Conn. 395.

Georgia. — Gress Lum. Co. *v.* Coody, 94 Ga. 519, 21 S. E. 217.

Illinois. — Farman *v.* Tompkins, 171 Ill. 519, 49 N. E. 568.

Indiana. — Bever *v.* Bever, 144 Ind. 157, 41 N. E. 944.

Iowa. — Brown *v.* Ward, (Iowa), 81 N. W. 247.

Maine. — Simpson *v.* Blaisdell, 85 Me. 199, 27 Atl. 101, 35 Am. St. Rep. 348.

Maryland. — Jacob Tome Inst. *v.* Crothers, 87 Md. 569, 40 Atl. 261.

Massachusetts. — Lovejoy *v.* Lovett, 124 Mass. 270.

Michigan. — Moran *v.* Lezotte, 54 Mich. 83, 19 N. W. 757.

Minnesota. — Beardsley *v.* Crane, 52 Minn. 537, 54 N. W. 740.

New Hampshire. — Bell *v.* Woodward, 46 N. H. 315.

New Jersey. — Morris R. Co. *v.* Bonnell, 34 N. J. Law 474.

New York. — Stout *v.* Woodward, 71 N. Y. 590; Stewart *v.* Patrick, 68 N. Y. 450; Freud *v.* Kearney, 23 Misc. 685, 52 N. Y. Supp. 149.

Ohio. — McAfferty *v.* Conover, 7 Ohio St. 99, 70 Am. Dec. 57.

Oregon. — Richards *v.* Snider, 11 Or. 197, 3 Pac. 177.

South Carolina. — Allen *v.* Fagan, 6 S. C. 206.

Texas. — Linney *v.* Wood, 66 Tex. 22, 17 S. W. 244.

Vermont. — Rugg *v.* Ward, 64 Vt. 402, 23 Atl. 726.

Virginia. — Knick *v.* Knick, 75 Va. 12.

West Virginia. — Gibney *v.* Fitzsimmons, 45 W. Va. 334, 32 S. E. 189.

Wisconsin. — Janesville Mills *v.* Ford, 82 Wis. 416, 52 N. W. 764.

A written lease described the demised land as "four acres, out of lot four," in a certain governmental subdivision, "lying north of the railroad track." *Held*, that in an action between the lessor and the lessee's assignee, parol evidence was admissible to show that the lessor and lessee, about the time the lease was made, had gone upon the land, and agreed upon certain lines and monuments as defining its boundaries. Schneider *v.* Patterson, 38 Neb. 680, 57 N. W. 398.

31. Grubb *v.* Buford, 98 Va. 553, 37 S. E. 4.

signification in trade or art, different from its ordinary meaning, for the purpose of showing which meaning was intended.[32] Such

32. *England.* — Shore *v.* Wilson, 9 Clark & F. 355.

Alabama. — Smith *v.* Aiken, 75 Ala. 209; Jones *v.* Anderson, 76 Ala. 427.

Georgia. — Dixon *v.* Cent. of Ga. R., (Ga.), 35 S. E. 369.

Illinois. — Stewart *v.* Smith, 28 Ill. 397; Myers *v.* Walker, 24 Ill. 133; Broadwell *v.* Broadwell, 6 Ill. 599.

Indiana. — Prather *v.* Ross, 17 Ind. 495.

Iowa. — Pilmer *v.* Branch Bank, 16 Iowa 321; Steyer *v.* Dwyer, 31 Iowa 20; Wood *v.* Allen, (Iowa), 82 N. W. 451.

Kansas. — Seymour *v.* Armstrong, (Kan.), 64 Pac. 612.

Massachusetts. — Stoops *v.* Smith, 100 Mass. 63, 92 Am. Dec. 76.

Michigan. — Dages *v.* Brake, 125 Mich. 64, 83 N. W. 1039.

Minnesota. — St. Paul & M. Trust Co. *v.* Harrison, 64 Minn. 300, 66 N. W. 980; Maurin *v.* Lyon, 69 Minn. 257, 72 N. W. 72, 65 Am. St. Rep. 568.

Missouri. — Long Bros. *v.* J. K. Armsby Co., 43 Mo. App. 253; Blair *v.* Corby, 37 Mo. 313.

Montana. — Newell *v.* Nicholson, 17 Mont. 389, 43 Pac. 180.

New Hampshire. — Farnum *v.* Concord Horse R. Co., 66 N. H. 569, 29 Atl. 541.

New Jersey. — Hartwell *v.* Camman, 10 N. J. Eq. 28, 64 Am. Dec. 448.

New York. —Colwell *v.* Lawrence, 38 Barb. 643; Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224; Lawrence *v.* Gallagher, 73 N. Y. 613; Bissel *v.* Campbell, 54 N. Y. 353; Thompson *v.* Sloan, 23 Wend. 71, 35 Am. Dec. 546; Stroud *v.* Frith, 11 Barb. 300; Sleght *v.* Hartshome, 2 Johns. 531.

Oregon. — Abraham *v.* Oregon & C. R. Co., 37 Or. 495, 60 Pac. 899, 82 Am. St. Rep. 779.

Pennsylvania. — Carey *v.* Bright, 58 Pa. St. 70.

Texas. — Dewees *v.* Lockhart, 1 Tex. 535.

Vermont. — Moore *v.* Hill, 62 Vt. 424, 19 Atl. 997.

Wisconsin. — Bedard *v.* Bonville, 57 Wis. 270, 15 N. W. 185.

Statement of the Rule. — The rule is too axiomatic to require the citation of authority for its support, that when parties have deliberately reduced their engagements to writing, in terms precise and unambiguous, their intention must be gathered from the whole instrument, and the language thus chosen to express their meaning, and parol evidence is inadmissible, to add to, contradict or alter such language, or to support a construction at variance with the fair, plain import of the words themselves. When, however, the agreement rests in doubt and uncertainty, because of the use of terms of a technical character, or so indefinite in their reference as to be alike applicable to different things, such technical terms may be explained, and surrounding facts and circumstances may be shown, to enable the court to point the proper application as intended by the parties. The range of this inquiry must, of course, be limited to such extrinsic facts as have some relevancy to the subject of inquiry, and cannot be extended to embrace facts clearly foreign to any possible matters mentioned and referred to in the contract. But, in no case can the mere admissions or declarations of a party to the agreement in respect to the purpose, meaning or effect of any of its provisions be received to aid or influence the court in reaching a correct interpretation. City of Winona *v.* Thompson, 24 Minn. 199.

"Season." — In an action for the breach of a written contract of employment for a "season" in which the duration of the season is not specified, parol evidence is not admissible to define the term. Walchtershauser *v.* Smith, 10 N. Y. St. 552, 10 N. Y. Supp. 535. *Compare* McIntosh *v.* Miner, 53 App. Div. 240, 65 N. Y. Supp. 735.

If there was any uncertainty, on the face of the bill, whether the word cashier was appended to the name, or rather, whether the figures and marks were intended for that word,

evidence neither varies nor adds to the writing, but merely translates it from the language of the trade or art in question, into the ordinary language of people generally.[33] But such evidence is not admissible where it is apparent that the word or term in question was not used in such new, peculiar or technical sense.[34]

Medium of Payment. — It has been held competent to show that the parties to a written contract by the word "dollars" intended Confederate dollars, and not lawful money of the United States.[35] So

testimony was proper and necessary to establish that fact. In the *fac similes* we have of the signatures of some distinguished men, it would be impossible to make out the name, except by the testimony of those acquainted with such signatures. This must, from the nature of the case, be a subject to be established by parol testimony. Farmers' & Mechanics' Bank *v.* Day, 6 Vt. 36.

33. Maurin *v.* Lyon, 69 Minn. 257, 72 N. W. 72, 65 Am. St. Rep. 568.

34. *Alabama.* — Mobbie M. Dork & Mut. Ins. Co. *v.* McMillan, 31 Ala. 711.

California. — Bullock *v.* Consumers' Lum. Co., (Cal.), 31 Pac. 367.

Illinois. — Lord *v.* Owen, 35 Ill. App. 382; Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 81 Am. Dec. 284.

Indiana. — Laugohr *v.* Smith, 81 Ind. 495.

Iowa. — Cash *v.* Hinkle, 36 Iowa 623.

Kansas. — Gowans *v.* Pierce, 57 Kan. 180, 45 Pac. 586.

Maine. — Littlefield *v.* Littlefield, 28 Me. 180.

Massachusetts. — First Nat. Bank *v.* Coffin, 162 Mass. 180, 38 N. E. 444.

New Jersey. — Hartwell *v.* Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448.

New York. — Strong *v.* Waters, 27 App. Div. 299, 50 N. Y. Supp. 257; Heiberger *v.* Johnson, 34 App. Div. 66, 53 N. Y. Supp. 1057.

Texas. — Ginnuth *v.* Blankenship Co. (Tex. Civ. App.), 28 S. W. 828.

35. *United States.* — Thorington *v.* Smith, 8 Wall. 1; The Confederate Note Case, 19 Wall. 548.

Alabama. — Hill *v.* Erwin, 44 Ala. 661.

Arkansas. — Roane *v.* Green, 24 Ark. 210

South Carolina. — Neely *v.* McFadden, 2 S. C. 169.

Texas. — Johnson *v.* Blount, 48 Tex. 38; Mathews *v.* Rucker, 41 Tex. 636; Roberts *v.* Short, 1 Tex. 373.

Statement of Rule. — It is quite clear that a contract to pay dollars, made between citizens of any state of the Union, while maintaining its constitutional relations with the National government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence. But it is equally clear, if in any other country, coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that, in a suit upon a contract to pay dollars, made in that country, evidence would be admitted to prove what kind of dollars were intended, and, if it should turn out that foreign dollars were meant, to prove their equivalent value in lawful money of the United States. Such evidence does not modify, or alter the contract. It simply explains an ambiguity, which, under the general rules of evidence, may be removed by parol evidence. We have already seen that the people of the insurgent states, under the confederate government were, in legal contemplation, substantially in the same condition as inhabitants of districts of a country occupied and controlled by an invading belligerent. The rules which would apply in the former case would apply in the latter; and, as in the former case, the people must be regarded as subjects of a foreign power, and contracts among them be interpreted and enforced with reference to the conditions imposed by the conqueror, so in the latter case, the inhabitants must be regarded as under the authority of

also, it has been held that it may be shown that an obligation described as payable in dollars and cents was in fact to be paid in United States bank bills.[36]

e. *Usage of the Business.* — Evidence of the known and ordinary course of the particular business is competent for the purpose of explaining an ambiguity,[37] as, for instance, that according to usage

the insurgent belligerent power actually established as the government of the country, and contracts made with them must be interpreted and enforced with reference to the condition of things created by the acts of the governing power. Thorington *v.* Smith, 8 Wall. 1.

36. Morton *v.* Wells, 1 Tyler (Vt.) 381, so holding that such evidence does not controvert, but explains the writing. *Compare* Noe *v.* Hodges, 3 Humph. (Tenn.) 162, wherein it was held that the admission of parol evidence to prove that it was agreed between the parties that bank notes should be receivable in discharge of an obligation payable in dollars was in violation of the great principle that parol evidence shall not be heard to add to or vary a writing. See also Ehle *v.* Chittenango Bank, 24 N. Y. 548, wherein it was held that evidence of an understanding by the cashier of a bank that "state currency" meant country bank notes current in New York city at a discount of a quarter of 1 per cent., but not showing general usage in that sense, was inadmissible.

37. Robinson *v.* U. S., 13 Wall. 363; Salmon Mfg. Co. *v.* Goddard, 14 How. 441.

Connecticut. — Hatch *v.* Douglass, 48 Conn. 117.

Georgia. — Maril *v.* Connecticut F. Ins. Co., 95 Ga. 604, 23 S. E. 463, 51 Am. St. Rep. 102, 30 L. R. A. 835.

Illinois. — Elgin *v.* Joslyn, 36 Ill. App. 301.

Indiana. — Lyon *v.* Lenon, 106 Ind. 567, 7 N. E. 311.

Massachusetts. — Brown *v.* Brown, 8 Metc. 573.

Minnesota. — Breen *v.* Moran, 51 Minn. 525, 53 N. W. 755.

New Hampshire. — Cummings *v.* Blanchard, 67 N. H. 268, 36 Atl. 556, 68 Am. St. Rep. 664.

New Jersey. — Smith *v.* Clayton, 29 N. J. Law 357.

New York. — White *v.* Ellisburgh, 18 App. Div. 514, 45 N. Y. Supp. 1122; Brunold *v.* Glasser, 25 Misc. 285, 53 N. Y. Supp. 1021; Livingston *v.* Ten Broeck, 16 Johns. 14, 8 Am. Dec. 287.

Pennsylvania. — Brown *v.* Brooks, 25 Pa. St. 210.

South Carolina. — Goddard *v.* Bulow, 1 Nott & McC. 45, 9 Am. Dec. 663.

Texas. — Brenneman *v.* Birsh, (Tex. Civ. App.), 30 S. W. 699.

Washington. — Adamant Plaster Co. *v.* Nat. Bank, 5 Wash. 232, 31 Pac. 634.

Proof of Usage is received in actions on express contracts, upon the ground that it serves to explain and ascertain the intent of the parties on some point as to which their contract is silent. Lamb *v.* Klaus, 30 Wis. 94.

It is permissible for the owner of a steamboat, when sued for the loss of goods by fire, to show by parol that the exceptive words, "dangers of the river," in a bill of lading, by custom and usage include dangers by fire. McClure & Co. *v.* Cox & Co., 32 Ala. 617, 70 Am. Dec. 552; *citing* Sampson *v.* Gazzam, 6 Port. (Ala.) 123, 30 Am. Dec. 578; Hibler *v.* McCartney, 31 Ala. 501.

Evidence of a Prior Course of Dealing between the parties to a contract is inadmissible when the contract is so distinctly drawn as to leave no ambiguities for parol explanation especially of a prior course of dealing between one of the parties to it and the predecessors of the other party; although it may be shown that the parties in their dealings under the contract varied its terms by a subsequent parol agreement. Conrad *v.* Fisher, 37 Mo. App. 352.

In Penn. Steel etc. Co. *v.* Iron Co., 1 Penn. (Del.) 337, 41 Atl. 236, an action to recover goods sold under written contract, requiring qual-

in the insurance business a word or term used in a policy has acquired a meaning other than its usual and ordinary sense.[38] But evidence of the sense in which a word or term was understood by other persons in the same business is not admissible, unless the party to the writing is shown to have known of such other transactions.[39]

III. LATENT AMBIGUITY.

1. In General. — A latent ambiguity being one that is evoked by extrinsic evidence, it follows as a corollary that its resolution should be effected in the same manner, and to that end, parol evidence is always admissible to aid or explain such an ambiguity, provided, of course, that such evidence does not contradict or vary the implications of the written terms employed.[40] Facts existing

ity and workmanship to be "up to standard," it was held that the defendant could not show that he contracted with reference to a standard defined by plaintiff in a circular issued by him in regard to his business, in the absence of evidence that there was no standard recognized by the trade.

The Phrase "Rainy Day" being of itself indefinite and uncertain, the sense in which it was used in a particular contract may, therefore, be shown by the surrounding circumstances, including the usage of the particular port or trade to which the contract relates. Balfour *v.* Wilkins, 5 Saw. 429, 2 Fed. Cas. No. 807.

Oral Evidence Is Admissible to Show That by Word "barrels," used in a writen contract, the parties intended vessels of a certain kind and capacity, used in a particular business, and not a measure of quantity as per statute barrel. Miller *v.* State, 100 Mass. 518, 97 Am. Dec. 123.

In Montana, by express statute (Civ. Code, §§ 2209, 2210) the words of a contract are to be understood in their ordinary and popular sense, and technical words are to be interpreted as usually understood by persons in the business to which they relate; and accordingly evidence of qualified witnesses to interpret technical terms used in a mining lease according to the usual understanding of miners, is competent. Cambers *v.* Lowry, 21 Mont. 478, 54 Pac. 816.

38. *United States.* — Erhart *v.* Ullman, 51 Fed. 414. *Compare* Moran *v.* Prather, 23 Wall. 492.

Arkansas. — Western Assur. Co. *v.* Altheimer, 58 Ark. 565, 25 S. W. 1067.

Iowa. — Brown *v.* Lucas Co., 94 Iowa 70, 62 N. W. 694.

Massachusetts. — Whitmarsh *v.* Conway F. Ins. Co., 16 Gray 359, 77 Am. Dec. 414.

Missouri. — Singleton *v.* St. Louis Mut. Ins. Co., 66 Mo. 63, 27 Am. Rep. 321.

New York. — Petrie *v.* Phoenix Ins. Co., 132 N. Y. 137, 30 N. E. 380.

Tennessee. — Fry *v.* Provident L. Assur. Soc., (Tenn.), 38 S. W. 116.

Washington. — Reed *v.* Tacoma Ass'n., 2 Wash. 198, 26 Pac. 252, 26 Am. St. Rep. 851.

39. Newhall *v.* Appleton, 102 N. Y. 133, 6 N. E. 120; Fabbri *v.* Phoenix Ins. Co., 55 N. Y. 129.

40. *England.* — Smith *v.* Thompson, 8 C. B. 44, 65 Eng. C. L. 44; Attorney General *v.* Shore, 11 Sim. 592; Way *v.* Hearn, 106 Eng. C. L. 291.

Canada. — Cutten *v.* Ker, 16 U. C. C. P. 227.

United States. — Clay *v.* Field, 138 U. S. 464, 11 Sup. Ct. 419.

Alabama. — McGhee *v.* Alexander, 104 Ala. 116, 16 So. 148; Smith *v.* Aiken, 75 Ala. 209.

Arkansas. — Cato *v.* Stewart, 28 Ark. 146.

California. — Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371; Brannan *v.* Mesick, 10 Cal. 95.

Colorado. — Blair *v.* Bruns, 8 Colo. 397, 8 Pac. 569.

Connecticut. — Lockwood *v.* Jessup, 9 Conn. 272.

prior to, and at the time of the writing, may be shown for the purpose of clearing up a latent ambiguity.[41]

. *Georgia.* — Hill *v.* Felton, 47 Ga. 455, 15 Am. Rep. 643.

Illinois. — Lyman *v.* Gedney, 114 Ill. 388, 55 Am. Rep. 871.

Indiana. — Thomas *v.* Trozel, (Ind.), 59 N. E. 683.

Iowa. — Palmer *v.* Albee, 50 Iowa 429.

Kansas. — Wyandotte County *v.* First Presbyterian Church, 30 Kan. 620.

Kentucky. — Breeding *v.* Tyler, 13 B. Mon. 477.

Louisiana. — Taylor *v.* Hollander, 5 Mart. (N. S.) 295; Pigean *v.* Commean, 4 Mart. (N. S.) 190.

Maine. — Patrick *v.* Grant, 14 Me. 233; Pope *v.* Machias Water Power Co., 52 Me. 535; Emery *v.* Webster, 42 Me. 204, 66 Am. Dec. 274.

Massachusetts. — Durr *v.* Chase, 161 Mass. 40, 36 N. E. 741; Proctor *v.* Hartigan, 143 Mass. 462, 9 N. E. 841.

Minnesota. — Reeves *v.* Cress, 80 Minn. 466, 83 N. W. 443.

Mississippi. — Wilson *v.* Horne, 37 Miss. 477; Peacher *v.* Strauss, 47 Miss. 353.

Missouri. — Goff *v.* Roberts, 72 Mo. 570.

New Hampshire. — French *v.* Hayes, 43 N. H. 30, 80 Am. Dec. 127; Tilton *v.* American Bible Soc., 60 N. H. 377, 49 Am. Rep. 321; Bartlett *v.* Nottingham, 8 N. H. 300.

New Jersey. — Hartwell *v.* Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448.

New York. — Mann *v.* Mann, 1 Johns. Ch. 231; Myers *v.* Paine, 13 App. Div. 332, 43 N. Y. Supp. 133.

North Carolina. — McDaniel *v.* King, 90 N. C. 597.

Ohio. — Caldwell *v.* Carthage, 40 Ohio St. 453.

Oregon. — Raymond *v.* Coffey, 5 Or. 132.

Pennsylvania. — Best *v.* Hammond, 55 Pa. St. 409.

South Carolina. — Barkley *v.* Barkley, 3 McCord 260; Goddard *v.* Bulow, 1 Nott. & McC. 45, 9 Am. Dec. 663.

Texas. — Busby *v.* Bush, 79 Tex. 656, 15 S. W. 638.

Utah. — Cowlaim *v.* Doull, 4 Utah 267, 9 Pac. 568.

Vermont. — Pitts *v.* Brown, 49 Vt. 86, 24 Am. Rep. 114.

Virginia. — Wooton *v.* Redd, 12 Gratt. 196; Hawkins *v.* Garland, 76 Va. 149, 44 Am. Rep. 158.

Wisconsin. — Schmitz *v.* Schmitz, 19 Wis. 222, 88 Am. Dec. 681.

Legislative Intent. — In State *v.* Partlow, 91 N. C. 550, 49 Am. Rep. 652, on the trial of an indictment under an act prohibiting the sale of liquor within three miles of "Mount Zion Church" in a certain county, it appeared that there were two churches known by that name in the county, and parol evidence to explain the ambiguity was excluded under the rule that legislative intent must be shown by the terms embodying it.

Coloring of Lots on Map. — In Board of Education *v.* Keenan, 55 Cal. 642, parol evidence was admitted to show that the coloring of certain lots on a map was intended to designate those selected by commissioners for school purposes. See also Board of Education *v.* Donahue, 53 Cal. 190.

Identification of Subject-Matter. In American Ex. Bank *v.* Georgia Const. etc., 87 Ga. 651, 13 S. E. 505, a letter was in evidence promising to pay "the notes" of a firm, and, under the Georgia Code allowing all ambiguities to be explained by parol, it was shown whether the term comprehended notes on which the firm was an indorser, as well as those of which it was the maker.

Identification of Party in Writ. In Stubbs *v.* Cook, Cro. Jac. 624, a replevin was discharged on showing that the execution debtor in the writ was identical in name, but not in person, with the owner of the goods distrained.

Where There Were Apparently Two Perfect Records of the proceedings of a town meeting, it was held that parol evidence must of necessity be resorted to, to determine which is the legitimate record. Walter *v.* Belding, 24 Vt. 658.

41. Crafts *v.* Hibbard, 4 Metc. (Mass.) 438; Waterman *v.* Johnson, 13 Pick. (Mass.) 261.

2. Illustrations of Rule Applied to Particular Instruments. — A. CONTRACTS GENERALLY. — So also, the reception of extrinsic evidence to aid or explain a latent ambiguity has been upheld in the case of such an ambiguity occurring in the subject matter of a contract generally.[42]

Terms Applicable to Two or More Objects. —The rule admitting extrinsic evidence to aid or explain a latent ambiguity has been especially invoked in those instances where the terms of the contract in question are susceptible of application to two or more objects.[43]

42. *United States.* — Clay *v.* Field, 138 U. S. 464, 11 Sup. Ct. 419.
Alabama. — Smith *v.* Aiken, 75 Ala. 209.
Colorado. — Hager *v.* Rice, 4 Colo. 90, 34 Am. Rep. 68 (bill of exchange.)
Connecticut. — Collins *v.* Driscoll, 34 Conn. 43.
Georgia. — Johnston *v.* Patterson, 86 Ga. 725, 13 S. E. 17.
Illinois. — Trustees of Schools *v.* Rogers, 7 Ill. App. 32 (township's treasurer's bond); Hogan *v.* Wallace, 63 Ill. App. 385.
Kentucky. — Kentucky Ass'n. *v.* Lawrence, 20 Ky. Law 1700, 49 S. W. 1059; Chapman *v.* Clements, (Ky.), 56 S. W. 646.
Louisiana. — Thompson *v.* Brothers, 5 La. 279.
Maine. — Storer *v.* Elliott Co., 45 Me. 175 (insurance policy.)
Maryland. — McCann *v.* Preston, 79 Md. 223, 28 Atl. 1102.
Massachusetts. — Keller *v.* Webb, 125 Mass. 88.
Michigan. — Germain *v.* Cent. Lum. Co., 120 Mich. 61, 78 N. W. 1007; Wickes Bros. *v.* Swift Elec. L. Co., 70 Mich. 322, 38 N. W. 299.
Missouri. — Franklin Sav. Inst. *v.* Board of Education, 75 Mo. 408.
New Jersey. — Bell *v.* Martin, 18 N. J. Law 167.
New York. — McNutty *v.* Urban, 1 Misc. 422, 21 N. Y. Supp. 247; Cole *v.* Wendel, 8 Johns. 116; Burr *v.* Broadway Ins. Co., 16 N. Y. 267; Bowman *v.* Agricultural Ins. Co., 59 N. Y. 521; Manchester Paper Co. *v.* Moore, 104 N. Y. 680, 10 N. E. 861.
North Carolina. — Bryan *v.* Harrison, 76 N. C. 360.
Ohio. — Webster *v.* Paul, 10 Ohio St. 531.
Pennsylvania. — Beaver *v.* Slear, 182 Pa. St. 213, 37 Atl. 991.
South Carolina. — Craig *v.* Pervis, 14 Rich. Eq. 150.
Tennessee. — Mumford *v.* Memphis & C. R. Co., 2 Lea 393, 31 Am. Rep. 616.
Texas. — Busby *v.* Bush, 79 Tex. 656, 15 S. W. 638; Missouri K. & T. R. Co. *v.* Graves, (Tex.), 16 S. W. 102.
Virginia. — Bank *v.* McVeigh, 32 Gratt. (Va.) 530.
Where a latent ambiguity appears in a certificate of fraternal beneficiary association as to the beneficiary intended, and an attempt is made to identify such beneficiary, the testimony of the person who drew the application for membership in such association is admissible to show the circumstances under which the certificate was made, but testimony as to what the deceased member, after the making of the certificate, said as to his intention is not. Hogan *v.* Wallace, 63 Ill. App. 385.

43. *England.* — Bruff *v.* Conybeare, 13 J. Scott (N. S.) 263, 106 Eng. C. L. 261.
Kentucky.—Hall *v.* Conlee, (Ky.), 62 S. W. 899 (bond for title, description of premises.)
Maine. — Mecher *v.* Ocean Ins. Co., 59 Me. 217 (policy of insurance, ambiguity as to property insured.)
Maryland. — Planters' Ins. Co. *v.* Deford, 38 Md. 382.
Massachusetts. — Sutton *v.* Bowker, 5 Gray 416 (place of unloading, bill of lading.)
Mississippi. — Wilson *v.* Horne, 37 Miss. 477 (memorandum of settlement.)
New Jersey. — Axford *v.* Meeks, 59 N. J. Law 502, 36 Atl. 1036.
New York. — Bagley Co. *v.* Saranac Co., 135 N. Y. 626, 32 N. E. 132.
Ohio. — Barrett *v.* Allen, 10 Ohio

B. Contracts of Guaranty. — Extrinsic evidence has been received for the purpose of aiding or explaining a latent ambiguity in a contract of guaranty.[44]

C. Chattel Mortgages. — So also, a latent ambiguity in the description of the property embraced in a chattel mortgage is explained by parol.[45]

D. Contracts for Sale of Land. — So, where a contract for the sale of land refers to some extraneous fact or facts in the description of the land, parol evidence of such facts may be received to identify the land.[46]

E. Conveyances.—a. *Description of Premises.* — (1.) In General. Latent ambiguities in the description of premises in a conveyance are within the rule admitting extrinsic evidence in aid or explanation thereof, whether the ambiguity occurs in respect of the application of the terms to the subject matter generally,[47] or in the case

426 (promissory note, mode of payment.)

Pennsylvania.—Lycoming Ins. Co. v. Sailer, 67 Pa. St. 108.

South Dakota. — First Nat. Bank v. North, 2 S. D. 480, 51 N. W. 96.

Wisconsin. — Fornette v. Carmichael, 41 Wis. 200 (contract for sale of logs, mode of ascertaining amount due.)

In Mumford v. Memphis & C. R. Co., 2 Lea (Tenn.) 393, 31 Am. Rep. 616, one of the defendants had been appointed ticket agent for the plaintiff railroad at Memphis, and gave bond as such agent. It appeared that the plaintiff maintained two ticket offices in that city. It was held that parol evidence was admissible to show to which office the defendant was appointed.

44. Hamill Co. v. Woods, 94 Iowa 246, 62 N. W. 735.

45. Galen v. Brown, 22 N. Y. 37.

46. Holmes v. Evans, 48 Miss. 247, 12 Am. Rep. 372.

Indiana Rule. — "Where the description (in a contract of conveyance) so far as it goes, is consistent, but does not appear to be complete, it may be completed by parol evidence, provided a new description is not introduced into the body of the contract." Baldwin v. Kerlin, 46 Ind. 426.

47. *United States.* —Boardman v. Reed, 6 Pet. 328; Deery v. Cray, 10 Wall. 263.

Alabama. — Stamphill v. Bullen, 121 Ala. 250, 25 So. 928; Guilmartin v. Wood, 76 Ala. 204.

Arkansas. — Dorr v. School District, 40 Ark. 237.

Colorado. — Sullivan v. Collins, 20 Colo. 528.

Connecticut. — Nichols v. Turney, 15 Conn. 101; Collins v. Driscoll, 34 Conn. 43.

Georgia. — Kirkpatrick v. Brown, 59 Ga. 450.

Illinois. — Bybee v. Hageman, 66 Ill. 519; Evans v. Gerry, 174 Ill. 595, 51 N. E. 615.

Indiana. — Symmes v. Brown, 13 Ind. 318.

Kentucky. — Baker v. Talbott, 6 T. B. Mon. 179; Breeding v. Taylor, 13 B. Mon. 477.

Louisiana. — Brand v. Dannay, 8 Mart. (N. S.) 159, 19 Am. Dec. 176.

Maine. — Abbott v. Abbott, 51 Me. 575.

Massachusetts. — Crafts v. Hibbard, 4 Metc. 448; Hoar v. Goulding, 116 Mass. 132; Putnam v. Bond, 100 Mass. 58.

Michigan. — Slater v. Breese, 36 Mich. 77.

Minnesota. — Slosson v. Hall, 17 Minn. 95.

Mississippi. — Ladnier v. Ladnier, 75 Miss. 777, 25 So. 430; Morton v. Jackson, 1 Smed & M. 494, 48 Am. Dec. 107.

New York. — Petrie v. Hamilton College, 158 N. Y. 458, 53 N. E. 216.

North Carolina. — Blow v. Vaughan, 105 N. C. 198, 10 S. E. 891.

of descriptions falling within the purview of the maxim *falsa demonstratio non nocet.*[48]

Ohio. — Caldwell *v.* Carthage, 40 Ohio St. 453.

Pennsylvania. — Patton *v.* Goldborough, 9 Serg. & R. 47.

Texas. — Clark *v.* Regan, (Tex. Civ. App.), 45 S. W. 169; Webb *v.* Frazar, (Tex. Civ. App.), 29 S. W. 665; Montgomery *v.* Carlton, 56 Tex. 361; Kingston *v.* Pickens, 46 Tex. 99.

Vermont. — Hull *v.* Fuller, 7 Vt. 100.

Wisconsin. — Lego *v.* Mealey, 79 Wis. 211, 48 N. W. 375, 24 Am. St. Rep. 706; Schmitz *v.* Schmitz, 19 Wis. 222, 88 Am. Dec. 681.

The Test of the Admissibility of Evidence Dehors the Deed is involved in the question whether it tends to so explain some descriptive word or expression contained in it as to show that such phraseology, otherwise of doubtful import, contains in itself, with such explanation, and identification of the land conveyed. The doctrine finds its support in the maxim "*Id certum quod certum reddi potest.*" Blow *v.* Vaughan, 105 N. C. 198, 10 S. E. 891.

Conversation at Time of Making Deed. — In an action of ejectment where the question involved is whether the premises in suit are included in the description in a certain deed, and the ambiguity does not appear on the face of the deed, but only by evidence, a conversation between the parties to the deed while the deed was being drawn, and in the presence of the scrivener, and in accordance with which an alteration was made in the description, is admissible in evidence as part of the *res gestae*, tending to identify the boundaries in dispute. Purkiss *v.* Benson, 28 Mich. 538.

In Bumpass *v.* Morrison, 70 Tex. 756, 8 S. W. 596, under a clause in a deed retaining a lien for prospective loss touching adverse claims, evidence was admitted in a suit to foreclose the lien to show the suit anticipated in reference to the title, and the expenses incurred in defending it.

In Prentiss *v.* Brewer, 17 Mich. 635, under a conveyance of "the south half of the fractional quarter" of a designated section, it was shown that the section was irregular in shape, and evidence was held admissible to show that the moiety was tended to be that of actual area, and not according to government survey. See also Hartford Co. *v.* Cambria Co., 80 Mich. 491, 45 N. W. 351; Owen *v.* Henderson, 16 Wash. 39, 47 Pac. 215, 58 Am. St. Rep. 17.

"Where a deed in one case bounds the premises conveyed on one side by a certain lane, and other parts of the deed cannot, on comparing the description with the premises, be answered unless another lane, parallel with the first but at a greater distance from the opposite side of the land than the first mentioned lane, be taken as the monument, extrinsic evidence is admissible to explain the latent ambiguity. Thornell *v.* Brockton, 141 Mass. 151, 6 N. E. 74.

48. *Illinois.* — Sharp *v.* Thompson, 100 Ill. 447, 39 Am. Rep. 61.

Indiana. — Lannan *v.* Crooker, 97 Ind. 163, 49 Am. Rep. 437.

Kentucky. — Breeding *v.* Taylor, 13 B. Mon. 477.

Louisiana. — Kernan *v.* Baham, 45 La. Ann. 799, 13 So. 155.

Michigan. — Slater *v.* Breese, 36 Mich. 77.

New Hampshire. — Cushman *v.* Luther, 53 N. H. 562.

North Carolina. — Goff *v.* Pope, 83 N. C. 123.

South Carolina. — Milling *v.* Crankfield, 1 McCord 258.

Texas. — Green *v.* Barnes, 9 Tex. Civ. App. 660, 29 S. W. 545; Arambula *v.* Sullivan, 80 Tex. 615, 16 S. W. 436; Early *v.* Sterrett, 18 Tex. 113.

Virginia. — Elliott *v.* Horton, 28 Gratt. 766.

Under a claim that the clause of a conveyance creates an ambiguity as to the premises conveyed thereby, extrinsic evidence is not admissible to show that the grantor intended to convey according to such clause where other parts of the conveyance, by reference to other conveyances,

(2.) Two Descriptions Applying to Same Subject Matter. — So also, where two descriptions of the premises conveyed are found to apply to the same subject matter, the rule admitting extrinsic evidence is invoked.[49]

(3.) Description Applicable to Two or More Objects. — And where the terms of the conveyance are applicable indifferently to two or more tracts of land, the rule admitting extrinsic evidence may be invoked.[50] So also, in the case of the extrinsic of two or more monuments or boundaries.[51]

precisely and accurately identifies the premises to be conveyed. Stowell *v.* Buswell, 135 Mass. 340.

49. *Arkansas.* — Cato *v.* Stewart, 28 Ark. 146.

Colorado. — Sullivan *v.* Collins, 20 Colo. 528, 39 Pac. 334.

Illinois. — Evans *v.* Gerry, 174 Ill. 595, 51 N. E. 615.

Massachusetts. — Fisk *v.* Fisk, 12 Cush. 150.

Michigan. — Moran *v.* Lezotte, 54 Mich. 83, 19 N. W. 757.

Missouri. — Thornton *v.* Missouri Pac. R. Co., 40 Mo. App. 265.

New Jersey. — Thayer *v.* Torrey, 37 N. J. Law 339.

Pennsylvania. — Hetherington *v.* Clark, 30 Pa. St. 393.

Texas. — Giddings *v.* Day, 84 Tex. 605, 19 S. W. 682.

50. *Alabama.* —Dorgan *v.* Weeks, 86 Ala. 329, 5 So. 581.

California. — Vejar *v.* Mound City Land & W. Ass'n., 97 Cal. 659, 32 Pac. 713.

Illinois. — Fisher *v.* Quackenbush, 83 Ill. 310; Bybee *v.* Hageman, 66 Ill. 519.

Iowa. — Palmer *v.* Albee, 50 Iowa 429.

Louisiana. — Bagley *v.* Denny, 26 La. Ann. 255.

Maryland. — Rogers *v.* Moore, 7 Har. & J. 111.

Massachusetts. — Durr *v.* Chase, 161 Mass. 40, 36 N. E. 741; Mead *v.* Parker, 115 Mass. 413, 15 Am. Rep. 110.

Michigan. — Ives *v.* Kimball, 1 Mich. 308.

Mississippi. — Fonte *v.* Fairman, 48 Miss. 536.

Nebraska. — Ballou *v.* Sherwood, 32 Neb. 666, 49 N. W. 790.

New Hampshire. — Lathrop *v.* Blake, 23 N. H. 46.

New Mexico. — Gentile *v.* Crossman, 7 N. M. 589, 38 Pac. 247.

North Carolina. — McGlawhorn *v.* Worthington, 98 N. C. 199, 3 S. E. 633.

Pennsylvania. — Hetherington *v.* Clark, 30 Pa. St. 393.

South Carolina. — Scates *v.* Henderson, 44 S. C. 548, 22 S. E. 724.

Tennessee. — Snodgrass *v.* Ward, 3 Hayw. 40.

Texas. — Bassett *v.* Martin, 83 Tex. 339, 18 S. W. 587.

Wisconsin. — Sargeant *v.* Solberg, 32 Wis. 127.

Place of Sale Under Trust Deed. In Goff *v.* Roberts, 72 Mo. 570, by the terms of a trust deed if the grantor defaulted in payment of a note the trustees were authorized to sell the property at the courthouse door in a certain town, and, as there were two houses called such in the town, parol evidence was held admissible to show which was intended.

51. *United States.* —Reed *v.* Proprietors of Locks & Canals, 8 How. 274.

Alabama. — Stamphill *v.* Bullen, 121 Ala. 250, 25 So. 928.

Connecticut. — Wooster *v.* Butler, 19 Conn. 308.

Indiana. — Hurst *v.* Francis, 5 Ind. 302.

Kentucky. — Shelby *v.* Teris, (Ky.), 14 S. W. 501.

Maine. — Emery *v.* Webster, 42 Me. 204, 66 Am. Dec. 274; Tyler *v.* Fickett, 73 Me. 410.

Massachusetts. — Flagg *v.* Mason, 141 Mass. 64, 6 N. E. 702; Waterman *v.* Johnson, 13 Pick. 261; Macdonald *v.* Morrill, 154 Mass. 270, 28 N. E. 259.

Michigan. — Purkiss *v.* Benson, 28 Mich. 538.

b. *Description of Party.* — **(1.) In General.** — Where the description of the party to a conveyance is equivocal in its application to the person, evidence is admissible to show what one was intended.[52]

(2.) Duplicate Grantees. — In case the description of a grantee can be applied to two or more persons indifferently, the rule admitting parol evidence to show the one intended may be invoked.[53]

F. Leases. — So also, a latent ambiguity in a lease may be aided or explained by extrinsic evidence.[54]

New Hampshire. — French *v.* Hayes, 43 N. H. 30, 80 Am. Dec. 127.

New Jersey. —Curtis *v.* Aaronson, 49 N. J. Law 68, 7 Atl. 886, 60 Am. Rep. 584.

New York. — Stewart *v.* Patrick, 68 N. Y. 450.

North Carolina. — Lawrence *v.* Hyman, 79 N. C. 209.

Oregon. — Kanne *v.* Otty, 25 Or. 531, 36 Pac. 537.

Pennsylvania. — Koch *v.* Dunkel, 90 Pa. St. 264.

Texas. — Johnson *v.* Archibald, 78 Tex. 96, 14 S. W. 266, 22 Am. St. Rep. 27.

Vermont. — Wead *v.* St. Johnsbury R. Co., 64 Vt. 52, 24 Atl. 361.

Washington. — Reed *v.* Tacoma Bldg. & Sav. Ass'n., 2 Wash. 198, 26 Pac. 252, 26 Am. St. Rep. 851.

52. *California.*—Wilson *v.* White, 84 Cal. 239, 24 Pac. 114.

Georgia. — Bowen *v.* Slaughter, 24 Ga. 338, 71 Am. Dec. 135; Henderson *v.* Haskney, 23 Ga. 383, 68 Am. Dec. 529.

Illinois. — Young *v.* Lorain, 11 Ill. 624, 52 Am. Dec. 463.

Louisiana. — Palangue *v.* Guesnon, 15 La. 311.

Massachusetts. — Scanlan *v.* Wright, 13 Pick. 523, 25 Am. Dec. 344.

Minnesota. — Wakefield *v.* Brown, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671.

Missouri. —Williams *v.* Carpenter, 42 Mo. 327.

Texas. —French *v.* Koenig, 8 Tex. Civ. App. 341, 27 S. W. 1079.

Wisconsin. — Sydnor *v.* Palmer, 29 Wis. 226; Staak *v.* Sigelkow, 12 Wis. 259.

Where a Co-Partnership Is Named As the Grantee in a Deed giving the surnames of the partners, but omitting the Christian names, any ambiguity resulting therefrom is what the law denominates a latent ambiguity, and parol evidence is admissible to remove the same and identify the grantees. Cole *v.* Mette, 65 Ark. 503, 47 S. W. 407, 67 Am. St. Rep. 945. See also Menage *v.* Burke, 43 Minn. 211, 45 N. W. 155, 19 Am. St. Rep. 235; De Cordova *v.* Korte, 7 N. M. 678, 41 Pac. 526; and where there is a conveyance to one partner by a deed absolute on its face, and it is attempted to be shown that it was, in fact, a conveyance to him for the use of himself and his co-partners, as tenants in common, parol evidence is competent to remove that ambiguity by showing that it was owned by them as partnership property. Black's App., 80 Pa. St. 201.

53. *Arkansas.* — Wolff *v.* Elliott, (Ark.), 57 S. W. 1111.

Illinois. — Billings *v.* Kankakee Co., 67 Ill. 489.

Massachusetts. — Simpson *v.* Dix, 131 Mass. 179; Kingsford *v.* Hood, 105 Mass. 495.

New York. — Jackson *v.* Goes, 13 Johns. 518.

Ohio. — Avery *v.* Stites, Wright, 56.

Wisconsin. — Begg *v.* Begg, 56 Wis. 534, 14 N. W. 602.

Where a deed is executed to a person named therein, of a certain town, and it is shown that there are two persons of that name, father and son, residing in such town; this is a case of latent ambiguity, and parol evidence is admissible to show which of those persons was intended as the grantee. Coit *v.* Starkweather, 8 Conn. 289.

54. American Sav. Bank *v.* Shaver Carriage Co., (Iowa), 82 N. W. 484; Myers *v.* Sea Beach R. Co., 43 App. Div. 573, 60 N. Y. Supp. 284; Paugh *v.* Paugh, 40 Ill. App. 143; Fowler *v.* Nixon, 7 Heisk. (Tenn.) 719.

G. Conveyances by Public Officers. — The weight of authority is to the effect that the rule admitting extrinsic evidence to aid or explain a latent ambiguity in instruments of writing generally applies with equal force to conveyances by public officers,[55] although it has been held to the contrary.[56]

H. Wills. — a. *Description of Subject Matter.* — An ambiguity in the description of the thing or property bequeathed or devised in

55. Sullivan *v.* Collins, 20 Colo. 528, 39 Pac. 334; Brown *v.* Walker, 85 Mo. 262; Billings *v.* Kankakee Co., 67 Ill. 489; Brown *v.* Guice, 46 Miss. 299; Wildasin *v.* Bare, 171 Pa. St. 387, 33 Atl. 365.

Statement of the Rule. — It is true that, if a sheriff levies on a whole tract of land, and describes it accurately in his levy and deed, parol testimony cannot be received to show that he intended to sell less than his deed describes, or that he excepted a part of the premises at the time of the sale. But that is not the case before us. The testimony offered is not to contradict the levy and deed, but to explain and confirm them. The plaintiff's testimony had shown that there was a latent ambiguity on the face of his deed. It purported to convey a single tract of land; it described one tract completely, with a single exception which applied to another. It might be void for uncertainty, if its description equally applied to two tracts, while it clearly purported to convey but one. It might convey one, and the part of the description which did not apply to that would be rejected as *falsa demonstratio*, or misdescription. Or it might possibly be intended to convey both; but in the present case the latter supposition had hardly a shade of probability to support it. Atkinson's Lessee *v.* Cummins, 9 How. 479.

In Texas, there are decisions to the effect that a resort to such evidence is not permissible to aid a latent ambiguity in a conveyance by a public officer. Wofford *v.* McKinna, 23 Tex. 36, 76 Am. Dec. 53. But the tendency of recent decisions is to ignore any distinction between such conveyances and ordinary conveyances, and to recognize the rule as stated in the text. Frazier *v.* Waco Bldg. Assn. (Tex. Civ. App.), 61 S. W. 132; Pierson *v.* Sanger, 93 Tex. 160, 53 S. W. 1012; Hermann *v.* Likens, 90 Tex. 448, 39 S. W. 382; Barclay *v.* Stuart, 4 Tex. Civ. App. 685, 23 S. W. 799.

In Wisconsin, it was formerly held that parol evidence was not admissible to explain a latent ambiguity in such a document; but this rule has been held to have been modified by a statute so as to let in such evidence. Jenkins *v.* Sharpf, 27 Wis. 472.

56. Birchmore *v.* Broughton, Harp. (S. C.) 300.

Parol evidence, after conflicting rights have grown up, cannot be received, to make the levy certain, which before was wholly uncertain. Gault *v.* Woodbridge, 4 McLean 329, 10 Fed. Cas. No. 5275.

A decree for the enforcement of a mechanic's lien, in which the property is described as "one acre, more or less, lying north of, and adjoining the northwest corner of Sixby's addition to the village of Van Buren, in the county of La Grange, state of Indiana," is void for uncertainty, and is not competent evidence to sustain a sheriff's deed, made in pursuance of an order of sale issued upon such decree. It is not competent in such cases, by parol evidence, to correct a radical defect in the description of property directed by such decree to be sold, or to identify it with that claimed by the purchaser under a sheriff's deed; and where the notice of lien filed by the mechanic describes the property as above set forth, and adds that it is the same land "conveyed to said G by one E B," said last named deed will not be competent as evidence to sustain such decree, for such decree must itself contain an intelligible description of the property. Munger *v.* Green, 20 Ind. 38.

a will comes within the rule admitting extrinsic evidence to aid or explain a latent ambiguity, whether the ambiguity is in the description generally of the subject of the bequest or devise,[57] in which case extrinsic evidence is admissible to identify the thing or property intended;[58] or whether the ambiguity arises from the fact that there are two or more things or parcels of land to which the bequest or devise may apply,[59] in which case the identity of the one intended may be shown by evidence of declarations of, and the circumstances surrounding, the testator.[60]

57. *England.* — Miller *v.* Fraiers, 8 Bing. 244, 21 Eng. C. L. 288.

United States. — Patch *v.* White, 117 U. S. 210, 6 Sup. Ct. 617.

Illinois. — Decker *v.* Decker, 121 Ill. 341, 12 N. E. 750.

Kentucky. — Breckenridge *v.* Duncan, 2 A. K. Marsh. 50, 12 Am. Dec. 359.

Missouri. — Riggs *v.* Myers, 20 Mo. 239.

New Hampshire. — Winkley *v.* Kaime, 32 N. H. 268.

58. *England.* — Miller *v.* Fraiers, 8 Bing. 244, 21 Eng. C. L. 288.

United States. — Gilmer *v.* Stone, 120 U. S. 586.

Connecticut. — Beardsley *v.* American Home Mis. Soc., 45 Conn. 327.

Illinois. — Decker *v.* Decker, 121 Ill. 341, 12 N. E. 750.

Kentucky. — Breckenridge *v.* Duncan, 2 A. K. Marsh. 50, 12 Am. Dec. 359.

Massachusetts. — Hinckley *v.* Thatcher, 139 Mass. 477, 1 N. E. 840, 52 Am. Rep. 719.

Missouri. — Riggs *v.* Myers, 20 Mo. 239.

New Hampshire. — Pickering *v.* Pickering, 50 N. H. 349; Winkley *v.* Kaime, 32 N. H. 268.

New Jersey. — Taylor *v.* Tolen, 38 N. J. Eq. 91.

New York. — Lefevre *v.* Lefevre, 59 N. Y. 434.

North Carolina. — Hatch *v.* Hatch, 2 Hayw. 19.

The Admission of Such Evidence Is No Encroachment upon the rule (to sustain which numerous cases were cited), that, "in general, parol evidence of the intention of the testator is inadmissible for the purpose of explaining, contradicting or adding to the contents of the will; but its language must be interpreted according to its terms." Morgan *v.* Burrows, 45 Wis. 211, 30 Am. Rep. 717.

Where words in a will are fairly and legitimately applicable to one thing as its name, and are equally applicable to another thing as words of description, parol evidence is admissible to show in which of the two senses the testator was in the habit of using the words. Boggs *v.* Taylor, 26 Ohio St. 604.

59. *England.* — Miller *v.* Fraiers, 8 Bing. 244, 21 Eng. C. L. 288.

Connecticut. — Doolittle *v.* Blakesley, 4 Day 265, 4 Am. Dec. 218.

Maryland. — Hammond *v.* Hammond, 55 Md. 575.

Massachusetts.—Sargent *v.* Towne, 10 Mass. 303.

Michigan. — Waldron *v.* Waldron, 45 Mich. 350, 7 N. W. 894.

New Jersey. — Den *v.* Culberly, 12 N. J. Law 308.

North Carolina. — Lowe *v.* Carter, 2 Jones Eq. 377.

Ohio. — Black *v.* Hill, 32 Ohio St. 313.

Pennsylvania. — Brownfield *v.* Brownfield, 12 Pa. St. 136, 51 Am. Dec. 590.

60. *England.* — *In re* Kilvert's Trusts, 12 Eng. C. L. 183; Grant *v.* Grant, L. R. 5 C. P. 38.

Connecticut. — Durham *v.* Averill, 45 Conn. 61, 29 Am. Rep. 642.

Illinois. — Bradley *v.* Rees, 113 Ill. 327, 55 Am. Rep. 422.

Indiana. — Daugherty *v.* Rogers, 119 Ind. 254, 20 N. E. 779.

Iowa. — Covert *v.* Sebern, 73 Iowa 564, 35 N. W. 636.

Kentucky. — Cronie *v.* Louisville Orphan's Home Soc., 3 Bush. 365.

Maine. — Howard *v.* American Peace Soc., 49 Me. 288.

Massachusetts.—Morse *v.* Stearies, 131 Mass. 389; Sargent *v.* Towne, 10 Mass. 303.

b. *Description of Devisee or Legatee.* — Likewise, where an ambiguity arises in respect of the application of the designation of the devisee or legatee named in a will, to an individual,[61] or where

Michigan. — Waldron *v.* Waldron, 45 Mich. 350, 7 N. W. 894.

New Hampshire. — Tilton *v.* American Bible Soc., 60 N. H. 377, 49 Am. Rep. 321.

New Jersey. — Den *v.* Cubberly, 12 N. J. Law 308.

New York. — St. Luke's Home *v.* Ass'n for Relief, 52 N. Y. 191, 11 Am. Rep. 697; Jackson *v.* Goes, 13 Johns. 518; Tillotson *v.* Race, 22 N. Y. 122.

North Carolina. — Lowe *v.* Carter, 2 Jones Eq. 377.

Ohio. — Black *v.* Hill, 32 Ohio St. 313.

Pennsylvania. — Vernor *v.* Henry, 3 Watts 385; Brownfield *v.* Brownfield, 12 Pa. St. 136, 51 Am. Dec. 590.

Tennessee. — Gass *v.* Ross, 3 Sneed 211.

Vermont. — Townsend *v.* Downer, 23 Vt. 225.

Virginia. — Maund *v.* McPhail, 10 Leigh 199.

Wisconsin. — Webster *v.* Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278.

Declarations of the Testator may be resorted to in case of a latent ambiguity, which arises where there are two or more persons or things, each answering exactly to the person or thing described in the will. In such an event, parol evidence of what the testator said may lawfully be adduced, to show which of them he intended; but such evidence will not be allowed to show that he meant a thing different from that disclosed in the will. Griscom *v.* Evens, 40 N. J. Law 402, 29 Am. Dec. 251.

Upon the question as to what the words used by the testator to express evidence of declaration as to what were his intentions in the dispositions which he had made, or as to the disposition which he intended to make, of his property, is inadmissible. But where it is found that the terms used apply indifferently and without ambiguity to each of several subjects or persons, then evidence of such declarations is admissible. Wooten *v.* Redd, 12 Gratt. (Va.) 196.

The general rule that parol evidence is admissible to explain a latent ambiguity, is perfectly well settled; and that the condition of the testator's property may be shown to raise this ambiguity, is also settled. Brainerd *v.* Cowdrey, 16 Conn. 1.

Instructions of a Testator to a Scrivener who drew his will have been held admissible in case of a latent ambiguity. Den *v.* Cubberly, 12 N. J. Law 308.

Contra. — Hill *v.* Felton, 47 Ga. 455, 15 Am. Rep. 643; see also Frick *v.* Frick, 82 Md. 218, 33 Atl. 462, wherein the court said: "We cannot, however, resort to extrinsic evidence as to ascertain from the scrivener what the testator instructed or intended him to say, as was attempted in this case, nor can we accept the declarations of the testator to establish his intention, or to aid in the interpretion of the will, as was settled in Cesar *v.* Chew, 7 Gill. & J. (Md.) 127; Zimmerman *v.* Hafer, 81 Md. 347, 32 Atl. 316; and other cases that might be cited."

61. *England.* — Grant *v.* Grant, L. R. 5 C. P. 380, 727; *In re* Wolverton's Estate, L. R. 7 Ch. Div. 197; Hiscocks *v.* Hiscocks, 5 M. & W. 363, 52 Rev. Rep. 748.

Illinois. — Bradley *v.* Rees, 113 Ill. 327, 55 Am. Rep. 422.

Indiana. — Skinner *v.* Harrison Twp., 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137.

Iowa. — Coovert *v.* Sebern, 73 Iowa 564, 35 N. W. 636.

Louisiana. — Barnabee *v.* Snaer, 18 La. Ann. 148.

Massachusetts.—Bodman *v.* American Tract Soc., 9 Allen 447; Morse *v.* Stearns, 131 Mass. 389.

New Jersey. — Atterbury *v.* Strafford, 58 N. J. Eq. 186, 44 Atl. 160.

New York. — *In re* Wheeler, 32 App. Div. 183, 52 N. Y. Supp. 943, *affirmed* 57 N. E. 1128; Gallup *v.* Wright, 61 How. Pr. 286.

the devisee or legatee is characterized in terms which are words of general description only, rather than by the use of an exact name,[62] extrinsic evidence is receivable in explanation thereof; and for this purpose evidence of the testator's declarations to show what person he meant to designate by the description is admissible.[63]

North Carolina. — Clarke *v.* Cotton, 2 Dev. Eq. 301, 24 Am. Dec. 279.

Pennsylvania. — Vernor *v.* Henry, 3 Watts. 385.

South Carolina. — *In re* Robb's Estate, 37 S. C. 19, 16 S. E. 241.

Virginia. — Hawkins *v.* Garland, 76 Va. 149, 44 Am. Rep. 158.

In Grant *v.* Grant, L. R. 2 Prob. & Div. 8, L. R. 5 C. P. 380, 727, a devise was "to my nephew J G," and the testator had such a nephew, but did not know his name or existence and was unfriendly with his father. Testator's wife had a nephew of the same name, who had lived with the testator for years, and was called "nephew" by him, and testator had declared that he meant to make this latter nephew his heir and cut off his brother's family. These facts were held competent evidence establishing the claim of the wife's nephew. *Compare* Wells *v.* Wells, L. R. 18 Eq. Cas. 504; *In re* Fish, L. R. 2 Ch. Div. (1894) 83; *In re* Foster, L. R. 17 Ch. Div. 382.

Where money is bequeathed to a school by a testatrix, designating the object of her bounty by a wrong name, but fixing the locality, it may be shown by extrinsic testimony what school was intended in the will and that it was the only school controlled by a certain denomination of religious people in that place. Ross *v.* Kiger, 42 W. Va. 402, 26 S. E. 193.

If there are two societies of the same name which is used by a testator to describe a legatee, extrinsic evidence is to be resorted to for the purpose of ascertaining which he had in mind. Bodman *v.* American Tract Soc., 9 Allen (Mass.) 447.

62. *England.* — Allen *v.* Allen, 12 Ad. & E. 451; *In re* Kilvert's Trusts, L. R. 7 Ch. App. Cas. 170; *In re* Alchius' Trusts, L. R. 14 Eq. 230; Doe *v.* Huthwaite, 3 Barn. & A. 632, 5 Eng. C. L. 363.

United States. — Gilmer *v.* Stone, 120 U. S. 586.

Connecticut. — Brewster *v.* McCall, 15 Conn. 274.

Illinois. — Missionary Soc. *v.* Mead, 131 Ill. 33, 23 N. E. 603.

Indiana. — Elliott *v.* Elliott, 117 Ind. 380, 20 N. E. 264, 10 Am. St. Rep. 54; Denis *v.* Holsapple, 148 Ind. 297, 47 N. E. 631, 62 Am. St. Rep. 526, 46 L. R. A. 168.

Massachusetts. — Faulkner *v.* National Sailors' Home, 155 Mass. 458, 29 N. E. 645.

New Hampshire. — Tilton *v.* American Bible Soc., 60 N. H. 377, 49 Am. Rep. 321.

New Jersey. — Van Nostrand *v.* Board of Missions, 59 N. J. Eq. 19, 44 Atl. 472.

New York. — Lefevre *v.* Lefevre, 59 N. Y. 434.

North Carolina. — Keith *v.* Scales, 124 N. C. 497, 32 S. E. 809.

Pennsylvania. — Appeal of Washington and Lee University, 111 Pa. St. 572, 3 Atl. 664.

Rhode Island. — Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324.

South Carolina. — *In re* Robb's Estate, 37 S. C. 19, 16 S. E. 241.

Tennessee. — Gass *v.* Ross, 3 Sneed 211.

Vermont. — McAllister *v.* McAllister, 46 Vt. 272.

Virginia. — Hawkins *v.* Garland, 76 Va. 149, 44 Am. Rep. 158.

West Virginia. — Ross *v.* Kiger, 42 W. Va. 402, 26 S. E. 193.

63. Gord *v.* Needs, 2 M. & W. 129. Dennis *v.* Holsapple, 148 Ind. 297, 47 N. E. 331; and see cases cited in notes immediately preceding.

Circumstances Indicative of the State of the Testator's Affections towards the object of his bounty, or the relative circumstances of his connections, or his acts and declarations in respect of the thing given, or the person of the donee, are constantly admitted. With this view the relative amount of advancements and the difference in value

3. Creating Ambiguity by Parol. — It is not enough to render parol evidence competent to show circumstances known to one of the parties, but unknown to the other, which might have influenced the former in making the contract; but, in order to create an ambiguity in the use of common and ordinary language, so as to open such writing to parol explanatory evidence, it must be established by proof of circumstances known to all of the parties to the writing and available to all, in selecting the language to be employed to express their meaning.[64]

IV. INTERMEDIATE OR MIXED AMBIGUITY.

The difficulty of always distinguishing between a patent and latent ambiguity has led to the suggestion that there is an intermediate class partaking of the nature of both patent and latent ambiguity,[65] and that in such case extrinsic evidence is properly resorted to in order that the ambiguity may be resolved;[66] but this suggested classification has been criticised.[67]

V. QUESTIONS OF LAW AND FACT.

The construction of an instrument of writing, being matter of

of the portions of the land, would be proper evidence. Brownfield *v.* Brownfield, 12 Pa. St. 136, 51 Am. Dec. 590.

Evidence that testator, at the time of making his will, stated that he had given a legacy to the "Shelter," and when told that he had erroneously called it the "Nursery," he replied that he did not wish to erase anything from the will, and that he meant the "nigger nursery," is inadmissible. Wood *v.* Hammond, 16 R. I. 98, 17 Atl. 324.

64. Brady *v.* Cassidy, 104 N. Y. 147, 10 N. E. 131.

65. Peish *v.* Dickson, 1 Mason 9, 19 Fed. Cas. No. 10,911, wherein Judge Story discusses this difficulty and suggests the classification above stated.

66. *United States.* — Peish *v.* Dickson, 1 Mason 9, 19 Fed. Cas. No. 10,911.

Alabama. — Moody *v.* Alabama G. S. R. Co. (Ala.), 26 So. 952; Chambers *v.* Ringstaff, 69 Ala. 140.

California. — Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371; Hawley *v.* Bader, 15 Cal. 44.

Mississippi. — Preacher *v.* Strauss, 47 Miss. 353.

New Mexico. — Gentile *v.* Crossan, 7 N. M. 589, 38 Pac. 247.

New York. — Fish *v.* Hubbard, 21 Wend. 651.

Wisconsin. — Beason *v.* Kurz, 66 Wis. 448, 29 N. W. 230; Ganson *v.* Madigan, 15 Wis. 158, 81 Am. Dec. 652.

In an action concerning a disputed boundary between two mining claims, depending on an agreement between the parties, in which the word "north" was used, and parol evidence was admitted to prove that it was the custom of the locality to run boundary lines by the magnetic meridian, and that that was the understanding of the parties. *Held*, that such evidence was admissible, not to contradict or vary the term, but to ascertain the sense in which it was used. Jenny Lind Co. *v.* Bower, 11 Cal. 194.

67. Schlottman *v.* Hoffman, 73 Miss. 188, 18 So. 893, 55 Am. St. Rep. 527, wherein the court says that the solution of the difficulty by Prof. Greenleaf, in assigning ambiguities of this character to the class of latent ambiguities, is perhaps as satisfactory as can be suggested, and reconciles many apparently conflicting statements of the rule. See also 2 Phil. Ev., Cowen, Hill & Edward's Notes to § 3, ch. 8.

law, is for the court; but when an ambiguity arises, and evidence is received in explanation thereof, it then becomes a question for the jury to determine the meaning of the ambiguous language,[68] and a charge by the court as to such meaning is error.[69]

68. *England.* — Smith *v.* Thompson, 8 M. & G. 44, 65 Eng. C. L. 42.

Georgia. — Hill *v.* King Mfg. Co., 79 Ga. 105, 3 S. E. 445.

Maine. — Fenderson *v.* Owen, 54 Me. 372, 92 Am. Dec. 551.

New Hampshire. — Bartlett *v.* Nottingham, 8 N. H. 300.

New Jersey. — Curtis *v.* Aaronson, 49 N. J. Law 68, 7 Atl. 886, 60 Am. Rep. 584.

North Carolina.—Colgate *v.* Latta, 115 N. C. 127, 20 S. E. 388, 26 L. R. A. 321.

Pennsylvania. — Lycoming Ins. Co. *v.* Sailor, 67 Pa. St. 108; Cummins *v.* Germain Am. Ins. Co., 197 Pa. St. 61, 46 Atl. 902; McCullough *v.* Wainwright, 14 Pa. St. 171.

Texas. — Kingston *v.* Pickins, 46 Tex. 99.

69. Ginnuth *v.* Blankenship (Tex. Civ. App.), 28 S. W. 828.

AMNESTY.—See Pardon.

AMOUNT.—See Books of Account, Quantity.

ANNOTION—See Corporations.

ANCIENT BOUNDARIES.—See Boundaries.

ANCIENT DOCUMENTS.

By Edgar W. Camp.

CROSS-REFERENCES.

Best and Secondary Evidence;
Handwriting;
Maps;
Private Writings; Public Documents.

NOTE. — This article includes only "Ancient Private Writings," and does not include public documents or maps.

NOTE. — This article includes only Ancient Private Writings, and does not include Public Documents or Maps.

I. DEFINITION.

The term "Ancient Document" includes any private writing[1] that is at least thirty years old.[2]

The rules as to Ancient Writings have been in some cases extended to documents less than thirty years old;[3] as in Canada by statute.[4] Formerly in England a greater age was required.[5]

The rules concerning Ancient Writings do not extend to recent entries made in such writings.[6]

II. DETERMINATION OF AGE.

1. Date From Which Reckoned. — A. GENERALLY. — The age of writings generally is reckoned from the time of their execution.[7]

B. WILLS. — But some authorities hold that wills age only from the testator's death.[8]

2. Date to Which Reckoned. — Age is reckoned down to the date the instrument is offered in evidence.[9]

3. Proving Age. — A. TO BE PROVED. — A paper offered as ancient must be proved to be so; the fact of antiquity is not usually taken for granted.[10]

1. Doe *v.* Turnbull, 5 U. C. Q. B. (Can.) 129; Montgomery *v.* Graham, 31 U. C. Q. B. (Can.) 57; Bell *v.* Brewster, 44 Ohio St. 690, 10 N. E. 679; Holt *v.* Maverick, 86 Tex. 457, 23 S. W. 75; Stroud *v.* Springfield, 28 Tex. 649.

2. Barr *v.* Gratz, 4 Wheat. 213; Fairly *v.* Fairly, 38 Miss. 280; Quinn *v.* Eagleston, 108 Ill. 248; Swygart *v.* Taylor, 1 Rich. Law (S. C.) 54.

3. No Fixed Rule as to Age. "It is said in one case (12 Vin. Abr. 57, pl. 9, MSS.) that there is no fixed rule about it, but that it had often been allowed where the deed was but 25 or 30 years old." Everley *v.* Stoner, 2 Yeates (Pa.) 122; and in that case a deed 28 years old was admitted without calling or accounting for a subscribing witness. But the deed was identified by a witness who had been present when it was executed.

Deed Twenty-five Years Old. — In Stroud *v.* Springfield, 28 Tex. 649, a paper 25 years old was offered as ancient; the supreme court held it was improperly admitted, but apparently not because it did not come within the definition of an ancient writing, but because it was not sufficiently proved under the rules for proving ancient writings.

4. Allan *v.* McTavish, 28 Grant's Ch. (Can.) 539.

5. **Sixty Years.** — Jackson *v.* Blanshan, 3 Johns. (N. Y.) 292.

6. Goulding *v.* Clark, 34 N. H. 148.

7. Mackery *v.* Newbolt, cited in Calthorpe *v.* Gough, 4 T. R. (Durn. & E.) 707, note; Doe *v.* Wolley, 8 Barn. & C. 22, 15 Eng. C. L. 150; Man *v.* Ricketts, 7 Beav. 93; McKenire *v.* Fraser, 9 Ves. 5.

8. Jackson *v.* Blanshan, 3 Johns. (N. Y.) 292 (but Spencer dissented, holding that age should be reckoned from date of execution); Shaller *v.* Brand, 6 Binn. (Pa.) 435; Fetherly *v.* Waggoner, 11 Wend. (N. Y.) 599. But see Mackery *v.* Newbolt, 4 T. R. (Durn. & E.) 709, note, and McKenire *v.* Fraser, 9 Ves. 5.

9. Johnson *v.* Shaw, 41 Tex. 428; Bass *v.* Sevier, 58 Tex. 567; Man *v.* Ricketts, 7 Beav. 93.

10. Fairly *v.* Fairly, 38 Miss. 280; Doe Stevens *v.* Clement, 9 U. C. Q. B. (Can.) 650.

Contra. — It will be presumed that

B. Method of Proof. — a. *Direct Evidence.* — Age may be proved by the direct evidence of those who can testify to having seen the paper more than thirty years before.[11]

b. *Circumstantial Evidence.* — **(1.) Generally.** — Antiquity may be shown by circumstances.[12]

(2.) Appearance. — Thus the court will take into consideration the appearance of the paper and of the writing thereon.[13]

(3.) Indorsements. — Indorsements on the paper may be considered as bearing on the question of age.[14]

archives became such at their date. Von Rosenberg *v.* Haynes, 85 Tex. 357, 20 S. W. 143.

11. To prove that a deed is more than 30 years old the recorder may be called to testify when his indorsement thereon was made. Cox *v.* Cock, 59 Tex. 521.

12. An Admission Made by Party or Privy. — Nixon *v.* Porter, 34 Miss. 697, 69 Am. Dec. 408.

A Copy shown to have been made more than thirty years before may be put in evidence to prove that the original is at least as old. Williams *v.* Conger, 125 U. S. 397, 8 Sup. Ct. 933.

Two Deeds Found Together. — In Applegate *v.* Lexington etc. Min. Co., 117 U. S. 255, 6 Sup. Ct. 742, it was held that where it appeared that two deeds had a common history, were found together, and had been relied on as links in the same title, testimony directly applicable to one tended to support the other.

13. Kennard *v.* Withrow (Tex. Civ. App.), 28 S. W. 226; Hollis *v.* Dashiell, 52 Tex. 187; Pridgen *v.* Green, 80 Ga. 737, 7 S. E. 97.

"It was an old and faded paper and was apparently of corresponding age with its purported date of execution." Williams *v.* Conger, 49 Tex. 582.

Stooksberry *v.* Swan (Tex. Civ. App.), 21 S. W. 694; Bell *v.* Hutchins (Tex. Civ. App.), 41 S. W. 200; Weitman *v.* Thiot, 64 Ga. 11; Corporation of Burford, 18 O. R. (Can.) 546; Davies *v.* Lowndes, 1 Bing. (N. C.) 161.

In Perry *v.* Clift (Tenn.), 54 S. W. 121, the court said: "The original is sent up and it bears on its face evidence of great age, in the tattered condition of the paper, its color, and the faded appearance of the ink."

Character of Handwriting, that it is of the period when the paper is alleged to have been made. Duke of Beaufort *v.* Smith, 4 Ex. 450, 19 L. J. Ex. 97.

14. Stooksberry *v.* Swan (Tex. Civ. App.), 34 S. W. 369, 21 S. W. 694, 22 S. W. 963; Whitman *v.* Henneberry, 73 Ill. 109; Pridgen *v.* Green, 80 Ga. 737, 7 S. E. 97.

In Bell *v.* Hutchins (Tex. Civ. App.), 41 S. W. 200, the court said: "When the age of the deed is the matter under investigation the indorsements made thereon and certificates attached thereto, which in any manner indicate its age, are matters to be considered by the jury. The jury can look to the deed, its appearance and all indorsements thereon, in determining its age."

A Certificate of Recordation apparently ancient and genuine will tend to show the antiquity of the deed. Applegate *v.* Lexington etc. Min. Co., 117 U. S. 255, 6 Sup. Ct. 742.

Even Though the Certificate is Not Signed. — Stebbins *v.* Duncan, 108 U. S. 32, 2 Sup. Ct. 313.

Certificate of Record in the Wrong County. — In Pridgen *v.* Green, 80 Ga. 737, 7 S. E. 97, there was a certificate of registration in a certain county which was objected to because the land conveyed lay in another county and therefore the certificate was unauthorized. *Held*, that the certificate, being over thirty years of age, might go before the jury, and be considered by them as a circumstance, both on the question of the antiquity of the deed and of its genuineness.

"The act of the notary, taking

III. SHOWING COMPETENCY.

1. Necessity of Proof. — It has often been said that Ancient Writings prove themselves,[15] but such is not the rule. In order that they may be admitted in evidence they must be shown to be probably genuine.[16]

2. Method of Proof. — A. Custody. — a. *Importance Of.* — In determining the competency of an ancient document offered without proof of execution, the custody from which it comes is a factor,[17]

proof of the execution of the instrument under his seal is proof that the act was done by him at the time stated, and the act of the clerk, under the seal of his office, certifying that the deed was recorded, is proof that it was recorded as stated and at the time stated. They are the original acts of the officers, and, being under seal, prove themselves. They do not prove the execution of the deed, but the age of the instrument, and tend to establish the fact that its date is correct." Kennard *v.* Withrow (Tex. Civ. App.), 28 S. W. 226.

15. Beall *v.* Dearing, 7 Ala. 124; Adams *v.* Roberts, 2 How. 486; Stroud *v.* Springfield, 28 Tex. 649; King *v.* Watkins, 98 Fed. 913; Green *v.* Chelsea, 24 Pick. (Mass.) 71; Everly *v.* Stoner, 2 Yeates (Pa.) 122; Mapes *v.* Leal's Heirs, 27 Tex. 345; Walker *v.* Peterson (Tex. Civ. App.), 33 S. W. 269, 42 S. W. 1045. "The deed being more than thirty years old required no proof." Henthorn *v.* Sheperd, 1 Blackf. (Ind.) 157, and in that case, apparently, the deed was supported by nothing but its age.

"**There Are Several Loose Dicta** to be found that an ancient deed proves itself." Kent, in Jackson *v.* Laroway, 3 Johns. Cas. (N. Y.) 283.

Parish Certificates of Pauper Settlement. — King *v.* Ryton, 5 T. R. 259; Rex. *v.* Netherthong, 2 M. & S. 537.

Ancient Corporation Records held to prove themselves. Goodwin *v.* Jack, 62 Me. 414; King *v.* Little, 1 Cush. (Mass.) 436; Rust *v.* Boston Mill Corporation, 6 Pick. (Mass.) 158.

16. Chamberlain *v.* Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1017; Jackson *v.* Luquere, 5 Cow. (N. Y.) 221; Stroud *v.* Springfield, 28 Tex. 649; Little *v.* Downing, 37 N. H. 355; Whitehouse *v.* Bickford, 29 N. H. 471; Manley *v.* Curtis, 1 Price 225; Crispen *v.* Hannovan, 50 Mo 418; Williams *v.* Bass, 22 Vt. 352; Havens *v.* Seashore L. Co., 47 N. J. Eq. 365, 20 Atl. 497; Jackson *v.* Lamb, 7 Cow. (N. Y.) 431; Hewlett *v.* Cock, 7 Wend. (N. Y.) 371; Fogal *v.* Pirro, 10 Bos. 100, 23 N. Y. Sup. Ct. 100.

Genuineness Not Presumed From Antiquity. — When the signing becomes a matter of legal controversy it must be established by proof. Showing that the instrument is thirty years old has no greater tendency to prove it genuine than would the fact that it had existed for a single day. The mere fact of existence has no tendency to prove legal execution. Indeed, when nothing has ever been done under the deed, the lapse of time tends to discredit it. Willson *v.* Bitts, 4 Denio (N. Y.) 201.

Presumption of Genuineness Insufficient. — While there is the presumption of the genuineness of a deed more than thirty years old, the party offering it is bound to use every means in his power to prove its genuineness, by proof of possession, by proof from the records where it has been recorded, and by testimony of the attesting witnesses, whenever possible. Smith *v.* Rankin, 20 Ill. 14.

17. Stroud *v.* Springfield, 28 Tex. 649; Stooksberry *v.* Swan (Tex. Civ. App.), 34 S. W. 360; Winn *v.* Patterson, 9 Pet. 663; Stoddard *v.* Chambers, 2 How. 284; Wilson *v.* Simpson, 80 Tex. 279, 16 S. W. 40;

and an important one.[18]

b. *Proper, Must Be Shown.* — (1.) **Generally.** — It has been held that a showing that it comes from proper custody is indispensable.[19]

(2.) Presumptions. — But where it is shown that anciently the paper was in a certain custody not apparently improper, it may be presumed to have been proper.[20]

(3.) Exceptions. — And the rule is relaxed as to papers so ancient that the proper custody cannot be determined;[21] so sometimes in case

Thompson *v.* Brannon, 14 S. C. 542; Lyon *v.* Adde, 63 Barb. (N. Y.) 89; Fogal *v.* Pirro, 10 Bosw. 100, 23 N. Y. Sup. Ct. 100; Rogers *v.* Shortis, 10 Grant's Ch. (Can.) 243; Van Every *v.* Drake, 9 U. C. C. P. (Can.) 478; Carroll *v.* Norwood, 1 Har. & J. (Md.) 167; Evans *v.* Rees, 10 Ad. & E. 151.

18. "It is not strictly correct to say that an ancient instrument proves itself. The presumptions that follow from the conditions that indicate its genuineness are allowed to take the place of the proof necessary at common law, and chief among these conditions has always been and still is the fact that it comes from a proper custody. To dispense with this requirement would be to push the rule beyond any known precedent; to throw down the last conservative barrier, and allow every instrument regular upon its face, and appearing to be over 30 years of age to be introduced without any evidence of its execution. We do not wish to be understood as saying that it is necessary for the evidence to trace step by step the custody of the instrument from its purported date, but that some fact or circumstance should appear to indicate that, when the instrument is presented to the court, it has come from the place or depository where it would naturally be found if genuine." Chamberlain *v.* Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1017.

19. Williamson *v.* Mosley, 110 Ga. 53, 35 S. E. 301; Rogers *v.* Riddlesburg C. & I. Co., 31 Leg. Int. (Pa.) 325.

In Long *v.* Georgia Land & Lum. Co., 82 Ga. 628, 9 S. E. 425, it was held that in the absence of preliminary proof as to its coming from proper custody, a deed over 70 years old is not admissible in evidence.

Records of a bishopric dated 1321 and 1412, were held inadmissible as not coming from the proper office. They were produced from the hands of a private collector, who himself purchased them from another collector. Their genuineness was amply corroborated; but it was held that the rule as to proper custody could not be so stretched. Potts *v.* Durant, 3 Anstr. 789, 4 Rev. Rep. 864.

20. In Tolman *v.* Emerson, 4 Pick. (Mass.) 160, a book of the proprietors produced by the witness was shown to have come to him from his grandfather, whose executor had had it thirty years. Since there was no showing of the present existence of any office or clerk where the book ought to be kept, and no depository appointed by law, it was presumed that the book came properly into the custody of the grandfather.

21. "The rule of evidence requiring the testimony of the lawful custodian of books of record offered in evidence, that they are of the description claimed, before they are admissible, has been repeatedly relaxed in the case of ancient books of record of the proprietors of land. In such instances such books have been held to prove themselves. When ancient books, purporting to be the records of such proprietary, contain obvious internal evidence of their own verity, and there is no evidence of the present existence of the proprietary or of any person representing it, or any clerk or other person authorized to keep the records, they are admissible in evidence without proof of the legal organization of the proprietary, or of its subsequent meetings. King *v.* Little, 1 Cush. 440; Rust *v.* Boston Mill Corporation, 6 Pick. 165; Monumoi Great Beach *v.* Rogers, 1 Mass. 159; Pitts *v.* Temple, 2 Mass.

of lost papers,[22] and where there are other circumstances corroborating the genuineness of the deed, production from the proper custody has been held not essential.[23]

One that has asserted the genuineness of the paper cannot object to it on the ground of improper custody.[24]

c. *By Whom to Be Proved.* — It was once said that the custody must be testified to by him who had it.[25]

d. *What Is Proper Custody.* — (1.) **Generally.** — A paper comes from proper custody when the custody is such as would be reasonable and probable for a genuine document of the kind offered;[26]

538; Tolman *v.* Emerson, 4 Pick. 160." Goodwin *v.* Jack, 62 Me. 414. But see Swinnerton *v.* Stafford, 3 Taunt. 91.

22. In Case of a Lost Deed no custody of which at any time can be directly proved, the fact that it was recorded raised the presumption that it was delivered and so obviates the requirement of proof of custody, which is "mainly that its delivery may be evidenced by the possession of a party claiming under it." Holmes *v.* Coryell, 58 Tex. 680.

23. Brown *v.* Woods, 6 Rich. Eq. (S. C.) 155; Quinn *v.* Eagleston, 108 Ill. 248; Whitman *v.* Shaw, 166 Mass. 451, 44 N. E. 333, where an old map or plan was let in, its genuineness not being questioned, although its custody could not be accounted for.

A town map bearing no date but marked with the letter "P" was offered in evidence. It did not come from the proper custody (that of the town clerk,) but was found in the possession of one G., an aged surveyor, who had, more than thirty years before, been town clerk, and who testified that the map was at that date among the records of the office. It was evidently much used and worn. Its genuineness was held to be sufficiently proved, regardless of the fact of its not having come from the proper custody. Gibson *v.* Poor, 21 N. H. 440.

Otherwise Custody Apparently Improper Must Be Explained. — Chamberlain *v.* Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1017.

24. Miller *v.* Foster, cited in note to Atkyns *v.* Hatton, 2 Anstr. 386, 3 Rev. Rep. 589.

25. Evans *v.* Rees, 10 Ad. & E. 151.

26. Former Heirs *v.* Eslava, 11 Ala. 1028; Reg. *v.* Nytton, 2 El. & E. 557, 29 L. J. N. C. 109; De La Vega *v.* League, (Tex. Civ. App.,) 21 S. W. 565; Talbot *v.* Lewis, 6 Car. & P. 603; Templeton *v.* Luckett, 75 Fed. 254; Rex *v.* Bathwick, 2 Barn. & A. 639; Blanchy-Jenkins *v.* Duirvaven, L. R. 2 Ch. Div. 121.

Book of Records of Boston preserved among the records of town. Rust *v.* Boston Mill Corporation, 6 Pick. (Mass.) 158.

Vicar's Books and Bishop's Ordinances from registry of bishop or archdeacon or from church chest. Armstrong *v.* Hewitt, 4 Price 216, 18 Rev. Rep. 707; Atkyns *v.* Hatton, 2 Anstr. 386, 3 Rev. Rep. 589; Graves *v.* Fisher, 3 Cl. & F. 1, 8 Bligh (N. S.) 937.

Custody Traced Back to Grantee. Cook *v.* Christie, 12 U. C. C. P. (Can.) 517.

Most Proper Custody. — "Documents found in a place in which and under the care of persons with whom the care of such papers might naturally and reasonably be expected to be found, are in precisely the custody which gives authenticity to them." McCleskey *v.* Leadbetter, 1 Ga. 551.

Lease Held at Lessee's Disposal is in proper custody. Rees *v.* Walters, 3 M. & W. 527, 7 L. J. Ex. 138.

Papers Filed With Land Commissioner. — A power of attorney in Texas after presentation to the commissioner would either be placed by him among the papers pertaining to the title issued by him, or be returned to the party presenting it; consequently such a power found among the papers of the person to whom it had been indorsed comes from a

as a letter among papers of the addressee;[27] a paper found in a custody provided by statute;[28] old surveys found in the surveyor-general's office;[29] papers found on file as exhibits in other actions, come from proper custody.[30]

The fact that the custodian bears the name of a party to the paper may indicate propriety of the custody.[31]

(2.) Custody of Claimant. — A paper is in proper custody if in the possession of one claiming under it,[32] or of his representatives,[33] or heirs.[34]

(3.) With Other Muniments. — A paper comes from proper custody if found among undisputed muniments of title to the land to which itself relates.[35]

proper custody. Williams *v.* Conger, 49 Tex. 582.

Deed Found in County Clerk's Office among papers labeled with grantee's name. Warren *v.* Frederichs, 76 Tex. 647, 13 S. W. 643. But see Harris *v.* Hoskins, 2 Tex. Civ. App. 486, 22 S. W. 251.

Ancient MSS. Brought From the Bodleian Collection did not come from the proper custody, and were consequently inadmissible. Michel *v.* Rabbets, cited in 3 Taunt. 91. See also Swinnerton *v.* Stafford, 3 Taunt. 91.

Book Should Be Traced Back to Maker. Randolph *v.* Gordon, 5 Price 312, 19 Rev. Rep. 633, that was an ancient book (MSS.) produced by the grandson of the maker, but not shown to have been found among the maker's papers.

27. Bell *v.* Brewster, 44 Ohio St. 690, 10 N. E. 679.

28. Wilson *v.* Bitts, 4 Denio (N. Y.) 201.

29. Rodgers *v.* Ruddlesberger, C. & I. Co., 31 Leg. Int. (Pa.) 325; Burchfield *v.* McCauley, 3 Watts (Pa.) 9.

30. Culmore *v.* Wedlerker, (Tex. Civ. App.,) 44 S. W. 676.

Presumed to Have Been Exhibits. In Applegate *v.* Lexington etc. Min. Co., 117 U. S. 255, 6 Sup. Ct. 742, deeds were found in the office of a clerk of court among the papers of a suit in that court in which suit they would have been proper exhibits and evidence, and it was fairly to be inferred from the record that they had been offered in evidence. The custody was held proper and beyond suspicion.

31. An ancient receipt found in the possession of a man bearing the same name as the one to whom the receipt was given, although a stranger to the action, held to come from the proper custody. Per Thomson, C. B., in Bertie *v.* Beaumont, 2 Price 303.

32. Hollis *v.* Dashiell, 52 Tex. 187; Beaumont Pasture Co. *v.* Preston, 65 Tex. 448; Williamson *v.* Moseley, 110 Ga. 53, 35 S. E. 301; Templeton *v.* Luckett, 75 Fed. 254; Williams *v.* Conger, 49 Tex. 582.

A receipt more than 100 years old found in a desk used for thirty years by the person into whose possession such receipt should have passed, comes from a proper custody. Lewis *v.* Lewis, 4 Watts & S. (Pa.) 378.

In trespass to try title, plaintiff offered in evidence, as an ancient instrument, a deed from N, the common source, to his grantor, purporting to be dated in 1854. There was proof that plaintiff obtained it from the grantee, who had it in possession in 1868, when he returned it, for acknowledgment, to N, who promised to acknowledge and return it; that N's widow returned it to such grantee after N's death, and that the deed was the same in 1868 as when offered in 1802. *Held*, that the deed should have been admitted. Lunn *v.* Scarborough, 6 Tex. Civ. App. 15, 24 S. W. 846.

33. Orser *v.* Vernon, 14 U. C. C. P. (Can.) 573.

From Trustees of Granted Estate. Thompson *v.* Bennett, 22 U. C. C. P. (Can.) 393.

34. Hogan *v.* Carruth, 19 Fla. 84; Pettingell *v.* Boynton (Mass.,) 29 N. E. 655.

35. Hewlett *v.* Cock, 7 Wend. (N.

(4.) **Custody of Grantor.** — But a deed coming from the possession of the grantor's heirs is not from proper custody.[36]

e. *Need Not Be Most Proper.* — The custody need not be the most proper one.[37]

f. *Explaining Custody.* — Custody *prima facie* improper may be explained.[38]

g. *Is Question for Court.* — The question what is proper custody is for the court.[39]

h. *Sufficiency of Custody As Proof.* — **(1.) England and Canada.** In England,[40] a different rule prevails, but apparently in Canada,[41]

Y.) 371; Bullen *v.* Michel, 4 Dow. 297, 16 Rev. Rep. 77.

Reason of the Rule. — "Ancient deeds proved to have been found amongst deeds and evidences of land may be given in evidence, although the execution of them cannot be proved, and the reason given is, 'that it is hard to prove ancient things, and the finding of them *in such a place* is a presumption that they were fairly and honestly obtained, and reserved for use, and *are free from suspicion of dishonesty*.'" Ellenborough, C. J., in Roe *v.* Rawlings, 7 East 279.

36. Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797; Williamson *v.* Moseley, 110 Ga. 53, 35 S. E. 301. *Contra.* — Patterson, J., in Doe *v.* Samples, 8 Ad. & E. 154.

37. Williams *v.* Conger, 49 Tex. 582; Whitman *v.* Shaw, 166 Mass., 44 N. E. 333; Doe *v.* Samples, 8 Ad. & E. 154; Croughton *v.* Blake, 12 M. & W. 705, 13 L. J. Ex. 28; Slater *v.* Hodgson, 9 Q. B. 727; Shrewsbury *v.* Ruling, 11 Q. B. 884, 17 L. J. Q. B. 190; Jacobs *v.* Phillips, 82 Q. B. 158, 15 L. J. Q. B. 47; Andrews *v.* Motley, 12 C. B. (N. S.) 514, 32 L. J. C. P. 128.

"It is not necessary that they should be found in the best and most proper place of deposit. There can only be one such place, but there may be many that are reasonable and probable, though differing in degree." Former Heirs *v.* Eslava, 11 Ala. 1028.

38. Former Heirs *v.* Eslava, 11 Ala. 1028; Rees *v.* Walters, 3 M. & W. 527, 7 L. J. Ex. 138; Lunn *v.* Scarborough, 6 Tex. Civ. App. 15, 24 S. W. 846.

"It is when documents are found in other than their proper place of deposit that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found, for it is obvious, that whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable, though differing in degree, some being more so, some less; and in those cases, the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine." Per Tindal, C. J., in Bishop of Meath *v.* Marquis of Winchester, 4 Cl. & F. 445, 3 Bing. (N. C.) 304.

39. Cook *v.* Christie, 12 U. C. C. P. (Can.) 517; Rees *v.* Walters, 3 M. & W. 527, 7 L. J. Ex. 138. See also Jacobs *v.* Phillips, 8 Q. B. 158, 15 L. J. Q. B. 47.

40. Clark *v.* Owens, 18 N. Y. 434; Havens *v.* Seashore L. Co., 47 N. J. Eq. 365, 20 Atl. 497; Wynn *v.* Syrwhett, 4 Barn. & A. 376; Brishro *v.* Cormican, 3 App. Cas. (Eng.) 641; Clarkson *v.* Woodhouse, 3 Doug. (Eng.) 189; Doe *v.* Passingham, 2 Car. & P. 440, 30 Rev. Rep. 327.

Purporting to Show Acts of Ownership. — Malcolinson *v.* O'Dea, 10 H. L. C. 593.

"**Old Leases Have Always Been Considered to Be Admissible** as being evidence of acts of ownership. I understand this to rest on the principle, that when at a distant period, as to which there is no more direct evidence available, you find a

the mere fact of proper custody makes an ancient document competent.

Corroboration was sometimes required,[42] but want of it went rather to the weight than to the admissibility of the paper.[43]

(2.) United States. — This is the rule in some of the United States,[44] but in others farther corroboration is required, at least

person claiming to be the owner of property, and willing to make himself responsible as lessor for the title to it, and another person willing to agree to give rent for the property and to enter into a solemn engagement as a tenant of it, admitting his landlord's title, these circumstances are of themselves admissible as evidence of title." Cairns, L. C. in Brishro v. Cormican, 3 App. Cas. 641. But see Lancum v. Lovell, 6 Car. & P. 437.

41. Doe v. Clement, 9 U. C. Q. B. (Can.) 650; Chamberlain v. Torrance, 14 Grant's Ch. (Can.) 181; Van Every v. Drake, 9 U. C. C. P. (Can.) 478.

42. In Brett v. Beales, 1 Kos. & Mal. 416, toll tables were admitted on proof that they had been acted on, but a deed never acted on was admitted, but only to prove reputation. See also Rogers v. Allen, 1 Camp. 309, 10 Rev. Rep. 689; Lancum v. Lovell, 6. Car. & P. 437; Rancliffe v. Perkyns, 6 Dow. 149.

43. Cunningham v. Davis, 175 Mass. 213, 56 N. E. 2.

44. Hogan v. Carruth, 19 Fla. 84; Follendore v. Follendore, 110 Ga. 359, 35 S. E. 676. But see Civil Code, Georgia, § 3610; and, Williamson v. Mosley, 110 Ga. 53, 35 S. E. 301; Cunningham v. Davis, 175 Mass. 213, 56 N. E. 2; Gardner v. Grannis, 57 Ga. 539; Harlan v. Howard, 79 Ky. 373; McReynolds v. Longenberger, 57 Pa. St. 13; Settle v. Alison, 8 Ga. 201, 52 Am. Dec. 383; McCleskey v. Leadbetter, 1 Ga. 551; Former Heirs v. Eslava, 11 Ala. 1028; Hewlett v. Cock, 7 Wend. (N. Y.) 371; Pendleton v. Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002 (an order of court for sale of land); Doe v. Roe, 31 Ga. 593.

In Missouri the court said, *obiter*, that age and proper custody suffice to let in a deed. Long v. McDow, 87 Mo. 197. But the deed there in question was a patent from the United States.

In Vermont in Townsend v. Downer, 32 Vt. 183, age and proper custody were said, *obiter*, to be sufficient.

In Ohio, Bell v. Brewster, 44 Ohio St. 690, 10 N. E. 679. In that case the paper was merely a letter and was offered, not as a muniment of title, but to identify a person by comparison of hands.

In Alabama. — Woods v. Montevallo etc. Co., 84 Ala. 560, 3 So. 475.

In New Hampshire, as to records of a proprietary, Little v. Downing, 37 N. H. 355.

In Texas. — "It has all the essentials and qualifications to make it an ancient instrument. It comes from the proper custody, is free from suspicion, and is over 30 years of age, and was therefore admissible, at common law, as an ancient instrument. Ammons v. Dwyer, 78 Tex. 650, 15 S. W. 1049; Crain v. Huntington, 81 Tex. 614, 17 S. W. 243.

"In the case of Stroud v. Springfield, 28 Tex. 664, it was held that, in addition to the other essentials above enumerated, there must have been some act of ownership, corroborative of the genuineness of the instrument, before it could be considered an ancient instrument. The case of Holmes v. Coryell, 58 Tex. 688, is perhaps a little more liberal in its views on this question, and yet there is drawn from the opinion the thought that all proof is not dispensed with; and the case of Beaumont Pasture Co. v. Preston, 65 Tex. 448, rather follows in its wake. But in the case of Parker v. Chancellor, 73 Tex. 478, 11 S. W. 503; Ammons v. Dwyer, 78 Tex. 639, 15 S. W. 1049, and Crain v. Huntington, 81 Tex. 614, 17 S. W. 243, the broad and liberal doctrine is laid down that where a deed is 30 years

if the paper offered is a muniment of title.[45]

B. Possession. — a. *With Custody Sufficient.* — If the instrument is a muniment of title found in proper custody, possession conformable to it is strong evidence of its genuineness and sufficient to permit its introduction in evidence.[46] The rule applies as well to

old, and is free from suspicion, and comes from the proper custody, it would be admissible in evidence as an ancient instrument." Holt *v.* Maverick, 86 Tex. 457, 23 S. W. 751.

See also Chamberlin *v.* Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1017; Jonett *v.* Gunn, 13 Tex. Civ. App. 84, 35 S. W. 194; Kennard *v.* Withrow (Tex. Civ. App.), 28 S. W. 226; Mackay *v.* Armstrong, 84 Tex. 159, 19 S. W. 463; Kellogg *v.* McCabe, 14 Tex. Civ. App. 598, 38 S. W. 542; Walker *v.* Peterson (Tex. Civ. App.), 33 S. W. 269, 42 S. W. 1045.

Even in Case of a Lost Deed the fact of its existence and its contents being established. Smith *v.* Cavitt, 20 Tex. Civ. App. ..., 50 S. W. 167.

An Order of Court for sale of land, found in the custody of the clerk of court, though not in the minutes upon regular records will be presumed genuine. Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002.

45. Clark *v.* Owens, 18 N. Y. 434; Havens *v.* Seashore L. Co., 47 N. J. Eq. 365, 20 Atl. 497; Osborne *v.* Tunis, 25 N. J. Law 633; Frost *v.* Frost, 21 S. C. 501; Cox *v.* Bowman, 2 Yerg. (Tenn.) 108; Applegate *v.* Lexington etc. M. Co., 117 U. S. 255, 6 Sup. Ct. 742; McArthur *v.* Morrison (Ga.), 34 S. E. 205; Williamson *v.* Moseley, 110 Ga. 53, 35 S. E. 301; Burchfield *v.* McCauley, 3 Watts (Pa.) 9; Fogal *v.* Pirro, 10 Bosw. 100, 23 N. Y. Sup. Ct. 100.

Reasons for Requiring Corroboration. — The fact of proper custody can never prove much in favor of the deed, for if it were a forgery we might expect to find it in the hands or control of those who intended to use it.

In the absence of all the usual proof of execution nothing can tend to corroborate the deed but acts done under it or the recognition of its validity by those who have an interest in the other direction. When possession has accompanied the deed, or other unequivocal acts have been done under it, then the longer it has existed the stronger is the presumption that it is genuine. But if the deed has never been put in use and especially if the right which it professes to give has been denied by an adverse possession, then the longer the deed has existed the stronger is the presumption that it is not a genuine instrument. Wilson *v.* Bitts, 4 Denio (N. Y.) 201.

46. *Canada.* — Orser *v.* Vernon, 14 U. C. C. P. 573; Monk *v.* Farlinger, 17 U. C. C. P. 41.

United States. — Walton *v.* Coulson, 1 McLean 120, 29 Fed. Cas. No. 17,132; Meegan *v.* Boyle, 19 How. 130; Stoddard *v.* Chambers, 2 How. 284.

Alabama. — White *v.* Hutchings, 40 Ala. 253.

Georgia. — Bell *v.* McCawley, 29 Ga. 355.

Kentucky. — Bennett *v.* Runyon, 4 Dana 422; Winston *v.* Gwathmey's Heirs, 8 B. Mon. 19; Thurston *v.* Masterson, 9 Dana 228; Cook *v.* Totton, 6 Dana 108.

Maine. — Crane *v.* Marshall, 16 Me. 27.

Maryland. — Carroll *v.* Norwood, 1 Har. & J. 167.

Massachusetts. — Pettingell *v.* Boynton (Mass.), 29 N. E. 655; Stockbridge *v.* West Stockbridge, 14 Mass. 257.

Mississippi. — Fairly *v.* Fairly, 38 Miss. 280.

New Hampshire. — Waldron *v.* Tuttle, 4 N. H. 371.

New York. — Hewlett *v.* Cock, 7 Wend. 371; Wilson *v.* Betts, 4 Denio 201; Clinton *v.* Phelps, 9 Johns. 169; Jackson *v.* Christman, 4 Wend. 277; Clark *v.* Owens, 18 N. Y. 434.

North Carolina. — Davis *v.* Higgins, 91 N. C. 382.

South Carolina. — Eubanks *v.* Har-

wills.[47]

b. *Whether Indispensable.* — (1.) **Rulings That it Is.** — (A.) PREVAILING RULE FORMERLY. — Indeed, it was formerly asserted that such possession must be shown, in order to warrant the introduction of the instrument without further proof.[48]

(B.) LENGTH OF POSSESSION. — And some cases hold that such possession must be shown to have continued thirty years.[49] But this rule is not generally followed.[50]

ris, 1 Spear 183; Swygart v. Taylor, 1 Rich. Law 54; Wagner v. Aiton, 1 Rich. 100; Robinson v. Craig, 1 Hill Law 251; Duncan v. Beard, 2 Nott & McC. 400; Edmonston v. Hughes, 1 Cheves 81; Thompson v. Bullock, 1 Bay 364; Polson v. Ingram, 22 S. C. 541.

Texas. — Gainer v. Cotton, 49 Tex. 101; Schunior v. Russell, 83 Tex. 83, 18 S. W. 484; Von Rosenberg v. Haynes, 85 Tex. 357, 20 S. W. 143.

Vermont. — Townsend v. Downer, 32 Vt. 183; Booge v. Parsons, 2 Vt. 450; Bank v. Rutland, 33 Vt. 414.

Virginia. — Shanks v. Lancaster, 5 Gratt. 110, 50 Am. Dec. 108.

No Conflict on This Point. — "The cases are entirely harmonious to this extent—that where possession of the land has accompanied the deed, that fact furnishes sufficient evidence of its authenticity to justify its admission." Havens v. Seashore L. Co., 47 N. J. Eq. 365, 20 Atl. 497. See also Roe v. Doe, Dud. (Ga.) 168.

47. Jackson v. Thompson, 6 Cow. (N. Y.) 178; Fetherly v. Waggoner, 11 Wend. (N. Y.) 599; Jackson v. Luquere, 5 Cow. (N. Y.) 221.

Although Probate Defective. Jordan v. Cameron, 12 Ga. 267.

Although Not Probated. — Bradstreet v. Clarke, 12 Wend. (N. Y.) 602.

48. Clarke's Lessee v. Courtney, 5 Pet. 319; Arnold v. Gorr, 1 Rawl. (Pa.) 223; Shaller v. Brand, 6 Binn. (Pa.) 435; Starin v. Bowne, 6 Barb. (N. Y.) 109; Homer v. Cilley, 14 N. H. 85; Zeigler v. Houtz, 1 Watts & S. (Pa.) 378; McGennis v. Allison, 10 Serg. & R. (Pa.) 197; Ridgeley v. Johnson, 9 Barb. (N. Y.) 527; Sims v. De Graffenreid, 4 McCord (S. C.) 253; Dishazer v. Maitland, 12 Leigh (Va.) 524 (which case is overruled by Carruthers v. Eldridge, 12 Gratt. [Va.] 670); Gittings v. Hall, 1 Har. & J. (Md.) 14, 2 Am. Dec. 502.

Opinions of Kent and Walworth. Such was the opinion expressed by Ch. Kent (dissenting) in Jackson v. Laroway, 3 Johns. Cas. (N. Y.) 283, citing Gilbert, p. 89; Peake pp. 72, 73; Fleta *lib.*, 6 ch. 34; 1 Co. Inst., 6 b.; Isaac v. Clarke, 1 Roll. 132; James v. Trollop, Skinner 239 and 2 Mod. 323; Forbes v. Wale, 1 Blackf. 532. See also Kent's opinion in Jackson v. Blanshan, 3 Johns. (N. Y.) 292, 3 Am. Dec. 485. Chancellor Kent's view seems again to be suggested in Jackson v. Brooks, 8 Wend. (N. Y.) 426, but it is not a direct ruling on the question. And as late as 1844 Chancellor Walworth declared in Northrop v. Wright, 7 Hill 476, that a will, more than 30 years old, could not be received in evidence without proof, because possession had not followed it.

49. Jackson v. Thompson, 6 Cow. (N. Y.) 178; Fetherly v. Waggoner, 11 Wend. (N. Y.) 599; Jackson v. Luquere, 5 Cow. (N. Y.) 221; Starin v. Bowen, 6 Barb. (N. Y.) 109; Walker v. Walker, 67 Pa. St. 185; Robinson v. Craig, 1 Hill Law (S. C.) 389. See also Nixon v. Porter, 34 Miss. 697, 69 Am. Dec. 408; Healy v. Moul, 5 Serg. & R. (Pa.) 181; McGinnis v. Allison, 10 Serg. & R. (Pa.) 197.

50. Jackson v. Luquere, 5 Cow. (N. Y.) 221.

Twenty Years' Possession Enough. Gainer v. Cotton, 49 Tex. 101.

Five Years' Possession Sufficient. Wagner v. Aiton, 1 Rich. (S. C.) 100.

Ten Years' Possession Without Objection. — Hughes v. Wilkinson, 37 Miss. 482.

Several Years. — King v. Sears, 91 Ga. 577, 18 S. E. 830.

Possession With Other Facts.

(C.) How Proved. — That the possession was held under the instrument offered may be established by circumstantial evidence,[51] or by declarations of those who had been in possession,[52] and it may be of no importance that the person in possession of the land is not in possession of the document.[53]

It is enough if one being in possession claims the right thereto under the document though he did not enter under it.[54]

(D.) Extent of Possession. — The possession need not be of the entire tract conveyed or devised;[55] nor need it be taken or held by all the devisees or grantees.[56]

(E.) Exceptions. — Where it appears that the land was wholly unoccupied for a long time after the date of the document, proof of possession is of necessity dispensed with.[57] Failure to take pos-

Stoddard *v.* Chambers, 2 How. 284, where it is said that "possession was held by Stoddard *for a time.*"

Weight of Authority. — In Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. 1014. Magruder J. said: "Some of the authorities differ as to whether it is necessary to show that possession was taken under the deed. It seems to be settled, however, by the weight of authority, that such possession if necessary to be shown, need not be for the full period of 30 years, if there are other circumstances tending to show the genuineness of the instrument."

51. Cahill *v.* Palmer, 45 N. Y. 478.

52. Jackson *v.* Van Dusen, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330.

53. Deed Not in Possession of One Holding Under It. — Possession may be under and conformable to a deed although the deed is not in possession of the one in possession of the land. "If property passes through a dozen hands in the course of 40 years, each keeping in his own possession the deed given to him, the possession of all is equally under the first deed, which may be given in evidence as an ancient deed, although never seen by any but the first grantee to whom it was given." Williams *v.* Conger, 125 U. S. 397, 8 Sup. Ct. 933.

54. Walton *v.* Coulson, 1 McLean 120, 29 Fed. Cas. No. 17,132.

55. It is not necessary in order to enable an instrument to be read as an ancient deed, to prove a corresponding possession of every portion of the premises which it purports to convey. A possession of a part under the deed affords evidence of its authenticity of as high a character as though that possession extended to the whole. Jackson *v.* Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; Jackson *v.* Luquere, 5 Cow. (N. Y.) 221; Townsend *v.* Downer, 32 Vt. 183.

56. Under the rule of 30 years possession is not meant that where there are ten devisees of separate parcels to ten persons, a possession in each devisee of more than 30 years must be made out before the will can be read as ancient. Jackson *v.* Luquere, 5 Cow. (N. Y.) 221.

57. Paying Taxes on Wild Land Sufficient. — Williams *v.* Hillegas, 5 Pa. St. 492.

Land Unoccupied and Considered Worthless. — In Havens *v.* Sea Shore L. Co., 47 N. J. Eq. 365, 20 Atl. 497, the land in question had until a few years before the trial remained unoccupied and had been deemed worthless. The deed offered was shown to be more than 100 years old, had been passed on to successive grantees of the land, had been referred to in subsequent deeds and in one recorded deed and had the appearance of genuineness. The deed was admitted on this showing.

Rule Requiring Possession Not Applicable. — When it is admitted by both parties that the lot was a wild lot and was never occupied by any one until shortly before the suit was brought. Pridgen *v.* Green, 80 Ga. 737, 7 S. E. 97.

session may be explained so as to avoid the rule requiring it.[58] Instruments not usually followed by possession are admitted without proof of it.[59] Where both parties claim under the document possession need not be shown.[60] The rule requiring possession to be proved was relaxed as to documents of great antiquity.[61]

(2.) Rulings That it Is Not. —But the highest authority now holds that without possession other corroborative evidence may suffice,[62]

58. Explaining Want of Possession. — In Jackson *v.* Laroway, 3 Johns. Cas. (N. Y.) 283, it appeared that for years after the testator's death the lands devised were wild and unoccupied and that for many years after they had been occupied by defendant's predecessors the plaintiff's ancestor, claiming under the will, had no notice of such occupancy. It was held that these facts so explained want of possession that the will should be admitted if other circumstances appeared sufficient to raise a presumption in its favor.

59. A Mortgage. —Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2.

60. Giddings *v.* Smith, 15 Vt. 344.

61. Where the transaction is so ancient that proof of contemporaneous acting, such as possession or the like, is not probably to be obtained, its production is not required. Still it is necessary to prove some acts of modern enjoyment with reference to similar documents or that modern possession or use should be shown in corroboration of the ancient documents. Former Heirs *v.* Eslava, 11 Ala. 1028.

62. *United States.* — Applegate *v.* Lexington etc. Min. Co., 117 U. S. 255, 6 Sup. Ct. 742; Templeton *v.* Luckett, 75 Fed. 254.

Alabama. — Former Heirs *v.* Eslava, 11 Ala. 1028.

Massachusetts. — Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2.

Missouri. — Long *v.* McDow, 87 Mo. 197.

New York. — Jackson *v.* Laroway, 3 Johns. Cas. 283; Hewlett *v.* Cock, 7 Wend. 371.

Pennsylvania. — Williams *v.* Hilligas, 5 Pa. St. 492; Walker *v.* Walker, 67 Pa. St. 185.

South Carolina. — Swygait *v.* Taylor, 1 Rich. Law 54.

Texas. — Stroud *v.* Springfield, 28 Tex. 649; Johnson *v.* Timmons, 50 Tex. 521; Holmes *v.* Coryell, 58 Tex. 680; Williams *v.* Hardie (Tex. Civ. App.), 21 S. W. 267; Lunn *v.* Scarborough, 6 Tex. Civ. App. 15, 24 S. W. 846; Ammons *v.* Dwyer, 78 Tex. 639, 15 S. W. 1049.

Vermont. — Williams *v.* Bass, 22 Vt. 352.

Other Circumstances May Be Resorted to, to raise the necessary presumption. Clark *v.* Owens, 18 N. Y. 434; in that case it was held sufficient to let in an ancient lease that the lessee had paid rent under it, had referred to it in conversation and had been shown the lease at least twice.

Possession Wanting; Document to be Reasonably Accounted For. Jackson *v.* Laroway, 3 Johns. Cas. (N. Y.) 283.

On Proof of Execution Except Delivery. — A deed more than 30 years old, unaccompanied by possession under it, was admitted where all the elements of its execution were proved, except delivery. Thursby *v.* Myers, 57 Ga. 155.

Rule in Pennsylvania. — In Walker *v.* Walker, 67 Pa. St. 185, it is said that it has never been expressly decided in Pennsylvania that nothing but proof of actual possession for 30 years under the deed will suffice to raise a presumption of its authenticity; but where possession is the only circumstance relied on, nothing less than proof of possession for 30 years will suffice.

In Virginia. — After an elaborate review of the authorities, the court overrules Dishazer *v.* Maitland, 12 Leigh (Va.) 524, and holds that proof of possession is only one of the means of raising a presumption of genuineness, and that there are other means which should not be excluded. Carruthers *v.* Eldridge, 12 Gratt. (Va.) 670.

but that in absence of possession there must be equivalent explanatory proof.[63]

C. Other Corroborative Facts. — a. *Attestation and Record.* Proof of attestation and record is sufficient corroboration.[64]

b. *Payment of Taxes.* — So is payment of taxes.[65]

c. *Acts of Ownership.* — So, too, are acts of ownership consistent with the document.[66]

63. Former Heirs *v.* Eslava, 11 Ala. 1028; Carter *v.* Chaudron, 21 Ala. 72; White *v.* Farris, 124 Ala. 461, 27 So. 259. See also Allen *v.* McTavish, 28 Grant's Ch. (Can.) 539.

Possession Not the Only Corroboration. — Frost *v.* Frost, 21 S. C. 501; Harlan *v.* Howard, 79 Ky. 373; Wilson *v.* Betts, 4 Denio (N. Y.) 201.

Character of Corroboration Depends on Instrument. — What circumstances of corroboration shall be necessary must depend in each case upon the purpose and character of the instrument. They must be auxiliary to its apparent antiquity and sufficient to raise a reasonable presumption of its genuineness. Stroud *v.* Springfield, 28 Tex. 649. See also Williams *v.* Conger, 49 Tex. 582; Lau *v.* Mumma, 43 Pa. St. 267.

64. Even if Not in Place Required by Law. — Whitman *v.* Heneberry, 73 Ill. 109.

Improperly Certified and Recorded. Hedger *v.* Ward, 15 B. Mon. (Ky.) 106.

Recording With Other Facts. Stoddard *v.* Chambers, 2 How. 284; King *v.* Sears, 91 Ga. 577, 18 S. E. 830.

Acknowledgment, With Other Facts. — "The court did not err in admitting in evidence as an ancient instrument a conveyance dated June 12, 1855, and acknowledged Mar. 31, 1859, notwithstanding there was no proof of possession under or referable to said deed. Proof that the signature of the acknowledgment was in the handwriting of the deceased officer who purports to have taken it in connection with other corroborative circumstances, is sufficient to raise a reasonable presumption of genuineness." Williams *v.* Hardie (Tex. Civ. App.), 21 S. W. 267.

Attestation Evidence of Delivery. Huff *v.* Crawford (Tex. Civ. App.), 32 S. W. 592.

In Missouri by Statute, the mere fact that an instrument was recorded more than 30 years before it is offered in evidence suffices to let it in. Crispen *v.* Hannavan, 12 Mo. 548. By a later statute the period was reduced to ten years but possession or claim of title under it for that time must also be shown. Hoge *v.* Huff, 94 Mo. 489, 7 S. W. 443.

(Doubtless the statutes in other states, admitting without proof instruments that have been properly recorded, apply to ancient documents as well as to others.)

65. Schnner *v.* Russell, 83 Tex. 83, 18 S. W. 484; Von Rosenburg *v.* Haynes, 85 Tex. 357, 20 S. W. 143; White *v.* Farris, 124 Ala. 461, 27 So. 259.

For Thirty Years. — Cox *v.* Cock, 59 Tex. 521; Williams *v.* Hillegas, 5 Pa. St. 492.

Possession of Deed and Paying Taxes. — In Ryder *v.* Fash, 50 Mo. 476, it was held that possession of the deed itself and paying taxes on the land was enough to let in the deed as ancient without further proof. It does not appear for how long a period taxes were paid, nor whether the land was actually occupied or by whom. But in Shaw *v.* Pershing, 57 Mo. 416, it appears that the land there involved was never actually occupied for more than 30 years after the execution of the deed, during all which time the grantee had kept the deed and had paid taxes on the land.

66. Chamberlin *v.* Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1017.

After Forty Years Acquiescence by the Assignor, proof of execution of a land warrant cannot be required by a stranger to the transaction. Botts *v.* Chiles, 21 B. Mon. (Ky.) 36.

d. *Assertion of Rights.* — Courts have required it to be shown that the document has been in some manner acted on;[67] that it appear that some claim has been asserted under it.[68]

D. Legal Execution. — a. *Must Show Compliance With Law.* The instrument must contain every essential requirement of the law under which it was made.[69] This rule applies where certain formalities were required in case of deeds executed by married women.[70]

b. *Presumptions in Favor Of.* — But in other cases liberal presumptions have been indulged in favor of due execution of ancient instruments.[71]

c. *Informalities Do Not Vitiate.* — But the absence of formalities usual but not going to the validity of the instrument may be explained.[72]

67. Wilson v. Simpson, 80 Tex. 279, 16 S. W. 40; Lau v. Mumma, 43 Pa. St. 267.

68. Stoddard v. Chambers, 2 How. 284; Fulkerson v. Holmes, 117 U. S. 389, 6 Sup. Ct. 780; Walton v. Coulson, 1 McLean 120, 29 Fed. Cas. No. 17,132; Barr v. Gratz, 4 Wheat. 213.

Where a Will Had Not Been Treated as Valid, as no claim has been set up under it, and all the heirs have acted in regard to the estate of their father as though he had died intestate, the will cannot be admitted without such proof as would be required in the case of writings not ancient. Meegan v. Boyle, 19 How. 130.

69. Meegan v. Boyle, 19 How. 130; in that case the law required that a will be proved by the attesting witness within one month after decease of the testator and be recorded, and it appeared that no such steps had been taken.

70. Meegan v. Boyle, 19 How. 130; Parker v. Chancellor, 73 Tex. 475, 11 S. W. 503; Stooksberry v. Swan (Tex. Civ. App.), 21 S. W. 694; Reaume v. Chambers, 22 Mo. 36.

71. King v. Whitchurch, 7 Barn. & C. 573; King v. Catesby, 2 Barn. & C. 814.

In Hill v. Lord, 48 Me. 83, it is said: "Various defects are suggested in some of the earlier conveyances which would be serious if they were of recent date. But much is to be presumed in favor of ancient deeds if accompanied by possession and the same rule may be applied to wills and to levies of execution to some extent."

Use of Unstamped Paper. — It will be presumed that the officer executing an instrument was authorized to use unstamped paper. Von Rosenburg v. Haynes, 85 Tex. 357, 20 S. W. 143.

After thirty years proceedings under a certificate of pauper settlement it need not be shown to have been made in accordance with statute. King v. Inhabitants of Farrington, 2 T. R. 466.

72. Where a deed purported to have been made in Texas in 1836 and was not acknowledged, certified to, witnessed nor written on sealed paper, Mr. Justice Bradley said: "The circumstances of the case and of the time are sufficient (if any reason is necessary) to account for the absence of these formalities." Williams v. Conger, 125 U. S. 397, 8 Sup. Ct. 933. See also Tex. & M. R. Co. v. Locke, 74 Tex. 370, 12 S. W. 80; Hill v. Lord, 48 Me. 83.

The Unsettled State of the Country, the transfers of the country from one sovereignty to another, the rude and defective organization of the government are facts which no courts can disregard in acting upon transfers of property between individuals. Technical and legal forms cannot be required among people ignorant of the forms of titles. Stoddard v. Chambers, 2 How. 284. See also Jackson v. Schoonmaker, 2 Johns. (N. Y.) 230.

E. Free From Grounds of Suspicion. — a. *Generally.* — It is further required that the paper be free from any just grounds of suspicion[73] apparent upon its face or shown by some fact directly connected with it.[74]

b. *Unusual Form.* — But the mere fact that the form of the document is unusual is not ground of suspicion.[75]

c. *Erasures.* — Nor necessarily is the erasure of an indorsement.[76]

d. *Mutilation.* — Nor is mutilation necessarily a ground of suspicion.[77]

e. *Alteration.* — **(1.) Generally.** — Nor is an alteration always ground of suspicion.[78]

(2.) Material, to Be Explained. — But material alterations appearing on the document must be explained.[79] It seems to be a suffi-

73. Doe *v.* Roe, 31 Ga. 593; Orser *v.* Vernon, 14 U. C. C. P. (Can.) 573; Monk *v.* Farlinger, 17 U. C. C. P. (Can.) 41; Fogal *v.* Pirro, 10 Bosw. 100, 23 N. Y. Sup. Ct. 100; Walton *v.* Coulson, 1 McLean 120, 29 Fed. Cas. No. 17,132; Rogers *v.* Shortis, 10 Grant's Ch. (Can.) 243. But see Davies *v.* Lowndes, 1 Bing. 161, where a will, purporting to be of the 17th century, showed several letters and words in modern characters, yet the will was admitted apparently on proof of custody alone.

An Impeaching Indorsement Not Objected to. — The fact that the recorder had made a note on the paper recorded that the same appeared not to be an original but might be a copy that this memorandum was followed by the words: "It is a copy by Dr. K," taken with the fact that no objection appeared to have been made to this impeachment of the paper when returned to the grantee, made the paper *prima facie* not genuine. Lau *v.* Mumma, 43 Pa. St. 267.

Error in Dating Does Not Vitiate. Jackson *v.* Schoonmaker, 2 Johns. (N. Y.) 230.

74. **"Suspicions Arising From Extraneous Testimony** are for the jury in passing upon genuineness after the paper is admitted." Williams *v.* Conger, 49 Tex. 582.

75. Hill *v.* Lord, 48 Me. 83. Although the form of an ancient instrument otherwise admissible as an ancient document may be unusual and the absence of certain usual formal requisites might excite inquiry bearing on the genuineness of the papers and the time and circumstances of their execution, such inquiries do not go to their admissibility in evidence unless suspicion other than such as may arise from their form be cast upon them. Tex. M. R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80.

76. An erasure of an indorsement on an ancient instrument might under certain circumstances be considered confirmatory of its genuineness. Holt *v.* Maverick, 5 Tex. Civ. App. 650, 23 S. W. 751.

77. The upper part of an ancient deed which had been cut in half, and mutilated, was offered in evidence. *Held,* that the fact of its mutilation affected its weight, but not its admissibility. Per Tindal, C. J. in Lord Trimmlestown *v.* Kemmis, 9 Cl. & F. 749. To same effect Andrew *v.* Motley, 12 C. B. (N. S.) 514, 32 L. J. C. P. 128.

78. Walton *v.* Coulson, 1 McLean 120, 29 Fed. Cas. No. 17,132; in that case the alteration was not material and not in the interest of the party claiming under the instrument.

But This Rule Was Questioned in Ridgeley *v.* Johnson, 9 Barb. (N. Y.) 527.

79. Walton *v.* Coulson, 1 McLean 120, 29 Fed. Cas. No. 17,132.

"Same Explanation of Interlineations and Erasure if there be any of a serious character, should always be required by the court when specially demanded and insisted on." Houston *v.* Blythe, 60 Tex. 506.

See article, "Alteration of Instruments."

cient explanation to show that the alteration itself is ancient.[80]

f. *Defective Acknowledgment.* — A document otherwise admissible as ancient is not rendered incompetent by a defective acknowledgment.[81]

F. Direct Proof of Execution. — a. *When Not Required.* **(1.) Subscribing Witness Need Not Be Called.** — If the conditions for admission without proof of execution are met, that proof need not be made even though the means for making it are at hand. A subscribing witness need not be called although within the court's jurisdiction.[82]

(2.) Nor Accounted For. — Absence of the subscribing witnesses need not be accounted for.[83] The witnesses are presumed dead[84] or

80. In McCelvey *v.* Cryer, 8 Tex. Civ. App. 437, 28 S. W. 691, the court said: "Being over fifty years of age, having been recorded for over forty years, and having come from the proper source, the mere fact of the erasure of the name 'Whiting' and the insertion of the name 'Jordan' would not throw such suspicion upon the instrument as would necessitate explanation as a prerequisite to its admission as an ancient instrument."

Deed the Same Twenty-Four Years Before. — A deed showed on its face that the consideration was written in different and fresher ink from the body of the deed, and the periods separating the initials of the signature were in different ink from the body of the signature. This was sufficiently met by the proof (if indeed such proof was required) that in these respects the deed was the same twenty-four years before. Lunn *v.* Scarborough, 6 Tex. Civ. App. 15, 24 S. W. 846.

81. Perry *v.* Clift (Tenn. Ch. App.), 54 S. W. 123; Frost *v.* Wolf, 77 Tex. 455, 14 S. W. 440.

Acknowledgment Not Inquired Into.—Smith *v.* Cavitt, 20 Tex. Civ. App. 558, 50 S. W. 167.

82. Jackson *v.* Christman, 4 Wend. (N. Y.) 277; Shaw *v.* Pershing, 57 Mo. 416; Lunn *v.* Scarborough, 6 Tex. Civ. App. 15, 24 S. W. 846; Allison *v.* Little, 85 Ala. 512, 5 So. 221; White *v.* Farris, 124 Ala. 461, 27 So. 259; Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 21; Gardner *v.* Grannis, 57 Ga. 539; Nixan *v.* Porter, 34 Miss. 697, 69 Am. Dec. 408; Doe *v.* Burdett, 4 Ad. & E. 19.

The Fact of Recordation does not change the rule as to admission of ancient document without proof of execution. McArthur *v.* Morrison (Ga.), 34 S. E. 205.

A Subscribing Witness, Though in the Court Room, should not be called. Kenyon, J. in Marsh *v.* Collnett, 2 Esp. 665, 5 Rev. Rep. 763.

Contra. — Staring *v.* Bowen, 6 Barb. (N. Y.) 109. See also Smith *v.* Rankin, 20 Ill. 14; Thompson *v.* Brannon, 14 S. C. 542.

Failure to Offer Proof of Handwriting raises a presumption against the paper. Stroud *v.* Springfield, 28 Tex. 649.

83. Vattier *v.* Hinde, 7 Pet. 252; Barr *v.* Gratz, 4 Wheat. 213; Shaw *v.* Pershing, 57 Mo. 416; Hinde *v.* Vattier, 1 McLean 110, 12 Fed. Cas. No. 6512; McGennis *v.* Allison, 10 Serg. & R. (Pa.) 197.

Reason for the Rule. — It is a rule adopted for common convenience, and founded upon the great difficulty of proving the due execution of a deed after an interval of many years. And the rule applies not only to grants of land, but to all other deeds. Winn *v.* Patterson, 9 Pet. 663.

84. Lunn *v.* Scarborough, 6 Tex. Civ. App. 15, 24 S. W. 846; Harlan *v.* Howard, 79 Ky. 373; Allison *v.* Little, 85 Ala. 512, 5 So. 221; Harris *v.* Hoskins, 2 Tex. Civ. App. 486, 22 S. W. 251; Winn *v.* Patterson, 9 Pet. 663; McArthur *v.* Morrison (Ga.), 34 S. E. 205; White *v.* Farris, 124 Ala. 461, 27 So. 259. See also Willson *v.* Betts, 4 Denio (N. Y.) 201; Carter *v.* Chaudron,

out of the jurisdiction.[85]

b. *When Must Be Proved.* — **(1.) Deed a Fraudulent Act.** — But if the making of the instrument was a fraudulent act the execution must be proved.[86]

(2.) Where Custody, Etc., Not Proved. — Where the conditions for admission of ancient instruments without proof of execution are not met the execution must be proved.[87]

c. *Method of Proof.* — **(1.) Rules Relaxed.** — But of necessity the rules of proof are relaxed,[88] except, according to some authorities, in the case of wills.[89] Other authorities do not recognize this exception.[90] Such papers may be admitted although the attesting

21 Ala. 72; Hollis *v.* Dashiell, 52 Tex. 187. But *compare* Houston *v.* Blythe, 60 Tex. 506.

"This presumption as far as the rule of evidence is concerned is not affected by proof that there are witnesses living." McReynolds *v.* Longenberger, 57 Pa. 13; White *v.* Huchings, 40 Ala. 253, 88 Am. Dec. 766.

85. Nixan *v.* Porter, 34 Miss. 697, 69 Am. Dec. 408.

86. "Where a man conveys a reversion to one, and after conveys it to another, and the second purchaser proves his title, the first deed must be proved because in such case the presumption arising from the antiquity of the deed is destroyed by an opposite presumption; for no man shall be supposed guilty of so manifest a fraud." Chettle *v.* Pound, Bull. N. P. 255; Gilb. Ev. 90.

87. Gainer *v.* Cotton, 49 Tex. 101; Williams *v.* Conger, 49 Tex. 582; Urket *v.* Coryell, 5 Watts & S. (Pa.) 60.

For method of proving private writings generally *see* article, "Private Writings."

88. Walton *v.* Coulson, 1 McLean 120, 29 Fed. Cas. No. 17,132; Boehm *v.* Lugle, 1 Dall. 14; McGennis *v.* Allison, 10 Serg. & R. (Pa.) 107; Knight *v.* Ferguson, 2 Nott. & McC. (S. C.) 588.

Proving Signatures of Some of Subscribing Witnesses. — Peterborough *v.* Lancaster, 14 N. H. 382.

Without Proof of Delivery. — If all other elements essential to execution are proved the deed will be admitted. Thursby *v.* Meyers, 57 Ga. 155.

Necessity the Basis of the Rule. Courts have not relaxed the rules of evidence in relation to ancient deeds because time alone furnishes any presumption in their favor, but because the lapse of time renders it difficult and sometimes impossible to give the usual proof of execution. Willson *v.* Betts, 4 Denio (N. Y.) 201. See also Coulson *v.* Walton, 9 Pet. 62.

89. It was held in Jackson *v.* Luquere, 5 Cow. (N. Y.) 221, that where direct proof of an ancient will is necessary it must be fully made, by proving the handwriting of all the witnesses. "Proof of the handwriting of one witness raises no presumption that either of the others subscribed his name. Cases arising on other instruments, do not decide the case of a will. There it is enough if the party executed, but here he must execute in a particular manner or his will is utterly void." See also Northrop *v.* Wright, 7 Hill (N. Y.) 476.

90. Fetherly *v.* Waggoner, 11 Wend. (N. Y.) 599.

Lapse of time is an element favoring the genuineness of a will, which is perfectly attested and the signatures of two witnesses to which are proven, even in the absence of the signature of the testatrix. "It is the duty of the court to ascertain, from all the facts and circumstances, whether the instrument offered is established with reasonable certainty, and if it is, to receive the same." Rider *v.* Legg, 51 Barb. (N. Y.) 260.

Presumption in Favor of Probate of Will. — In McClaskey *v.* Barr, 47 Fed. 154, it is said that the ancient record of an ancient will is competent although the record does not

witnesses cannot fully recall the execution.[91]

(2.) Accounting for Witnesses. — The strictest possible search for the subscribing witnesses is not required.[92] The death of subscribing witnesses to very ancient papers will be presumed.[93]

(3.) Proof of Handwriting. — But their handwriting must, if possible, be proved in the same manner as in other cases.[94] But if that is impossible, proof by comparison with other writings is allowed.[95]

show on its face such proof made as entitles the will to probate. It will be presumed after twenty years, from the existence of the judicial record that the requisite proof was made.

91. Lawry *v.* Williams, 13 Me. 281, where a deed was proved by one witness who could not testify as to delivery, but the delivery was otherwise proved.

Inability to State Particulars. Although a witness testifying to execution of a will 36 years before, may not be able to call to remembrance all the facts minutely so as to be able to state them distinctly and positively, yet her testimony is not to be disregarded. Where such a subscribing witness swore to her belief that the testator signed the will, though she could not recollect the particular facts, if she is an intelligent and respectable witness, the jury should have found in favor of the execution of the will. Fetherly *v.* Waggoner, 11 Wend. (N. Y.) 599.

92. Only Reasonable Diligence in searching for witnesses to deed 50 years old. McGennis *v.* Allison, 10 Serg. & R. (Pa.) 197; Houston *v.* Blythe, 60 Tex. 506.

Accounting for One Witness. — In Jackson *v.* Burton, 11 Johns. (N. Y.) 64, a deed 44 years old was let in on proof of death of one of the subscribing witnesses and his handwriting without fully accounting for absence of the other witness; Ch. J. Kent holding that, considering the lapse of time, changes in population of New York City caused by the revolution, "the court ought not to be rigid in requiring at this day some further account of (the witness). The rules and practice of the courts leave this point with some latitude of discretion." See also Boehm *v.* Lugle, 1 Dall. (Pa.) 14.

93. To Papers More Than Thirty Years Old. — Willson *v.* Betts, 4 Denio (N. Y.) 201.

A Deed Thirty-five Years Old. Hollis *v.* Dashiell, 52 Tex. 187.

Contra.—But in Houston *v.* Blythe, 60 Tex. 506, the signature of the officer who executed the instrument was duly and formally attested by two assisting witnesses. The objection was specially taken that its execution should in some manner be proved by these two witnesses or their absence satisfactorily explained. It was held that after so great a lapse of time no very great deal of evidence should be required as to the death or non-production of such assisting witnesses; still when specially demanded the best evidence of that fact the nature of the case would admit of should be required. Some evidence of some kind, at least, pertinent to that matter should be produced when demanded. Their existence, age, occupation, their place of residence, when last known to be alive, some evidence as to their handwriting, or other like matters, it would seem under the facts disclosed in this case could be proved, to some extent at least, by some of their old neighbors or acquaintances. Houston *v.* Blythe, 60 Tex. 506.

94. By Persons Who Have Seen Them Write.—While after 30 years the subscribing witnesses are presumed dead, yet there is not after that length of time a presumption that the handwriting of such witnesses cannot be proved by persons who have seen them write. Willson *v.* Betts, 4 Denio (N. Y.) 201.

95. Jackson *v.* Brooks, 8 Wend. (N. Y.) 426; Smyth *v.* N. O. C. B. Co., 93 Fed. 899; Doe *v.* Sawer, R. & M. 141; Roe *v.* Rawlings, 7 East 279; Carroll *v.* Norwood, 1 Har. & J. (Md.) 167; Strother *v.* Lucas, 9 Pet. 763.

And papers may be introduced simply for the purpose of making such comparison, in jurisdictions where such evidence is not generally allowed.[96]

IV. EXECUTION BY AGENT.

1. Recitals Prove Authority. — A. General Rule. — If an ancient paper shown to be otherwise competent recites an authority under which it purports to be executed,[97] or recites facts equivalent to a power,[98] the recital is *prima facie* evidence of the authority,[99] provided the recital shows the principal's name,[1] and provided also acts of ownership have been done under the instrument.[2]

B. Exception. — a. *Authority Producible.* — But this rule does

Comparison With Papers Admittedly Genuine.—"Where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write, comparison with documents known to be in his handwriting may be admitted." Clark *v.* Wyatt, 15 Ind. 271, 77 Am. Dec. 90.

Paper One Hundred Years Old. In Lewis *v.* Lewis, 4 Watts & S. (Pa.) 378, a draft of survey purporting to have been made by A more than one hundred years before, was admitted on evidence that it was in same handwriting with other official papers drawn by A and on proof of his handwriting by some descendants of A who had seen much of his writing.

96. Smyth *v.* N. O. C. B. Co., 93 Fed. 899; Morewood *v.* Wood, 14 East 328. But no such relaxation of the common law rule was suggested in Williams *v.* Couger, 125 U. S. 397, 8 Sup. Ct. 933.

97. Johnson *v.* Tunmoris, 50 Tex. 521; Harrison *v.* McMurray, 71 Tex. 129, 8 S. W. 612; O'Donnell *v.* Johns, 76 Tex. 362, 13 S. W. 376; Baldwin *v.* Goldfrank, 9 Tex. Civ. App. 269, 26 S. W. 155; Davis *v.* Pearson, 6 Tex. Civ. App. 593, 26 S. W. 241; Rigsby *v.* Galceron, 15 Tex. Civ. App. 377, 39 S. W. 650; Clinton *v.* Phelps, 9 Johns. (N. Y.) 169; Doe *v.* Campbell, 10 Johns. (N. Y.) 475; Johnson *v.* Shaw, 41 Tex. 428; Robinson *v.* Craig, 1 Hill (S. C.) 251; Watrous *v.* McGrew, 16 Tex. 506; Storey *v.* Flanagan, 57 Tex. 649.

98. Carter *v.* Chaudron, 21 Ala. 72.

Analogously if an old survey purports to have been made by royal commission, the commission need not be produced. Smith *v.* Earl, L. R. 9 Eq. 241, 18 W. R. 271; Rowe *v.* Benton, 8 Barn. & C. 737; Vicar of Kellington *v.* Trinity College, 1 Wils. 170.

Contra. — Evans *v.* Taylor, 7 Ad. & E. 617, 3 N. & P. 174; Jones *v.* McMullen, 25 U. C. Q. B. (Can.) 542. And see Fell *v.* Young, 63 Ill. 106.

99. In Williams *v.* Hardie (Tex. Civ. App.), 21 S. W. 263, the court said: "We think it may now be considered as established in this state that the recital in such a deed of facts equivalent to a power of attorney will be given like effect."

1. In Baldwin *v.* Goldfrank, 9 Tex. Civ. App. 269, 26 S. W. 155, the deed contained a recital that it was executed under a power of attorney signed by the "heirs of Antonio Rivas" without giving their names. It was held that the power to execute the deed after the lapse of 30 years would be presumed; but not that the persons who signed the power were the heirs of a certain person. (See further on same point, same case in 88 Tex. 249, 31 S. W. 1064.)

2. In Baldwin *v.* Goldfrank, 88 Tex. 249, 31 S. W. 1064, where no claim appeared to have been asserted under the deed for over a quarter of a century the court said: "The presumption would seem to be, not that the power did in fact exist, but rather that it did not exist, or that for some other reason not disclosed no title passed by the deed."

not, perhaps, apply where it appears that the authority can be produced.[3]

b. *Authority Matter of Record.* — The rule does not apply where the authority is matter of public record,[4] unless it appear that the record is lost.[5]

C. Presumptions in Favor of Authority. — The existence of any facts necessary to make valid the exercise of such power will be presumed.[6] The presumption has been extended to papers less than thirty years old.[7]

2. Where There Are No Recitals. — A. Proof Required. — If there is no such recital and the paper appears to have been signed by one person on behalf of another, some evidence of authority must be produced.[8]

B. Presumptions Indulged. — But the contrary has been held as to deeds executed by attorneys in fact,[9] deeds of community

3. Tolman *v.* Emerson, 4 Pick. (Mass.) 160; Jones *v.* McMullen, 25 U. C. Q. B. (Can.) 542.

4. Green *v.* Blake, 10 Me. 16; Ruby *v.* Von Valkenberg, 72 Tex. 450, 10 S. W. 514.

Reason for Rule. — "If a power be recorded so that the evidence is perpetuated there can be no reason for admitting the deed without the power however ancient it may be, for there is certain proof to be obtained for which a mere presumption ought not to be substituted." Tolman *v.* Emerson, 4 Pick. (Mass.) 160. That was a case where the authority was by act of legislature.

Contra. — **Confirmation of Probate Sale Presumed.** — But in King *v.* Merritt, 67 Mich, 194, 34 N. W. 689, it is said that where a deed more than 40 years old purports to have been executed under authority of a probate court, confirmation of the sale, if essential, will be presumed.

5. Giddings *v.* Lea, 84 Tex. 605, 19 S. W. 682.

If Large Part of the Records Are Lost it may be presumed that the power referred to existed and was among the lost records. Willetts *v.* Mandlebaum, 28 Mich. 521.

Non-Production of Records To Be Explained. — No presumption will be indulged in of the existence of an execution and judgment recited in a sheriff's deed, where no attempt is made to account for their non-production by showing loss or destruction. French *v.* McGinnis, 69 Tex. 19, 9 S. W. 323.

6. **Corporation Grants Presumed Made at Duly Called Meeting.** Pitts *v.* Temple, 2 Mass. 538; Cedams *v.* Stanyan, 24 N. H. 405.

Proceedings Under Probate Presumed Authorized. — Winkley *v.* Kaine, 32 N. H. 268.

Power Given by Executor. — In Smith *v.* Swan, 2 Tex. Civ. App. 563, 22 S. W. 247, a deed was executed under power of attorney from an executor who had no right to delegate the discretionary power of sale conferred upon him by the will, but as he might delegate the mere ministerial act of executing the deed it was presumed that he had himself agreed upon and arranged the sale and settled all the necessary preliminaries.

7. **Thirty Years Lacking Five Weeks.** — Harrison *v.* McMurray, 71 Tex. 120, 8 S. W. 612.

Twenty-five Years Old. — Blackburn *v.* Norman (Tex. Civ. App.), 30 S. W. 718.

8. Urket *v.* Coryell, 5 Watts & S. (Pa.) 60; Kingston *v.* Lesley, 10 Serg. & R. (Pa.) 383; Com. *v.* Albinger, 1 Whart. (Pa.) 469.

9. The conveyance appeared to be more than 30 years old, and no objection was taken to its admissibility as an ancient instrument, except that the instrument in such cases is required to recite or purport, in the body of it, that it is made for and by authority of the owner. We think

property,[10] of partnership property,[11] and deeds executed by persons unable to write.[12]

C. Slight Proof Sufficient. — And where required at all slight evidence of authority will suffice.[13]

V. ORIGINALS LOST OR INACCESSIBLE.

1. Contents, How Proved. — A. As Recent Documents. — The contents of an ancient document lost or inaccessible may be proved as in case of other documents.[14]

B. By Ancient Accepted Copy. — In case of very ancient documents what purports to be and has long been held as a copy, may be accepted as such without further proof.[15]

this not indispensable, and that it is sufficient if such expression appear in the signature to the instrument, which is an essential part of a deed, and indispensable to give it any effect. That a deed signed, "R. W. B. Martin, by His Attorney, John S. Martin," is sufficient to convey R. W. B. Martin's title, if John S. Martin in fact held a power of attorney, although there be nothing in the body of the deed on the subject, is practically held in Hill *v.* Conrad, 91 Tex. 341, 43 S. W. 789. This being so, it must be held that an ancient instrument thus executed will authorize the authority to be presumed. Ferguson *v.* Ricketts (Tex. Civ. App.), 55 S. W. 975.

10. On a question whether community obligations existed sufficient to authorize Col. Bowie to sell the community property of himself and wife, held that after the lapse of more than 40 years such authority would be presumed, as in the case of a power of attorney. Veramendi *v.* Hutchins, 48 Tex. 531.

11. In Frost *v.* Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761, a deed was offered and admitted in evidence signed in a firm name and acknowledged by one partner for the firm. *Held*, that after the lapse of more than 30 years the authority of the partner to execute the deed for the firm would be presumed to have existed. The court saying: "The same presumptions arise from lapse of time as to power of a partner to bind the firm by a deed, which he assumes the right to make in its name, as arises in other cases in which one person has assumed to execute a deed in the name of another."

12. In Hogan *v.* Carruth, 19 Fla. 84, it was proved that some of the parties to an ancient deed were illiterate and that their names were in the handwriting of a person not a party, who was present at the time of the execution of the paper, and it was presumed that such signing was authorized by the parties and in their presence.

13. Urket *v.* Coryell, 5 Watts & S. (Pa.) 60. In that case it appeared that a receipt was signed in the name of an official by his son and there was some evidence that the son occasionally signed papers for his father. The court said that after so great a lapse of time (nearly 40 years) any slight evidence would suffice to submit the paper to the jury.

14. Gittings *v.* Hall, 1 Har. & J. (Md.) 14, 2 Am. Dec. 502; Smith *v.* Cavitt, 20 Tex. Civ. App. 558, 50 S. W. 167; Beall *v.* Dearing, 7 Ala. 124.

Copy of Lodge Minutes. — Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525.

Oral Evidence of Contents of Old Will. — Fetherly *v.* Waggoner, 11 Wend. (N. Y.) 599.

Oral Testimony as to Tax Receipts. McReynolds *v.* Longenberger, 57 Pa. St. 13.

Counterparts of Old Leases, found in proper custody, are admissible in absence of the original. Hewlett *v.* Cock, 7 Wend. (N. Y.) 371.

15. Atty. Gen. *v.* Boultbee, 2 Ves. Jr. 380.

C. By Record or Certified Copy. — a. *Commonly Used.* — In many jurisdictions in case of recorded instruments, the record or a certified copy thereof is admitted without proof of the original.[16]

b. *Original Entitled to Record.* — The original must have been entitled to record,[17] except in Missouri[18] and Alabama,[19] and even there the instruments must be of a kind that might be recorded.[20]

c. *When Affidavit of Forgery Is Filed.* — In Texas if a statutory

16. N. Y. etc. R. Co. *v.* Benedict, 169 Mass. 262, 47 N. E. 1027; Hall *v.* Gittings, 2 Har. & J. (Md.) 112.

By Statute, record or copy thereof admissible. Holmes *v.* Coryell, 58 Tex. 680.

In Georgia. — If an affidavit of forgery is filed, the record or copy thereof is not equivalent to proof of execution of the deed. McArthur *v.* Morrison (Ga.), 34 S. E. 205; Civil Code § 3628.

In Canada. — Records more than 30 years old admitted on bare production from registrar's office. Doe *v.* Turnbull, 5 U. C. Q. B. 129.

Wanting Clerk's Certificate. — In Booge *v.* Parsons, 2 Vt. 456, 21 Am. Dec. 557, it was held that the record of a deed in the office of the town clerk, such record being more than 40 years old and never having been expunged or discredited—the deed itself having been destroyed—sufficed to prove the execution of the deed and its contents, although there was no certificate of the clerk following the record of the deed.

17. Beall *v.* Dearing, 7 Ala. 124; Cochran *v.* Linville Imp. Co., 128 N. C. 616, 37 S. E. 496.

Acknowledged With Requisite Formalities. — Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797; Hill *v.* Taylor, 77 Tex. 295, 14 S. W. 366.

Must Be Proper Certificate of Acknowledgment. — Hill *v.* Taylor, 77 Tex. 295, 14 S. W. 366.

Presumed to Have Been Properly Attested. — After the lapse of 30 years the law presumes that the official who made the record is dead, and that he cannot be summoned to explain the circumstances under which he made it, and it presumes that everything was done which ought to have been done. If the paper appears to be formally a deed, admitted to record on the attestation of one witness, where two witnesses were required by law, it will be presumed that there were two witnesses, and that the clerk omitted one. This rule of evidence is enforced *ex necessitate rei.* As in other rules of evidence it is made to further the ascertainment of truth. Dodge *v.* Briggs, 27 Fed. 160.

18. **Under the Statute of 1867,** the record of a deed recorded more than 30 years before Jan. 1st, 1867, may be read in evidence without proof of the execution of the original and whether the same was properly acknowledged or not. Smith *v.* Madison, 67 Mo. 694; Plaster *v.* Riguey, 97 Fed. 12; Riguey *v.* Plaster, 88 Fed. 686. But it must be shown that the original is lost or cannot be produced. Crispen *v.* Hannovan, 72 Mo. 548.

A Subsequent Statute has reduced the time from 30 to 10 years. Hoge *v.* Hubb, 94 Mo. 489, 7 S. W. 443.

19. **In Alabama** it is held that ancient deeds may be proved by record thereof in the proper office, if the record itself is more than 20 years old, although it appears that the deed had not been so acknowledged or proved as to be entitled to record and had not been recorded within the time required by law. Bernestein *v.* Humes, 75 Ala. 241.

Presumed Original Had Certificate of Acknowledgment. — Allison *v.* Little, 85 Ala. 512, 5 So. 221.

20. The record of an ancient bill of sale, there being no law requiring or providing for the recording of such instruments, is not proof of the contents, but is admissible to show that such a bill of sale existed. Beall *v.* Dearing, 7 Ala. 124.

affidavit of forgery is filed, the record will not prove the deed unless the record itself is thirty years old.[21]

D. Where Copy Imperfect. — Where the copy is defective it will sometimes be presumed that the original was perfect.[22]

E. Where Original in Existence. — If the original is in existence the testimony of the person holding it should be introduced.[23]

2. Proving Loss. — A. Slight Proof Required. — Less proof of loss is required than in the case of recent documents,[24] especially if the paper is one not likely to have been so long preserved.[25]

B. When No Proof Required. — And it has been held that if the grantee is dead no proof of loss is necessary.[26]

21. If an "affidavit of forgery" is filed and the original document cannot be produced, the record or a certified copy thereof may be used, provided it appears that the record was made more than 30 years before the trial. "To hold that a recent record, because it purports to be of an instrument more than 30 years old, is evidence of the execution of a deed, the genuineness of which is impeached, would be to open the door to fraud and forgery." Brown *v.* Simpson, 67 Tex. 225, 2 S. W. 644. See also Davis *v.* Pearson, 6 Tex. Civ. App. 593, 26 S. W. 241; Ammon *v.* Dwyer, 78 Tex. 639, 15 S. W. 1049; McWhirter *v.* Allen, 1 Tex. Civ. App. 640, 20 S. W. 1007; Ehrenbey *v.* Babee (Tex. Civ. App.), 54 S. W. 435.

22. **Copy Lacking Name of Witness.** Dodge *v.* Briggs, 27 Fed. 160, where the record showed only one witness where the law required two as a prerequisite to recordation.

Although the Record Shows No Copy of a Seal or memorandum thereof, provided possession has followed the deed. Williams *v.* Rass, 22 Vt. 352.

Copy Considered With Other Facts. Standing alone the record of a deed apparently not entitled to record is not evidence of the existence or execution of the deed. But such record may be considered in connection with other facts to establish the deed. Townsend *v.* Downer, 32 Vt. 183.

23. Schmmer *v.* Russell, 83 Tex. 83, 18 S. W. 484.

24. Patterson *v.* Winn, 5 Pet. 233; Kingston *v.* Lesley, 10 Serg. & R. (Pa.) 383.

Proof Need Not Be Strict and Technical. — The proof of the loss being addressed exclusively to the court and for the satisfaction of the judge, need not be as strict and technical as is required by the general rules of evidence. Fetherly *v.* Waggoner, 11 Wend. (N. Y.) 599.

Showing That Place of Proper Custody Was Burned. — Isham *v.* Wallace, 4 Sm. 25.

25. In Beall *v.* Dearing, 7 Ala. 124, it is held that where a bill of sale of slaves had never been in possession of the party wishing to introduce it, and was not an instrument likely to be preserved so long as thirty years, only a slight showing of loss or inability to produce it was necessary to let in secondary evidence. In that case it was proved that inquiry had been made of persons likely to have knowledge of the deed and an ineffectual attempt made to take deposition of one person supposed to be able to say that the deed was lost. This was held sufficient search and that secondary evidence of contents could be given.

26. In Allison *v.* Little, 85 Ala. 512, 5 So. 221, where a certified transcript of a deed over thirty years old was admitted, it was held that the grantees being deceased there was no presumption that their successors in trust had custody of the original deed and hence no necessity arose for accounting for the loss of such original before introducing the copy. To same effect, Beard *v.* Ryan, 78 Ala. 37.

3. Competency of Original. — A. Must Be Shown. — It must first be shown that the original would be competent.[27]

B. Method of Showing. — And this may be by such evidence as would suffice if the original were produced.[28] But this rule has been questioned,[29] and it has been suggested that more evidence of genuineness will be required in the case of ancient papers that have been lost than of such as are produced in court.[30]

VI. OBJECTIONS TO INTRODUCTION.

Objections to the introduction of documents as ancient should be specific.[31]

27. Smith *v.* Cavitt, 20 Tex. Civ. App. 558, 50 S. W. 167.

28. **Showing of Authority and Custody of Original.** — McReynolds *v.* Longenberger, 57 Pa. St. 13.

Circumstances to Prove Original. It being out of the power of the plaintiff to produce the original, and the instrument being so old as to render direct evidence of its execution improbable, we are of the opinion that he should be permitted to show its execution by circumstances. Long possession under it, the payment of taxes upon the land, the marks of age upon the paper itself, are all circumstances which might be looked to. Schumer *v.* Russell, 83 Tex. 83, 18 S. W. 484.

Mode of Proving Lost Paper. It was shown that search had been made for a supposed deed and that it could not be found. A former clerk of the county court testified that at the time the deed was supposed to have been made he was clerk of the court; that he knew the grantor in the deed and his writing; that he knew the witness subscribing the deed. That from his record in his own hand he knew that he had recorded such a deed on proof of the subscribing witness; he testified he would not have done so had not the original been executed in the hand of the grantor. The grantor and witness were dead, and the grantee also. It was held that the record showed delivery of the deed and hence filled the requirement that deeds must come from proper custody. That the record proved the antiquity of the deed and the deed was admitted on proof of taxes paid and claims to the property made by the grantee. Holmes *v.* Coryell, 58 Tex. 680.

29. It was suggested in Jones *v.* Morgan, 13 Ga. 515, that the rules admitting ancient documents without full and direct evidence of execution might not apply unless the original document itself was before the court. But in that case there was not only no direct proof of execution, but no evidence of possession under the deed for several years after its date.

30. "Indeed, we think it possible to make a case under which the copy would be admissible as the copy of an ancient instrument, but, certainly, it should require much stronger corroborating proof than where the original is produced before the court, bearing the appearance of age and authenticity upon its face." Schumer *v.* Russell, 83 Tex. 83, 18 S. W. 484.

31. Sullivan *v.* Richardson, 33 Fla. 1, 14 So. 692. See Houston *v.* Blythe, 60 Tex. 506.

Where the objection was that one of the witnesses to the will was living and had not been called, but the objection did not point out the fact that the attestation clause of the will failed to state that the witnesses signed in the testator's presence, the objection was held insufficient, because independently of that failure the will could properly be read as an ancient will without calling the witness. Jackson *v.* Christman, 4 Wend. (N. Y.) 277.

Where the objection was that "execution has not been proved" the appellate court will not consider whether or not the deed was pro-

VII. PROVINCE OF COURT AND JURY.

1. Competency. — A. For Court. — The question of the competency of an instrument as ancient is for the court.[32]

B. What Testimony Heard As To. — The court usually hears only what is adduced by the party offering the paper.[33]

C. Discretion of Court. — And it has been said to be in the court's discretion to admit the paper on less proof than is usually required.[34]

2. Genuineness. — A. Instructions That Paper Is Genuine. If the preliminary showing is convincing and nothing contrary appears later in the case, the court may instruct that the paper is genuine.[35]

duced from proper custody. Alexander *v.* Wheeler, 78 Ala. 167.

32. Harlan *v.* Howard, 79 Ky. 373; Stooksberry *v.* Swan (Tex. Civ. App.), 22 S. W. 963; Chamberlain *v.* Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1017; Kellogg *v.* McCabe, 14 Tex. Civ. App. 598, 38 S. W. 542; Shaller *v.* Brand, 6 Binn. (Pa.) 435; Kennard *v.* Withrow (Tex. Civ. App.), 28 S. W. 226; Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13.

"**The True Rule for Receiving Documents**, ancient or modern, in evidence, is conceived to be this: The party offering the paper must make out a *prima facie* case for its reception. He must show that the paper is apparently as he contends. If he wholly fails to do this, the court should reject the paper; but, if there be a reasonable probability established that the paper is what it purports to be, the question then becomes one for the jury, and the paper ought to go before them with proper instructions." Gibson *v.* Poor, 21 N. H. 446; Laurence *v.* Tennant, 64 N. H. 532, 15 Atl. 543; Beaumont Pasture Co. *v.* Preston, 65 Tex. 448.

33. In Beaumont Pasture Co. *v.* Preston, 65 Tex. 448, the court said: "In making the proof upon which such paper gets to the jury, the party offering it proceeds *ex parte*. If, without considering any other evidence than that produced by him, there is enough to raise an issue of fact upon the genuineness of the document, it is proper for the court to allow the paper to go before the jury, and the issue of fact is then determined by them, after hearing all the testimony on both sides."

34. Pendleton *v.* Robertson (Tex. Civ. App.), 32 S. W. 442.

Deed admitted to be read to the jury without any introduction, when there was a possibility that it might be proved to have come from the proper custody, etc., being over thirty years old. Burgin *v.* Chenault, 9 B. Mon. (Ky.) 285. See also Jackson *v.* Lamb, 7 Cow. (N. Y.) 431.

35. Stooksberry *v.* Swan (Tex. Civ. App.), 22 S. W. 963, where the court said: "If, on proper and uncontroverted testimony, a deed be admitted as an ancient instrument, then, in the absence of evidence, subsequently admitted, tending to show that it is not genuine, a court might, without violation of the statute, instruct a jury to consider the execution of the instrument proved."

Nothing to Rebut Inference of Genuineness. —Where the instrument is not assailed as a forgery and there is no evidence tending even to rebut the inference of genuineness deducible from the testimony under which it was admitted, there is no controverted issue of the fact on the question of its proper execution to be submitted to the jury, the court being justified in assuming that its execution had been established. Pendleton *v.* Robertson (Tex. Civ. App.), 32 S. W. 442.

Contra. — In Pridgen *v.* Green, 80 Ga. 737, 7 S. E. 97, the defendant sought to show by the deed itself that it was a forgery, relying on the

B. When Question Is for Jury. — Otherwise the question of genuineness of a document admitted as ancient is for the jury,[36] (especially if the evidence is conflicting,[37]) upon all the evidence including that produced after such admission.[38]

C. Burden of Proof. — The burden of proof is on him who offers the paper.[39] But some cases hold the contrary as to the

recitals in the deed and its general appearance to convince the jury. The court, by its charge, did not allow the jury to consider the theory of the defendant. The court said: "It does not follow that because the deed was thirty years old, and for that reason admissible as evidence before the jury, the jury could not look to the face of the deed, and the entries thereon, and determine that it was a forgery, without resorting to *aliunde* evidence."

36. Harlan *v.* Howard, 79 Ky. 373; Kellogg *v.* McCabe, 14 Tex. Civ. App. 598, 38 S. W. 542; Chamberlain *v.* Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1017; Shinn *v.* Hicks, 68 Tex. 277, 4 S. W. 486; Warren *v.* Frederichs, 76 Tex. 647, 13 S. W. 643; Beaumont Pasture Co. *v.* Preston, 65 Tex. 448; Ammon *v.* Dwyer, 78 Tex. 639, 15 S. W. 1049; McCelvey *v.* Cryer, 8 Tex. Civ. App. 437, 28 S. W. 691; McWhirter *v.* Allen, 1 Tex. Civ. App. 649, 20 S. W. 1007; Stooksberry *v.* Swan (Tex. Civ. App.), 21 S. W. 694, where the court said: "Whether testimony is admissible is addressed to, and must be determined by, the court; but the weight to be given to corroborative evidence on which a deed is admitted as an ancient instrument, including the appearance and age of the paper itself, as well as to all evidence introduced and tending to show that the paper is not genuine, must be left for the ultimate decision of the jury, under all the relevant testimony permitted to go before them."

37. Holt *v.* Maverick, 86 Tex. 457, 23 S. W. 751.

"The age of the deed rendered it admissible in evidence. It placed it, however, in no better attitude before the jury than if an attesting witness had appeared before them, and testified that he saw the grantor, Robert W. Hamilton, execute it. Holmes *v.* Coryell, 58 Tex. 689. As the effect of its age, which would otherwise have been conclusive of its genuineness, was denied by the testimony of the witness Hamilton, we think that this litigated fact should have been left to the determination of the jury." Stooksberry *v.* Swan (Tex. Civ. App.), 21 S. W. 694.

38. Albright *v.* Jones, 106 Ga. 302, 31 S. E. 761; Patterson *v.* Collier, 75 Ga. 419; Beaumont Pasture Co. *v.* Preston, 65 Tex. 448; Pridgen *v.* Green, 80 Ga. 737, 7 S. E. 97; Sibley *v.* Haslam, 75 Ga. 490; Houston *v.* Blythe, 60 Tex. 506; Williams *v.* Conger, 125 U. S. 397, 8 Sup. Ct. 933; Chamberlin *v.* Torrence, 14 Grant's Ch. (Can.) 181.

Showing Forgery. — To prove the deed a forgery it may be shown that there was not at the time the deed was executed any justice of the peace bearing the name affixed to the certificate on the deed. Parker *v.* R. Co., 81 Ga. 387, 8 S. E. 871.

(For rules governing the introduction of evidence for and against the genuineness of documents *see* the article, "Private Writings.")

39. The genuineness of the deed should be left to the jury, under an instruction requiring them to look to all the evidence permitted to go before them, without any intimation that the admission of the deed relieves the defendants from the necessity to produce a preponderance of evidence in favor of its genuineness. Beaumont Pasture Co. *v.* Preston, 65 Tex. 448. The rule under which ancient instruments are admitted in evidence without direct proof of their execution is based on the usual relation of ascertained facts to some ulterior fact, not directly proved, which the common experience of men shows usually to

burden of proof,[40] and one case seems to hold that the jury should not be told that the burden of proof is on one side or the other.[41]

VIII. RELEVANCY.

1. Rule. — It has been said that the relevancy of a paper is not affected by its antiquity.[42]

2. Exceptions. — But ancient papers have often been held to be admissible as evidence of facts not provable by similar recent documents: for example, boundaries,[43] ancient possessions,[44] title,[45] pedigree,[46] custom,[47] reputation,[48] existence and location of highways,[49] and of water courses;[50] or to establish the citizenship[51] or identity of a person named therein.[52]

exist. The fact not directly proved is said to be presumed, but the presumption is only one of fact, and when the fact to be presumed is controverted by direct testimony the jury may indulge or reject the presumption, as the entire evidence may justify. Stooksberry *v.* Swan (Tex. Civ. App.), 21 S. W. 694.

40. Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13.

Although Affidavit of Forgery Is Filed. — In Masterson *v.* Todd, 6 Tex. Civ. App. 131, 24 S. W. 682, it was said that the party attacking an ancient document admitted in evidence has the burden of proof and cannot relieve himself of it by filing an affidavit of forgery. But the ruling in the case was that a charge requiring the jury to be *satisfied* of the forgery before finding against genuineness, imposed on the party attacking the deed more than the mere burden of proof and was therefore error.

41. Stooksberry *v.* Swan (Tex. Civ. App.), 21 S. W. 694.

(The apparent conflict in the cases is probably to be explained by the use of the phrase "Burden of Proof" in different senses.)

See article, "Burden of Proof."

42. King *v.* Watkins, 98 Fed. 913; Jackson *v.* Witters, 2 Johns. (N. Y.) 180.

An ancient pedigree, dated 1733, with a certificate of its correctness attached, the handwriting and signatures to which were proved, found in a locked room by a purchaser of part of the estate of an ancestor under whom the demandant claimed, purporting to be "collected from parish registers, wills, monumental inscriptions, family records and history," held inadmissible on the ground that it was secondary evidence, and the registers, etc., should be produced. Per Tindal, C. J., in Davies *v.* Lowndes, 5 Bing. 161.

43. *See* article, "Boundaries."

44. *See* article, "Possession."

45. *See* article, "Title."

46. *See* article, "Pedigree."

47. *See* article, "Custom."

48. Reputation. — *See* article, "Reputation."

49. Almy *v.* Church, 18 R. I. 182, 26 Atl. 58; Whitman *v.* Shaw, 166 Mass. 451, 44 N. E. 333.

See article, "Highways."

50. Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543; Whitman *v.* Shaw, 166 Mass. 451, 44 N. E. 333.

51. The question was whether "A" was a citizen of Mexico in 1837. "The only direct statement as to his citizenship is that contained in a power of attorney which he executed and which begins as follows: 'In the city of Mexico on the 10th day of January, 1837, before me, a notary public and witnesses, personally appeared "A," a citizen and of the commerce of this place, in whom I have faith and know' etc;" held, that this recital was evidence of the citizenship of "A." Williams *v.* Conger, 125 U. S. 397, 8 Sup. Ct. 933.

52. In Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525, a copy of minutes fifty years old of a lodge of Masons, showing that on a certain day a certain person was present in the

A recital in such a document may be evidence of the fact recited, as of an assignment,[53] or release,[54] or that a certain map was accepted as correct,[55] or that a certain document existed;[56] and such papers are used to prove handwriting by comparison.[57]

lodge, was offered in evidence. It was shown that the original minutes could not be had and it was proved by the testimony of the secretary of the lodge that he was the custodian of the minutes and the writing offered was a true copy; held, that this evidence tended to prove identity of person and was relevant and admissible as a copy of an ancient document; that the entry being more than 30 years old the presumption should be that the entry was correctly made; that in order to prove a fact occurring fifty years ago, the record of an ancient and well established society may be resorted to upon a question of pedigree.

53. Chandler *v.* Wilson, 77 Me. 76.

54. Hughes *v.* Wilkinson, 37 Miss. 482.

55. Whitman *v.* Shaw, 166 Mass. 457, 44 N. E. 333, and to show that the map was a part of actual transactions.

56. Havens *v.* Seashore L. Co., 47 N. J. Eq. 365, 20 Atl. 497.

57. A deed proved 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 proved 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. See also Strother *v.* Lucas, 6 Pet. 763.

ANCIENT LIGHTS.—See Easements; Prescription.

ANIMALS.

By A. B. Young.

I. OWNERSHIP OF ANIMALS.

1. Marks and Brands. — A. In General. — It has been held that flesh marks on animals are competent evidence on an issue as to the ownership of the animals.[1] And it has been also held that brands which are inadmissible as evidence of ownership because not recorded as required by statute may still be regarded as such flesh marks,[2] and received for the purpose of identifying the animals.[3]

1. People *v.* Bollinger, 71 Cal. 117, 11 Pac. 799; Territory *v.* Chavez (N. M.), 30 Pac. 903; Tittle *v.* State, 30 Tex. App. 597, 17 S. W. 1118; Allen *v.* State, 42 Tex. 517.

2. Turner *v.* State, 39 Tex. Crim. App. 322, 45 S. W. 1020; Chowning *v.* State (Tex. Civ. App.), 51 S. W. 946.

In every case where it is questionable whether the proof of ownership depends upon flesh marks or upon the brand which is unrecorded, it is the duty of the court in such cases to limit the testimony of such unrecorded brand that the same can be used merely as a flesh mark and not as evidence of ownership as in the case of a recorded brand. Childers *v.* State, 37 Tex. Crim. App. 392, 35 S. W. 654.

3. Tittle *v.* State, 30 Tex. App. 597, 17 S. W. 1118; State *v.* Hanna, 35 Or. 195, 57 Pac. 629; Chesnut *v.* People, 21 Colo. 512, 42 Pac. 656; State *v.* King, 84 N. C. 737.

"The court did not err in admitting evidence showing the character and description of the brand used by Prather, although this brand had not been recorded. The evidence was not offered or relied upon to prove title, but for the purpose, in connection with the other evidence before the jury, of identifying the steer referred to by the witnesses with the one described in the indictment." Poag *v.* State, 43 Tex. 151.

B. Brands Recorded Under Statutes. — Under statutes requiring brands to be recorded as therein provided before such brands are evidence of ownership of the animals branded, a brand is not admissible as evidence of such ownership unless the statute has been complied with.[4]

The Purpose of Authorizing the Registration of Marks and Brands is to perpetuate and supply evidence as to the ownership of animals.[5]

Recorded Brands Not Exclusive Evidence. — It has been held, however, that recorded brands are never exclusive evidence of ownership.[6]

C. Burden of Proving Record. — It has been held that it is only when the state relies solely upon proof of a brand to show the ownership of an animal that the state has the burden to show the brand to have been recorded.[7]

D. Certified Copies of Recorded Brands. — Under the statutes before referred to requiring the registration of marks and brands, a properly certified copy of such registration or record establishes *prima facie* that the animal bearing such mark or brand is owned by the person in whose name it was registered.[8] And it is held also

4. McKenzie *v.* State, 32 Tex. Crim. App. 568, 25 S. W. 426, 40 Am. St. Rep. 795; Debord *v.* Johnson, 10 Colo. App. 402, 53 Pac. 255; Murray *v.* Trinidad Nat. Bank, 5 Colo. App. 359, 38 Pac. 615.

"No brands except such as are recorded by the officers named in this act *shall be recognized in law as any evidence* of the ownership of the cattle, horses or mules upon which the same may be used."

"When a party or the state desires to introduce the mark and brand as evidence, preliminary proof that the same is recorded is absolutely necessary." Allen *v.* State, 42 Tex. 517.

5. Dickson *v.* Territory (Ariz.), 56 Pac. 971; Walden *v.* Murdock, 23 Cal. 540, 83 Am. Dec. 135; Chesnut *v.* People, 21 Colo. 512, 42 Pac. 656; Debord *v.* Johnson, 10 Colo. App. 402, 53 Pac. 255; Murray *v.* Trinidad Nat. Bank, 5 Colo. App. 359, 38 Pac. 615; Territory *v.* Chavez (N. M.), 30 Pac. 903; Gale *v.* Salas (N. M.), 66 Pac. 520; State *v.* Cardelli, 19 Nev. 319, 10 Pac. 433; McKenzie *v.* State, 32 Tex. Crim. App. 568, 25 S. W. 426, 40 Am. St. Rep. 795; De Garcia *v.* Galvan, 55 Tex. 53; Allen *v.* State, 42 Tex. 517; Beyman *v.* Black, 47 Tex. 558.

"Nor was it necessary for the state to show a recorded brand since the ownership was established positively and emphatically independently of the brand." Wolf *v.* State, 4 Tex. App. 332.

6. Territory *v.* Chavez (N. M.), 30 Pac. 903; Fisher *v.* State, 4 Tex. App. 181; Hutto *v.* State, 7 Tex. App. 44; Debord *v.* Johnson, 10 Colo. App. 402, 53 Pac. 255; Cragin *v.* Dickey, 113 Ala. 310, 21 So. 55; Gale *v.* Salas (N. M.), 66 Pac. 520.

7. Fisher *v.* State, 4 Tex. App. 181.

And in every case where the fact of ownership depends alone upon an unrecorded brand and the verdict is procured on such testimony it cannot be permitted to stand; and in every case where it is questionable whether the proof of ownership depends upon flesh marks or upon the brand which is unrecorded, it is the duty of the court in such cases to limit the testimony of such unrecorded brand, that the same can be used merely as a flesh mark and not as evidence of ownership as in the case of a recorded brand. Childers *v.* State, 37 Tex. Crim. App. 392, 35 S. W. 654; Poag *v.* State, 40 Tex. 151; Allen *v.* State, 42 Tex. 517; Hutto *v.* State, 7 Tex. App. 44; State *v.* Cardelli, 19 Nev. 319, 10 Pac. 433.

8. Dickson *v.* Territory (Ariz.),

that such copy may be used as evidence in counties other than that where the brand was registered.[9]

E. Distinction Between "Brand" and "Mark." — It has been held that statutes requiring the registration of marks and brands, but providing that brands only shall be evidence of ownership, do not constitute the registration the best evidence of a mark.[10]

F. Written Transfers As Evidence. — It has been held that bills of sale and other written transfers of live stock are competent though not conformable to the statute.[11]

G. Oral Evidence of Transfer of Recorded Brand. — Oral evidence is admissible for the purpose of showing the transfer of ownership of a recorded brand.[12]

II. IMPOUNDING ANIMALS.

1. Memoranda Kept by Pound Keeper. — Memoranda and certificates required by law to be made and filed with pound keepers and

56 Pac. 971; Yale *v.* Salas (N. M.), 66 Pac. 520; McKenzie *v.* State, 32 Tex. Crim. App. 568, 25 S. W. 426, 40 Am. St. Rep. 795.

Purpose of Registration of Brand Notice Prima Facie Proof. — The very purpose of the law in requiring the registration of a brand is that it shall be *prima facie* proof of ownership. De Garcia *v.* Galvan, 55 Tex. 53.

"The object of branding and marking cattle is for the purpose of identification that their ownership may be known and distinguished from other stock, that it may be known to whom the particular cattle belong." State *v.* Cardelli, 19 Nev. 319, 10 Pac. 433.

9. Atterberry *v.* State, 19 Tex. App. 401; Chesnut *v.* People, 21 Colo. 512, 42 Pac. 656.

10. Johnson *v.* State, 1 Tex. App. 333; Lawrence *v.* State, 20 Tex. App. 536.

Mark Unrecorded May Be Proved. A mark may be proved without showing it to have been recorded. The rule that no brands except such as are recorded shall be recognized in law as evidence of ownership is not applicable to marks. Love *v.* State, 15 Tex. App. 563.

The latter article provides that no brands except, etc. If this latter article applied at all to sheep, which are not mentioned in it, it does not apply to *marks*, but to *brands* only. Dreyer *v.* State, 11 Tex. App. 631; Dixon *v.* State, 19 Tex. 134.

11. Brill *v.* Christy (Ariz.), 63 Pac. 757; Gale *v.* Salas (N. M.), 66 Pac. 520; Nance *v.* Barber (Tex. Civ. App.), 26 S. W. 151.

12. Transfer of Recorded Brand May Be Proved Orally. — A brand had been recorded as the property of two brothers. On the trial, after introducing the recorded brand in evidence, one of the brothers was permitted to testify that at the time of the larceny he owned the animal in question and the brand. The court held it was not error to permit this testimony. "The brand was recorded as required by law, and, while it was *prima facie* evidence that L. and H. Huning were owners of the brand at the time of record, it was not conclusive evidence of ownership in them." Territory *v.* Chavez (N. M.), 30 Pac. 903.

Exception. — But where statutes provide for the sale of stock running in the range by sale and delivery of the brands and marks, and requiring that instruments evidencing such sales be recorded as well as noted on the record of original brands, oral proof is not admissible to establish ownership of such recorded brand. Nance *v.* Barber (Tex. Civ. App.), 26 S. W. 151.

other officials charged with duties respecting impounded animals are admissible as other official documents.[13]

2. Oral Evidence to Show Creation of Pound. — Where it does not appear from the record that officials of distinct localities united in providing a pound for their common use it is competent to establish the fact of such joint official action by oral testimony.[14]

III. INJURIES BY ANIMALS.

1. To Property. — A. Burden of Proof. — The burden of proof rests upon the owner of animals found upon another's close to excuse or justify their presence there except as it may otherwise be provided by statute.[15]

2. To Persons. — A. In General. — a. *Character of the Animal.* **(1.) Presumption of Owner's Knowledge.** — (A.) Wild Animals. — In actions to recover for injuries by wild beasts or animals that are in their nature ferocious, the owner is conclusively presumed to know them to be mischievous.[16] And negligence will be presumed from the fact that he has permitted them to be at large.[17]

13. Bruce *v.* Holden, 21 Pick. (38 Mass.) 187.

Records of awards of damages for injuries by trespassing animals required by statute to be made by designated officials and by them filed for record are competent evidence of such assessments where the original award cannot be found. Lyons *v.* Van Gorder, 77 Iowa 600, 42 N. W. 500.

14. Albright *v.* Payne, 43 Ohio St. 8, 1 N. E. 16.

15. Wells *v.* Howell, 19 Johns. (N. Y.) 385; Lyman *v.* Gipson, 18 Pick. (Mass.) 422; Lorance *v.* Hillyer, 57 Neb. 266, 77 N. W. 755; Story *v.* Robinson, 32 Cal. 205; Pettit *v.* May, 34 Wis. 666.

"In trespass for damage done by the defendant's sheep to the plaintiff's close, if it is admitted that the sheep were upon the plaintff's land, the burden is upon the defendant to show some justification or excuse; and if they entered from the highway, and no justification or excuse is shown for their being in the highway, the plaintiff is entitled to damages." Hodson *v.* Kilgore, 77 Me. 155.

Actual Knowledge Not Always Necessary to Be Shown. — And in connection with evidence tending to show actual knowledge, it is competent to show that the animals in question were bought from a locality known by the person complained of to be infected and liable to communicate disease as tending to establish such knowledge by implication. Lynch *v.* Grayson, 5 N. M. 487, 25 Pac. 992; Grayson *v.* Lynch, 163 U. S. 468; Croff *v.* Cresse, 7 Okla. 408, 54 Pac. 558; State *v.* Turner (Kan.), 65 Pac. 217.

16. Manger *v.* Shipman, 30 Neb. 352, 46 N. W. 527; Earl *v.* Van Alstine, 8 Barb. (N. Y.) 630; Van Leuven *v.* Lyke, 1 N. Y. 515, 49 Am. Dec. 346.

Animal's Viciousness Presumed. "Though the owner have no particular notice that he did any such thing before, yet if he be a beast that is *ferae naturae*, if he get loose and do harm to any person, the owner is liable to an action for the damage." 1 Hale P. C. 430.

The owner of beasts that are *ferae naturae* must always keep them up at his peril and an action lies without notice of the quality of the beasts. Rex. *v.* Huggins, 2 Lord Raym. 1574.

The owner's knowledge of the ferocity of a tiger will be presumed from the nature of the animal. Laverone *v.* Mangianti, 41 Cal. 138, 10 Am. Rep. 269.

17. *England.* — May *v.* Burdett.

(B.) Domestic Animals. — The owner of domestic animals is not presumed to know that they are vicious.[18]

58 Eng. C. L. 101; May *v.* Burdett, 9 Q. B. 101.

United States. — Spring Company *v.* Edgar, 99 U. S. 645.

Connecticut. — Selleck *v.* Selleck, 19 Conn. 500.

Illinois. — Ahlstrand *v.* Bishop, 88 Ill. App. 424; Hammond *v.* Melton, 42 Ill. App. 186; Stumps *v.* Kelley, 22 Ill. 140.

Indiana. — Graham *v.* Payne, 122 Ind. 403, 24 N. E. 216.

Iowa. — Marsel *v.* Bowman, 62 Iowa 57, 17 N. W. 176.

Kentucky. — Brooks *v.* Brooks, 21 Ky. Law Rep. 940, 53 S. W. 645; Pfaffinger *v.* Gilman, 18 Ky. Law Rep. 1071, 38 S. W. 1088.

Maine. — Decker *v.* Gammon, 44 Me. 322, 69 Am. Dec. 99.

Massachusetts.—Linnehan *v.* Sampson, 126 Mass. 506, 30 Am. Rep. 692; Lyons *v.* Merrick, 105 Mass. 71.

Missouri. — Speckman *v.* Kreig, 79 Mo. App. 376.

New York. — Malone *v.* Knowlton, 39 N. Y. St. 901, 15 N. Y. Supp. 506; Wheeler *v.* Brant, 23 Barb. 324; Rider *v.* White, 65 N. Y. 54, 22 Am. Rep. 600; Earl *v.* Van Alstine, 8 Barb. 630.

Pennsylvania. — Dolph *v.* Ferris, 7 Watts. & S. 367.

Texas. — Triolo *v.* Foster (Tex. Civ. App.), 57 S. W. 698.

Vermont. — Oakes *v.* Spaulding, 40 Vt. 347, 94 Am. Dec. 404.

Evidence That Vicious Animal Was Not Restrained Renders Owner Liable. — In an action against the proprietor of a park for injuries sustained by the plaintiff from an attack by a male deer, which with other deer was permitted to roam in the park. The evidence showed that the park was open to visitors; that plaintiff was in the habit of visiting it, and when lawfully there was attacked by the deer and severely injured; that she had often seen the deer, about nine in number, three being bucks, the oldest four years old—running about the lawn and persons playing with them, and had there seen a sign "Beware of the buck;" that the park contained about eleven acres; that notices were put up there about a year or two before cautioning the visitors not to tease or worry the deer; that plaintiff had no knowledge prior to this attack that the deer were dangerous if not disturbed. There was expert testimony that in the opinion of such witnesses the male deer was a dangerous animal at the season of the injury. There was no evidence offered by defendant. The court held that the verdict in favor of the plaintiff was justified. Spring Company *v.* Edgar, 99 U. S. 645.

Distinction in Case of Bees. Animals classed as *ferae naturae* may become practically tame, and as in the cases of bees, an owner will not be held liable, at all events for their accidental injuries, in absence of proof of knowledge on his part that it is dangerous to keep them in a given situation. Earl *v.* Van Alstine, 8 Barb. (N. Y.) 630.

18. *Georgia.* — Reed *v.* Southern Exp. Co., 95 Ga. 108, 22 S. E. 133, 51 Am. St. Rep. 62.

Minnesota. — Erickson *v.* Bronson, 81 Minn. 258, 83 N. W. 988.

New York. — Vrooman *v.* Lawyer, 13 Johns. 339; Van Leuven *v.* Lyke, 1 N. Y. 515, 49 Am. Dec. 346; Lawlor *v.* French, 12 App. Div. 140, 37 N. Y. Supp. 807; Bennett *v.* Mallord, 33 Misc. 112, 67 N. Y. Supp. 159; Dickson *v.* McCoy, 39 N. Y. 400; Benoit *v.* Troy & L. R. Co., 154 N. Y. 223, 48 N. E. 524.

Oregon. — Dufer *v.* Cully, 3 Or. 377.

"In an action for the death of plaintiff's intestate, caused by a kick from a horse, used by defendant on his theatrical stage, evidence that the horse at one time pressed a witness against another horse as he went into his manger, and that he, several months before the accident, when teased by those around him, snapped at them, and that on another occasion had kicked another man, is insufficient to prove that the manager of the theater had knowledge that the horse was vicious, so as to render

(2.) Former Instances of Viciousness. — It is competent to give evidence of former instances of viciousness similar to that in question of which the owner had, or may be assumed to have had, notice.[19]

(3.) Evidence Other Than Conduct of Animal. — Evidence other than that furnished by the conduct of the animal at the time of the injury complained of is ordinarily essential to fix a vicious character upon such animal.[20]

the owner liable. Williams and O'Brien, J. J., dissenting." Lawlor *v.* French, 12 App. Div. 140, 37 N. Y. Supp. 807.

"If damage is done by any domestic animal kept for use or convenience, the owner is not liable to an action on the ground of negligence without proof that he knew that the animal was accustomed to do mischief." Vrooman *v.* Lawyer, 13 Johns. (N. Y.) 339.

19. Arnold *v.* Norton, 25 Conn. 92; Kittredge *v.* Elliott, 16 N. H. 77, 41 Am. Dec. 717; Loomis *v.* Terry, 17 Wend. (N. Y.) 496; Cockerham *v.* Nixon, 11 Ired. (N. C.) 269; Johnson *v.* Eckberg, 94 Ill. App. 634.

Animal's Vicious Propensity, What Is Evidence Of. — "When, as here, Lovelace and Treece had been sent upon an independent mission, and put in complete charge of the animal, they stood in the performance of their task in the place of the defendant, and the question of defendant's responsibility will be answered as may be answered the inquiry, what would have been the master's responsibility and liability had he personally been in charge of the animal? To this there can be but one answer: He would have been liable. Twice before on that very day had the bull evinced its ugly disposition by attacks actual and threatened. Here was ample proof of the fact of viciousness, and of the knowledge of that fact brought home to the master." Clowdis *v.* Fresno Flume & Irrigation Co., 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238.

"It is not necessary that the vicious acts of a domestic animal, brought to the notice of the owner, should be precisely similar to that upon which the action against him is founded. If it were, there would be no actionable redress for the first injury of a particular kind committed by such an animal, because its owner would necessarily be exempt from all liability until it should commit another injury of exactly the same kind. It is enough to say that the law sanctions no such absurdity.

"Neither is it necessary, in order to fasten a liability upon the owner, that we have notice of a previous injury to others." Reynolds *v.* Hussey, 64 N. H. 64, 5 Atl. 458.

To prove the bad habits of a horse at the time of the accident, evidence of particular instances of vicious conduct is admissible. "We think also that the court, in its discretion, might receive evidence of particular acts extending as far back as the spring before the accident." Whittier *v.* Town of Franklin, 46 N. H. 23, 88 Am. Dec. 185.

20. Holliday *v.* Gardner (Ind. App.), 59 N. E. 686; Hammack *v.* White, 11 C. B. (N. S.) 588; Benoit *v.* Troy & L. R. Co., 154 N. Y. 223, 48 N. E. 524.

Horse's Single Act of Viciousness Does Not Establish Character. — "A cart horse becoming suddenly unmanageable, backed off the dock into the water and was lost. It was held that the fact that the horse was for the moment beyond control did not show that he was vicious and unsafe, or that the owner was careless. Kennedy *v.* Mayor etc., 73 N. Y. 365, 29 Am. Rep. 169.

"It does not appear that the injury resulted from the negligence of either the plaintiff or the defendant. The mere fact that the horse became unmanageable on the occasion of the injury does not show that he was vicious or generally unsafe, nor does it prove that the statement of the defendant that the horse was

(4.) Conduct Subsequent to Injury. — It has been held that evidence of conduct of the animal subsequent to the injury complained of is not admissible upon the question of disposition manifested at the time of the injury.[21] But when the time intervening is so short, and the circumstances such as to render it improbable that the habit was lately formed or the vice newly acquired, evidence of such after conduct is competent.[22]

(5.) Habits. — Evidence is admissible which tends to show a habit of the animal in question to commit the species of viciousness displayed when an injury is caused by it.[23]

gentle was untrue. Kennedy *v.* Mayor, 73 N. Y. 365." Finney *v.* Curtis, 78 Cal. 498, 21 Pac. 120.

Contra. — One attempt of a bull to gore a human being sufficient. Cockerham *v.* Nixon, 11 Ired. (N. C.) 269.

21. "The conduct of the horse after the accident was not material in any view of the case. Vicious disposition and knowledge thereof by the defendant before the accident, must concur in order to sustain the action." Knickerbocker Ice Co. *v.* DeHaas, 37 Ill. App. 195.

In an action to recover injuries from the kick of a horse, the question, whether he was vicious to the knowledge of the defendant, being strongly contested at the trial, it was held to have been error to admit testimony of one to whom the horse was sold after the injury that he had owned him some months, that he was a good dispositioned horse in his judgment, and that he never saw him kick at anything unless he was playing around. Woodward *v.* Loomis, 64 App. Div. 27, 71 N. Y. Supp. 690.

Contra. — When the question is as to the existence of certain vicious habits in a horse at a given time the fact that the horse exhibited the same vices six or eight months after the time specified, may be competent evidence, in the discretion of the court, if accompanied with proper instructions as to application. Chamberlain *v.* Enfield, 43 N. H. 356.

22. Hine *v.* Wooding, 37 Conn. 123; Kennon *v.* Gilmer, 131 U. S. 22; Chamberlain *v.* Enfield, 43 N. H. 356.

In an action to recover for injuries inflicted by a vicious mare, the trial court rules that a horse trainer, in whose charge she was placed two days after the injury, might testify as to the condition she was then in, on the ground that the time intervening between the time of the accident and his reception of the mare was not of such duration as to effect any change in her character by training or similar means. Brown *v.* Green, 1 Penn. (Del.) 535, 42 Atl. 991.

23. Tolmie *v.* Standard Oil Co., 59 App. Div. 332, 69 N. Y. Supp. 841; Lynch *v.* Moore, 154 Mass. 335, 28 N. E. 277; Todd *v.* Inhabitants, 8 Allen (Mass.) 51; Maggi *v.* Cutts, 123 Mass. 535.

Habit of Acting in a Given Vicious Manner May Be Shown. "The basis of the plaintiff's cause of action was the negligence of the defendant in knowingly permitting a dangerous horse, a track bolter, to run in a race controlled by it, and in which the plaintiff rode and was injured, without informing her of the vicious character of the horse, of which she was ignorant. On the trial there was evidence tending to show that the horse, to the knowledge of one of the officers of the defendant, would bolt in practice; also that the horse came upon the race track wearing blinkers. *Held*, that it was not error for the trial court to receive evidence to show that a race horse which bolts in practice will usually do so in an actual race; and, further, for what purpose blinkers are put on race horses." Lane *v.* Minnesota State Agricultural Soc. (N. D.), 69 N. W. 463.

Habits May Be Shown As Imply-

B. Injuries by Dogs. — a. *Matters As to Liability.* — (1.) **The Keeping.** — (A.) Circumstances. — In actions based upon alleged injuries from vicious dogs, the fact that the defendant owned or kept the animal in question may be shown by circumstances as well as by direct proof.[24]

(B.) Suffering Dog's Presence About Premises. — But mere evidence that a defendant suffered a dog owned by another to stay about his premises will not necessarily render him responsible for injuries committed by such dog.[25]

ing Notice to Owner. — Evidence of the reputation of a horse among those employed in the stable where he is kept, while not competent to show his disposition, is so for the purpose of establishing notice to the owner of such disposition. Short *v.* Bohle, 64 Mo. App. 242.

24. *California.* — Wilkinson *v.* Parrott, 32 Cal. 102.

Connecticut. — McCormack *v.* Martin, 71 Conn. 748, 43 Atl. 194.

Iowa. — Shultz *v.* Griffith, 103 Iowa 150, 72 N. W. 445; O'Harra *v.* Miller, 64 Iowa 462, 20 N. W. 760; Trumble *v.* Happy (Iowa), 87 N. W. 678.

Maine. — Mitchell *v.* Chase, 87 Me. 172, 32 Atl. 867.

Massachusetts. — Com. *v.* Gorman, 10 Gray (82 Mass.) 601; Buddington *v.* Shearer, 22 Pick. (39 Mass.) 427; Ingraham *v.* Chapman, 177 Mass. 123, 58 N. E. 171; Com. *v.* Coates, 169 Mass. 354, 47 N. E. 1011; Barrett *v.* Malden and Melrose R. Co., 3 Allen (85 Mass.) 101.

Michigan. — Newton *v.* Gordon, 72 Mich. 642, 40 N. W. 921; Jenkinson *v.* Coggins, 123 Mich. 7, 81 N. W. 974; Burnham *v.* Strother, 66 Mich. 519, 33 N. W. 410.

New York. — Kessler *v.* Lockwood, 42 N. Y. St. 563, 16 N. Y. Supp. 677; Quilty *v.* Battie, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521.

Vermont. — Plummer *v.* Ricker, 71 Vt. 114, 41 Atl. 1045, 76 Am. St. Rep. 757.

In an action for injuries by a vicious dog, the defendant denying ownership of the dog, placing it in her son, twenty-eight years old, who made his home with her at Flint, working for her on the farm near there, the evidence showed substantially that defendant owned everything else about the premises, the son being really a hired man, getting his keep and one-third of the crops for his services. The court saying that it appeared from the testimony that the home of Martin was with the defendant, and that the only home the dog had was upon the premises owned and controlled by the defendant and that the trial court very properly said to the jury the defendant was the keeper of the dog. Jenkinson *v.* Coggins, 123 Mich. 7, 81 N. W. 974.

25. McLaughlin *v.* Kemp, 152 Mass. 7, 25 N. E. 18; Whittemore *v.* Thomas, 153 Mass. 347, 26 N. E. 875; Collinghill *v.* City of Haverhill, 128 Mass. 218; Lynt *v.* Moore, 5 App. Div. 487, 38 N. Y. Supp. 1095.

One Merely Suffering Dog of Another to Remain on His Premises Is Not Keeping It. — The fact that the defendants treated a dog the same as anybody would that had a dog at their home would not show as matter of law that they were keepers of it, notwithstanding the fact that the dog belonged to their nephew who was a boarder with them, nor because defendants exercised some control over and custody of the dog could they be held responsible for him as keepers. Boylan *v.* Everett, 172 Mass. 453, 52 N. E. 541.

"One who suffers a dog to remain temporarily on his premises is not, as matter of law, its keeper. Nor do we think is one who harbors one for a short time liable under all circumstances as a keeper." O'Donnell *v.* Pollock, 170 Mass. 441, 49 N. E. 745.

(2.) Character of the Dog. — (A.) PREVIOUS INJURIES TO OTHERS — It has been held in case of injury to a person that it is not necessary to show that the dog in question had previously bitten any human being.[26]

(B.) KNOWLEDGE OF THE OWNER. — (a.) *Express Notice Not Necessary.* It is not necessary that express notice to the owner of the vicious propensity of a dog be shown.[27]

(b.) *Vicious Acts.* — It has been held that one single vicious act of a dog may be of such character and attended by such circumstances as to imply the owner's knowledge of the savage propensity thus displayed.[28] But in order to justify such implication the facts relied

26. Rider *v.* White, 65 N. Y. 54, 22 Am. Rep. 600; Warner *v.* Chamberlain (Del.), 30 Atl. 638; Johnson *v.* Eckberg, 94 Ill. App. 634; Montgomery *v.* Koester, 35 La. Ann. 1091, 48 Am. Rep. 253; Goode *v.* Martin, 57 Md. 606, 40 Am. Rep. 448; Marsel *v.* Bowman, 62 Iowa 57, 17 N. W. 176.

In the action against the keeper of a dog it need not be proved that he had previously bitten mankind. It is sufficient to prove that the dog was of a ferocious nature, and that its keeper from his knowledge thereof, had reason to apprehend that under some circumstances it would bite mankind. Godeau *v.* Blood, 52 Vt. 251, 36 Am. Rep. 751.

The defendant testified that while he kept always "half a dozen dogs, they were always chained day and night, at night tied out to the buildings, in the daytime in the house, never unchained." The court said: "Again if the dog was defendant's dog, the very purpose for which he kept him charges him with knowledge of his character, and he is therefore chargeable with negligently keeping him, although it did not appear that he had actually bitten another person before he bit the plaintiff." Brice *v.* Bauer, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. Rep. 454.

27. *Colorado.*—Melsheimer *v.* Sullivan, 1 Colo. App. 22, 27 Pac. 17.

Connecticut. — Simmonds *v.* Holmes, 61 Conn. 1, 23 Atl. 702, 15 L. R. A. 253.

Delaware. — Barclay *v.* Hartman, 2 Marv. 351, 43 Atl. 174; Freidman *v.* McGowan, (Del.), 42 Atl. 723; Warner *v.* Chamberlain, (Del.), 30 Atl. 638.

Illinois. — Johnson *v.* Eckberg, 94 Ill. App. 634.

Iowa. — Cameron *v.* Bryan, 89 Iowa 214, 56 N. W. 434; Sanders *v.* O'Callaghan, 111 Iowa 574, 82 N. W. 969.

Louisiana. — Montgomery *v.* Koester, 35 La. Ann. 1091, 48 Am. Rep. 253.

Michigan. — Knowles *v.* Mulder, 74 Mich. 202, 41 N. W. 896, 16 Am. St. Rep. 627.

New York. — Earl *v.* Van Alstine, 8 Barb. 630; Brice *v.* Bauer, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. Rep. 454; Hahnke *v.* Friederich, 140 N. Y. 224, 35 N. E. 487; Lynch *v.* McNally, 73 N. Y. 347; Rider *v.* White, 65 N. Y. 54, 22 Am. Rep. 600; Jacoby *v.* Ockerhousen, 59 Hun 619, 13 N. Y. Supp. 499.

Vermont. — Worthen *v.* Love, 60 Vt. 285, 14 Atl. 461; Godeau *v.* Blood, 52 Vt. 251, 36 Am. Rep. 751.

Washington.—Robinson *v.* Marino, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50.

Express Notice of Viciousness Unnecessary. — "Proof that the animal is of a savage and ferocious nature is equivalent to proof of express notice." Earl *v.* Van Alstine, 8 Barb. (N. Y.) 630.

The defendant testified that he kept the dog chained up in the daytime so that it would not bite people. This was evidence of its vicious character and of defendant's knowledge thereof. Sanders *v.* O'Callaghan, 111 Iowa 574, 82 N. W. 969.

28. Bauer *v.* Lyons, 22 App. Div. 204, 48 N. Y. Supp. 729; Mont-

upon must point to the particular propensity conducing to the injury then in question.[29]

(c.) *Knowledge of Agent.* — It is competent to give evidence tending to show that an agent had knowledge of the vicious propensity of a dog owned by his principal when the circumstances are such as to render such knowledge imputable to the owner.[30]

(d.) *Reputation of Dog.* — Evidence of a general neighborhood reputation of a dog for viciousness is admissible, not to show the fact of his dangerous propensity, but the public notoriety, and as tending to support the inference of the owner's knowledge of such vicious propensity.[31]

gomery v. Koester, 35 La. Ann. 1091, 48 Am. Rep. 253; Goode v. Martin, 57 Md. 606, 40 Am. Rep. 448; Marsel v. Bowman, 62 Iowa 57, 17 N. W. 176; Smith v. Pelah, 2 Str. 1264; Arnold v. Norton, 25 Conn. 92; Loomis v. Terry, 17 Wend. (N. Y.) 496.

Evidence of a single instance of killing a sheep by defendant's dog coming to his knowledge is sufficient to render him liable for injuries inflicted by the dog. Kittredge v. Elliott, 16 N. H. 77, 41 Am. Dec. 717.

The plaintiff, servant of defendant, stepped out of the house in the evening to get a pail when the dog without any warning sprang upon and bit her. "This act is sufficient to stamp the character of the dog as vicious and dangerous and the master was bound to keep him in subjection without further notice." Brice v. Bauer, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. Rep 454; Webber v. Hoag, 28 N. Y. St. 630, 8 N. Y. Supp. 76.

29. Norris v. Warner, 59 Ill. App. 300; Wormley v. Gregg, 65 Ill. 251; Dearth v. Baker, 22 Wis. 70; Keightlinger v. Egan, 65 Ill. 235.

Knowledge Imputed From Habits of Dog. — Evidence is competent which tends to show the habit of a dog to act in a manner corresponding to that manifested on the occasion of a particular injury in question. Broderick v. Higginson, 169 Mass. 482, 48 N. E. 269, 61 Am. St. Rep. 296; Kennett v. Engle, 105 Mich. 693, 63 N. W. 1009; Dover v. Winchester, 70 Vt. 418, 41 Atl. 445.

30. Corliss v. Smith, 53 Vt. 532; Harris v. Fisher, 115 N. C. 318, 20 S. E. 461, 44 Am. St. Rep. 452; Niland v. Greer, 46 App. Div. 194, 61 N. Y. Supp. 696; Turner v. Craighead, 63 N. Y. St. 853, 31 N. Y. Supp. 369; The Lord Derby, 17 Fed. 265.

A servant's knowledge of the vicious character of a dog accustomed to follow him about in the master's business but not put in his charge by the master, is not imputable to the latter. Twigg v. Ryland, 62 Md. 380, 50 Am. Rep. 226.

31. Cuney v. Campbell, 76 Minn. 59, 78 N. W. 878; Murray v. Young, 12 Bush (Ky.) 337; Freidman v. McGowan (Del.), 42 Atl. 723; Chenny v. Russell, 44 Mich. 620, 7 N. W. 234; Trinity & S. R. Co. v. O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389; Cameron v. Bryan, 89 Iowa 214, 56 N. W. 434; Triolo v. Foster (Tex. Civ. App.), 57 S. W. 698.

Knowledge May Be Inferred From Notorious Reputation of Dog. — If one keeps upon his premises a dog which has attacked or bitten a considerable number of persons coming upon or passing by them, and is notoriously cross and vicious, it may safely be assumed that the owner has some knowledge of the fact. The evidence of general repute is, in such cases, received not to prove the particular fact of the dangerous propensity of the animal, but the public notoriety, and as tending to support the inference of knowledge on the part of the owner, of such propensity." Fake v. Addicks, 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 716.

(e.) *Conduct Contrary to General Habits.* — It is not competent for the owner of a dog to give evidence tending to show that the conduct of the dog on a given occasion was contrary to his general habits for peaceableness.[32]

(3.) Damages. — (A.) Peculiar Painfulness of Injury. — It is competent to show by medical experts that wounds from dog bites are more painful and more difficult to heal than those made from clean instruments requiring altogether different treatment.[33]

(B.) Dread of Hydrophobia. — Testimony of the injured person as to dread of hydrophobia as the result of a bite of a dog is admissible upon the question of damages.[34]

(C.) Expression Indicative of Mental Suffering. — Testimony of physicians and others respecting expressions uttered in their hearing by persons injured by dogs as indicative of mental suffering is not admissible.[35]

32. Buckley *v.* Leonard, 4 Denio (N. Y.) 500; Linck *v.* Scheffel, 32 Ill. App. 17.

In an action for injuries caused by a dog jumping at the head of a horse plaintiff was driving along the highway and causing it to run away and throw plaintiff out of the vehicle, it was held that the defendant was not entitled to show that the actions of the dog, a the time of the injury, as claimed by the plaintiff, were contrary to his habits and disposition. Willett *v.* Goetz, 125 Mich. 581, 84 N. W. 1071.

At the trial, it appearing the dog had bitten the plaintiff while he was walking in the highway. It was held that the trial court properly excluded offered proof that the dog was peaceable and had not been known to attack anyone but the plaintiff. Kelly *v.* Alderson, 19 R. I. 544, 37 Atl. 12.

Injury From Party's Own Wrong Not Actionable. — "The supposed kicking of the dog did not appear to have been done for a justifiable purpose, the only evidence on the subject being an admission of the plaintiff, which was testified to, that he kicked the dog, and it bit him. If the plaintiff wantonly irritated and aggravated the dog, and the dog bit him, in repelling the aggression, and not from a mischievous propensity, which we understand to be the purport of the instruction, then the plaintiff should not be allowed to recover for damages caused by his own wrong." Keightlinger *v.* Egan, 65 Ill. 235.

33. Expert Medical Testimony As to Peculiar Nature of the Dog Bite Wound. — In an action to recover damages for bite of a vicious dog it was held competent for plaintiff to show by expert medical testimony that a wound made by a dog is more painful to the patient than one made by a clean instrument; and that "a wound of this kind—a lacerated wound by a dog or any other animal, is considered by recent surgeons as being altogether different, and is treated differently from wounds made by clean instruments or from wounds made by the surgeon's knife and for the reason that there is more tearing of the tissue." Sanders *v.* O'Callaghan, 111 Iowa 574, 82 N. W. 969.

34. Godeau *v.* Blood, 52 Vt. 251, 36 Am. Rep. 751; Trinity & S. R. Co. *v.* O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389.

Hydrophobia, Evidence of Dread of, Admissible. — It was held competent to put to the plaintiff in an action to recover damages for the bite of a dog, the question: "Have you or not been afraid of hydrophobia ever since you were bitten by this dog?" Friedman *v.* McGowan (Del.), 42 Atl. 723.

35. Exclamations Indicative of Mental Suffering Inadmissible. — It is not competent to admit statements

b. *Matters of Defense.* — (1.) **Contributory Negligence.** — Evidence of negligence in the ordinary sense not being required to fasten liability upon the owner of a vicious dog for his acts, neither is evidence of contributory negligence in the ordinary sense admissible in extenuation or defense of an action predicated upon such acts.[36] But it is competent to prove facts tending to show that the person injured brought the injury upon himself by his own wrong or received it while in the commission of an unlawful act directly contributing thereto.[37]

IV. ANIMALS INJURED OR KILLED.

1. Failure to Maintain Visible Cattle Guards. — In actions against railroad companies for stock killing it is competent to show as bearing upon the charge of negligence that essential cattle guards were suffered to fill up with sand and become obscure from the view of live stock by the growth of weeds, grass and other vegetation.[38]

2. Circumstances to Fix Prima Facie Liability. — Circumstances alone, unsupported by testimony of any eye witnesses, may be sufficient to establish a *prima facie* liability upon the part of a railroad company for injury to an animal from one of its trains.[39]

of a physician respecting exhibitions of anguish made by a patient on being informed of the possible results from the bite of a dog. Trinity & S. R. Co. *v.* O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389.

Words Spoken in Sleep. — "Take him off the dog was biting him" uttered by a boy two or three nights after being assaulted by a dog, held inadmissible. Plummer *v.* Ricker, 71 Vt. 114, 41 Atl. 1045, 76 Am. St. Rep. 757.

36. Muller *v.* McKesson, 73 N. Y. 195, 29 Am. Rep. 123; Van Bergen *v.* Eulberg, 111 Iowa 139, 82 N. W. 483; Fake *v.* Addicks, 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 716; Lynch *v.* McNally, 73 N. Y. 347; Linck *v.* Scheffel, 32 Ill. App. 17; Raymond *v.* Hodgson, 161 Mass. 184, 36 N. E. 791; Wolff *v.* Lamann, 21 Ky. Law 1780, 56 S. W. 408; Plumley *v.* Birge, 124 Mass. 57, 26 Am. Rep. 645.

37. Keightlinger *v.* Egan, 65 Ill. 235; Stuber *v.* Gannon, 98 Iowa 228, 67 N. W. 105; Chickering *v.* Lord, 67 N. H. 555, 32 Atl. 773; Bush *v.* Wathen, 20 Ky. Law 731, 47 S. W. 599; Sanders *v.* O'Callaghan, 111 Iowa 574, 82 N. W. 969.

38. Evidence to Show Previous Bad Condition of Cattle Guards Competent. — Evidence showing the condition of cattle guards and fences at place where animals killed got on right of way a year before, followed by proof of their continuous bad condition from then until the time of the injury, is competent. Chicago & E. I. R. R. Co. *v.* Chipman, 87 Ill. App. 292.

39. Burlington & M. R. R. in Neb. *v.* Campbell, 14 Colo. App. 141, 59 Pac. 424; Louisville & N. R. Co. *v.* Solomon, 127 Ala. 189, 30 So. 491; Louisville & N. R. Co. *v.* Lancaster, 121 Ala. 471, 25 So. 733.

"There was evidence from which the jury might have inferred that the engineer could have seen the animals on the track in time to have stopped short of striking them. If this were true, it was his duty to see them, and a failure to perform that duty was damnifying negligence.

"There was no burden on the plaintiff to prove that the tracks testified to by one witness were made by the mare or colt, or by the colt alone, at the time of the killing. That may have been important evidence for the plaintiff, but to say

3. Foot-Prints of Animals Near Place of Injury. — Evidence of foot-prints of animals near the place of injury is not only competent, but may have the effect to outweigh the testimony of eye witnesses upon given points of proof.[40]

4. Proof of Value of Animals. — A. Special Usefulness of Dog. In actions wherein the supposed pecuniary value of the dog may come in question, and there be no statutory guide nor attainable market standard, it may still be competent to introduce evidence tending to show that by his usefulness and services the dog has rendered himself of some special pecuniary value to his owner.[41]

B. Pedigree. — As respects animals of certain exceptional qualities, bred and maintained for especial purposes, evidence of pedigree is admissible as affecting the estimate of value.[42] And it is held

that the burden was on him to produce it is inapt, confusing and misleading. The jury might well have been reasonably satisfied that the tracks were made by the animals killed, or one of them, and still have had a doubt on that point." Louisville & N. R. Co. *v.* Brickerhoff, 119 Ala. 606, 24 So. 892.

Circumstances Unsupported by Eye Witnesses Sufficient Prima Facie. — The plaintiff described his animal as "a four year old half bred polled Angus bull, branded M. K. on the left side, and a piece cut out of his ear." Two other witnesses testified that the bull was plaintiff's; the evidence further showed that it was snowing up to 9 P. M. of the night of the killing, that the tracks at the place of killing were straight for a mile or more; that there were tracks between the rails for some distance to where the first bull was knocked off the track, and some twenty steps further to where the second bull was struck. There was snow on the ground; the animals were black. The court said: "We think sufficient was shown by plaintiff to put the defendant to its proof. In fact, we do not well see, in the absence of an eye witness, how more could be proved by plaintiff." Kelly *v.* Oregon Short Line R. Co. (Idaho), 38 Pac. 404.

40. Illinois Cent. R. Co. *v.* Abernathey (Tenn.), 64 S. W. 3; Louisville & N. R. Co. *v.* Brinkerhoff, 119 Ala. 606, 24 So. 892.

41. Spray *v.* Ammerman, 66 Ill. 309.

Evidence of Either Market or Peculiar Value to Owner Is Competent. — The value of a dog may be either a market value, if the dog has any, or some special or pecuniary value to the owner that may be ascertained by reference to the usefulness and services of the dog. Heiligmann *v.* Rose, 81 Tex. 222, 16 S. W. 931, 26 Am. St. Rep. 804.

Farmers who know the value of a shepherd dog, which is chiefly valuable for its ability to herd cattle and horses, can give their opinions as to the value without showing that the dog has any marketable value on account of his breed or peculiar qualities which make him salable at some approximately regular price. Bowers *v.* Horen, 93 Mich. 420, 53 S. W. 535, 32 Am. St. Rep. 573, 17 L. R. A. 773.

42. Pacific Exp. Co. *v.* Lothrop, 20 Tex. Civ. App. 339, 49 S. W. 888; Ohio & Miss. R. Co. *v.* Stribling, 38 Ill. App. 17.

Evidence of Pedigree Admissible on Question of Damages. — In an action for alleged negligent killing of a race horse by a railroad, it was held competent to show the pedigree of the animal as shown by the American Stub books; the court said: "Undoubtedly the pedigree of a race horse constitutes an important element in determining its value, as it is matter of common knowledge that a much larger proportion of thoroughbred horses are successful

also that evidence of pedigree admissible in cases involving animals more purely domestic may be given in the case of a dog.[43]

C. Opinions of Farmers and Others. — In localities where the business of buying and selling animals is not carried on to the extent of establishing a general market value, farmers and others who have owned and used, bought and sold animals of similar character, are competent witnesses to give their opinions as to value.[44]

D. Matters in Mitigation. — a. *Bad Habits.* — Evidence of the bad habits of a dog may be given in evidence in an action to recover

racers than horses not so bred." Louisville & N. R. Co. *v.* Kice, 22 Ky. Law 1462, 60 S. W. 705.

In an action against a railroad company for killing and injuring horses it was held competent, as effecting the estimate of value, to give evidence of the pedigree of a certain mare, showing her blood relationship to Jay Eye See, and other noted trotting horses; and that for the purpose of proving the speed of such trotters it was held competent to introduce records of the American Trotting Association evincing it, but not by statements of one who purported to have read such record. Pittsburgh C. C. & St. L. R. Co. *v.* Sheppard, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732.

Evidence as to the name of the sires of the animal and unborn foal is admissible as an element of market value. Ohio & Miss. R. Co. *v.* Stribling, 38 Ill. App. 17.

The blood and excellence of the sire and dam of the animal alleged to have been killed were circumstances merely for the jury's consideration in passing upon the evidence which was offered to prove the market value of the bull for whose death the recovery was sought. Richmond & D. R. Co. *v.* Chandler (Miss.), 13 So. 267.

43. Hodges *v.* Causey, 77 Miss. 353, 26 So. 945, 78 Am. St. Rep. 525; Hamilton & Son *v.* Wabash, St. L. & P. R. Co., 21 Mo. App. 152.

Pedigree, When Evidence of, Admissible. — In an action for the injury and killing of a dog much evidence was given on the trial upon the question of the dog's pedigree and ancestry. The court said: "It is shown that certain books are kept, and in them there is a registration of pedigrees kept for the information of the public, not only as to horses, but also, as to cattle and dogs. Upon the general question as to the admissibility of evidence of the dog's pedigree, and the qualities and performances of his ancestors, we think there can be no doubt but that such evidence is competent. The question of pedigree is really important so far only as it bears upon the question of value of the animal killed." Citizens Rapid Transit Co. *v.* Dew, 100 Tenn. 317, 45 S. W. 790.

44. Opinions of Farmers Admissible as to Value. — "The witnesses who testified as to value of the mare were owners of similar animals, used them, and had for years, in their occupation as farmers; had bought them, and, in some instances, sold animals of this character; and we think that under such circumstances their opinion as to the value was competent, and of weight and should not be rejected because there did not happen to be an established and general market value for such animals in that community, there being no person in that neighborhood engaged actively in the business of buying and selling horses, so as to establish a market value." Burlington & M. R. R. in Nebraska *v.* Campbell, 14 Colo. App. 141, 59 Pac. 424.

The testimony as to the value of the horse by the appellee and his neighbors who knew it, was competent although they did not profess

damages for his killing, not in bar of the action, but in mitigation of damages.[45]

to be experts. Louisville & N. R. Co. *v.* Jones, 21 Ky. Law 749, 52 S. W. 938.

45. Reynolds *v.* Phillips, 13 Ill. App. 557; Dunlap *v.* Snyder, 17 Barb. (N. Y.) 561.

ANNUITIES.—See Insurance-Value; Expectation of Life; Mortality Tables.

ANSWERS.

By John D. Works.

CROSS-REFERENCES.

Admissions;
Best and Secondary Evidence;
Corporations;
Pleadings;
Witnesses;
Written Instruments.

I. SCOPE OF THE ARTICLE.

The effect of answers as evidence of admissions has been considered.[1] Answers under the common law and code systems of pleading need no special treatment under this head. They are not competent as original affirmative evidence, in favor of the party pleading them to establish any fact they may set up. Therefore it is as admissions, almost entirely, that such answers are competent as evidence. They, like other pleadings, may be received to show that such a pleading was filed in a given case, or what the issues in that case were and the like, but no farther.

As to the competency of evidence under the issues formed by the pleadings, depending upon whether the answer is sufficient or in proper form to admit proof, it will be taken up under the title "Pleadings."

II. ANSWERS IN SUIT IN EQUITY.

The effect of the answer in equity as evidence constituting admissions of the defendant has been considered in another place.[2] In this article its effect as original evidence in favor of the defendant will be treated.

1. Competent Evidence for Defendant. — The most important difference between answers in suits in equity and in actions at common law, and under the codes, is that they are, *where called for under oath by the bill, and responsive thereto*, competent and material evidence for the defendant.[3]

1. *See* "ADMISSIONS," p. 452.
2. *See* "ADMISSIONS," p. 445.
3. **When Competent Evidence for the Defendant.** — Story's Eq. Pl., § 849a; Beach Mod. Eq., § 366.

United States.— Farley *v.* Kittson, 120 U. S. 303, 7 Sup. Ct. 534; Morgan *v.* Tipton, 3 McLean 339, 17 Fed. Cas. No. 9809; Slessinger *v.* Buckingham, 17 Fed. 454.

Alabama. — Hogan *v.* Smith, 16 Ala. (N. S.) 600; Walthall *v.* Rives, 34 Ala. 91; Marshall *v.* Croom, 52 Ala. 554.

Arkansas. — Morrison *v.* Peay, 21 Ark. 110; Magness *v.* Arnold, 31 Ark. 103; Scott *v.* Henry, 13 Ark. 112; Roberts *v.* Totten, 13 Ark. 609.

Delaware. — In Wharton *v.* Clements, 3 Del. Ch. 209, it was contended that an answer should not be allowed as evidence in a suit charging the defendant with fraud. But the court held that the answer was competent the same as in other cases.

Georgia. — Eastman *v.* McAlpin, 1 Kelley 157.

Illinois. — Mey *v.* Gulliman, 105 Ill. 272.

Indiana. — Achey *v.* Stephens, 8 Ind. 411.

Maryland. — Stewart *v.* Duvall, 7 Gill. & J. 179; Dilly *v.* Barnard, 8 Gill. & J. 170.

Michigan.—Schwarz *v.* Wendell, 1 Walk. 267; Darling *v.* Hurst, 39 Mich. 765.

Mississippi. — Petrie *v.* Wright, 6 Smed. & M. 647.

North Carolina.—Hughes *v.* Blackwell, 6 Jones Eq. 73; Morrison *v.* Meacham, 4 Ired. Eq. 381.

Pennsylvania. — Eberly *v.* Groff, 21 Pa. St. 251.

South Carolina. — President etc. of Branch Bank of Columbia *v.* Black, 2 McCord Eq. 344.

Tennessee. — Jones *v.* Perry, 10 Yerg. 59; McConnell *v.* Com'rs. etc., 2 Humph. 53; Shown *v.* McMakin, 9 Lea 601, 42 Am. Rep. 680.

Vermont. — Blaisdell *v.* Bowers, 40 Vt. 126.

Virginia. — Chapman *v.* Turner, 1

2. Not Competent, Read by Opposing Party, Evidence for All Purposes. — And where the answer, not being competent in favor of a defendant, is read in evidence by the opposing party, it thereby becomes evidence for all purposes, and so much thereof as is beneficial to the defendant inures to his benefit.[4]

3. What Necessary to Overcome Effect Of. — The answer is generally held to be of such force and weight, as evidence in favor of the defendant, that it must be overcome by evidence of greater weight than that of one witness.[5]

Call 280, 1 Am. Dec. 514; Major *v.* Ficklin, 85 Va. 732, 8 S. E. 715.

In Pomeroy *v.* Manin, 2 Paine 476, 19 Fed. Cas. No. 11,260, it was conceded that in the state of Connecticut an answer in chancery is not evidence for the defendant unless the complainant seeks a disclosure, by an appeal to the conscience of the defendant, but, that, in the United States courts, a different rule obtains and that, upon a removal to the federal court, the practice in the state court would not be followed.

In Tracy *v.* Rogers, 69 Ill. 662, it was held that the rule in chancery making the answer of the defendant evidence in his favor, applied to an action to foreclose a mechanic's lien.

In Chaffin *v.* Chaffin, 2 Dev. Eq. 255, the question was as to the effect of answers to interrogatories, by the defendant, the suit being one for an accounting and it was held that the answer to interrogatories stood on the same footing, as evidence, as an answer to the bill.

4. Roberts *v.* Tennell, 3 B. Mon. (Ky.) 247.

5. What Degree of Proof Necessary to Overcome Answer. — 1 Story Eq. Pl., § 849a; Beach Mod. Eq., § 366.

England. — Evans *v.* Bicknell, 6 Ves. 174, 5 Rev. Rep. 245; Cooth *v.* Jackson, 6 Ves. 12; Mortimer *v.* Orchard, 2 Ves. Jr. 243; East India Co. *v.* Donald, 9 Ves. 275; Cooke *v.* Clayworth, 18 Ves. 12, 11 Rev. Rep. 137; Savage *v.* Brocksopp, 18 Ves. 336; Walton *v.* Hobbs, 2 Atk. 19; Sanson *v.* Rany, 2 Atk. 140; Only *v.* Walker, 3 Atk. 407.

United States. — Hughes *v.* Blake, 6 Wheat. 453; Southern Development Co. *v.* Silva, 125 U. S. 247, 8 Sup. Ct. 881; Union Bank *v.* Geary, 5 Pet. 99; Voorhees *v.* Bonesteel, 16 Wall. 16; Carpenter *v.* Providence etc. Ins. Co., 4 How. 185; Morrison *v.* Durr, 122 U. S. 518, 7 Sup. Ct. 1215; Vigel *v.* Hopp, 104 U. S. 441; Gilman *v.* Libbey, 4 Cliff. 447, 10 Fed. Cas. No. 5445; Scammon *v.* Cole, 3 Cliff. 472, 21 Fed. Cas. No. 12,432; Parker *v.* Phetteplace, 2 Cliff. 70, 18 Fed. Cas. No. 10,746; Badger *v.* Badger, 2 Cliff. 137, 2 Fed. Cas. No. 718; Delano *v.* Winson, 1 Cliff. 501, 7 Fed. Cas. No. 3754; Cushing *v.* Smith, 3 Story 556, 6 Fed. Cas. No. 3511; McNeil *v.* Magee, 5 Mason 244, 16 Fed. Cas. No. 8915; Towne *v.* Smith, 1 Woodb. & M. 115, 24 Fed. Cas. No. 14,115; Slessinger *v.* Buckingham, 17 Fed. 454.

Alabama. — Hogan *v.* Smith, 16 Ala. (N. S.) 600; Edmonson *v.* Montague, 14 Ala. (N. S.) 370; May *v.* Barnard, 20 Ala. 200; McMekin *v.* Bobo, 12 Ala. (N. S.) 268; Camp *v.* Simon, 34 Ala. 126; Beene *v.* Randall, 23 Ala. 514; Bryan *v.* Cowart, 21 Ala. 92; Marshall *v.* Howell, 46 Ala. 318; Marshall *v.* Croom, 52 Ala. 554; Turner *v.* Flinn, 67 Ala. 529; Tompkins *v.* Nichols, 53 Ala. 197; Smith *v.* Rogers, 1 Stew. & P. 317.

Arkansas. — Cummins *v.* Harrell, 6 Ark. 308; Wheat *v.* Moss, 16 Ark. 243; Jordon *v.* Fenno, 13 Ark. 593; Aiken *v.* Harrington, 12 Ark. 391; Byrd *v.* Belding, 18 Ark. 118; Dunn *v.* Graham, 17 Ark. 60; Spence *v.* Dodd, 19 Ark. 166.

Delaware. — Pickering *v.* Day, 2 Del. Ch. 333; Davidson *v.* Wilson, 3 Del. Ch. 307; McDowell *v.* Bank of Wilmington etc., 1 Harr. 369; Small *v.* Collins, 6 Houst. 273.

Florida. — White *v.* Walker, 5 Fla. 478; Carr *v.* Thomas, 18 Fla. 736;

Some of the cases hold that the answer must prevail unless over-

Stephens *v.* Orman, 10 Fla. 9; Foster *v.* Ambler, 24 Fla. 519, 5 So. 263.

Georgia. — Galt *v.* Jackson, 9 Ga. 151; Williams *v.* Philpot, 19 Ga. 367; Harris *v.* Collins, 75 Ga. 97; Durham *v.* Taylor, 29 Ga. 166; White *v.* Crew, 16 Ga. 416; Robinson *v.* Hardin, 26 Ga. 344; Low *v.* Argrove, 30 Ga. 129.

Illinois. — Mey *v.* Gulliman, 105 Ill. 272; O'Brian *v.* Fry, 82 Ill. 274; Walton *v.* Walton, 70 Ill. 142; Trout *v.* Emmons, 29 Ill. 433, 81 Am. Dec. 326; Marple *v.* Scott, 41 Ill. 50; Panton *v.* Tefft, 22 Ill. 367; Stauffer *v.* Machen, 16 Ill. 553; Swift *v.* Trustees of Schools, 14 Ill. 493; Martin *v.* Eversall, 36 Ill. 222; Barton *v.* Moss, 32 Ill. 50; Myers *v.* Kenzie, 26 Ill. 36; Wildey *v.* Webster, 42 Ill. 108; Blow *v.* Gage, 44 Ill. 208; Fish *v.* Stubbings, 65 Ill. 492; Russell *v.* Russell, 54 Ill. 250; Martin *v.* Dryden, 1 Gilm. 187; Richeson *v.* Richeson, 8 Ill. App. 204.

Indiana. — Green *v.* Vardiman, 2 Blackf. 324; Pierce *v.* Gates, 7 Blackf. 162; Nash *v.* Hall, 4 Ind. 444; Calkins *v.* Evans, 5 Ind. 441; McCormick *v.* Malin, 5 Blackf. 508; Jenison *v.* Graves, 2 Blackf. 440.

Kentucky. — Vance *v.* Vance, 5 T. B. Mon. 521; Hudson *v.* Cheatham, 5 J. J. Marsh. 50; McCrum *v.* Preston, 5 J. J. Marsh. 332; Patrick *v.* Langston, 5 J. J. Marsh. 654; Sullivan *v.* Bates, 1 Litt. 41; Pringle *v.* Samuel, 1 Litt. 43, 13 Am. Dec. 214; Patterson *v.* Hobbs, 1 Litt. 275; Lee *v.* Vaughn, 1 Bibb. 235; Bibb *v.* Smith, 1 Dana 580.

Maine. — Gould *v.* Williamson, 21 Me. 273; Appleton *v.* Horton, 12 Me. 23.

Maryland. — Hagthorp *v.* Hook, 1 Gill. & J. 270; Hopkins *v.* Strump, 2 Har. & J. 301; Rider *v.* Reily, 22 Md. 540; Glenn *v.* Grover, 3 Md. 212; West *v.* Flannagan, 4 Md. 36; Brooks *v.* Thomas, 8 Md. 367; Turner *v.* Knell, 24 Md. 55; Gelston *v.* Rullman, 15 Md. 260; Ing *v.* Brown, 3 Md. Ch. 521; Beatty *v.* Davis, 9 Gill 211; Roberts *v.* Salisbury, 3 Gill & J. 425; Thompson *v.* Diffenderfer, 1 Md. Ch. 489; Rich *v.* Levy, 16 Md. 74.

Mississippi. — Johnson *v.* Crippen, 62 Miss. 597; McGehee *v.* White, 31 Miss. 41; Lee *v.* Montgomery, 1 Miss. 109; Nichols *v.* Daniels, 1 Miss. 224.

Missouri. — Hewes *v.* Musick, 13 Mo. 395; French *v.* Campbell, 13 Mo. 485; Roundtree *v.* Gordon, 8 Mo. 19; Bartlett *v.* Glascock, 4 Mo. 62.

New Hampshire. — Miles *v.* Miles, 32 N. H. 147, 64 Am. Dec. 362; Moors *v.* Moors, 17 N. H. 481; Hollister *v.* Barkley, 11 N. H. 501; Page *v.* Page, 8 N. H. 187; Lawton *v.* Kittredge, 30 N. H. 500; Warren *v.* Swett, 31 N. H. 332.

New Jersey. — De Hart *v.* Baird, 19 N. J. Eq. 423; Stearns *v.* Stearns, 23 N. J. Eq. 167; Chance *v.* Teeple, 4 N. J. Eq. 173; Neville *v.* Demeritt, 2 N. J. Eq. 321; Wilson *v.* Cobb, 28 N. J. Eq. 177; Calkins *v.* Landis, 21 N. J. Eq. 133; Bird *v.* Styles, 18 N. J. Eq. 297; Force *v.* Dutcher, 18 N. J. Eq. 401; Vandegrift *v.* Herbert, 18 N. J. Eq. 466; Brown *v.* Bulkley, 14 N. J. Eq. 294; Bent *v.* Smith, 22 N. J. Eq. 560; Kinna *v.* Smith, 3 N. J. Eq. 14; Bent *v.* Smith, 20 N. J. Eq. 199; Marlitt *v.* Warwick, 18 N. J. Eq. 108; Frink *v.* Adams, 36 N. J. Eq. 485.

New Mexico. — Keeney *v.* Carillo, 2 N. M. 480.

New York. — Smith *v.* Brush, 1 Johns. Ch. 459; Dunham *v.* Jackson, 6 Wend. 22; Clason *v.* Morris, 10 Johns. 524, 4 N. Y. C. L. 1137; Mason *v.* Roosevelt, 3 Johns. Ch. 627; Atkinson *v.* Holroyd, 1 Cow. 691, 7 N. Y. C. L. 664; Stafford *v.* Bryan, 1 Paige Ch. 239, 2 N. Y. Ch. 631; Johnson *v.* Johnson, 1 Edw. Ch. 439, 6 N. Y. Ch. 201; Cushman *v.* Shepard, 4 Barb. 113; Jacks *v.* Nichols, 5 N. Y. 178.

North Carolina. — Bruce *v.* Child, 4 Hawks. 372; Lewis *v.* Owen, 1 Ired. Eq. 290; Averitt *v.* Foy, 2 Ired. Eq. 224; Alley *v.* Ledbetter, 1 Dev. Eq. 449; Hill *v.* Williams, 6 Jones Eq. 242.

Ohio. — Washburn *v.* Holmes, Wright 67; Miami Importing Co. *v.* Bank of U. S., Wright 249.

come by the satisfactory evidence of two witnesses, or of one witness

Pennsylvania. — Reed's Appeal (Pa. St.), 7 Atl. 174; Pusey *v.* Wright, 31 Pa. St. 387; Galbraith *v.* Galbraith, 190 Pa. St. 225, 42 Atl. 683; Delaney *v.* Thompson, 187 Pa. St. 343, 40 Atl. 1023; Horton's Appeal, 13 Pa. St. 67; Eberly *v.* Groff, 21 Pa. St. 251; Campbell *v.* Patterson, 95 Pa. St. 447; Nulton's Appeal, 103 Pa. St. 286; Rowley's Appeal, 115 Pa. St. 150, 9 Atl. 329.

South Carolina. — Moffat *v.* McDowall, 1 McCord Eq. 434; McDowell *v.* Teasdale, 1 Des. Eq. 457; Martin *v.* Sale, Bailey Eq. 1; Johnson *v.* Slawson, Bailey Eq. 453; McCaw *v.* Blewit, 2 McCord Eq. 90.

Tennessee. — Spurlock *v.* Fulks, 1 Swan 289; Searcy *v.* Pannell, 3 Cooke 110; Meek *v.* McCormick (Tenn.), 42 S. W. 458; Van Wyck *v.* Norvell, 2 Humph. 192; Baker *v.* Barfield, 23 Tenn. 515; Davis *v.* Turner, 10 Heisk. 447; Tansel *v.* Pepin, 13 Tenn. 452; Gray *v.* Faris, 15 Tenn. 154; Copeland *v.* Murphey, 2 Cold. 64; Carrick *v.* Prater, 29 Tenn. 270.

Vermont. — Pierson *v.* Catlin, 3 Vt. 272; Field *v.* Wilbur, 49 Vt. 157; Veille *v.* Blodgett, 49 Vt. 270.

Virginia. — Major *v.* Fincklin, 85 Va. 732, 8 S. E. 715; Love *v.* Braxton, 5 Call 537; Heffner *v.* Miller, 2 Munf. 43; Auditor etc. *v.* Johnson, 1 Hen. & Munf. 537; Beatty *v.* Thompson, 2 Hen. & Munf. 395; Wise *v.* Lamb, 9 Gratt. 294; Beatty *v.* Smith, 2 Hen. & Munf. 395; Beverley *v.* Walden, 20 Gratt. 147.

Wisconsin. — Smith *v.* Potter, 3 Wis. 384; Walton *v.* Cody, 1 Wis. 364; Parish *v.* Gear, 1 Pinn. 261.

"The general rule that either two witnesses or one witness with probable circumstances will be required to outweigh an answer asserting a fact responsively to a bill, is admitted. The reason upon which the rule stands, is thus: The plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness, in order to turn the balance. But certainly there may be evidence arising from circumstances stronger than the testimony of any single witness." Clark's Executors *v.* Van Riemsdyk, 9 Cranch 153.

"It has long been the settled law of this state, that if a bill charges fraud, and the answer denies it, the answer, if uncontradicted, is conclusive evidence for the defendant. Smith *v.* Rogers, 1 Stewart & Porter 317; Br. Bank Huntsville *v.* Marshall, 4 Ala. 60. The rule announced in these decisions, however, is not confined in its operation to charges of fraud alone. In all cases in our system of equity jurisprudence where the answer is verified in obedience to the requirement of the bill, it operates, so far as responsive, as evidence for the defendant, and must prevail unless disproved by two witnesses, or by one witness with corroborating circumstances. 1 Brickell's Dig. 738, and cases cited in section 1466. In the language of Judge Story: 'It is an invariable rule in equity, that where the defendant in express terms negatives the allegations of the bill, and the evidence is only of one person affirming as a witness what has been so negatived, the court will neither make a decree nor send the case to be tried at law, but will simply dismiss the bill. The reason upon which the rule stands is this: The plaintiff calls upon the defendant to answer an allegation of fact, which he makes; and thereby he admits the answer to be evidence of that fact. If it is testimony, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail unless the balance of proof is in his favor, he must either have two witnesses, or some circumstances in addition to a single witness, in order to turn the balance.' 2 Story's Eq. Jur. § 1528." Marshall *v.* Croom, 52 Ala. 554.

"In this case, when the sworn answer of defendant Mey was filed,

corroborated by circumstances which are equivalent in weight to another witness.[6] While in others the contrary is held, and the rule further declared that the answer may be overcome by circumstances alone if sufficiently strong to give sufficient weight to the complainant's case.[7]

A. When by Documentary Evidence. — While the rule is generally so stated, the testimony of a witness is not a necessary part of the evidence required to overcome a sworn answer. It may be overcome by documentary evidence alone.[8]

B. Where Bill Is Verified. — A distinction has been made

in August, 1875, it became evidence against the complainant in his favor, of such force that complainant could have no decree against him until the same was proven false by evidence equal to that of one witness, and in addition thereto a preponderance of proofs sufficient to sustain the bill if the oath to the answer had been waived. If it be conceded that complainant may file another bill, and litigate the matters upon their merits, this sworn answer remains proof on record against her, and she can have no decree until this is overcome by a preponderance of other proofs." Mey *v.* Gulliman, 105 Ill. 272.

"The only material controverted fact is, whether the orators have established by the requisite measure of proof, that the barn was built by them at the request of the trustee, Mary E. Wilbur. She denies in her answer making any such request in connection with her husband, or otherwise, and the answer is in this respect responsive to the bill. The only direct witness to such request is the orator, S. M. Field. Where a material fact stated in the bill is denied in the answer, the rule is well settled that something more than the testimony of one witness is required to sustain the bill and entitle the orator to a decree. The orator must overcome the denial in the answer by what is deemed equal to the testimony of two witnesses. Shattuck *v.* Gay *et al*, 45 Vt. 87. This rule does not require that the denial in the answer shall be overcome by the testimony of two living witnesses who were present and cognizant of the fact in controversy. Circumstantial evidence may, if of equal weight and credibility, take the place of the testimony of one or both of such witnesses. The amount of testimony or evidence required to be produced by the orator in such cases, though expressed numerically, is not always the same. If the defendant, by his answer, or otherwise, is shown to be a very reliable and credible witness, it is manifest that more weighty testimony should be required to overcome the denial in the answer, and to establish the averment in the bill, than there should be if the defendant was shown to be unreliable and entitled to but little credence. So, too, the testimony of witnesses, when to the same facts, is not always doubled by doubling the number. The rule must be construed and applied with good sense and reason, to each case, having reference to other well-established rules and principles in regard to weighing testimony. It requires that the credence and weight to be given to the answer, remembering that the orator has called the defendant into the case as a witness, is to be fairly overcome, and the averment in the bill is to be reasonably established by a preponderance which the law has denominated the testimony of a second witness." Field *v.* Wilbur, 49 Vt. 157.

6. Morrison *v.* Durr, 122 U. S. 518, 7 Sup. Ct. 1215.

7. **May Be Overcome by Proof of Circumstances Alone.** — White *v.* Crew, 16 Ga. 416; Jones *v.* Abraham, 75 Va. 466.

8. Jones *v.* Abraham, 75 Va. 466.

between cases in which the bill is verified, and those in which it is not, as to the amount or weight of evidence necessary to overcome the answer, the court in weighing the evidence taking the sworn bill as equal to the sworn answer, leaving it necessary only for the complainant to offer such additional evidence as will give him the preponderance.[9] But not where the bill is sworn to on information and belief.[10]

9. Searcy *v.* Burton, 3 Cooke (Tenn.) 110; McLard *v.* Linnville, 29 Tenn. 163.

10. Carrick *v.* Prater, 10 Humph. (29 Tenn.) 270.

Rule Stated. — The general rule and its limitations are thus fully and clearly stated in Carpenter *v.* Providence etc. Ins. Co., 4 How. (U. S.) 185:

"But how much of evidence should be required to prove that allegation, under the principles applicable to the circumstances of this case, is one of some difficulty, and is first to be settled. Where an answer is responsive to a bill, and, like this, denies a fact unequivocally and under oath, it must in most cases be proved not only by the testimony of one witness, so as to neutralize that denial and oath, but by some additional evidence, in order to turn the scales for the plaintiff. Daniel *v.* Mitchell, 1 Story's Rep. 188; Higbie *v.* Hopkins, 1 Wash. C. C. R. 230; The Union Bank of Georgetown *v.* Geary, 5 Peters 99. The additional evidence must be a second witness, or very *strong circumstances.* 1 Wash. C. C. R. 230; Hughes *v.* Blake, 1 Mason's C. C. R. 514; 3 Gill & Johns. 425; 1 Paige 239; 3 Wend. 532; 2 Johns. Ch. R. 92; Clark's Ex'rs *v.* Van Riemsdyk, 9 Cranch 153, says, 'with pregnant circumstances.' (Neale *v.* Hagthrop, 3 Bland's Ch. 567; 2 Gill & Johns. 208.)

"But a part of the cases on this subject introduce some qualifications or limitations to the general rule, which are urged as diminishing the quantity of evidence necessary here. Thus, in 9 Cranch 160, the grounds of the rule are explained; and it is thought proper there, that something should be detracted from the weight given to an answer, if from the nature of things the respondent could not know the truth of the matter sworn to. So, if the answer do not deny the allegation, but only express ignorance of the fact, it has been adjudged that one positive witness to it may suffice. 1 J. J. Marshall, 178. So if the answer be evasive or equivocal. 4 J. J. Marshall 213; 1 Dana 174; 4 Bibb 358. Or if it do not in some way deny what is alleged. Knickerbocker *v.* Harris, 1 Paige 212. But if the answer, as here, explicitly denies the material allegation, and the respondent, though not personally conusant to all the particulars, swears to his disbelief in the allegations, and assigns reasons for it, the complainant has in several instances been required to sustain his allegation by more than the testimony of one witness. (3 Mason's C. C. R. 294.) In Coale *v.* Chase, 1 Bland 136, such an answer and oath by an administrator were held to be sufficient to dissolve an injunction for matters alleged against his testator. So is it sufficient for that purpose if a corporation deny the allegation under seal, though without oath (Haight *v.* Morris Aqueduct, 4 Wash. C. C. R. 601); and an administrator denying it under oath, founded on his belief, from information communicated to him, will throw the burden of proof on the plaintiff beyond the testimony of one witness, though not so much beyond as if he swore to matters within his personal knowledge. 3 Bland's Ch. 567, note; 1 Gill & Johns. 270; Pennington *v.* Gittings, 2 Gill & Johns. 208. But, what seems to go further than is necessary for this case, it has been adjudged in Salmon *v.* Clagett, 3 Bland 141, 165, that the answer of a corporation, if called for by a bill, and it is responsive to the call, though made by a 'corporation aggregate under its seal,

C. Rule Has Its Exceptions.—The rule establishing the weight to be given to the answer has its exceptions. It may be controlled by written evidence referred to or made part of the answer.[11] It cannot be modified to meet the case where the evidence necessary to support the answer is within the reach of the defendant and inaccessible to the complainant.[12] It does not extend to answers on information and belief.[13]

D. Offered in Action at Law, Rule Not Applicable. — The rule does not apply where the answer to a bill of discovery is offered as evidence in an action at law.[14]

without oath,' is competent evidence, and 'cannot be overturned by the testimony of one witness alone.' We do not go to this extent, but see no reason why such an answer, by a corporation, under its seal and sworn to by the proper officer, with some means of knowledge on the subject, should not generally impose an obligation on the complainant to prove the fact by more than one witness. (5 Peters 111; 4 Wash. C. C. R. 601.) Here the denial by the corporation is explicit and responsive to the bill, and its truth sworn to by its president, 'according to the best of his knowledge and belief.' The only difficulty is in respect to the extent of that knowledge. He was not the president of the company at the time the information of the second insurance is alleged to have been given. Nor is it relied on in argument, that he was then a member and lived near, or was for any reason likely to be consulted when such notices were received. But he has since had access to all the files and records, in his official capacity, so as to know if any letter on this subject appears to have been received, and therefore testifies with some means of knowledge. And though it is admitted, that the certainty is not so great against the reception of the notice as if Jackson himself was alive and testified against it, yet, in the nature of the case and by the precedents, the denial is strongly enough made and supported to impose on the complainant the proof of his allegation by something more than the testimony of one witness, though not so much more, it is conceded, as the 'pregnant circumstances' before alluded to."

11. May Be Overcome by Writing Referred to Therein.—Thus, in Jones *v.* Belt, 2 Gill (Md.) 106, it is held that the rule that a positive denial in the answer must be overcome by two witnesses, etc., is not one of universal application, and that where an agreement was admitted in the defendant's answer, and held by the court to be the agreement of the parties, the written instrument was sufficient to control the answer denying the agreement, without the aid of any oral testimony in its support.

12. Thompson *v.* Diffenderfer, 1 Md. Ch. 489.

13. Rogers *v.* French, 19 Ga. 316.

14. Rule Does Not Apply Where Offered in Action at Law. — Hunter *v.* Wallace, 1 Over. (Tenn.) 239.

In Allen *v.* McNew, 8 Humph. (Tenn.) 46, an action of assumpsit, an answer to a bill of discovery was offered in evidence. The court below ruled that it required the testimony of two witnesses, or of one witness with strong corroborating circumstances, to countervail the statements of the answer. The supreme court held this to be error, saying that the whole of the answer must be read but that its truth, before the jury, should be weighed like other testimony, by its intrinsic character, subject to be set aside by what might be found in the answer itself, by the nature of the statement or by other proof.

But see Stillwell *v.* Badgett, 22 Ark. 22, in which it was held that under the statute of Arkansas, the answer to a petition for discovery is evidence as an answer to a bill of discovery would be in equity.

And Saltmarsh *v.* Bower, 22 Ala. 221, in which it was held that where

E. Where Plaintiff Offers in Action at Law. — Where the plaintiff introduces in evidence an answer to a bill of discovery in aid of an action at law, the answer is not conclusive upon him, but other evidence consistent with the issue, may be offered.[15]

4. Cannot Contradict Written Agreement. — The answer cannot be admitted to show that the intent and meaning of the parties to a written agreement were contrary to what appears on the face of it.[16]

5. Competency of Not Dependent on Defendant's Competency As a Witness. — If the plaintiff calls for a sworn answer from a defendant, he makes him a competent witness as to matters contained in the answer and responsive to the bill. Therefore, the answer is competent for him, although the defendant making it is not a competent witness.[17]

6. Cannot Be Weakened by Impeachment of Defendant. — The effect and weight of an answer cannot be affected by the degree of credit to which the defendant is entitled. Therefore, it is not competent to impeach the defendant by proof of his general bad character, as a means of weakening the effect of his answer.[18] But

interrogatories were procured in an action at law, under a statute providing therefor, the rules applied in chancery to answers to bills of discovery, must be applied to such answers when offered as evidence.

In Glover *v.* Foote, 7 Blackf. (Ind.) 292, where an issue raised was sent to be tried at law, it was held that the answer, if competent at all, could not be given the same weight before the jury that would be given it by the chancellor, but that the jury had the right to view it with the same suspicion that attends the testimony of an interested witness and give it such credit as they might think it deserved.

For a discussion of the difference in courts in chancery and at law, as to the effect given to the answer as evidence, see Humphreys *v.* Blevins, 1 Over. (Tenn.) 177.

15. Cox *v.* Cox, 2 Port. (Ala.) 533.

16. Carter *v.* Bennett, 6 Fla. 214.

17. Saffold *v.* Horne, 71 Miss. 762, 15 So. 639.

18. **Cannot Impeach Defendant to Weaken Answer.** — Brown *v.* Bulkley, 14 N. J. Eq. 294; Clark *v.* Bailey, 2 Strob. Eq. (S. C.) 143; Chambers *v.* Warren, 13 Ill. 319; Butler *v.* Catling, 1 Root (Conn.) 310.

"But there is a question of practice, of some importance, presented in this case which it is proper to notice. The complainant was permitted to discredit the defendant by impeaching his general character, as in the case of a witness. The argument is, that when the answer is responsive to the charges or interrogatories in the bill, he is made a witness by complainant, and his statements are to be regarded as true, unless disproved by two witnesses, or one with circumstances; and, therefore, he should be subject to impeachment in all the modes applicable to witnesses proper. It is insisted that the weight to be given to his answer depends on the strength of his character. But that is not so. The rule is based upon the consideration, that the complainant had called upon him to answer as to certain facts, and thereby puts him in the place of a witness to that extent. Having thus forced him into the position he occupies, and compelled him to answer on oath to the limited extent he chooses to prescribe, it is but reasonable that he should be bound by the responses he has extracted, unless he can disprove them. He may weaken them by circumstances intrinsic or extrinsic, but he cannot be allowed to discredit by attacking the general character. He could not do this as to a witness called by himself, much less a party

there are cases to the contrary.[19]

7. But May Be by Defects or Contradictions. — But while proof of the general bad character of the defendant is not allowed to affect the weight to be given the answer, as evidence, the answer itself may be so inconsistent, defective or contradictory in its different parts as to destroy its effect.[20]

made by his bill. It is easy to see how such a practice could be abused by turning every contest for rights into a war upon character. Such a practice would be intolerable, and is not sustained by either reason or authority." Murray *v.* Johnson, 1 Head (Tenn.) 353.

19. Miller *v.* Tollison, Harper Eq. (S. C.) 119.

20. May Be Overcome by Its Own Defects or Contradictions. — *Alabama.* — Crawford *v.* Kirksey, 50 Ala. 590; Cummings *v.* McCullough, 5 Ala. 324.

Arkansas. — Brittin *v.* Crabtree, 20 Ark. 309.

Georgia. — Harris *v.* Collins, 75 Ga. 97.

Maine. — Gould *v.* Williamson, 21 Me. 273.

Maryland. — Jones *v.* Belt, 2 Gill 106..

New Jersey. — Brown *v.* Bulkley, 14 N. J. Eq. 294; Stevens *v.* Post, 12 N. J. Eq. 408; Commercial Bank *v.* Reckless, 5 N. J. Eq. 650; Sayre *v.* Fredericks, 16 N. J. Eq. 205; Hoboken Bank *v.* Beckman, 33 N. J. Eq. 53.

New York. — Dunham *v.* Gates, 1 Hoff. 184.

North Carolina. — Moore *v.* Hylton, 1 Dev. 429.

Pennsylvania. — Baker *v.* Williamson, 4 Pa. St. 456.

Tennessee. — Brown *v.* Brown, 10 Yerg. 84.

Wisconsin. — Cooper *v.* Tappan, 9 Wis. 333; Hartley's Appeal, 103 Pa. St. 23.

As to the weight to be given to the answer or deposition of the defendant called for by the complainant, see Baker *v.* Williamson, 4 Pa. St. 456, in which it is said: "It is contended, that if Adam's testimony is taken as to the amount of the notes, it ought all to be taken together, and that as he swears to the gift, that ought to be taken also. If this part of his testimony was connected with, and in the same paragraph or sentence of the admission, perhaps the one ought not to be taken without the other. But in one part of his deposition he states the amount of the notes, and in another part he swears to the gift. The rule, as established under such circumstances, is, that the one part of the deposition may be relied on without admitting the other. In Blount *v.* Burrow, 4 Bro. Ch. 75, Lord Chancellor Hardwicke, after stating the rule at law, says, 'but what is sworn by a man's answer admits of a different construction, as if a man admit by his answer that he received several sums at different times, and in the same answer swears that he paid away those sums at different times in discharge of himself; otherwise, it would be to allow a man to swear for himself, and be his own witness.' We can readily perceive the reason of the distinction taken by his lordship; for alleging a new and independent defense is not directly responsive to the bill, and ought to be established by disinterested testimony; and even at law the rule is not much variant. Thus, in the case of Bermon *v.* Woodbridge, Lord Mansfield says: 'Though the whole of an affidavit or answer must be read, if any part is, you need not believe all equally; you may believe what makes against his point who swears without believing what makes for it.' Doug. 788. And the rule established in Davis *v.* Spurling, 1 Russ. & Mylne, 68, is to the same effect; and also in Parterich *v.* Powlet, 2 Atkins 383. Adam was made a witness, it is true, by the complainants, and therefore they cannot allege that his testimony is incompetent on account of his interest. But that cannot enforce the conscience of this

8. And by Defendant's Testimony at Trial. — So the testimony of the defendant at the trial may be such as to destroy the effect of the answer as evidence in his favor.[21]

court, or any other court, to believe all he says, even if contrary to the laws of nature, of mathematics, of moral science, or of facts satisfactorily established in the cause by disinterested testimony, and legal inference and presumption. The same may be said in regard to another allegation of the respondents, that is, that Adam's whole testimony must be taken as true, unless contradicted by two witnesses. In early chancery practice, the rule was perhaps so held; the court adopting the rule of the Roman law, *responsio unius non omnino audiatus*, when the main fact alleged in the bill was directly denied by the answer. But this rule has been gradually yielding to the experience, judgment, and enlightened jurisprudence of later times, when the matter is resolved into the credibility to be attached to the answer of the respondent under all the circumstances. And where his answer is precise, clear, and positive, to the main facts alleged in the bill, he is to be considered as any other witness, and when it is witness against witness, the chancellor will not decree, but dismiss the bill. Small and slight circumstances, however, will turn the scale, so small and slight, that it is impossible not to perceive that equity considers and appreciates the anomalous position of the respondent. 2 Story's Equity, § 1528; 1 Brown's Ch. Rep. 52; 9 Cranch 160; Clark *v.* Van Reimsdyk, Greenl. Ev. 297; Gresley's Eq. Ev. p. 4, and the numerous cases there cited. The whole of the evidence brings us irresistibly to the belief that Adam, in good faith and conscience, ought to be charged with the notes, and we perceive nothing in the rules of law and equity which prevents our deciding the case on that conviction."

21. Effect of Defendant's Testimony at the Trial. — Spencer's Appeal, 80 Pa. St. 317; Roberts *v.* Miles, 12 Mich. 297.

In Michigan, the supreme court has stated the rule as follows: "In other words, the rule amounts simply to this, that a decree can never be made in favor of a complainant unless the evidence preponderates in his favor; and that where answer and opposing witness are equally full, fair and explicit, there can be no such preponderance. See 2 Dan. Ch. Pr. 985. If, therefore, a defendant on the stand furnishes the means of destroying his own answer, and corroborating complainant's case, his testimony is preferable to his answer, for the same reason which makes any oral examination and cross examination more favorable for eliciting the truth than a statement where the affiant is not pressed to answer questions too rapidly to enable him to deliberate how he can best shape his response to secure his own ends. No one who desires to sift a witness would ordinarily prefer a discovery to an examination on the stand; but under our present system, where both may be resorted to, the choice is not very important. Mr. Headlam is of opinion that now the whole force of the old rule is done away: 2 Headlam's Dan. Ch. Pr. 3d ed. p. 676. He remarks: 'The defendant is now, as we have seen, enabled to obtain the benefit of his own testimony, and the court will probably not be bound by any previous decisions in balancing his testimony against that of a witness.' This old practice has often been misunderstood and misapplied, and since the statute has removed the only reason which ever made a discovery by answer necessary, we think there is no longer any occasion for giving to the evidence of a witness in one shape any more force than it would have in another. Strictly speaking, the old rule, when fairly carried out, may not have done so; but it is not to be denied that its existence has led practically, in many cases, to arbitrary and improper conclusions. We are therefore of opinion that an answer in chancery responsive to a bill is now to be

9. Contradicted in Material Point, Effect Of. — It is held that where an answer is disproved in a material point, it loses all weight as evidence and stands only as a pleading necessary to form the issue.[22]

10. Dismissal of Bill Destroys As Evidence. —The answer is given effect as evidence only because it is called for and is responsive to the bill or cross-bill, as the case may be. Therefore, if the bill, or cross-bill, to which it is an answer, is dismissed, the answer cannot be read in evidence in favor of the defendant.[23] But where the original bill is dismissed, and an amended bill filed, the sworn answers to the original are competent in favor of the defendant, although answer under oath to the amended bill is waived.[24]

11. Not Evidence for Defendant in Another Action. — The answer is evidence for the defendant only as against the bill to which it is opposed, and not in another action, or in support, in his favor, of another and different issue.[25]

A. To Bill of Discovery Offered in Action at Law. — It is

regarded as of the same force which it would have were it the defendant's deposition as a witness."

22. Contradicted in Material Point. — Pharis *v.* Leachman, 20 Ala. 662; Gunn *v.* Brantley, 21 Ala. 633; Prout *v.* Roberts, 32 Ala. 427; Fay *v.* Oatley, 6 Wis. 45; Forsyth *v.* Clark, 3 Wend. (N. Y.) 637, 10 N. Y. C. L. 495; Countz *v.* Geiger, 1 Call (Va.) 190.

23. Dismissal of Bill Destroys. In Saffold *v.* Horne, 71 Miss. 762, 15 So. 639, the cross bill had been dismissed and the answer thereto was held not to be competent thereafter as evidence in favor of the defendant.

24. Mey *v.* Gulliman, 105 Ill. 272.

25. Not Evidence in Another Action. — Phillips *v.* Thompson, 1 Johns. Ch. (N. Y.) 131, 1 N. Y. Ch. 87; Thompson *v.* French, 10 Yerg. (Tenn.) 452.

"An answer responsive to a bill avails the respondent in the hearing of the case in which it is part, but it is not evidence, for the party who makes it, in any other issue. It performs its office as a response to the bill it answers. Away from that, it has no function, and can serve no purpose of its author as evidence for him. It serves him only against the bill it answers. All that is found in the books as to the effect of an answer has reference to its effect or influence as to the bill answered, and not to other and different issues. After the dismissal of the ill-advised cross bill in this case, the cause stood on bill and answer, and no evidence was admissible, except such as would have been if a cross bill had not been thought of. The idea seems to have obtained that a defendant to a bill for relief, called on to answer under oath, is entitled ever afterwards to use as evidence in his behalf his answer thus made. Such an idea is without any support whatever in principle or authority, as may be discovered by any one who will diligently examine the subject." Saffold *v.* Horne, 71 Miss. 762, 15 So. 639.

In Branch Bank *v.* Parker, 5 Ala. (N. S.) 731, the question arose under a statute of Alabama providing for the propounding of interrogatories in actions at common law, the statute providing that answers to such interrogatories should be evidence at the trial of the cause, in the same manner, and to the same purpose and extent, and upon the same condition in all respects as if they had been procured upon a bill in chancery for discovery, but no further or otherwise. It was held that the answers could not be used as evidence unless they were offered by the opposite party by whom they were procured.

held that in case of an answer to a pure bill of discovery used on a trial at law, it is used as a matter of evidence to be read as the testimony of a witness, and to have like weight.[26]

B. When Offered on an Issue of Fact. — When offered upon the trial of an issue of fact, the answer of a defendant is properly excluded when offered by the defendant, if it has been disproved by more than one witness.[27] And it is held not to be competent at all on the trial of such issue unless it is directed to be read as a part of the evidence in the order for the trial of such issue.[28]

12. Taken to Be True Until Disproved. — If the answer denies a fact under oath, and no proof is offered in support of the fact by the complainant, the answer must be taken to be true.[29]

A. Complainant May Disprove. — If the complainant calls for relief as well as a discovery, he is not bound by the answer, but may resort to other evidence to prove his case, leaving the defendant to use his answer in his own behalf.[30]

a. *Rule Where Bill Is for Discovery Only.* — A distinction has

26. Fant *v.* Miller, 17 Gratt. (Va.) 187.

27. Cartwright *v.* Godfrey, 1 Murph. Law (N. C.) 422.

28. Jackson *v.* Spivey, 63 N. C. 261.

29. Taken To Be True Until Disproved. — *United States.* — McCoy *v.* Rhodes, 11 How. 131; Gettings *v.* Burch, 9 Cranch 372.

Alabama. — Edmondson *v.* Montague, 14 Ala. (N. S.) 370; Paulling *v.* Sturgus, 3 Stew. 95; Henderson *v.* McVay, 32 Ala. 471; Lucas *v.* Bank of Darien, 2 Stew. 280; Branch of the Bank *v.* Marshall, 4 Ala. 60.

Arkansas. — Cummins *v.* Harrell, 6 Ark. 308.

Georgia. — Imboden *v.* Etowah etc. Min. Co., 70 Ga. 86.

Illinois. — Cassell *v.* Ross, 33 Ill. 245; Duncan *v.* Wickliffe, 5 Ill. (4 Scam.) 452; O'Brian *v.* Fry, 82 Ill. 274.

Maine. — Alford *v.* McNarrin, 44 Me. 90.

Maryland. — Cowman *v.* Hall, 3 Gill & J. 398; Neale *v.* Hagthrop, 3 Bland 551.

Mississippi. — Fulton *v.* Woodman, 54 Miss. 158; Petrie *v.* Wright, 6 Smed. & M. 647.

Missouri. — Prior *v.* Mathews, 9 Mo. 267; Gamble *v.* Johnson, 9 Mo. 605; Laberge *v.* Chauvin, 2 Mo. 145.

New Hampshire.—Dodge *v.* Dodge, 33 N. H. 487.

New Jersey. — Graham *v.* Berryman, 19 N. J. Eq. 29; Allen *v.* Cole, 9 N. J. Eq. 286, 59 Am. Dec. 416; Morris etc. R. Co. *v.* Blair, 9 N. J. Eq. 635; Central R. Co. *v.* Hetfield, 18 N. J. Eq. 323.

New York. — Miller *v.* Avery, 2 Barb. Ch. 582; Murray *v.* Blatchford, 1 Wend. 583, 19 Am. Dec. 537.

Pennsylvania. — Paul *v.* Carver, 24 Pa. St. 207, 64 Am. Dec. 649; Peacock *v.* Chambers, 3 Grant Cas. 398.

South Carolina. — President etc. Branch Bank of Columbia *v.* Black, 2 McCord Eq. 344.

Wisconsin. — Coulson *v.* Coulson, 5 Wis. 79.

30. Complainant Not Bound By. *Alabama.* — Dunn *v.* Dunn, 8 Ala. (N. S.) 784; Fenno *v.* Sayre, 3 Ala. 458.

Illinois. — Chambers *v.* Warren, 13 Ill. 319.

Mississippi. — Carson *v.* Flowers, 7 Smed. & M. 99; Greenleaf *v.* Highland, 1 Miss. 375.

New York. — Jackson *v.* Hart, 11 Wend. 343.

North Carolina.—Harrison *v.* Bradley, 5 Ired. Eq. 136.

South Carolina. — Boyd *v.* Boyd, Harper Eq. 144.

Virginia. — Maupin *v.* Whiting, 1 Call 224; Thornton *v.* Gordon, 2 Rob. 750; Blanton *v.* Brackett, 5 Call 232.

been made in some of the cases between an answer as a pleading and as evidence, it being held that so much of the answer as is in response to interrogatories seeking discovery, by the defendant, is evidence called for by the plaintiff, but that part of the answer which goes to the allegations of the bill, as a cause for relief, is a pleading and not evidence; and that, therefore, if the bill is for a discovery only, the answer is evidence, wholly, and not a pleading, and the answer made is conclusive on the complainant.[31] But other cases declare the rule that an answer to a bill of discovery, or that part of the bill calling for discovery, where the bill is for relief and discovery, is of no greater weight, as evidence, than a responsive answer to the charging part of the bill for relief, and may be disproved by the complainant in the same way and by the same kind and degree of evidence in the one case as in the other.[32]

B. Must Be Direct, Responsive and Without Evasion.—This

31. Where Bill is for Discovery Only.—Miller *v.* Tollison, Harper Eq. (S. C.) 119; Jackson *v.* Hart, 11 Wend. (N. Y.) 343.

"An affirmative in the answer need not however be proved, if it be responsive to the stating or charging part of the bill, or an interrogatory authorized by either of them (Fenno *et al. v.* Sayre & Converse, 3 Ala. 478); for in such case the complainant has, by the frame of his bill, engaged to prove the negative. He has voluntarily assumed the onus, and cannot complain of the difficulty of the task he has undertaken. The complainant, in the formation of his bill, may at his election make as much or as little use of the defendant as he pleases, except that, according to the established course of chancery, he must receive a direct denial of his allegations by the defendant as evidence, as well as pleading. Responsive affirmations by the defendant, are most usually invited by the charging part of the bill, which is a negation of what are supposed to be the defendant's pretenses, or by the extended scope of the interrogatories. Neither of these it is said are essential parts of the bill, but are usually inserted, if with any definite object, to obtain a more particular disclosure from the defendants. If the bill contains the stating part, with a prayer that the defendant may answer, omitting all charges and interrogations, the complainant will not be compelled to receive the defendant's oath beyond a mere denial of the equity of his bill. (See 2 Mad. Ch. Prac. 137; Partridge *v.* Haycroft, 1 Ves. 574; Wakeman *v.* Grover, 4 Paige's Rep. 23.)" Branch of the Bank *v.* Marshall, 4 Ala. 60.

See, also, for a discussion of the twofold character of an answer in chancery, Smith *v.* St. Louis L. Ins. Co., 2 Tenn. Ch. 599.

In Thompson *v.* Clark, 81 Va. 422, it is directly held that where upon a pure bill of discovery the court retains and decides the cause, plaintiff cannot contradict the answer by other evidence, because the plaintiff would thereby prove himself out of court. See, also, to the same effect, Fant *v.* Miller, 17 Gratt. (Va.) 187.

32. Rule the Same Whether Bill for Discovery or Not.—Chambers *v.* Warren, 13 Ill. 319; Nourse *v.* Gregory, 3 Litt. (Ky.) 378; Williams *v.* Wann, 8 Blackf. (Ind.) 477; March *v.* Davison, 9 Paige Ch. (N. Y.) 580; Curtiss *v.* Martin, 20 Ill. 557.

In Greenleaf *v.* Highland, 1 Miss. 375, it is held that answers in chancery, whether to bills purely of discovery or those seeking relief also, are considered as the written confessions of the party making them, that they may be used as evidence against him and that matters in avoidance therein are subject to be supported or disproved by evidence *aliunde* on both sides.

rule of evidence giving such effect to the defendant's answer, grew out of the practice of submitting, as part of the bill, interrogatories to be answered by the defendant under oath; under this practice the evidence took the form of interrogatories and answers thereto, enforced at the instance of the plaintiff. And it is well settled that in order to give effect to the answer, as evidence for the defendant, it must be full, direct, responsive to the bill, and positive and without evasion.[33] It is not enough that the bill be answered literally. The answer must confess or traverse each charge in the bill.[34]

a. *General Denial, When Sufficient.* — But if a general denial is filed, the remedy of the complainant is to except to the answer, and if he does not, the answer will be held sufficient at the trial.[35]

33. Must Be Direct and Responsive. — *United States.* — Seitz *v.* Mitchell, 94 U. S. 580; Slater *v.* Maxwell, 6 Wall. 268.

Alabama. — Grady *v.* Robinson, 28 Ala. 289; Smilie *v.* Siler, 35 Ala. 88; Cummings *v.* McCullough, 5 Ala. (N. S.) 324; Lucas *v.* Bank of Darien, 2 Stew. 280.

Arkansas. — Pelham *v.* Moreland, 11 Ark. 442.

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

Illinois. — Derby *v.* Gage, 38 Ill. 27; Gregg *v.* Renfrews, 24 Ill. 621; Deimel *v.* Brown, 35 Ill. App. 303; Atkinson *v.* Foster, 134 Ill. 472, 25 N. E. 528.

Indiana. — Green *v.* Vardiman, 2 Blackf. 324.

Kentucky. — Price *v.* Boswell, 3 B. Mon. 13; Lewis *v.* Outton, 3 B. Mon. 453; Phillips *v.* Richardson, 4 J. J. Marsh. 212.

Maine. — Buck *v.* Swazey, 35 Me. 41.

Massachusetts. — New England Bank *v.* Lewis, 8 Pick. 113; Leach *v.* Fobes, 11 Gray 506.

Michigan. — Schwarz *v.* Wendell, 1 Walk. 267; Newlove *v.* Callaghan, 86 Mich. 301, 49 N. W. 214.

Mississippi. — Rodd *v.* Durbridge, 53 Miss. 694; Toulme *v.* Clark, 64 Miss. 471.

Missouri. — Martin *v.* Greene, 10 Mo. 652.

New Jersey. — Stevens *v.* Post, 12 N. J. Eq. 408; Allen *v.* Cole, 9 N. J. Eq. 286, 59 Am. Dec. 416.

New York. — Dunham *v.* Gates, 1 Hoff. 184.

Pennsylvania. — Coleman *v.* Ross, 46 Pa. St. 180; Com. *v.* Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Eberly *v.* Groff, 21 Pa. St. 251.

Tennessee. — Spurlock *v.* Fulks, 1 Swan 289; Sims *v.* Sims, 5 Humph. 369.

Vermont. — Blaisdell *v.* Bowers, 40 Vt. 126; Veile *v.* Blodgett, 49 Vt. 270; Rich *v.* Austin, 40 Vt. 416.

Virginia. — Wilkins *v.* Woodfin, 5 Munf. 183.

"The general rule of equity practice is, that when a defendant has, by his answer under oath, expressly negatived the allegations of the bill, and the testimony of one person only has affirmed what has been negatived, the court will not decree in favor of the complainant. There is then oath against oath. In such cases there must be two witnesses, or one with corroborating circumstances, to overbear the defendant's sworn answer. The reason for this is, that the complainant generally calls upon the defendant to answer on oath; and he is, therefore, bound to admit the answer, so far as he has called for it, to be *prima facie* true, and as worthy of credit as the testimony of any other witness. This rule, however, does not extend to averments in the answer not directly responsive to the allegations of the bill, for the complainant has not called for them." Seitz *v.* Mitchell, 94 U. S. 580.

34. Savage *v.* Benham, 17 Ala. 119; Parkman *v.* Welch, 19 Pick. (Mass.) 231.

35. Parkman *v.* Welch, 19 Pick.

b. *Argumentative Not Competent.* — Under the rule that the answer must be direct and positive, matter of argument or inference is not competent as evidence.[36]

c. *What Is Responsive.* — It is not always easy to determine when an answer is sufficiently responsive to admit it as evidence for the defendant, and upon this the authorities are, not unnaturally, in conflict. Each case depends materially upon its own facts, and the best that can be done is to cite the cases bearing on the question.[37]

(Mass.) 231; Smith *v.* St. Louis L. Ins. Co., 2 Tenn. Ch. 599.

In White *v.* Wiggins, 32 Ala. 424, it is said: "The defendant has not here contented himself with a denial, based upon, and referring to certain facts; but, in responding to a specific interrogatory, has taken up the subject a second time, and given a flat denial, not dependent upon any statement of facts. This general denial, that the defendant was insolvent as alleged in the bill, would, on exceptions to the answer, have been held insufficient, but for the rule of practice which prohibits exceptions to answers where a verification by oath is waived, because a literal denial, not meeting the charge, is insufficient. Woods *v.* Morrell, 1 John. Ch. 103; 2 Dan. Ch. Pl. and Pr. 835. But it is not the case of an omission to answer, because there is a plain denial of the allegation in the manner and form in which it is made. An admission of an allegation in a bill cannot be implied from the insufficiency of the answer to it. Savage *v.* Benham, *supra*; Parkman *v.* Welch, 19 Pick. 231."

36. Toulme *v.* Clark, 64 Miss. 471; Atkinson *v.* Foster, 134 Ill. 472, 25 N. E. 528; Copeland *v.* Crane, 9 Pick. (Mass.) 73.

37. What is Responsive Matter. *United States.* — Reid *v.* McAllister, 49 Fed. 16.

Alabama. — Ware *v.* Jordan, 21 Ala. 837; Manning *v.* Manning, 8 Ala. (N. S.) 138; Hanson *v.* Patterson, 17 Ala. 738; Wellborn *v.* Tiller, 10 Ala. (N. S.) 305; Buchanan *v.* Buchanan, 72 Ala. 55; Fenno *v.* Sayre, 3 Ala. 458; Powell *v.* Powell, 7 Ala. (N. S.) 582; May *v.* Barnard, 20 Ala. 200; Green *v.* Casey, 70 Ala. 417.

Arkansas. — Pelham *v.* Moreland, 11 Ark. 442; Wheat *v.* Moss, 16 Ark. 243.

Delaware. — Merriken *v.* Godwin, 2 Del. Ch. 236.

Georgia. — Smith *v.* Atwood, 14 Ga. 402; Laughlin *v.* Greene, 13 Ga. 359; Eastman *v.* McAlpin, 1 Kelley 157.

Illinois. — Gregg *v.* Renfrews, 24 Ill. 621.

Maryland. — Neale *v.* Hagthrop, 3 Bland 551; Glenn *v.* Grover, 3 Md. 212; Turner *v.* Knell, 24 Md. 55; Philadelphia Trust etc. Co. *v.* Scott, 45 Md. 451.

Michigan. — Schwarz *v.* Wendell, 1 Walk. 267.

Mississippi. — Rodd *v.* Durbridge, 53 Miss. 694; Lockman *v.* Miller (Miss.), 22 So. 822; Rossell *v.* Moffitt, 6 How. 303.

New Hampshire. — Bellows *v.* Stone, 18 N. H. 465.

New Jersey. — Cammack *v.* Johnson, 2 N. J. Eq. 163; Merritt *v.* Brown, 19 N. J. Eq. 286.

New York. — Dunham *v.* Gates, 1 Hoff. 184; Dunham *v.* Jackson, 6 Wend. 22; Hart *v.* Ten Eyck, 2 Johns. Ch. 62; Jackson *v.* Hart, 11 Wend. 343.

Pennsylvania. — Eaton's Appeal, 66 Pa. St. 483; Appeal of Kenney (Pa. St.), 12 Atl. 589; Pusey *v.* Wright, 31 Pa. St. 387; Cresson's Appeal, 91 Pa. St. 168; Appeal of Gleghorne, 118 Pa. St. 383, 11 Atl. 797; Bell *v.* Farmers' Dep. Nat. Bank, 131 Pa. St. 318, 18 Atl. 1079; Appeal of Rowley, 115 Pa. St. 150, 9 Atl. 329; Hand *v.* Weidner, 151 Pa. St. 362, 25 Atl. 38.

Rhode Island. — Ives *v.* Hazard, 4 R. I. 14, 67 Am. Dec. 500; Parkes *v.* Gorton, 3 R. I. 27.

Tennessee. — Walter *v.* McNabb, 1 Heisk. 703; Meek *v.* McCormick

d. *In Avoidance Not Evidence.* — It is only such matter as is responsive to the bill that is competent evidence for the defendant. Therefore, where matter in avoidance is pleaded, the answer is not competent evidence for the defendant, but the matter alleged must be proved by extrinsic evidence.[38] But some of the cases allow the

(Tenn.), 42 S. W. 458; Alexander *v.* Wallace, 10 Yerg. 105; Gass *v.* Simpson, 4 Cold. 288; Hopkins *v.* Spurlock, 2 Heisk. 152.

Vermont. — Mann *v.* Betterly, 21 Vt. 326; Rich *v.* Austin, 40 Vt. 416.

In Laughlin *v.* Greene, 13 Ga. 359, it is held that if the answer springs out of the allegations in the bill and its statements stand connected with the allegations although not literally and directly responsive, they are to go to the jury as evidence for the defendant for as much as they are worth.

The general rule on the subject is thus stated in Schwarz *v.* Wendell, 1 Walk. 267: "The general rule is, that whatever is responsive to the bill is evidence for, as well as against, the defendant. But there is frequently much difficulty in applying the rule, and regard must always be had to the case made by the bill, in determining what is, and what is not responsive. Is the fact stated in the bill, and answered by defendant, material to complainant's case, that is, must it be proved to entitle him to relief; or is it a circumstance from which such material fact may be inferred?—for the complainant may prove his case, by either positive or presumptive evidence. If it is, the answer, as it regards such fact, is responsive to the bill, and is evidence in the cause. It may also, sometimes, be evidence of a fact not stated in the bill; as where the bill sets forth part of complainant's case, only, instead of the whole, and the part admitted and stated in the answer shows a different case from that made by the bill, and is not matter in avoidance merely. As where a bill, filed to redeem stock, alleged it had been pledged for five hundred dollars, and the answer stated it was pledged for eight hundred dollars, in addition to the five hundred dollars stated in the bill, the answer was held to be responsive. Dunham *v.* Jackson, 6 Wend. R. 22. Here the answer, instead of being responsive to a particular fact stated in the bill, was responsive to complainant's case, which the answer denied, by showing a different case. But where the answer does not show a different case, but, admitting the case made by the bill, sets up new matter in avoidance of it, the answer is not evidence of such new matter. As where the defendant sets up usury, in his answer to a bill filed to foreclose a mortgage. Green *v.* Hart, 1 J. R. 850. Such are the general principles, to be adduced from the cases, for our guide in determining what parts of an answer are responsive to the bill."

In Merritt *v.* Brown, 19 N. J. Eq. 286, the interrogatory in the bill asked "for what purpose and consideration the said stock was assigned?" and it was held that an affirmative statement, in the answer, of the particulars of the transaction inquired about, was responsive.

So it was held in Reid *v.* McAllister, 49 Fed. 16, that in a suit to foreclose a mortgage against a husband and wife, an answer by the wife that her signature to the mortgage was procured by the fraudulent representations of the complainant, was responsive.

And the same conclusion was reached in Appeal of Rowley, 115 Pa. St. 150, 9 Atl. 329, where the suit was by one claiming to have subscribed to the stock of a corporation seeking to enforce his rights as a stockholder, and the answer admitted that the plaintiff subscribed to the stock but alleged that it was with the understanding that his subscription was for the benefit of another.

38. Matter in Avoidance Must Be Proved by Defendant. — 2 Story's Eq. Pl., 849a.

United States. — Reid *v.* McAllis-

answer to be evidence for the defendant whether the matter therein

ter, 49 Fed. 16; Lake Shore etc. R. Co. *v.* Felton, 103 Fed. 227, 43 C. C. A. 189; Carpenter *v.* Providence Ins. Co., 4 How. 185; McCoy *v.* Rhodes, 11 How. 131; Tilghman *v.* Tilghman, 1 Baldw. 464, 23 Fed. Cas. No. 14,045; Morgan *v.* Tipton, 3 McLean 339, 17 Fed. Cas. No. 9809.

Alabama. — Goodloe *v.* Dean, 81 Ala. 479, 8 So. 197; Ware *v.* Jordan, 21 Ala. 837; Forrest *v.* Robinson, 2 Ala. (N. S.) 215; Hanson *v.* Patterson, 17 Ala. 738; Wellborn *v.* Tiller, 10 Ala. (N. S.) 305; Buchanan *v.* Buchanan, 72 Ala. 55; Lucas *v.* Bank of Darien, 2 Stew. 280; Gordon *v.* Bell, 50 Ala. 213; Webb *v.* Webb, 29 Ala. 588; Branch of the Bank *v.* Marshall, 4 Ala. 60; McGowan *v.* Young, 2 Stew. 276; Marks *v.* Cowles, 61 Ala. 299; Green *v.* Casey, 70 Ala. 417; Holmes *v.* State, 100 Ala. 291, 14 So. 51.

Arkansas. — Pelham *v.* Moreland, 11 Ark. 442; Stillwell *v.* Badgett, 22 Ark. 164; Magness *v.* Arnold, 31 Ark. 103; Byers *v.* Fowler, 12 Ark. 218, 54 Am. Dec. 271; Whiting *v.* Beebe, 12 Ark. 421; Scott *v.* Henry, 13 Ark. 112; Roberts *v.* Totten, 13 Ark. 609; Walker *v.* Scott, 13 Ark. 644; Wheat *v.* Moss, 16 Ark. 243; Patton *v.* Ashley, 3 Eng. 290; Cummins *v.* Harrell, 6 Ark. 308.

Delaware. — Merriken *v.* Godwin, 2 Del. Ch. 236.

Georgia. — Lee *v.* Baldwin, 10 Ga. 208; Cartledge *v.* Cutliff, 29 Ga. 758; Neal *v.* Patten, 40 Ga. 363; Daniel *v.* Johnson, 29 Ga. 207.

Illinois. — O'Brian *v.* Fry, 82 Ill. 274; Roberts *v.* Stigleman, 78 Ill. 120; Mahoney *v.* Mahoney, 65 Ill. 406; Cooper *v.* Tiler, 46 Ill. 462, 95 Am. Dec. 442; Brown *v.* Welch, 18 Ill. 343, 68 Am. Dec. 549; Cummins *v.* Cummins, 15 Ill. 34; Lynn *v.* Lynn, 10 Ill. 602; Walton *v.* Walton, 70 Ill. 142; Harding *v.* Hawkins, 141 Ill. 572, 31 N. E. 307.

Indiana. — Green *v.* Vardiman, 2 Blackf. 324; Wasson *v.* Gould, 3 Blackf. 18; Pierce *v.* Gates, 7 Blackf. 162.

Iowa. — Schaffer *v.* Grutzmacher, 6 Iowa 137.

Kentucky. — Lampton *v.* Lampton, 6 T. B. Mon. 616; Vance *v.* Vance, 5 T. B. Mon. 521; Atwood *v.* Harrison, 5 J. J. Marsh. 329; Todd *v.* Sterrell, 6 J. J. Marsh. 425; Prior *v.* Richards, 4 Bibb 356; Ballinger *v.* Worley, 1 Bibb 195.

Maine. — Buck *v.* Swazey, 35 Me. 41; Gilmore *v.* Patterson, 36 Me. 544; O'Brien *v.* Eliott, 15 Me. 125; Warren *v.* Lovis, 53 Me. 463; Peaks *v.* McAvey (Me.), 7 Atl. 270.

Maryland. — Ringgold *v.* Ringgold, 1 Har. & G. 11, 8 Am. Dec. 250; Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626; Jones *v.* Belt, 2 Gill 106; McNeal *v.* Glenn, 4 Md. 87; Salmon *v.* Clagett, 3 Bland 125; Neale *v.* Hagthrop, 3 Bland 551; Gardiner *v.* Hardey, 12 G. & J. 365; Fitzhugh *v.* McPherson, 3 Gill 408; Hagthorp *v.* Hook, 1 Gill & J. 270.

Massachusetts. — New England Bank *v.* Lewis, 8 Pick. 113; Leach *v.* Fobes, 11 Gray 506, 71 Am. Dec. 732.

Michigan. — Schwarz *v.* Wendell, 1 Walk. 267; Van Dyke *v.* Davis, 2 Mich. 144; Hunt *v.* Thorn, 2 Mich. 213; Hart *v.* Carpenter, 36 Mich. 402; Millerd *v.* Ramsdell, Har. Ch. 373.

Mississippi. — Dease *v.* Moody, 31 Miss. 617; Brooks *v.* Gillis, 12 Smed. & M. 538; Wofford *v.* Ashcraft, 47 Miss. 641; Miller *v.* Lamar, 43 Miss. 383; Greenleaf *v.* Highland, 1 Miss. 375; Planters' Bank *v.* Stockman, 1 Freem. Ch. 502.

New Hampshire. — Bellows *v.* Stone, 18 N. H. 465.

New Jersey. — Neville *v.* Demeritt, 2 N. J. Eq. 321; Fisler *v.* Porch, 10 N. J. Eq. 243; Stevens *v.* Post, 12 N. J. Eq. 408; Roberts *v.* Birgess, 20 N. J. Eq. 139; Dickey *v.* Allen, 2 N. J. Eq. 40; Winans *v.* Winans, 19 N. J. Eq. 220; Miller *v.* Wack, 1 N. J. Eq. 204; Vanderhorf *v.* Clayton, 6 N. J. Eq. 192; Fey *v.* Fey, 27 N. J. Eq. 213; Brown *v.* Kahnweiler, 28 N. J. Eq. 311; Van Dyke *v.* Van Dyke, 26 N. J. Eq. 180; Wilkinson *v.* Bauerle (N. J. Eq.), 7 Atl. 514; Vorhees *v.* Vorhees, 18 N. J. Eq. 223.

New York. — Hart *v.* Ten Eyck,

is set up by way of denial, or as affirmative matter responsive to the bill.[39] But the correctness of this rule, so far as it relates to the

2 Johns. Ch. 62; Dunham *v.* Gates, 1 Hoff. 184; Jackson *v.* Hart, 11 Wend. 343; Wakeman *v.* Grover, 4 Paige Ch. 23; Atwater *v.* Fowler, 1 Edw. Ch. 417; Simson *v.* Hart, 14 Johns. 63; Dunham *v.* Jackson, 6 Wend. 22; Green *v.* Hart, 1 Johns. 580.

North Carolina. — Lyerly *v.* Wheeler, 3 Ired. Eq. 599; Jones *v.* Jones, 1 Ired. Eq. 332; Woodall *v.* Prevatt, Busb. Eq. 199; Fleming *v.* Murph, 6 Jones Eq. 59; Johnson *v.* Person, 1 Dev. Eq. 364.

Ohio. — Methodist E. Church *v.* Wood, 5 Ohio 283; Brown *v.* Cutler, 8 Ohio 142.

Pennsylvania. — Eaton's Appeal, 66 Pa. St. 483; Appeal of Kenney (Pa. St.), 12 Atl. 589; Pusey *v.* Wright, 31 Pa. St. 387; Vollmer's Appeal, 61 Pa. St. 118; Appeal of Luburg (Pa. St.), 17 Atl. 245; Appeal of Gleghorne, 118 Pa. St. 383, 11 Atl. 797; Bell *v.* Farmers' Dep. Nat. Bank (Pa. St.), 18 Atl. 1079.

Rhode Island. — Ives *v.* Hazard, 4 R. I. 14, 67 Am. Dec. 500; Parkes *v.* Gorton, 3 R. I. 27.

South Carolina. — Gordon *v.* Saunders, 2 McCord Eq. 151; Reeves *v.* Tucker, 5 Rich. Eq. 150.

Tennessee.—Alexander *v.* Wallace, 10 Yerg. 105; Cocke *v.* Trotter, 10 Yerg. 212; Wolfe *v.* Cawood, 1 Heisk. 597; Davis *v.* Clayton, 5 Humph. 445; State *v.* McAuley, 4 Heisk. 424; Gass *v.* Arnold, 6 Baxt. 329; Beech *v.* Haynes, 1 Tenn. Ch. 569.

Texas. — Thouvenin *v.* Helzle, 3 Tex. 57; Jouett *v.* Jouett, 3 Tex. 150.

Vermont. — Mott *v.* Harrington, 12 Vt. 199; Spaulding *v.* Holmes, 25 Vt. 491; Adams *v.* Adams, 22 Vt. 50; Cannon *v.* Norton, 14 Vt. 178; Lane *v.* Marshall, 15 Vt. 85; Pierson *v.* Clayes, 15 Vt. 93; McDonald *v.* McDonald, 16 Vt. 630; Sanborn *v.* Kittredge, 20 Vt. 632; McDaniels *v.* Barnum, 5 Vt. 279.

Virginia. — Paynes *v.* Coles, 1 Munf. 373; Leas *v.* Eidson, 9 Gratt. 277; Vathir *v.* Zane, 6 Gratt. 246; Purcell *v.* Purcell, 4 Hen. & Munf. 507.

Wisconsin. — Farmers' & Mechanics' Bank *v.* Griffith, 2 Wis. 324; Smith *v.* Potter, 3 Wis. 384; Walton *v.* Cody, 1 Wis. 364; Parish *v.* Gear, 1 Pinn. 261; Cooper *v.* Tappan, 9 Wis. 333.

39. *Georgia.* — Smith *v.* Atwood, 14 Ga. 402; Shields *v.* Stark, 14 Ga. 429.

Michigan. — Schwarz *v.* Wendell, 1 Walk. 267.

New Hampshire. — Bellows *v.* Stone, 18 N. H. 465.

New Jersey. — Merritt *v.* Brown, 19 N. J. Eq. 286.

New York. — Woodcock *v.* Bennet, 1 Cow. 711.

Pennsylvania. — Appeal of Rowley, 115 Pa. St. 150, 9 Atl. 329.

Vermont. — Adams *v.* Adams, 22 Vt. 50.

Rule the Same Whether Matter Affirmative or Negative. — In Smith *v.* Atwood, 14 Ga. 402, it was held that where an interrogatory in the bill calls upon a defendant to show by what pretended claim he refuses to deliver possession of property, and the defendant, in his answer sets up an assignment from the husband of the complainant (who had the right to execute the same) as such evidence of claim, the matter set up, though in discharge, is yet responsive because directly called for by the complainant, and may be admitted as proof of such assignment.

So it is held that when the answer is necessarily connected with or explanatory of the responsive matter it will be competent evidence.

In Bellows *v.* Stone, 18 N. H. 465, the rule is declared in general terms that the doctrine that if the plaintiff seeks to impeach the answer he must overcome it by more than the testimony of a single witness, is not limited to matters in the answer which deny what is stated in the bill, but extends to matter of affirmance, if the latter be in relation to a particular upon which the bill requires the defendant to make answer.

admission in evidence of affirmative matter, although responsive to the bill, has been doubted.[40]

"It is indeed questionable, whether, when the plaintiff's claim rests upon a written contract, or admission, and the defendant is called upon in the bill to admit, or deny, its existence, and does admit it, which makes a full case for the plaintiff, the defendant can go farther, and show that it is not now of binding obligation upon him. The opinion of Chancellor Kent, in Hart v. Ten Eyck, 2 Johns. Ch. R. 62, restricts the rule, as to defendant's right to discharge himself, when he is only charged by his admission in the answer, to the very same sentence, and to the same transaction. This case was, indeed, reversed in the court of error upon this point, as stated in a note to Woodcock v. Bennet, 1 Cow. 744, where the rule is laid down, which is substantially followed in the later cases in that state, that whatever is fairly a reply to the general scope of the claim set up in the bill, whether in the stating or charging part, and whether by way of denial, or excuse, or avoidance, is to be treated as evidence for the defendant. This is far more rational, and just, and easy of application, than the restricted rules contained in the case of Hart v. Ten Eyck; but I am not sure that it is yet fully established." Adams v. Adams, 22 Vt. 50.

"But it is claimed by the complainant that affirmative matter in avoidance, though responsive to the bill, is not evidence. Such, however, is not the rule. All matter strictly responsive, whether affirmative or negative, is evidence. But when the answer is direct to the allegation or interrogatory, either affirmative or negative, and in explanation or qualification, the defendant goes on to set up new matter to avoid the effect of his admission or denial, such new matter is not evidence; as if the bill alleged that the defendant, at a certain time and place executed a promissory note, and the defendant in answer admits the execution of the note, but sets up a want of consideration, or, when the complainant calls for an account, and charges receipt of money or property, and the defendant admits the receipt of the money or property and sets up matters in discharge, in such and similar cases, the matter of avoidance or discharge is not strictly responsive, and must be proved." Farmers' and Mechanics' Bank v. Griffith, 2 Wis. 324.

40. But Correctness of This Doctrine Doubtful. — "The general rule undoubtedly is that an answer which, while admitting or denying the facts in the bill, sets up other facts in defense or avoidance, is not evidence of the facts so stated. Sto. Eq., § 1529; Gresley's Eq. Ev., 13. This rule, upon a careful review of the authorities, was considered as well settled by Ch. Kent in Hart v. Ten Eyck, 2 J. Ch. 88; and, although its application to the facts of that case was held erroneous by the court of errors, it has been approved by the supreme court of the United States in Clements v. Moore, 6 Wall. 315, and by our supreme court in Napier v. Elam, 6 Yer. 113. The qualification of the rule, or of its application, established by the court of errors of New York, upon appeal in the case of Hart v. Ten Eyck, is stated to have been, for the decision was never reported, that if the facts in discharge or avoidance are a direct and proper reply to an express charge or interrogatory of the bill, then the answer is evidence of those facts. Woodcock v. Bennet, 1 Cow. 744, note. And this distinction has also been adopted by our supreme court. Alexander v. Williams, 10 Yer. 109; Goss v. Simpson, 4 Cold. 288; Walter v. McNabb, 1 Heisk. 703. And this whether the response be by a direct denial or by a statement of facts by way of avoidance. Hopkins v. Spurlock, 2 Heisk. 152. Some authorities are quoted as holding that where a defendant, in response to the bill, once admits liability, there is no escape except by proof of the matters of discharge or avoidance. Dyre v. Sturgess, 3 Des. 553; Paynes v. Coles,

e. *Is Answer of Payment Responsive.* — So it is held that an answer of payment is responsive and competent as evidence for the defendant.[41] But an answer of payment is certainly an affirmative defense in avoidance, and not a denial of any allegation in the bill. Therefore, the better rule would seem to be that such an answer is not competent evidence for the defendant.[42]

f. *When Admission and Avoidance One Fact.* — And it is held that where the admission and avoidance constitute one single fact or transaction, the answer is evidence of both.[43]

1 Munf. 395; Fisler *v.* Porch, 2 Stock. 248. It is probable, however, that a careful analysis of the cases would show that the rule is substantially the same everywhere, but its application is varied by the particular facts of the several cases.

"A qualification of the general rule is, that where the transaction is a continuous one, and the matters of charge and discharge occur at the same time, the whole statement must be taken together. Robinson *v.* Scotney, 19 Ves. 582; Lady Ormond *v.* Hutchinson, 13 Ves. 50; Thompson *v.* Lambe, 7 Ves. 588. The qualification is more broadly stated under the English practice in 2 Dan. Ch. Pr. 835, thus: 'Where a plaintiff chooses to read a passage from the defendant's answer, he reads all the circumstances stated in the passage. If the passage so read contains a reference to any other passage, that other passage must be read also.' Bartlett *v.* Gillard, 3 Russ. 157; Nurse *v.* Bunn, 5 Sim. 225. The old decisions went so far as to hold that a discharge in the same sentence with the charge would be evidence (because the whole context must be read), when it would not have been if stated separately. Ridgeway *v.* Darwin, 7 Ves. 404; Thompson *v.* Lambe, 7 Ves. 588. The consequences of which was, as stated by Mr. Gresley in his work on Evidence in Equity, p. 15, that formerly much of the skill required in drawing an answer consisted in uniting by connecting particles important points of the defendant's case with admissions that could not be withheld. The answer in the case now before me seems framed on these old cases. But the modern decisions are governed by the sounder rule of being controlled by the sense instead of the contiguity or grammatical structure of the sentences. Passages connected in meaning may be read together from distinct parts of the answer. Rude *v.* Whitechurch, 3 Sim. 562. And, on the other hand, if the matter in avoidance has been skillfully interwoven into the sentences containing responsive admissions, the complainant will be entitled to have the matter of avoidance considered as struck out. McCoy *v.* Rhodes, 11 How. U. S. 131; Baker *v.* Williamson, 4 Penn. St. 467, 3 Greenl. Ev., § 281." Beech *v.* Haynes, 1 Tenn. Ch. 569.

41. Is Answer of Payment Responsive. — Grafton Bank *v.* Doe, 19 Vt. 463; King *v.* Payan, 18 Ark. 583; Britt *v.* Bradshaw, 18 Ark. 530; Stevens *v.* Post, 12 N. J. Eq. 408; McCaw *v.* Blewett, 2 McCord Eq. (S. C.) 90.

42. Of Payment Not Evidence for Defendant. — Ison *v.* Ison, 5 Rich. Eq. (S. C.) 15; Walker *v.* Berry, 8 Rich. (S. C.) 33; Adams *v.* Adams, 22 Vt. 50; Hickman *v.* Painter, 11 W. Va. 386.

43. Appeal of Rowley, 115 Pa. St. 150, 9 Atl. 329; Cummins *v.* Cummins, 15 Ill. 34.

Thus it is held that where the defendant admits the signing of an instrument, but alleges that his signature was procured by fraud, the answer is evidence of both the signing and that the signature was so procured. Reid *v.* McAllister, 49 Fed. 16.

"It would seem from these, that where the answer admits facts which charge the defendant, and sets up, also, matter which discharges him, the latter is not evidence for him,

g. *If Responsive, Competent Whether Affirmative or Negative.* And again the general rule is laid down that all matter strictly responsive to the bill, whether affirmative or negative, is evidence for the defendant.[44]

h. *Competent Only Where Evidence of Fact Would Be.* — The answer cannot be taken to establish anything in bar of the relief prayed for which parol testimony would not be admitted to prove, as it is as evidence only that it is received.[45]

i. *Part Defective, Balance Competent.* — If the answer called for is insufficient in some of its parts, such defect does not render the balance of the answer, if sufficient, incompetent. The remedy of the complainant is to except and compel a full answer, and if he does not, he cannot object to the answer as evidence.[46]

g. *Hearsay Not Evidence.* — The answer to be competent as evidence for the defendant must state matters within his knowledge, and not mere hearsay.[47]

13. On Hearing on Bill and Answer. — A. Answer Taken to Be True. — If instead of filing a replication, which puts in issue the allegations of the answer, the complainant sets the case down for hearing on the bill and answer, the answer must be taken to be true and cannot be controverted, and the allegations in the bill denied by the answer are taken as disproved.[48] And this is held

unless the charge and discharge arise out of one transaction, in which case the defendant may state the whole transaction and it is all held responsive, and evidence in his favor. But perhaps this answer should be distinguished from those which are held to charge and discharge the defendant, and that the latter are those only which, while admitting that the defendant was once liable to the charge set up in the bill, go to discharge him by some matter in avoidance. But here, although we think the answer admits facts enough, which, unexplained, prove the usury alleged, yet, if it avoids it at all, it does not do it on the hypothesis that the usury really once existed, and is admitted and avoided, but by showing that it never did exist. And perhaps the phrase 'matter in avoidance,' as applied to an answer, relates only to such matter as avoids a conceded liability, and not to such as avoids the effect of facts admitted, which, if unexplained, might show the liability, but which, if explained, show that the liability never existed at all. So that a defendant, when answering a bill charging a transaction to have been of a certain character, although compelled to admit facts which would, alone, go to show the charge true, may, nevertheless, state other facts, which go to show that it really was of a different character, and be entitled to have the whole statement considered evidence for him." Cooper *v.* Tappen, 9 Wis. 333.

44. Responsive Evidence, Whether Negative or Affirmative. Farmers' & Mechanics' Bank *v.* Griffith, 2 Wis. 324; Cammack *v.* Johnson, 2 N. J. Eq. 163; Hannah *v.* Carrington, 18 Ark. 85.

45. But Only Where Parol Evidence Competent. — Winn *v.* Albert, 2 Md. Ch. 169; Neale *v.* Hagthrop, 3 Bland (Md.) 551; Kent *v.* Carcaud, 17 Md. 291; Jones *v.* Slubey, 5 Har. & J. (Md.) 372; Carter *v.* Bennett, 6 Fla. 214; Forrest *v.* Frazier, 2 Md. Ch. 147; Trump *v.* Baltzell, 3 Md. 295.

46. Whitney *v.* Robbins, 17 N. J. Eq. 360.

47. Stevens *v.* Post, 12 N. J. Eq. 408; Brown *v.* Bulkley, 14 N. J. Eq. 294.

48. On Bill and Answer Latter

to be so where the answer is defective and not responsive to the bill.[49] And where the answer is not positive, but on belief.[50] And

Taken To Be True. —*England.*—Barker *v.* Wyld, 1 Vern. Ch. 140.

United States. — Leeds *v.* Marine Ins. Co. 2 Wheat. 380; *In re.* Sanford Fork & Tool Co., 160 U. S. 247, 16 Sup. Ct. 291; U. S. *v.* Scott, 3 Woods 334, 27 Fed. Cas. No. 16,242; U. S. *v.* Trans-Missouri F. Ass'n, 58 Fed. 58, 7 C. C. A. 15.

Alaboma. — Forrest *v.* Robinson, 2 Ala. (N. S.) 215; Frazer *v.* Lee, 42 Ala. 25; White *v.* President etc. Florence Bridge Co., 4 Ala. (N. S.) 464.

Illinois. — Kitchell *v.* Burgwin, 21 Ill. 40; Knapp *v.* Gass, 63 Ill. 492; Mason *v.* McGirr, 28 Ill. 322.

Iowa. — State *v.* Jolly, 7 Iowa 15; Childs *v.* Horr, 1 Clarke 432.

Maryland. — Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762; Mason *v.* Martin, 4 Md. 124; McKim *v.* Odom, 3 Bland 407; Coutee *v.* Dawson, 2 Bland 264; Estep *v.* Watkins, 1 Bland 486; Eversole *v.* Maull, 50 Md. 95; Warren *v.* Twilley, 10 Md. 39.

Massachusetts. — Tainter *v.* Clark, 5 Allen 66.

Michigan.—Ruhlig *v.* Wilgert, 49 Mich. 399, 13 N. W. 791.

Mississippi. — Russell *v.* Moffitt, 6 How. 303.

New Jersey. — Hoff *v.* Burd, 17 N. J. Eq. 201.

New York.—Brinkerhoff *v.* Brown, 7 Johns. Ch. 217; Dale *v.* McEvers, 2 Cow. 118.

Ohio. — Gwin *v.* Sedley, 5 Ohio St. 97.

Pennsylvania. — Russell's Appeal, 34 Pa. St. 258; Randolph's Appeal, 66 Pa. St. 178; Goodyear *v.* Peck (Pa. St.), 20 Atl. 693.

Tennessee. — Martin *v.* Reese (Tenn.), 57 S. W. 419.

Vermont. — Doolittle *v.* Gookin, 10 Vt. 265.

Virginia. — Kennedy *v.* Baylor, 1 Wash. 162.

West Virginia.—Copeland *v.* McCue, 5 W. Va. 264.

Wisconsin. — Walton *v.* Cody, 1 Wis. 364.

"It is true, that when a cause proceeds to a hearing upon a bill and answer, the answer must be taken to be true in every particular. The reason for this rule is, that the complainant, failing to take issue by a replication, deprives the defendant of the opportunity to prove the matters set up in his answer. It is an admission on his part, that he is content with the case as the bill and answer present it, and that he cannot deny, or does not seek to question or deny, any of the matters set up. But when the complainant puts in a replication, he thereby controverts all the facts contained in the answer. He completes the issue between the parties. Then, as to all such matters as the complainant has addressed to the conscience of the defendant, the answer is evidence. It is evidence, as to such matters, because, and only because, the complainant has called the defendant as a witness to them. They are propounded by his bill. The answer responds to the bill, and so far is taken to be true." Walton *v.* Cody, 1 Wis. 364.

49. Even Where Not Responsive. De Wolf *v.* Long, 2 Gilm. (Ill.) 679; Perkins *v.* Nichols, 11 Allen (Mass.) 542; Doremus *v.* Cameron, 49 N. J. Eq. 1, 22 Atl. 802; Huyck *v.* Bailey, 100 Mich. 223, 58 N. W. 1002.

"If an answer is defective—if it is not responsive to the allegations of the bill, it should be excepted to, and on exception being allowed and the defendant ruled to put in a sufficient answer, on failing to comply, the bill is taken for confessed. If an answer is put in, no matter how defective, and there be no exceptions to it, and no replication, the cause is set down for hearing on bill and answer and exhibits, if any, and the answer is taken to be true, whether responsive to the bill or not." Kitchell *v.* Burgwin, 21 Ill. 40.

50. And on Belief. —Brinckerhoff *v.* Brown, 7 Johns. Ch. 217; Gates *v.* Adams, 24 Vt. 70.

whether the answer is in denial or avoidance.[51] And although it may be entirely improbable.[52]

a. *Statutory Modification.* — But a different rule prevails under statutory modifications in some of the states, it being held that the answer is taken to be true only so far as it is responsive to the bill.[53]

b. *Rule Applies Only to Pertinent Facts.* — The rule that the answer is conclusive applies only to the *facts* alleged, and not to alleged intentions or motives,[54] and to such matters only as are pertinent to the bill.[55]

c. *Admission in Must Be Considered.* — The admissions contained in the answer must also be considered, and they may sustain the bill.[56]

d. *When Rule Applies.* — The rule that the answer must be taken to be true applies only where the cause is set down for hearing, by order of the court, or by counsel, on the bill and answer, and not to a hearing on bill, answer and proofs.[57] Therefore, if the defendant waives the filing of a replication, either expressly or by conduct amounting to such waiver, and the proof is taken, the rule does not apply.[58]

14. On Bill, Answer and Replication. — Where the case is submitted on the bill, answer and replication, the allegations of the bill, not controverted by the answer, and the allegations of the answer responsive to the bill, must be taken to be true, and all allegations of the answer not responsive to the bill, but in avoidance of it, must be taken as untrue.[59]

15. Effect of Calling for, Modified by Statute. — The rule that the

51. And Whether in Denial or Avoidance. — Atkinson *v.* Manks, 1 Cow. (N. Y.) 691.

The reason given for holding that matters in avoidance must be taken to be true, is that by setting the case down on bill and answer the complainant deprives the defendant of the right to prove such matter, and he cannot, for that reason, be heard to say that it is not true. Salmon *v.* Clagett, 3 Bland (Md.) 125; Baldwin *v.* Lee, 7 Ga. 186.

In Eversole *v.* Maull, 50 Md. 95, the rule is stated to be that the answer is to be considered as true in regard to all matters in it which are susceptible of proof by legitimate evidence.

To the same effect, Warren *v.* Twilley, 10 Md. 39.

52. And Although Improbable. Booream *v.* Wells, 19 N. J. Eq. 87.

53. Under Statutes Must Be Responsive.—Wynn *v.* Rosette, 66 Ala. 517; Keiffer *v.* Barney, 31 Ala. (N. S.) 192.

54. Applies to Facts Alleged Only. — Belford *v.* Crane, 16 N. J. Eq. 265, 84 Am. Dec. 155.

55. And Matters Pertinent to the Bill. — Gunnell *v.* Bird, 10 Wall. 304.

56. Admissions Must Be Considered. — Lampley *v.* Weed, 27 Ala. 621; Crawford *v.* Kirksey, 50 Ala. 590.

57. When Rule Applies. — Corbus *v.* Teed, 69 Ill. 205; Hengst's Appeal, 24 Pa. St. 413; Carman *v.* Watson, 1 How. (Miss.) 333; Walton *v.* Cody, 1 Wis. 364; Forrest *v.* Robinson, 2 Ala. (N. S.) 215; White *v.* President etc. Florence Bridge Co., 4 Ala. (N. S.) 464.

58. Marple *v.* Scott, 41 Ill. 50; Jordan *v.* Brunough, 11 Ark. 702.

59. Submitted on Bill, Answer and Replication, What Admitted. U. S. *v.* Ferguson, 54 Fed. 28; Hopkins *v.* McLaren, 4 Cow. 667, 8 N. Y. C. L. 524.

complainant, by requiring an answer under oath, makes the answer evidence against him, whether he offers it in evidence or not, has been modified by statute in some of the states, where the doctrine has not been wholly overturned by enactment of the codes.[60]

16. Under Oath Waived, Incompetent for Defendant. — The answer, as we have seen, is made competent when made under oath, because such an answer is called for by the complainant, whereby he, in effect, makes the defendant a witness in the case. Therefore, if the complainant, in his bill, waives an answer under oath, the reason for admitting the answer as evidence does not exist, and it is not competent evidence for the defendant even if made under oath.[61]

A. Waiver Must Be in the Bill. — The waiver of the oath to be effectual, must be in the bill before answer, and cannot be made afterwards.[62] And must be unqualified.[63] But where a sworn answer has been interposed to the original bill, the complainant may, in an amended bill, waive an answer under oath to any new matter set up in the amended bill.[64] But it has been held that the com-

60. Effect of Calling for Answer on Oath Modified.—Davis *v.* Crockett, 88 Md. 249, 41 Atl. 66; Manley *v.* Mickle, 55 N. J. Eq. 563, 37 Atl. 738; Harrington *v.* Harrington, 15 R. I. 341, 5 Atl. 502; Brown *v.* Knapp, 7 W. Va. 678; Lowry *v.* Buffington, 6 W. Va. 249; Warren *v.* Twilley, 10 Md. 39; Taggart *v.* Boldin, 10 Md. 104; Mickle *v.* Cross, 10 Md. 352.

61. Under Oath Waiver Not Competent for Defendant. — *United States.* — Huntington *v.* Saunders, 120 U. S. 78, 7 Sup. Ct. 356; National etc. Co. *v.* Interchangeable etc. Co., 83 Fed. 26.

Alabama. — Goodloe *v.* Dean, 81 Ala. 479, 8 So. 197; Ladd *v.* Smith, 107 Ala. 506, 18 So. 195; Marks *v.* Cowles, 61 Ala. 299; Watts *v.* Eufaula Nat. Bank, 76 Ala. 474; Rainey *v.* Rainey, 35 Ala. 282; Mosser *v.* Mosser, 29 Ala. 313.

Georgia.—Imboden *v.* Etowah etc. Min. Co., 70 Ga. 86; Sims *v.* Ferrill, 45 Ga. 585; Woodward *v.* Gates, 38 Ga. 205.

Illinois.—James T. Hare Co. *v.* Daily, 161 Ill. 379, 43 N. E. 1096; Wallwork *v.* Derby, 40 Ill. 527; Hopkins *v.* Granger, 52 Ill. 504; Chambers *v.* Rowe, 36 Ill. 171; Willenborg *v.* Murphy, 36 Ill. 344; Adlard *v.* Adlard, 65 Ill. 212; Moore *v.* Hunter, 1 Gilm. 317; Patterson *v.* Scott, 142 Ill. 138, 31 N. E. 433.

Indiana. — Moore *v.* McClintock, 6 Ind. 209; Peck *v.* Hunter, 7 Ind. 295; Larsh *v.* Brown, 3 Ind. 234.

Maine. — Peaks *v.* McAvey (Me.), 7 Atl. 270.

Massachusetts.—Gerrish *v.* Towne, 3 Gray 82.

New Hampshire.—Ayer *v.* Messer, 59 N. H. 279.

New Jersey. — Symmes *v.* Strong, 28 N. J. Eq. 131; Hyer *v.* Little, 20 N. J. Eq. 443; Walker *v.* Hill, 21 N. J. Eq. 191; Sweet *v.* Parker, 22 N. J. Eq. 453.

New York. — Bartlett *v.* Gale, 4 Paige 503, 3 N. Y. Ch. 502; Lowry *v.* Chautauqua Co. Bank, Clarke Ch. 67, 7 N. Y. Ch. 53.

Rhode Island.—Harrington *v.* Harrington, 15 R. I. 341, 5 Atl. 502.

Tennessee. — Lindsley *v.* James, 3 Cold. 477.

Wisconsin. — Flint *v.* Jones, 5 Wis. 424.

62. Waiver of Oath Must Be in the Bill. — Bingham *v.* Yoemans, 10 Cush. (Mass.) 58.

63. Must Be Unqualified.—Woodward *v.* Gates, 38 Ga. 205.

64. Waiver as to New Matter in Amended Bill. — Jefferson *v.* Kennard, 77 Ill. 246.

General Rule as to Effect of Waiver of Oath. — In Lindsley *v.* James, 3 Cold. (Tenn.) 477, the question was as to the effect of an

plainant cannot, by waiving an answer under oath, take away the

answer under oath where the oath was waived in the bill. It was there said: "Ordinarily, if the bill is for discovery of evidence, and the answer is directly responsive to the bill, the complainant is bound by it, and no proof to sustain it is either requisite or necessary. Napier *v.* Elam, 6 Yer. 108-116. And this for the reason that the complainant, by seeking a discovery of the defendant, makes him a witness as to the facts sought to be disclosed, and cannot, because it is against him, object to the testimony. James *v.* Perry, 10 Yer. 81; 2 Story's Eq. Jur., 1528.

"This is the rule as established by repeated decisions in this state, when the answer is under oath; but how is it when the oath is waived, and thereby loses its character as evidence? The Code, § 4317, declares: 'The plaintiff may, in his bill, waive an answer from the defendant, under oath; in which case, the answer will be entitled to no more weight than the bill, as evidence.'

"Language, it would seem, could not be clearer than the words of the statute; and all the difficulty that arises on the construction, grows out of the conflict of authorities, found in the books, in relation to the weight of an answer not under oath, without reference to any existing statute. The answer of an individual not under oath, as the answer of a corporation under its common seal, seems, in our practice, only to create an issue in pleading, between the parties; and no decree without more, can be rendered, as to the issue thus created. Van Wyck *v.* Norvell, 2 Hum., 192-196; 2 Story's Eq. Jur., 1528.

"True, the answer not under oath, as well as an answer regularly sworn to, either in a bill for discovery, or for general relief, may contain such admissions as would entitle the complainant to a decree; but if the oath is expressly waived by the bill, it cannot, even in a bill for discovery, and when the answer is directly responsive to the allegations in the bill, so far be treated as evidence, as to enable the defendant, without more, to a decree in his favor. Bartlett *v.* Green, 4 Page's R., 503; Fisher *v.* Miller, 5 Page's R., 25."

In Morris *v.* Hoyt, 11 Mich. 9, the rule is thus stated: "The merits of the case depend mainly upon the facts admitted by the pleadings, no proofs having been taken except upon the reference after preliminary decree. The answer, being without oath, is but a pleading, and of no effect as mere evidence. So far as it admits the case made by the bill, as an admission in pleading, it relieves the complainant from proof; so far as it denies the facts, or controverts the case made by the bill, it puts the complainant to his proof. But so far as it alleges any new matter of avoidance, or any fact the burden of proving which would naturally rest upon the defendants, it is of no effect without proof.

"It will be observed, the bill waives the oath of the defendant to his answer, yet notwithstanding, the defendant puts in a sworn answer, and claims the benefit of it, insisting that it must be overcome by the testimony of two witnesses. This is absurd, and it is very improper practice for the solicitor of a defendant, in a case where the oath is waived, to put in an answer under oath, a practice that ought to be rebuked. Waiving the oath, the answer becomes mere pleading, if put in under oath. However 'sharp' the practice might have been supposed to be, by no possibility can the defendant derive any advantage from it; the answer still remains mere pleading. The testimony of the complainant was quite sufficient to establish the claim set up, and fully makes out the case stated in the bill." Willenborg *v.* Murphy, 36 Ill. 344.

"In the present case the answer is not evidence, though sworn to, because, first, its denials, or the facts it alleges, are not within the knowledge, and are not averred so to be, of the parties who answer; and because, secondly, the bill prays an answer without oath. When this is done, the answer if sworn to is

right of the defendant to verify his answer and thus make it evidence for himself.[65]

treated as if it were not. Stevens *v.* Post, 1 Beasley 408; Hyer *v.* Little, 5 C. E. Green 443. The testimony of the complainant must be therefore overruled." Sweet *v.* Parker, 22 N. J. Eq. 453.

65. Authorities That Waiver Does Not Destroy Effective Answer as Evidence. — Armstrong *v.* Scott, 3 G. Greene (Iowa) 433; Woodruff *v.* Dubuque & S. C. R. Co., 30 Fed. 91; White *v.* Hampton, 10 Iowa 238; White *v.* Hampton, 9 Iowa 181; Amory *v.* Lawrence, 3 Cliff. 523, 1 Fed. Cas. No. 336; Clements *v.* Moore, 6 Wall. (U. S.) 299; Heath *v.* Erie Ry. Co., 8 Blatchf. 347, 11 Fed. Cas. No. 6306; Jones *v.* Abraham, 75 Va. 466; Thornton *v.* Gordon, 2 Rob. (Va.) 750; Fant *v.* Miller, 17 Gratt. (Va.) 187; Vanderzer *v.* McMillan, 28 Ga. 339.

"The remaining question is as to the right of the orator to have the defendants Drexel, Morgan & Co., or the directors, prevented from voting upon the stock of others deposited. It is urged for the orator that the transaction creates a trust for the corporation itself. Whether it does or not depends upon whether what is done in this behalf is done with corporate funds, for the corporation. The bill charges that it is so done. The answer denies this, and in this respect it is directly responsive to the bill. By the law an answer so responsive is evidence which must be overcome by other evidence or stand. It is said that the orator waived an answer under oath, as the rules in equity provide may be done. This is not understood to take away the right to answer under oath, and, when a defendant does so answer, the effect of the answer as evidence would appear to rest upon the law of the subject, which the rules of court do not appear to attempt to change. The answer must therefore, in this respect, for the purposes of this motion, be taken to be true." Woodruff *v.* Dubuque & S. C. R. Co., 30 Fed. 91.

"Armstrong files a sworn answer, and it is now contended that inasmuch as such answer was waived by the complainants, that it cannot be received as evidence. We do not so understand the law. The practice of waiving an answer under oath originated in the state of New York, by virtue of an express provision in the statute—*vide* N. Y. R. S., p. 175, § 44. This provision, Chancellor Walworth says, was incorporated in the revised statutes at his suggestion, and it introduced a new principle into the system of equity pleading. It was intended to leave it optional with the complainant to compel a discovery in aid of the suit, or to waive the oath of the defendant if the complainant was unwilling to rely upon his honesty, and chose to establish his claim by other evidence. Burrus *v.* Looker, 4 Paige 227. Here is the origin of that practice which, we believe, has to some extent been adopted in our own state. It is purely statutory—an innovation upon long established chancery pleadings, and must be exclusively confined to those states that have adopted it by legislative enactment. It is not necessary, at this late period, to adduce reasons in support of the practice permitting the defendant to answer under oath, and such answer to be taken as testimony. We consider it a valuable feature in equity proceeding, and one that cannot be dispensed with without operating oppressively upon chancery defendants. Its antiquity, constituting as it does, one of the distinctive features between common law and chancery practice; the protection which it affords to those from whom discovery is sought; the only opportunity which it gives to purge the conscience; the continued acquiescence in such a practice, only interrupted by statute, are strong arguments in favor of its observance. We then lay down, as the settled doctrine, that a complainant cannot deprive a respondent from answering under oath. That notwithstanding such oath may be waived in the bill, yet he has a right to file a sworn answer, and such answer will be entitled to the same weight as evi-

B. Competent in Support of Motion to Dissolve Injunction. And the answer, if verified, is competent evidence in support of a motion to dissolve an injunction, although answer under oath is waived.[66]

17. Not Verified, Not Competent for Defendant. — The answer to be competent as evidence for the defendant, must be verified. If not, it serves only to put the allegations of the bill in issue.[67]

dence, as though the complainant called for an answer under oath. But admitting the answer of Armstrong as testimony, there is still sufficient evidence to justify the decree." Armstrong *v.* Scott, 3 G. Greene (Iowa) 433.

66. Although Oath Waived Competent to Support Motion to Dissolve. Walker *v.* Hill, 21 N. J. Eq. 191; Woodruff *v.* Dubuque etc. R. Co., 30 Fed. 91; Lockhart *v.* City of Troy, 48 Ala. 579; Gelston *v.* Rullman, 15 Md. 260; Dorsey *v.* Hagerstown Bank, 17 Md. 408; Hubbard *v.* Mobray, 20 Md. 165.

67. Incompetent When Not Under Oath. — *United States.* — Union Bank *v.* Geary, 5 Pet. 99; Whittemore *v.* Patten, 81 Fed. 527.

Alabama. — Buchanan *v.* Buchanan, 72 Ala. 55; Guthrie *v.* Quinn, 43 Ala. (N. S.) 561; Zelnicker *v.* Brigham, 74 Ala. 598.

Illinois. — Hopkins *v.* Granger, 52 Ill. 504; Jones *v.* Neely, 72 Ill. 449; Willis *v.* Henderson, 4 Scam. 13, 38 Am. Dec. 120; Harris *v.* Reece, 5 Gilm. 212.

Maryland. — Dorn *v.* Bayer, 16 Md. 144.

Michigan. — Morris *v.* Hoyt, 11 Mich. 9; Adair *v.* Cummin, 48 Mich. 375, 12 N. W. 495.

New Hampshire. — Wilson *v.* Towle, 36 N. H. 129.

New York. — Miller *v.* Avery, 2 Barb. Ch. 582.

Tennessee. — Dunlap *v.* Haynes, 4 Heisk. 476.

Wisconsin. — Smith *v.* Potter, 3 Wis. 384; Flint *v.* Jones, 5 Wis. 424.

In Harris *v.* Reece, 5 Gilm. (Ill.) 212, and in Willis *v.* Henderson, 4 Scam. (Ill.) 13, 38 Am. Dec. 120, the rule is thus stated:

"An answer put in without oath is not for any purpose evidence in the cause but performs the office of a pleading only."

Under the revised code of Alabama it was said by the supreme court of that state, in Guthrie *v.* Quinn, 43 Ala. 562: "The answer of the defendant Lewis in the court below, is put in without oath. This takes from it the force that it otherwise would have been entitled to as evidence in the cause on behalf of the defendant. In such case it merely puts the cause at issue and is of no more weight as evidence than the bill. Rev. Code, § 3328; Rainey *v.* Rainey, 35 Ala. 282. Then it did not require the testimony of two witnesses to overturn the answer and deposition of Lewis."

Again, in Lockhart *v.* City of Troy, 48 Ala. 579, the court say: "The statements of the bill, upon which its equity is presumed to rest, are directly denied by the answers. But it is contended, that as these denials are made in answers made without the support of a verification by oath, they ought not to be permitted to overturn the allegations of the bill, which is a sworn bill. But the complainants waive any oath to the answers, yet require them to be made and put in, upon the penalty of admitting the bill to be true, upon decree *pro confesso*. This is a privilege in favor of the complainants, which they can avail themselves of or not, as they choose. It takes from the answers their potency as evidence, and dispenses with the necessity, which would otherwise exist, of requiring two witnesses to overturn them. Rev. Code, § 3328. If, then, the complainants elect to waive the answers being made upon oath, it should not prejudice the defendant's rights beyond the limitation of the statute; that is, it leaves the answers in every other respect sufficient, except as testimony. Such unsworn answers are 'entitled to no more weight as evidence than the

18. Verified by One Not Having Knowledge. — The answer must not only be positive, but it must be verified by one having knowledge of the facts to render it competent as evidence for the defendant.[68]

bill.' It does not destroy its effect as a denial of the complainant's case. To treat them otherwise, would be to go beyond the purpose of the statute, and put it in the power of the complainants to use a privilege granted to them as a serious injury to the defendant beyond the purpose of the law. This would be neither equity nor justice, which is supposed to prevail in all the proceedings in a court of chancery. I therefore think that answers, the oath to which is waived by the complainants, must be treated as answers on oath, on motion to dissolve an injunction."

See also Zelnicker *v.* Brigham, 74 Ala. 598: "We encounter a fatal objection to this decree at the very threshold to the case. The right of the complainants to invoke the interference of a court of equity depends on the truth of the allegations in the bill, that they are the heirs at law of Thomas Botkin, deceased. This averment is denied by the answer. There is not a particle of proof to sustain it. Any further investigation of the cause would be profitless. It will be in time to do that when the complainants show a right to demand it. The fact that the bill dispenses with the oaths of the defendants to their answers does not relieve the complainants. It was still incumbent on them to sustain by proof the allegations of the bill put in issue by the answer. The answer in such case only ceases to be evidence for the defendants. It still puts in issue the averments of the bill, and throws on the complainants the burden of proving them to be true. The only difference is as to the amount of the proof necessary to do this. The same amount of evidence, which would sustain the material averments of a declaration when denied by a plea, would be sufficient."

68. Answer Without Knowledge Not Evidence. —*United States.*—Carpenter *v.* Providence etc. Ins. Co., 4 How. 185; Dutilh *v.* Coursault, 5 Cranch C. C. 349, 8 Fed. Cas. No. 4206; Brown *v.* Pierce, 7 Wall. 205.

Alabama. — Waters *v.* Creagh, 4 Stew. & P. 410; Garrow *v.* Carpenter, 1 Port. 359; Gibbs *v.* Frost, 4 Ala. 720; Godwin *v.* Young, 22 Ala. 553.

Arkansas. — Fairhurst *v.* Lewis, 23 Ark. 435; Biscoe *v.* Coulter, 18 Ark. 423.

Delaware. — Lattomus *v.* Garman, 3 Del. Ch. 232.

Illinois. — Fryrear *v.* Lawrence, 5 Gilm. 325.

Indiana. — State *v.* Holloway, 8 Blackf. 45; Townsend *v.* McIntosh, 14 Ind. 57.

Kentucky. — Young *v.* Hopkins, 6 T. B. Mon. 19; Combs *v.* Boswell, 1 Dana 473; Harlan *v.* Wingate, 2 J. J. Marsh. 139; Williamson *v.* McConnell, 4 Dana 454.

Maryland. — Dugan *v.* Gittings, 3 Gill 138, 43 Am. Dec. 306; Permington *v.* Gittings, 2 Gill & J. 208.

New Jersey. — Lawrence *v.* Lawrence, 21 N. J. Eq. 317; Sweet *v.* Parker, 22 N. J. Eq. 453.

Vermont. — Loomis *v.* Fay, 24 Vt. 240; Wooley *v.* Chamberlain, 24 Vt. 270.

Virginia. — Tabbs *v.* Cabell, 17 Gratt. 160; Jones *v.* Abraham, 75 Va. 466.

"While we are not disposed to controvert the existence of the general rule, that one witness alone, however positive, cannot overturn the denial of a defendant, as to a fact resting within his knowledge, we are not disposed to admit that it can, in this case, bring out the appellees. The answers of the assignee on this point, cannot be relied on for that purpose. They have no knowledge of the facts, and therefore their answers cannot be taken as doing more than putting the fact in issue; than asserting their ignorance, and requiring proof. Any satisfactory testimony, therefore, must be held sufficient to establish the fact against such answers. The answer of Hopkins must, therefore, contain the denial relied on, and the rule will not support it." Young *v.* Hopkins, 6 T. B. Mon. (Ky.) 19.

19. Must Be Verified by Defendant. — If the answer is called for under oath by the bill, necessarily it must be sworn to by the defendant to bring it within the rule that the answer must be true unless overcome by the required evidence to the contrary.[69]

20. On Belief, or Information and Belief. — An answer on mere belief, or on information and belief, is not such an answer as will stand as evidence for the defendant, but merely raises an issue that casts the burden of proof on the complainant, and the rule that the answer must be disproved by more than one witness does not apply.[70] In some of the cases the fact that the answer is made on belief, or without knowledge, is treated as going to the weight and not to the competency of the answer.[71]

69. McGuffie *v.* Planters' Bank, 1 Freem. Ch. (Miss.) 383.

70. **On Information and Belief, Not Evidence.** — *United States.* Lake Shore etc. R. Co. *v.* Felton, 103 Fed. 227, 43 C. C. A. 180; Hanchett *v.* Blair, 100 Fed. 817, 41 C. C. A. 76; Brown *v.* Pierce, 7 Wall. 205; Berry *v.* Sawyer, 19 Fed. 286; Slater *v.* Maxwell, 6 Wall. 268; Robinson *v.* Mandell, 3 Cliff. 169, 20 Fed. Cas. No. 11,959; Holladay Case, 27 Fed. 830.

Alabama. — Newman *v.* Newman, 12 Ala. 29; Paulding *v.* Watson, 21 Ala. 279; Pearce *v.* Nix, 34 Ala. 183.

Arkansas. — Watson *v.* Palmer, 5 Ark. 501.

Georgia. — Arline *v.* Miller, 22 Ga. 330.

Illinois. — Deimel *v.* Brown, 35 Ill. App. 303; Cunningham *v.* Ferry, 74 Ill. 426.

Kentucky. — Price *v.* Boswell, 3 B. Mon. 13; Whittington *v.* Roberts, 4 T. B. Mon. 173.

Maryland. — Philadelphia Trust etc. Co. *v.* Scott, 45 Md. 451; Dorsey *v.* Gassaway, 2 Har. & J. 402, 3 Am. Dec. 557; Doub *v.* Barnes, 1 Md. Ch. 127.

Massachusetts. — Copeland *v.* Cran[illegible], 9 Pick. 73; Buttrick *v.* Holden, 13 Metc. 355.

Mississippi. — McGuffie *v.* Planters' Bank, 1 Freem. Ch. 383; Toulme *v.* Clark, 64 Miss. 471; Carpenter *v.* Edwards, 64 Miss. 595; Snell *v.* Fewell, 64 Miss. 655.

New York. — Town *v.* Needham, 3 Paige Ch. 545, 3 N. Y. Ch. 268, 24 Am. Dec. 246; Dunham *v.* Gates, 1 Hoff. 184, 6 N. Y. Ch. 1110; Knickerbacker *v.* Harris, 1 Paige Ch. 209, 2 N. Y. Ch. 207.

Rhode Island. — Atlantic F. & M. Ins. Co. *v.* Wilson, 5 R. I. 479.

Tennessee. — McLard *v.* Linnville, 29 Tenn. 163; McKissick *v.* Martin, 12 Heisk. 311; Wilkins *v.* May, 3 Head 173.

Vermont. — Wooley *v.* Chamberlain, 24 Vt. 270.

71. **In Some Cases Treated as Going to Weight of Answer.** Clark *v.* Van Riemsdyk, 9 Cranch 153; Purvis *v.* Woodward (Miss.) 29 So. 917; Copeland *v.* Crane, 9 Pick. (Mass.) 73; Gamble *v.* Johnson, 9 Mo. 605; Allan *v.* O'Donald, 28 Fed. 17; Givens *v.* Tidmore, 8 Ala. (N. S.) 745.

"The weight of an answer must also, from the nature of evidence, depend, in some degree, on the fact stated. If a defendant asserts a fact which is not and cannot be within his own knowledge, the nature of his testimony cannot be changed by the positiveness of his assertion. The strength of his belief may have betrayed him into a mode of expression of which he was not fully apprised. When he intended to utter only a strong conviction of the existence of a particular fact, or what he deemed an infallible deduction from facts which were known to him, he may assert that belief or that deduction in terms which convey the idea of his knowing the fact itself. Thus, when the executors say that John Innes Clark never gave Benjamin Munro authority to take up money or to draw bills, when they assert that Riemsdyk, who was in Batavia, did not take this bill on the credit

21. Of Corporation Sworn to by Officer. — The rule that a sworn answer must be overcome by evidence greater in weight than that of one witness, applies to the answer of a corporation sworn to by one of its officers on his personal knowledge.[72] But it has been

of the owners of the Patterson, but on the sole credit of Benjamin Munro, they assert facts which cannot be within their own knowledge. In the first instance they speak from belief; in the last they swear to a deduction which they make from the admitted fact that Munro could show no written authority. These traits in the character of testimony must be perceived by the court, and must be allowed their due weight, whether the evidence be given in the form of an answer or a deposition. The respondents could found their assertions only on belief; they ought so to have expressed themselves; and their having, perhaps incautiously, used terms indicating a knowledge of what in the nature of things they could not know, cannot give to their answer more effect than it would have been entitled to, had they been more circumspect in their language." Clark's Executors *v.* Van Riemsdyk, 9 Cranch 153.

72. Effect of Verification by Officer of Corporation. — Kane *v.* Schuylkill Fire Ins. Co. (Pa. St.), 48 Atl. 989; Lindsley *v.* James, 3 Cold. (Tenn.) 477.

"The important question in this case, by which all the others are more or less affected, is whether an answer in equity of a corporation, sworn to by an officer on his personal knowledge, is entitled to the benefit of the equity rule that a responsive answer is evidence only to be overcome by the testimony of two witnesses, or of one witness with corroborating circumstances, or whether it is to be regarded as mere pleading. The precise origin of the rule has been the subject of difference of opinion among text writers, as is shown by the learned referee in this case. But the reason for it is fairly apparent. Cases in equity are those in which the law affords no adequate remedy. They are therefore exceptional, and, before a party should be granted exceptional and extralegal relief, his case should be established clearly. In issues at law all cases are clear in theory. If there is witness against witness and oath against oath, the jury decides which to believe, and finds a verdict for one party or the other. There is no room for doubt. But in equity, if there is oath against oath, ordinarily on paper, by depositions or testimony before an examiner, the matter as the early expression was, is in *equilibrio*, and there is no clear case for the chancellor to act upon. The complainant, having the burden of proof, must fail. But, whatever its origin, the rule is settled, and is a part of universal equity practice. The respondent is brought into court without his consent, and put to compulsory answer and disclosure of his knowledge on the subject of the suit for the benefit of his adversary. By the action of the plaintiff the testimony of defendant is thus made evidence, and it is only proper and just that, if the plaintiff does not find it all in his favor, he should be required to overcome it by a preponderance of evidence to the contrary. No sufficient reason has been presented why a corporation should not be entitled to the protection of the rule. It is said that a corporation cannot answer under oath, but only under seal. This is conceded, but it is purely technical. A corporation can only act through the persons of its officers or other agents. Its corporate seal is not action, but only evidence of action by the proper officers. When, therefore, to the answer under seal there is added the oath of an officer on his own knowledge, the whole becomes a corporate act, with all the advantages to the plaintiff of compulsory disclosure of the truth which he would have had in a suit against an individual, and he should take such advantages in the same manner *cum onere*. The point has not been much discussed in Pennsylvania, but the opinion of this court was indicated by the late Chief Justice Sterrett in Riegel *v.* Insurance

held that a verification by an officer does not meet the requirements of the rule for the reason that such officer is not a party defendant.[73] And that the proper officer may be made a party for the purpose of enforcing discovery by him under oath.[74]

22. Of Corporation Under Seal. — The use of its seal by a corporation will not take the place of an oath, and an answer under seal, without verification, is not competent evidence for the defendant.[75]

Co., 153 Pa. 134, 143, 25 Atl. 1070; and in Waller *v.* Coal Co., 191 Pa. 193, 202, 203, 43 Atl. 235, an express ruling in accordance with our present views was made by the court below, and necessarily by this court in affirming the decree on his opinion. The learned referee was of opinion that 'the very great weight of American authority is contrary to the view' of appellant, but the authorities do not sustain him. If we take out of the list of citations those which deal with answers under corporate seal only, there is no uniformity shown; and in the weightiest authority, the supreme court of the United States, the practice is settled in accordance with our views. Carpenter *v.* Insurance Co., 4 How. 219, 11 L. Ed. 931. We are therefore of opinion that the ruling of the referee was erroneous, and the tenth assignment must be sustained." Kane *v.* Schuylkill Fire Ins. Co. (Pa.), 48 Atl. 989.

73. Officer Not Party, Oath Insufficient. — Van Wyck *v.* Norvell, 2 Humph. (Tenn.) 192.

"It is insisted, however, that the facts hereinbefore stated, are proved only by one witness; and that as the answer contains a direct denial of them, there should be two witnesses, or corroborating circumstances, in addition to Norvell's testimony. This rule, has no application to a case like the present. The defendant here is a corporation. It answers by its corporate seal. It cannot swear to the answer, so as to oppose the oath of the defendant, to the oath of one witness, and thereby create the reason for two witnesses. Its answer does no more, therefore, than to create an issue in pleading between the parties. 6 Paige's Rep. 54. But it is said, the cashier of the bank has sworn to the answer. It may be replied, the cashier is no party to this suit. He is an entire stranger to the proceeding; as much so as he would be to a suit between two of his neighbors, the facts in relation to which he might happen to know. His affidavit in such a case, would have just as much efficacy as it can have in this case." Van Wyck *v.* Norvell, 2 Humph. (Tenn.) 192.

74. Officer May Be Made Party to Enforce Answer Under Oath. Lindsley *v.* James, 3 Cold. (Tenn.) 477; Smith *v.* St. Louis L. Ins. Co., 2 Tenn. Ch. 599.

"Admitting that the bill had been properly framed as a bill of discovery, were the defendants, John D. James and the bank, bound to answer? The discovery is sought, and the answer of the defendants, under oath, expressly waived. The bank, as a corporation, cannot answer, except under its corporation seal; and a disclosure, under the common seal of the corporation, however false, would subject the corporation to no punishment; and it would, therefore, of course, answer nothing to its prejudice. To avoid this difficulty, when it is necessary to obtain a disclosure from a corporation, it seems to be allowable to make a principal officer or agent of the corporation, a party, so far as the bill seeks for discovery; and that may be done, although such officer or agent, has no individual interest in the suit, and no relief can be had against him. 1 Dan. Ch. Pr., 180, 181, note 1; Story's Eq. Pl., § 235; 2 Story's Eq. Jur., §§ 1500, 1501." Lindsley *v.* James, 3 Cold. (Tenn.) 477.

75. Answer of Corporation Under Seal Not Competent Evidence. *England.* — Wych *v.* Meal, 3 P. Wms. 310.

United States. — Union Bank *v.* Geary, 5 Pet. 99.

Alabama. — Griffin *v.* State Bank, 17 Ala. 258.

But it is sufficient to raise an issue and put the plaintiff to the proof.[76]

23. When Competent in Favor of Co-Defendant. — The answer of one defendant is sometimes held competent evidence for a co-defendant where it is responsive to the interrogatories in the bill, but not otherwise.[77] But it is declared to be the general rule that the answer of one defendant is not competent evidence for his co-defendant.[78] If, however, the defendants are jointly liable and the

Maryland. — Maryland etc. Co. *v.* Wingert, 8 Gill 170; Bouldin *v.* Mayor etc. of Baltimore, 15 Md. 18; Farmers' and M. Bank *v.* Nelson, 12 Md. 35.

New York. — Lovett *v.* Steam Saw Mill Ass'n, 6 Paige 54, 3 N. Y. Ch. 896.

Tennessee. — Lindsley *v.* James, 3 Cold. 477; Van Wyck *v.* Norvell, 2 Humph. 192; Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 599.

Virginia. — Baltimore & O. R. Co. *v.* City of Wheeling, 13 Gratt. 40. But see to the contrary, Hogan *v.* Branch Bank, 10 Ala. 485; Haight *v.* Morris Aqueduct, 4 Wash. C. C. 601, 11 Fed. Cas. No. 5902.

76. But Sufficient to Raise an Issue. — Smith *v.* St. Louis Mut. Ins. Co., 2 Tenn. Ch. 599; Fulton Bank *v.* New York etc. Canal Co., 1 Paige Ch. 311, 2 N. Y. Ch. 659.

"There are other circumstances which go very far to take this case out of the application of the rule which requires corroborating evidence to support the testimony of a single witness against the answer. This is an injunction bill, filed upon the oath of the complainant. An answer in all cases, according to the course and practice of courts of chancery, must be sworn to unless dispensed with by order of the court under special circumstances. In the present case, the answer being by a corporation, it is put in under their common seal, unaccompanied by an oath. And although the reason of the rule, which requires two witnesses, or circumstances to corroborate the testimony of one, to outweigh the answer, may be founded in a great measure upon the consideration that the complainant makes the answer evidence by calling for it; yet this is in reference to the ordinary practice of the court, requiring the answer to be on oath, but the weight of such answer is very much lessened, if not entirely destroyed as matter of evidence, when unaccompanied by an oath; and indeed we are inclined to adopt it as a general rule, that an answer not under oath is to be considered merely as a denial of the allegations in the bill, analogous to the general issue at law, so as to put the complainant to the proof of such allegations." Union Bank *v.* Geary, 5 Pet. 99.

77. When Competent in Favor of Co-Defendant. — *Delaware.* — Pleasanton *v.* Raughley, 3 Del. Ch. 124.

Georgia. — Ligon *v.* Rogers, 12 Ga. 281.

Maryland. — Powles *v.* Dilley, 9 Gill 222.

Massachusetts. — Mills *v.* Gore, 20 Pick. 28.

Mississippi. — Salmon *v.* Smith, 58 Miss. 399.

New Jersey. — Hoff *v.* Burd, 17 N. J. Eq. 201.

Tennessee. — Davis *v.* Clayton, 5 Humph. 445; McDaniel *v.* Goodall, 2 Cold. 391.

Vermont. — Cannon *v.* Norton, 14 Vt. 178.

78. General Rule Against Competency. — Gilmore *v.* Patterson, 36 Me. 544; Cannon *v.* Norton, 14 Vt. 178; Blodgett *v.* Hobart, 18 Vt. 414; Lenox *v.* Notrebe, Hempst. 251, 15 Fed. Cas. No. 8246c; Carr *v.* Weld, 19 N. J. Eq. 319; Morris *v.* Nixon, 1 How. (U. S.) 118.

As to the general question whether an answer of one defendant is competent evidence in favor of another defendant, see Dunn *v.* Graham, 17 Ark. 60, in which it is said: "It is perfectly clear, that had Varn's answer been the opposite of what it was, it could never have been read by the complainants *against* Graham, unless, in connection with other tes-

answer of one defendant defeats the action as to him, it necessarily has the effect to defeat it as to his co-defendant, who can only be

timony establishing—not a community of interest merely, like that of tenants in common—but such an absolute unity and identity of interest and design between Graham and Yarn, by means of the fraud charged against them in the bill, as, under the ordinary rules of law, would have made the acts or admissions of either the acts or admissions of the other—like the acts or admissions of co-partners, or joint tenants, having a complete unity of title and interest, or of co-conspirators identified in common design. And this, because of the established rule, no longer open to question, that the answer of one defendant cannot be read in evidence against his co-defendant, unless he refers to such answer as correct, or is so combined and identified with the answering defendant, as to be bound, under the ordinary rules of law, by his confessions, declarations and admissions. Blakeny *v.* Ferguson *et al,* 14 Ark. 641, and cases there cited.

"But although that proposition is perfectly clear, it is equally clear, that Graham could not, nevertheless, insist that that answer should enure to his benefit by way of a legitimate operation, *against the complainants.*

"The adjudged cases, favoring the affirmative of the proposition, so far as they have come under our observation, do not go the length of holding that in every case, where the responsive answer of the responding defendant goes to destroy the foundation of the case made in the bill, it shall enure to the benefit of the co-defendant, by operating as evidence against the complainant in the whole case; but the reasoning, upon which these adjudged cases are based, and by which they are supported, does seem to go that far. They are, so far as we have seen cases, where the defendant, protected in this wise, was either *claiming under* the responding defendant, as in the case of Field *et al. v.* Holland *et al.*, 6 Cranch Rep. 8-24; and see, also, Judge Baldwin's exposition of that case in Pettit *v.* Jennings, 2 Robinson's (Va. Rep. 581); or elsewhere he occupied the attitude of a *stake-holder* for the complainant and his co-defendant, as in the case of Mills *v.* Gore, 20 Pick. Rep. 35. See, also, Greenl. Ev., vol. 3, § 283, p. 269.

"The reasoning, in support of the ruling in both of these classes of cases, is to the effect, that the complainant, having called upon the responding defendant for discovery, as to the whole case made in his bill, has thereby made him a credible witness against himself, as to his whole case; having interrogated him only as he desired; upon allegations framed in the manner most favorable to his own interest, and obtained the discovery sought, by searching and leading questions, the response has been obtained under the most favorable auspices for the complainant; and that the response, thus obtained, is not, as against the complainant, obnoxious to the objection for want of cross-examination, as it would be, if allowed to be used against a co-defendant. Hence it was supposed not unfair to hold in these cases, that it should not lay in the mouth of the complainant—when the response thus obtained went to destroy the foundation of the case made in his bill, to say it was not evidence *against* himself on the *whole case* made by his bill; in imperfect analogy to the rule, which holds a party to the answer of his own witness, who unexpectedly testifies the very opposite of what he anticipated.

"The argument to the contrary is, that the answer to a petition for discovery, stands as a deposition, and is not evidence, for any purpose, until read by the party obtaining it, who may read it, or not, at his election. Conway & Reyburn *v.* Turner & Woodruff, 3 Eng. Rep. 362, and cases there cited. But conceding this to be so, do the reasons, which sustain the rule, apply with full force, when the bill is not only for discovery, but also for relief consequent thereon; and that, too, in some one aspect of the bill, against all the defendants therein?"

liable with the defendant answering. So, in such case, the answer of one defendant goes to the relief of the other, and in that sense is evidence in his favor.[79]

24. Execution of Instrument Not Proved. — A written instrument may be referred to and attached to the answer, but this does not amount to proof of its execution.[80]

25. When Not Evidence on Appeal. — If the court below finds the answer to be untrue, it is no evidence of the facts relied upon on behalf of the defendant in the appellate court on the hearing on appeal.[81]

79. When Answer of One Defeats Joint Cause of Action. — McDaniel *v.* Goodall, 2 Cold. (Tenn.) 391; Cherry *v.* Clements, 29 Humph. (Tenn.) 551; Hartley *v.* Mathews, 96 Ala. 224, 11 So. 452.

80. Execution of Instrument Not Proved By. — Shepard *v.* Shepard, 36 Mich. 173.

81. Callender *v.* Colegrove, 17 Conn. 1.

APPEAL.—See Appeal Bonds.

APPEAL BONDS.

CROSS-REFERENCES.

Bonds;
Estoppel;
Judgments;
Principal and Surety;
Records.

I. THE BOND.

1. **Execution.** — A recital in the bill of exceptions is incompetent to prove the execution,[1] but in case of loss of the bond, the obligor's signature thereto may be proved by secondary evidence, either written or oral.[2]

II. PRESUMPTIONS.

1. **Authority to Execute.** — Authority to execute an appeal bond regular on its face will be presumed from its acceptance and approval, whether executed by an agent,[3] or by an attorney,[4] or a suretyship corporation.[5]

1. Hydraulic Co. *v.* Zeppenfeld, 9 Mo. App. 595.
2. Cincinnati Ins. Co. *v.* Harrison, 25 La. Ann. 1; Commercial Bank *v.* Harrison, 24 La. Ann. 361.
3. Lindner *v.* Aaron, 5 How. (Miss.) 581; Robertson *v.* Johnson, 40 Miss. 500; Belew *v.* Jones, 56 Miss. 592; Union Co. *v.* Bank, 2 Colo. 226.
4. Sullivan *v.* Dollins, 11 Ill. 16.
5. Gutzeil *v.* Pennie, 95 Cal. 598, 30 Pac. 836.

2. Delivery. — The filing of an appeal bond with the clerk of the court,[6] or his official indorsement thereon, when authorized to receive the same, is competent evidence of its delivery.[7]

Bond As Evidence. — The production of the appeal bond itself in an action thereon is *prima facie* evidence of proper delivery.[8]

3. Filing and Approval. — That an appeal bond was filed within time, is presumed from evidence of its acceptance and approval,[9] though the date of approval is shown only by that of filing,[10] or by that of the bond.[11]

Due Filing. — Due filing of the bond will be presumed from evidence of its presence in the transcript,[12] if it it also approved.[13]

Oral evidence is admissible to prove the filing and approval of an appeal bond,[14] and the records in the case are also proper evidence.[15]

Approval. — The approval of an appeal bond is established as a *prima facie* presumption by evidence of its filing,[16] or of its acceptance,[17] or of both,[18] or of its presence in and as a part of the transcript,[19] or of affirmation of judgment on appeal,[20] or by signing the citation and witnessing the bond by the court *a quo*.[21]

4. Justification. — Justification of sureties on an appeal bond may be presumed from evidence of the filing.[22]

5. Waiver of Objection. — Waiver of objection to an appeal bond on the ground of its insufficiency will be presumed, in absence of proof to the contrary, where it is shown to be filed and approved,[23] as will the objection to its filing beyond the time limit.[24]

6. Dore *v.* Covey, 13 Cal. 502; Holmes *v.* Ohm, 23 Cal. 268.

7. Byers *v.* Gilmore (Colo. App.), 50 Pac. 370.

8. Byers *v.* Gilmore (Colo. App.), 50 Pac. 370.

9. Carroll *v.* City of Jacksonville, 2 Ill. App. 481; McLane *v.* Russell, 29 Tex. 127.

10. Robinson *v.* Chadwick, 22 Ohio 527.

11. Evans *v.* Pigg, 28 Tex. 586.

12. Evans *v.* Pigg, 28 Tex. 586.

13. McLane *v.* Russell, 29 Tex. 127.

14. Woodburn *v.* Fleming, 1 Blackf. (Ind.) 4; Miller *v.* O'Reilly, 84 Ind. 168; McCrory *v.* Anderson, 103 Ind. 12, 2 N. E. 211; Carothers *v.* Wheeler, 1 Or. 94.

15. Hartley *v.* Cole, 120 Ind. 247, 22 N. E. 130.

16. Robinson *v.* Chadwick, 22 Ohio 527; Rawson *v.* Dofner, 143 Mass. 76, 8 N. E. 892; Keene *v.* Whittington, 40 Md. 480; Clapp *v.* Freeman, 16 R. I. 344, 16 Atl. 207.

17. Marshall *v.* Croom, 50 Ala. 479; Williams *v.* McConico, 25 Ala. 538.

18. Hanaw *v.* Bailey, 83 Mich. 24, 46 N. W. 1039; McCloskey *v.* Indianapolis Union, 87 Ind. 20; Asch *v.* Wiley, 16 Neb. 41, 20 N. W. 21.

19. Ohio R. Co. *v.* Hardy, 64 Ind. 454; Evans *v.* Pigg, 28 Tex. 586; McLane *v.* Russell, 29 Tex. 127; Rogers *v.* Ferguson, 32 Tex. 533; Lacy *v.* Fairman, 7 Blackf. (Ind.) 558; Jenkins *v.* Emery, 2 Wyo. 58.

20. Courson *v.* Browning, 78 Ill. 208.

21. Davidson *v.* Lanier, 4 Wall. 447.

22. Keene *v.* Whittington, 40 Md. 489.

Waiver of justification of sureties may be presumed from evidence of the bond being found in the case prepared and adopted by the court *a quo*. Gruber *v.* Washington R. Co., 92 N. C. 1; Moring *v.* Little, 95 N. C. 87.

23. Hancock *v.* Bramlett, 85 N. C. 393; Dore *v.* Covey, 13 Cal. 502.

24. Taliaferro *v.* Herring, 29

III. THE APPEAL.

1. Taking of Appeal. — In establishing the fact of an appeal taken, the bond itself is not competent evidence, except so far as its recitals may explain an ambiguity in the record, such as determining which of the parties appealed,[25] or the omission to enter the prayer and grant of appeal,[26] or to what court the appeal was prayed.[27]

2. Affirmance of Appeal. — A properly certified transcript of the record or order affirming the judgment from which an appeal is taken, or the record itself, is competent evidence of affirmance, in an action on the appeal bond.[28]

3. Remittitur. — The order of the appellate court affirming the decree or judgment from which the appeal was taken is conclusive evidence to establish the regularity of the appeal,[29] and is held *prima facie* evidence that the decree affirmed was the one appealed from.[30]

IV. COSTS AND DAMAGES.

Appeal bonds being intended to secure the appellee from all costs and damages consequent on the failure to sustain appellant's plea, the nature and extent of such costs and damages must be proved.[31]

Tenn. (10 Humph.) 271; Singer Co. *v.* Barrett, 94 N. C. 219.

25. Cooly *v.* Julin, 13 Tenn. (5 Yerg.) 439.

26. Lawler *v.* Howard, 10 Tenn. (Meigs) 15.

27. Rogers *v.* Cochran, 11 Tenn. (3 Yerg.) 311.

But in Hydraulic Co. *v.* Neumeister, 15 Mo. App. 592, it was held that the filing of the bond and the clerk's indorsement thereon were evidence of the taking of an appeal.

28. Grashaw *v.* Wilson (Mich.), 82 N. W. 73; Miller *v.* Vaughan, 78 Ala. 323; Robert *v.* Good, 36 N. Y. 408; Pierce *v.* Banta, 9 Ind. App. 376, 31 N. E. 812; Pray *v.* Wasdell, 146 Mass. 324, 16 N. E. 266; Harding *v.* Kuessner, 172 Ill. 125, 49 N. E. 1001; Gille *v.* Emmons (Kan.), 59 Pac. 338; Jenkins *v.* Hay, 28 Md. 547.

29. In Hill *v.* Burke, 62 N. Y. 111, in an action on an appeal bond, the *remittitur* of the court of appeals was in evidence, showing appeal and affirmation of judgment, and the court said: "This was, I think, conclusive evidence that an appeal had been duly taken by the filing of the notice with the undertaking, the service of the same, and of a copy of the undertaking as the code requires, and it was not necessary to establish, by other and independent evidence, that these preliminary steps, which are required to perfect the appeal, had been taken."

30. Pearl *v.* Wellmans, 11 Ill. 352; McDonald *v.* Allen, 128 Ill. 521, 21 N. E. 537.

In an action on an appeal bond alleging failure to prosecute with effect, it being shown that the judgment was affirmed more than ten years before, it was held that the due filing of a certified copy of the opinion of the court affirming judgment would be presumed. Buchanan *v.* Milligan, 125 Ind. 332, 25 N. E. 349.

31. Proving Rental Value of Realty. — Gilliam *v.* Coon, 10 Ill. App. 43; Shumnick *v.* Thompson, 25 Ill. App. 619; Higgins *v.* Parker, 48 Ill. 445.

Judgments in Foreclosure. — Scott *v.* Marchand, 88 Ind. 349; Willson *v.* Glenn, 77 Ind. 585.

In General. — Sanger *v.* Nadlehoffer, 34 Ill. App. 252; Bank *v.* Swann, 4 Cranch C. C. 139, 2 Fed.

Cas. No. 902; Tucker *v.* Lee, 3 Cranch C. C. 684, 24 Fed. Cas. No. 4221; Thalheimer *v.* Crow, 13 Colo. 397, 22 Pac. 779; Jenkins *v.* Hay, 28 Md. 547.

Record Evidence. — A certified statement of the clerk of the court who is authorized to tax costs is competent evidence of the amount of such costs, in an action on an appeal bond covering the same. Thalheimer *v.* Crow, 13 Colo. 397, 22 Pac. 779; Parisher *v.* Waldo, 72 Ill. 71.

APPLICATION.—See Payments; Insurance.

APPOINTMENT—See Principal and Agent; Officers, Executors and Administrators; Guardian and Ward; Receivers.

APPRAISAL.—See Value.

APPRENTICES.

By George W. Lewis.

I. PROVING APPRENTICESHIP.

1. By Indenture. — Apprenticeship is proved by producing in evidence the indenture by which the relation of master and apprentice is created.[1]

A. Approval of Indenture. — An indenture of apprenticeship is admissible in evidence, if the approval of the justices of the peace appears anywhere in, or upon, the indenture.[2]

B. Stamping of Indenture. — An unstamped indenture of apprenticeship, which by law should be stamped, is inadmissible in evidence.[3]

1. **Proof of Apprenticeship.** Williams *v.* Younghusband, 1 Stark. 139; Williams *v.* Morgan, 15 Ad. & E. 781.

An Indenture of Apprenticeship Regarded as a Deed, and when offered in evidence its execution must be proved as other deeds are proved. St. Clair *v.* Jones, Add. (Pa.) 343; Skillman *v.* Quick, 4 N. J. Law 102; Potter *v.* Hyndman, 1 Harr. (Del.) 123; Owen *v.* State, 48 Ala. 328.

2. **Indenture.** — *When Admissible.* State *v.* Hooper, 1 Houst. Crim. Cas. (Del.) 17.

3. *See* article "Stamp Acts."

2. Unsealed Contract. — A contract of apprenticeship must comply with all the requirements of the statute. It must be in writing,[4] and signed[5] and sealed[6] by the parties;[7] and lacking any of these requisites it is void and inadmissible in evidence to prove a binding contract.[8]

II. PROVING THE INDENTURE.

1. Indenture From Sister State. — A copy of the record of an indenture made in one state, authenticated under the acts of Congress of 1790, 14, or 1804, 15, without proof of being entitled to registry or entitled to full faith and credit in the courts of such state is inadmissible in evidence in another state.[9]

2. Foreign Indenture. — An indenture of apprenticeship, executed by the orphan's court of a foreign state, is binding under a peculiar jurisdiction, given by statute, and the statute of such state should be given in evidence in connection with the indenture.[10]

3. Proof by Subscribing Witness. — An indenture is admissible in evidence, on proof of its execution by one, only, of the subscribing witnesses.[11]

4. Counterparts. — When an indenture is executed in counter-

4. Owen *v.* State, 48 Ala. 328; St. Clair *v.* Jones, Add. (Pa.) 343; Phelps *v.* Pittsburg etc. R. Co., 99 Pa. St. 108; Overseers of Poor *v.* Overseers of Poor, 2 Cow. (N. Y.) 537.

5. The Contract of Apprenticeship Must Be Signed. — Phelps *v.* Pittsburgh etc. R. Co., 99 Pa. St. 108; Tague *v.* Hayward, 25 Ind. 427; Rex *v.* Newton, 1 Ad. & E. 238; Com. *v.* Atkinson, 8 Phila. (Pa.) 375; Parish of Castor and Accles, 1 Salk. 68; Overseer of Poor *v.* Overseer of Poor, 2 Cow. (N. Y.) 537; Lally *v.* Cantwell, 40 Mo. App. 44; Owen *v.* State, 40 Ala. 328.

Signature of Counterpart by Master is not essential to the validity of an indenture. Rex *v.* Fleet, Cald. 31; Rex *v.* St. Peter's on the Hill, 2 Bott. P. L. 367.

6. The Contract Must Be Sealed. Com. *v.* Wilbank, 10 Serg. & R. (Pa.) 416; Overseers of Poor *v.* Overseers of Poor, 6 N. J. Law 169; Hopwell *v.* Amwell, 3 N. J. Law 16.

An Instrument Not Having Affixed Thereto a Seal of Wax or Wafer Susceptible of Receiving An Impression has been held in New Jersey to be void as a contract of apprenticeship. A scroll or scribble of ink is insufficient for the purpose of a seal. Hopwell *v.* Amwell, 3 N. J. Law 169; Perrine *v.* Cheeseman, 11 N. J. Law 174; Flanigan *v.* The C. M. Ins. Co., 25 N. J. Law 506.

7. The Contract Must Be in Writing and Signed and Sealed by the Parties. — Rex *v.* White Church, Burr. Sel. Cas. 540; 1 Bott. P. L. 532; Phelps *v.* Pittsburgh etc. R. Co., 99 Pa. St. 108; Rex *v.* Stratton, Burr. Sel. Cas. 272; Rex. *v.* All Saints in Hereford, Burr. Sel. Cas. 656.

8. When Void and Inadmissible in Evidence. — Tague *v.* Hayward, 25 Ind. 427; Respublica *v.* Keppele, 2 Dall. (U. S.) 197; Overseers of Poor *v.* Overseers of Poor, 2 Cow. (N. Y.) 537; Reg. *v.* Callingwood, 2 Ld. Raym. 1116; Phelps *v.* Pittsburgh etc. R. Co., 99 Pa. St. 108.

9. *See* "BEST AND SECONDARY EVIDENCE;" "RECORDS."

10. Indenture, Under Peculiar Statute, When Admissible. — Potter *v.* Hyndman, 1 Harr. (Del.) 123; Moore *v.* Ann, 9 B. Mon. (Ky.) 36.

11. Admissible on Testimony of One of the Subscribing Witnesses. McAdams Exrs *v.* Stilwell, 13 Pa. St. 90; Belbin *v.* Skeats, 1 Sw. & Tr. 148; Wright *v.* Doe d'Tatham, 1 Ad. & E. 3; Melcher *v.* Flanders, 40 N. H. 139.

parts, each part is the best evidence against the party executing it, and those in privity with him.[12]

When Secondary Evidence. — When an indenture is executed in counterparts, each part is secondary evidence against the party executing the other part, and those in privity with him.[13]

5. Record. — On an indictment for harboring an apprentice, the record of the indenture is admissible in evidence, although the original was not delivered by the justices to the recorder of deeds for the county, within the statutory time.[14]

6. Secondary Evidence Generally. — If an indenture has been lost or destroyed, secondary evidence of its existence and contents may be given, when it appears that a faithful but ineffectual effort has been made to produce it.[15]

III. CONSENT OF PARTIES.

1. To the Contract. — An infant's consent to be bound as an apprentice may be proved by the fact of his executing the indenture, the circumstances attending it, or by evidence *aliunde*.[16]

Proof by Parol. — Oral evidence is admissible to prove the consent of the father and minor to the execution of an indenture with the master.[17]

2. To Assignment. — The consent of the original master that his apprentice serve with another master may be proved by direct or circumstantial evidence.[18]

12. Counterpart, When Primary Evidence. — Roe *v.* Davis, 7 East 363; Mayor of Carlisle *v.* Blamire, 8 East 487; Paul *v.* Meek, 2 Y. & J. 116; Houghton *v.* Koenig, 18 C. B. 235, 25 L. J. C. P. 218; C. & T. R. Co. *v.* Perkins, 17 Mich. 296; Pearse *v.* Morice, 3 Barn. & A. 396, 4 L. J. K. B. 21; Philipson *v.* Chase, 2 Camp. 110; Burleigh *v.* Stibbs, 5 T. R. 465.

13. Garnons *v.* Swift, 1 Taunt. 507; Munn *v.* Godbold, 2 Bing. 292; Waller *v.* Horsfall, 1 Camp. 501; Doe *v.* Trapaud, 1 Stark. 281; St. Clair *v.* Jones, Add. (Pa.) 343.

Original Lost or Destroyed. If the original instrument cannot be produced, the next best evidence is, first, a counterpart, if no counterpart, a copy, and if no counterpart or copy can be produced, then oral testimony. Villiers *v.* Villiers, 2 Atk. 71; Buller's Nisi Prius, 254; Rex. *v.* Castleton, 6 T. R. 236; Kerns *v.* Swope, 2 Watts (Pa.) 75.

14. Record of Indenture, When Admissible. — State *v.* Hooper, 1 Houst. Crim. Cas. (Del.) 17.

15. Drew *v.* Peckwell, 1 E. D. Smith (N. Y.) 408; Bonnell *v.* Brotzman, 3 Watts & S. (Pa.) 178; Heinecke *v.* Rawlings, 4 Cranch 699, 11 Fed. Cas. No. 6326. But see Hooks *v.* Perkins, Busbee Law (N. C.) 21. For methods of proving age *see* article "AGE."

16. Consent of Infant. — Fisher *v.* Lunger, 33 N. J. Law 100; Rex. *v.* Arundel, 5 M. & S. 257; Keane *v.* Boycott, 2 H. Bl. 511.

When the infant's consent is required to be expressed in the indenture, the instrument itself is the best evidence of such consent. The Queen's Case, 2 B. & B. 286; Harper *v.* Gilbert, 5 Cush. (59 Mass.) 417; Dodge *v.* Hills, 13 Me. 151.

17. Olney *v.* Meyers, 3 Ill. 311.

18. Consent to Assignment, How Proved. — Kingwood *v.* Bethlehem, 13 N. J. Law 221; Graham *v.* Graham, 1 Serg. & R. (Pa.) 330. See Rex. *v.* The Holy Trinity, 3 T. R. 605.

Consent Required by Statute to be given before justices of the peace must be certified at the time in writing, and thereafter oral proof of such consent is inadmissible.

3. To Removal. — The consent of parties to the removal of an apprentice from the jurisdiction may be proved by parol.[19]

4. To Discharge. — The discharge of an apprentice with his consent can only be sustained by evidence that it would be to his advantage.[20]

IV. AGE OF APPRENTICE.

The recitals of age stated in an indenture do not conclude the apprentice; his true age may be proved by parol.[21]

Recitals Of — Master Concluded By — Evidence to Contradict Recitals Inadmissible. — The master is concluded by the recitals in the indenture of the age of the apprentice, and evidence on his part to contradict such recitals is inadmissible.[22]

V. BREACH OF COVENANTS.

In an action against a master for failure to instruct his apprentice in an art or business, evidence is admissible in defense, to prove that the apprentice is a good workman in such business, or in some specific branch thereof.[23]

Acts and Declarations As Evidence. — The acts and declarations of an apprentice are admissible in evidence on the part of the master to show the temper and disposition of the apprentice.[24]

Com. *v.* Jones, 3 Serg. & R. (Pa.) 158. See Com. *v.* Leeds, 1 Ashm. (Pa.) 405.

19. Consent to Removal. — *Proof by Parol.* — Lobdell *v.* Allen, 9 Gray (Mass.) 377; Com. *v.* Hamilton, 6 Mass. 272. As to removal from jurisdiction, see Com. *v.* Edwards, 6 Binn. (Pa.) 202; Randall *v.* Rotch, 12 Pick. (Mass.) 107; Eaton *v.* Western, 9 Q. B. D. 636, 52 L. J. Q. B. 41, *overruling* Royce *v.* Charlton, 8 Q. B. D. 1, 45 L. T. 712.

20. Rex. *v.* Great Wigston, 3 Barn. & C. 484; Rex. *v.* Mountsorrell, 3 M. & S. 497.

A Discharge by Consent of All the Parties is presumptive evidence that it is for the benefit of the infant and is therefore valid. Rex. *v.* Weddington, Burr. Sel. Cas. 765; Rex. *v.* Spaurstown, Burr. Sel. Cas. 801; Crombie *v.* McGrath, 139 Mass. 550, 2 N. E. 100; Kingwood *v.* Bethlehem, 13 N. J. Law 221; Graham *v.* Graham, 1 Serg. & R. (Pa.) 330.

21. Recitals of Age. — *Apprentice Not Concluded by Parol.* — *Proof of True Age.* — Banks *v.* Metcalfe, 1 Wheeler's Crim. Cas. (N. Y.) 381; *In re* Brennan, 1 Sandf. (N. Y.) 711; Drew *v.* Peckwell, 1 E. D. Smith (N. Y.) 408; Hooks *v.* Perkins, Busbee Law (N. C.) 21; *Ex parte* Davis, 5 T. R. 715.

22. McCutchin *v.* Jamison, 1 Cranch 348, 16 Fed. Cas. No. 8743; Hooks *v.* Perkins, Busbee Law (N. C.) 21; Glidden *v.* Unity, 30 N. H. 104.

23. Failure to Teach. — *Evidence in Defense.* — Barger *v.* Cashman, 4 Bibb. (Ky.) 278; Wright *v.* Brown, 5 Md. 37; Hughes *v.* Humphreys, 6 Barn. & C. 680; Barger *v.* Caldwell, 2 Dana (Ky.) 129.

In actions for breach of contract for failure to teach, evidence is inadmissible to show that the apprentice was kept at work with others of the same experience. Bell *v.* Herrington, 3 Jones Law (N. C.) 320.

24. Acts and Declarations As Evidence. — Clancy *v.* Overman, 1 Dev. & B. Law (N. C.) 402.

APPROPRIATION OF PAYMENTS.—See Payments.

APPROVAL.—See Appeal Bonds; Bond Certificates; Records.

APPROVER.—See Accomplice.

ARBITRATION AND AWARD.

By Clark Ross Mahan.

For matters of evidence generally pertaining to Fraud, Mistake, see those titles.

I. PRODUCTION OF WITNESSES AND EVIDENCE BEFORE THE ARBITRATORS.

1. Procuring the Attendance of Witnesses. — A. Power of the Arbitrators. — The power of the arbitrators as relates to the witnesses is not great. They have no authority of themselves to compel the witnesses to appear before them,[1] unless they are so expressly authorized by statute.[2]

B. Right of the Parties. — Without doubt, however, the parties are entitled to a reasonable opportunity to procure the attendance of their witnesses.[3]

Documentary Evidence. — And the rule applies with equal force to documentary evidence.[4]

1. **Power of Arbitrators to Compel Attendance of Witnesses.** Bryant *v.* Levy, 52 La. Ann. 1649, 28 So. 191; Tobey *v.* Bristol County, 3 Story 800, 23 Fed. Cas. No. 14,065 (*dictum*).

2. **Statutes Authorizing Arbitrators to Compel Attendance of Witnesses.** — Wolfe *v.* Hyatt, 76 Mo. 156; Thomasson *v.* Risk, 11 Bush. (Ky.) 619. And see the various local codes and statutes.

3. **Party Entitled to Reasonable Opportunity to Procure Witnesses.** Hollingsworth *v.* Leiper, 1 Dall. (Pa.) 161. And see Morewood *v.* Jewett, 2 Rob. (N. Y.) 496. But the objection that opportunity was not given is without merit where it appears that the arbitrators offered to hold the case open for such time as was required. Madison Ins. Co *v.* Griffin, 3 Ind. 277. And see Homes *v.* Aery, 12 Mass. 134.

Where the Arbitrator Promises to Hear Witnesses, and then makes up his award without doing so, the award is invalid. Earl *v.* Stocker, 2 Vern. 251.

Depositions. — So, where the arbitrators refuse a party time to obtain the deposition of a foreign witness, and there is no reason to suppose that the object of the request is mere delay, their award will be invalid. Passmore *v.* Pettit, 4 Dall. (Pa.) 271.

Surprise at Trial. — And where a party is surprised at evidence adduced by his adversary, and because of the unexpected absence of the witness by whom he can meet that evidence, it is fatal to the award if the arbitrators refuse time to procure the witness, on the party's making the necessary showing. Torrance *v.* Amsden, 3 McLean 509, 24 Fed. Cas. No. 14,103.

To Entitle a Party to Further Time to Produce Testimony, he must show the arbitrators what the evidence is, why he is unable to produce it, and that he expects to be able to produce it in a reasonable time. A naked allegation that he desires further time is not enough. Latimer *v.* Ridge, 1 Binn. (Pa.) 458.

Waiver of Right. — The objection that the arbitrators tried and decided the cause in the absence of a witness will not be sustained where it appears that the party objecting announced ready for trial, and it is not pretended that the witness was ever subpoenaed, or that any effort was made to procure his attendance, or to take his deposition, or that any motion for a postponement was asked on account of the witness' absence. Canada *v.* Barksdale, 84 Va. 742, 6 S. E. 10.

4. Green *v.* Franklin, 1 Tex. 497. The objection in this case was overruled, however, under the facts shown, as being without merit.

C. Assistance of Court in Procuring Witnesses. — And there are cases in which the courts have aided the parties in securing the attendance of witnesses before the arbitrators.[5]

2. Swearing the Witnesses. — A. Power of the Arbitrators. Arbitrators, at common law, possess no power to administer oaths to the witnesses.[6] In England,[7] however, and in some at least of the United States,[8] this power is expressly conferred upon them by statutes.

B. Necessity of Swearing Witnesses. — An award which is otherwise unobjectionable will not be invalidated by the mere fact that the arbitrators permitted the examination of the witnesses without their being first sworn,[9] unless the arbitration agreement

5. Habeas Corpus ad Testificandum. — In Marsden *v.* Overbury, 18 C. B. 30, the court granted a *habeas corpus ad testificandum* to bring up a prisoner in criminal custody, for the purpose of testifying before an arbitrator. And in Graham *v.* Glover, 5 El. & Bl. 591, to bring up a witness who was in prison under execution for debt.

Hearing Before Arbitrator Not a Trial. — In Hall *v.* Brand, 12 Q. B. D. 39, an action and "all matters in difference" between the parties were referred by consent to an arbitrator; and it was held that no subpoena would be granted under 17 & 18 Vict. c. 34, S. 1, to compel the attendance of a witness residing in the United Kingdom but out of the jurisdiction of the Queen's Bench Division, as a hearing before the arbitrator was not a "trial" within the meaning of that statute.

6. Arbitrators Are Without Power to Swear Witnesses. — Tobey *v.* Bristol County, 3 Story 800, 23 Fed. Cas. No. 14,065; People *v.* Townsend, 5 How. Pr. (N. Y.) 315; State *v.* Jackson, 36 Ohio St. 281; Street *v.* Rigby, 6 Ves. 822; Wellington *v.* McIntosh, 2 Atk. 569; Halfhide *v.* Fenning, 2 Bro. C. C. 336; Bonner *v.* McPhail, 31 Barb. (N. Y.) 106; Large *v.* Passmore, 5 Serg. & R. (Pa.) 51. *Compare* Inlay *v.* Wikoff, 4 N. J. Law 132. But the fact that the arbitrator who is a justice of the peace and as such has power under the statute to swear witnesses before any other person acting as arbitrator, swears the witnesses himself, is no objection to the award. Rice *v.* Hassenpflug, 45 Ohio St. 377, 13 N. E. 655.

7. Under the English Statute, according to Hodson *v.* Wilde, 4 M. & W. 536, 2 Jur. 992, if the submission provides that the witnesses shall be examined under oath, the arbitrators have power to administer the oath.

8. Thus in California. See *In re* Connor, 128 Cal. 279, 60 Pac. 862. And see the local codes and statutes of the various states on this question.

9. Examination of Witnesses Not Sworn Not Fatal to Award.—Thornton *v.* McCormick, 75 Iowa 285, 39 N. W. 502; Jenkins *v.* Meagher, 46 Miss. 84 (*dictum*). And according to Tomlinson *v.* Hammond, 8 Iowa 40, it is not necessary that the award show affirmatively that the witnesses were sworn. The presumption is that the arbitrators discharged their duty in this respect. See also Older *v.* Quinn, 89 Iowa 445, 56 N. W. 660. *Compare* Knowlton *v.* Mickles, 29 Barb. (N. Y.) 465, where the award was held invalid because the arbitrators heard statements of witnesses in the absence of the opposite party, and without their being sworn, and awarded in accordance with those statements, although there was no evidence showing corruption or intentional violation of duty.

Affirmative Showing Necessary. In Dolph *v.* Clemens, 4 Wis. 204, it was held that the objection that the witnesses were not sworn was without merit, in the absence of an affirmative showing by the party raising the objection.

expressly requires that the witnesses shall be sworn,[10] or unless it is done against the express request[11] and objection of one of the parties interposed at the time.[12] And even when required by an express statute[13] the parties may either expressly or impliedly waive such requirement.[14]

10. Submission May Require Witnesses To Be Sworn. — Ridout *v.* Pye, 1 Bos. & P. 91; Biggs *v.* Hansell, 16 C. B. 562; Banks *v.* Banks, 1 Gale 46; Kane *v.* Fond du Lac, 40 Wis. 495; Sanborn *v.* Paul, 60 Me. 325; State *v.* Jackson, 36 Ohio St. 281. *Compare* Dater *v.* Wellington, 1 Hill (N. Y.) 319, where the court held that the omission to swear the witnesses, whether the parties had agreed that they should be sworn or not, and whether the parties had waived their being sworn or not, was, at most, mere matter of error or mistake which could not be corrected in an action on the award.

11. Necessity for Request That Witnesses Be Sworn. — *In re* McGregor, 59 Hun 617, 13 N. Y. Supp. 191. And according to Pierce *v.* Perkins, 2 Dev. Eq. (N. C.) 250, hearing the witnesses without swearing them, cannot be complained of when so done by the express consent of the counsel.

In Canada, when the arbitration is not under a rule of court, the witnesses need not be sworn unless required by the parties. See Woodrow *v.* O'Conner, 28 Vt. 776.

12. Necessity for Proper and Timely Objection. — *In re* Connor, 128 Cal. 279, 60 Pac. 862; Bryant *v.* Levy, 52 La. Ann. 1649, 28 So. 191; Maynard *v.* Frederick, 7 Cush. (Mass.) 247; Greer *v.* Canfield, 38 Neb. 169, 56 N. W. 883; Newcomb *v.* Wood, 97 U. S. 581 (*dictum*); Rounds *v.* Aiken Mfg. Co., 58 S. C. 299, 36 S. E. 714; Britton *v.* Hooper, 25 Misc. 388, 55 N. Y. Supp. 493; Biggs *v.* Hansell, 7 J. Scott, 81 Eng. C. L. 562; Cochran *v.* Bartle, 91 Mo. 636, 3 S. W. 854; Bergh *v.* Pfeiffer, Hill & D. Supp. 110; Wakefield *v.* Llanelly R. & D. Co., 34 Beav. 245. And there are cases which hold that even when a party objects, and his objection is overruled, he cannot afterwards complain if his own witnesses are allowed to give their evidence without being sworn. Allen *v.* Francis, 9 Jur. 691; Smith *v.* Sparrow, 16 L. J. Q. B. 139.

In Smith *v.* Goff, 14 M. & W. 264, where the submission provided that the arbitrators might, if they saw fit, examine the witnesses on oath, it was held discretionary with the arbitrators to swear the witnesses, and their not doing so was not fatal even as against the express request of one of the parties.

13. Statute Requiring Witnesses To Be Sworn. — Wolfe *v.* Hyatt, 76 Mo. 156; *In re* Grening, 26 N. Y. Supp. 117.

A Recital in the Award That the Arbitrators Heard the Testimony respecting the matters submitted sufficiently shows that the witnesses were in fact sworn as required by statute. Testimony, as understood in judicial proceedings, means the statements of a witness made under oath. Reeves *v.* McGlochlan, 65 Mo. App. 537.

That the Record of a Statutory Arbitration Does not Show that the witnesses were subpoenaed or sworn does not avoid the arbitration; that fact can be taken advantage of only on review. Weir *v.* West, 27 Kan. 650.

14. Express or Implied Waiver of Statutory Requirement. — Russell *v.* Seery, 52 Kan. 736, 35 Pac. 812; Grafton Quarry Co. *v.* McCully, 7 Mo. App. 580; Cochran *v.* Bartle, 91 Mo. 636, 3 S. W. 854; Woodrow *v.* O'Connor, 28 Vt. 776. And see Large *v.* Passmore, 5 Serg. & R. (Pa.) 51.

In California the code does not expressly require the witnesses to be sworn by the arbitrators, although the arbitrators are empowered to administer oaths to them; and although it might be improper for the arbitrators to refuse a request to swear them, still an award cannot be invalidated because they were not

3. Admission and Rejection of Evidence.—A. Receiving Illegal Evidence. — a. *General Rule.* — Courts of justice have long manifested a strong inclination to support the decisions of arbitrators, who are judges of the parties' own choosing, and have repeatedly declared that these voluntarily chosen tribunals are not to be held to the same strictness in their proceedings as has been most wisely required in other cases.[15] And accordingly it has been held that it is not fatal to the award that the arbitrators have received impertinent and incompetent testimony,[16] unless its admission constituted corruption, partiality or undue means to produce the award,[17] or

sworn when all the parties agreed either expressly or by failure to object. *In re* Connor, 128 Cal. 279, 60 Pac. 862.

15. Arbitrators Not Usually Held to Strict Rules of Evidence. — Fennimore *v.* Childs, 6 N. J. Law 386; Livingston *v.* Combs, 1 N. J. Law 42; Sabin *v.* Angell, 44 Vt. 523; Turnbull *v.* Martin, 37 How. Pr. (N. Y.) 20. But when a cause is actually pending in court, and is referred by rule of court to arbitrators, the latter have no authority to dispense with the rules of evidence, and substitute therefor their own capricious notions. Eyre *v.* Fenimore, 3 N. J. Law 932.

In England the Cases are Conflicting. — Thus Attorney General *v.* Davison, 1 McClel. & Y. 160, 29 Rev. Rep. 774, holds that the arbitrators must follow the rules of evidence strictly. While Hagger *v.* Baker, 14 M. & W. 9, holds that they need not do so.

16. Admission of Illegal Evidence Not Fatal to Award. — Eastern Counties R. *v.* Robertson, 1 D. & L. 498, 6 Man. & G. 38; Symes *v.* Goodfellow, 2 Bing. (N. C.) 532; Perryman *v.* Steggall, 9 Bing. 679; Chestly *v.* Chestly, 10 N. H. 327; Johnson *v.* Noble, 13 N. H. 286, 38 Am. Dec. 485; Smith *v.* Gorman, 41 Me. 405; Vaughn *v.* Graham, 11 Mo. 575; Maynard *v.* Frederick, 7 Cush. (Mass.) 247; Lillard *v.* Casey, 2 Bibb. (Ky.) 459.

Contra. — Parker *v.* Avery, Kirby (Conn.) 353.

Evidence Not Considered by Arbitrators. — In Offut *v.* Proctor, 4 Bibb (Ky.) 252, it was held that where the objectionable evidence was not considered by the arbitrators in making up their award, the award is not invalidated. So also, in Bassett *v.* Cunningham, 9 Gratt. (Va.) 684, where the award does not show upon what evidence the arbitrators acted.

Evidence Not Affecting Result. Nor is the reception of illegal evidence fatal to the award where the evidence did not materially affect the arbitrators' decision. Hartshorne *v.* Cuttrell, 2 N. J. Eq. 297. See also Learned *v.* Bellows, 8 Vt. 79; Kingwell *v.* Elliott, 7 D. P. C. 423, 49 Rev. Rep. 485.

Parties and Interested Persons as Witnesses. — Formerly it was held that parties and other persons interested in the event of the suit could not be used as witnesses on the hearing before the arbitrators. Fennimore *v.* Childs, 6 N. J. Law 386; Fowler *v.* Thayer, 4 Cush. (Mass.) 111; McAlister *v.* McAlister, 1 Wash. (Va.) 192. But there were cases holding to the contrary. Askew *v.* Kennedy, 1 Bailey (S. C.) 46; Mulder *v.* Cravat, 2 Bay (S. C.) 370; Fuller *v.* Wheelock, 10 Pick. (Mass.) 135; Hollingsworth *v.* Leiper, 1 Dall. (Pa.) 173; McCrae *v.* Robeson, 2 Murph. (N. C.) 127; Golden *v.* Fowler, 26 Ga. 451 (Ga. Stat. 1856, § 38, p. 223); Wade *v.* Powell, 31 Ga. 1. And see Hartshorn *v.* Cuttrell, 2 N. J. Eq. 297. And others held that it could be done if the submission expressly authorized it. Warne *v.* Bryant, 3 Barn. & C. 590. And see Lloyd *v.* Archbowle, 2 Taunt. 324, 11 Rev. Rep. 595. But under the present statutes and practice, this objection would hardly be raised; at all events, there do not seem to be any recent cases involving the question.

17. Harding *v.* Wallace, 8 B. Mon. (Ky.) 536.

Receiving the Statement of One

unless it is otherwise expressly stipulated or agreed in the arbitration agreement.[18]

Excess of Power can not be inferred from the mere fact that the arbitrators may have admitted illegal evidence about the subject-matter of the submission.[19] Otherwise, however, where they have received evidence as to matters which were not submitted to them.[20]

b. *Waiver of Objection.* — Some of the courts, while holding that the reception of illegal evidence is not fatal to the award, base their decision on the fact that the party has waived his right to

of the Parties, Without Proof, and against the objection of the opposite party, was held to constitute such a gross impropriety as would vitiate the award, in Hartshorne *v.* Cuttrell, 2 N. J. Eq. 297. So held, also, of receiving *ex parte* statements and testimony of one of the parties and without the knowledge of the other, and contrary to the express provision of the submission, in Speer *v.* Bidwell, 44 Pa. St. 23.

18. Unless Restricted by the Submission, the arbitrators may disregard the strict rules of evidence, and decide according to their own sense of equity. McGregor *v.* Sprott, 59 Hun 617, 13 N. Y. Supp. 191.

Viewing the Premises. — Under an agreement that the arbitrators may "proceed informally, according to their own sense of propriety, with or without witnesses, and with or without notice as they might prefer," it was held in Bridgeport *v.* Eisenman, 47 Conn. 34, that "the arbitrators had great latitude within which to exercise their discretion. They were limited by no rules of law or equity, by no precedents of form or practice, in hearing and deciding the case. Their only rule of procedure was their own sense of propriety. They were not obliged to call witnesses, and if they saw fit to call them were not bound to have them sworn. They were not required to hold any formal meetings for hearing the case, and if they held such meetings were not bound to give the parties notice of the time and place, unless their own sense of propriety led them to do it. They might view the premises and decide upon such view, might examine them by themselves or in the presence of both parties, or in that of either party alone. The agreement covered all irregularities and informalities, unless they were of so gross a character as to show that they were acting fraudulently and corruptly."

Reading From Another Case. *In re* Union El. R. Co., 55 Hun 611, 8 N. Y. Supp. 813, the submission provided that "the arbitrators by a majority vote, may exercise their discretion as to the manner and way in which to inform themselves of the matters and things in dispute. They may refuse to hear witnesses and counsel, and proceed to a final determination in whatever manner they may by a majority vote decide;" and it was held that it was proper for one of them, in support of his contention as to the award to be made, to read from the report of another case involving a question identical with that submitted to them.

Not Bound by Agreement as to Effect of Evidence. — In Adams *v.* McFarlane, 65 Me. 143, it was held that an agreement in the submission of mutual accounts between the parties, that an annexed statement of disbursements and collections should be taken to be correct by the arbitrators, did not preclude them from hearing evidence as to items not included in the statement.

19. Burchell *v.* Marsh, 17 How. (U. S.) 344. To the same effect where the arbitrators, under a submission to settle the affairs of a partnership, heard evidence, although against the objection of one of the parties, as to an account which had been settled on an account stated long previous to the arbitrament. Emmet *v.* Hoyt, 17 Wend. (N. Y.) 410.

20. Austin *v.* Clark, 8 W. Va. 236, citing Swann *v.* Deem, 4 W. Va. 368.

interpose this ground of objection by his failure to object to the reception of the evidence at the time.[21]

c. *Arbitrators As Witnesses.* — And it has been held that the fact that the arbitrators were used as witnesses on the hearing before themselves, is not fatal to the award.[22]

d. *Attorneys As Witnesses.* — And the appearance, as a witness, of counsel for one of the parties, is a mere irregularity which cannot be complained of for the first time after the case has been finally submitted to the arbitrators.[23]

B. Rejecting Pertinent Evidence. — a. *General Rule.* — On the other hand, an award, although it may be valid in all other respects, will be invalidated by the action of the arbitrators in rejecting evidence pertinent and material to the submission,[24]

21. Waiver of Objection. — Fennimore *v.* Childs, 6 N. J. Law 380; Bollmann *v.* Bollmann, 6 S. C. 29; Patten *v.* Hunnewell, 8 Me. 19.

22. Bollmann *v.* Bollmann, 6 S. C. 29; Graham *v.* Graham, 9 Pa. St. 254, 49 Am. Dec. 557.

23. Counsel Testifying as Witness Mere Irregularity. — Britton *v.* Hooper, 25 Misc. 388, 55 N. Y. Supp. 493.

24. The Parties Have a Right to Be Heard by Their Proofs. — Their right in this respect is a primary right. It is founded in natural justice.

England. — Phipps *v.* Ingram, 3 D. P. C. 669; Johnston *v.* Cheape, 5 Dow 247, 16 Rev. Rep. 114.

Indiana. — Indiana Cent. R. Co. *v.* Bradley, 7 Ind. 49; Milner *v.* Noel, 43 Ind. 324.

Iowa. — Thompson *v.* Blanchard, 2 Iowa 44.

Louisiana. — Dreyfous *v.* Hart, 36 La. Ann. 929.

Maryland. — And see Cromwell *v.* Owings, 6 Har. & J. 10.

Mississippi. — Jenkins *v.* Meagher, 46 Miss. 84.

Missouri. — Newman *v.* Lebeaume, 9 Mo. 30.

New Jersey. — Hart *v.* Kennedy, 47 N. J. Eq. 51, 20 Atl. 29; Burroughs *v.* Thorn, 5 N. J. Law 777.

New York. — Moran *v.* Bogart, 16 Abb. Pr. (N. S.) 303; Fudickar *v.* Guardian M. L. In. Co., 62 N. Y. 392; Halstead *v.* Seaman, 82 N. Y. 27, 37 Am. Rep. 536; Van Cortland *v.* Underhill, 17 Johns. 405 (distinguished in McKinney *v.* Newcomb, 5 Cow. 425, where a motion to set aside an award for the rejection of a material witness was denied).

Oregon. — Stemmer *v.* Scottish Union Etc. Ins. Co., 33 Or. 65, 53 Pac. 498.

Virginia. — Ligon *v.* Ford, 5 Munf. 10.

Washington.—McDonald *v.* Lewis, 18 Wash. 300, 51 Pac. 387.

West Virginia. — Fluharty *v.* Beatty, 22 W. Va. 698.

And in Severance *v.* Hilton, 32 N. H. 289, rejection of proper evidence was held to be especially fatal where the arbitrators undertake to decide as to its admissibility according to the principles of law.

Compare Com. *v.* La Fitte, 2 Serg. & R. (Pa.) 106. This case, however, seems to have turned on the fact that a statute gave the arbitrators power to decide on the competency of evidence, as well as its credibility, and to determine all questions in the case, as well of law as of fact; that the award when filed was to be considered as a judgment until reversed, and that the exceptant's remedy was by appeal.

Statement of the Rule. — In Canfield *v.* Watertown F. Ins. Co., 55 Wis. 419, 13 N. W. 252, the court, in speaking of this question say: "Whether the submission and award are ruled by the statute, or whether they constituted merely a common law arbitration, (the parties are) entitled to introduce evidence to the arbitrators. If the proceeding was ruled by the statute, the exclusion of evidence violates a

unless the parties have waived their rights in this respect,[25] either expressly or impliedly.[26]

An Exception to This Rule Exists, however, where the persons selected as arbitrators possess peculiar skill and knowledge concerning the subject-matter submitted to them, and it appears that the parties to the submission intend to rely upon that skill and knowledge.[27]

plain provision (thereof) that 'all of the arbitrators *must* meet together and hear all the proofs and allegations of the parties.' If this was merely a common law arbitration, the right of the plaintiff to introduce evidence pertinent and material to the issue is equally clear. Whether it be a statutory or common law arbitration, the exclusion of proper testimony is fatal to the award." And in Hurdle *v.* Stallings, 109 N. C. 6, 13 S. E. 720, it was held that, although, without doubt, arbitrators have some discretionary power to determine how much evidence they shall hear, they have no power to arbitrarily decline to receive or examine any testimony whatever.

In California, in recognition of this principle, by express statute, one of the grounds which will invalidate an award is the refusal of the arbitrators to hear pertinent evidence. See *In re* Connor, 128 Cal. 279, 60 Pac. 862.

So Also in Indiana. — Indiana Central R. Co. *v.* Bradley, 7 Ind. 49; Deford *v.* Deford, 116 Ind. 523, 19 N. E. 530.

And in New York. — Locke *v.* Filley, 14 Hun 139.

Affirmative Showing Necessary. In Dolph *v.* Clemens, 4 Wis. 204, it was held that the objection that arbitrators refused to hear testimony is without merit when the award does not show upon what evidence it is based, and in the absence of an affirmative showing by the party objecting.

Excluding Witness of Doubtful Competency. — In Campbell *v.* Westen, 3 Paige (N. Y.) 124, it was held that a mistake of judgment of the arbitrators in rejecting a witness, as to whose inadmissibility there is some doubt, will not be sufficient evidence of improper conduct in the arbitrators to set aside the award in equity.

25. Rector *v.* Hunter, 15 Tex. 380; Bridgeport *v.* Eisenman, 47 Conn. 34. And see Morewood *v.* Jewett, 2 Rob. (N. Y.) 496.

Oral Waiver. — The rejection of testimony is not fatal where, although the written submission is silent in relation thereto, it was verbally agreed between the parties that no evidence should be adduced, and that agreement was formally stated to the arbitrators at the commencement of the hearing to be the rule governing the parties and the arbitrators, and it was in fact observed during a material part of the hearing. Bennett *v.* Bennett, 25 Conn. 66.

View of Premises by Arbitrator. The fact that the arbitrator did not view the premises under dispute is not fatal to his award, where it does not appear that he was asked to do so, and it is clearly shown that he had previously on several occasions been upon them and was familiar with them. Hewitt *v.* Lehigh & H. R. Co., 57 N. J. Eq. 511, 42 Atl. 325.

26. Implied Waiver Must Be Clearly Intended. — In Hart *v.* Kennedy, 47 N. J. Eq. 51, 20 Atl. 29, the submission permitted the arbitrators to "survey the ground, take levels, and determine," and it was contended that thereby the parties had expressly relinquished their right to produce testimony before the arbitrators; but it was held that neither expressly nor by implication could this be taken to be the meaning of the language used; that "nothing short of plain and clear words should be considered sufficient for this purpose." See also Alexander *v.* Cunningham, 111 Ill. 511.

27. Arbitrators Possessing Special Knowledge. — Stemmer *v.* Scottish etc. Ins. Co., 33 Or. 65, 53 Pac. 408; Hall *v.* Norwalk F. Ins. Co., 57

b. *Offer of Evidence Necessary.* — But testimony must be offered before it can be rejected; and a party cannot convict the arbitrators of error in refusing to hear pertinent evidence unless he has first offered to introduce the evidence.[28]

C. Referring Admissibility to Court. — It seems that it is proper for the arbitrator acting under a submission under rule of court, to receive evidence as to the admissibility of which he is in doubt, and to award in the alternative for the one party, if the evidence be admissible, otherwise for the other party.[29]

D. Reopening Case for Additional Evidence. — The arbitrators undoubtedly have the power to reopen a case after it has been once finally submitted to them, for the introduction of further evidence;[30] but whether or no they shall do so is a matter resting in their discretion, and their refusal so to do will not be revised except for a plain case of abuse of that discretion.[31]

E. Adducing Evidence Before Third Arbitrator or Umpire. Where two or more arbitrators, after hearing the evidence, are unable to agree, and in accordance with the submission they select a third person, it is the duty of such third person, sitting either as third arbitrator,[32] or as umpire,[33] to hear the whole case and evi-

Conn. 105, 17 Atl. 356; Wiberly *v.* Matthews, 91 N. Y. 648; Johnston *v.* Cheape, 5 Dow 247, 10 Rev. Rep. 114.

28. Necessity for Offer of Evidence. — Ormsby *v.* Bakewell, 7 Ohio 88; Russell *v.* Smith, 87 Ind. 457.

A Mere Statement of Willingness to Bring in Witnesses is not a production of testimony. Stemmer *v.* Scottish etc. Ins. Co., 33 Or. 65, 53 Pac. 498. Nor can a party complain when he merely said he desired to introduce testimony, but does not even intimate that he expressed his desire or that it was refused. Turnbull *v.* Martin, 2 Daly 428, 37 How. Pr. 20. Nor where he does not show what evidence it was which he claims the arbitrators rejected. Newman *v.* Lebeaume, 9 Mo. 30. *Compare* Halstead *v.* Seaman, 82 N. Y. 27, 37 Am. Rep. 536, where the submission required the arbitrament "to be conducted and decided upon the principle of fair and honorable dealing between man and man;" and the arbitrators based their refusal to hear testimony on the assumption, though erroneous, that by the submission their powers were limited to hearing the parties' statements. It was held that it was not necessary for the objecting party, in order to preserve his rights, to actually produce, or to name his witnesses, or to state what facts he intends to prove by them.

29. See Byam *v.* Robbins, 6 Allen (Mass.) 63, where this was done without objection being raised.

30. Power of Arbitrators to Reopen Case for Additional Evidence. Sweeney *v.* Vaudry, 2 Mo. App. 352.

31. Reopening Case Discretionary With Arbitrators. — Blodgett *v.* Prince, 109 Mass. 44; Tennant *v.* Divine, 24 W. Va. 387.

32. Duty of Third Arbitrator to Rehear Evidence. — West Jersey R. Co. *v.* Thomas, 23 N. J. Eq. 431, *affirmed* 24 N. J. Eq. 567; Alexander *v.* Cunningham, 111 Ill. 511; Day *v.* Hammond, 57 N. Y. 479, 15 Am. Rep. 522; Wheaton *v.* Crane, 27 N. J. Eq. 368. *Compare* Ranney *v.* Edwards, 17 Conn. 309, where it was held discretionary, in the absence of an express request for such rehearing. Knowlton *v.* Homer, 30 Me. 552, where it was held that failure to so rehear was not fatal to the award in the absence of an express request by either such third arbitrator or the parties, or a stipulation in the submission requiring it.

33. Duty of Umpire to Rehear Evidence. — Gaffy *v.* Hartford

dence, in the absence of any agreement or consent by the parties dispensing with such full hearing.[34] And according to some of the decisions this duty is equally imperative whether such third person be a third arbitrator or an umpire with sole power to decide the award.[35]

F. Rehearing on Recommitment. — Where the court, in pursuance of the submission, recommits the matters to the arbitrator for his reconsideration, it is the duty of the arbitrator to hear the evidence anew.[36]

II. ACTIONS AND DEFENSES FOUNDED ON AWARDS.

1. The Fact of Submission. — A. Necessity for Proof. — Where an award is sought to be used and introduced in evidence as the basis for recovery, the fact of submission must be proved.[37] But

Bridge Co., 42 Conn. 143; Ingraham *v.* Whitmore, 75 Ill. 24; Falconer *v.* Montgomery (Pa.), 4 Dall. 232; Passmore *v.* Pettit (Pa.), 4 Dall. 271; Taber *v.* Jenny, 1 Spr. 315, 23 Fed. Cas. No. 13,720; Byrne *v.* Usry, 85 Ga. 219, 11 S. E. 561; Daniel *v.* Daniel, 6 Dana (Ky.) 93; Frissell *v.* Fickes, 27 Mo. 557. *Compare* Jenkins *v.* Meagher, 46 Miss. 84, where it was held that failure to do so was not fatal to the award, in the absence of a request for rehearing; Sharp *v.* Lipsey, 2 Bailey (S. C.) 113, so holding in the absence of such request or a stipulation in the submission, referring it to similar effect; Blood *v.* Shine, 2 Fla. 127. See also Graham *v.* Graham, 9 Pa. St. 254, 49 Am. Dec. 557.

In Texas, such a rehearing is required under the statute governing arbitration proceedings. Warren *v.* Tinsley, 53 Fed. 689.

34. The Burden of Proving Waiver of the Right to Adduce Evidence Before a Third Arbitrator is upon the party asserting that fact, and it must be proved, not beyond doubt, but beyond reasonable doubt, so that the court shall feel convinced that such was the fact. West Jersey R. Co. *v.* Thomas, 23 N. J. Eq. 431, *affirmed* 24 N. J. Eq. 567.

35. No Distinction Between Third Arbitrator and Umpire. Alexander *v.* Cunningham, 111 Ill. 511; Day *v.* Hammond, 57 N. Y. 479, 15 Am. Rep. 522.

36. Nickalls *v.* Warren, 51 Eng. C. L. 615.

Recommitment for Specific Alteration. — But on a recommitment merely for the purpose of asking a specific alteration in or addition to the award, further evidence on the events discovered since the making of the original award, need not be heard by the arbitrators. *In re* Huntley, 1 El. & B. 787, 12 Jur. 571.

37. Proof of Submission Necessary. — Andrain *v.* Chace, 15 East 209; Ferrer *v.* Oven, 7 B. & C. 427, 31 Rev. Rep. 239; Milner *v.* Turner, 4 T. B. Mon. (Ky.) 240; Hand *v.* Columbus, 4 Smed. & M. (Miss.) 203; Chicago & C. S. R. Co. *v.* Peters, 45 Mich. 636, 8 N. W. 584; Burghardt *v.* Turner, 12 Pick. (Mass.) 534; Perit *v.* Cohen, 4 Whar. (Pa.) 181; Boots *v.* Canine, 58 Ind. 450. And plaintiff in assumpsit on an award must show that the agreement to abide by the award was mutual and concurrent. Keep *v.* Goodrich, 12 Johns. (N. Y.) 397. And so must a defendant who sets up an award under a parol submission in bar of the plaintiff's cause of action. Houghton *v.* Houghton, 37 Me. 72.

Where a Pending Suit Is Referred under an agreement that the award shall be made a rule of court, the defendant should file and prove the submission and award as a paper in the case on which the court may render judgment according to the terms of the award; but he cannot plead the award by way of answer to the suit. Grayson *v.* Meredith, 17 Ind. 357.

Inadvertent Reference in Award to Bond as Submission. — The fact

where the party against whom the award is sought to be used, admits the award in his pleadings, he also admits the submission, and further proof thereof is unnecessary.[38]

B. Competency of Evidence. — And it must be proved by evidence competent for that purpose.[39]

The Recital in the Award is not proof of the submission, and without other evidence thereof, the court is without authority to enter judgment on the award.[40]

The Testimony of the Subscribing Witness to the submission and award has been held to be the highest and best evidence to prove their execution; and if he can be produced and can be examined he must be produced.[41]

The Testimony of the Arbitrator is competent to prove a parol sub-

that an award, in speaking of a submission, inadvertently calls it a certain bond of arbitration, will not sustain an objection to the admission of the award as evidence on the ground that no such bond was given in evidence, the submission being fully proved by competent evidence. Robertson *v.* McNeil, 12 Wend. (N. Y.) 578.

38. Sadler *v.* Olmstead, 79 Iowa 121, 44 N. W. 292.

Admission of Submission by Promise to Pay Award. — In Williams *v.* Williams, 11 Smed. & M. (Miss.) 393, an action on an award, the court excluded the submission, but admitted the award in evidence, and in the course of the trial one of the arbitrators proved that after the award was made and delivered to the plaintiff he presented it to the defendant, who said he would settle the matter and pay the amount awarded; and it was held that the defendant thereby admitted the authority of the arbitrators and afforded sufficient evidence of the submission to sustain the award.

39. Statute Requiring Written Submission. — Where the statute authorizes a submission of a pending suit by agreement in writing only, proof of a parol submission is inadmissible. Manhattan L. Ins. Co. *v.* McLaughlin, 80 Pa. St. 53. See also Wayte *v.* Wayte, 40 Ark. 163.

Parol Evidence of Parol Submission. — But where the award derives its validity and effect wholly from a parol submission, no other than parol evidence can exist as to the extent of the submission and what it contains. Hall *v.* Mott, Brayt. (Vt.) 81. And see *infra* this title, III. 6, for the rule as to the parol evidence to show that the arbitrators exceeded their authority by considering and passing upon matters not submitted to them.

The Certificate of a County Clerk That a Controversy Was Submitted to Him by agreement of the parties, and that he made the award, is not evidence that the parties did so agree. Howard *v.* Sherwood, 1 Colo. 117.

Rule of Court. — A submission to arbitration by agreement written and attested is not sufficiently proved by evidence of a rule making such agreement a rule of court in accordance with the statute. Beverley *v.* Read, 7 Ad. & El. N. S. 79, 53 Eng. C. L. 79. The court said, however, that a judge's order for referring the cause might be proved by such rule of court. See also Tankersley *v.* Richardson, 2 Stewt. (Ala.) 130; Shriver *v.* State, 9 Gill. & J. (Md.) 1.

40. Stokely *v.* Robinson, 34 Pa. St. 315; Collins *v.* Freas, 77 Pa. St. 493. And see Houghton *v.* Burroughs, 18 N. H. 499.

41. Tyler *v.* Stephens, 7 Ga. 278, so holding as against the objection that the best evidence was the arbitrators themselves. See also Spooner *v.* Payne, 56 Eng. C. L. 328, where the indenture was received upon proof of the subscribing witness' handwriting, and of a diligent but unavailing search made for him.

mission,[42] but not to prove a submission made under rule of court.[43]

2. Publication and Delivery of the Award. — Proof of publication of the award is necessary only when the submission requires it.[44] And possession of an award, apparently complete, by one of the parties is, in the absence of any proof as to how he obtained it, *prima facie* evidence that the arbitrators delivered it to him as their award.[45] But when a party introduces in evidence, as a basis for the award, a submission to arbitration, which discloses that the arbitrators were required to make an award in writing, under their hands, and to deliver to the parties thereto a copy within a certain time, he must show not only that the award has been made, but that a copy thereof has been delivered to the other party within the time prescribed, unless it appears that the stipulation has been waived.[46]

3. Tender and Demand of Performance. — One seeking to avail himself of an agreement to arbitrate the matters in suit, as a defense in bar of the suit, must prove an offer on his part, and a refusal on the part of his adversary, to comply with the agree-

42. Cady *v.* Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834. And the fact that he is an attorney at law will not justify the exclusion of his testimony upon the ground that the communications made to him were privileged.

43. Lloyd *v.* Seal, 5 Harr. (Del.) 250.

44. Parsons *v.* Aldrich, 6 N. H. 264.

45. Possession of Award Prima Facie Evidence of Delivery. — Lausdale *v.* Kendall, 4 Dana (Ky.) 613.

46. Necessity of Proof of Delivery of Award. — Anderson *v.* Miller, 108 Ala. 171, 19 So. 302. "The right of the parties," said the court in this case, "and the duty and authority of the arbitrators are to be measured by the terms of the submission. Pratt *v.* Hackett, 6 Johns. 14. When actual delivery of the award, or a copy, is required, an informal notice to one of the parties, by one of the arbitrators, that an award has been made, even when accompanied by a statement of the contents thereof, would not be a sufficient compliance, as to such party, with the terms of the submission, to constitute a valid award. Buck *v.* Wadsworth, 1 Hill 321. Even after an award is drawn up, it is, until delivery, under the control of the arbitrators, who may, in their discretion, within the time limited, reopen the case and hear other evidence. So that, until the award is delivered, there is lacking one element of completeness and finality of decision; and informal information to a party that the arbitrators had then made a decision, which was still within their control and subject to alteration, would fall short of showing an irrevocable award, binding as their last judgment." But it is not necessary for him to show that he had himself received a copy of the award. *Ibid.*

Acquiescence as Amounting to Delivery. — In Perkins *v.* Wing, 10 Johns. (N. Y.) 143, an action on an arbitration bond, evidence of part payment of the award was held admissible to show acquiescence in the production and reading of the award, as amounting to a delivery of the award, and as being the delivery required.

Declarations of Administrator Admitting Award. — In Lobb *v.* Lobb, 26 Pa. St. 327, an action against an administrator on an award against the estate made subsequent to his appointment, it was held that declarations by him that the money awarded was unpaid and still in his hands were admissible to prove the existence of the award which the pleadings put in issue, as well as its payment, and that he had recognized its validity, but not to prove the original liability of the estate.

ment.[47] And where the award requires the defendant to pay to the plaintiff a sum certain, and the plaintiff to pay to the defendant an annuity for life, and each party to execute mutual releases for all demands pertaining to the arbitration, the plaintiff must aver and prove a tender by him to the defendant of the requisite release, upon his giving the requisite security for the annuity, and the defendant's refusal thereof.[48] But in an action for money awarded to be paid to the plaintiff as a creditor of one of the parties to the award, out of funds in the hands of the defendant, it is not necessary that the plaintiff, in order to maintain his action, prove a demand on the defendant.[49]

4. Illegality of Award As Affecting Its Admissibility. — In an action in which an award is the basis of the cause of action or defense, the submission and award, which are consistent and harmonious, the latter with the former, and both with the pleadings, are admissible in evidence for the party seeking to avail himself of them, although their validity in law may in fact be open to serious objection.[50]

47. Snodgrass *v.* Gavit, 28 Pa. St. 221.

48. Hugg *v.* Collins, 18 N. J. Law 294.

49. Scearce *v.* Scearce, 7 Ind. 286.

50. Richards *v.* Drinker, 6 N. J. Law 307; Onion *v.* Robinson, 15 Vt. 510; Hewitt *v.* Furman, 16 Serg. & R. (Pa.) 135; Lobb *v.* Lobb, 26 Pa. St. 327; Hume *v.* Hume, 3 Pa. St. 144; Dickerson *v.* Rorke, 30 Pa. St. 390.

The Consideration of Matters Extraneous to the Submission, and Other Acts Constituting Misconduct, if not apparent on the face of the award, are not grounds for the exclusion of the submission and award as evidence. Whether such facts are proved is for the jury to determine, under proper instructions from the court; but the court can not determine them and refuse to receive the award as evidence, or exclude it after it has been admitted. Burns *v.* Hendrix, 54 Ala. 78.

That a Party Was Denied a Proper Hearing is no ground for ruling out the award as evidence; the inquiry whether this was so or not being a question for the determination of the jury. Riley *v.* Hicks, 81 Ga. 265, 7 S. E. 173. And in Harris *v.* Seal, 23 Me. 435, defendant's offer to prove great and manifest errors by the arbitrator to his great injury, and the disallowance as evidence by the arbitrator of various items of claims proved by him against the plaintiff, and that the decision was influenced by prejudice and partiality, was rejected, although he expressly disclaimed any imputation of corruption or of general want of integrity. The court ruled that the award could be neither recommitted nor rejected for either of the reasons asserted unless the referee should testify that he had become satisfied that errors or mistakes existed in the award which rendered a revision of it necessary.

Notice to Third Arbitrator. — But an award by two of the three arbitrators to whom the matters were submitted, without any notice to the third arbitrator and refusal by him to act, is inadmissible in evidence in a subsequent proceeding to enforce the performance of the award. Bannister *v.* Read, 6 Ill. 92.

The Mere Fact That One of the Parties With His Counsel Withdraws From the Hearing after having participated therein during a portion of the time, is no reason for excluding the award as evidence on a subsequent proceeding between the same parties involving the same subject matter, as against the party who withdrew. Caldwell *v.* Caldwell, 121 Ala. 598, 25 So. 825.

Grounds of Decision not Shown. — The fact that the award does not show on its face just how the result was reached is no ground for excluding it as evidence on behalf of the successful party in an action by him on a bond conditioned for the performance of the award.[51]

The Mere Fact That an Award Is Signed by but Two of Three Arbitrators to whom the submission was referred, is no objection to its admission in evidence to support a cause of action thereon, where the statute authorizes awards to be signed by a majority of the arbitrators.[52]

The Fact That Exceptions Have Been Filed, although subsequently withdrawn, to an award which has been made the judgment of the court, does not affect the admissibility of the award.[53]

5. Best and Secondary Evidence. — Proof of the contents of a lost submission and award may be made by parol evidence.[54]

6. Pleading and Proof. — A. VARIANCE. — A party who relies upon an award to support his right of action or defense, cannot give evidence thereof which does not in precise terms identify the award proved with that alleged.[55]

51. Grounds of Decision Need Not Be Shown. — Where the controversy under submission relates to cross-money demands, whether in suit or not, or where, in any case, the circumstances are such that the arbitrators will be warranted in requiring the party who, upon the whole, appears to be in default, to pay to the other a gross sum of money, it is not necessary, nor is the better practice, for the award to show upon its face just how the result was reached; and the fact that it does not so show that fact is no ground for excluding it as evidence. Stearns *v.* Cope, 109 Ill. 340.

52. Whitewater Valley Canal Co. *v.* Henderson, 3 Ind. 3; Thompson *v.* Blanchard, 2 Iowa 44. So held also in Gas Co. *v.* Wheeling, 8 W. Va. 320, where the submission by implication authorized an award by two.

But an Award Purporting to Be the Award of the Three Arbitrators to whom the submission was made, which is in fact executed by only two of them, is inadmissible in evidence in a subsequent proceeding to enforce it. Bannister *v.* Read, 6 Ill. 92.

And an Award by a Single Arbitrator must have been signed and delivered to the parties before it can be used in evidence. Morrison *v.* Russell, 10 Ired. Law (N. C.) 273

53. McRory *v.* Sellars, 46 Ga. 550.

54. Brown *v.* East, 5 T. B. Mon. (Ky.) 405; Collier *v.* Watley, 120 Ala. 38, 23 So. 796.

But not where the party offering the evidence does not first give evidence accounting for the absence of the award. Burke *v.* Voyles, 5 Blackf. (Ind.) 190.

Leading Question Put to Witness. In Adams *v.* Harrold, 29 Ind. 108, to prove the contents of the award, which was shown to have been lost, the plaintiff put a paper in the hands of a witness, and asked him, "State whether or not this is a true copy of the award?" It was urged that this question was objectionable as leading; but the court held the objection untenable, stating that "leading questions are not always objectionable. They are sometimes eminently proper. It would be difficult to imagine any mode better calculated to get at the real truth of the matter than by the very interrogatory put."

But evidence of the terms of a settlement based upon an arbitration in writing cannot be given without producing the award. Smith *v.* McGehee, 14 Ala. 404.

55. Variance Between Pleading and Proof. — Thus evidence of an award by arbitrators is a material variance from a complaint setting up

7. Awards As Evidence Against Strangers. — An award is not competent evidence as against a person not a party thereto, and who sustains no such relations as constitute a legal privity between himself and either party thereto.[56] Nor can it be received under the

an award by an umpire. Lyon *v.* Blossom, 4 Duer (N. Y.) 318. But proof of a submission and award to two arbitrators named, and an umpire to be chosen by them as therein provided, is not a variance from an allegation of a submission and award to three arbitrators and an award by them. Chase *v.* Jefts, 51 N. H. 494.

Award Settling Terms of Executory Contract. — And an award under a submission of a dispute in relation to the share of the crop claimed by one of the parties, which simply finds that, "the contract has been proved that defendant was to give plaintiff the fifth of the crop made for said defendant," does not support an averment and complaint in a subsequent action on the award, averring that the arbitrators "awarded to plaintiff the one-fifth part of said crop." Roundtree *v.* Turner, 36 Ala. 555.

Award To Be Judgment of Court. Proof that suits pending should be submitted, and that the award should be the judgment of the court, is a material variance from an averment in the declaration on an award of an agreement to submit to arbitration certain differences existing, and that the defendant undertook to observe and perform the award, and will defeat the plaintiff's right of recovery in such an action. Smith *v.* Crosswhite, 5 Humph. (Tenn.) 59. The court said: "The submission proved was made of record, by order of court, and stipulates that the award is to be the judgment of the court, the design being to put an end to those suits, and prevent further litigation. But, according to the submission stated in the declaration, a right of action only would exist to enforce the award. Instead of putting an end to litigation, it would only increase it."

Award Adjusting Partnership Transaction. — In Wood *v.* Deutchman, 80 Ind. 524, it was held that a complaint declaring for a "balance on settlement of partnership account" was not sustained by evidence of an award for an amount due on adjustment of partnership transactions; that such evidence did not establish a claim for an amount due from the defendant upon a settlement between the parties, but that it showed rather that the mutual accounts between them had been merged in the arbitration proceeding, and that the plaintiff's remedy, if any, was on the award.

Award To Be Full Release. *Payment on Demand.* — In Parmelee *v.* Allen, 32 Conn. 115, an action on an award, the declaration averred that the award required the defendant to pay the sum awarded on demand; while the award merely required him to pay the plaintiff the sum mentioned, to be in full of all demand when he had done the other acts required by the award to be done. It was held that the payment of the money was to be on demand; that the last clause was not intended to affect the time for its payment, and that there was no variance.

56. Coon *v.* Osgood, 15 Barb. (N. Y.) 583; Woodward *v.* Woodward, 14 Ill. 370; Smith *v.* Weber, 1 Ad. & El. 119, 28 Eng. C. L. 119, 40 Rev. Rep. 286. *Compare* Thorpe *v.* Eyre, 1 Ad. & El. 926, 28 Eng. C. L. 426, where it was held that on an issue between a landlord and an execution creditor of his tenant, whether the crops on the land at a certain time were the property of the party so found by the award to have been tenant, the award was admissible on behalf of the landlord.

Award Not Evidence Against Grantee Without Notice. — In Emery *v.* Fowler, 38 Me. 99, it appeared that owners of adjoining lands agreed in writing to submit to arbitration a dispute between them as to the boundary line; that thereafter, but before the award, one of the parties sold his land to another having no notice of the arbitration agreement; and it was held that an award subsequently made was not admissible

rule allowing verdicts as proof of reputation, although between strangers to the record.[57]

III. MATTERS IN DEFENSE OR AVOIDANCE OF AWARDS.

1. Contradiction or Explanation by Extrinsic Evidence. — A. General Rule. — It is a general rule that parol or other extrinsic evidence, the only tendency of which is to vary or explain a written submission and award, cannot be received.[58]

in a suit involving such boundary line, between the grantee under the deed, and the other party.

57. Award Not Evidence of Reputation. — "The authority of an arbitrator is entirely derived from the consent of the parties to the reference; his award has no force except by reason of that consent, and no instance can be proved in which strangers have been held to be in any way affected in their rights by an award, either as evidence of right or of reputation. The award is but the opinion of the arbitrator, formed, not upon his own knowledge, as declarations used by way of reputation commonly are, but upon the result of evidence laid before him, most probably in private, and formed also *post litem motam*, having none of the qualities upon which evidence of reputation rests. It may be said that the verdict of a jury is equally defective in such qualities. Whether it be so or not, it is sufficient to say that the admissibility of a verdict as evidence of reputation is established by too many authorities to be now questioned, but that the principle of those authorities is not clear enough to embrace an award. We are therefore of opinion that the learned judge was perfectly right in rejecting the award." Evans *v.* Rees, 10 Ad. & El. 151, 37 Eng. C. L. 101, 50 Rev. Rep. 366.

58. Extrinsic Evidence Inadmissible to Vary or Explain Written Submission and Award. — *Alabama.* Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159.

Kentucky. — Grimes *v.* Grimes, 1 Dana 234.

Maine. — Buck *v.* Spofford, 35 Me. 526; McNear *v.* Bailey, 18 Me. 251.

Massachusetts. — Richardson *v.* Ins. Co., 3 Mete. 573.

New Hampshire. — Pike *v.* Gage, 29 N. H. 461; Furber *v.* Chamberlain, 29 N. H. 405.

New Jersey. — Leslie *v.* Leslie, 52 N. J. Eq. 332, 31 Atl. 724, *affirming* N. J. Eq., 24 Atl. 1029.

New York. — Efner *v.* Shaw, 2 Wend. 567.

Vermont. — May *v.* Miller, 59 Vt. 577, 7 Atl. 818.

Wisconsin. — Kane *v.* Fond du Lac, 40 Wis. 495.

Oral Agreement Collateral to Written Submission. — Parol evidence is inadmissible to enlarge the powers of the arbitrators to pass upon and include matters not submitted to them, by showing that at the hearing before the arbitrators it was so agreed, without specifying when the agreement was made — especially where the award conclusively shows that the only submission acted on was the one in writing. Palmer *v.* Green, 6 Conn. 14.

Finality of Award. — In McDermot *v.* United States Ins. Co., 3 Serg. & R. (Pa.) 604, the award found that "proof had not been produced sufficient to establish a claim against the defendant;" and it was held incompetent to show that the plaintiff desired a postponement before the arbitrators, but that defendant urged a decision, when such evidence is offered, not for the purpose of impeaching the award for misconduct or precipitancy of the arbitrators, but as tending to show that the award was not final.

Supplementary Explanatory Award. — Under a parol submission, it may be shown that after the award had been made the parties verbally consented to the arbitrators' making an additional award for the purpose of explaining their original award. Eveleth *v.* Chase, 17 Mass. 458.

B. Controlling Intent and Meaning. — Nor can extrinsic evidence be received to control the intent and meaning of the award made by the arbitrators,[59] or to explain the intent and meaning of the parties to an arbitration bond.[60]

Improper Execution of the Award may be shown by extrinsic evidence, on a motion for an attachment for failure to perform the award, for the purpose of annulling the award.[61]

C. Ambiguity. — But extrinsic evidence is competent to explain an uncertain expression in a written submission[62] or award.[63] But evidence of the meaning of the arbitrators can not be received to obviate a patent ambiguity.[64]

D. Testimony of Arbitrators. — And the rule excluding extrinsic evidence to vary or explain a written submission or award is equally applicable to the testimony of the arbitrators.[65] Nor

Boundary Lines. — In Robertson *v.* McNeil, 12 Wend. (N. Y.) 578, ejectment to recover lands awarded to the plaintiff, it was held to be incompetent for the defendant to show that the line established by the arbitrators was not the line referred to in the submission to be found and established by the arbitrators. But the testimony of the arbitrator that the line established was in conformity to the original referred to in the submission was competent.

Correction on Recommitment. — On a motion to accept an award returned under a submission under rule of court, it is competent to introduce evidence to show that the award, which had been recommitted to the arbitrators for correction, and a new award returned, had been in fact corrected by the arbitrators in matters of form only. Atkinson *v.* Crooker, 35 Me. 135.

Signing Award Without Reading. In Withington *v.* Warren, 10 Metc. (Mass.) 431, an action on a promissory note for a sum awarded by arbitrators to be paid by him to the plaintiff, it is held that the defendant could not defend by showing that one of the arbitrators, upon the statement of the chairman who drew up the award, that it was right, signed it without reading it or knowing its contents, and that it was for a larger sum than was agreed upon by the arbitrators, unless he also shows that the said arbitrator was induced by some false representation, fraud or misconduct to sign a different award from that which he intended.

59. Cobb *v.* Dortch, 52 Ga. 548; Clark *v.* Burt, 4 Cush. (Mass.) 396; Parker *v.* Parker, 103 Mass. 167; Doke *v.* James, 4 N. Y. 568; Scott *v.* Green, 89 N. C. 278.

60. Sessions *v.* Barfield, 2 Bay (S. C.) 94.

61. Stalworth *v.* Inns, 2 D. & L. 428. And see Kerr *v.* Jeston, 1 Dow N. S. 338; Wade *v.* Dowling, 4 El. & Bl. 44.

62. Faw *v.* Davy, 1 Cranch C. C. 89, 440, 7-8 Fed. Cas. Nos. 3663, 4701.

63. Thus of an uncertain description. Bancroft *v.* Grover, 23 Wis. 463, 99 Am. Dec. 195.

64. *See* generally, the title "Ambiguity."

65. Bigelow *v.* Maynard, 4 Cush. (Mass.) 317; King *v.* Jemison, 33 Ala. 499.

That He Did Not Unite or Concur with his co-arbitrators in making or publishing the award, cannot be proved by the testimony of the arbitrator. Ellison *v.* Weathers, 78 Mo. 115.

Vagueness or Uncertainties cannot be explained by the testimony of the arbitrators. Alexander *v.* McNear, 28 Fed. 403.

Arbitrators Cannot Be Examined as to What Evidence Was Laid Before Them of a tender of continental money, how much and when it was made, or in what kind of money; but they may be examined as to a single point, such as did they

can the arbitrators be called upon to disclose the grounds upon which they made their award,[66] nor to construe their award.[67]

allow interest. Wade v. Gallagher, 1 Yeates (Pa.) 77.

Finality of Award. — An arbitrator may be called upon to testify to facts showing that no final award was made, and that he, as the arbitrator entrusted with the award, discovered a mistake in it soon after he had signed it, and that he thereupon refused to deliver it as his award. Shulte v. Hennessey, 40 Iowa 352. See also Hintman v. Nichols, 116 Mass. 521, where it was held that an arbitrator under an oral submission could testify that he "had no idea the reference was final," as showing that he had not understood that he had rendered any decision upon the question which finally determined the rights of the parties.

When Award Returned Into Court. Where the clerk of the court omitted to make the usual indorsement on arbitration papers left with him to be filed, testimony of one of the arbitrators is admissible to show that the award had been returned within the time stipulated in the submission. Young v. Dugan, 1 G. Greene (Iowa) 152.

Alteration of Submission. — In Abel v. Fitch, 20 Conn. 90, the question was whether the submission was in its original form as used by the arbitrators, or had been altered by an interlineation since the submission and award; and it was held proper, in order to prove the alteration, to introduce the testimony of the arbitrators that they had no knowledge or recollection that this interlineation was in the submission when they acted; that according to their recollection and belief there was no question before them of matters contained in the interlineation; nor did they hear anything about them from the parties, but arbitrated only upon questions submitted in the submission as it read without the interlineation.

Examining Arbitrators as to Affidavits Made by Them. — On motion to set aside an award, in support of which has been filed affidavits of the arbitrators, the court may, in its discretion, permit the other party to call the arbitrators and examine them orally as to matters stated by them in their affidavits. Robinson v. Shanks, 118 Ind. 125, 20 N. E. 713. "It is doubtless true," said the court, "that a juror can not be heard to impeach his verdict. Perhaps the same rule would apply to an arbitrator whose award is attacked. In this case, however, the testimony of the arbitrators had been heard in support of the award. As the object of all judicial investigation is to ascertain the exact truth, we think that if the court had reason to believe that the affidavits of the arbitrators did not state the whole truth, we think it was in its discretion to call and examine them in relation to the matters about which they had testified in their affidavits. In this case there does not seem to have been any abuse of discretion in this regard."

66. Testimony of Arbitrators Disclosing Grounds of Decision. — Kingston v. Kincaid, 1 Wash. C. C. 448, 14 Fed. Cas. No. 7821; Bigelow v. Maynard, 4 Cush. (Mass.) 317. And according to Aldrich v. Jessiman, 8 N. H. 516, affidavits of the arbitrators cannot be received, giving a construction of their award, and stating the question which was meant to be presented. And see Ward v. American Bank, 7 Metc. (Mass.) 486 (where it was so held of a written statement of the arbitrator stating substantially what he might testify); Leggo v. Young, 16 C. B. 626 (where it was so held of a letter of the arbitrator stating the grounds of his decision).

67. Testimony of Arbitrators to Continue Award. — Ward v. Gould, 5 Pick. (Mass.) 291; Cobb v. Dolphin Mfg. Co., 108 N. Y. 463, 15 N. E. 438; Cobb v. Dortch, 52 Ga. 548; Mulligan v. Perry, 64 Ga. 567. See also Wiswall v. Hall, Quincy (Mass.) 27, wherein it was held that arbitrators could not be admitted to testify that their award that each party should bear his own costs was made in consideration of a

E. Admissions and Declarations. — And the rule excluding extrinsic evidence to control the terms of an award extends to admissions made by one of the parties as to the intent and meaning of the arbitrators.[68] Nor can declarations of the arbitrators be received for that purpose,[69] although they were made at the time they published the award.[70]

2. Authority of the Arbitrators. — A. The Appointment of the Umpire. — It may be shown by parol evidence that after the submission in writing the parties agreed that the arbitrators should have power to call in an umpire. Such an agreement is a new and independent contract, and is not a variance of the written sub-

promise by one party never to enforce a certain judgment against the other.

Statement of Rule. — In speaking of the question whether an award, reduced to writing in plain, unambiguous terms, can afterwards be shown by the arbitrators themselves, or by other parol evidence, not to mean what it clearly purports to mean on the face of it, but was intended to mean something else not expressed in the award, the court in Cobb *v.* Dortch, 52 Ga. 548, said: "If that can be done in the absence of fraud or mistake, then the award of arbitrators is of but little value; it would settle nothing in relation to the subject matter of their award; besides, it is as much against public policy to allow arbitrators to impeach their award after it has been reduced to writing, and delivered to the parties making the submission, as it would be to allow jurors to impeach their own verdict after it has been made and delivered to the court."

Explaining Phraseology.—In Boughton *v.* Seamans, 9 Hun (N. Y.) 392, the question put to the arbitrators, "What did you agree to?" was held as not upon its face calling for any evidence touching the consultations or reasons of the arbitrators, but only a statement by them of what the award in fact was, there being some dispute owing to the phraseology of the award, as to what it was.

68. Clark *v.* Burt, 4 Cush. (Mass.) 396.

Declarations of Party Previous to Arbitrament. — In Cook *v.* Gardner, 130 Mass. 313, a trust deed provided that if the beneficiary should not discharge his obligations to the grantor, the trustee might appoint arbitrators to pass on the matters submitted to them, with power to determine the trust upon terms by them considered just and equitable, and that thereupon the trustee should hold the land for the benefit of the grantor. It was held, on a writ of entry by the trustee against the beneficiary after the award determining the trust, that evidence of declarations by the grantor, to the effect that the beneficiary had discharged the obligations imposed on him by the deed was not admissible. The court said: "The question had been submitted to and decided by the tribunal which the parties in interest had selected. Any admissions which had been made (by the grantor) before the hearing by that tribunal were proper matters for its consideration. Such admissions, whether made before or after that hearing, were not competent evidence for the purpose of vitiating the award, nor to affect the rights which were established by it."

69. Declarations of an Arbitrator, to the effect that he and his co-arbitrators neglected to be sworn, should not be received for the purpose of impeaching the award. Kankakee & S. R. Co. *v.* Alfred, 3 Ill. App. 511. See also Hubbell *v.* Russell, 2 Allen (Mass.) 196, holding thus of declarations made by the arbitrator several days after making and publishing his award.

70. Clark *v.* Burt, 4 Cush. (Mass.) 396.

mission.[71] Otherwise under a statutory submission providing that it shall be made a rule of court.[72]

B. Improper Appointment of the Umpire may be shown, on a motion for an attachment for failure to perform the award, for the purpose of annulling the award.[73]

C. Termination of Submission. — Extrinsic evidence may be received, on a motion for an attachment for failure to perform an award, to show that the arbitrators' authority to act had been revoked.[74] But on a proceeding to enforce an award against two defendants, evidence by one of them that after the hearing on the submission, but before the arbitrators had declared their award, he had declared to them that he would not be bound by their award is not competent to prove revocation of the submission.[75] But where an arbitrator has been called to prove a parol submission and an award thereunder, it is competent for the other party to prove by him facts showing that the submission had ceased to be operative when the award was made.[76]

71. Sharp *v.* Lipsey, 2 Bailey (S. C.) 113.

72. Elmendorf *v.* Harris, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587. Nor is the award, if signed by the umpire only, any evidence of such appointment.

73. Improper Appointment of Umpire. — Lord *v.* Lord, 5 El. & Bl. 404, 84 Eng. C. L. 403.

74. Milne *v.* Gratrix, 7 East 608; King *v.* Joseph, 5 Taunt. 452, 22 Rev. Rep. 803.

75. Robertson *v.* McNiel, 12 Wend. (N. Y.) 578.

As to evidence to show that the arbitrators exceeded their authority, see *infra* this title.

76. Perit *v.* Cohen, 4 Whart. (Pa.) 81. The facts sought to be proved were that soon after the submission a meeting of the arbitrators was held, and upon the facts and statements then before them, they decided that they could make no award and so informed the parties; and, second, that long afterwards, without any new submission or notice to defendant, they met and made the award in question, not on the facts and statements communicated by the parties, but upon circumstances which had happened after the first meeting and after the abandonment of the reference. The court said: "The court below fell into an error in rejecting the evidence, under the impression, it would seem, that the witness was incompetent, or could not be required to give it, because he acted as an arbitrator in making the award upon which the plaintiff relied for his recovery against the defendant. The court seem to have taken up the idea, that the evidence, which the defendant proposed to give by the witness, tended to impeach the propriety, if not the integrity of his conduct, as an arbitrator. This, however, I think, was a misapprehension; for the evidence offered to be given by him, instead of going to show that he acted improperly as an arbitrator between the parties here, would have shown, if it had been given, that he in fact was not an arbitrator at the time, and had no authority from the parties, to act as such; and that, though he had had such authority some time before that, yet he with the other gentleman upon whom it was conferred, after making an attempt to execute it, but being unable to do so, had surrendered or given it up again to the parties; who thereupon had a right to consider the submission as terminated, and no longer in force."

This case also held it competent for the defendant to bring out these facts on cross examination, and without first having opened his case. The court said: "Having given evidence accordingly by the witness, which, without more, went to prove

D. Resignation of Arbitrators. — Evidence is admissible, to bar an action on an award, to show that the arbitrators had resigned their authority, before making their award, and that their resignation had been accepted by the parties. It is certainly competent to show that they acted without authority.[77]

E. Substitution of Arbitrators. — Parol evidence is admissible to show that the arbitrators who made the award acted in the place of those first agreed upon, by the consent of the parties.[78]

3. The Oath of the Arbitrators. — When the fact that the arbitrators have been sworn is not required by statute to be evidenced by a writing, parol evidence is competent to show that fact.[79] So also of the fact that the parties waived the necessity of the oath of the arbitrators.[80]

4. Time of Meeting. — If it is not required by an express provision in the submission, or by some statute, that the arbitrators shall keep a detailed written account of their meetings, adjournments, and all other proceedings, parol evidence is admissible to show the time when the arbitrators met for the hearing.[81]

5. Number of Arbitrators Present and Acting. — Although the award may not on its face show that all the arbitrators were present and acted under the submission, that fact may be shown by evidence *aliunde*.[82]

6. Matters Submitted to, and Decided by, the Arbitrators. — A. In General. — Whenever parties have submitted disputes or dif-

that the writing, purporting to be an award, was made in pursuance of an agreement of submission in force at the time of making the award, he (the plaintiff) could with no propriety or color of reason, after closing his examination of the witness in chief, object to the defendant's asking such questions of the witness as would tend to elicit evidence from him, showing that the submission, of which he testified, as having been made, had been put an end to, before the making of the award; and consequently the award was made without any submission, which authorized it."

77. Relyea *v.* Ramsay, 2 Wend. (N. Y.) 602.

78. Douglass *v.* Brandon, 6 Baxt. (Tenn.) 58.

79. **Parol Testimony to Show That Arbitrators Have Been Sworn.** Crook *v.* Chambers, 40 Ala. 239; Price *v.* Kirby, 1 Ala. 184; Cones *v.* Vanosdol, 4 Ind. 248, citing Jacobs *v.* Moffat, 3 Blackf. (Ind.) 395. And see Shryock *v.* Morton, 2 A. K. Marsh. 561. *Compare* Bethea *v.* Hood, 9 La. Ann. 88; Sharkey *v.* Wood, 5 Rob. (La.) 326.

80. **Waiver of Arbitrators' Oath.** Tucker *v.* Allen, 47 Mo. 488.

81. Porter *v.* Dugat, 12 Mart. O. S. (La.) 245.

82. Hoffman *v.* Hoffman, 26 N. J. Law 175; Schultz *v.* Halsey, 3 Sandf. (N. Y.) 405.

Statement of the Rule. — "It is apprehended that no case can be adduced, showing the necessity of this fact appearing in the award itself. To prove it by parol, does not contravene any adjudged principle in the exposition of awards. It neither impeaches nor supports its merits, but supplies a fact not affirmed or denied by the award, and which, perhaps, it was not the duty of the two arbitrators to notice. If, in this case, one of the arbitrators had not met, and arbitrated with the other two, would it not be competent to prove it, and thereby show, what a defendant is always entitled to show, in a court of law, that the award is not within the submission?" Ackley *v.* Finch, 7 Cow. (N. Y.) 290.

ferences to arbitration and award, and the award does not upon its face show what matters were in fact submitted and decided, and it subsequently becomes a material fact as to whether or not the matter then at issue had been submitted to and decided by the arbitrators, either party may introduce evidence *aliunde* for the purpose of showing what matters were in fact submitted.[83] But parol evidence

83. *England.* — Brown *v.* Croydon Canal Co., 9 Ad. & El. 522, 36 Eng. C. L. 282.

Delaware. — Robinson *v.* Burton, 2 Houst. 62.

Kentucky.—Shackelford *v.* Pucket, 2 A. K. Marsh. 435. 12 Am. Dec. 422.

Maine. — Comery *v.* Howard, 81 Me. 421, 17 Atl. 318 (*dictum*); Carter *v.* Shibles, 74 Me. 273.

Massachusetts.—Blackwell *v.* Goss, 116 Mass. 394; Leonard *v.* Root, 15 Gray 553; Cook *v.* Jaques, 15 Gray 59; Hodges *v.* Hodges, 5 Metc. 205.

North Carolina. — Osborne *v.* Calvert, 83 N. C. 365, 86 N. C. 170.

Pennsylvania. — Huckestein *v.* Kaufman, 173 Pa. St. 199, 33 Atl. 1028.

Tennessee. — Newman *v.* Wood, Mart. & Y. 190.

Contra. — Gardener *v.* Oden, 2 Cush. (Miss.) 382.

"Without the Aid of Parol Evidence," said the court in Schackelford *v.* Purket, 1 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422, "it would be impossible to sustain a general submission of all matters in dispute. For, as the submission contains no suggestion of the matters disputed, it must be inoperative unless those matters can be ascertained by matters extraneous from the submission; for it is plain no defect in the submission, the mere act of the parties can be explained by anything contained in an award—the act of the administrators; and there is nothing else but parol evidence which can be resorted to for the purpose of supporting the submission." And in Bennett *v.* Pierce, 28 Conn. 314, the court in sustaining the admissibility of such evidence, say: "The parol evidence was not offered for the purpose of altering or changing the terms of the written submission, or even for the purpose of explaining an ambiguity contained in it, which may be done in some cases; but, as intimated, for the mere purpose of applying the instrument to its proper subject matter, which may always be done. And we see no more objection to it in this case than there is in proving by parol that a piece of land is the same that is described in a deed, because it answers to the description."

Accidental Omission to Lay Matter Before Arbitrators. — Where there is a submission to arbitration of all demands which either party has against the other one, one of the parties as plaintiff in a subsequent action against the other, who has pleaded the award as in bar plaintiff's cause of action, cannot introduce evidence to show that the matters on which he has brought suit were by accident never laid before the arbitrators for their consideration, nor did they decide thereon. Wheeler *v.* Van Houten, 12 Johns. (N. Y.) 311. The court said: "It would be a very dangerous precedent, to allow a party, on a submission so general, intended to settle everything between the parties, to lie by, and submit only part of his demands, and then institute a suit for the part not brought before the arbitrators. The objection of the submission was to avoid litigation; and neither party is at liberty to withhold a demand from the cognizance of the arbitrators, on such submission and then to sue for it. It is true, if a person sues upon several and distinct causes of action, and submits only a part of them to the jury, he is not precluded from suing again for such distinct cause of action as was not passed upon. In that case, he was not bound originally, to unite the different causes of action, and, therefore, shall not be barred; but here he bound himself to the defendant to submit every demand, and cannot recede from his agreement." See also Owen *v.* Boerum, 23 Barb. 193.

of what was understood and intended and acted upon is not competent to show what the award itself does not show.[84]

B. As Showing Excess of Authority by Arbitrators. — It is a very general rule that it may be shown by parol evidence, either in defense or avoidance of an award, that the arbitrators acted in excess of their jurisdiction by considering and passing upon matters not properly within the terms of the submission, or by omitting to pass upon matters submitted to them,[85] although there are decisions

Misconduct of Party Causing Omission by Arbitrators. — But it is proper for the plaintiff to show that he endeavored to bring before the arbitrators the subject matter of the present cause of action, but that the defendant, by his objections, caused the arbitrator to refuse to consider it. Such evidence not only shows that the cause of action was not included in the award, but that it could not be, on account of the misconduct of the defendant himself. Morrss *v.* Osborn, 64 Barb. (N. Y.) 543.

Where the Submission Mentions Certain Items, and it is objected that the award makes no mention of or decision thereon, it can be proved by parol that there was in fact a dispute between the parties about those items that had been submitted to the arbitrators, and that the latter had acted upon them. Hewitt *v.* Furman, 16 Serg. & R. (Pa.) 135.

Parol evidence is always resorted to for the purpose of identifying the thing or matter. Burrows *v.* Guthrie, 61 Ill. 70.

Matters Expressly Excluded by Award. — Although a submission may be general of all matters in dispute, and the award may recite the consideration of such matters, yet the defendant in an action on the award may give evidence of indebtedness to him from the plaintiff where the arbitrators in a memorandum on the back of the award, expressly stated that they took no notice of such indebtedness. Griffith *v.* Jarrett, 7 Har. & J. (Md.) 70.

84. As for example what the arbitrator intended to decide and did decide. Such evidence adds to and varies the effect, if it does not contradict, the written award. Parker *v.* Parker, 103 Mass. 167. And see *supra*, this article III, 1, B. "Contradiction or Explanation by Extrinsic Evidence;" "Controlling Intent and Meaning."

Performance of Contract Submitted. — In Galvin *v.* Thompson, 13 Me. 367, an action on an award, it was held competent to show by parol how far each party had performed or fallen short of performance of the contract submitted to the determination of the arbitrators, and what claims thence resulted by one upon the other, depending on facts subsequent to the agreement and which could only be verified by such proof.

Award Not Separating Demands Due Party in Different Capacities. In Strong *v.* Beroujon, 18 Ala. 168, it was contended that the award in question was uncertain because it did not show what was awarded to one of the parties in his own right and what as guardian; but it was said that this was not required by the submission, and that if it ever became a material question in the event of a future suit about the same matters, evidence would be admissible to prove it.

85. Parol Evidence to Show Excess of Authority. — *Alabama.* Burns *v.* Hendrix, 54 Ala. 78.

Indiana. — Brown *v.* Harness, 11 Ind. App. 426, 38 N. E. 1098.

Iowa. — Sharp *v.* Woodbury, 18 Iowa 195; Dice *v.* Yarnel, Morr. 241.

Maine. — Wyman *v.* Hammond, 55 Me. 534; McNear *v.* Bailey, 18 Me. 251.

Massachusetts. — Hubbell *v.* Bissell, 2 Allen 196; Gaylord *v.* Norton, 130 Mass. 74.

New York. — Dodds *v.* Hakes, 114 N. Y. 260, 21 N. E. 398; Briggs *v.* Smith, 20 Barb. 409; Butler *v.* New York, 7 Hill 329, (reversing 1 Hill 489, and in effect overruling Barlow *v.* Todd, 3 Johns. 367, 2 Johns. Ch. 55; Perkins *v.* Wing, 10 Johns. 143.

to the contrary.[86]

C. Testimony of the Arbitrators. — And for the purpose of

and see De Lorig *v.* Stanton, 9 Johns. 38; and followed in Williams *v.* Goodrich, 4 Denio 194); French *v.* New, 20 Barb. 481.

North Carolina. — Walker *v.* Walker, 1 Winst. 255; Brown *v.* Brown, 4 Jones Law 123.

Pennsylvania.—Dickerson *v.* Rorke, 30 Pa. St. 390.

Statement of the Rule. — "Such evidence," said the court in Butler *v.* New York, 7 Hill 329, "has a bearing upon the right and power of the arbitrators to make the award. It does not propose to vary the written terms of the award, but to show that the arbitrators did award upon matters not submitted to them. It is analogous to the case of a special power of attorney, where oral evidence can, unquestionably, be received to show that the act done or the instrument executed by the attorney was not within the scope of his authority. The award of arbitrators is absolute and conclusive except in the specified cases of misconduct, or where they exceed their power. These are matters not necessarily or ordinarily appearing on the face of the award, and generally can only be brought to the consideration of a court by extrinsic evidence. It would seem like a denial of justice, where arbitrators have transcended the power and authority given them, that the party shall be precluded from giving any proof, and be bound to submit, merely because the arbitrators have not made such defect of authority apparent upon the face of the award."

"**The Purpose of Such Evidence Is Not to Vary the Terms of the Award,** but to show that the arbitrators did award on matters not submitted to them. The law is well settled that the power of arbitrators is confined strictly to the matters submitted to them, and if they exceed that limit their award will, in general, be void. They cannot decide upon their own jurisdiction, nor take upon themselves authority by deciding that they have it, but must in fact have it, under the agreement of the parties whose differences are submitted to them, before their award can have any validity, and the fact of jurisdiction, when their decision is challenged, is always open to inquiry." Dodds *v.* Hakes, 114 N. Y. 260, 21 N. E. 398.

Affidavit of Arbitrators or Other Persons. — The court may receive the affidavits of the parties—the arbitrators or other persons—to show what took place at the hearing before the arbitrators, for the purpose of showing that the arbitrators exceeded their powers under the submission. Williams *v.* Goodrich, 4 Denio (N. Y.) 194.

86. Ruckman *v.* Rawson, 37 N. J. Law 565.

Parol Evidence of What Was Considered. — Where three successive arbitraments have been had, and awards made, and, in an action on the last award, it appears on the face of the award that the arbitrators had allowed damages adjudicated on in a prior arbitrament, parol evidence is admissible as to what had been considered on the prior award in order to show how far such award was conclusive; but not as to what had occurred under the last award to show an excess of authority, and thus to contradict or explain the award. Hoagland *v.* Veghte, 23 N. J. Law 92.

Of Failure to Consider. — In Whitewater Valley Canal Co. *v.* Henderson, 3 Ind. 3, an action upon an award for damages for injuries to plaintiff, caused by defendant's entering on his land and taking material for the construction of the defendant's canal, it was held that the defendant could not introduce evidence that at the time of the injuries the lands were owned by a third person, but that the arbitrators, on determining upon their award, refused to take into account, under a claim of offset to the damages claimed by the plaintiff, the benefits and advantages resulting from the construction of the canal to the whole of the lands of which plaintiff's land was a parcel.

Consideration of Matter Not Fur-

showing the facts shown by the two preceding sections as facts proper to be shown, it is proper to use the testimony of the arbitrators.[87] And the testimony of an arbitrator, who is a lawyer, offered for this purpose, is not to be excluded on the ground that the communications made to him on the hearing were privileged.[88] But such testimony cannot be received for the purpose of impeaching the award.[89]

7. Mistake. — A. In General. — The right to impeach or avoid an award on the ground that the arbitrators have mistaken the law on the facts or have miscalculated, or the like, when the fact is not apparent on the face of the award, is one upon which the courts

nishing Legal Claim. — In Rundell *v.* Le Fleur, 6 Allen (Mass.) 480, it was held that where an award, under a general submission, by bond, of all demands to arbitration, is unobjectionable on its face, and no partiality or corruption is charged against the arbitrators, parol evidence is inadmissible to show that they considered in making their award of damages, a matter which furnished no legal ground of claim for damages.

Boundary Line. — A party to an award settling a boundary line dispute between himself and the other party, cannot, for the purpose of showing an excess of authority by the arbitrators, introduce evidence that at the time of the arbitration there was no dispute in relation to the boundary line in dispute. Searle *v.* Abbe, 13 Gray (Mass.) 409.

87. Testimony of Arbitrators to Show Matters Submitted and Decided. — *England.* — Burdeugh *v.* L. R., 5 H. L. 418.

United States. — York etc. R. Co. *v.* Myers, 18 How. 246.

Delaware. — Allen *v.* Smith, 4 Har. 234; Stevens *v.* Gray, 2 Har. 347.

Illinois. — Spurck *v.* Crook, 19 Ill. 415.

Maine. — Buck *v.* Spofford, 35 Me. 526.

Massachusetts. — Hale *v.* Huse, 10 Gray 99; Evans *v.* Clapp, 123 Mass. 165, 25 Am. Rep. 52; Hodges *v.* Hodges, 5 Metc. 205.

Missouri. — Valle *v.* North Mo. R. Co., 37 Mo. 445.

Nebraska. — Hall *v.* Vanier, 6 Neb. 85.

New York. — New York *v.* Butler, 7 Hill 329 (reversing 1 Barb. 325, 4 How. Pr. 446); Briggs *v.* Smith, 20 Barb. 409.

Pennsylvania.—Graham *v.* Graham, 9 Pa. St. 254, 49 Am. Dec. 557; Converse *v.* Colton, 49 Pa. St. 346; Zeigler *v.* Zeigler, 2 Serg. & R. 286; Roop *v.* Brubacker, 1 Rawl. 304.

Contra. — Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159; State *v.* Stewart, 12 Gill & J. (Md.) 458; Gardener *v.* Oden, 2 Cush. (Miss.) 382.

Testimony to Enlarge Written Award. — In Glade *v.* Schmidt, 20 Ill. App. 157 (*affirmed* 126 Ill. 485), it was held that when the written award pursues the submission, it cannot be enlarged by testimony of the arbitrators showing that they considered and settled matters not submitted; although such testimony might be admissible in a direct attack to set aside the award or in answer to a suit upon it, in support of a plea denying the validity of the award.

88. Cady *v.* Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834.

89. Dohe *v.* James, 4 N. Y. 568.

Writing Signed by Arbitrators. Where two of the arbitrators are called and examined as witnesses touching the matters submitted to them, and they contradict each other, a writing signed by them, and containing that portion of the award sought by one of the parties to be rejected as not having been submitted to the arbitrators under the submission, after it has been submitted to them, is competent evidence to be considered by the jury in determining the relative weight that ought to be given to

are by no means in accord.[90] Of course, if the courts of a particular jurisdiction do not allow an inquiry into an award upon any such ground, they will not allow the introduction of any kind of evidence *aliunde* to show it; and again if the courts do allow such an inquiry, the important question then is, what kind of evidence may and will they receive for the purpose of showing the mistake.[91]

B. Testimony of the Arbitrators. — Accordingly, some of the courts hold that for the purpose of showing mistake of the arbitrators, it is proper to receive the testimony of the arbitrators,[92] although there are courts holding otherwise.[93]

the testimony of the arbitrators. McCullough *v.* McCullough, 12 Ind. 487.

90. Consequences of Mistake. As was said by Mr. Morse in his work on Arbitration and Award (chap. xix.): "We now approach the most difficult topic in the law of arbitration, to wit, the question, what will be the effect of a mistake made by the arbitrator in matter of law or of fact, not obvious on the face of the award itself? The embarrassment in dealing with this matter lies in the utter inconsistency of the judicial decisions; for so soon as we seem to have successfully educed a rule or principle from some of them, we straightway find it contradicted by other authorities. Thus the only certain element is the entire uncertainty. The trouble exists in England to an even greater extent than in our own country. Russell acknowledges that 'a close examination of the cases compels one to say that one uniform principle has not been adhered to as to the consequences of a mistake.'" Citing Lord Ellensborough as having acknowledged the same difficulty in Chace *v.* Westmore, 13 East 356; and Chief Justice Parker, in Jones *v.* Boston Mill Corporation, 6 Pick. (Mass.) 148; Russell on Arb., 3d ed., p. 292.

91. Scope of the Article. — The question of the right to impeach an award for mistake naturally does not fall within the scope of a work on evidence. And it is thought by the writer of this article that the proper point at which to start is with the assumption that the courts do allow such an inquiry, and accordingly restrict the treatment of the question here to showing what evidence may be received.

92. Williams *v.* Paschall, 3 Yeates (Pa.) 564; King *v.* Armstrong, 25 Ga. 264; Roop *v.* Brubacker, 1 Rawle (Pa.) 304.

Mistake Must Be An Available Ground. — Of course the mistake must be one recognized by courts as one available to the party as a ground for impeaching the award. Thus Barows *v.* Sweet, 143 Mass. 316, 9 N. E. 665, allowed the testimony of the arbitrator to be received to show an inadvertent charge against one party of an item which all the parties admitted and intended should have been charged to another, and that but for such mistake his award would have been different. While Monk *v.* Beal, 2 Allen (Mass.) 585, holds that his testimony cannot be received to show an erroneous conclusion upon the evidence before him. And again in Leavitt *v.* Comer, 5 Cush. (Mass.) 129, testimony of one of the arbitrators tending to show that, although the award was signed by him, yet in fact it was not his award, as he intended to have made the same, and that in making their computations the arbitrators overlooked certain items and made certain omissions which materially affected the result, was held to have been properly rejected.

Concurrence of All the Arbitrators. Again, some of the courts modify the above rule by holding that all of the arbitrators must be produced and a concurrence by all of them in the mistake shown. Stow *v.* Atwood, 28 Ill. 30; Pulliam *v.* Pensoneau, 33 Ill. 374.

93. Newland *v.* Douglass, 2 Johns (N. Y.) 62; Chapman *v.* Ewing, 78 Ala. 403. And in Shiver *v.* Ross, 1 Brev. (S. C.) 203, on motion to

A Letter From the Arbitrator to one of the parties stating the grounds of his decision cannot be received to show mistake of law by him.[94]

C. Admissions of Arbitrator. — Again it has been held that a mistake of law on the part of the arbitrator which is not apparent on the face of the award, can only be proved by the express admissions or statements of the arbitrator himself that he had meant to decide according to the legal rule and mistaken it.[95]

D. Affidavits. — But it has been held that after an award has been filed in court by the arbitrators, the affidavits of the arbitrators that they made a mistake in calculation will not justify the court in changing the award.[96] Otherwise, however, of affidavits showing that the arbitrators had misconstrued the rule of reference as to the extent of their jurisdiction, and had misdecided accordingly.[97]

An Ex Parte Statement Purporting to Contain the Evidence Before the Arbitrators, compiled from the notes of, and sworn to by counsel for one of the parties, but under no authority derived from the rules and practice of the court, or the consent of the opposite party, is not competent evidence on a motion to set aside the award for mistake.[98]

confirm an award, it was insisted that the arbitrators had made a mistake, and leave was asked to examine one of the arbitrators to explain the award, and discover whether the same mistake was not made; but the motion was denied. The court said: "If the arbitrators themselves, or a majority of them, would come forward and express their dissatisfaction with the award, and offer to explain some mistake or miscalculation which they had involuntarily committed, it would be a good cause for sending them out again, or referring the matter back to them, to reconsider their award; or even for refusing to affirm the award, without sending it back to be reconsidered. But as this was not the case in the present instance, the rule was ordered to be made absolute."

Evidence of Promises by the Arbitrators to Correct Errors and mistakes is inadmissible in defense of an action at law on the award. Efner *v.* Shaw, 2 Wend. (N. Y.) 567.

94. Leggo *v.* Young, 16 C. B. 626. And see Ward *v.* American Bank, 7 Mete. (Mass.) 486, so holding of such a statement in writing by the arbitrator.

95. Admissions of Arbitrator to Show Mistake. — Bell *v.* Price, 22 N. J. Law 578. See also Morgan *v.* Mather, 2 Ves. Jr. 15, 2 Rev. Rep. 163. And see Valle *v.* North Missouri R. Co., 37 Mo. 445, where it is said "that the arbitrator may come into court of equity and prove the mistake, but that it ought to be a mistake that does not result from the mere negligence of the losing party, but one that, by due diligence, he would not be able to discover."

96. Tilghman *v.* Fisher, 9 Watts (Pa.) 441, wherein the court said: "It would be monstrous indeed, if the court were, upon the application of either party, to undertake to alter the award of arbitrators to what they, at the solicitation of the party, had declared on oath was their intention, so as to make it materially different, by enlarging the amount nearly five hundred dollars from what they had returned in their award. The iniquity that would inevitably result from such a practice, were it to obtain, is too obvious to require it to be stated."

97. Thus, in Jones *v.* Corry, 5 Bing. N. C. 187, 35 Eng. C. L. 109, 55 Rev. Rep. 652, such affidavit was received and the award set aside, notwithstanding on the face of the award there was no objection.

98. Bell *v.* Price, 22 N. J. Law

8. Misconduct, Fraud, Corruption, Partiality, Etc. — A. In General. — Under the rule allowing a party to impeach an award upon the ground that the arbitrators have been guilty of corruption, partiality, gross misbehavior and the like, the evidence to establish those facts may be either direct, or of such a character as will lead the mind to the inevitable conclusion that the award was influenced by dishonest methods.[99]

Constructive Fraud. — Extrinsic evidence to show fraud on the part of the arbitrators, as a ground for avoiding the award, must be such as will show an actual and intentional fraud and not a constructive fraud such as flows from an erroneous or unjust judgment.[1]

The Amount of the Award is a fact that may be shown and taken into consideration as tending to show misconduct on the part of the arbitrators.[2]

B. Testimony of the Arbitrators. — The weight of authority seems to be to the effect that an arbitrator is not a competent witness to impeach his own award by evidence of his own misconduct,[3]

578. The court also ruled that the statement was incompetent for the further reason that the court could not review the merits of the award by an examination of the evidence before the arbitrators.

99. Bumpass *v.* Webb, 4 Port. (Ala.) 65, 29 Am. Dec. 274. And see Hartupee *v.* Pittsburgh, 131 Pa. St. 535, 19 Atl. 507, where evidence sought to be adduced on a charge of collusion between the arbitrator and one of the parties was ruled out, because of its insufficiency, as not showing any such collusion.

Heated Discussion Between Arbitrators During Consultation. — But evidence to the effect that after the hearing and while the arbitrators were in consultation, the chairman expressed in a decided manner his views of the law of the case; that one of the arbitrators stated that he should rely upon the chairman's knowledge of the law; that the other arbitrator dissented from the chairman; that there was a heated and unfriendly discussion between the chairman and dissenting arbitrator, and that afterwards the other two refused to discuss the case further with him, will not justify the setting aside of the award conformable to the submission and unobjectionable upon its face. Roberts *v.* Old Colony R. Co., 123 Mass. 552.

Injustice of Award. — So evidence introduced for the purpose of assailing an award, the utmost tendency of which is to show that the judgment of the arbitrators is unjust, will not sustain a charge of fraud, partiality or corruption. Elrod *v.* Simmons, 40 Ala. 274.

And in Hoffman *v.* De Graff, 109 N. Y. 638, 16 N. E. 357, it was held incompetent for a party to introduce evidence as to the value of land, which had been submitted to arbitration, and the character and competency of the adverse party's witnesses who had testified before the arbitrators, for the purpose of avoiding the award for misconduct of the arbitrators.

Proceeding Ex Parte. — But in an action on an award, defended on the ground of misconduct on the part of the arbitrators, it is competent for the defendant to show that the arbitrators, contrary to the express provision of the submission, received *ex parte* statements and affidavits from one party, without the knowledge of the other. Speer *v.* Bidwell, 44 Pa. St. 23.

1. Hostetter *v.* Pittsburg, 107 Pa. St. 419.

2. Brown *v.* Bellows, 4 Pick. (Mass.) 178. See also Smith *v.* Cooley, 5 Daly (N. Y.) 401.

3. Claycomb *v.* Butler, 36 Ill. 100; French *v.* New, 20 Barb. 481; Denman *v.* Bayless, 22 Ill. 300; Ellmaher

nor that of his co-arbitrators,[4] nor of a party if it involve his own misconduct.[5] But he may depose to facts which transpired at or during the arbitration tending to show the award to be void for legal cause.[6]

C. Declarations in Pais. — But evidence of declarations of the arbitrators, uttered *in pais*, after having made his award, is admissible in support of a charge of partiality by him.[7]

D. Affidavits. — It has been held that affidavits may be introduced in evidence for the purpose of showing partiality or misbehavior.[8]

9. Performance of the Award. — In an action on an award it is competent for the defendant to give evidence to show performance of the award,[9] or to give evidence that the plaintiff had not complied with its terms.[10] And the plaintiff, in an action on an arbitration bond may give evidence showing its breach.[11]

v. Buckley, 16 Serg. & R. (Pa.) 72; Overby *v.* Thrasher, 47 Ga. 10.

4. Tucker *v.* Page, 69 Ill. 179.

But an Arbitrator Who Has Refused to Join in the Award, is competent to testify to acts of misconduct committed by another arbitrator. Levin *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 854, where the court said: "It will be observed that this evidence was not offered for the purpose of explaining or altering the award, but with a view to invalidating it altogether; nor was it calling on an arbitrator to testify as to the grounds of his decision, but as to extrinsic facts tending to show misconduct on the part of one of the arbitrators who joined in making the award. It is also to be observed that the witness was not called to impeach his own award, for he had never joined in the award. We apprehend no case can be found which holds that an arbitrator (especially one who has refused to join in the award) is incompetent to testify as to acts of misconduct committed by another arbitrator. If such was the law, the grossest fraud, corruption or partiality might prevail, and its victim have no relief. The rule, founded on considerations of public policy, that no affidavit shall be received from a juror to impeach his verdict, is not applicable, to its full extent, to arbitrators."

5. Ellemaker *v.* Buckley, 16 Serg. & R. (Pa.) 72.

6. Strong *v.* Strong, 9 Cush. (Mass.) 560.

7. **Declaration by Arbitrators to Show Partiality.** — Strong *v.* Strong, 9 Cush. (Mass.) 560.

8. Pleasants *v.* Ross, 1 Wash. (Va.) 156, 1 Am. Dec. 449. But *compare* Smith *v.* Smith, 32 Me. 23, where it is held that the affidavit of a party is not evidence on a motion to reject an award, that he was induced by fraud to enter into the submission.

9. **Evidence of Performance of the Award.** — Thus in an action to enforce performance of an award directing the defendant to execute to the plaintiff a "good and authentic deed of conveyance" of certain lands, performance of the award may be shown by the defendant by evidence of a tender of such a deed, agreeably to the award, as was effectual to convey all the right and title to the land which the defendant had at the time of the award; it is not necessary that he show that he had legal title thereto. Preston *v.* Whitcomb, 11 Vt. 47. Nor can the defendant show in answer thereto that the defendant had no legal title to the land, or that a third person had adverse possession thereof.

10. Keaton *v.* Mulligan, 43 Ga. 308.

11. **Breach of Bond.** — In Quimby *v.* Melvin, 35 N. H. 198, an action on an arbitration bond, it was held proper for the plaintiff to show

10. Pleading and Proof. — A. VARIANCE. — The evidence offered for the purpose of impeaching an award upon any of the grounds just discussed, must support the particular ground set up.[12]

11. Burden and Requisite Cogency of Proof. — One who is seeking to impeach the validity of an award upon a ground available to him for that purpose, such as fraud, misconduct, excess of authority by the arbitrators, and the like, has the burden of proving such ground;[13] and that burden must be sustained by evidence clearly and convincingly establishing the ground set up.[14]

breach of the bond by evidence that the defendant prevented one of the arbitrators from taking part in the award in reference to the costs, they being included in the matters submitted, although the costs were the only matter undecided.

12. Thus Error in Judgment in Law, Mistake of Facts, or in the Amount, cannot be shown under an allegation charging fraud and corruption. Root *v.* Renwick, 15 Ill. 461.

13. *Arkansas.* — Green *v.* Ford, 17 Ark. 586.

Georgia. — Cobb *v.* Morris, 40 Ga. 671; Hardin *v.* Almand, 64 Ga. 582.

Louisiana. — New Orleans Elev. Co. *v.* New Orleans, 47 La. Ann. 1351, 17 So. 860.

Maine. — Hayes *v.* Forskoll, 31 Me. 112; Akinson *v.* Crooker, 35 Me. 135.

Maryland. — Witz *v.* Tregallas, 82 Md. 351, 33 Atl. 718.

Massachusetts. — Gaylord *v.* Norton, 130 Mass. 74; Roberts *v.* Old Colony R. Co., 123 Mass. 552; Boston Water Power Co. *v.* Gray, 6 Metc. 131; Sperry *v.* Ricker, 4 Allen 17.

Michigan. — Clement *v.* Comstock, 2 Mich. 359.

Nebraska. — Connecticut F. Ins. Co. *v.* O'Fallon, 49 Neb. 740, 69 N. W. 118.

New Hampshire. — Richardson *v.* Huggins, 23 N. H. 106.

Burden of Proving Excess of Authority. — So in an action to set aside an award, in which it appears by comparison with the arbitration agreement that the arbitrators exceeded their authority, and made an award in respect to matters not submitted to them, and the defendant contends that the complainant, after he had seen the award and fully understood what it contained, assented to its execution, the defendant has the burden of establishing that fact. Leslie *v.* Leslie, 52 N. J. Eq. 322, 31 Atl. 724.

"The Party Who Charges the Arbitrators With Having Committed Errors in Fact, and who seeks on that ground to set aside their award, must lay before the court all the evidence in reference to the alleged errors which was before the arbitrators. For without the whole evidence, how can this court say the arbitrators were mistaken? It will not do to produce a part of the evidence raising a *prima facie*, and it may be a strong case of mistake and withhold the remaining part, or seek to throw upon the other party the burden and expense of proving the mistake is upon the party charging it. The court cannot intelligently decide that the arbitrators erred without having before it the same evidence upon which they acted; and if the burden of proving the mistake is upon the party charging it, then upon him rests the burden of producing the whole evidence in relation to it." Bell *v.* Price, 21 N. J. Law 32, 38.

14. Clear and Conclusive Proof Necessary. — *Kentucky.* — Callant *v.* Downey, 2 J. J. Marsh. 346.

Michigan. — Bush *v.* Fisher (Mich.), 38 N. W. 446; Batten *v.* Patrick (Mich.), 81 N. W. 1081.

Minnesota. — Mosness *v.* German American Ins. Co., 50 Minn. 341, 52 N. W. 932.

Mississippi. — Thornton *v.* McNeil, 1 Cush. 369.

New York. — Wood *v.* Auburn etc. R. Co., 8 N. Y. 160.

Pennsylvania. — Robinson *v.* Bickley, 30 Pa. St. 384; Bond *v.* Olden, 4 Yeates 243; Warden *v.* Parker, 2

Yeates 513; Williams *v.* Paschall, 3 Yeates 564.

Tennessee. — Dougherty *v.* M. Whorter, 7 Yerg. 239; Hardeman *v.* Burge, 10 Yerg. 201.

Vermont. — Kendrick *v.* Tarbell, 26 Vt. 416.

Mistake Must Be Clearly Shown. And where parties have submitted their controversies to arbitration the one who seeks to annul the award on the ground of mistake, must not only clearly establish the mistake, and that he was prejudiced thereby, but that if the mistake had not occurred the award would have been different. Gorham *v.* Millard, 50 Iowa 554; Thompson *v.* Blanchard, 2 Iowa 44.

So held also where, in the absence of fraud, it is claimed that certain matters were in fact before the arbitrators and within the submission, but were not examined or acted upon by them. Tomlinson *v.* Tomlinson, 3 Iowa 575.

But the Burden of Proof to Show That Arbitrators Rejected and Excluded Pertinent and Material Testimony offered before them, is satisfied by a fair preponderance of evidence. Mossness *v.* German American Insurance Co., 50 Minn. 341, 52 N. W. 932.

ARDENT SPIRITS.—See Intoxicating Liquors.

ARREST.—See Attendance of Witnesses; Impeachment.

ARSON.

By D. Mountjoy Cloud.

I. CORPUS DELICTI.

1. Fact of Fire. — Upon a question whether the act proceeded beyond a mere attempt, boards showing marks of fire may be put in evidence,[1] and the question whether or not any part of the building was actually burned will be for the jury.[2]

1. Com. *v.* Betton, 5 Cush. (Mass.) 427.

2. **Portion of Burnt House Produced in Court.** — Upon the trial of one for arson, the state, in connection with other evidence, produced in court a board from the side of the building alleged to have been burned, and which was offered as exhibiting the whole of the part burnt. It was held that, whether such board had been so affected by fire as to constitute a burning, was a question of fact to be decided by the jury, and Shaw C. J., said: . . . "Whether the fire took effect on the fiber of the wood, must depend on an inference of fact to be drawn from its condition, as indicated by its being discolored, blackened, scorched, charred or consumed. . . . The judge may inspect and examine it, and comment on the evidence, but the jury must decide." Com. *v.* Betton, 5 Cush. (Mass.) 427.

In Minnesota, by statute (Penal Code, § 375) where one was indicted for burning a barn, it was held competent to show that an inhabited dwelling caught fire from the barn, in order to prove the material ingredient of the offense charged, viz., that

2. Intent. — A. GENERALLY. — The rule that intent may be proved by circumstantial evidence is peculiarly applicable to cases of arson.[3]

B. PRESUMPTIONS. — a. *Of Accident.* — In the absence of evidence a fire is presumed to have been accidental.[4]

b. *Of Intending Natural Results.* — One who sets a fire is presumed to intend the natural consequences of his act.[5]

3. Character of Structure. — To show that a structure is such a building as the indictment specifies, evidence of its use and contents is admissible,[6] where the character of the structure is not otherwise clearly shown or admitted.[7]

4. Ownership. — A. GENERALLY. — *See* articles "OWNERSHIP" and "TITLE." The matter is considered here only as the cases seem to state rules peculiarly applicable to arson.

B. DEEDS AND RECORDS. — Ownership of the burned building may be shown by title deeds or the record thereof.[8]

C. POSSESSION. — By open, exclusive, undisputed possession of the burned premises.[9]

the inhabited dwelling was "endangered." State *v.* Grimes, 50 Minn. 123, 52 N. W. 275.

3. For method of proving intent generally, *see* article "INTENT." People *v.* Hiltel 131 Cal. 577, 63 Pac. 919; State *v.* Byrne, 45 Conn. 273; Com. *v.* McCarthy, 119 Mass. 354; Com. *v.* Bradford, 126 Mass. 42; People *v.* Vasalo, 120 Cal. 168, 52 Pac. 305; Meister *v.* People, 31 Mich. 99; Hall *v.* State, 3 Lea (Tenn.) 552.

Intent Shown by Attempt to Fire Another House. — Upon an indictment for attempting to fire a dwelling, by attempting to set fire to another building, the jury may infer the attempt alleged from the evidence of the attempt to fire the other building. Com. *v.* Wade, 17 Pick. (Mass.) 395.

4. Phillips *v.* State, 29 Ga. 105.

Evidence to Show Accident. — In Hamilton *v.* People, 29 Mich. 173, it was held error to have excluded evidence that persons were in the habit of playing cards in the barn with lights, as the fire might have started that way.

5. State *v.* Phifer, 90 N. C. 721; Morris *v.* State, 124 Ala. 44, 27 So. 330.

The accused having set fire at night to an inhabited dwelling, it appearing that the act was willful, evidence of his intent was inadmissible. People *v.* Jones, 2 Edm. Sel. Cas. (N. Y.) 86.

6. **Contents of Corn Crib.** — In an indictment for arson, the building was designated as a "corn crib," and proof that "corn and fodder" were kept in it was admissible to show the building to be such as was contemplated by the indictment, though evidence of the contents of the barn at the time of the fire was held inadmissible. Brown *v.* State, 52 Ala. 345.

7. Simpson *v.* State, 111 Ala. 6, 20 So. 572; Hamilton *v.* People, 29 Mich. 173.

8. Com. *v.* Preece, 140 Mass. 276, 5 N. E. 494.

Introduction of Deed to Property. In State *v.* Smalley, 50 Vt. 736, the defendant was charged with burning a house alleged to belong to him. The prosecution, to prove his ownership, introduced a deed to the property executed in the name of another person, and supplemented such deed by evidence showing that defendant had actually purchased the property and had made several payments thereon, while the person named in the deed had never made payment. It was held that such evidence was admissible.

9. State *v.* Thompson, 97 N. C. 406, 1 S. E. 921.

D. Parol. — And may probably be proved by parol evidence,[10] including the declarations of the accused;[11] as where defendant occupied as lessee of the one alleged to be the owner.

E. Objections to Proof Of. — And an objection that the evidence does not show property in the alleged owner of the burned building must be taken at the trial, and cannot be made on a motion in arrest of judgment.[12]

5. Occupancy. — Upon an indictment for arson, where the occupancy of the burned building is an essential ingredient of the crime, it is insufficient to show that fact by mere inference.[13] But it may be shown by parol evidence.[14]

6. Variance. — In prosecutions for arson, the crime being one of a local nature, whatever is stated in the indictment by way of description of the locality of the offense, must be strictly proved as laid.[15]

In Massachusetts. — Under an indictment for burning a building, a conviction cannot be had by proof of the burning of a structure other than a dwelling.[16] Nor is parol evidence admissible to prove such ownership.[17]

II. MOTIVE.

1. Ill-Will. — A. Of Whom. — Evidence of ill-will is limited to

10. State *v.* Burrows, 1 Houst. (Del.) 74; State *v.* Smalley, 50 Vt. 736; Rogers *v.* State, 26 Tex. App. 404, 9 S. W. 762.

Parol Evidence to Show Ownership. — In Knights *v.* State, 58 Neb. 225, 78 N. W. 508, it was held competent to prove the ownership of a store building by parol evidence, in the absence of a showing that such building was real estate.

In State *v.* Tennebom, 92 Iowa 551, 61 N. W. 193, an abstractor was allowed to testify that the record title of the property burned was in a certain woman, it was held that, if this was error it was harmless, where the ownership was subsequently proved by a deed, and by the testimony of the woman's husband.

In State *v.* Lyon, 12 Conn. 486, an indictment for burning a shop, one count alleged it to be the property of B and C as trustees for D, and another count alleged it to belong jointly to B and C. There was no evidence to support the first allegation, and to support the second, only the testimony of one witness that, at the time the shop was burned, he was employed therein by B, and of another witness that, at the same time, the accused was working in the same shop, employed by one E. It was held insufficient to authorize a conviction.

11. Conversations Admissible to Show Ownership. — Upon the trial of one for arson, where the indictment alleged the building to have been burned with the design of defrauding the insurance companies, testimony of a witness as to his conversations with the accused, were held admissible, as tending to show ownership in the latter. Com. *v.* Wesley, 166 Mass. 248, 44 N. E. 228.

12. Rogers *v.* State, 26 Tex. App. 404, 9 S. W. 762.

13. State *v.* Thompson, 97 N. C. 496, 1 S. E. 921.

14. Stallings *v.* State, 47 Ga. 572.

15. State *v.* Jaynes, 78 N. C. 504; State *v.* Roseman, 66 N. C. 634; State *v.* Burrows, 1 Houst. (Del.) 74.

16. People *v.* Slater, 5 Hill. (N. Y.) 401.

17. Com. *v.* Hayden, 150 Mass. 332, 23 N. E. 51.

the defendant himself, and is inadmissible as regards the members of his family.[18]

B. To Owner or Occupant. — Evidence of ill-will, harbored by the accused against the owner of the burned building,[19] or an occupant thereof, is admitted.[20]

C. To Owner of Contents. — So of ill-will towards the owner of property contained in the burned building.[21]

D. To Owner's Agent. — A motive of arson cannot be shown by proof of the ill-will of the accused towards the agent of the owner.[22]

E. Proving Ill-Will. — a. *Threats Against Owner.* — Threats uttered, by one accused of arson, against the person or property

18. Bell *v.* State, 74 Ala. 420.

19. As to proof of motive generally, *see* the article "Motive."

Alabama. — Bell *v.* State, 74 Ala. 420; Hinds *v.* State, 55 Ala. 145; Overstreet *v.* State, 46 Ala. 30; Simpson *v.* State, 111 Ala. 6, 20 So. 572.

Georgia. — Meeks *v.* State, 103 Ga. 420, 30 S. E. 252.

Michigan. — People *v.* Eaton, 59 Mich. 559, 26 N. W. 702.

North Carolina. — State *v.* Rhodes, 111 N. C. 647, 15 S. E. 1038.

Vermont. — State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

Evidence of Previous Difficulties. Hudson *v.* State, 61 Ala. 333; Davis *v.* State, 15 Tex. App. 594; Winslow *v.* State, 76 Ala. 42.

Ill-Will Toward Wife. — Upon the question of motive, it is competent to prove the prisoner's ill-will for his wife, where the latter owns an interest in the building burned. State *v.* Hannett, 54 Vt. 83.

Wages Due From Owner. — Where the accused was employed as a laborer on the farm of the prosecutor, it was attempted to show a motive in the burning by proof that the prosecutor had not paid him his entire wages promised. It was held that a failure to pay the balance due was insufficient, when taken alone, to furnish a sufficient motive for arson. Ross *v.* State, 109 Ga. 516, 35 S. E. 102. See also Simpson *v.* State, 111 Ala. 6, 20 So. 572.

20. Oliver *v.* State, 33 Tex. Crim. App. 541, 28 S. W. 202.

Defendant's Wife in Burned Building. — In Shepherd *v.* People, 19 N. Y. 537, the court said: "The evidence showing the terms upon which the prisoner lived with his wife was of the same general character (i. e. tending to show a motive). Ordinarily one would be slow to do an act which would endanger the safety of a person connected with him in this relation. But if, instead of the sentiments of regard and affection, he entertained towards her feelings of bitterness and hatred, the presumption would be quite otherwise."

21. McAdory *v.* State, 62 Ala. 154.

In State *v.* Emery, 59 Vt. 84, 7 Atl. 129, the defendant was charged with firing a barn, and the evidence showed his threats and ill-feeling toward one who owned cattle in such barn. It was held that evidence tending to prove the defendant's knowledge of the presence of those cattle in the barn, was admissible to show motive.

22. **Such Evidence Too Remote.** In State *v.* Battle, 126 N. C. 1036, 35 S. E. 624, a trial for arson, Montgomery, J., said: . . . "Malice or ill-will is evidence upon which a jury might infer a motive to commit a crime against a person or the property of the object of ill-will or malice, but the commission of the crime for the purpose of compelling the injured person to punish the enemy of the criminal cannot be a basis of inference of the motive to commit the crime. It is too remote. Such a conclusion must be based upon evidence, not of motive, but of the fact as to the object on the part of the criminal committing the crime."

of one whose property has been burned, are admissible to prove the existence of ill-will.[23]

b. *Against Owner's Family.* — Evidence of threats against a son and grandson, by reason of their close relationship to the owner of the burned property, is admissible, thought not weighty, as showing ill-will to the family and a motive for the crime.[24]

c. *Weight of Threats As Evidence.* — If a threat is proved, its weight as evidence against the accused is for the jury.[25] And the lapse of time between such threat and the burning, affects the

23. For proof of ill-will generally *see* article "MALICE."

Alabama. — McAdory *v.* State, 62 Ala. 154; Pratter *v.* State, 107 Ala. 26, 18 So. 238; Brock *v.* State, 26 Ala. 104; Winslow *v.* State, 76 Ala. 42; Hinds *v.* State, 55 Ala. 145; Hudson *v.* State, 61 Ala. 333; Overstreet *v.* State, 46 Ala. 30.

California. — People *v.* Lattimore, 86 Cal. 403, 24 Pac. 1091.

Illinois. — Carlton *v.* People, 150 Ill. 181, 37 N. E. 244.

Iowa. — State *v.* Millmeier, 102 Iowa 692, 72 N. W. 275.

Maine. — State *v.* Fenlasan, 78 Me. 495, 7 Atl. 385; State *v.* Day, 79 Me. 120, 8 Atl. 544.

Massachusetts. — Com. *v.* Choate, 105 Mass. 451; Com. *v.* Goodwin, 14 Gray 55; Com. *v.* Quinn, 150 Mass. 401, 23 N. E. 54; Com. *v.* Allen, 128 Mass. 46, 35 Am. Rep. 356.

Michigan. — People *v.* Eaton, 59 Mich. 559, 26 N. W. 702.

Missouri. — State *v.* Crawford, 99 Mo. 74, 12 S. W. 354; State *v.* Moore, 61 Mo. 276.

Nevada. — State *v.* McMahon, 17 Nev. 365, 30 Pac. 1000.

New York. — People *v.* Murphy, 10 N. Y. Crim. 177, 17 N. Y. Supp. 427.

North Carolina. — State *v.* Lytle, 117 N. C. 799, 23 S. E. 476; State *v.* Rhodes, 111 N. C. 647, 15 S. E. 1038; State *v.* Thompson, 97 N. C. 496, 1 S. E. 921.

Tennessee. — Hensley *v.* State, 9 Humph. 243.

Vermont. — State *v.* Emery, 59 Vt. 84, 7 Atl. 129.

Virginia. — Sawyers *v.* Com., 88 Va. 356, 13 S. E. 708; Shifflet *v.* Com., 14 Gratt. 652; Bond *v.* Com., 83 Va. 581, 3 S. E. 149.

West Virginia. — Gregg *v.* State, 3 W. Va. 705.

In Winslow *v.* State, 76 Ala. 42, the court said: "The previous threats of the defendant, and his declarations in the nature of threats, were, on the same principle, properly admitted: while they are not of themselves convincing of guilt, from them, in connection with the other circumstances, if believed by the jury, guilt may be a logical sequence."

Hostility Continuing to Time of Fire. — One charged with arson, had threatened that, "unless his mother got something out of the property he would burn the building;" it appeared that although his mother did get something, yet there was ill-feeling between the accused and his sister when the threat was made, which ill-will continued down to the time of the burning, his sister occupying a part of the building during the time. It was held that such evidence was admissible. Com. *v.* Crowe, 165 Mass. 139, 42 N. E. 563.

24. State *v.* Thompson, 97 N. C. 496, 1 S. E. 921.

25. State *v.* Hallock, 70 Vt. 159, 40 Atl. 51.

In Fulton *v.* State, 58 Ga. 224, the court said: "If the prisoner threatened to burn the gin-house, and it was burned accordingly, by some person, on the same night the threat was uttered, whether the prisoner is the incendiary is for the jury to determine. If they should believe the threat was made, and made seriously, and that the house was not burned accidently, but by design, they might deem it sufficient to identify the prisoner as the guilty party."

weight, but not the admissibility of the evidence.[26]

d. *Order of Proof.* — Evidence of the threats of the prisoner are admissible at any stage of the prosecution's case.[27]

2. Pecuniary Motive. — A. Generally Admissible. — The state may show a pecuniary motive in the accused, to commit the crime.[28]

B. Fact of Insurance. — a. *Relevancy.* —And to that end proof that the accused held a policy of insurance on the burned building or on goods therein at the time of the fire,[29] or acted for one who

26. Hudson *v.* State, 61 Ala. 333.

Threats Made Two Years Before. State *v.* Jones, 106 Mo. 302, 17 S. W. 366; Com. *v.* Goodwin, 14 Gray (Mass.) 55.

Threats Made Three Years Before. Com. *v.* Quinn, 150 Mass. 401, 23 N. E. 54.

Chief Indicia of Corpus Delicti. In Sawyers *v.* Com., 88 Va. 356, 13 S. E. 708, the court said: "Among the chief *indicia* which go to substantiate at once the *corpus delicti* and the guilt of the prisoner in a case like this, say the authorities, are the circumstances that the fire broke out suddenly in an uninhabited house or in different parts of the same building, and that the accused had a cause of ill-will against the sufferer, or had been heard to threaten him."

In People *v.* Simonsen, 107 Cal. 345, 40 Pac. 440, the court said: "A building may be burned under such suspicious circumstances as to indicate the act of an incendiary, and thus a *corpus delicti* established and the doors opened for the defendant's admissions and confessions; but there must be some evidence of some kind tending to show the incendiary character of the fire, aside from these admissions and confessions."

27. In State *v.* Day, 79 Me. 120, 8 Atl. 544, a prosecution for arson, the court said: "While it is true that the commission of the offense charged must necessarily be the foundation of every criminal prosecution, yet it by no means follows that it is necessary that the accused party should be previously shown to be connected with the crime in order to render his threats in relation to the commission of such crime admissible. The order in which they are received is not material. They are admissible at any stage of the government's case."

28. Com. *v.* Hudson, 97 Mass. 565.

Pecuniary Reward. — In State *v.* Green, 92 N. C. 779, an indictment for burning a mill, after evidence had been introduced tending to prove guilt, it was held competent for the state to prove, as showing a pecuniary motive, that the prisoner was to be paid for the crime, that he had declared shortly before the fire that he had no money, but expected to have some soon, and did, in fact, have some soon after the fire.

29. State *v.* Watson, 63 Me. 128; Freund *v.* People, 5 Park. Crim. (N. Y.) 198; People *v.* Fournier (Cal.), 47 Pac. 1014.

Suggestion to Agent as to Increasing Insurance. — Evidence that, a month before the fire the accused suggested to an insurance broker that there should be an increase of insurance upon the building afterwards burned, was held admissible, as showing a motive to commit the offense. Com. *v.* Bradford, 126 Mass. 42.

Mortgages of Destroyed Goods to Repel Presumption. — Where it was contended by the prosecution that defendant's motive in firing the building was to collect the insurance on his stock of goods, which was worth $500.00 on the day of the fire, and insured for $2000, the defendant introduced in rebuttal, office copies of the mortgages on such goods, dated six months before the fire, amounting to $1700. It was held that the mortgages were immaterial and had no tendency to disprove the defendant's motive to destroy the goods. Com. *v.* McCarthy, 119 Mass. 354. But in People *v.* Doneburg, 51 App. Div. 613, 64 N. Y. Supp. 438, the

had such a policy is admissible.[30]

Over-Insurance. — It is, likewise, competent to prove that the burned property was over-insured.[31] But not for mere purpose of impeaching the character of the defendant.[32]

Defendant's Knowledge. — Provided defendant knew of such over-insurance,[33] and the demand of the insured against the company for such over-insurance.[34]

b. *Mode of Proof.* — (1.) **Existence of Insurance Company.** — It is unnecessary to prove the legal existence of the insurance company.[35]

(2.) **Validity of Policy.** — Nor the validity of the policy of insurance issued to the accused;[36] nor that the latter could sue upon such policy.[37]

burned property was owned by the wife of the accused, was mortgaged for $1560 and insured for $1300, loss, if any, payable to the mortgagee. The property was unprofitable and there was nothing to show that the accused would be benefited by burning it. It was held insufficient to show a motive in the accused.

Disposition of Insurance Money. Upon the trial of one charged with arson, to obtain insurance money, it was held error to refuse to charge the jury that the law presumed that the accused would not steal or misapply the insurance money if he obtained possession thereof. People *v.* Fitzgerald, 156 N. Y. 253, 50 N. E. 846.

30. People *v.* Scott, 10 Utah 217, 37 Pac. 335.

In Tennessee, it has been held inadmissible upon the trial of one for burning the house of another, by the latter's procurement, to prove the building to have been insured. Roberts *v.* State, 7 Cold. (Tenn.) 359.

31. Stitz *v.* State, 104 Ind. 359, 4 N. E. 145; Shepherd *v.* People, 19 N. Y. 537; People *v.* Sevine (Cal.), 22 Pac. 969; People *v.* Kelly, 11 App. Div. 495, 42 N. Y. Supp. 756.

And so to prove want of motive it may be shown that the property was worth more than the insurance. State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

32. Stitz *v.* State, 104 Ind. 359, 4 N. E. 145.

33. People *v.* Kelly, 11 App. Div. 495, 42 N. Y. Supp. 756; Martin *v.* State, 28 Ala. 71.

34. Stitz *v.* State, 104 Ind. 359, 4 N. E. 145.

35. *United States.* — U. S. *v.* Amedy, 11 Wheat. 392.

California. — People *v.* Hughes, 29 Cal. 257; People *v.* Schwartz, 32 Cal. 160.

District of Columbia. — U. S. *v.* McBride, 7 Mackey 371.

Illinois. — McDonald *v.* People, 47 Ill. 533.

Indiana.—Johnson *v.* State, 65 Ind. 204.

Massachusetts. — Com. *v.* Goldstein, 114 Mass. 272.

Michigan. — Meister *v.* People, 31 Mich. 99.

Missouri. — State *v.* Tucker, 84 Mo. 23.

New York. — Carncross *v.* People, 1 N. Y. Cr. 518; Freund *v.* People, 5 Park. Cr. 198.

Ohio. — Evans *v.* State, 24 Ohio St. 458.

In State *v.* Byrne, 45 Conn. 273, the court said: "If he (the defendant) believed that the policy was legally issued, that it was valid, and would be paid, and burned the building with the expectation and belief that the money would be paid, and for the purpose of obtaining it, it was enough. The actual payment of the money, and the legality and validity of the policy, are not essential elements of the crime."

36. People *v.* Hughes, 29 Cal. 257; State *v.* Byrne, 45 Conn. 273.

37. People *v.* Hughes, 29 Cal. 257.

(3.) **Value of Property.** — And not only evidence of value is admissible, but also evidence of its enhanced value by reason of its location, together with circumstances showing the profits derived therefrom.[38]

(4.) **Defendant's Financial Condition.** — It has been held that, upon trials for arson, evidence of the defendant's financial condition is irrelevant and inadmissible,[39] though the contrary view seems to have been taken.[40]

3. Other Motive. — Advantage to be gained by destroying records or other papers may be shown as motive.[41]

4. Defendant's Proof of Motive in Another. — The accused may show that others possessed some motive for burning the property.[42] Upon a trial for arson, evidence that another had uttered threats to burn the building in question, is irrelevant and inadmissible.[43]

III. CONFESSIONS AND CONDUCT.

1. Generally. — The character of the crime of arson renders conviction frequently dependent upon an extrajudicial confession.[44] But the *corpus delicti* must, as in other cases, be established by evidence *aliunde* such confession.[45] Statements and declarations of

38. Hudson *v.* State, 61 Ala. 333.

39. State *v.* Moore, 24 S. C. 150, 58 Am. Rep. 241.

40. Defendant's Financial Condition. — In Reg. *v.* Grant, 4 F. & F. 322, an indictment for arson, where one count in the indictment charged an intent to defraud the insurance company, evidence was admitted to prove the prisoner to be in easy circumstances and under no financial necessity to obtain the insurance funds.

41. State *v.* Travis, 39 La. Ann. 356, 1 So. 817; Winslow *v.* State, 76 Ala. 42; Luke *v.* State, 49 Ala. 30, 20 Am. Rep. 269.

42. Hudson *v.* State, 61 Ala. 333. But the accused will not be permitted to give the names of such other persons. One was accused of starting a fire in a building not his own in order to burn the adjoining building occupied by himself; the prosecution having shown that defendant's building was insured, it was competent for defendant to show that the building wherein the fire started was also insured—thus showing motive in another than himself. People *v.* Fournier (Cal.), 47 Pac. 1014.

43. Carlton *v.* People, 150 Ill. 181, 37 N. E. 244; Ford *v.* State, 112 Ind. 373, 14 N. E. 241; State *v.* Crawford, 99 Mo. 74, 12 S. W. 354; Shifflet *v.* Com., 14 Gratt. (Va.) 652.

But see Hensley *v.* State, 9 Humph. (Tenn.) 243, where it was held competent for the accused to prove that a third person had made threats to burn the building in question and was in the neighborhood on the night of the fire.

44. As to proof of confessions *see* article "CONFESSIONS." Smith *v.* State, 64 Ga. 605.

Corroborating Circumstances. Where the prisoner had confessed to the crime it was held that, evidence of the building's having been burned under circumstances indicating incendiarism, though weak and unsatisfactory in those details which were susceptible of clearer proof, was nevertheless admissible as being sufficiently corroborated by the confession. People *v.* Jones, 123 Cal. 65, 55 Pac. 698.

45. Sam *v.* State, 33 Miss. 347; Winslow *v.* State, 76 Ala. 42; People *v.* Jones, 123 Cal. 65, 55 Pac. 698; Wimberly *v.* State, 105 Ga. 188, 31 S. E. 162; Murray *v.* State, 43 Ga. 256.

the accused, tending to show his guilt, are admissible.[46]

2. As Part of Res Gestae. — Any statement that is part of the *res gestae* is, of course, admissible on that ground.[47]

3. Made at Inquest. — The voluntary testimony of the accused before a fire inquest, is competent evidence against him on his prosecution for arson.[48] Although he was not informed that he need not criminate himself.[49]

4. Behavior at Fire. — Evidence of the conduct of the defendant, during the fire, is admissible.[50]

46. *See* "CONFESSIONS," "DECLARATIONS," Com. *v.* Chase, 147 Mass. 597, 18 N. E. 565.

Statements on Morning After Fire. In Com. *v.* Crowe, 165 Mass. 139, 42 N. E. 563, the accused, on the morning after the fire, said to his brother-in-law, "Is this the place where the fire was?" to which the latter replied, "Don't you know it is" at which the accused laughed. The conversation was overheard by a policeman who thereupon arrested the brother-in-law for being drunk, and the accused said, "You want to arrest him to find out what he knows about who set the fire." It was held that these facts were admissible in evidence.

47. *See* article "RES GESTAE."

Upon the trial of an indictment for aiding and abetting the insured in setting fire to his house with the intent to thereby defraud the insurance company, the statement of the party insured made after the fire occurred, claiming and swearing to his proof of loss, are part of the *res gestae* and admissible. Searless *v.* State, 6 Ohio Cir. Ct. 331.

Statements a Part of Res Gestae. In People *v.* O'Neil, 112 N. Y. 355, 19 N. E. 796, the defendant was president and owned most of the stock of the company whose building was destroyed; it was held that, the proof of loss which he made out jointly with another of the company's officials, giving the total insurance, and stating it to be his opinion that the fire was of incendiary origin, were admissible against him as part of the *res gestae*.

A False Statement Made by Defendant After the Fire, to the effect that the barn burned was not insured, was held to constitute no part of the *res gestae*, and could not aid in defrauding the insurance companies, and should have been excluded. Hamilton *v.* People, 29 Mich. 173.

48. Com. *v.* Bradford, 126 Mass. 42; Com. *v.* Wesley, 166 Mass. 248, 44 N. E. 228; Com. *v.* King, 8 Gray (Mass.) 501.

49. Com. *v.* King, 8 Gray (Mass.) 501.

50. State *v.* Ward, 61 Vt. 153, 17 Atl. 483; People *v.* Burton, 9 N. Y. Crim. 207, 28 N. Y. Supp. 1081. See also People *v.* Fournier (Cal.), 47 Pac. 1014.

Defendant's Behavior at the Fire. In Reg. *v.* Taylor, 5 Cox C. C. 138, the indictment was for firing a certain hay-rick, and evidence was admitted to show the presence of the accused at the burning of other ricks on the same night, for the purpose of illustrating the prisoner's behavior before and after the fire in question, notwithstanding there were indictments against him for the two other fires; but evidence of threats and statements connected with the other indictments, but not illustrative of the one in issue, were inadmissible.

Where the prisoner was accused of aiding and abetting the firing of his own house, a witness testified that, during the fire, when the firemen and general public had access to the house, the prisoner arrived and seeing witness with others inside the house, pulled him out; that prisoner afterwards asked witness if he had told anyone, and upon receiving a negative answer, replied that he was glad, as that would have made him appear guilty. It was held weak and inclusive, and insufficient to over-

5. Behavior After Fire. — So is the conduct of the accused after the fire, but connected therewith.[51]

6. Possession of Goods. — Possession by the accused of goods from the burned building, may go to the jury in connection with other evidence of the defendant's guilt.[52]

IV. EVIDENCE OF OTHER FIRES OR ATTEMPTS.

1. Generally Inadmissible. — Evidence that other buildings in the same place were burned about the same time, is inadmissible.[53]

2. Part of One Scheme. — Except where the state undertakes to show that the fires to be proved, were part of a scheme that included the fire charged in the indictment.[54]

come the presumption of the prisoner's innocence. People v. Kelly, 11 App. Div. 495, 42 N. Y. Supp. 756.

Conduct of Defendant's Clerk. Upon a trial for arson, the admission of evidence that the prisoner's clerk prevented the removal of goods from the burning store, was not error, it appearing the prisoner himself had forbidden such clerk to carry out any goods and had prevented another from doing so. Bluman v. State, 33 Tex. Crim. App. 43, 21 S. W. 1027.

51. The Rule Stated. — In People v. O'Neil, 112 N. Y. 355, 19 N. E. 796, the court said: "We do not think the court committed an error in the reception of this evidence. Its admission was, under the circumstances, somewhat a matter of discretion. It was a remote circumstance, but it bore upon the question of guilt, in that it tended to show what was his conduct and demeanor, when engaged in matters connected with the fire, and in the course and disposition of which he was principally interested and a prominent actor. The calm or disturbed demeanor, the natural or the unusual conduct, of the individual, are witnesses to the workings of the mind, and, taken in connection with all other circumstances tending to connect him with an event, aid the jury in forming the inference of innocence or of guilt."

52. Johnson v. State, 48 Ga. 116.

Goods in Prisoner's Trunk. — In State v. Vatter, 71 Iowa 557, 32 N. W. 506, it was held competent to prove that certain goods which were in the house on the day it burned, were discovered in the prisoner's trunk.

Stolen Bank Notes Possessed by Accused. — In State v. Gillis, 4 Dev. (N. C.) 605, the evidence showed the prisoner's possession of bank notes similar to some stolen from the house when the arson was committed, and that his explanations of their possession were conflicting: it was held admissible as tending to show his guilt.

A witness may testify that, after the fire, he bought from the wife of the defendant, goods of the same kind as those insured in the burned building. Johnson v. State, 65 Ind. 204.

53. Com. v. Gauvin, 143 Mass. 134, 8 N. E. 895; Brock v. State, 20 Ala. 104.

Upon the Trial of an Accessory before the fact, in the burning of a barn, evidence of the burning of a depot in a neighboring town, is inadmissible. State v. Dukes, 40 S. C. 481, 19 S. E. 134.

Where the Other Fires Are Not Shown To Be of Incendiary Origin. evidence that such other fires destroyed property belonging to the same owner, is inadmissible. People v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846.

Evidence of Fires Five Years Before. in which the accused was interested, is incompetent. State v. Raymond, 53 N. J. Law 260, 21 Atl. 328.

54. Where the Accused Had Predicted the Fire. and had said that all the houses of the owner would burn, it was held competent

3. Part of One Conflagration. — Or where the fires were part of one conflagration.[55]

4. Previous Attempts. — Evidence of a previous attempt by the accused to burn the same building is admissible.[56]

V. NATURE AND SUFFICIENCY.

1. Circumstantial Evidence. — Direct evidence to establish the crime of arson, is not essential.[57]

to show that the dwelling of the same person had been set on fire a short time before the fire in question. State *v.* Hallock, 70 Vt. 159, 40 Atl. 51.

Evidence to Prove an Incendiary Origin has been admitted to show that both fires were part of a scheme planned and executed by the prisoner and his associates. Wright *v.* People, 1 N. Y. Cr. 462.

Testimony of the Prosecutor, to the effect that he had taken unusual precaution to prevent the fire in question "because of other fires" is admissible to prove an incendiary origin for the one in question. State *v.* McMahon, 17 Nev. 365, 30 Pac. 1000.

In England. — In Reg. *v.* Dossett, 2 C. & K. 306, an indictment for arson, by willfully discharging a gun close to a hayrick and thereby setting the same on fire, evidence was admitted to show that on another occasion the accused was observed, with a gun in his hand, near the rick, and that the hay was then on fire.

In Reg. *v.* Gray, 4 F. & F. 1102, where the prisoner was accused of burning his house to obtain insurance, evidence was admitted to show that twice before insurance had been collected from other companies for successive fires, in order to establish the fire in question to have been intentional and not accidental.

55. Woodford *v.* People, 5 Thomp. & C. (N. Y.) 539, affirmed in 62 N. Y. 117, 20 Am. Rep. 464, where a dwelling and two outhouses were situated in such a manner that should one burn all must burn, it is competent to prove that the three structures must have been set fire to at the same time. People *v.* Hiltel, 131 Cal. 577, 63 Pac. 919.

56. State *v.* Ward, 61 Vt. 153, 17 Atl. 483; People *v.* Lattimore, 86 Cal. 403, 24 Pac. 1091; Com. *v.* McCarthy, 119 Mass. 354; State *v.* Hallock, 70 Vt. 159, 40 Atl. 51; People *v.* Shainwold, 51 Cal. 468; Com. *v.* Bradford, 126 Mass. 42.

But in Reg. *v.* Bailey, 2 Cox C. C. 311, evidence was admitted showing previous efforts to set fire to other portions of the same building, notwithstanding the fact that no evidence had been introduced to connect the accused with such other attempts.

Previous Solicitation of Another. The testimony of a witness, that, several months before the trial, the accused requested him to do the burning, is admissible in evidence. Martin *v.* State, 28 Ala. 71; People *v.* Bush, 4 Hill (N. Y.) 133, following McDermott *v.* People, 5 Park Crim. (N. Y.) 102.

Contra. — **Offer Several Years Before.** — But in Carncross *v.* People, 1 N. Y. Crim. 518, evidence of defendant's proposal to burn the house in question, made several years before, to one unconnected with the offense in question, was held inadmissible.

Statements During Solicitation. Evidence that, during his solicitation of another to burn a building, the accused stated to the latter that he had twice before attempted to burn such building, is admissible. McSwean *v.* State, 113 Ala. 661, 21 So. 211.

57. Whitfield *v.* State, 25 Fla. 289, 5 So. 805; Winslow *v.* State, 76 Ala. 42; State *v.* Carroll, 85 Iowa 1, 51 N. W. 1159.

Rule Stated. — In Smith *v.* State, 64 Ga. 605, the court said: "If it required positive testimony to convict in cases of arson, it would be next to impossible ever to procure a conviction, for it is a crime committed

2. Articles Connected With the Crime. — It is competent to introduce such articles as the evidence associates with the incendiary.[58]

3. Experiments. — It is competent to introduce evidence of certain experiments and comparisons, made after the occurrence of the fire, in order to explain and illustrate the manner in which the premises were burned.[59]

4. Opinions. — It is incompetent, in a trial for arson, for a witness to testify that "he thought the house was burned by some one."[60]

5. Sufficiency. — It is impracticable to state a useful rule for determining whether or not a given set of facts will or will not sustain conviction, but in the note several illustrations will be given.[61]

under cover of darkness and when there is no human eye to see; therefore, circumstances and confessions are the only evidence usually obtained; and, whilst they should be received with great caution, yet if they are such as to convince the mind and satisfy the judgment of the upright and intelligent juror, this is all that the law requires."

Where circumstantial evidence is relied upon to establish the *corpus delicti* it must be cogent and conclusive. State *v.* Millmeier, 102 Iowa 692, 72 N. W. 275.

Where one was charged with firing an outhouse "used as a kitchen," the prosecution introduced, over defendant's objection, evidence that at the same time the outhouse was burned, the dwelling house, fifteen yards away, was also set on fire by means of sticks tied together with a rope belonging to the accused, and soaked with oil. It was held that such evidence was admissible. State *v.* Thompson, 97 N. C. 496, 1 S. E. 921.

Presumption of Connivance. — The fact that incendiaries entered the owner's house in his absence and prepared to set fire thereto, raises no inference of connivance on the part of such owner. People *v.* Kelly, 11 App. Div. 495, 42 N. Y. Supp. 756.

58. State *v.* Ward, 61 Vt. 181, 17 Atl. 483; Gawn *v.* State, 7 Ohio Dec. 6.

Flask Containing Kerosene. — In Morris *v.* State (Ala.), 27 So. 336, it was held competent to prove that a half-pint flask containing kerosene oil had been found about 100 feet from the house which was burned, and that such flask had contained something like bluing, and that it had been seen in the possession of the defendant's wife during the previous summer, and had then had water and bluing in it.

Jug Formerly in Possession of Defendant's Wife. — In Thomas *v.* State, 107 Ala. 13, 18 So. 229, a trial for arson, the evidence showed the accused to have been seen approaching the premises in question with a jug in her hand, that she poured oil therefrom upon the building, ignited it and ran away. It was held that evidence of the same jug's having been in the possession of the husband of the accused at a time prior to the fire, was admissible, as showing opportunity to have the jug in her possession at the time of the burning, and to identify her as the guilty party.

59. Reg. *v.* Hasseltine, 12 Cox C. C. 404. See also Com. *v.* Choate, 105 Mass. 451; People *v.* Fournier (Cal.), 47 Pac. 1014.

60. State *v.* Nolan, 48 Kan. 723, 29 Pac. 568.

61. Facts Sufficient to Convict. *Alabama.* — Overstreet *v.* State, 46 Ala. 30; Childress *v.* State, 86 Ala. 77, 5 So. 775; Cook *v.* State, 83 Ala. 62, 3 So. 849.

California. — People *v.* Sevine, (Cal.), 22 Pac. 969.

Florida. — Whitfield *v.* State, 25 Fla. 289, 5 So. 805.

Georgia. — Johnson *v.* State, 89 Ga. 107, 14 S. E. 889; Brooks *v.* State, 51 Ga. 612; Allen *v.* State, 91 Ga. 189, 16 S. E. 980.

Illinois. — Carlton *v.* People, 150 Ill. 181, 37 N. E. 244.

Iowa. — State *v.* Burgor, 94 Iowa 33, 62 N. W. 696.

Louisiana. — State *v.* Fulford, 33 La. Ann. 679.

Maine. — State *v.* Taylor, 45 Me. 322.

Massachusetts. — Com. *v.* Squire, 1 Metc. 258.

Michigan. — People *v.* Burridge, 99 Mich. 343, 58 N. W. 319.

Missouri. — State *v.* Moore, 61 Mo 276.

Ohio. — Evans *v.* State, 24 Ohio St. 458.

Virginia. — Sawyers *v.* Com., 88 Va. 356, 13 S. E. 708.

In People *v.* Hiltel, 131 Cal. 577, 63 Pac. 919, the evidence showed that, at the time of the arrival of the first neighbor the accused was seen appearing from behind the burning building, fully dressed, except his coat was off; that no cry or alarm had been heard, and that accused made no attempts to save the effects until the arrival of neighbors; that shortly before the fire, he was very much excited and angry with his wife, who owned the house, and who was about to get a divorce from accused on account of his cruelty. The accused testified that he was asleep at 8 o'clock, and the fire was discovered soon after 8, and had been burning a considerable time. It was held sufficient evidence to convict.

Suffieient to Go to the Jury. In Meeks *v.* State, 103 Ga. 420, 30 S. E. 252, the evidence showed the prisoner to have entertained ill-feeling towards his employer, claiming the latter owed him money; that he subsequently made threats, from which it might be inferred that he intended to be revenged by burning his employer's house; that a day or two before the fire, he was overheard plotting with his brother, though the plot did not appear; that the employer's family was away from home on the night of the fire; that tracks were traced from the vicinity of prisoner's house to within a few yards of the one burned, and from the latter back home by a circuitous route; that these tracks were made by shoes with a peculiar worn place upon them, and that the prisoner's shoes fitted them exactly; that upon his arrest, the prisoner desired, for no apparent reason, to change his shoes. It was held sufficient to go to the jury on his guilt or innocence. People *v.* Burton, 9 N. Y. Cr. 207, 28 N. Y. Supp. 108; State *v.* Shines, 125 N. C. 730, 34 S. E. 552.

Facts Insuffieient to Convict. *Georgia.* — Green *v.* State, 111 Ga. 139, 36 S. E. 609.

Iowa. — State *v.* Delaney, 92 Iowa 467, 61 N. W. 189; State *v.* Johnson, 19 Iowa 230.

Kentucky. — Com. *v.* Phillips, (Ky.), 14 S. W. 378.

Massachusetts. — Com. *v.* Wade, 17 Pick. 395.

Mississippi. — Luker *v.* State, (Miss.), 14 So. 259.

New York. — McGary *v.* People, 45 N. Y. 153.

Texas. — Tullis *v.* State, 41 Tex. 598.

Virginia. — Garner *v.* Com., (Va.), 26 S. E. 507; Brown *v.* Com., 87 Va. 215, 12 S. E. 472.

In Boatwright *v.* State, 103 Ga. 430, 30 S. E. 256, the evidence showed that the prisoner had had a difference with his employer, Boyd, about the amount due for services; that a short time before the fire, the prisoner advised a friend not to go near the house, as they might hold him responsible should anything occur; that when his attention was called to the fire, some distance away, accused said: "Look what a fire over to Boyd's!" that he had stated to fellow prisoners in jail that, he had not burned the house, but knew who had, and had offered a little boy a dollar if he would burn it; that there was nothing to connect this boy with the fire; that there had been three fires at the Boyd place that summer. It was held insufficient to convict.

ART, STATE OF.—See Patents.

ASSAULT AND BATTERY.

Civil Action by Geo. A. Whipple.

Criminal Action by Horace T. Smith.

I. THE CIVIL ACTION.

1. Evidence Generally Admissible. — A. Intent and Malice. The *intention* to do harm is of the essence of an assault.[1] And the intent is to be collected from the circumstances of the case; and therefore overt acts when accompanied by words that are mere threats and in themselves negative the idea of a present intention to assault, are not sufficient to sustain the action.[2] As physical contact is not necessary to the consummation of an assault, the allegation of an assault is proved by evidence that defendant did an overt act against plaintiff capable of causing injury, with the intent to injure

1. Intention. — Greenl. Ev., vol. 2, § 83.

In Com. *v.* White, 110 Mass. 407, Wells, J., said: "It is not the *secret intent* of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material, but what his conduct and the attending circumstances denote at the time to the party assaulted." In Blake *v.* Barnard, 9 Car. & P. 626, it was held not to be an assault if the gun was not loaded. But see remark in McKay *v.* State, 44 Tex. 43.

In Metcalfe *v.* Conner, 5 Litt. (15 Ky.) 370, it was said that a man going into a house with clubs did not commit an assault, unless the intention to assault was shown.

So where defendant entered on a holding over tenant who refused to quit and removed the furniture and the windows, it was held not to be an assault as there was no intention to do violence to the person, but if there had been an assault these acts would undoubtedly aggravate it. Sterns *v.* Sampson, 59 Me. 568, 8 Am. Rep. 442; Meader *v.* Stone, 7 Metc. (Mass.) 147; and see O'Donnell *v.* McIntyre, 37 Hun (N. Y.) 623; *affirmed* 118 N. Y. 156, 23 N. E. 455; Plank *v.* Grimm, 62 Wis. 251, 22 N. W. 470; Degenhardt *v.* Heller, 93 Wis. 662, 68 N. W. 411, 57 Am. St. Rep. 945.

2. The Intention Qualified by Words. — Tuberville *v.* Savage, 1 Mod. 3, where defendant, drawing

whether the act failed in its intended effect or not.[3] Malice or want of malice may be shown, when exemplary damages are allowable for the purpose of aggravating or mitigating general damages.[4]

his sword said: "If it were not assize time, I would not take such language from you." Blake *v.* Barnard, 9 Car. & P. 626.

3. Futile Overt Acts. — Smith *v.* Newsam, 1 Vent. 256; Tombs *v.* Painter, 13 East 1; Lewis *v.* Hoover, 3 Blackf. (Ind.) 407; Handy *v.* Johnson, 5 Md. 450; Liebstadter *v.* Federgreen, 80 Hun 245, 29 N. Y. Supp. 1039; Morgan *v.* O'Daniel, 19 Ky. Law 193, 39 S. W. 410.

4. MacDougall *v.* Maguire, 35 Cal. 274, 95 Am. Dec. 98. In Bartram *v.* Stone, 31 Conn. 159, it is said: "In an action for assault and battery, the plaintiff may prove the previous threats of the defendant to make the assault, both for the purpose of proving that the defendant made the assault, and to prove that it was maliciously made. Where it is material to show the *animus* with which an act was done, both the prior and subsequent declarations of the party doing the act, as well as those which accompany the act, are admissible."

Time Limits on Acts or Words Showing Malice. — In Irwin *v.* Yeager, 74 Iowa 174, 37 N. W. 136, it was held error to admit in evidence that more than two years prior to the alleged assault, in a difficulty between the plaintiff and the defendant, defendant said "Never mind, I will fix you yet," as the evidence was too remote to show malice.

Breitenbach *v.* Trowbridge, 64 Mich. 393, 31 N. W. 402, 8 Am. St. Rep. 829, held, that the question whether defendant after an assault, had not called plaintiff "a damned police court shyster," is not competent on his cross examination for the purpose of showing malice at the time of the assault.

In Peterson *v.* Toner 80 Mich. 350, 45 N. W. 346, held, that for the purpose of showing defendant's malice in making an assault on plaintiff, the latter may introduce evidence of threats made against him by defendant, three or four years before the assault.

Subsequent Threats. — In Spear *v.* Sweeney, 88 Wis. 545, 60 N. W. 1060, held, abusive epithets addressed to a person fourteen hours after an assault was made upon him, are admissible in evidence to show that the assault was made with express malice.

Circumstances Tending to Show Malice. — In Elfers *v.* Woolley, 116 N. Y. 294, 22 N. E. 548, the court say: "The rule is well settled in this state that in an action for assault and battery, all the circumstances immediately connected with the transaction tending to exhibit and explain the motive of the defendant are competent for the purpose of showing whether he acted maliciously or in an honest belief that he was justified in what he did."

In Voltz *v.* Blackmar, 64 N. Y. 440, a conversation had on the night before the alleged assault, was admitted as evidence tending to show the motive.

Watkins *v.* Gaston, 17 Ala. 664. Threats made ten days before the assault are admissible to show motive. Bell *v.* Morrison, 27 Miss. 68.

In Castner *v.* Sliker, 33 N. J. Law 95, it was held that acts and declarations of plaintiff occurring more than two or three months before the affray and on several occasions, are not admissible to show an intention of wanton violence at the time of the assault.

In Byers *v.* Horner, 47 Md. 23, it is said: "Any acts or declarations indicative of the existence of malice or ill-will on the part of defendant towards plaintiff at the time of the wrong committed, may be given in evidence to prove malice."

Malice Determined by All the Circumstances. — Frost *v.* Pinkerton, 61 App. Div. 566, 70 N. Y. Supp. 802.

All the circumstances should be considered in determining whether there was malice. Borland *v.* Bar-

B. Res Gestae. — Any acts or declarations which are a part of the *res gestae* are admissible in evidence.[5]

C. Declarations and Admissions. — Admissions made by significant acts are receivable in evidence against the defendant;[6] also admissions of the defendant at the trial of a criminal action for the same assault.[7] Declarations made to a physician are admissible so far as they refer to plaintiff's physical condition and sensations.[8]

D. Opinion Evidence. — Opinion evidence is generally inadmissible except in cases where the witnesses may have better means of forming opinions than the jury.[9]

E. Real Evidence. — The weapon with which the assault was

rett, 76 Va. 128, 44 Am. Rep. 152.

In Klein *v.* Thompson, 19 Ohio St. 569, evidence of express malice is admissible though not averred in the petition. Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1079; Crosby *v.* Humphreys, 59 Minn. 92, 60 N. W. 843.

5. Bruce *v.* Priest, 87 Mass. 100; Queen *v.* Bedell, 48 N. H. 546; State *v.* Rawles, 65 N. C. 334; Ward *v.* White, 86 Va. 212, 9 S. E. 1021, 19 Am. St. Rep. 883; Byers *v.* Horner, 47 Md. 23; Haviland *v.* Chase, 74 N. C. 477; Nelson *v.* State (Tex. Crim. App.), 20 S. W. 766.

See also "Mitigation of Damages, Provocation," *post* I. 3. b.

See Cherry *v.* McCall, 23 Ga. 193.

See also "Mitigation of Damage," in general, *post* I. 3; Maisenbacker *v.* Society Concordia, 71 Conn. 369, 42 Atl. 67; Pokriefke *v.* Mackurat, 91 Mich. 399, 51 N. W. 1059; Gillespie *v.* Beecher, 85 Mich. 347, 48 N. W. 561; Puett *v.* Beard, 86 Ind. 104.

See in Rosenbaum *v.* State, 33 Ala. 354, what took place between prosecutor and prisoner at a previous interview in the forenoon of the same day, cannot be proved, as it is too far removed to constitute a part of the *res gestae*.

Cleveland *v.* Stilwell, 75 Iowa 466, 39 N. W. 711; Matthews *v.* Terry, 10 Conn. 455; Bracegirdle *v.* Orford, 2 M. & S. 77; Brzezinski *v.* Tierney, 60 Conn. 55, 22 Atl. 486, where complaint alleged an assault and battery with a cane, it was held admissible to prove that while beating the plaintiff, the defendant pushed him against a car, thereby injuring him. Blake *v.* Damon, 103 Mass. 199.

6. Jewett *v.* Banning, 21 N. Y. 27. The fact that defendant remained silent when accused by plaintiff of making an assault on him may be taken as an admission.

In Heneky *v.* Smith, 10 Or. 349, 45 Am. Rep. 143, evidence of the fact that six days after plaintiff brought suit, defendant made a conveyance of land, was received as tending to show an admission of liability. Myers *v.* Moore, 3 Ind. App. 226, 28 N. E. 724; Puett *v.* Beard, 86 Ind. 104.

7. Brietenbach *v.* Trowbridge, 64 Mich. 393, 31 N. W. 402, 8 Am. St. Rep. 829.

8. Lichtenwallner *v.* Laubach, 105 Pa. St. 366; Newman *v.* Dodson, 61 Tex. 91; Earl *v.* Tupper, 45 Vt. 275.

In Collins *v.* Waters, 54 Ill. 485, it is held that plaintiff's declarations to his physician as to how and with what instrument the injury was produced, is inadmissible in a civil action for assault.

9. In State *v.* Garvey, 11 Minn. 154, opinion of prosecuting witness as to the intent with which defendant committed the act is not admissible, where he has no better means to judge, than the jury. Smith *v.* State (Tex. Crim. App.), 20 S. W. 360, opinion of a witness as to whether a whipping by a school teacher was severe, cruel or unjust is not admissible. Trimble *v.* State (Tex. Crim. App.), 22 S. W. 879, opinion not admissible as to why defendant assaulted plaintiff.

committed may be produced in evidence upon being properly identified.[10]

F. Character and Condition of Parties. — Evidence of defendant's good character is not admissible in a civil action.[11] Nor can the plaintiff give in evidence that he is a man of good general character.[12] But if the evidence has already shown that defendant was acting in self-defense, then evidence of the turbulent and quarrelsome disposition of the plaintiff is admissible, if it was known to defendant at the time of the assault;[13] unless the character of plaintiff has no connection with the assault.[14] But if defendant was the aggressive party he cannot show that the person assaulted was a violent man or had a bad character.[15]

Physical Condition of the Parties. — It is competent to give in evidence to the jury the physical condition of the plaintiff or defendant before, at the time of, and after the assault, where it is necessary to explain the transaction and its consequences.[16] Also to show

10. Von Reeden *v.* Evans, 52 Ill. App. 209.

11. *United States.* — Brown *v.* Evans, 17 Fed. 912, *affirmed* 109 U. S. 180.

California.—Anthony *v.* Grand, 101 Cal. 235, 35 Pac. 859; Vance *v.* Richardson, 110 Cal. 414, 42 Pac. 909.

Connecticut. — Thompson *v.* Church, 1 Root 312.

Indiana. — Elliott *v.* Russell, 92 Ind. 526; Sturgeon *v.* Sturgeon, 4 Ind. App. 232, 30 N. E. 805.

Iowa. — Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1079.

Kentucky. — Drake *v.* Com., 10 B. Mon. 225.

Maine. — Soule *v.* Bruce, 67 Me. 584.

Massachusetts. — Day *v.* Ross, 154 Mass. 13, 27 N. E. 676.

Michigan. — Fahey *v.* Crotty, 63 Mich. 383, 29 N. W. 876, 6 Am. St. Rep. 305; Pokriefke *v.* Mackurat, 91 Mich. 399, 51 N. W. 1059; Derwin *v.* Parsons, 52 Mich. 425, 18 N. W. 200, 50 Am. Rep. 262.

Mississippi. — Sowell *v.* McDonald, 58 Miss. 251.

Missouri. — Lyddon *v.* Dose, 81 Mo. App. 64.

Nebraska. — Barr *v.* Post, 56 Neb. 698, 77 N. W. 123.

North Carolina. — Smithwick *v.* Ward, 7 Jones Law 64.

Ohio. — Sayen *v.* Ryan, 9 Ohio Cir. Ct. 631.

12. Givens *v.* Bradley, 6 Ky. 192, 6 Am. Dec. 646; Reed *v.* Kelly, 4 Bibb. (Ky.) 400; Quinton *v.* Van Tuyl, 30 Iowa 554.

13. Galbraith *v.* Fleming, 60 Mich. 403, 27 N. W. 581; Harrison *v.* Harrison, 43 Vt. 417; Knight *v.* Smythe, 57 Vt. 529; Keep *v.* Quallman, 68 Wis. 451, 32 N. W. 233; Culley *v.* Walkeen, 80 Mich. 443, 45 N. W. 368; Silliman *v.* Sampson, 42 App. Div. 623, 59 N. Y. Supp. 923.

Defendant cannot show that plaintiff was an irritating and troublesome old man and had similar trouble before. MacIntoch *v.* Bartlett, 67 Me. 130.

Must Be Shown by General Reputation and Not Opinion. Golder *v.* Lund, 50 Neb. 867, 70 N. W. 379.

14. McKenzie *v.* Allen, 3 Strob. (S. C.) 546; Cummins *v.* Crawford, 88 Ill. 312, 30 Am. Rep. 558; McCarty *v.* Leary, 118 Mass. 509; Shook *v.* Peters, 59 Tex. 393; Littlehale *v.* Dix, 11 Cush. (Mass.) 364.

15. Kuney *v.* Dutcher, 56 Mich. 308, 22 N. W. 866; Bruce *v.* Priest, 87 Mass. 100.

16. Stone *v.* Moore, 83 Iowa 186, 49 N. W. 76. In Bonino *v.* Caledonia, 144 Mass. 299, 11 N. E. 98, a physician allowed to testify as to condition of plaintiff's nose eight months after the injury, where the request is for him to state the condition of the plaintiff at that time, so far as related to the effect of the injury to the nose—there being evi-

the relative sizes of the plaintiff and defendant as bearing on the amount of force necessary to be used by defendant.[17]

2. Evidence in Special Pleas. — A. Moderate Castigavit. When the plea of *moderate castigavit* is put in, the defendant must not only show his authority, and the cause of the beating, but also that it was in fact moderate; and if by his own evidence it appears that he has abused his authority and inflicted blows unnecessary for the purpose, his issue fails him, and it is of his own wrong and without the cause set forth in his plea.[18] The defendant must also show that the plaintiff was his apprentice, by the evidence of the articles of apprenticeship.[19] Evidence is not admissible as to what was the customary practice of other masters in chastising their apprentices,[20] or that the ordinary management of the defendant

dence to connect the then condition with the injury.

Family witnesses were allowed to give a full account of the physical condition of plaintiff before the injury, and of his sufferings then and since, and of the continued infirmities, without apparent improvement, for three and one-half years after the injury. Kuney *v.* Dutcher, 56 Mich. 308, 22 N. W. 866.

Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668; Jackson *v.* Wells, 13 Tex. Civ. App. 275, 35 S. W. 528. Evidence that the plaintiff had hemorrhages of the lungs eighteen months before and was weak and feeble at the time, accompanied by evidence from which it would be inferred that defendant had knowledge of such facts, is admissible. Ously *v.* Hardin, 23 Ill. 352. Competent to show that plaintiff was weak-minded.

Evidence as to plaintiff's condition the following morning is admissible. Hannan *v.* Gross, 5 Wash. 703, 32 Pac. 787.

Where plaintiff had been injured in the army, it was admissible to show that these injuries had been aggravated, and to what extent, by the assault. Watson *v.* Rheinderknecht, 82 Minn. 235, 84 N. W. 798.

Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1079. *Held,* that a ferreotype of the condition of plaintiff's wounds, taken shortly after the battery, with testimony that it was a correct representation of the then condition, was competent.

17. Thomason *v.* Gray, 82 Ala. 291, 3 So. 38. In determining the amount of force necessary to be used by defendant, the jury may consider the age and relative size of the parties. Crosby *v.* Humphreys, 59 Minn. 92, 60 N. W. 843.

18. Hannen *v.* Edes, 15 Mass. 365. In Matthews *v.* Terry, 10 Conn. 455, the court say on this issue: "It is claimed by the defendant, that the relation of master and servant existed between them, which conferred upon him this right. Admitting that relation to have existed, it by no means followed that the defendant possessed the power claimed. There is no doubt but that for just cause, a parent may reasonably correct his child, a master his apprentice, and a schoolmaster his pupil. Yet that power cannot be lawfully exercised by a master over his hired servant, whether that servant is employed in husbandry, in manufacturing business, or in any other manner, *except in the case of sailors.* And if the master beat such servant though moderately, and by way of correction, it is good ground for the servant's departure, and he may support an action against the master for battery. Citing 1 Chitty Pr. 73, 75; Newman *v.* Bennett, 2 Chitty 195. See also Watson *v.* Christie, 2 Bos. & P. 224; Brown *v.* Howard, 14 Johns. (N. Y.) 119; Thorne *v.* White, 1 Pet. Adm. 168, 23 Fed. Cas. No. 13,989; Sampson *v.* Smith, 15 Mass. 365.

19. Greenl. Ev., vol. 2, § 97.

20. Newman *v.* Bennett, 2 Chitty 195.

was mild and moderate.[21]

B. Son Assault Demesne. — When the defendant pleads *son assault demesne*, he must prove that the plaintiff assaulted him first,[22] and that what was done by him was in necessary defense of his own person.[23] A previous assault is not admissible in evidence under this plea, or any assault other than the one laid in the declaration.[24] It is also necessary to prove an assault commensurate with the trespass sought to be justified[25] when the plea is used, and the reply is *de injuria*, all averments of the plea are put in issue, and the plaintiff can only recover for the excess of force he proves;[26] and under these pleas the defendant is confined to evidence in excuse of the battery.[27]

C. Replication de Injuria. — The replication *de injuria* is really a traverse to a plea in excuse, and therefore puts in issue only the matter of excuse alleged in the plea; therefore, under *de injuria*, the plaintiff may show in evidence that the defendant's battery was excessive.[28] Where there is only one count and a traverse *de injuria*, no evidence can be introduced relating to any other assault than the one specified in the plea.[29]

D. Molliter Manus Imposuit. —Although the plea may justify a mere assault, it is never good if the evidence shows a beating and wounding.[30] Where the assailant does not use force, evidence of a request to depart should be given under this plea.[31] Where a per-

21. Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156.

22. Stevens *v.* Lloyd, 1 Cranch C. C. 124, 23 Fed. Cas. No. 13,402; Schlosser *v.* Fox, 14 Ind. 365. See Wilken *v.* Exterkamp, 19 Ky. Law 1132, 42 S. W. 1140. In the absence of a plea of *son assault demesne*, defendant cannot prove that plaintiff first assaulted him.

23. Rogers *v.* Waite, 44 Me. 275; Fitzgerald *v.* Fitzgerald, 51 Vt. 420; Watson *v.* Hastings, 1 Penn. (Del.) 47, 39 Atl. 587.

24. Gibson *v.* Fleming, 1 Har. & J. (Md.) 483; Dole *v.* Erskine, 37 N. H. 316; Peyton *v.* Rogers, 4 Mo. 254.

25. Reece *v.* Taylor, 4 N. & M. 470.

26. Harrison *v.* Harrison, 43 Vt. 417; Watson *v.* Hastings, 1 Penn. (Del.) 47, 39 Atl. 587.

27. Frederick *v.* Gilbert, 8 Pa. St. 454. But if plaintiff attempts to justify he must newly assign the matter of justification. Elliot *v.* Kilburn, 2 Vt. 470.

28. Ayers *v.* Kelley, 11 Ill. 17; Fortune *v.* Jones, 30 Ill. App. 116, reversed 128 Ill. 518, 21 N. E. 523; Fisher *v.* Bridges, 4 Blackf. (Ind.) 518; Gaither *v.* Blowers, 11 Md. 536; Hannen *v.* Edes, 15 Mass. 347; Curtis *v.* Carson, 2 N. H. 539; Bennett *v.* Appleton, 25 Wend. (N. Y.) 371; Bartlett *v.* Churchill, 24 Vt. 218; Mellen *v.* Thompson, 32 Vt. 407; Philbrick *v.* Foster, 4 Ind. 442; Dole *v.* Erskine, 37 N. H. 316; Thomas *v.* Black, 8 Houst. (Del.) 507, 18 Atl. 771.

29. Carpenter *v.* Crane, 5 Blackf. (Ind.) 119; Berry *v.* Borden, 7 Blackf. (Ind.) 384.

30. Cox *v.* Cooke, 1 J. J. Marsh. (Ky.) 360; Shain *v.* Markham, 4 J. J. Marsh. (Ky.) 578, 20 Am. Dec. 232; Boles *v.* Pinkerton, 7 Dana (Ky.) 453; French *v.* Marstin, 24 N. H. 440, 57 Am. Dec. 294; Gates *v.* Lounsbury, 20 Johns. (N. Y.) 427; Bush *v.* Parker, 1 Bing. (N. C.) 72; Brubaker *v.* Paul, 7 Dana (Ky.) 428, 32 Am. Dec. 111.

31. McIlvay *v.* Cockran, 2 Marsh. (Ky.) 276; Ford *v.* Logan, 2 Marsh. (Ky.) 325. See Tullay *v.* Reed, 1 Car. & P. 6; Ballard *v.* Bond, 1 Jur. 7.

son is justified in laying hands on another, this plea will be sustained by evidence of the use of necessary and reasonable force, but not of unnecessary and unreasonable force.[32] And the one who justifies the use of force, must prove the circumstances of justification.[33]

3. Damages. — A. MITIGATION OF DAMAGES. — a. *In General.* Mitigation of damages in a case of assault is admissible,[34] but the circumstances of mitigation must form part of the *res gestae*.[35] Although consent to an assault is no justification, yet such consent may be shown in mitigation of damages.[36] In actions for indecent assaults and solicitations, evidence may be given for the purpose of mitigating damages, as to the general character of plaintiff for unchastity, but evidence of specific acts is inadmissible.[37] But usually the evidence of character of plaintiff or defendant is immaterial, and inadmissible to mitigate damages.[38]

32. Green *v.* Bartram, 4 Car. & P. 308, where B would have been justified in using reasonable force to put A out of his house, yet was not justified in having A arrested.

England. — Hillary *v.* Gay, 6 Car. & P. 284; Edwick *v.* Hawkes, 18 Ch. D. 199; Eyre *v.* Norsworthy, 4 Car. & P. 502; Imason *v.* Cope, 5 Car. & P. 193; Thomas *v.* Marsh, 5 Car. & P. 596.

United States. — Denver etc. R. Co. *v.* Harris, 122 U. S. 597.

Connecticut. — Larkin *v.* Avery, 23 Conn. 304.

Illinois. — Comstock *v.* Brosseau, 65 Ill. 39.

New Jersey. — Todd *v.* Jackson, 26 N. J. Law 525.

New York. — Hyatt *v.* Wood, 3 Johns. 239, 4 Johns. 150, 4 Am. Dec. 258; Wood *v.* Phillips, 43 N. Y. 152; McMillan *v.* Cronin, 75 N. Y. 474; Bristor *v.* Burr, 120 N. Y. 427, 24 N. E. 937, 8 L. R. A. 17; O'Donnell *v.* McIntyre, 37 Hun 623.

Ohio. — Pitford *v.* Armstrong, Wright 94.

Texas. — Sinclair *v.* Stanly, 69 Tex. 718, 7 S. W. 511. See also Canavan *v.* Gray, 64 Cal. 5; Franck *v.* Wiegert, 56 Mich. 472, 23 N. W. 172.

Contra. — Sterling *v.* Warden, 51 N. H. 217, 12 Am. Rep. 80; Kellam *v.* Janson, 17 Pa. St. 467; Rich *v.* Keyser, 54 Pa. St. 86.

Eviction From Railway Train. Coleman *v.* N. Y., N. H. & H. R., 106 Mass. 161.

Eviction of Trespasser. — Brebach *v.* Johnson, 62 Ill. App. 131; Gyre *v.* Culver, 47 Barb. (N. Y.) 592; Beecher *v.* Parmele, 9 Vt. 352, 31 Am. Dec. 633; Brothers *v.* Morris, 49 Vt. 460; Abt *v.* Burgheim, 80 Ill. 92; Jones *v.* Jones, 71 Ill. 562; Wright *v.* So. Exp. Co., 80 Fed. 85; Low *v.* Elwell, 121 Mass. 309, 23 Am. Rep. 272.

33. Hanson *v.* E. & N. A. R. Co., 62 Me. 84, 16 Am. Rep. 404; Coleman *v.* N. Y., N. H. & H. R., 106 Mass. 161; Brown *v.* Gordon, 1 Gray (Mass.) 182; Rhinehardt *v.* Whitehead, 64 Wis. 42, 24 N. W. 401.

34. Anonymous, Brayt. (Vt.) 168.

35. Mowry *v.* Smith, 9 Allen (Mass.) 67; Tyson *v.* Booth, 100 Mass. 258; Child *v.* Homer, 13 Pick. (Mass.) 503; Byers *v.* Horner, 47 Md. 23. Currier *v.* Swan, 63 Me. 323. Evidence of a previous assault upon the same afternoon between the parties admissible in mitigation of damages, but not the details thereof. See also Flint *v.* Bruce, 68 Me. 183.

36. Adams *v.* Waggoner, 33 Ind. 531, 5 Am. Rep. 230; Barholt *v.* Wright, 45 Ohio St. 177, 12 N. E. 185, 4 Am. St. Rep. 535; Logan *v.* Austin, 1 Stew. (Ala.) 476; Schutter *v.* Williams, 1 Ohio Dec. 47; Grotton *v.* Glidden, 84 Me. 589, 24 Atl. 1008.

37. Dimick *v.* Downs, 82 Ill. 570; Gore *v.* Curtis, 81 Me. 403, 17 Atl. 314, 10 Am. Rep. 265; Miller *v.* Curtis, 158 Mass. 127, 32 N. E. 1039, 35 Am. St. Rep. 469.

38. Reddin *v.* Gates, 52 Iowa 210,

b. *Provocation.* — No provocation will reduce the damages, in an action for assault and battery, below compensatory or actual damages, unless it amounts to a justification.[39] But any act of provocation, or any insulting and provoking language used, at the time of the assault and battery, may be given in evidence in mitigation of damages.[40] Such provocation or language is not admissible unless

2 N. W. 1079; Corning *v.* Corning, 6 N. Y. 97; Willis *v.* Forrest, 2 Duer 310.

39. *United States.* — Cushman *v.* Waddell, 1 Baldw. 57, 6 Fed. Cas. No. 3516.

Connecticut. — Burke *v.* Melvin, 45 Conn. 243.

Delaware. — Tatnall *v.* Courtney, 6 Houst. 434.

Illinois. — Scott *v.* Fleming, 16 Ill. App. 539.

Kentucky. — Waters *v.* Brown, 3 A. K. Marsh. (10 Ky.) 557.

Maine. — Prentiss *v.* Shaw, 56 Me. 427, 96 Am. Dec. 475.

New York. — Keyes *v.* Devlin, 3 E. D. Smith 518.

Vermont. — Goldsmith *v.* Joy, 61 Vt. 488, 17 Atl. 1010, 15 Am. St. Rep. 923, 4 L. R. A. 500.

Wisconsin. — Birchard *v.* Booth, 4 Wis. 85; Corcoran *v.* Harran, 55 Wis. 120, 12 N. W. 468; Brown *v.* Swineford, 44 Wis. 282, 28 Am. Rep. 582.

40. Rochester *v.* Anderson, 1 Bibb (Ky.) 428; Avery *v.* Ray, 1 Mass. 12; Ellsworth *v.* Thompson, 13 Wend. (N. Y.) 658; Cushman *v.* Ryan, 1 Story 91, 6 Fed. Cas. No. 3515; Cushman *v.* Waddell, 1 Baldw. 57, 6 Fed. Cas. No. 3516; Burke *v.* Melvin, 45 Conn. 243; Brown *v.* Swineford, 44 Wis. 282, 28 Am. Rep. 582, provocation of an assault, though not sufficient for justification may go to exclude exemplary damages. Richardson *v.* Hine, 42 Conn. 206; Matthews *v.* Terry, 10 Conn. 455; Bartram *v.* Stone, 31 Conn. 159

In Fairbanks *v.* Witter, 18 Wis. 301, on the strength of a provocation at the time, evidence was admitted in mitigation of damages, tending to show that plaintiff had during several years previous to the affray frequently tried to provoke a quarrel with defendant, and had threatened on various occasions to take his life.

In Stetler *v.* Nellis, 60 Barb. (N. Y.) 524, the court said although evidence of acts done or words spoken by plaintiff long before the cause of action arose, is inadmissible for the purpose of showing provocation and mitigating the damages, yet, where such acts or words are a portion of a series of provocations frequently repeated and continued down to the time of the assault, they may be shown in evidence.

In Bundy *v.* Maginess, 76 Cal. 532, 18 Pac. 668, it was said, where defendant alleges acts of provocation both before and at the time of the assault, and that those that caused the assault and battery were those at the time of the assault, he cannot give evidence of other provocative acts.

Dole *v.* Erskine, 37 N. H. 316, held that evidence that plaintiff had for a long time previous to the assault and battery entertained hostile feelings towards defendant and had formerly committed an assault on him, is inadmissible.

An article published in a newspaper two days before the assault, is admissible in evidence as part of the *res gestae*. Ward *v.* White, 86 Va. 212, 9 S. E. 1021, 19 Am. St. Rep. 883.

England. — Fraser *v.* Berkeley, 7 Car. & P. 621.

Arkansas. — Ward *v.* Blackwood, 41 Ark. 295, 48 Am. Rep. 41.

Connecticut. — Guernsey *v.* Morse, 2 Root 252, 1 Am. Dec. 69.

Delaware. — Jarvis *v.* Manlove, 5 Harr. 452.

Illinois. — Ogden *v.* Claycomb, 52 Ill. 365; Murphy *v.* McGrath, 79 Ill. 594; Donnelly *v.* Harris, 41 Ill. 126.

Indiana. — Fullerton *v.* Warrick, 3 Blackf. 219, 25 Am. Dec. 99.

Iowa. — Ireland *v.* Elliott, 5 Iowa 478, 68 Am. Dec. 715; Thrall *v.* Knapp, 17 Iowa 468; Gronan *v.* Kukkuck, 59 Iowa 18, 12 N. W. 748.

Kentucky. — Chandler *v.* Newton, 13 Ky. Law 927.

it is a part of the *res gestae*.[41] And therefore evidence of a provocation given by plaintiff some time before the assault, is not admissible in evidence.[42]

c. *Criminal Prosecution.* — In a civil action for assault and battery evidence may not be given to the jury for the purpose of reducing damages, that the plaintiff had been prosecuted criminally for the assault and paid his fine.[43] The record of the indictment may be introduced in evidence to show that the indictment and action are founded on the same transaction.[44]

Louisiana. — Richardson *v.* Zuntz, 26 La. Ann. 313; Caspar *v.* Prosdame, 46 La. Ann. 36, 14 So. 317.

Maryland. — Gaither *v.* Blowers, 11 Md. 536.

Massachusetts.—Paul *v.* Bisset, 121 Mass. 170.

Michigan. — Millard *v.* Truax, 84 Mich. 517, 47 N. W. 1100, 22 Am. St. Rep. 705.

Minnesota. — Crosby *v.* Humphreys, 59 Minn. 92, 60 N. W. 843.

New York. — Willis *v.* Forrest, 2 Duer 310; Lee *v.* Woolsey, 19 Johns. 319, 10 Am. Dec. 230.

North Carolina. — Barry *v.* Ingles, Taylor 72.

Tennessee. — Jackaway *v.* Dula, 7 Yerg. 82, 27 Am. Dec. 492.

In Marker *v.* Miller, 9 Md. 338, it was held that the fact that the assault was committed by the defendant in vindication of his truth and veracity is a mitigating circumstance if he had the truth on his side, and hence plaintiff may rebut it by proof that truth was with him. But see Butt *v.* Gould, 34 Ind. 552, and Bartram *v.* Stone, 31 Conn. 159.

41. Avery *v.* Ray, 1 Mass. 12; Ellsworth *v.* Thompson, 13 Wend. (N. Y.) 658; Richardson *v.* Hine, 42 Conn. 206; Brooks *v.* Carter, 34 Fed. 505; Millard *v.* Truax, 84 Mich. 517, 47 N. W. 1100, 22 Am. St. Rep. 705; Coxe *v.* Whitney, 9 Mo. 531; Lee *v.* Woolsey, 19 Johns. (N. Y.) 319; Chapell *v.* Schmidt, 104 Cal. 511, 38 Pac. 892.

Where defense was that plaintiff unlawfully entered defendant's garden and was picking his flowers at the time of the assault, it was not error to exclude evidence of prior commissions of the same trespass.

Alabama. — Keiser *v.* Smith, 71 Ala. 481, 46 Am. Rep. 342.

Indiana. — Baker *v.* Gausin, 76 Ind. 317.

Iowa. — Cleveland *v.* Stilwell, 75 Iowa 466, 39 N. W. 711.

Kentucky. — Rochester *v.* Anderson, 1 Bibb 428; Dungan *v.* Godsey, 2 A. K. Marsh. 352; Sherley *v.* Billings, 8 Bush 147, 8 Am. Rep. 451.

Massachusetts.—Hall *v.* Powers, 12 Metc. 482, 46 Am. Dec. 698; Paul *v.* Bisset, 121 Mass. 170.

New York. — Maynard *v.* Beardsley, 7 Wend. 560, 22 Am. Dec. 595.

Virginia. — Davis *v.* Franck, 33 Gratt. 413; McAlexander *v.* Harris, 6 Munf. 465.

42. Rochester *v.* Anderson, 1 Bibb (Ky.) 428; Chrisman *v.* Hunter, 3 Dana (Ky.) 83; Berry *v.* Ingles, Taylor 72; Roach *v.* Caldbeck, 64 Vt. 593, 24 Atl. 989; Waters *v.* Brown, 3 A. K. Marsh. (Ky.) 557.

43. *Alabama.* — Phillips *v.* Kelly, 29 Ala. 628.

California. — Bundy *v.* Maginess, 76 Cal. 532, 18 Pac. 668.

Delaware. — Keller *v.* Taylor, 2 Houst. 20.

Iowa. — Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1079.

Kentucky. — Reed *v.* Kelly, 4 Bibb 400.

Mississippi. — Wheatley *v.* Thorn, 1 Cush. 62.

Missouri. — Corwin *v.* Walton, 18 Mo. 71, 59 Am. Dec. 285.

South Carolina. — Wolff *v.* Cohen, 8 Rich. Law 144.

Vermont. — Roach *v.* Caldbeck, 64 Vt. 593, 24 Atl. 989; Headle *v.* Watson, 45 Vt. 289, 12 Am. Rep. 197.

Contra. — Smithwick *v.* Ward, 7 Jones Law 64; Rhodes *v.* Rodgers, 151 Pa. St. 634, 24 Atl. 1044; Flanagan *v.* Womack, 54 Tex. 45; Jackson *v.* Wells, 13 Tex. Civ. App. 275, 35 S. W. 528.

44. Blackburn *v.* Minter, 22 Ala. 613.

The pecuniary circumstances of the defendant may be considered in awarding damages,[45] and also the station or position of the parties.[46]

B. Aggravation of Damages. — a. *In General.* —Circumstances of outrage and insult attending an assault and battery,[47] which wound the feelings or tend to lower the party injured in the estimation of society, may be given in evidence to influence the award of damages beyond the usual amount.[48] Malice may also be shown in evidence in aggravation of actual damages even though exemplary or punitive damages are also recoverable on the same ground.[49] But evidence of words spoken at the time of the assault, or at another time and place, is inadmissible in aggravation of damages.[50] Where it is averred that the assault was unlawfully made, matters of aggravation may be given in evidence without pleading them.[51]

b. *Financial and Social Condition of Parties.* — When an aggravated assault and battery is sued for, evidence is admissible of the pecuniary ability of the defendant,[52] or of his social posi-

45. Sloan *v.* Edwards, 61 Md. 89. But the court say as to financial condition that where the question is "what is pecuniary condition of defendant" and the answer is "generally considered good" it is inadmissible because too indefinite. Schmidt *v.* Pfeil, 24 Wis. 452; Harris *v.* Marco, 16 S. C. 575; Dailey *v.* Houston, 58 Mo. 361.

In Mullin *v.* Spangenberg, 112 Ill. 140, court say defendant cannot show he is without pecuniary resources, unless by way of rebuttal. Johnson *v.* Smith, 64 Me. 553; Jacoby *v.* Guier, 6 Serg. & R. (Pa.) 399.

46. Sloan *v.* Edwards, 61 Md. 89; Dailey *v.* Houston, 58 Mo. 361; Schelter *v.* York, Crabbe 449, 21 Fed. Cas. No. 12,446; Jarvis *v.* Manlove, 5 Harr. (Del.) 452.

47. Barnes *v.* Martin, 15 Wis. 240, 82 Am. Dec. 670; Dickey *v.* McDonnell, 41 Ill. 62; Root *v.* Sturdivant, 70 Iowa 55, 29 N. W. 802; Worford *v.* Isbel, 1 Bibb (4 Ky.) 247, 4 Am. Dec. 633; Pratt *v.* Ayler, 4 Har. & J. (Md.) 448.

In Shafer *v.* Smith, 7 Har. & J. (Md.) 67, other trespasses to plaintiff, or to his family, if committed at the time of the principal trespass, may be given in evidence to increase the damages. Bell *v.* Morrison, 27 Miss. 68; Joice *v.* Branson, 73 Mo. 28; Pendleton *v.* Davis, 1 Jones (N. C.) 98; Dean *v.* Raplee, 75 Hun 389, 27 N. Y. Supp. 438.

48. Townsend *v.* Briggs (Cal.), 32 Pac. 307; Ously *v.* Hardin, 23 Ill. 352; Johnson *v.* McKee, 27 Mich. 471; Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668, aggravation of an existing disease; Hodges *v.* Nance, 1 Swan (Tenn.) 57; Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287.

49. Webb *v.* Gilman, 80 Me. 177, 13 Atl. 688; Shafer *v.* Smith, 7 Har. & J. (Md.) 67; Joice *v.* Branson, 73 Mo. 28.

50. Hallowell *v.* Hallowell, 1 T. B. Mon. (Ky.) 130.

51. Sampson *v.* Henry, 11 Pick. (Mass.) 379; Pierce *v.* Carpenter, 65 Mo. App. 191. See Birchard *v.* Booth, 4 Wis. 85, where damage is not the necessary or natural consequence of the assault and battery or where it is matter of aggravation, evidence cannot be given unless specially stated on the record.

52. *United States.* — Brown *v.* Evans, 17 Fed. 912.

Illinois. — Cockran *v.* Ammon, 16 Ill. 315; Jones *v.* Jones, 71 Ill. 562.

Kentucky. — Gore *v.* Chadwick, 6 Dana (36 Ky.) 477.

Maine. — Webb *v.* Gilman, 80 Me. 177, 13 Atl. 688.

Maryland. — Sloan *v.* Edwards, 61 Md. 89.

North Carolina. — Pendleton *v.* Davis, 1 Jones 98.

Ohio. — Hendricks *v.* Fowler, 16 Ohio Cir. Ct. 597.

South Carolina. — Rowe *v.* Moses,

tion,[53] but this evidence is not admissible on the subject of actual compensatory damages.[54]

c. *Consequential Injuries.* — Where the complaint is general, no special damages alleged, evidence may be given of damages naturally and necessarily resulting from the act of defendant.[55] Where the damages are consequential they must be set forth specially in the petition, or else no evidence of such damages will be allowed.[56]

9 Rich. Law 423, 67 Am. Dec. 560; Harris *v.* Marco, 16 S. C. 575.

Wisconsin. — Barnes *v.* Martin, 15 Wis. 240, 82 Am. Dec. 670; Draper *v.* Baker, 61 Wis. 450, 21 N. W. 527, 50 Am. Rep. 143; Birchard *v.* Booth, 4 Wis. 85.

53. McNamara *v.* King, 2 Gilm. (Ill.) 432; Sloan *v.* Edwards, 61 Md. 89; Eltringham *v.* Earhart, 67 Miss. 488, 7 So. 346, 19 Am. St. Rep. 319; Dailey *v.* Houston, 58 Mo. 361; Jones *v.* Jones, 71 Ill. 562; Gaithers *v.* Blowers, 11 Md. 536.

54. Roach *v.* Caldbeck, 64 Vt. 593, 24 Atl. 989; Hare *v.* Marsh, 61 Wis. 435, 21 N. W. 267, 50 Am. Rep. 141.

55. Morgan *v.* Kendall, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445.

Andrews *v.* Stone, 10 Minn. 72, where no special damages alleged, not confined to nominal damages, but may recover such general damages as are proved to result. O'Leary *v.* Rowan, 31 Mo. 117.

Stevenson *v.* Morris, 37 Ohio St. 10, 41 Am. Rep. 481; Birchard *v.* Booth, 4 Wis. 85. Need not set out in petition necessary or usual consequences of the injury, and may recover for these even though they accrue after the commencement of the suit. Gronan *v.* Kukkuck, 59 Iowa 18, 12 N. W. 748; Sloan *v.* Edwards, 61 Md. 89; Fetter *v.* Beale, 1 Ld. Raym. 339, 2 Salk. 11; Moore *v.* Adam, 2 Chitty 198; 1 Chitty Pl. 346.

56. Vertz *v.* Singer Mfg. Co., 35 Hun (N. Y.) 116.

In Hutts *v.* Shoaf, 88 Ind. 395, it is said that if the complaint alleges that the plaintiff was made lame and sick, evidence of special damage is admissible, though no specific amount is claimed "*co nomine.*"

In Hamm *v.* Romine, 98 Ind. 77, complaint alleged permanent disability, and it was held that plaintiff could give evidence as to her ill health since the assault. Sloan *v.* Edwards, 61 Md. 89, held might show that had become subject to fits, although not specially alleged as grounds of special damages. Avery *v.* Ray, 1 Mass. 12.

In Welch *v.* Ware, 32 Mich. 77, declaration set up items of injury, suffering and expense, avers hindrance in plaintiff's affairs, loss of profits in occupation as a theatrical performer, etc. *Held*, that evidence was admissible of price plaintiff was paying for board of himself and family, value of the joint services of himself and wife as performers, and of proportion his services were worth.

Cannot recover for doctor's bill resulting, unless specially set forth. O'Leary *v.* Rowan, 31 Mo. 117.

In Robinson *v.* Stokely, 3 Watts (Pa.) 270, consequential injury to plaintiff's business must be averred in declaration, otherwise evidence of such injury is inadmissible. Kuhn *v.* Freund, 87 Mich. 545, 49 N. W. 867; Pettit *v.* Addington, Peake 62. If consequent sickness be intended to be relied on, it must be laid under a *per quod.*

Exceptions to Above. — Special damages may be recovered, when not declared on in the complaint, if the evidence in regard to such special damages is given to the jury without objection. Atkinson *v.* Harran, 68 Wis. 405, 32 N. W. 756.

Must Be Proved as Averred. Allegation that plaintiff expended moneys to be cured is not sustained by proof that he simply incurred liability therefor. Ward *v.* Haws, 5 Minn. 440.

II. CRIMINAL ACTION.

1. Presumptions and Burden of Proof. — The burden is upon the state to prove the assault to be a criminal one,[57] not made in self-defense,[58] even where a deadly weapon was used;[59] but it has also been held that the burden is upon the defense to justify the use of such weapon.[60] There is no presumption that a billy,[61] axe,[62] pistol, or other instrument is a deadly weapon,[63] and the burden is upon the state to show its deadly character[64] as used.[65]

Where the defense relies upon some distinct and independent fact not part of the *res gestae*, the burden shifts to the defendant.[66]

Natural Results. — The law presumes that the defendant intends the ordinary results of his acts,[67] and the acts of his accomplices.

Loaded Gun Aggravated Assault. — The burden is upon the defendant to prove that his gun was not loaded,[68] and it has been held that the burden is upon the defendant to justify mayhem.[69]

57. Presumptions and Burden of Proof. — Com. *v.* McKie, 1 Gray 67 Mass.) 61, 61 Am. Dec. 410; State *v.* Shea, 104 Iowa 724, 74 N. W. 687; People *v.* Shanley, 30 Misc. 290, 62 N. Y. Supp. 389; State *v.* Fowler, 52 Iowa 103, 2 N. W. 983; State *v.* Morphy, 33 Iowa 270; State *v.* Porter, 34 Iowa 131; U. S. *v.* Lunt, 1 Sprague (U. S.) 311.

If the defendant relies upon no separate, distinct or independent fact, but confines his defense to the original transaction on which the charge is founded with the accompanying circumstances, the burden of proof never shifts, but remains upon the state throughout the whole case to prove the act a criminal one beyond a reasonable doubt. People *v.* Rodrigo, 69 Cal. 601, 11 Pac. 481.

58. State *v.* Hickam, 95 Mo. 322, 6 Am. St. Rep. 54.

59. Deadly Weapon. — State *v.* Hickam, 95 Mo. 322, 6 Am. St. Rep. 54.

60. Sawyer *v.* People, 91 N. Y. 667.

61. Ballard *v.* State (Tex. App.), 13 S. W. 674.

62. Melton *v.* State, 30 Tex. App. 273, 17 S. W. 257.

There is no presumption that an ax is a deadly weapon, but its character in this regard depends upon its size, manner of use and proof is required. Gladney *v.* State (Tex. App.), 12 S. W. 868.

63. Ballard *v.* State (Tex. App.), 13 S. W. 674; Hilliard *v.* State, 17 Tex. App. 210; Parks *v.* State (Tex. App.), 15 S. W. 174.

64. Hunt *v.* State, 6 Tex. App. 663; Hillard *v.* State, 17 Tex. App. 210.

65. Branch *v.* State, 35 Tex. Crim. App. 304, 33 S. W. 356.

66. People *v.* Rodrigo, 69 Cal. 601, 11 Pac. 481; Com. *v.* McKie, 67 Mass. (1 Gray) 61.

67. Natural Results. — Donaldson *v.* State, 10 Tex. App. 307; Aikins *v.* State, 11 Tex. App. 8; Evans *v.* State, 25 Tex. Sup. 304; People *v.* Wright, 93 Cal. 564, 29 Pac. 240.

The law warrants the presumption that a person intends the results or consequences to follow an act which he intentionally commits, which ordinarily do follow such acts. State *v.* Gillett, 56 Iowa 459, 9 N. W. 362.

It is presumed that one who hires another to commit an assault, intends the probable consequences of his act. State *v.* Merchant (N. H.), 18 Atl. 654.

68. Loaded Gun.—State *v.* Cherry, 33 N. C. (11. Ired.) 475; Crow *v.* State, 41 Tex. 468; Burton *v.* State, 3 Tex. App. 408, 30 Am. Rep. 146; Caldwell *v.* State, 5 Tex. 19; State *v.* Herron, 12 Mont. 230, 29 Pac. 819, 33 Am. St. Rep. 576.

69. *See* "MAYHEM."

Where the defendant bit off a portion of the ear of the assaulted party,

2. Res Gestae. — The *res gestae* of the assault are competent evidence,[70] and include the acts,[71] declarations,[72] appearance,[73] and physical condition of the parties,[74] and of the accomplices of either,[75] as well as all the circumstances of the assault.[76]

the burden of establishing that it was done in self-defense was upon the defense. State *v.* Skidmore, 87 N. C. 509.

70. Res Gestae. — People *v.* Pearl, 76 Mich. 207, 42 N. W. 1109, 115 Am. St. Rep. 304, 4 L. R. A. 709. *See* RES GESTAE." Smith *v.* State, 123 Ala. 64, 26 So. 641; Blount *v.* State, 49 Ala. 381.

Each party to the affray should be permitted to give all the details and the jury will then be better able to pass upon their credibility. State *v.* Newland. 27 Kan. 764. Although the prosecutor was the aggressor, the State may show that the defendant struck after the necessity for defense had ceased. Harris *v.* State, 123 Ala. 69, 26 So. 515.

71. Richards *v.* State, 3 Tex. App. 423; Blount *v.* State, 49 Ala. 381. The defendant may prove that his pistol was not, in fact, loaded with ball, although he believed it to be at the time and intended homicide. State *v.* Swails, 8 Ind. 524, 65 Am. Dec. 772.

The prosecuting witness testified that the defendant struck him; on cross-examination it is proper to inquire, "How he knew witness struck him, and what defendant was doing when he turned around." Com. *v.* Crowley, 167 Mass. 434, 45 N. E. 766.

72. State *v.* Wiggins, 152 Mo. 170, 53 S. W. 421.

The witness heard the cry of the prosecutor and as he ran to his assistance, saw somebody run away. The witness asked what was the matter and the prosecutor said defendant was trying to choke him to death. *Held,* the declaration of the prosecutor, part of the *res gestae* and admissible. Monday *v.* State, 32 Ga. 672, 79 Am. Dec. 314.

Threats made at the time of the assault coupled with conditions, the defendant had no right to exact, may be shown in aggravation. Crow *v.* State, 41 Tex. 468.

73. Com. *v.* Malone, 114 Mass. 295.

Evidence of the conduct, demeanor and expression of the defendant at or about the time of the assault is always admissible. Blount *v.* State, 49 Ala. 381.

74. Harris *v.* State, 123 Ala. 69, 26 So. 515; Hodges *v.* State, 15 Ga. 117.

75. Rape *v.* State, 34 Tex. Crim. App. 615, 31 S. W. 652; Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452; Elmore *v.* State, 110 Ala. 63, 20 So. 323; Ross *v.* State, 62 Ala. 224.

Contemporaneous declarations of those not on trial, who were of the assaulting party, are admissible. Blount *v.* State, 49 Ala. 381.

When the combination to commit an assault is established, the acts or declarations of one accomplice in the prosecution of the enterprise is evidence against others and when a *prima facie* case of joint action is shown the whole transaction should be submitted to the jury. Tompkins *v.* State, 17 Ga. 356.

Where there was a conspiracy to assault a temperance speaker it is competent to show that the conspirators went together to the place of assault, that some of the parties worked for the others and that some of them had been engaged in the liquor business. Yeary *v.* State (Tex.), 66 S. W. 1106.

76. Yeary *v.* State (Tex.), 66 S. W. 1106; Law *v.* State, 34 Tex. Crim. App. 79, 29 S. W. 160; Tompkins *v.* State, 17 Ga. 356; Harris *v.* State, 123 Ala. 69, 26 So. 515; State *v.* Goering, 106 Iowa 636, 77 N. W. 327.

Where two parties made a demonstration with guns against the prosecutor and while he was attempting to disarm one and a third party was trying to disarm the other, the defendant cut the prosecutor and third party in quick succession with a knife, all the facts and circumstances are competent evidence for the State as part of the *res ges-*

About the Time. — And include matters just before[77] and after the assault.[78]

Remote Facts. — But those remote in time[79] or space are not competent unless upon special grounds.[80]

A. WEAPONS. — The weapon used may be identified by a witness,[81] and the manner of its use may be described as affecting its deadly character.[82]

3. Nature of Injuries. — The extent and nature of the injuries of the prosecutor may be shown by his testimony,[83] by a non-expert

tae. Smith *v.* State, 123 Ala. 64, 26 So. 641.

It may be shown as part of the *res gestae* that the father of the defendant in the same affray inflicted other wounds upon the prosecuting witness. Hoffmann *v.* State, 65 Wis. 46, 26 N. W. 110.

Where there was testimony tending to show the same motive for assaulting several persons, evidence of assaults upon such other persons at the time of the assault in issue is admissible. Horn *v.* State, 102 Ala. 144, 15 So. 278.

77. About Time. — People *v.* Demasters, 109 Cal. 607, 42 Pac. 236.

Evidence that defendant before striking the blow pointed a pistol at the assaulted person and tried to pull the trigger is part of the *res gestae* and admissible. Nelson *v.* State (Tex. Crim App.), 20 S. W. 766.

78. Com. *v.* Malone, 114 Mass 295; Horn *v.* State, 102 Ala. 144, 15 So. 278; State *v.* Fowler, 52 Iowa 103, 2 N. W. 983; People *v.* Teixeira, 123 Cal. 297, 55 Pac. 988; Hodges *v.* State, 15 Ga. 117; Monday *v.* State, 32 Ga. 672, 79 Am. Dec. 314.

Where the offense charged was assault with a pistol, evidence that the defendant immediately afterward procured an ax and attacked the same party, is admissible to show *animus* and as a part of the *res gestae*. Richards *v.* State, 3 Tex. App. 423.

Declarations of an assaulted party after he had run 600 feet were held competent. Waechter *v.* State, 34 Tex. Crim. App. 297, 30 S. W. 800.

Statements made by the assaulted boy when he came home wounded and crying were regarded by the court as part of the *res gestae* and admissible. Pool *v.* State (Tex. Crim. App.), 23 S. W. 891.

79. Remote Matters. — Rosenbaum *v.* State, 33 Ala. 354; Hadley *v.* State, 58 Ga. 309; State *v.* Noeninger, 108 Mo. 166, 18 S. W. 990; Whilden *v.* State, 25 Ga. 396, 71 Am. Dec. 181.

Evidence that threats were made after the assault to lynch the defendant is not admissible for him. McAllister *v.* State, 49 Ga. 306.

Declarations of the assaulted boy after he came home and a stranger was called in to hear them are not part of the *res gestae* and are not admissible. Pool *v.* State (Tex. Crim. App.), 23 S. W. 891.

Evidence that the parties are reconciled and now friends is not competent for the defense. Hadley *v.* State, 58 Ga. 309.

80. State *v.* Fowler, 52 Iowa 103, 2 N. W. 983; Rosenbaum *v.* State, 33 Ala. 354; State *v.* Noeninger, 108 Mo. 166; 18 S. W. 990.

81. Weapons. — Thompson *v.* State, 35 Tex. Crim. App. 352, 33 S. W. 871; Cain *v.* Warner, 13 Pa. Supp. Ct. 461.

82. State *v.* Swails, 8 Ind. 524, 65 Am. Dec. 772; Tolett *v.* State (Tex. Crim. App.), 55 S. W. 335; Hunt *v.* State, 6 Tex. App. 663; Shaddle *v.* State, 34 Tex. 572; Chambers *v.* State, 42 Tex. 254; Skidmore *v.* State, 43 Tex. 93; Filkins *v.* People, 69 N. Y. 101, 25 Am. Rep. 143.

Whether the gun was loaded and how loaded is very material evidence under an indictment for shooting at another. Allen *v.* State, 28 Ga. 395, 73 Am. Dec. 760.

83. Injuries. — People *v.* Sutherland, 104 Mich. 468, 62 N. W. 566; People *v.* Zounek, 66 Hun 626, 20 N. Y. Supp. 755.

witness,[84] or by the testimony of a physician or surgeon[85] who alone can give his opinion as to the injuries,[86] or upon an agreed statement or hypothetical case.[87]

A. Wounds in Evidence. — The wounds themselves may be exhibited to the jury by the state[88] or defense.[89]

4. Intent, Malice, Declarations and Threats. — Declarations of ill-will,[90] and threats by the defendant[91] or his accomplices,[92] and relevant conversations between the parties[93] before[94] or after the assault, are competent for the state to show malice or intent.[95]

A. Former Difficulties. — Evidence that former difficulties existed between the parties is admissible,[96] but evidence of what those difficulties were is excluded by some courts,[97] while others

84. Kinnard *v.* State, 35 Tex. Crim. App. 276, 33 S. W. 234; Pilcher *v.* State, 32 Tex. Crim. App. 557, 25 S. W. 24.

85. State *v.* Haynie, 118 N. C. 1265, 24 S. E. 536.

86. Opinions. — Dean *v.* State, 89 Ala. 46, 8 So. 38.

87. Doolittle *v.* State, 93 Ind. 272.

88. Exhibit Wounds. — People *v.* Sutherland, 104 Mich. 468, 62 N. W. 566; Parrish *v.* State, 32 Tex. Crim. App. 583, 25 S. W. 420.

89. The prosecuting witness should be required to exhibit his alleged wounded arm to the jury and a contrary ruling of the court is error. King *v.* State, 100 Ala. 85, 14 So. 878.

90. Declarations and Threats. Walker *v.* State, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17.

See "Intent," "Malice," "Motive."

The prosecutor testified that five weeks before the assault he heard the defendant say, "if he had not just now got out of trouble he would break a stick over the head of" the prosecutor. *Held*, the testimony was admissible to show *animus*. Bolton *v.* State (Tex. Crim. App), 39 S. W. 672.

91. State *v.* Henn, 39 Minn. 476, 40 N. W. 572; Skelton *v.* State (Tex. Crim. App.), 51 S. W. 943; Walker *v.* State, 85 Ala. 7, 4 So. 686; 7 Am. St. Rep. 17.

Evidence that defendant said on the day of the assault that he expected to kill somebody before he left town is admissible to show intent. Read *v.* State, 2 Ind. 438.

92. Yeary *v.* State (Tex. Crim. App.), 66 S. W. 1106.

93. Walker *v.* State, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17.

The assaulted wife may testify to conversations between her and the assaulting husband. Doolittle *v.* State, 93 Ind. 272.

94. State *v.* Henn, 39 Min. 476, 40 N. W. 572; Walker *v.* State, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17.

95. After. — Cogswell *v.* Com., 17 Ky. Law. Rep. 822, 32 S. W. 935; Allen *v.* State, 74 Ind. 216; Richards *v.* State, 3 Tex. App. 423; Walker *v.* State, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17.

Declarations made by the accused regretting that he missed the assaulted party when he shot at him are admissible, to contradict the defense that he fired into the air to frighten the prosecuting witness. Cogswell *v.* Com., 17 Ky. Law Rep. 822, 32 S. W. 935.

Where an officer wrongfully arrested and assaulted a person — what the officer did and said at the police station afterward is competent. State *v.* Davidson, 44 Mo. App. 513.

96. Former Difficulties. — Where malice aforethought is an element of the crime, evidence of former trouble and quarrels is competent. State *v.* Forsythe, 98 Mo. 667, 1 S. W. 834.

97. May *v.* State, 6 Tex. App. 191; Latham *v.* State, 39 Tex. Crim. App. 472, 46 S. W. 638; Stewart *v.* State, 78 Ala. 436; Wood *v.* State, 86 Ala. 71; Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17.

It is error to permit the state to go minutely into other quarrels of

hold to the contrary and admit evidence of the facts of such difficulties,[98] including the acts and declarations of the assaulted party tending to anger the defendant;[99] and it is proper to ask the prosecutor as to the motive or cause of the assault,[1] but where his opinion is sought or given, the evidence should be excluded.[2]

When the evidence for the prosecution as to such difficulties suggests a wrong upon the part of the defendant, the defense should be permitted to explain the transaction.[3]

Where malice or premeditation is not an element of the offense, and does not affect its grade,[4] where the matters were remote[5] or a

the defendant. People *v.* Kenyon, 93 Mich. 19, 52 N. W. 1032. The party alleged to have been assaulted had an encounter with defendant's brother a few mornings before and the brother was killed, but the defendant was not present. *Held,* evidence of such encounter was not admissible against the defendant. State *v.* Clayton, 160 Mo. 516, 13 S. W. 819, 18 Am. Rep. 565.

98. State *v.* Sanders, 106 Mo. 188, 17 S. W. 223; Ross *v.* State, 62 Ala. 224; Tompkins *v.* State, 17 Ga. 356; People *v.* Deitz, 86 Mich. 419, 49 N. W. 296; Sullivan *v.* State, 31 Tex. Crim. App. 486, 20 S. W. 927, 37 Am. St. Rep. 826; Walker *v.* State, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17; State *v.* Schleagal, 50 Kan. 325, 31 Pac. 1105; State *v.* Montgomery, 65 Iowa 483, 22 N. W. 639.

In proof of malice it may be shown that the assaulted party was on the jury which recently convicted the defendant. Trimble *v.* State (Tex. Crim. App.), 22 S. W. 879.

Evidence that defendant married the prosecutor's sister soon after the assault and that the prosecutor had interfered with their affairs just before the assault are competent. Thomas *v.* State, 117 Ala. 178, 23 So. 665.

In an action against a policeman for assault in arresting the mother without cause, it is competent to prove that the officer had seduced her daughter to show his motive in making the arrest. People *v.* Daily, 143 N. Y. 638, 37 N. E. 823.

99. A speech which was the cause of a conspiracy to assault the speaker may be given in evidence in the absence of proof that the defendant did not hear the speech or have it communicated to him. Yeary *v.* State (Tex. Crim. App.), 66 S. W. 1106.

It is competent for the state to prove that the assaulted party said that "no honest man would avail himself of the bankrupt law" and that the defendant's father had just passed through bankruptcy. State *v.* Griffs, 3 Ired. (N. C.) 504.

1. The questions, "What caused the defendant to strike you?" "What was his motive for striking?" are not objectionable, especially where the answer is not an opinion. Trimble *v.* State (Tex. Crim. App.), 22 S. W. 879.

2. Trimble *v.* State (Tex. Crim. App.), 22 S. W. 879.

3. Where the state gives evidence of former affray between the parties too remote to be part of the *res gestae* to show malice or intent, the defense may show that the prosecutor was the aggressor in the former difficulty and pleaded guilty to an assault while defendant acted wholly in defense. Morrison *v.* State, 37 Tex. Crim. App. 601, 40 S. W. 591.

The prosecuting witness testified that there had been no trouble before between the parties, except about a letter of his which the defendant had opened. *Held,* error for the court to exclude testimony of the defendant, that his mother who had poor eyesight, opened the letter and handed it to defendant to read; that he read no more after he discovered the mistake, but returned it to the postoffice. Skelton *v.* State (Tex. Crim. App.), 51 S. W. 943.

4. In a simple case of assault and battery, declarations or threats of the accused made some time before are inadmissible. State *v.* Norton, 82 N. C. 628.

5. People *v.* Deitz, 86 Mich. 419, 49 N. W. 296.

reconciliation had occurred, such evidence of intent or motive has been excluded.[6] Such evidence is confined to matters between the parties themselves,[7] and the defendant may testify as to his intent and motive in the matter.[8]

5. Recklessness, Illegal Act. — Where there was no intent to assault the prosecutor, negligence or recklessness may be shown,[9] and evidence that the assault was committed in the performance of an illegal act is admissible;[10] but it has been held that an act *malum prohibitum* would not supply the place of malice,[11] and to rebut the claim of accident the ill-will of the defendant may be shown.[12]

6. Assault on Female. — **Declarations.** — The declarations of the assaulted woman or girl, which are voluntary and spontaneous, made at the time of the assault,[13] or very soon afterward, are admissible against the defendant,[14] but her narratives of past events should be excluded.[15]

6. Threats two years old with intervening reconciliation too ancient. People *v.* Deitz, 86 Mich. 419, 49 N. W. 296.

7. Where the prosecutor made the attack and was severely punished, he may not show that long before, the father of the defendant made threats against him. People *v.* Pearl, 76 Mich. 207, 4 L. R. A. 709, 5 Am. St. 304.

Evidence that the defendant said that the ward of the assaulted men owed him a gambling debt and that he would have his money or the ward's blood, is not admissible. State *v.* Moberly, 121 Mo. 604, 26 S. W. 364.

8. The *quo animo* of the assault is material in fixing the grade, the offense and direct proof of such intent is admissible. Filkins *v.* People, 69 N. Y. 101.

Where the accused gives the reasons that induced him to commit the assault, the state may show that the reasons or fact did not exist and that the defendant was mistaken in his beliefs as to facts. Cornelison *v.* Com., 84 Ky. 583, 2 S. W. 235.

9. Recklessness. — Com. *v.* McLaughlin, 5 Allen (Mass.) 507; People *v.* Raher, 92 Mich. 165, 52 N. W. 625, 31 Am. St. Rep. 575.

10. Illegal Act. — Turner *v.* State, 35 Tex. Crim. App. 369, 33 S. W. 972; Cowley *v.* State, 10 Lea (Tenn.) 282; Smith *v.* McLain, 11 W. Va. 658; Powell *v.* State, 32 Tex. 230, 22 S. W. 667; Dunaway *v.* People, 110, Ill. 333, 51 Am. Rep. 686; McGehee *v.* State, 62 Miss. 772, 52 Am. Rep. 209; State *v.* Gilman, 69 Me. 163, 31 Am. Rep. 257.

Where a grossly negligent discharge of a pistol is the assault in question, the ordinance making such discharge unlawful is competent evidence. Com. *v.* Hawkins, 157 Mass. 551, 32 N. E. 862.

11. Com. *v.* Adams, 114 Mass. 323, 19 Am. Rep. 362.

12. To rebut the claim that an assault producing severe injury was accidental, it may be shown that the defendant did not show the injured party any attention or sympathy. State *v.* Alford, 31 Conn. 40.

13. Assault on Female. *See* "RAPE."

If the declarations of the assaulted woman or child are voluntary, spontaneous and contemporaneous with the main fact and not narratives of past events, they are admissible against the accused. Veal *v.* State, 8 Tex. App. 474.

14. Declarations made by the assaulted woman 10 minutes afterward are admissible. Pilcher *v.* State, 32 Tex. Crim. App. 557, 25 S. W. 24.

15. Veal *v.* State, 8 Tex. App. 474; Price *v.* State, 35 Tex. Crim. App. 501, 34 S. W. 622.

What an assaulted female told the officer during the week is not evidence. Com. *v.* Fitzgerald, 123 Mass. 408.

Complaint. — Though the fact that she made a complaint is admissible.[16]

A. Appearance of Injuries. — Evidence of the appearance and condition of the prosecutrix immediately after the alleged assault is admissible.[17]

B. Former Acts.— Evidence of a previous indecent assault upon the same party is competent to show motive or intent.[18]

C. Character of Female. — Evidence of the general reputation of the prosecutrix as to chastity,[19] of her specific acts of unchastity,[20] or immodesty with the defendant,[21] but not with others, is admissible for the defense.[22]

7. Bad Reputation of Defendant. — Evidence of the bad reputation of the defendant is not admissible,[23] and specific matters to his discredit[24] not relating to the assaulted party should be excluded.[25]

When the defendant offers evidence of a declaration of the prosecuting witness that she did not know who committed the assault, it renders her declaration that the assault was committed by him, competent. Duke *v.* State, 35 Tex. Crim. App. 283, 33 S. W. 349.

16. Complaint.—It may be shown that the assaulted female made some complaint, but her declarations in making it are not admissible unless part of the *res gestae*. People *v.* Hicks, 98 Mich. 86, 56 N. W. 1102.

17. Appearance and Injuries. — Price *v.* State, 35 Tex. Crim. App. 501, 34 S. W. 622.

See "Res Gestae," II, 2, *ante*.

18. Former Acts. — Com. *v.* Kendall, 113 Mass. 210, 18 Am. Rep. 469.

Where an assault was committed upon a moving train in one state, a previous assault on the train in another state may be shown to explain the latter assault. State *v.* Place, 3 Wash. 973, 32 Pac. 736.

19. Reputation. — Donaldson *v.* State, 10 Tex. App. 307; McCombs *v.* State, 8 Ohio St. 643; State *v.* Forshner, 43 N. H. 89, 80 Am. Dec. 132; Com. *v.* Kendall, 113 Mass. 210, 18 Am. Rep. 469.

20. McCombs *v.* State, 8 Ohio St. 643; State *v.* Forshner, 43 N. H. 89, 80 Am. Dec. 132.

The prosecutrix may be required to answer, whether there had been prior acts of sexual intercourse between her and the defendant. Donaldson *v.* State, 10 Tex. App. 307.

21. Com. *v.* Kendall, 113 Mass. 210, 18 Am. Rep. 469

Upon an indictment for an indecent assault, the defendant offered to prove that the married prosecuting witness promised to kiss him if he would take her for a drive. *Held*, that it was error to exclude such evidence. Com. *v.* Bean, 111 Mass. 438.

22. State *v.* Fitzsimmons, 18 R. I. 236, 49 Am. St. Rep. 766; Regend *v.* Holmes, Cox C. C. 137; McCombs *v.* State, 8 Ohio St. 643.

Evidence of specific acts is not admissible to show character of the complainant. People *v.* Frindel, 58 Hun 626, 12 N. Y. Supp. 298; Thomas *v.* State, 67 N. Y. 218; Harman *v.* State, 40 Tenn. (3 Head), 243.

23. *See* "Reputation," "Character."

Declarations of the prosecuting witness that he was afraid to testify are admissible. State *v.* Day, 22 Or. 160, 29 Pac. 352.

24. People *v.* Denby, 108 Cal. 54, 40 Pac. 1051.

Evidence of a plan at another time to commit a distinct and disconnected crime, and rob the assaulted party, is not admissible. State *v.* Moberly, 121 Mo. 604, 26 S. W. 361.

It is error to admit declarations of an accomplice that he belonged to a band who revenged each other's injuries. Hart *v.* Com. 22 Ky. Law Rep. 1183, 60 S. W. 298.

25. The assaulted wife was properly permitted to testify that her husband married her under an assumed name and had no occupation. Doolittle *v.* State, 93 Ind. 272.

A. Discredit Defendant As Witness. —But where the defendant becomes a witness, such evidence may be used to discredit him as in other cases.[26] Admissions[27] and confessions[28] are competent under the general rules of evidence.

Denial. — Evidence tending to show that the assault was committed by another is admissible, but evidence of his threats unsupported by other evidence should be excluded.[29]

III. MATTERS OF DEFENSE.

1. Res Gestae. — On the question of self defense evidence of the *res gestae*[30] including the wounds received by the defendant, is admissible.[31]

2. Intent. — The defendant may testify as to his intent and motive[32] and his belief regarding the purposes of the prosecutor at the time of the assault.[33]

3. Declarations and Threats of Prosecutor. — Evidence of threats and declarations of ill-will which were made by the prosecutor before the assault[34] of his former difficulties with the defend-

26. Discredit Defendant as Witness. —Where the defendant is a witness, to discredit him, it may be shown upon his cross-examination, that he had been indicted twice before for stealing. Bolton *v.* State (Tex. Crim. App.), 39 S. W. 672.

27. An admission made while under arrest, by the defendant to the officer, not procured by threats is competent for the state. Com. *v.* Mitchell, 117 Mass. 431. *See* "Confessions."

28. The confessions or admissions of the defendant made while intoxicated are admissible, but the degree of intoxication may be shown as affecting their weight. State *v.* Grear, 28 Minn. 426, 10 N. W. 472, 41 Am. Rep. 296.

29. Disconnected threats not part of the *res gestae* made by a third party against the assaulted one may not be shown by the defendant where the defense is that the assault was committed by another. State *v.* Beaudet, 52 Conn. 536, 4 Atl. 237, 55 Am. Rep. 155.

30. Res Gestae. — State *v.* Goering, 106 Iowa 636, 77 N. W. 327.

In proof of self-defense it is competent to show that a stick in the hands of the prosecuting witness and used by him in the affray had the appearance of being loaded. Law *v.* State, 34 Tex. Crim. App. 70, 29 S. W. 160. Evidence that the defendant provoked an assault upon him is competent to rebut evidence of self-defense. Henry *v.* State, 79 Ala. 42; Page *v.* State, 69 Ala. 229; Johnson *v.* State, 69 Ala. 253.

31. The Extent and Nature of the Defendant's Injuries may be shown where he relies upon self defense as a justification and the complaints of pain he made while suffering are admissible evidence. Com. *v.* Jardine, 143 Mass. 567, 10 N. E. 250.

32. Berry *v.* State, 30 Tex. App. 423, 17 S. W. 1080.

33. U. S. *v.* Lunt, 1 Sprague (U. S.) 311.

34. Declarations and Threats. Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17; State *v.* Goodrich, 19 Vt. 116, 47 Am. Dec. 676; Harman *v.* State, 40 Tenn. (3 Head) 243.

Contra. — State *v.* Skidmore, 87 N. C. 509.

Evidence of threats and acts of hostility on the part of the prosecuting witness so far as known by or reported to the defendant is competent in proof of self defense to show what danger the defendant might reasonably have apprehended from the assault of such witness. State *v.* Dee, 14 Minn. 35. Where there was evidence that the prosecutor had made threats before the affray and the defendant testified

ant[35] but not with others,[36] and of his quarrelsome and vindictive reputation is admissible to show self defense.[37]

4. Information. — The defendant may testify as to his information regarding such matters[38] and may show by other evidence that the information was imparted to him.[39]

Exceptions. — Where the defendant was the aggressor and there is no evidence of self defense,[40] or where the defendant did not recognize the prosecutor[41] or know of his dangerous character or reputation, such evidence would not be competent to show self defense.[42]

Relatives. — Similar evidence as to the relatives of the prosecutor is not admissible.[43]

5. Declarations After Assault. — Evidence of the acts[44] or declarations of the prosecutor occurring after the assault and too

that he made a movement toward his hip pocket as if to draw a revolver, evidence of the prosecutor's good reputation for being peaceable is admissible. Rhea *v.* State, 37 Tex. Crim. App. 138, 38 S. W. 1012.

35. Former Difficulties. — State *v.* Dee, 14 Minn. 35; Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17.

36. Evidence of difficulties between the prosecutor and others not connected with the assault in question, should be excluded. Bolton *v.* State (Tex. Crim. App.), 39 S. W. 672.

37. Reputation of Prosecutor. Lewallen *v.* State, 6 Tex. App. 475; People *v.* Frindel, 58 Hun 482, 12 N. Y. Supp. 498.

Where an assault is in self defense, evidence of the violent character of the assaulted party is admissible, but where the defendant was the aggressor such evidence is not admissible. People *v.* Kelly, 94 N. Y. 526.

38. Information. — State *v.* Dee, 14 Minn. 35; U. S. *v.* Lunt, 1 Sprague (U. S.) 311.

39. A prison keeper justified an assault upon a prisoner with a cane as being necessary for discipline and in self defense, and offered testimony of the sheriff that he had informed defendant upon his delivery of the prisoner to him that he was a violent and desperate man. *Held*, rejection of this testimony was error. State *v.* Lull, 48 Vt. 581.

40. Exceptions. — State *v.* Reed, 137 Mo. 125, 38 S. W. 574; Martin *v.* State, 5 Ind. App. 453, 32 N. E. 594; Whilden *v.* State, 25 Ga. 396, 71 Am. Dec. 181; State *v.* Jackson, 17 Mo. 544, 59 Am. Dec. 281; Harman *v.* State, 40 Tenn. (3 Head) 243; People *v.* Frindel, 58 Hun 482, 12 N. Y. Supp. 498; Brown *v.* State, 74 Ala. 42; Rufus *v.* State, 117 Ala. 131, 23 So. 144; Wright *v.* State, 17 Tenn. (9 Yerg) 342.

Where the defendant was first assaulted in his saloon and his assailant then went outside and defied him, and the defendant procured a revolver, went out, renewed the affray and fired when his former assailant was in full retreat, evidence of bad character of the prosecutor is not admissible. State *v.* Paterno, 43 La. Ann. 514, 9 So. 442.

41. Where an assault was made by owner in alleged defense of his property and he did not recognize the prosecutor, evidence that the prosecutor was a quarrelsome man was properly excluded. Henderson *v.* State, 12 Tex. 525.

42. Henderson *v.* State, 12 Tex. 525.

43. Evidence of an assault upon the defendant by a brother of assaulted party earlier in the day is not admissible in justification for pointing loaded gun. May *v.* State, 6 Tex. App. 191.

44. The defense may not show that the assaulted person had a weapon a short time after the assault. State *v.* Noeninger, 108 Mo. 166, 18 S. W. 999.

remote for the *res gestae* is generally excluded,[45] but may become competent in cross examination[46] or to discredit his testimony.[47]

6. Actions Against Prosecutor. — Evidence that the prosecutor was indicted or even convicted of an assault upon the defendant for the same affray is not competent in proof of self defense,[48] but may be evidence to discredit him as a witness.[49]

7. Defense of Another. — The defendant may show that the assault was made in defense of another[50] and evidence of the relations existing between the defendant and the person he sought to defend is admissible.[51]

8. Defense of Property. — Evidence of the facts and circumstances as to the right forcibly to retain,[52] recapture or obtain possession of lands[53] or goods is admissible in defense of an assault made for

45. State v. Newland, 27 Kan. 746.

46. State v. Goodrich, 19 Vt. 116, 47 Am. Dec. 676.

The declarations of the assaulted person made soon after the affray are not competent, except to contradict his testimony. State v. Noeninger, 108 Mo. 166, 18 S. W. 990.

47. State v. Goodrich, 19 Vt. 116, 47 Am. Dec. 676.

48. Com. v. Lincoln, 110 Mass. 410.

Evidence that one defendant obtained a warrant against the prosecutor for an assault is not admissible. Hadley v. State, 58 Ga. 309.

49. State v. Kepple, 2 Kan. App. 401, 42 Pac. 745.

50. State v. Totman, 80 Mo. App. 125; State v. Reed, 137 Mo. 125, 38 S. W. 574; Spicer v. People, 11 Ill. App. 294.

One who intervenes to defend a party to an affray does so at his own peril; he stands in the shoes of the defended party and can only do such acts as the latter might lawfully do under the circumstances, and the wrongful acts of the defended party may be shown against such defendant. Wood v. State, 128 Ala. 27, 29 So. 557.

One may lawfully do in defense of another what he might do for himself. State v. Foley, 12 Mo. App. 431.

51. Orton v. State 4 Greene (Iowa) 140; State v. Bullock, 91 N. C. 614; Com. v. Malone, 114 Mass. 295; State v. Johnson, 75 N. C. 174; Waddell v. State, 1 Tex. App. 720.

The defense of one's self, husband, wife, child, parent, or servant is a natural right. State v. Elliott, 11 N. H. 540. A parent may defend his child as he may himself. State v. Herdina, 25 Minn. 161.

52. State v. Johnson, 12 Ala. 840, 46 Am. Dec. 283; People v. Teixeira, 123 Cal. 297, 55 Pac. 988; Filkins v. People, 69 N. Y. 101, 25 Am. Rep. 143; Smith v. State, 105 Ala. 136, 17 So. 107; State v. Downer, 8 Vt. 424, 30 Am. Dec. 48.

In defense for assault upon one of his employers, the defendant may show a special contract by which he was to have sole possession of the place where he worked and that the assault was in defense of such possession. Com. v. Ribert, 144 Pa. St. 413, 22 Atl. 1031; Com. v. Donahue, 148 Mass. 529, 20 N. E. 171, 12 Am. St. Rep. 591, 2 L. R. A. 623; Com. v. Renard, 8 Pick (Mass.) 133; State v. Dooley, 121 Mo. 591, 26 S. W. 558; Anderson & Austin v. State, 6 Baxt. (Tenn.) 608; Rex v. Mitton, 3 Car. & P. 31, 14 Eng. C. L. 196.

53. Clarke v. State, 89 Ga. 768, 15 So. 696; State v. Lockwood, 1 Penn. (Del.) 76, 39 Atl. 589; Goshen v. People, 22 Colo. 270, 44 Pac. 503.

A contract was left with the defendant in escrow, the prosecutor asked permission to see the document and then attempted to carry it away. *Held*, an assault with only necessary force was justifiable. Com. v. Lynn, 123 Mass. 218.

A tenant put new windows in the rented house, the property was sold and after possession under the sale

such a purpose,[54] but evidence of anger and undue violence may be shown in rebuttal,[55] and where there is no question as to trespass, evidence of title to the *locus in quo* is inadmissible.

9. Master of Ship. — The master of a ship may show that the assault was made in defense of his authority, and evidence of the information upon which he relied and of the facts as to the danger, is admissible.[56]

10. Arrest. — The defendant may show the facts and circumstances which justify an arrest[57] and that the assault was only the necessary force required to make such arrest,[58] but the conviction or acquittal of the arrested and assaulted person is not competent evidence,[59] but evidence of malice or undue severity on the part of the officer is admissible.[60] The defendant may show that an assault upon an officer was made in resisting an illegal arrest.[61]

such tenant came back and removed the windows. *Held*, an assault without unnecessary force in their recapture was justifiable. State *v.* Elliott, 11 N. H. 540.

The defendant, lessor, brought an action before a justice of the peace against the prosecuting witness, the lessee, to obtain possession but while the lessee was attending court, fastened up the house against the lessee, who broke open the house, when he was assaulted by the lessor. *Held*, the papers and docket of the justice were admissible to show the state of the action at the time, but the lease for the premises should be excluded. State *v.* McKinley, 82 Iowa 445, 48 N. W. 804.

54. Com. *v.* Lynn, 123 Mass. 218; Com. *v.* Donahue, 148 Mass. 529, 20 N. E. 171, 2 L. R. A. 623; State *v.* Smith, 105 Ala. 136, 17 So. 107.

The ownership or right of possession of property in whose defense the assault is made is material and may be shown. Filkins *v.* People, 69 N. Y. 101; State *v.* Forsythe, 89 Mo. 667, 1 S. W. 834; State *v.* Dooley, 121 Mo. 591, 26 S. W. 558; State *v.* Morgan, 3 Ired. (N. C.) 186.

55. To rebut the defense that the assault was only the necessary force required in a lawful recapture of property, it may be shown that the assault was made in any angry and rude manner with unnecessary force. Bonner *v.* State, 97 Ala. 47, 12 So. 408.

56. Master of Ship. — U. S. *v.* Lunt, 1 Sprague (U. S.) 311.

57. Evidence that the defendant was a member of an association to detect crime and apprehend criminals, that a crime had been committed, that the prosecuting witness was suspected and the assault was made in arresting him, is competent to show intent. Kercheval *v.* State, 46 Ind. 120.

58. State *v.* McNinch, 90 N. C. 695; State *v.* Pugh, 101 N. C. 737, 7 S. E. 757, 9 Am. St. Rep. 44.

The officer is the judge of the propriety and necessity of adopting a certain mode of securing his prisoner, but it may be shown that the officer did not act honestly in the matter and was gratifying his malice. State *v.* Stalcup, 2 Ired. (N. C.) 30.

59. The question is did the officer use unnecessary force constituting an assault in making the arrest, and evidence of the conviction of the prosecuting witness is irrelevant and should be excluded. State *v.* Gregory, 30 Mo. App. 582.

Against an officer on trial for assault in arresting the complainant, the judgment of acquittal of the latter is not competent. Patterson *v.* State, 91 Ala. 58, 8 So. 756.

60. State *v.* Stalcup, 2 Ired. (N. C.) 30; State *v.* Gregory, 30 Mo. App. 582; State *v.* Davidson, 44 Mo. App. 513; People *v.* Daily, 143 N. Y. 638, 37 N. E. 823.

See "INTENT."

61. Denby *v.* State, 108 Cal. 54, 40 Pac. 1051; State *v.* Beek, 76 N. C. 10; Stockton *v.* State, 25 Tex. 772; Massie *v.* State, 27 Tex. App. 617, 11 S. W. 638.

In Defense of a Conductor for Ejecting One From His Car, evidence as to improper conduct at the time and for a considerable period before is admissible.[62] The defense may show the reasonable rule or custom the conductor sought to enforce,[63] and the conductor may testify as to his belief concerning the misconduct of the prosecutor.[64] The state may show the undue violence of the assault[65] or the removal of the prosecutor while the cars were in motion.[66]

11. Punishment. — Evidence that the defendant was the parent of the assaulted party or stood in *loco parentis* is admissible for the defense,[67] and upon the issue as to the reasonableness of the punishment, the nature of the offense,[68] the severity of the punishment,[69] the nature of the instrument used in correction, and all the attendant circumstances may be shown.[70] A witness may not give an opinion upon this issue,[71] but the defendant may testify as to his purpose and

62. The passenger showed only his spent ticket and was ejected from the car. *Held*, misconduct which justified the conductor in ejecting him when he re-entered, showing his good ticket. State *v.* Campbell, 32 N. J. Law 309.

The misconduct of an ejected passenger during his whole trip where it was a short one is competent for the defendant conductor in proof of justification. People *v.* Caryl, 3 Parker Crim. (N. Y.) 326.

63. Com. *v.* Powers, 48 Mass. (7 Metc.) 596; People *v.* McKay, 46 Mich. 439, 9 N. W. 486, 41 Am. Rep. 169; State *v.* Goold, 53 Me. 279; State *v.* Overton, 24 N. J. Law 435, 61 Am. Dec. 671; State *v.* Thompson, 20 N. H. 250.

Evidence of the custom of the company in collecting tickets is competent defense of a conductor for assault in removing one from a car upon refusal to deliver up his ticket. People *v.* Caryl, 3 Parker Rep. (N. Y.) 326.

64. The passenger deposited his fare but the street car conductor under an honest mistake, ejected him from the car for supposed nonpayment. *Held*, intent is an element of the assault and such belief of the conductor may be shown in defense and as a justification. State *v.* McDonald, 70 Mo. App. 510.

65. State *v.* Ross, 26 N. J. Law 224.

66. State *v.* Kinney, 34 Minn. 311, 25 N. W. 705.

67. Anderson *v.* State, 3 Head (Tenn.) 455, 75 Am. Dec. 774; Snowden *v.* State, 12 Tex. App. 105, 41 Am. Rep. 667; Gorman *v.* State, 42 Tex. 221; Donnelly *v.* Territory (Ariz.), 52 Pac. 368; State *v.* Bost (S. C.), 34 S. E. 650.

Articles of apprenticeship are competent to show the defendant's rights in relation to his apprentice. Orton *v.* State, 4 Iowa 140.

The probate record appointing the prosecuting witness conservator of the person and estate of the defendant, is competent to rebut the defense that he was a trespasser in defendant's house. State *v.* Hyde, 29 Conn. 564.

68. Dean *v.* State, 89 Ala. 46, 8 So. 38; Anderson *v.* State, 3 Head (Tenn.) 455, 75 Am. Dec. 774.

69. Kinnard *v.* State, 35 Tex. Crim. App. 276, 33 S. W. 234; Anderson *v.* State, 3 Head (Tenn.) 455.

See "Injuries."

70. Dean *v.* State, 89 Ala. 46, 8 So. 38; Danenhoffer *v.* State, 79 Ind. 75.

A parent or one standing in *loco parentis*, exercises *pro hac vice*, judicial functions and to determine the reasonableness and animus of the punishment, the nature of the instrument used and all attendant circumstances may be shown. Dean *v.* State, 89 Ala. 46, 8 So. 38.

71. In defense of a school teacher a witness may not give his opinion that the whipping was neither severe, cruel nor unjust. Smith *v.* State (Tex. Crim. App.), 20 S. W. 360.

intention,[72] but his self serving declarations are not admissible.[73]

12. Evidence of Intoxication. — Intoxication of the defendant, where part of the *res gestae*, is admissible,[74] and where intent is an element of the crime intoxication may be shown in defense,[75] or to reduce the grade of the offense,[76] but where intent is not a part of the crime, evidence of intoxication is not admissible.[77] It is competent for the state to show that to nerve himself for the assault the defendant became intoxicated.[78]

13. Provocation Which is of the Res Gestae, may be shown,[79] while evidence of other provocation is excluded in many jurisdictions[80] but admitted in others.[81]

72. Kinnard *v.* State, 35 Tex. Crim. App. 276, 33 S. W. 234; Berry *v.* State, 30 Tex. App. 423, 17 S. W. 1080; Danenhoffer *v.* State, 79 Ind. 75.

73. Kinnard *v.* State, 35 Tex. Crim. App. 276, 33 S. W. 234.

74. Carter *v.* State, 87 Ala. 113, 6 So. 356.

Intoxication of the defendant is of the *res gestae* and may be shown. State *v.* Garrey, 11 Minn. 154.

75. Cline *v.* State, 43 Ohio St. 332, 1 N. E. 22; Parker Crim. Rep. (N. Y.) 291; Mooney *v.* State, 33 Ala. 419; Chrisman *v.* State, 54 Ark. 283, 15 S. W. 889, 26 Am. St. Rep. 44.

Intoxication to such an extent that the defendant does not know what he is doing may be shown as defense. State *v.* Garvey, 11 Minn. 154.

76. Ford *v.* State, 71 Ala. 385; Mooney *v.* State, 33 Ala. 419; Engelhardt *v.* State, 88 Ala. 100, 7 So. 154.

Drunkenness may not be shown in defense of assault and battery, but where the law recognizes degrees of the offense and intent or premeditation are elements of the crime, it may be shown to reduce its grade. Engelhardt *v.* State, 88 Ala. 100, 7 So. 154.

77. People *v.* Gordon, 103 Cal. 568, 37 Pac. 534; Walker *v.* State, 85 Ala. 7, 4 So. 686, 7 Am. St. Rep. 17; Com. *v.* Malone, 114 Mass. 295.

On an indictment of assault with a deadly weapon evidence of drunkenness of the defendant at the time is immaterial and not admissible, as proof of specific intent is not necessary. People *v.* Marseiler, 70 Cal. 98, 11 Pac. 503.

78. Cline *v.* State, 43 Ohio S 332, 1 N. E. 22.

79. Rawlins *v.* Com., 1 Leigh (Va.) 581, 19 Am. Dec. 757.

The law has enough regard for the weakness of human nature to regard a violent attack as a sufficient excuse for going beyond the mere necessities of self defense and chastising the aggressor within such bounds as do not exceed the natural limits of the prosecution. People *v.* Pearl, 70 Mich. 207, 42 N. W. 1109, 4 L. R. A. 709, 15 Am. St. Rep. 304.

80. Rawlings *v.* Com., 1 Leigh (Va.) 581, 17 Am. Dec. 707.

Evidence that the prosecutor had killed defendant's dog, and that it was a small pet, is not admissible for the defendant. Rogers *v.* State, 126 Ala. 40, 28 So. 619.

The prosecuting witness was asked if he had not struck the defendant at another time, and by objection was rightly sustained. State *v.* Montgomery, 65 Iowa 483, 22 N. W. 639.

81. People *v.* Ross, 66 Mich. 94, 33 N. W. 30; Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781; Brown *v.* State, 79 Ala. 42.

Where the defense is the use of opprobrious words, the relative size and strength of the parties, and all the circumstances of the case should be shown. Marion *v.* State, 68 Ga. 290.

Although the shooting occurred the next day, evidence of an attempted rape made by the assaulted party upon the defendant's wife or daughter is competent. Biggs *v.* State, 29 Ga. 723, 76 Am. Dec. 630.

Evidence of the general character of the wife for virtue and chastity

14. Discredit Prosecuting Witness. — Upon cross examination of the prosecutor, his hostile feelings, declarations of ill-will and the making of threats may be shown to discredit his testimony,[82] and after his attention has been called to such declarations and threats, but not before, they may be proved by any competent evidence,[83] but evidence of the facts of previous difficulties too remote for *res gestae*, is not admissible.[84]

15. Good Reputation of Defendant. — Evidence of the general good reputation of defendant, with reference to the nature of the offense charged is competent for the defense[85] even to raise a doubt where none existed,[86] and it is error for the court unreasonably to limit the number of character witnesses,[87] but where the assault is only a misdemeanor, evidence of good character of the defendant is sometimes excluded.[88] Evidence in rebuttal and cross examination are admissible as in other cases.[89]

is admissible for the defense, where her character had been attacked by the state upon a trial of her husband for shooting one who assaulted her. Biggs *v.* State, 29 Ga. 723, 76 Am. Dec. 630; Booker *v.* State, 4 Tex. App. 564; People *v.* Webster, 89 Cal. 572; State *v.* Montgomery, 65 Iowa 483, 22 N. W. 639.

82. State *v.* Dee, 14 Minn. 35.

83. Booker *v.* State, 4 Tex. App. 564.

A declaration of the prosecuting witness that "he would say anything or do anything" to get the defendant convicted, is not admissible unless the witness' attention was called to the *statem cut* to lay the foundation for the impeachment of his testimony. State *v.* Dickerson, 98 N. C. 708, 3 S. E. 687.

It is proper to inquire of the prosecuting witness if he has not expressed feelings of hostility toward the defendant and such inquiry is a necessary foundation for evidence of declaration made by the witness. Booker *v.* State, 4 Tex. App. 564.

84. Rosenbaum *v.* State, 33 Ala. 354.

Evidence of manner and conduct of prosecuting witness at an earlier meeting same day, not of the *res gestae*, too remote and not admissible. Henry *v.* State, 79 Ala. 42.

85. People *v.* Rodrigo, 69 Cal. 601, 11 Pac. 481; People *v.* Spriggs, 58 Hun 603, 11 N. Y. Supp. 433; State *v.* Schleagel, 50 Kan. 325, 31 Pac. 1105; State *v.* King, 78 Mo. 555; People *v.* Jassino, 100 Mich. 536, 59 N. W. 230.

Evidence of good character is of the wife for virtue and chastity iginal evidence, independent of the other evidence of the cause, both on the question of guilt and the degree of his criminality. Rosenbaum *v.* State, 33 Ala. 354.

Defendant may show his reputation for peace, "notwithstanding he was full of strange oaths," "desperate in demeanor," and "reckless in display of deadly weapons," but evidence of the custom of himself and associates to flourish weapons without intent to use them is admissible. Walters *v.* State, 17 Tex. Crim. App. 226, 50 Am. Rep. 129.

86. Rosenbaum *v.* State, 33 Ala. 354.

87. The defendant used three character witnesses as to his general reputation for peace and quietude. The state informed the court that it did not intend to introduce evidence in rebuttal. The court then excluded further character testimony by the defense although this was his first intimation as to limiting the number of witnesses, and the defense claimed surprise and that it had not called its best witnesses. The action of the court was error. Morrison *v.* State, 37 Tex. Crim. App. 601, 40 S. W. 591.

88. Drake *v.* Com., 49 Ky. (10 B. Mon.) 225; Matthews *v.* State, 32 Tex. 117.

89. The defendant, charged with improper assault upon a woman, offered evidence of his good char-

16. Consent. — Evidence of consent is admissible in defense,[90] but upon a charge of assault upon a girl under the statutory age such evidence is generally excluded[91] unless as part of the *res gestae*.[92] Many courts, however, admit such evidence as a defense.[93]

17. Opinions. — Except that of experts in proper cases,[94] opinion evidence is not admissible in cases of assault,[95] though some courts show a disposition to relax this rule.[96]

18. Prior Acquittal or Conviction. — Evidence of acquittal or conviction in a prosecution for or involving the assault charged, is admissible,[97] but where the issue as to the assault charged was not included in the prosecution, such evidence should be excluded.[98]

acter. Upon cross examination of the character witnesses, they testified that his general character was bad for running after women." *Held*, that the evidence was properly admitted. Balkum *v.* State, 115 Ala. 117, 22 So. 532.

Where the defendant offered evidence of good character as a peaceable, orderly and law-abiding citizen, it was error to admit evidence in rebuttal of his soldier record or reputation as to his being often absent without leave and drinking and gambling. Burns *v.* State, 23 Tex. App. 641, 5 S. W. 140.

90. Consent to an assault, committed without malice, may be shown as a defense. State *v.* Back, 1 Hill (S. C.) 363, 26 Am. Dec. 190.

91. People *v.* McDonald, 9 Mich. 150; Hill *v.* State, 37 Tex. Crim. App. 279, 38 S. W. 987, 66 Am. St. Rep. 803; People *v.* Verdegreen, 106 Cal. 211, 39 Pac. 607, 46 Am. St. Rep. 234; Hays *v.* People, 1 Hill (N. Y.) 351.

There is a great difference between submission and consent, and involuntary submission would not be evidence of consent. Regina *v.* Day, 9 Car. & P. 722, 38 Eng. C. L. 306.

92. People *v.* Verdegreen, 106 Cal. 211, 39 Pac. 207, 46 Am. St. Rep. 234.

93. State *v.* Packett, 11 Nev. 255, 21 Am. Rep. 754; Smith *v.* State, 12 Ohio St. 466, 80 Am. Dec. 365; Regina *v.* Meredith, 8 Car. & P. 589, 34 Eng. C. L. 539.

94. Where an expert has no better means to form an opinion as to the intention of the defendant than the jury has, his testimony should be excluded. State *v.* Garvey, 11 Minn. 154.

95. Trimble *v.* State (Tex. Crim. App.), 22 S. W. 879.

Where the prosecutor testified that the defendant and he were always good friends and that the defendant shot without any cause or provocation, the questions by defendant's counsel, "Pistol must have gone off accidentally then?" and "Will you tell the jury whether the shooting was accidental?" were properly excluded, as calling for conclusions. Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17.

96. The prosecuting witness may be asked what he understood by the defendant's remark at the time of the assault that "the easiest way is the best," and his answer that "he thought they meant to use him roughly" is competent. People *v.* Moore, 50 Hun 356, 3 N. Y. Supp. 159.

97. Com. *v.* Miller, 5 Dana (Ky.) 320; Regina *v.* Smith, 34 U. C. Q. B. 552; Gunter *v.* State, 111 Ala. 23, 20 So. 632, 56 Am. St. Rep. 17.

Where the indictment for a higher grade of crime includes a charge of assault either in terms or by implication, acquittal or conviction or improper discharge of the jury against objection of defendant may be shown. Mitchell *v.* State, 42 Ohio St. 383.

98. Regina *v.* Smith, 34 U. C. Q. B. 552.

An acquittal in a lower grade of offense would not be a bar to a prosecution for a higher one. State *v.* Foster, 33 Iowa 525.